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Double Jeopardy Jurisprudence in India

Law

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ABSTRACT

It is a cardinal principle of law that once a crime has already been judged in a case or all the appeals have already been exhausted and the judgment has become final, t he accused in such a case shall not be tried or punished for the same offence again. There shall always be one punishment for one offence. The principle governing this law is called as the doctrine of double jeopardy.

The purpose of this study is to find out the Indian position regarding the application of this doctrine of double jeopardy that provides that the life of an offender shall not be put in peril twice for the same offence.

Prelude

A person who commits crime is liable to be prosecuted and if convicted, be punished by the State, but the natural justice requires that the one act must result in one consequence only. This must necessarily be so whether the act is right or wrong. If an act is a legal wrong, the law must provide punishment only once. This is what justice demands and public policy supports. In fact, it is the cardinal principle of criminal justice that a person shall never be punished twice for the same offence. This principle holds good, as it must, even when the same act is made punishable under two or more enactments. The principle is sometimes extended further in some foreign countries like United States to bar a second trial when the first one has resulted in conviction leading to punishment or to acquittal or even when the trial had not ended in any final verdict. The policy demands finality to judicial verdict, be it acquittal or conviction. These principles culminate in what is known as the doctrine of double jeopardy.

A basic purpose of the principle of double jeopardy is to protect a defendant "against a second prosecution for the same offense after conviction."[1] It is well "settled" that "no man can be twice lawfully punished for the same offense.[2] Of course, the defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment. The situation involving re-prosecution ordinarily arises, therefore, only in the context of successful defence appeals and controversies over punishment. This doctrine is necessary to provide a protection to an accused from the conduct of sovereign power which imperils him. In fact it is designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an offence.

The term 'jeopardy' is used to designate the danger of conviction and punishment which an accused in a criminal action incures.[3] 'Jeopardy' implies an exposure to a lawful conviction for an offence of which a person has already been acquitted or convicted. This word generally means exposure to death, injuries or loss and is synonymous with peril, hazard or risk. Francis and Gilbert described 'jeopardy' as that status which attaches to a person when he is put on trial before a court of competent jurisdiction on indictment, presentment or information which is sufficient in form and substance a conviction and a jury has been charged with his deliverance.[4]

The term "double jeopardy" which is also known as "former jeopardy", "jeopardy of life or limb", "jeopardy for the same offence" "twice put in jeopardy punishment" and other similar expressions used in various Constitutions and statutes are to be construed substantially to the same effect. The expression "double jeopardy" is used to denote the protection to an accused that if he had a fair trial, he shall not again be put on trial for the same offence. Fair trial means trial according to law and established legal procedure. The doctrine has been variously stated by the authors but each expression contains the same basic principle which is embodied in the well known maxim "*Nemo debet bis vexarimsi constet curiae quod sit pro una et eadem causa*", i.e. no one ought to be vexed twice if it appears to the court that it is for one and the same cause.

It will be pertinent to clarify here that the doctrine of double jeopardy is not against double punishment for one offence. Thus, for instance, a person can both be imprisoned as well as punished for same offence. There is a major difference between double jeopardy and double punishment. Double punishment may also arise when a person is convicted of two or more crimes charged in one indictment. The question of double jeopardy arises when a second trial is sought on the subsequent indictment following a conviction or acquittal on an earlier indictment.

This doctrine also does not protect an individual from being tried and punished second time for an offence. In other words, the doctrine is not a protection to the individual from peril of second sentence or punishment nor to the service of a sentence for one offence but is a protection against double jeopardy for same offence, that is, against a second trial for the same offence. Hence, the rule against double jeopardy forbids second trial for the same offence regardless of whether the accused was convicted or acquitted at the former trial.

The idea underlying the doctrine is that the State, with all its resources and power, should not be allowed to make repeated attempts to get conviction of an individual for an alleged offence. In fact it shall be the duty of the State to ensure the protection of an individual from being punished twice for the same offence as it is a rule common to all civilised systems of law. In fact it has also been described as a part of the advance system of law. It is one of those universal principles of reason, justice and good conscience of which Cicero said : *Nor is it one thing at Rome and another at Athens, one now and another in future, but among all nations it is the same.*[5]

Purpose or Objective

The doctrine of double jeopardy finds place in almost all civilised systems of law to achieve certain purposes. The very first purpose behind the same is the 'finality'. It means once a person has been convicted or punished thereafter finality should be attached to the judgment of acquittal or conviction. The position is same in India as well. Therefore, following the Privy Council decision in *Sambasivam vs. Federation of Malaya,*[6] the Supreme Court accepted the issue estoppel for application in criminal cases.[7] Explaining the need for issue estoppels in according fi-

nality, the Supreme Court stated:

The rule of issue estoppel prevents re-litigation of the issue which has been determined in a criminal trial between the State and the accused. If in respect of an offence arising out of a transaction a trial has taken place and the accused has been acquitted, another trial in respect of the offence alleged to arise out of that transaction or of a related transaction which requires the court to arrive at a conclusion inconsistent with the conclusion reached at the earlier trial is prohibited by the rule of issue estoppels.[8]

The second purpose or objective that this doctrine purports to achieve is the 'protection of acquitted defendant'. The common law accords maximum finality to acquittals by preventing appeals against them. But the Indian law allows acquittals to be appeal against. The Indian law has taken care to prevent injustice. The appeals against acquittals in India can only be filled in High Court by State whereas private complainant can file the same in High Court only by special leave.[9] The Indian judiciary tries to accord finality to acquittals even though the law allows them to be appealed against. The reason for according finality to acquittals is to afford protection to acquitted defendants especially those who are adjudged innocents.

The third purpose intended to achieve by the doctrine of double jeopardy is the 'protection of the defendants from harassment of second trial'. Once a person has already faced a trial he deserves not to be harassed again. The doctrine of double jeopardy as applicable in India does not prevent further proceedings such as retrial or appeals, as strictly as its counterparts in England or in United States. The last but not the least the purpose of the doctrine of double jeopardy is the 'protection from multiple punishments'. So far as this objective is concerned it is applied under all civilised societies in the same spirit. Under all systems of law the multiple punishments are prohibited.

Origin and development of the doctrine

The doctrine of double jeopardy is among one of the principles which have been more deeply rooted in traditions and conscience of the people. This doctrine has usually been dealt with in England and United States as belonging to the law of evidence instead of procedural law. In India, however, the doctrine is not confined merely to the law of procedure and evidence but is a rule of substantive law. It has been incorporated in Article 20(2) of the Constitution of India, Section 300 of the Criminal Procedure Code and Section 26 of the General Clauses Act, 1897.

The doctrine of double jeopardy in India, like its counterparts in other common law regimes, has its origin English common law maximum *nemo debet bis vexari pro una et edem causa*. Hence it is not unusual to say that the Britishers brought it to India with clarity, as a part of their laws. The common law principles of *autrefois acquit* and *autrefois convict* deeply embodied in principle of English law were recognised in India in Section 300 of the Code of Criminal Procedure, 1973. It will not be out of place to mention that the above principle is an offshoot of the doctrine of *res judicata* not only rooted in common law principle of English law but also recognised and applied in ancient Indian law, as it is evident from spiritual literature. In ancient times, *Prangnyaya (res judicata)* has been referred to as one of the possible defences to an action.[10] once a decision has been given, it becomes final and can not be reopened by leading fresh evidence.

The Britishers ruled India till 1947, but the Government of India Acts of 1909, 1919 and 1935 did not guarantee rights relating to personal liberty to the citizens. But it does not mean that the Britishers did not bring this principle to India. As a matter of fact, the well established principles of English criminal jurisprudence were given statutory recognition under various legislations. It was a well-established rule even before the enactment of the Code of Criminal Procedure, 1861 that a court cannot entertain any cause, which shall appear to have been heard and determined by any judge before. This rule of English law had been applied by judges in our country. The English judges administering justice in India were well acquainted with the rule of *res judicata* in civil and criminal law.

In the rule of res judicata had been first introduced in the year 1793 by Section 16 of the Bangal Regulation, III of 1793 which, prohibited Zila and City Courts from entertaining any cause, which from any decree or record produced before the court appeared to have heard and determined by any judge or any superintendent of a court having competent jurisdiction.[11]

The doctrine of double jeopardy found recognition in form of statutory protection for the very first time under the Code of Criminal Procedure, 1861 which was later amended and codified on several occasions to regulate procedural law for criminal trials. But the protection against double jeopardy provided by Code of Criminal Procedure, 1861 was always incorporated. The provisions of Section 403 of the Code of Criminal Procedure, 1898 were, however more explicit and detailed one so far as the principle of double jeopardy is concerned. In the independent India once again the new Code of Criminal Procedure, 1973 took proper care of the principle of double jeopardy and incorporated the same in the Code in Section 300.

Besides the Code of Criminal Procedure the doctrine of double jeopardy found place in the Indian Evidence Act, 1872 as well. The law of the same is contained in Section 40 of the Act. This Section recognises both the pleas of *autrefois convict* and *autrefois acquit* known under English criminal law. Therefore it can be said that the Evidence Act gives due respect to a previous judgment whereby a person has either been convicted or acquitted. It creates a complete bar for second trial irrespective of the result of the previous trial. The only requirement is that there shall be a previous judgement delivered on the same facts.

The Indian Penal Code, 1860 is another significant legislation that provides protection against multiple punishments under Section 71. Although this provision was not there in the original Code but the same was inserted after amendment in the year 1861. However it will be pertinent to mention here that the provision of Section 71 of the Indian Penal Code, 1860 contains the substantial law as compared to the provisions of the Code of Criminal Procedure and the Evidence Act, which contains law relating to procedure and law relating to evidence respectively. The doctrine of double jeopardy also found place Section 26 of the General Clauses Act, 1897. It simply provides that if an act or omission is an offence under two or more enactments then the offender shall not be punished more than once for the offence.

After independence, fundamental rights were guaranteed under the Part III of the Constitution. These rights owe their existence to the recommendations made by the sub-committee on fundamental rights appointed by Advisory Committee of the Constituent Assembly. The sub-committee submitted its report on February 27, 1947.[12] In the Annexure attached with the Draft Report, fundamental rights were mentioned. The Clause 28(2) of the same under the head "Miscellaneous Rights" provided the principle of double jeopardy in the following words:

No person shall be tried for the same offence more than once nor be compelled in any criminal case to be witness against himself.

On February 21, 1948 the draft was produced before the Constituent Assembly for consideration. Finally, the doctrine of double jeopardy found its place under Part III in Article 14(2) of the Draft Constitution in the following words:

No person shall be punished for the same offence more than once.

After considering the proposed amendments, the Constituent Assembly adopted the Article 14(2) of the Draft Constitution, which now finds its final shape in Article 20(2) of the Constitution in the following words:

No person shall be prosecuted and punished for the same offence more than once.

Constitutional Protection Against Double Jeopardy:
The Part III of the Constitution contains long list of fundamental rights and Article 20 is one of them. The Article 20 of the Constitution provides protection against *ex-post facto laws*, *double jeopardy* and *self Incrimination*.[13] All these three clauses deal with three different safeguards against arbitrary action against the individual, affecting his life and personal liberty. The proceedings contemplated in Article 20 are proceedings of criminal nature before the court of law or a judicial tribunal. This Article imposes certain constitutional limitations upon the power of State and enforces criminal laws which it otherwise oppose. The Supreme Court in Hosiery Works vs. Bharat Woollen Mills Ltd.[14] clearly said that Article 20 constitute a limitation on the absolute legislative power which would, but for that Article, be exercisable by Parliament or the State legislature under Article 246 read with legislative list.

The doctrine of double jeopardy embodied in Article 20(2) of the Constitution guarantees freedom to every 'person' against being 'prosecuted and punished' for the 'same offence' more than once. The very first question that arises over here is whether this freedom can be enjoyed by artificial persons as well especially when by its nature it seems to be available only to natural person. At the same time another question that arises over here is whether non-citizens can also avail the protection under this clause. The Constitution does not define the term person, but this term has been defined in Section 3(42) of the General Clauses Act, 1897[15] as "*person shall include any company or body of individuals, whether incorporated or not*". Thus, according to this definition contained in General Clauses Act, 1897, the protection under Article 20(2) of the Constitution of is available to all natural persons whether citizens[16] or not and also to artificial persons. In a landmark judgment the Madras High Court held that the partnership firm shall be prosecuted for non-payment of sales tax because it is '*person*' for criminal matters as well.[17]

The Article 20(2) deals with the concept of protection against double jeopardy. The doctrine of double jeopardy embodied in this Article guarantees protection to an individual against successive prosecution and conviction for the same offence. Though the words used in this clause are simple but their literal interpretation would result in an extreme view. Thus when the clause provides that "No person shall be prosecuted and punished for the same offence more than once" it indicates that the protection to an individual is available only if the first prosecution had resulted in punishment. If the previous prosecution resulted in acquittal then the protection under this clause cannot be claimed. It is now a well settled law in India that there should be not only a prosecution but also a prosecution and punishment for the same offence.[18]

Therefore it is clear that Article 20(2) provides protection only in cases where a person claims "*autrefois convict*" Although the Supreme Court is quite clear on this point but still there is one more view expressed by C.B.L. Saxena. According to this view[19] the Article 20(2) afford protection to the person coming under both the category of cases i.e. *autrefois convict* and *autrefois acquit*, and there is no warrant to treat a compound sentence. But if the construction of the word "and" was adopted to conjunctive in Article 20(2), the scope of operation and field of activity covered under that clause would be greatly curtailed and would be limited to only those cases in which there was prosecution followed by punishment for the same offence. In other words, Article 20(2) of the Constitution would deprive a person of the right he had under Section 300 of the Code of Criminal Procedure, 1973 in cases of acquittal after prosecution. It is further stated that curious anomalies and incoherent result will follow if cases of acquittals and discharge are excluded from the purview of Article 20(2).

The application of Article 20(2) came up directly to the Supreme Court in Maqbool Hussain vs. State of Bombay.[20] The question that arose before the Court in this case was whether the custom officials were court and the imposition of penalty by custom officials is punishment within the, meaning of Article 20(2) of the Constitution. The court ruled that punishment could mean only trial and imposition of punishment by a court of law in criminal trial and not otherwise. It may be mentioned that the word "court of law or judicial tribunal" are not mentioned in the constitutional provisions but the court by the very first interpretation circumscribed the guarantee by giving it very technical legal meaning and reading something into the language of the Article which is not there. The Court made it clear that since the sea custom authorities were neither Court nor their adjudication under the Sea Customs Act constituted a punishment, the protection of Article 20(2) was, therefore, not available to the appellant when he was proceeded with the same offence under Section 23 of the Foreign Exchange Regulation Act, 1947.[21]
In S.A. Venkataraman vs. Union of India[22] the Court reaffirmed and reiterated the judgment delivered in Maqbool Hussain case. The question before the Court was whether the orders of dismissal after an inquiry by the department amount to punishment. The Court ruled that the order of dismissal of a servant could not be regarded as a punishment for an offence punishable under particular section of the Indian Penal Code, 1860 or Prevention of Corruption Act, 1947.

The Supreme Court also went into the depth of the question raised by the petitioner that the commission was invested with some powers of the Court for instance summoning and compelling the production of documents and reports etc. The Court ruled that:

The language of Article and the words used afford a clear indication that the proceedings in connection with the prosecution and punishment must be in the nature of criminal proceeding before a court of law or judicial tribunal and not before a tribunal which entertains a departmental or an administrative enquiry even though set up by a statute, which is not required to try a matter judicially or on legal evidence.[23]

In a landmark judgment[24] the Supreme Court dealt with the question whether the forfeiture of pension in addition to the punishment imposed under Section 71 of the Army Act amounts to double jeopardy? The Court made it clear that since there is no second prosecution and punishment hence there is no question of application of double jeopardy.

In order to bring the case in four corners of the Article 20(2) of it is necessary to prove that there was a prosecution which resulted in punishment for the 'same offence'. In measuring whether the two offences are identical, the evidence necessary to support the second indictment should have been sufficient to support a legal conviction of the first. If the same evidence is sufficient to support a conviction in both cases then the offence can be treated as identical.

Dealing with the question of identity of the two offences the Supreme Court in Maqbool Hussain case[25] held that "*...the offence*

now charged has the same ingredients in the sense that the facts constituting the one are sufficient to justify a conviction of the other and not the fact relied on by the crown are the same." The Supreme Court in Apte's case[26] and Bhagwan Swaroop's Case[27] reaffirmed that to ascertain that the two offences are the same it is not the identity of the allegation but the identity of the ingredients that matters.

Conclusion:

Therefore on the basis of the above study it is quite clear that the doctrine of double jeopardy found place in the Constitution of India and a few statutes as well. The protection provided under the Constitution is limited to *autrefois convict* only whereas the Code of Criminal procedure provides complete protection including *autrefois convict* and *autrefois acquit*. It is suggested that it will be better if the Constitution shall itself provide a complete protection to an accused because the constitutional protection is extraordinary remedy whereas the statutory are simply ordinary remedies. If we really need to strengthen the double jeopardy rule then the Constitution shall provide protection against both second prosecution and second punishment.

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