

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7015 OF 2016

Siddharth N. Banthia .. Petitioner
vs.
Smt. Smitha S. Banthia .. Respondent

Mr. R.D.Soni i/b. M/s. Ram & Co. for the Petitioner.
None for the Respondent.

CORAM : M. S. SONAK, J.

Date of Reserving the Judgment : 8th December 2017.

Date of Pronouncing the Judgment: 14th December 2017.

JUDGEMENT:-

1] Heard Mr. Soni, learned counsel for the petitioner.

2] The petitioner-husband challenges the order dated 4th June 2016 made by the Family Court, Pune rejecting the petitioner's application under Section 10 read with Section 151 of the Code of Civil Procedure, 1908 (CPC) to stay the proceedings, i.e., Petition No. 84 of 2012, in which, the respondent – wife, has applied for declaration that her marriage with the petitioner is null and void.

3] The petitioner, applied for stay of proceedings in the civil suit on the ground that the respondent-wife has initiated criminal proceedings alleging that the petitioner has

committed offences under sections 420, 406, 467, 471, 474, 376, 323, 504, 506(1) and 494 of the Indian Penal Code, 1860 (IPC) and such proceedings are pending in the Sessions Court, Pune.

4] Mr. Soni, learned counsel for the petitioner, submits that unless the civil proceedings are stayed, the petitioner, will face sever embarrassment in the criminal proceedings before the Sessions Court. Mr. Soni submits that complicated questions of law and fact are involved in both the matters and therefore, applying the law laid down by the Supreme Court in case of *M.S. Sheriff and anr. vs. State of Madras and ors.* reported in *AIR 1954 S.C. 397*, the civil proceedings must be stayed. Mr. Soni submits that in criminal proceedings, the petitioner is not obliged to disclose his defence. If, the petitioner is obliged to disclose his defence in the civil proceedings, valuable constitutional rights available to the petitioner in the criminal proceedings will be denied to the petitioner.

5] Mr. Soni relies on the decisions of this Court in *Arvind K. Wadodkar vs. Ramdas D. Joshi* reported in *(1996) 2*

MHLJ 907 and *Ramanand N. Ladda vs. Kacharulal A. Lodha* reported in *1998 (2) MHLJ 112*, to submit that if simultaneous prosecution of civil and criminal proceedings would embarrass the defendant, then civil suit is required to be stayed. Mr. Soni submits that since all such principles have been ignored by the Family Court, this is a clear case of failure to exercise jurisdiction. Mr. Soni submits that the impugned order therefore, warrants interference under Article 227 of the Constitution of India.

6] In the present case, there is no clear material to establish that the civil proceedings and the criminal proceedings arise out of identical set of facts. No doubt, there is bound to be some overlap. But that by itself, is never sufficient to stay the civil proceedings. This is because scope of two proceedings is substantially different. The standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of probabilities while in criminal case, the prosecution is required to prove the case beyond reasonable doubt. There is neither any statutory provision nor any legal principle that the findings recorded in one proceedings may be treated as

final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein. (*See: Iqbal Singh Marwah vs. Meenakshi Marwah – AIR 2005 Supreme Court 2119*)

7] The record indicates that the chargesheet in the criminal proceedings was served on the petitioner on 6th January 2016. Thereafter, on 28th January 2016, the petitioner has already filed his written statement in the civil proceedings, wherein, he has not only denied the allegations in the plaint/petition, but further disclosed his defence. In the civil proceedings, even issues came to be framed and the application seeking stay of the civil proceedings was moved by the petitioner at the stage when the respondent-wife had concluded her examination-in-chief and the petitioner was called upon to cross-examine her, in case, he was desirous to do so. This is therefore, not a case where the petitioner is yet to disclose his defence or a case where disclosure of defence in the civil proceedings might affect the petitioner's right to remain silent in the criminal proceedings.

8] In *State of Rajasthan vs. Kalyan Sundaram Cement Industries Ltd. and ors.* reported in (1996) 3 SCC 87, the Supreme Court, was examining the validity of the order, by which, Rajasthan High Court had stayed the proceedings in civil suits pending disposal of criminal cases under section 138 of Negotiable Instruments Act, 1881 and section 420 of IPC. The Supreme Court held that it is settled law that pendency of criminal matters would not be any impediment to proceed with the civil suits. The criminal court would deal with the offence punishable under the Act. The Supreme Court also held that the High Court proceeded on a wrong premise that the accused would be expected to disclose their defence in the criminal case by asking them to proceed with the trial of the suit. The Supreme Court held that this is not a correct principle of law and even otherwise, it no longer subsists, since many of the defendants in the civil suit have already filed their defences in the civil suit.

9] In *Asok Kumar Pal vs. Smt. Sawan Pal* reported in (2008) 3 CALLT 437, learned Single Judge of the Calcutta High Court relying upon *Kalyan Sundaram Cement Industries Ltd. (supra)* refused to stay matrimonial proceedings on the

ground of pendency of criminal proceedings arising out of similar set of facts. In the case before Calcutta High Court, divorce was applied for by the wife on the ground of cruelty. Similarly, cruelty was also the foundation in the complaint before the criminal court. However, applying the principle in *Kalyan Sundaram Cement Industries Ltd. (supra)*, the Calcutta High Court held that mere fact that the two proceedings are founded on the same set of facts, is not sufficient for stay of the civil proceedings in all cases. It was observed that even the concept of *cruelty* under the Indian Penal Code is not identical to the concept under the Hindu Marriage Act. It was held that the husband has already disclosed his defence in the civil suit and it cannot be reasonably expected that a different stand will be taken by him in the criminal proceedings. The Calcutta High Court also took note of the circumstances that scope of enquiry and standard or proof in the civil and criminal proceedings are quite different. On basis of all such considerations, the Calcutta High Court declined the stay on the civil proceedings.

10] The principle in the aforesaid decisions of the Supreme Court and the Calcutta High Court will govern the present

case as well. As noted earlier, this is not a case of the two proceedings being founded on identical set of facts. In any case, there is no question of any embarrassment to the petitioner in the criminal trial, because, the petitioner, even after he was served with the chargesheet in the criminal proceedings has already filed his written statement in the civil proceedings and disclosed his defence. This is also not a case involving complicated issues with law and fact, so as to embarrass the trial in either of the proceedings. As noted earlier, the scope of the two proceedings is quite different. Even the principles, by which, the evidence is to be assessed in the two proceedings are quite different. Thus construed, there is really no infirmity in the impugned order made by the Family Court. The impugned order neither amounts to failure to exercise jurisdiction nor can it be said that the view taken by the Family Court suffers from any jurisdictional error so as to warrant interference under section 227 of the Constitution of India.

11] Even *M.S. Sheriff (supra)* the Supreme Court has held that civil and criminal matters can simultaneously proceed unless it is established that there is likelihood of

embarrassment. Then again, there is no hard and fast rule in this regard. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to prosecution.

12] In the present case, there is no clarity as to whether the charge has been framed against the petitioner in the criminal proceedings. In contrast, trial in the civil proceedings has already commenced. The petitioner, as noted earlier, has already disclosed his defence by filing written statement on 28th January 2016. Although, there is no much discussion in *Arvind Wadodkar (supra)*, from the statement of facts it is quite clear that the defendant in the civil suit for damages on the ground of defamation was yet to file his defence. In these circumstances, learned Single Judge of this Court held that there might be an embarrassment to the defendant in the criminal trial, where, the defendant, was not even bound to disclose his defence.

13] It must be noted that *Arvind Wadodkar (supra)* was decided on 5th September 1996 and it is possible that on the said date the decision of the Supreme Court in *Kalyan Sundaram Cement Industries Ltd. (supra)*, though delivered on 12th February 1996, might not have been reported. Learned Single Judge of this Court, therefore, did not possibly have the benefit of decision of the Supreme Court in *Kalyan Sundaram Cement Industries Ltd. (supra)*. The judgment of the Supreme Court was not cited before the learned Single Judge.

14] *Ramanand Ladda (supra)* also entirely relies on *Arvind Wadodkar (supra)*. Again, even this decision, makes no reference to ruling of the Supreme Court in *Kalyan Sundaram Cement Industries Ltd. (supra)*. In any case, the decisions in *Arvind Wadodkar (supra)* and *Ramanand Ladda (supra)* turn on their own facts. The facts and circumstances in the present case are similar to the facts obtaining in *Asok Kumar Pal (supra)* , which, in turn, relies upon the decision of the Supreme Court in *Kalyan Sundaram Cement Industries Ltd. (supra)*. Therefore, applying the principles in the said two

decisions, there is really no case made out to interfere with the impugned order.

15] The petitioner in the present case had applied for a stay in the civil proceedings by invoking the provisions of Sections 10 and 151 of the CPC. The provisions of Section 10 of CPC are inapplicable to the facts and circumstances of the present case. This is not a case of two courts of concurrent jurisdiction trying two parallel suits in respect of the same matter in issue.

16] In *National Institute of Mental Health and Neuro Sciences vs. C. Parameshwara* reported in *2005(2) SCC 256*, the Supreme Court has held that the object underlying section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of same matter in issue. The object underlying section 10 is to avoid two parallel trials on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to the proceedings of other nature instituted under any other

statute. The fundamental test to attract section 10 is, whether on final decision being reached in the previous suit, such decision would operate as *res-judicata* in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both suits is identical. The key words in section 10 are the “*matter in issue is directly and substantially in issue*” in the previous instituted suit. Therefore, section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical.

17] In *National Institute of Mental Health and Neuro Sciences vs. C. Parameshwara (supra)*, an employee had been removed from service on the charges of misappropriation of drugs after conduct of disciplinary proceedings. The Labour Court upset the dismissal by award dated 29th October 2001. The employer instituted Writ Petition No. 24348 of 2002 to question the Labour Court award. At the same time, the employer, had also instituted Civil Suit No. 1732 of 1995 for recovery of loss suffered by it on account of misappropriation of drugs by the employee. The Supreme Court, in such

circumstances, held that the civil suit could not be stayed by invoking the provisions of section 10 of the CPC since, the subject matter of the two proceedings was entirely distinct and different. Even the cause of action in the two proceedings was entirely different and distinct. The Supreme Court also held that the proceedings before the Labour Court cannot be equated with the proceedings before the civil court. The Labour Court, cannot be held to be a court of concurrent jurisdiction and therefore section 10 had no application to the facts of the case.

18] The contention that stay to civil proceedings can always be granted even though the parameters of section 10 may not be strictly fulfilled was rejected by the Supreme Court by reference to its earlier decision in *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal* reported in *AIR 1962 SC 527*. The Supreme Court held that the inherent jurisdiction of the court to make orders *ex debito justitiae* is undoubtedly affirmed by section 151 of CPC. However, that jurisdiction cannot be exercised so as to nullify the provisions of the Code. Where the Code deals expressly with a particular matter, the provision should normally be regarded as

exhaustive. Since, in the case before the Supreme Court, the section 10 of the CPC had no application, consequently it was not open the High Court to by-pass section 10 of CPC by invoking section 151 of CPC. This is a complete answer to Mr.Soni's contention that stay to the civil proceedings in the present case, was required to be granted under section 151 of CPC, since, even he conceded that the parameters of section 10 of the CPC were not attracted to the present case.

19] Upon cumulative consideration of the aforesaid, there is no case made out to interfere with the impugned order. This petition is therefore dismissed. There shall, however, be no order as to costs.

(M. S. SONAK, J.)