Digamber Vs. Prakash

Digamber Vs. Prakash

SooperKanoon Citation : sooperkanoon.com/1183917

Court : Mumbai Aurangabad

Decided On : Sep-15-2016

Judge : V.K. Jadhav

Appeal No. : Criminal Application No. 2217 of 2005

Appellant : Digamber

Respondent : Prakash

Judgement :

1. Being aggrieved by the order dated 1.8.2005 passed by the learned Chief Judicial Magistrate, Nanded below Exh.39 in S.C.C. No. 1687 of 1997, the original accused has preferred present criminal application.

2. Brief facts, giving rise to the present application are as follows:-

a) The respondent complainant was serving as sectional Engineer at Masoli project, sub division Janapuri, Tq. Loha, District Nanded and his remotely related sister is the wife of applicant original accused. The applicant accused is serving as Manager with State Bank of Hyderabad. In the month of October-December, 1996, the applicant accused had approached the complainant and requested for hand loan of Rs.1,25,000/- for the purpose of marriage of his daughter Kum. Sujata. Thus, considering the request of the accused and his persuasions thereto, respondent complainant obtained a sum of Rs.1,00,000/- from his father in law on 29.12.1996 and paid the same to the applicant-accused as a hand-loan with

condition to repay the said amount within four months.

b) Since the applicant accused failed to repay the said amount within stipulated period, the respondent complainant approached him on 1.5.1997 and made a demand of the said amount. The applicant accused had accordingly issued a cheque dated 1.5.1997 drawn on State Bank of Hyderabad, Branch Mukhed in favour of the respondent complainant. Though the respondent complainant has deposited the said cheque in his saving bank account with State bank of Hyderabad, Nanded. however, the said cheque was dishonoured with endorsement that 'payment is stopped by the drawer'. Consequently, the respondent complainant has issued a demand notice calling upon applicant-accused to pay sum of Rs.1,00,000/- within 15 days. The notice was duly served on the applicant and even the applicant accused gave reply to the said notice through his advocate. The applicant accused has denied the liability in toto to pay the amount under cheque.

c) Thus, the respondent complainant constrained to file complaint under Section 138 of Negotiable Instruments Act against the applicant-accused before the Chief Judicial Magistrate, Nanded and the same is accordingly registered as S.C.C. No.1687 of 1997. The applicant accused on his appearance before the learned C.J.M. Nanded filed an application below Exh.39 and claimed discharge mainly on the ground that Special Civil Suit No. 9 of 2000 instituted by the respondent-complainant for the same cause, came to be dismissed by the Civil Court and thus, the finding recorded in the said Civil Suit are binding on the criminal court. Learned C.J.M. Nanded by its impugned order dated 1.8.2005 rejected the said application Exh.39. Hence, this criminal application.

3. Learned counsel for the applicant submits that during pendency of Summary Criminal Case No. 1687 of 1997, the respondent original complainant instituted Special Civil Suit No. 9 of 2000 against the applicant accused before the learned C.J.S.D. Nanded for recovery of amount of Rs.1,36,000/-, which includes principal amount of Rs.1,00,000/- and Rs.36,000/- as an interest. The respondent original complainant had instituted the said suit in respect of the same transaction, which is subject matter of S.C.C. No. 1687 of 1997. The learned C.J.S.D. Nanded by

judgment an decree dated 2.1.2004 dismissed the Special Civil Suit No. 9 of 2000 with costs by recording negative finding in so far as the transaction of paying sum of Rs.1,00,000/- as hand loan and further issuance of cheque for repayment of the said amount.

Learned counsel for the applicant submits that the decision of the civil court is binding on criminal court and in view of the same, the applicant-accused is entitled for discharge. In view of clause 2 of Article 20 of the Constitution of India, there is immunity guaranteed from double punishment. The decision rendered in the said civil suit by the civil court has attained finality and therefore, the doctrine of merger squarely applied to the facts and circumstances of the present case. There cannot be more than one decree or operative order governing the same subject matter at given point of time. Learned counsel submits that the doctrine of estoppel, as provided under Section 115 of the Evidence Act also attracts and the application of said doctrine precludes the respondent complainant herein from denying the truth of the statement previously made by him in the said civil suit. Learned counsel further submits that in view of the provisions of Sections 40 to 43 of the Evidence Act, once an issue was tried and determined by the competent court between the parties, the same cannot be reopened between the same parties at later stage. Learned counsel submits that in the given set of facts the parties could not be permitted to put criminal law into motion when the allegations are purely in the nature of civil dispute. Learned counsel for the applicant-original accused submits that the maxim that a person cannot approbate and reprobate , squarely applies to the facts of the present case. It is well settled that no person can 'approbate and reprobate' together, to approve and reject. The respondent complainant when failed to prove before the Civil Court that the present applicant who is defendant in that suit issued cheque for repayment of loan of Rs.1,00,000/- then he cannot 'approbate and reprobate' together in the subsequent criminal proceeding.

Learned counsel for the applicant in order to substantiate his contentions, places reliance on the following cases:-

i) M/s. Karamchand Ganga Pershad and Anr vs. Union of India and others, reported in AIR 1971 SC 1244

ii) Kunhayammed and others vs. State of Kerala and another, reported in AIR 2000 SC 2587

iii) Pooja Ravinder Devidasani vs. State of Maharashtra and Anr, reported in 2015 AIR SCW 446

iv) Nagubai Ammal and others vs. B. Shama Rao and others, reported in AIR 1956 SC 593

4. Learned counsel for the respondent original complainant submits that Article 20 of the Constitution of India, most particularly clause (2), the person must have been prosecuted in the previous proceeding and the conviction or acquittal in the previous proceeding must be in force at the time of the second trial. There are certain conditions which are required to be fulfilled and bar provided by clause (2) of Article 20 does not apply unless all such conditions are satisfied. In the instant case, criminal proceedings are yet to be concluded and clause (2) of Article 20 is having no relevancy so far as the facts and circumstances of the present case are concerned. Learned counsel submits that similarly doctrine of merger and doctrine of estoppel also having no relevancy at all to the facts and circumstances of the present case.

Learned counsel submits that if the criminal case and civil proceedings are for the same cause, then the judgment of civil court would be relevant if conditions of any of Sections 40 to 43 of Evidence Act are satisfied. It cannot be said that the same would be conclusive except as provided under Section 41 of the Evidence Act. The Criminal prosecution would not be required to be dropped alone on the ground that the civil suit, for the same cause, came to be dismissed. The recovery of amount in the civil suit is different than the dishonour of cheque which is subject matter of complaint filed under section 138 of Negotiable Instruments Act before the Court. Both the proceedings can be continued simultaneously and both the remedies are independent to each other.

Learned counsel of the respondent original complainant, in order to substantiate his submissions, places reliance on the following cases:-

i) K.G. Premshankar vs. Inspector of Police and Anr, reported in 2002 Cri. L. J. 4343

ii) Vijaykumar B. Agarwal vs. Govindbhai Dayal Mange and Anr, reported in 1999 (3) Mh.L.J. 81

5. It is the submission of learned counsel for the applicant that the civil court after full-fledged trial in Special Civil Suit No. 9 of 2000 recorded a finding to the effect that the present respondent-complainant (plaintiff in the suit) failed to prove that on 29.12.1996 he paid sum of Rs.1,00,000/- to present applicant original accused (defendant in that suit) as a hand loan and that the applicant accused herein (defendant in the said suit) issued a cheque dated 1.5.1997 as claimed and the said findings bind the parties. The criminal proceeding stands suspended by the findings recorded by the civil court and thereby the findings of the civil court get precedence over the criminal proceedings.

6. Sections 40 to 43 of the Evidence Act provide which judgment of the Court of justice are relevant and to what extent. Sections 40 to 43 of the Evidence Act read as under:-

40. Previous judgments relevant to bar a second suit or trial.

The existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

41. Relevancy of certain judgments in probate, etc., jurisdiction.

A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant. Such judgment, order or decree is conclusive proof

that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;

that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property.

42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state.

43. Judgments, etc., other than those mentioned in sections 40 to 42, when relevant. Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act.

7. In the case of **K.G. Premshankar vs. Inspector of Police and Anr, (supra)** relied upon by learned counsel for the respondent original complainant, the Apex Court had an occasion to deal with the similar issue. The Hon ble Apex Court referred its previous judgment on the said point and even the decision rendered by the Privy Council and also the decision of Full Bench of Lahore High Court, thus concluded the point by making following observations in para 31 to 33 of the judgment. Paras 31 to 33 of the said judgment as reproduced as follows:-

31. Further, the judgment, order or decree passed in a previous civil proceeding, if relevant, as provided under Sections 40 to 41 or other provisions of the Evidence

Act then in each case, Court has to decide to what extent it is binding or conclusive with regard to the matter(s) decided therein. Take for illustration, in a case of alleged trespass by 'A' on B's property, 'B' filed a suit for declaration of its title and to recover possession form 'A' and suit is decree. Thereafter, in a criminal prosecution by 'B' against 'A' for trespass, judgment passed between the parties in civil proceeding cold be relevant and Court may hold that if conclusively establishes the title as well as possession of 'B' over the property. In such case, 'A' may be convicted for trespass. The illustration to Section 42 which is quoted above makes the position clear. Hence, in each and every case, first question which would require consideration is- whether judgment, order or decree is relevant? If relevant its effect. It may be relevant for a limited purpose, such as, motive or as a fact in issue. This would depend upon facts of each case.

32. In the present case, the decision rendered by the Constitution Bench of M.S. Sheriff's case (supra) would be binding, wherein it has been specifically held that o hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court biding on the other, or even relevant, except for limited purpose such as sentence or damages.

33. Hence, the observation made by this Court in V.M. Shah's case (supra) that the finding recorded by the criminal Court stands superseded by the finding recorded by the Civil Court is not correct enunciation of law. Further, the general observations made in Karam Chand's case are in context of the facts of the case stated above. The Court was not required to consider the earlier decision of the Constitution Bench in M.S. Sheriff's case as well as sections 40 to 43 of the Evidence Act.

8. It is thus clear that the previous judgment which is final can be relied upon under Sections 40 to 43 of the Evidence Act. In civil Suit between the parties, the principle of res-judicata may apply. In criminal case section 300 of Cr.P.C. makes a provision that once a person is convicted or acquitted he may not be tried if the conditions mentioned therein are satisfied. If the criminal case and civil

proceedings are for the same cause, the judgment of the Civil Court would be relevant, if conditions of any of the sections 40 to 43 are satisfied, but it cannot be said that the same would be conclusive except as provided in section 41. Section 41 provides, which judgment would be conclusive proof of what is stated therein. In the instant case, Section 41 has no application. Further, the judgment, order or decree passed in previous civil proceedings if relevant, as provided under sections 40 and 42 of the Evidence Act or other provisions of Evidence Act then in each case the Court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. The Court may take into consideration the illustration of Section 42, which makes the position clear. Thus in the instant case, the learned Magistrate would require to consider all evidence whether the judgment, order or decree passed in the said Special Civil Suit is relevant and if relevant, its effect.

9. It is thus clear that in view of the provisions of Sections 41, 42 and 43 of the Evidence Act, to what extent the judgment given in the previous proceedings are relevant, is provided and therefore, it would be against the law, if it is held that as soon as the judgment and decree passed in Civil Suit, criminal proceedings are required to be dropped, if the suit is decided against the plaintiff, who is complainant in criminal proceedings. In view of the observations made by the Hon ble Apex Court, I do not find any substance in the submissions made by learned counsel for the applicant that the findings recorded by the criminal court stand superseded by the findings recorded by the Civil Court.

10. In the case of **Kunhayammed and others vs. State of Kerala and Anr. (supra)** relied upon by learned counsel for the applicant; the Apex Court has observed that the logic underlying the doctrine of merger is that there cannot be more than one decree or operative orders governing the same subject matter at a given point of time. It is clear that when the decree or order passed by the inferior Court, Tribunal or authority was subjected to a remedy available under the law before a superior forum then, though the decree or order under challenge continues to be effective and binding, nevertheless its finality is put in jeopardy. Once the superior court has disposed of lis before it either way whether the decree or order under appeal is set aside or modified or simply confirmed, it is the decree

or order of the superior Court, Tribunal or authority which is the final, binding and operative decree or order wherein merges the decree or order passed by the court, Tribunal or the authority below. I do not think that the doctrine of merger stands applied to the facts and circumstances of the present case.

11. The maxim that a person cannot approbate and reprobate is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The doctrine of Approbate and reprobate is only species of estoppel. During the course of trial, it is for the Magistrate to decide to what extent the conduct of the parties binds them with reference to previous proceeding.

12. So far as the Article 20 of the Constitution of India is concerned, clause (2) guarantees that no person be prosecuted and punished for the same offence more than once. Article 20 (2) bars the second prosecution only where the accused has been both prosecuted and punished for the same offence previously. I do not think that Article 20 has any relevancy with the facts and circumstances of the present case.

13. In view of the above discussion and the law laid down by the Hon ble Apex Court in the case of **K.G. Premshankar vs. Inspector of Police and another, reported in 2002 Cri.L.J. 4343**, I do not find any substance in this criminal application. Thus, the order passed by the learned Chief Judicial Magistrate, Nanded calls for no interference. Criminal application is therefore, rejected. Rule discharged.

14. Learned counsel for the petitioner has requested to extend the interim relief for a period of four weeks from today. However, request is refused for the reason that case is old one and is pending before the learned Chief Judicial Magistrate, Nanded since 1997.