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WHETHER IMMUNITY FROM SUBSEQUENT TRIAL A FUNDAMENTAL RIGHT?

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Two queries have been made from us-the second one is a corollary of the first one.

i. Whether the fundamental right guaranteeing protection from punishment for the same offence more than once under Art. 20 (2) of the Constitution of India can be extended to the case where a person has been acquitted ' earlier, i.e. whether the expression ‘prosecuted and punished’ in the said Article can be read or even implied as prosecuted and acquitted' also.?
ii. Whether the non-extension of this protection would not mean sitting in appeal or revision by a court or tribunal of concurrent jurisdiction over the judgment of first court or tribunal and thereby finality of a judgment which may even get the seal of finality from higher courts can be disturbed. ?

The cardinal principle of justice giving finality in criminal cases too both in the matter of acquittal and conviction is not something unknown to Indian sky from ancient times. The ancient Roman maxim 'Nemo bis debet puniri pro uno delicto' which means that no one ought to be put in peril twice for the same offence which sometimes is written as 'pro eadem causa' for the same cause, stands translated in the modern common law principle of England known as autre fois convict (formerly convicted) and autre fois acquit (formerly acquitted) . In the 5th amendment to American Constitution, it is known as rule against double jeopardy which provides 'Nor shall any person be subjected for the same offence to be put twice in jeopardy of life and limb.'

In ancient India litigation apparently was not substantial, the king was vested with supreme powers in judicial matters including the power to appoint judges for excess work. There was no difference in practice or procedure in civil and criminal (nkf.Md) matters. The principle of finality viz. res judicata or autre fois convict/autre fois acquit was recognised and was in vogue. It furnished one of the four types of reply open to the defendant/accused who could have pleaded finality of decision once arrived at which was binding between the parties and could not be reopened. It was known as-

प्राङ्.न्याय (प्राक्+न्याय) वत पूर्व न्याय

A reference to the same will be found in Virmitrodaya and Mitakshara in the commentary on Vajnavalkya 2/7 For definition they rely on the following couplet of Brihaspati and/or Katyayan –

आचारेणऽवसन्नोऽपि पुनर्लेखयते यदि।
सोऽभिधेयो जितः पूर्व प्राङ्न्यायस्तु स उच्यते।।

It could have been pleaded and was to be applied where a person ha already faced tribulations and had been saddled with liability, fine, conviction or acquittal.

Even prior to coming Into force of the Constitution of India, protection against second punishment after conviction or acquittal in first one on the same offence was available under the general law of the land which is still intact.

Section 26 of the General Clauses Act 1897 also contains such protection In the matter of conviction for any offence -Section 26 of General Clauses Act reads as under:

"26. Provision as to offences punishable under two or more enactments-

Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments. but shall not be liable to be punished twice for the same offence."

Under this section when more than one complaint under different enactments refer to same offence, the bar Is applicable; but where offences art distinct, section 26 does not apply. The offender would be liable to be prosecuted and punished under either or any of those enactments but the twice punishment for the same offence would be barred, and punishment under one enactments would be a bar for any other punishment for same offence in yet another trial or trials.

Section 300 of Code of Criminal Procedure provides that a person once convicted or acquitted is not to be retried for the same offence. This section thus incorporates both the pleas of common law viz. autre fois convict and autre fois acquit. The limits and scope of these two pleas are contained in the said section.

The word 'punishment' used In Article 20 (2), means nothing else than what Is known as punishment. The dictionary (Concise Oxford Dictionary) meaning of word 'punish' Is to cause the offender to suffer or to Inflict penalty for the offence. It can otherwise be defined as penalty for transgression of law and the word 'punish' denotes or signifies some offence committed by the person who is punished. The definition or the meaning of word "punish" exclules what Is not visited by penalty viz. acquittal. Nothing can be added to

the word punishment and nothing can be Implied which is not warranted from the context and language used. The Constitution is a written document; and when language used. The Constitution is written document; and when language is clear, on additional meaning can be implied or imported in it.

It appears that the drafting committee of the Constituent Assembly for certain reasons preferred not to include acquittal also alongwlth conviction In Article 20 (2) though during debates such a plea was raised before the I Constituent Assembly. It may be because the general law of the land specifically bars double jeopardy both In the cases of conviction and acquittal, it preferred to confine the protection in the matter of acquittal under the general law only, and not to raise its status to that of fundamental right like that of conviction. The protection under Article 20 (2) is available when punishment is by a court of law or judicial tribunal which is required by law to decide the matter Judicially on legal evidence. Although Article 20 (2) nowhere uses the word 'court' or 'Judicial tribunal' yet the use of the words 'offence' 'conviction', 'prosecution' and 'punishment' makes it abundantly clear which could be by the court of law and judicial tribunal. The apex court while Interpreting Article 20 (2) has taken the view that protection of Article 20 (2) applies when conviction is by court or judicial tribunal. It appears that for this reasons Constitution makers considered it unnecessary to use or add these words. The Constitution thus does not guarantee protection from second trial and punishment for the same offence again after acquittal and neither status of fundamental right, nor of legal right have been granted to immunity from punishment for the same offence after acquittal once for it. Notwithstanding recognition of any such right as aforesaid by the Constitution of India, such rights have got full recognition in the Interest of Justice and equity under the judicial interpretation and enunciation of law by the Supreme Court for a welfare state like India In which social justice and human rights have got full recognition in this complex society. The principle of 'Issue estoppel' or res judicata which principle has been accepted and enforced In some of the countries of world has been recognised in India as an enforceable principle by the apex court. The principle of issue estoppel or res judicata applies both on question of fact or law even in criminal proceedings and genesis of same Is that when a matter has been settled once between the parties, It Is not to be unsettled and varied. This principle Is recognised In America, Australia, Malayasia, but in England still doubts have been expressed over this principle; as such, it has not become a recognised principle of common law. Judicial decisions in the said country on the point are not quite consistent on this principle. Whether there should be a legislation on the rule of Issue estoppel In criminal matters, was considered by Law Commission In Its 41st Report (Vol. 3, page 256) which was submitted in the year 1969. The Commission was of the opinion that In view of the fact that India so far had no proper opportunity and considering all the implication of applying the rule of Issue estoppel in criminal matters, any legislation on it

would be unwise, but in future possibility of such legislation cannot be ruled out.

The rule of issue estoppel was applied first in Australia and the court viewed that the term ‘issue estoppel’ covers estoppel by issues determined in some earlier proceedings, which in fact were the basis of judgment. The Privy Council applied this principle in the matter of acquittal in a case from Malaya and ruled that it applied in criminal cases also. In Sambasivam v. Public Prosecutor, Federation of Malaya, 1950 AC 458,it was observed “The effect of verdict of acquittal pronounced by a competent court after a lawful charge and after a lawful trial Is not completely stated by saying that the person acquitted can not be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim “Res judicata pro veritate accipitur” is no less applicable to criminal than to civil proceedings……….". The Supreme Court of India agreeing with what was discussed by Privy Council in Sambasivam case accepted the Principle of issue estoppel In the cases of acquittal also. Suffice will be to make reference to the cases of Pritam Singh v. S\a\e 0' Punjab, AIR 1956 SC 419, Manipur Administration v. Bira Singh, AIR 1965 SC 87,Assistant Collector of Customs v. Malwani, AIR 1970 SC 962 in which this principle was accepted. Accordingly, both these questions stand answered.

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