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NEW SHORROCK SPG. & MFG. CO., LTD. v. COMMISSIONER OF INCOME-TAX, BOMBAY

Chagla C. J.

In our opinion, therefore, this was an expenditure which the assessee company could claim as a permissible deduction under s. 10 (2) (v) of the Act. We will therefore answer question (1) in the affirmative. We express no opinion on question (2) and therefore we will say that it does not arise. Commissioner to pay the costs.

Attorneys for Appellant:—Manilal, Kher and Ambalal & Co.
Attorneys for Respondents:—N. K. Petigara.

Order accordingly.

P. M. P.

APPELLATE CRIMINAL

Before Mr. Justice Gajendragadkar and Mr. Justice Gokhale.

STATE *v.* S. L. APTE AND ANOTHER.*

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Constitution of India, Art. 20 (2)—General Clauses Act (Act X of 1897), s. 26—Indian Penal Code (Act XLV of 1860), s. 409—Indian Insurance Act (Act IV of 1938), s. 105—Criminal Procedure Code s. 258 (2)—Managing Directors of an Insurance Company convicted and sentenced for criminal breach of trust of the funds of the Company under s. 409, Indian Penal Code—A subsequent prosecution and order under s. 105 of the Insurance Act whether competent—Whether an order on the same facts under s. 105 (1) a punishment within the meaning of s. 26 of the General Clauses Act or Art. 20 (2) of the Constitution of India.

Where the managing directors of an Insurance Company were previously convicted and punished under s. 409 of the Indian Penal Code for using Rs. 95,000 belonging to the company for their own purpose contrary to the provisions of the Insurance Act, their subsequent prosecution on the same facts under s. 105 (1) of the Insurance Act is barred under s. 26 of the General Clauses Act as well as Art. 20 (2) of the Constitution of India.

Even an order for restitution under s. 105 (1) of the Insurance Act cannot be made in the circumstances inasmuch as such an order amounts to 'punishment' under s. 105.

Bombay State v. *Punjamal*,[1] *Emperor* v. *Bhogilal*,[2] *Emperor* v. *Peter D'Souza*,[3] referred to.

Loomchand v. *Official Liquidators*,[4] relied upon.

CRIMINAL Appeal against the order of acquittal passed by A. B. Bagi, Esquire, Judicial Magistrate, First Class, Poona.

Charge under s. 105 of the Indian Insurance Act, 1938.

The facts are fully stated in the Judgment.

H. M. Choksi, Government Pleader for the State.

S. G. Patwardhan, for Respondent-accused No. 1.

S. G. Patwardhan with *K. K. Gadgil* for Respondent- accused No. 2.

*Criminal Appeal No. 1258 of 1955.

1. (1950) 52 Bom. L. R. 788.
2. (1931) 33 Bom. L. R. 648.
3. (1948) 50 Bom. L. R. 574.
4. (1953) A. I. R., Mad. 595.

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Gajendragadkar J.

Gajendragadkar J.—This appeal raises an interesting question of law under s. 26 of the General Clauses Act and art. 20 (*2*) of the Constitution of India. The question arises in this way: The two respondents were tried for an offence under s. 409 of the Indian Penal Code and s. 105 of the Indian Insurance Act in Criminal Case No. 82 of 1953. They were both convicted and sentenced for both the said offences. When the order of conviction and sentence imposed on them by the learned trial Magistrate was challenged before the learned Sessions Judge at Poona in Criminal Appeal No. 77 of 1954, the learned Sessions Judge confirmed the order of conviction under s. 409 of the Indian Penal Code but set aside the order of conviction under s. 105 of the Indian Insurance Act. He held that the proceedings instituted against them under s. 105 were invalid and incompetent in the absence of a complaint as required by the said Act. Thereafter the State obtained sanction for filing a proper complaint and on this complaint a charge is framed against the respondents under s. 105 of the Indian Insurance Act. The learned Magistrate has found that the charge is proved and that both the respondents are guilty of the offence under s. 105 of the Act. He however held that having regard to the provisions of s. 26 of the General Clauses Act and art. 20 (*2*) of the Constitution of India they could not be punished for the said offence. That is why he has ordered that the respondents should be acquitted of the offence under s. 105. It is this order of acquittal that is challenged before us by the learned Government Pleader on behalf of the State and his argument is that the learned Magistrate was in error in coming to the conclusion that s. 26 of the General Clauses Act or art. 20 (*2*) of the Constitution create a bar against adequate and proper orders being passed against the respondents under s. 105 of the Indian Insurance Act.

Section 26 of the General Clauses Act provides that 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. Article 20 (*2*) of the Constitution contains a similar provision by way of fundamental rights. Under this article no person shall be prosecuted and punished for the same offence more than once. It is thus clear that if the acts or omissions on which the charge against the respondents in the present case is based under s. 105 of the Insurance Act are the same on which the charge under s. 409 of the Indian Penal Code was based in the earlier trial, the respondents could not be prosecuted and punished for the same acts twice over. The bar is not so much against the second prosecution as against the second

punishment being imposed on the accused person for the same act or omission. This position is plain and cannot be disputed. It is common ground that the facts on which the two charges are respectively based are identical, but the argument is that the respondents can be prosecuted under s. 105 (*1*) of the Insurance Act and an appropriate order can be passed without violating the bar created by s. 26 of the General Clauses Act or art. 20 (*2*) of the Constitution and that is the argument which needs to be considered in the present appeal.

At this stage it may be convenient to refer very briefly to the facts giving rise to the charge against the respondents. Respondent No. 1, S. L. Apte, was the managing director of the Long Life Insurance Company, Ltd., at Poona. He had been appointed as such director on or about the 1st of July 1942 and the terms of his employment were subsequently settled. Respondent No. 2 Miss Dwarkabai Bhat, was appointed as managing director, Women's Department, of the Company on December 12, 1938 and she entered into an agreement in that behalf on December 15, 1938. By this agreement the terms and conditions of her service were prescribed. Respondent No. 1 was in charge and custody of the cash, the property and the accounts of the company. Respondent No. 2 had also similar power and control over the cash and the accounts of the complainant company according to the power of attorney executed on June 22, 1942. The prosecution case is that on August 9, 1952, respondent No. 1 took Rs. 95,000 of the company by voucher executed in that behalf. Respondent No. 1 with the sanction of respondent No. 2 had thus in his possession Rs. 95,000 belonging to the company and the two together wrongfully withheld this amount or wilfully applied it to purposes other than those expressed or authorised by the Insurance Act. It was in this manner that both the respondents having had legal custody and dominion over the property belonging to the company are alleged to have used that amount for their own purpose contrary to the provisions of the Insurance Act. That is how a charge under s. 105 (*1*) of the Insurance Act was framed against them. It would be noticed that on the same facts a charge under s. 409 of the Indian Penal Code was framed against both the respondents, and as I have just indicated they were convicted of the said offence and sentenced to different terms of imprisonment and ordered to pay respective amounts of fine. The position therefore is clear that the acts on which the charge under s. 105 (*1*) of the Insurance Act is based are identical with the acts on which the charge under s. 409 of the Indian Penal Code had been based; and that would attract the provisions of s. 26 of the General Clauses Act as well as art. 20 (*2*) of the Constitution of India.

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It has been strenuously urged before us by the learned Government Pleader that the bar on which the order of acquittal is based cannot come in our way of convicting the respondents under s. 105 (*1*) of the Insurance Act and passing an appropriate order, because it is urged that under the penal section in question we could, after convicting the respondents, order them to deliver up or refund within a time to be fixed by us the property which has been improperly obtained or wrongfully withheld or wilfully misapplied by them, and that such an order can be made under s. 105 of the Act and it does not amount to a punishment at all. If such an order can be passed by us without imposing any sentence as to fine and if the order does not amount to a punishment, then it may be possible to take the view that the respondents can be convicted under s. 105 (*1*) of the Act and an appropriate order may be passed against them without offending against the bar on which the order of acquittal is based. The answer to this point would naturally depend upon a fair and reasonable construction of s. 105 (*1*) of the Insurance Act. This section provides that any director or managing agent of an insurer who wrongfully obtains possession of any property of the insurer or having any such property in his possession wrongfully withholds it or wilfully applies it to purposes other than those expressed or authorised by this Act shall on the complaint of the Controller made after giving the insurer not less than fifteen days notice of his intention, or on the complaint of the insurer or any member or any policy-holder thereof, be punishable with fine which may extend to one thousand rupees and may be ordered by the Court trying the offence to deliver up or refund within a time to be fixed by the Court any such property improperly obtained or wrongfully withheld or wilfully misapplied and in default to suffer imprisonment for a period not exceeding two years. The argument is that even after an accused person is convicted under this section, it is not obligatory on the Court to impose a sentence of fine. The Court may content itself on convicting the accused to direct the accused to deliver up or refund within a time to be fixed by the Court the property in question. Such an order is not punishment properly so-called. Again the sentence of imprisonment which the Court may impose on the accused, in default of his carrying out this order cannot be said to be punishment imposed on him for the principal act for which he is convicted under the section. A sentence in default is, as the expression 'in default' itself indicates, a sentence no doubt, but it is imposed on the accused because he does not carry out the earlier substantive order. The learned Government Pleader has pointed out that an order calling upon the offender to

deliver up the property is in effect an order for restitution of property; and if the offender is compelled to restitute the property to its rightful owner, that cannot be regarded as a punishment, so that a person ordered to cause restitution of the property cannot be held to be punished within the meaning of s. 26 of the General Clauses Act or art. 20 (2) of the Constitution of India.

Before dealing with this argument, it will be relevant to refer to some subsidiary and incidental contentions which have been raised before us by the learned Government Pleader. Section 258 (2) of the Criminal Procedure Code provides that where an accused person is found to be guilty he would be convicted and on conviction the Court shall pass sentence upon him according to law. There can be no doubt that generally speaking a criminal trial is expected to end either in an order of acquittal or conviction and in the latter class of cases the order of conviction must be followed by an order of adequate and proper sentence. The sentence has to be passed according to law which prescribes such sentence. In other words, the penal section under which the accused is convicted also provides for the sentence awardable to the offender, and after an accused person is convicted a sentence according to the relevant penal section must follow. The learned Government Pleader argues that there is no provision in the Criminal Procedure Code which necessarily requires the imposition of two separate sentences where an accused person is tried and convicted of two different offences constituted by the same set of acts or omissions. In such a case it would be open to the criminal Court to convict the accused of both the offences but to sentence him only in respect of one of these convictions. In support of this argument the learned Government Pleader has referred us to a decision of Dixit and Chainani, JJ. in *Bombay State* v. *Pujamal.*[5] In this case the learned Judges were dealing with the question as to whether separate sentences can legally be imposed at the same trial on a person charged with offences punishable under ss. 65 (*b*), 65 (*f*) and 66 (*b*) of the Bombay Prohibition Act. Apparently there was a conflict of judicial opinion on this point; but on examining the relevant decisions it was held that ordinarily one sentence alone should be passed for the offence of manufacturing liquor under s. 65 (*b*) and no separate sentences should be passed for the offences of possessing materials or apparatus for manufacturing liquor and for possessing liquor punishable under ss. 65 (*f*) and 66 (*b*) of the Act. Our attention has also been drawn to another decision of this Court in *Emperor* v. *Bhogilal,*[6] where Beaumont, C. J., and Murphy, J. had occasion to

5. (1950) 52 Bom. L. R. 788.

6. (1931) 33 Bom. L. R. 648.

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consider a similar question. In this case the accused was found carrying boxes containing salt and stamped with the words "Swarajya Sabha" and "Gujarat Prantik Samiti", an association declared unlawful, and he was convicted under s. 47 (*c*) of the Bombay Salt Act for being in possession of contraband salt, as well as under s. 17 (*1*) of the Criminal Law Amendment Act for assisting the operation of an unlawful association. When this double conviction and punishment was brought to the notice of the learned Sessions Judge at Ahmedabad, he made a reference to this Court pointing out that the double punishment was illegal and requesting that appropriate orders should be passed against the accused in accordance with law. The learned Judges accepted the reference and, as the judgment delivered by Beaumont C.J. points out, the sentence passed against the accused for the second offence under s. 17 (*1*) of the Criminal Law Amendment Act was set aside. In effect the accused was convicted of both the offences but sentenced only for one of them, the sentence imposed upon him by the learned Magistrate in respect of the other offence having been set aside. It would thus appear that if the present respondents had been charged properly both under s. 409 of the Indian Penal Code and s. 105 of the Insurance Act, it would have been open to the Court to convict the respondents of both the offences while imposing a sentence or punishment on them for either of the two but not for both. Even so, it cannot be disputed that where an accused person is sought to be tried on a second occasion, it would be idle to prosecute him solely with the object of convicting him without imposing on him any sentence at all, because the normal rule laid down in s. 258 (*2*) of the Criminal Procedure Code requires that on conviction of an accused person the Court shall pass sentence upon him according to law. This position is in fact not seriously disputed before us by the learned Government Pleader. He however contends that under s. 105 (*1*) of the Insurance Act it would be open to the Court to pass an order for restitution as he describes it, without imposing any sentence of fine; and, as I have already mentioned, such an order does not, according to the learned Government Pleader, amount to a punishment.

In support of the construction which is sought to be placed by him on s. 105 (*1*) of the Insurance Act the learned Government Pleader relied on a decision of a Full Bench of this Court in *Emperor* v. *Peter D'Souza*,[7]. In this case the Full Bench was concerned with the construction of the penal clause of s. 43 (*1*) of the Bombay Abkari Act as amended. This clause provides that the accused "shall, on conviction, be punishable

7. (1948) 50 Bom. L. R. 574.

with imprisonment for a term which may extend to six months and with a fine which may extend to rupees one thousand." For the State it was urged that the amended provision made it obligatory on the Court to award both the sentences to the accused after his conviction. This argument was rejected by the Full Bench and it was held that the provision as amended does not make it obligatory upon the Court to inflict on the accused both the sentence of imprisonment and the sentence of fine; inasmuch as the provision merely lays down that the accused on conviction is punishable and does not provide that the accused on conviction shall be punished, the Court has discretion to inflict both the sentences or either of them according to the needs of any given case. Applying this principle s. 105 (*1*) of the Insurance Act is sought to be construed by the learned Government Pleader as giving the Court discretion either to impose a fine up to one thousand rupees or to make an order calling upon the accused to deliver up the property in question. We are unable to accept this construction. As the section is worded, it appears that the offender is made punishable with fine, and that is the main punishment which can and must be imposed by the Court on convicting the offender. It is not as if the subsequent order which the Court is authorised to pass on imposing a fine is an alternative mode of punishment under s. 105 (*1*) of the Act. The imposition of fine is the main punishment, and the order which the Court may pass on convicting the accused and imposing a fine on him is in the nature of an incidental or supplemental order. If the Legislature had intended that fine and this order should be alternative punishments, they would undoubtedly have used more appropriate phraseology in the material part of the section. After providing that the director who is found guilty shall be punishable with fine, the section goes on to add that he may be ordered by the Court trying the offence to deliver up the property in question. That is one reason why we are not prepared to accept the construction for which the learned Government Pleader contends. Besides, if the order in question is regarded as an alternative to the imposition of fine, then it would be difficult to escape the conclusion that like fine this order is also a punishment provided by s. 105. If the order of refund or restitution and the order of fine are both awardable on the ground that the offender is punishable in that manner alternatively, the word 'punishable' must be given its effect and the order which may be passed against the offender would inevitably have to be regarded as a matter of punishment within the meaning of s. 105.

There is another consideration which has weighed in our minds. The order in question can be passed by the Court

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trying the offence and its character may perhaps be determined by taking into account the consequence provided by the section if the offender commits a default in complying with this order, and the consequence is that in default the offender can be ordered to suffer inprisonment for a period not exceeding two years. It seems to us clear that the sentence which the Court is entitled to impose on the offender in default applies to the default in the payment of fine as well as to the default in complying with the order of restitution. In other words, the order which the learned Government Pleader wants us to impose against the respondents in this case is not an order for restitution simpliciter. It is an order for restitution passed by a criminal Court and the consequence of non-compliance with the order would inevitably be that we would have to direct the accused to undergo imprisonment in default for a period not exceeding two years. Technically it is no doubt true that this sentence in default cannot be said to be awarded against the accused for the main offence itself; it is a sentence in default and it would be imposed if the accused does not comply with the order calling upon him to deliver up the property in question. But nevertheless the consideration about the sentence in default which can be passed against him may not be irrelevant in determining the true character of the order for restitution. Therefore, we have come to the conclusion that however we look at the material provisions of s. 105 of the Insurance Act it is difficult to accept the argument that the order for restitution can be passed against the respondents without offending the bar created by s. 26 of the General Clauses Act and art. 20 (2) of the Constitution of India

In this connection it would be useful to refer to a decision of the Madras High Court in *Loomchand* v. *Official Liquidators*[8]. Govinda Menon and Basheer Ahmed Sayeed, JJ. were considering in this case the effect of the provisions contained in s. 282-A of the Indian Companies Act. This section is substantially similar to s. 105 of the Insurance Act. The judgment shows that while construing s. 282-A the learned Judges held that the clause in respect of the sentence in default governs both the orders provided for by the section. In other words, the order of sentence in default can be imposed against the accused both for his failure to pay the fine as well as his failure to deliver up the property as directed; and it has been observed that the order directing the accused to deliver up the property can be regarded as incidental or supplemental to the main order of sentence of fine. In other words, the view which the learned Judges took appears to be that when an accused person is convicted under s. 282-A of the Companies Act the Court will

8. [1953] A. I. R., Mad. 595.

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have to sentence him to pay a fine within the limits permitted by the section, and having done so the Court may in its discretion call upon the accused to restore the property and in default of either payment of fine or restitution of the property the accused may further be ordered to undergo a sentence of imprisonment in default. This judgment, in our opinion, seems to support the construction which we are disposed to put on s. 105 of the Insurance Act. If the order which the learned Government Pleader wants us to pass against the respondents cannot be passed without infringing the provisions of s. 26 of the General Clauses Act and art. 20 (2) of the Constitution, we must hold that the learned Magistrate was right in acquitting the respondents of the offence charged.

In the result, the order of acquittal passed in favour of the respondents is confirmed and the appeal is dismissed.

Appeal dismissed.

G. N. V.

INCOME-TAX REFERENCE

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Tendolkar.

THE COMMISSIONER OF INCOME-TAX, BOMBAY CITY I, BOMBAY APPLICANT, *v.* BAI SHIRINBAI K. KOOKA, BOMBAY, RESPONDENT.*

1956 *March 6*

Indian Income-Tax Act (XI of 1922), s. 10 (2)—Shares previously purchased by assessee converted into her stock-in-trade of business—Sale of such shares during year of account relevant to assessment year —Assessable profits on such sale, how computed.

S. E. K., assessee, purchased certain shares for investment and on April 1, 1945 she converted them into her stock-in-trade and carried on business in shares. Some of these shares were sold in the year of account relevant for the assessment year 1947-48. The contention of the assessee that only the difference between the sale price and the market-price prevailing on the date on which the assessee converted them into her stock-in-trade and not the difference between the sale-price and the cost-price could be taxed was upheld by the Income-Tax Appellate Tribunal. On reference at the instance of the Commissioner of Income-Tax, Bombay City I, Bombay,

Held, that profits assessable to tax are commercial profits, that is, profits made in a business by the carrying on of the business which a commercial man would accept as profits of that business. The commercial profits on a sale of an article, therefore, can only be the difference between what that article realises and what that article cost the business—not what it had cost someone else.

Held, therefore, that the assessee's assessable profits on the sale of shares were the difference between the sale-price and the market price prevailing on April 1, 1945.

*Income-Tax Reference No. 49 of 1955.