

CIVIL REVISION

Present: The Hon'ble Justice Md. Abdul Ghani

27.08.2010

C.O. 1785 OF 2008

SRI BATA KRISHNA MONDAL

Vs.

SMT. ANTU RANI SEN & ANR.

Points:

Resjudicata, Sanction- Suit dismissed for default -Whether the principle of waiver and/or constructive resjudicata applies – Application under Sec. 340 of the Code of Criminal Procedure-Whether opportunity of hearing would be given to the opposite party before sending the application to the Magistrate or on being satisfied about the prima facie merit court have to refer the said application to the Magistrate–Code of Criminal Procedure 1973 S.340- Code of Civil Procedure, 1908 S.11

Facts:

The petitioner instituted a suit against opposite party no. 2 and other members of his family being the in-laws of opposite party no. 1 and in the said suit the learned trial Judge was pleased to allow the petition for temporary injunction in favour of the present petitioner. Subsequently, the present opposite party no. 1 instituted suit for specific performance of oral contract and in the alternative for recovery of a sum of Rs.2,25,000/- against the petitioner. In the said suit the petitioner entered appearance and started contesting the same by filing a written statement. But the opposite parties did not proceed with the suit as a result the suit was dismissed for default with cost. Thereafter, the present applicant filed a petition under Section 340

of Cr. P. C. The opposite party contended that the application barred by waiver and/or resjudicata. Trial Court dismissed the application under section 340 Cr.P.C.

Held:

In view of the provisions laid down in Section 340(1) of Cr. P. C. as also the principles laid down in the ruling reported in (2002) 1 SCC 253 Pritish Vs. State of Maharashtra and Others (supra) the learned trial Judge was not required to give any opportunity to the opposite parties to take part in the proceeding under Section 340 of the Cr. P. C. and instead the learned trial Judge on being satisfied about the prima facie merit of the application ought to have referred the said application to the Magistrate having competent jurisdiction. The contention made on behalf of the opposite party is not acceptable inasmuch as the O.S. Suit No. 13 of 2004 was not decided on merit and instead it was dismissed for default. Therefore, question of waiver and/or res judicata as urged on behalf of the opposite parties cannot be given effect to. Para 6

Cases cited:

(2002) 1 SCC 253 (Pritish Vs. State of Maharashtra and Others)

Mr. Manjit Singh,

Mr. Aabir Mondal,

Mr. Anand Keshari.

... .. for the petitioner.

Ms. Chandreyi Alam,

Ms. Runu Mukherjee.

Mr. R. Chatterjee. for the O.Ps.

The Court: By filing the instant application under Article 227 of the Constitution of India, the applicant Sri Bata Krishna Mondal has prayed for setting aside the order dated 26.11.2007 passed in Misc. Petition Case No. 1 of 2007 arising out of O.S. No. 13 of 2004, now pending in the Court of learned Civil Judge (Senior Division), 3rd Court, Midnapore under Section 340 read with Section 195 (1)(b)(i)(iii) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr. P. C.).

2. Having heard the learned lawyers of the parties concerned and also on perusal of the materials on record it could be detected that the present petitioner by filing Misc. Petition Case No. 1 of 2007 in the Court of learned Civil Judge (Senior Division), 3rd Court at Midnapore sought for criminal action against the opposite parties after holding preliminary enquiry as envisaged in the said section.

3. Mr. Manjit Singh, the Learned lawyer appearing for the petitioner while arguing the case drew this Court's attention to the contents of the impugned order dated 26.11.2007 as also the application under Section 340 of the Cr. P. C. as well as some other important materials on record and emphatically argued and submitted that the learned Court below while disposing of the petition under Section 340 of Cr. P. C. committed gross mistake and illegality by rejecting the same inasmuch as the learned Court below ignoring the provisions of law as also the principles relied upon by different Hon'ble Courts as also the Hon'ble Apex Court rejected the petition under Section 340 Cr. P. C. and thus caused miscarriage of justice to his client. In support of his contention he has relied upon the ruling reported in (2002) 1 SCC 253 (Pritish Vs. State of Maharashtra and Others) and strenuously urged that in a case like the present one, the Court below ought

to have referred the petition under Section 340 Cr. P. C. to the local Judicial Magistrate having jurisdiction after holding preliminary enquiry and on being satisfied that the petition contains grounds for proceeding with the matter against the alleged persons. Further, he has submitted that the learned Court below should not have allowed any opportunity to the opposite parties to participate in the proceeding initiated on the basis of the petition under Section 340 Cr. P. C. Lastly, he argued that it is a fit case wherein the impugned order deserves to be set aside.

4. On the other hand, Mr. R. Chatterjee, the learned lawyer appearing for the opposite parties referring to the contents of the impugned order dated 26.11.2007 as also some other important materials on record argued that the instant application under Section 227 of the Constitution of India being devoid of any merit is liable to be dismissed as because the petitioner by accepting the order to show-cause issued against the opposite parties by the learned trial Court waived his right to proceed with the matter any further. He further submitted that the instant case can be said to be barred by the principles of analogous resjudicata and as such the same needs to be dismissed.

5. After going through the materials on record and also giving due consideration to the submissions made on behalf of the parties concerned it would appear that the present petitioner instituted Title Suit No. 3 of 2003 against present opposite party no. 2 and other members of his family being the in-laws of opposite party no. 1 and in the said suit the learned trial Judge was pleased to allow the petition for temporary injunction in favour of the present petitioner. Subsequently, the present opposite party no. 1 instituted an alleged false suit being O.S. no. 13 of 2002 for specific performance of oral contract and in the alternative for recovery of an imaginary sum of

Rs.2,25,000/- against the present petitioner. In the said suit the petitioner entered appearance and started contesting the same by filing a written statement. But the opposite parties ultimately did not dare to turn up before the Court to proceed with the suit as a result of which the suit being O.S. No. 13 of 2004 was dismissed for default with cost on 10.4.2006. Thereafter, the present applicant by filing a petition under Section 340 of Cr. P. C. sought for redress indicated above and after disposal of the aforesaid application being Misc. Petition Case No. 1 of 2007 the petitioner being very aggrieved by and dissatisfied with the impugned order dated 26.11.2007 has come up before this Court with the present application for setting aside the said order.

6. From the materials placed before this Court it could be gathered that the petitioner filed the aforesaid application under Section 340 of the Cr. P. C. before the learned Trial Judge subsequent to dismissal of the O.S. Suit No. 13 of 2004 i.e. after 10.4.2006. In view of the provisions laid down in Section 340(1) of Cr. P. C. as also the principles laid down in the ruling reported in (2002) 1 SCC 253 Prithi Vs. State of Maharashtra and Others (supra) the learned trial Judge was not required to give any opportunity to the opposite parties to take part in the proceeding under Section 340 of the Cr. P. C. and instead the learned trial Judge on being satisfied about the prima facie merit of the application ought to have referred the said application to the Magistrate having competent jurisdiction. In my considered view, the contention made on behalf of the opposite party is not acceptable inasmuch as the O.S. Suit No. 13 of 2004 was not decided on merit and instead it was dismissed for default. Therefore, question of waiver and/or res judicata as urged on behalf of the opposite parties cannot be given effect to.

7. For the reasons aforesaid, I am satisfied to hold that the learned trial Judge while disposing of the application under Section 340 of the Cr. P. C. was not justified and thus committed error and illegality. Accordingly, the impugned order dated 26.11.2007 passed by the learned trial Judge is not warrantable and acceptable in the eye and estimation of law and as such the same cannot be sustained under the law. In the result, the impugned order dated 26.11.2007 stands set aside and the instant application under Article 227 of the Constitution of India is allowed. The learned trial Judge is directed to proceed with the matter strictly in accordance with law.

8. However, I make no order as to costs.

9. Urgent xerox certified copy be given to the parties expeditiously, if applied for.

(Md. Abdul Ghani, J.)

