(2013) 08 AP CK 0011

Andhra Pradesh High Court

Case No: Criminal Petition No. 2768 of 2009

V. Bheemayya		APPELLANT
	Vs	
Y. Rami Reddy and Others and State of A.P.		RESPONDENT

Date of Decision: Aug. 13, 2013

Citation: (2014) 1 ALD(Cri) 63 : (2014) 1 Crimes 345

Hon'ble Judges: K.G. Shankar, J

Bench: Single Bench

Advocate: Ch. Srihari, for the Appellant; B. Nagarjuna Reddy, Counsel for Respondent No. 1, Sri M.B.A. Khan, Counsel for Respondent No. 3 and Public Prosecutor, High Court of A.P, Counsel, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K.G. Shankar, J.

The petitioner is accused in C.C. No. 227 of 2008 on the file of the Special Judicial Magistrate of First Class for Prohibition and Excise Cases, Mahabubnagar. The de facto complainant, who is the 1st respondent herein, filed Crl.M.P. No. 146 of 2008 before the trial court u/s 65 of the Indian Evidence Act, 1872 (the Act, for short) to grant permission to lead secondary evidence in respect of the photostat copy of a Memorandum of Understanding (MoU, for short) dated 25-4-2006 and an Agreement of Sale dated 12-5-2006. The petition was allowed by the trial court. Aggrieved by the same, the present petition is laid by the accused. He has arrayed 3rd parties to the case as respondents 2 and 3 apart from arraying the State as respondent No. 4. The 2nd respondent is an Advocate of Hyderabad. One Aktar Ali, resident of King Koti, Hyderabad, who is a client of the 2nd respondent, entered into an Agreement of Sale of Ac. 20-00 guntas out of Ac. 20-18 gts of land in Survey No. 1009 situate at Kukatpally with the owner of the property, by name Smt. Azeemunnisa Begum. A dispute arose between Aktar Ali and Azeemunnisa Begum.

It is the case of the petitioner that the 2nd respondent has been engaged by Aktar Ali as his counsel. It is his further case that on the instructions of the 2nd respondent, the 3rd respondent paid Rs. 6,00,000/- to Aktar Ali and obtained ''No Objection''. It is said to be prior to 25-4-2006 on which date, the respondents 1 and 2 allegedly entered into MoU with the petitioner. The 3rd respondent allegedly paid Rs. 5,00,000/- and Rs. 15,00,000/- on 04-5-2006 and 09-5-2006 to the 2nd respondent and obtained receipts from him in the name of the petitioner instead of in the name of the 3rd respondent.

2. While things stood thus, differences arose between the 3rd respondent on the one side and the respondents 1 and 2 on the other side. It is the contention of the learned counsel for the petitioner that the respondents 1 and 2 consequently created MoU dated 25-4-2006 and that the 2nd respondent signed the MoU on behalf of the 3rd respondent as his counsel. This is the case of the petitioner.

3. On the other hand, the fact which led to the present lis is dishonour of two cheques dated 05-12-2006 for Rs. 32,00,000/- and Rs. 20,00,000/- allegedly issued by the petitioner. It is the case of the 1st respondent that Smt. Azeemunnisa Begum entered into an Agreement of Sale with the petitioner and the respondents 1 and 2 on 12-5-2006 and that a MoU was accordingly signed among them on 25-4-2006 whereunder the petitioner and the 2nd respondent agreed that they would pursue the litigation in respect of the land. Be that as it is, the learned counsel for the petitioner is not questioning the validity of these documents. His contention is that the documents never existed on the one hand and that the 1st respondent, who failed in Crl.M.P. No. 1283 of 2008 before the trial court for an identical relief, is not entitled to lay the present petition. I may answer this question at the outset.

4. Section 63 of the Act defines secondary evidence. Section 63(2) of the Act points out that copies made from the original by mechanical processes are secondary evidence. Section 64 of the Act proscribes secondary evidence in respect of documents except in the cases mentioned under the Act. Section 65(a) of the Act envisages that secondary evidence regarding the existence, condition, or contents of a document can be given when the original is in the possession of a person against whom the document is sought to be proved or in the possession of any person who is bound to produce it, subject to the condition that such a person did not respond to notice u/s 66 of the Act. Section 66 of the Act, which is complementary to Section 65 of the Act, points out that secondary evidence of the contents of the documents is permissible only when the party who proposes to lead secondary evidence has given to the party in whose possession or power the document is, such notice to produce the document.

5. The 1st respondent has filed a petition in Crl.M.P. No. 1283 of 2008 before the trial court u/s 65 of the Act to permit him to lead secondary evidence in respect of the documents referred to above without giving notice u/s 66 of the Act to the petitioner, who is claimed to be in possession of the originals. The trial court

dismissed such an application on the ground that the petitioner did not comply with Section 66 of the Act. The 1st respondent has later come forward with the present petition in Crl.M.P. No. 146 of 2008 after giving notice to the petitioner herein u/s 66 of the Act.

6. Sri Ch. Srihari, learned counsel for the petitioner, contended that the orders in Crl.M.P. No. 1283 of 2008 operate as res judicata for the present case. On the other hand, Sri B. Nagarjuna Reddy, learned counsel for the 1st respondent, submitted that res judicata has no application. In Daryao and Others Vs. The State of U.P. and Others, , the Supreme Court pointed out that the rule of res judicata was merely a technical rule and that it could be invoked in proceedings under Article 32 or Article 226 of the Constitution of India. The decision has no bearing on the facts of the present case as it merely declares that the principle of res judicata is a technical rule.

7. Again, in The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara, , the Supreme Court reiterated that the principle of res judicata applies to writ petitions. Once again, there was no finding as to the application of principle of res judicata to criminal proceedings. In Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others, , relying upon the two decisions cited above, the Supreme Court reiterated that the principle of res judicata applies to writ proceedings. Similar view was expressed in Virudhunagar Steel Rolling Mills Limited Vs. The Government of Madras,

8. It may be noticed that the present proceedings are initiated under the Code of Criminal Procedure. In Workmen of Cochin Port Trust Vs. Board of Trustees of The Cochin Port Trust and Another, it was observed that it was not safe to extend the principle of res judicata to proceedings other than the civil proceedings. In P.D. Sharma Vs. State Bank of India, the Supreme Court declined to apply the principle of res judicata to proceedings under the Industrial Disputes Act, 1947. A learned single Judge of the Kerala High Court held in K. Karunakaran, M.P., v. State of Kerala 1997 CRI. L. J. 3618 that the principle of res judicata does not apply to criminal proceedings. Apart from this position, in Hoshnak Singh Vs. Union of India (UOI) and Others, the Supreme Court observed that when the former petition was dismissed in limine without passing a speaking order, subsequent petition would not be barred by res judicata. In view of these decisions, it is more than evident that the present petition cannot be dismissed on the ground that the same is barred by orders in Crl.M.P. No. 1283 of 2008 as res judicata.

9. Be that as it may, there is no dispute that the principle of issue estoppel applies to criminal proceedings. It was observed in Gopal Prasad Sinha Vs. State of Bihar, that the basic principle underlying the rule of issue estoppel is that the same issue of fact and law must have been determined in the previous litigation. It was further clarified by the Bombay High Court in G.N. Deshpande Vs. Ishwaribai U. Ahuja and others, , that both the former and the latter proceedings must be proceedings under the Criminal Procedure Code for the application of his plea estoppel.

However, similar to res judicata, issue estoppel also does not apply where the former proceedings were dismissed in limine.

10. In the present case, the application in Crl.M.P. No. 1283 of 2008 was dismissed on the ground that notice was not ordered u/s 66 of the Act. Further, when this petition was laid after service of notice, a different cause of action has arisen. Consequently, the former petition does not operate as either res judicata or issue estoppel in the present application.

11. The main question, however, is whether the petitioner can be permitted to let in secondary evidence. The petitioner contended that both the documents are necessary for the disposal of the case. I have already recorded the rival contentions regarding these two documents. The documents certainly go to show whether there was a subsisting debt between the petitioner and the 1st respondent, which is a necessary ingredient to be established by the 1st respondent to seek conviction against the petitioner for the offence u/s 138 of the Negotiable Instruments Act, 1881. I therefore consider that these documents are relevant for an enquiry. However, it is for the trial court to consider whether to admit the documents in evidence or otherwise. The trial court considered it appropriate to allow the petition laid by the 1st respondent to permit him to lead secondary evidence in respect of the two documents. I am afraid that the finding of the trial court does not suffer from any infirmity on any count. I therefore see no merits in this petition. This petition consequently is dismissed.