

## REVISIONAL CRIMINAL

*Before Mehar Singh, J.*

HAVELI RAM,—*Petitioner.*

*versus*

MUNICIPAL CORPORATION OF DELHI,—*Respondent.*

Criminal Revision No. 256-D of 1964.

*Code of Criminal Procedure (Act V of 1898)—S. 403—'Tried'—Meaning of—Complaint filed under sections 7 and 16 of the Prevention of Food Adulteration Act, (XXXVII of 1954) and withdrawn after magistrate had taken cognizance of the same but before the respondent appeared pursuant to a summons issued to him by the magistrate and order of acquittal passed—Second trial for the same offence—Whether barred.*

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*Held*, that once the Court has taken cognizance of a complaint or a criminal case and has ordered issue of process for the accused to appear, it has taken steps towards the trial and what it has done is proceedings in the nature of trial. Where a magistrate takes cognizance of a complaint under section 7 and 16 of the Prevention of Food Adulteration Act, 1954 and issues process to the respondent for appearance but the complaint is withdrawn before the respondent appears before the magistrate pursuant to the summons issued to him and the magistrate passes an order of acquittal, the respondent will be deemed to have been tried within the meaning of section 403(1) of the Code of Criminal Procedure and the second trial of the respondent for the same offence on a second complaint will be barred.

*Case reported by Shri C. G. Suri, Additional Sessions Judge, Delhi, under Section 438 of the Code of Criminal Procedure.*

*Revision from an order dated 9th October, 1963, of Shri B. K. Malhotra, Magistrate 1st Class, Delhi, rejecting the objections filed by the petitioner under section 403 Cr. P. C. that a previous complaint against the petitioner was withdrawn and the petitioner had been acquitted and that he could not be proceeded against on the same facts on the basis of a fresh complaint filed by the respondent—Corporation.*

C. L. BAHAL, ADVOCATE, for the Petitioner.

B. DAYAL, ADVOCATE for the Respondent.

## ORDER

Mehar Singh, J. MEHAR SINGH, J.—In this reference the only question that comes for consideration is whether the second trial of the respondent under sections 7 and 16 of the Prevention of Food Adulteration Act, 1954, is barred by sub-section (1) of section 403 of the Code of Criminal Procedure, as on a previous complaint, which was withdrawn, after its cognizance had been taken by the trial Magistrate, but before the respondent appeared as an accused person before the Magistrate pursuant to a summons issued to him in that behalf, and an order of acquittal was made under section 248 of the Code of Criminal Procedure ?

Nothing appears on the record why the first complaint under sections 7 and 16 of the Prevention of Food Adulteration Act, 1954, against the respondent was withdrawn. However, in that complaint the trial Magistrate took cognizance of it and issued process to the respondent to appear as an accused person. The withdrawal of that complaint was before the respondent appeared as an accused person in the Court. The offence for which the complaint was made and has now been made against the respondent is triable as a summons case.

An objection was raised before the trial Magistrate on the side of the respondent to his prosecution on the ground that sub-section (1) of section 403 of the Code of Criminal Procedure bars the same, but that was overruled. On revision the learned Additional Sessions Judge recommends that the proceedings against the respondent be quashed and in this respect he relies upon *Municipal Corporation of Delhi v. Lekh Raj*, (1). In that case, however, the argument was that the previous complaint had been withdrawn because of want of authority from proper quarters to file the complaint, and the learned Judges found that question was being raised before them for the first time in an appeal against acquittal in the second complaint. They said that there was no material before them upon which they could have accepted the contention. That was also a case for prosecution under sections 7 and 16 of the Prevention of Food Adulteration Act, 1954. So on the basis of the previous acquittal, the subsequent prosecution under

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(1) 1964 P.L.R. 6.

a second complaint was held barred by sub-section (1) of section 403 of the Code of Criminal Procedure.

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The learned counsel for the Municipal Corporation contends that the first complaint in the present case was never tried and as there was no trial of that complaint, sub-section (1) of section 403 of the Code of Criminal Procedure is not attracted. He points out that in *Municipal Corporation of Delhi v. Lekh Raj* (1) no such question was ever presented for the consideration of the learned Judges or a decision given by them on it, which is correct. Obviously for the consideration of this argument that case is not helpful. Sub-section (1) of section 403 of the Code of Criminal Procedure says that a person, who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237. Leaving aside the remaining sub-sections which are not material here, the explanation to this section says that—'The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused or any entry made upon a charge under section 273, is not an acquittal for the purpose of this section.' The word used in sub-section (1) is 'tried', and it is upon the meaning and scope of this word that the whole argument of the learned counsel for the Municipal Corporation turns. The first case to which reference is made in this respect is *In re Muthia Moepan* (2), which was a case of security proceedings under section 107 of the Code of Criminal Procedure. On the first complaint under that section an order was passed saying that the opposite side were acquitted. On a second complaint objection was that it was not competent because of the provisions of sections 403 and 495 of the Code of Criminal Procedure. While considering this argument the learned Judges at page 319 have made observation about trial of summons and warrant cases, which is relevant here, in this manner—"The provisions regulating trials and enquiries all contemplate the appearance of the accused as essential for the commencement of the proceedings. See

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(2) I.L.R. (1913) 36 Mad. 315.

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sections 242 and 252 'when the accused appears or is brought before the Magistrate'; section 208(1) the Magistrate shall 'when the accused appears or is brought before him, etc.', section 171 'when the Court is ready to commence the trial, the accused shall appear or be brought before it, etc.' Attention was drawn to the terms of section 248 'if a complainant, at any time before the final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.' But it is clear to our minds that the language 'at any time before any final order is passed' does not apply to a time before the accused has been ordered to appear in as-much as section 242, Criminal Procedure Code, applicable to the trial of summons cases says, as already pointed out, that "when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted." The learned Judges were thus of the opinion that in a summons case trial does not commence until the accused appears according to section 242. This was perhaps not directly relevant to the facts of the case, but the learned Judges have expressed themselves very clearly. The next case is *Bezwada Kotayya v. Konathalapalli Venkayya* (3), in which the complainant having failed to appear in a summons case an order of acquittal was passed under section 247 of the Code of Criminal Procedure. Subsequently, a fresh complaint was made of the same offence based on the same facts. To an argument that the trial of the second complaint was barred under section 403, the learned Judges observed that no trial having commenced on the first complaint that section did not bar the Court from taking cognizance of the second complaint and further said that 'in our opinion some meaning must be attached to the word 'tried' in the earlier part of section 403(1). It should not be treated as mere surplusage as the learned Judge would seem to do.' In that case, cognizance of the complaint had been taken and the case had been posted for hearing on a future date when an order under section 247 of the Code of Criminal Procedure was made acquitting the two

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(3) A.I.R. 1918 Mad. 212.

persons. The third case relied upon in this respect is *Girraj Kishore v. The State through Municipal Board, Agra* (4). Although in that case the prosecution in this first complaint was held, but the Magistrate acquitted the accused for want of proper sanction to institute it; the learned Judge has observed that 'a verdict of acquittal immune from challenge, but it is only when an accused has been 'tried' and acquitted of an offence that the immunity arises. The last case is *Gopal Chandra Mandal v. The State* (5), which was again a summons case with an order of acquittal under section 248 of the Code of Criminal Procedure. It does not, however, appear from the report whether after the Magistrate had taken cognizance of the first complaint process to the accused had or had not been issued. In any case, the complaint was withdrawn. Then a second complaint was made to which an objection was taken under section 403 of the Code of Criminal Procedure. The learned Judge observed—'I hold that section 403 of the Code of Criminal Procedure can be a bar only when there has been a trial. Under section 248 the trial is not concluded, and before a final order is passed, permission is accorded to withdraw from the prosecution, and the result is a statutory acquittal.' The learned Judge then further says that—'section 403 can be called in aid only when there has been a trial to a close. It is only then that the question of previous acquittal or previous conviction comes into play.' It will be seen that the other cases cited by the learned counsel for the Municipal Corporation do not go as far as this case. This is one view of meaning and scope of the word 'tried' in section 403 of the Code of Criminal Procedure. There is, however, a contrary view. The first case for this is *Shankar Dattatraya Vaze v. Dattatraya Sadashiv Tendulkar* (6), which was a summons case, in which acquittal was under section 247 of the Code of Criminal Procedure because of the absence of the complainant. In that case, although the summons had been issued to the accused, but he was not served by the time the order of acquittal under section 247 was made. The learned Judges say. 'It is urged, however, on behalf of the applicant that though the word 'tried' may not mean trial on the merits, yet the trial must commence before an

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(4) A.I.R. 1957 All. 129.

(5) A.I.R. 1957 Cal. 382.

(6) A.I.R. 1929 Bom. 408.

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order of acquittal is passed, and that unless a summons is served in a summons case against the accused, the trial cannot be said to have commenced against the accused. We are of opinion that as soon as a Magistrate takes cognizance of an offence and an order for summons is issued, the proceedings have commenced against the accused, and under section 241 it is not necessary that the summons should be served, or that the accused should be present in Court before an order of acquittal might be passed in his favour on account of the absence of the complainant.' In *Suku Ram Koch, v. Krishna Deb Sarma* (7), Mukerji J., observed—'the word 'tried' there used does not necessarily import a decision of the case on the merits, but only refers to the nature of the proceedings that were held; or in other words, means that the proceedings in which the acquittal was passed were in the nature of a trial.' And Graham J., agreed with Mukerji J. The third case is *Bhupati Bhusan Mukerji v. Amio Bhusan Mukerji* (8), which was a case of a complaint under section 426 of the Penal Code. The accused persons on having been summoned appeared and the case was set for trial, when the complainant was absent and the accused were acquitted under section 247 of the Code of Criminal Procedure. On the day following that order a fresh complaint was filed by the complainant on the same facts. To that section 403 of the Code of Criminal Procedure was pleaded as a bar. Although on facts that case is slightly different from the present case, but Lord Williams J., considered the previous cases and expressed his agreement with this observation—'In *Gomer Sirda v. Queen Empress* (9), Maclean, C.J., held that 'trial' meant the proceeding which commences when the case is called on with the Magistrate on the Bench, the accused in the dock, and the representatives of the prosecution and for the defence, if the accused be defended, are present in Court for the hearing of the case. In the present case the Magistrate, this accused, and the complainant, were all present in Court on the first day, namely May 31. In *Shankar Dattatraya Vaze v. Dattatraya Sadashiv* (10), all the decisions upon the present point were ably reviewed by Patkar, J., who observed that section 247 does not refer to the day upon which the accused appears, but to the day appointed for the

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(7) A.I.R. 1929 Cal. 189.

(8) A.I.R. 1935 Cal. 491.

(9) I.L.R. 25 Cal. 863.

(10) I.L.R. 1929 Bom. 408.

appearance of the accused, showing that it is not necessary even that the accused should appear in order to attract the provisions of the section. In *Suku Ram v. Krishna Dev* (7), Mukerji, J., said that 'he was clearly of opinion that the word 'tried' used in section 403 does not necessarily import a decision of the case on the merits, but only refers to the nature of the proceedings that were held, or in other words, means that the proceeding in which the acquittal was passed were in the nature of a trial.' The learned Judge, then referred to sections 242 to 245 and 247 of the Code of Criminal Procedure and then held that 'section 247 overrides the previous provisions of the Chapter, and these sections and section 403 must be read together. The result of doing so is to show that the intention of the legislature was that the procedure under section 247 should be deemed to be a trial within the meaning of section 403. So these are the two views with regard to the meaning and scope of the word 'tried' in sub-section (1) of section 403: one view being that the accused must be present in Court on being summoned before it can be said that the trial has commenced and the other being that once the Court has taken cognizance of a complaint or a criminal case and has ordered issue of process for the accused to appear, it has taken steps towards the trial and what it has done is proceedings in the nature of a trial. This view seems to accord more with the explanation to section 403 of the Code because if it was the intention of the Legislature to exclude acquittals under sections 247 and 248 from the purview of section 403 that could have been as specifically provided as stopping of proceedings under section 249 or the discharge of the accused or an entry made upon a discharge under section 273 as has been done in that explanation. Learned counsel for the Municipal Corporation refers to Chapter 17 of the Code of Criminal Procedure with the heading 'of the Commencement of Proceedings before Magistrates' and sections 204 and 205 which deal with the issue of process to an accused person after the Magistrate has taken cognizance of an offence. He says that this is dealt with in a separate chapter while Chapter 20 deals with the trial of summons cases by Magistrates, and section 242 says that 'when the accused appears or is brought before the Magistrate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted, but it shall not be necessary to frame a formal

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charge. The learned counsel urges that the procedure under Chapter 17 dealing with the commencement of proceedings is separate and, according to him, is not a part of the trial, which only commences under Chapter 20 with the stage referred to in section 242 in regard to summons cases. But in this very chapter appear sections 247 and 248. The first of these sections says—'if the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day. . . . The Magistrate, once the complainant is absent, has power to proceed under this section when summons have been issued on complaint and even though the accused has not been served and has not appeared on the day appointed for his appearance, but the complainant is absent. So that an order under section 247 is made under Chapter 20 and as it is a section that appears long after section 242, it would seem that it refers to such a stage when trial has commenced, and yet if what the learned counsel for the Municipal Corporation contends is true, then there can be a case under section 247 when acquittal results before the commencement of the trial. Similar is the position with regard to section 248 which says—'if a complainant, at any time before a final order is passed in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused.' Under this section also permission for withdrawal of the complaint may be made either even before process for summoning the accused is issued or after the process has been issued, but before the accused has been served and has appeared or after he has appeared. In the first of these three instances, if the contention of the learned counsel for the Municipal Corporation is to prevail, no trial has commenced, and yet there follows an acquittal. So that it will not be quite correct to read Chapters 17 and 20 in separate and isolated manner in which the learned counsel says that the same should be read. It would not be correct either that not until the stage of section 242 has been reached with the presence of the accused and an opportunity to ask him about the nature of the offence that the trial



commences. An order of acquittal either under section 247 or under section 248, until set aside, holds good, and if, as stated, the Legislature intended that it should not have an effect like any other acquittal under the Code, it could well have explained this away in the explanation as has been pointed out. I am, therefore, of the opinion that the view in the second set of cases more conforms with the collective reading of the sections under Chapter 20 with section 403 of the Code of Criminal Procedure. Any other view seems to divide one form of acquittal from another form of acquittal. Such a division is, of course, possible if it is expressly provided for, but the word 'tried' as used in subsection (1) of section 403 not having been defined and no accepted definition of the word 'tried' having been stated, it would not be reasonable to interpret that word in a narrow sense so as to confine it in cases in which either the trial has actually reached the stage of close as held in one of the cases cited or at least must reach the stage of section 242 before the acquittal can be said to have resulted in a complaint 'tried' according to section 403. In this approach the reference made by the learned Additional Sessions Judge is accepted and the proceedings against the respondent are quashed.

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B.R.T.

CIVIL MISCELLANEOUS

*Before P. D. Sharma, J.*

M/S INTERNATIONAL COTTON (WASTE) CORPORATION,  
BOMBAY,—*Petitioner.*

*versus*

THE ASSESSING AUTHORITY, BHATINDA, AND OTHERS,—  
*Respondents.*

Civil Writ No. 364 of 1963.

*Punjab General Sales Tax Act (XLVI of 1948)—S. 5(2)(a) (vi)  
—Exemption under—Firm having Head Office at one place and  
Branch Office at another place—Branch Office purchasing goods and  
Head Office exporting those goods to foreign countries—Whether  
entitled to exemption.*

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*Held, that, in law, a partnership has no existence distinct and independent of the members composing it. The name under which*