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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE.

(JUDICIAL DEPARTMENT)

Criminal Miscellaneous No.3568-M of 2024.

Zahid Maqsood Butt Versus The State, etc.

JUDGMENT

DATE OF HEARING:	<u>07.06.2024</u>
PETITIONER BY:	Barrister Ahmed Raza Kazim.
STATE BY:	Ms. Asmat Parveen, Deputy District Public Prosecutor with Bilal, SI.
RESPONDENT BY:	S.M. Zeeshan Mirza & Yamna Baig, Advocates.

MUHAMMAD AMJAD RAFIQ, J:- Through this Criminal Miscellaneous under Section 561-A of Cr.P.C., petitioner Zahid Maqsood Butt, being complainant of case FIR bearing No.38 dated 02.02.2015 registered under section 408 PPC at Police Station New Anarkali, Lahore has challenged the vires of order dated 20.12.2023 passed by learned Additional Sessions Judge, Lahore whereby a criminal revision filed by respondent No.02 Usman Khalid, accused of above case against the order dated 17.06.2023 passed by learned Magistrate Section-30, Lahore, was accepted and proceedings in criminal trial (case FIR No.38 of 2015) were ordered to be stopped under section 249 of Cr.P.C.

02. Criminal action was initiated against respondent No.02 (the respondent)with the narration that he being manager/employee has misappropriated an amount of Rs. 5 crores, therefore, matter was pending trial on a charge under section 408 PPC when an application was filed by the respondent to stay the criminal proceedings because he was not the employee but the partner of the petitioner and in this respect the respondent, his brother and mother have filed suit for declaration, cancellation of document, rendition of accounts and

recovery etc. titled “Mst. Robina Khalid etc. VS Zahid Maqsood Butt” claiming therein an amount of Rs. 9 Crores due against the petitioner. Such application though was dismissed by the trial Court yet allowed by the learned revisional Court with following observations;

“Said suit was instituted on 22.10.2015. Process of criminal litigation and civil litigation continued since 2015 till today side by side. Now in criminal trial complete prosecution evidence has been recorded. Statement of petitioner u/s 342 Cr.P.C. is also recorded and the case is fixed for final arguments. Allegation punishable u/s 408 PPC depends whether petitioner was an employee of complainant or not, therefore, question of entrustment does not arise. Same question is before civil court. If present case is decided earlier, the same would prejudice civil suit pending between the parties while question regarding status of petitioner as employee or business partner is a civil issue/matter to be decided in civil suit. In para No.6 of plaint of said suit, petitioner has contended that he invested Rs. 45 million as partner in the business of complainant through bank draft of his account deposited in the account of complainant. It is to be proved by the petitioner that amount of Rs. 45 million was transferred from his bank account in the account of complainant. In these circumstances, it is necessary that his civil suit be decided earlier and then the present case be decided.”

(Emphasis supplied)

The learned Additional Sessions Judge has passed the impugned order presumably on the strength of case laws cited in the impugned order. Basic judgment was “MUHAMMAD AKBAR versus (1) THE STATE AND (2) Maulvi MUHAMMAD YASIN KHAN” (PLD 1968 Supreme Court 281), wherein an FIR was registered for an alleged forcible and dishonest snatching of a bus. Dispute of many buses was already pending trial in a civil suit between the partners due to dissolution of partnership and bus, subject matter of FIR was also included therein. The parties have acquiesced the status of each other in that case; whereas in the present case complainant/petitioner has not conceded the status of accused/respondent as partner, nor brought any suit in this respect; therefore, present case hardly had any identical features. Thus, learned Additional Sessions Judge has wrongly placed reliance on the cited case as well as case laws mentioned in the impugned order.

03. Now coming to the legal position of the case; it is trite that civil and criminal proceedings can go side by side provided subject matter before civil Court and criminal Court is the same and is

required to be determined by civil court first being Court of ultimate jurisdiction. Connotation “same subject matter” does not mean only a fact in issue relating to such subject but the subject matter as a whole. In the present criminal litigation subject matter is ‘misappropriation of amount’ whether as an employee or partner whereas in civil litigation matter is of ‘entitlement of amount’. Law does not permit any person to acquire disputed amount through misappropriation. If it is permitted, this would open an absurd practice of taking the law into one’s own hands, giving an air to a mechanism of private vengeance parallel to constitutional arrangement for judicial system of the country. Even in civil jurisdiction when possession is unlawfully taken from an illegal occupant of land, Court is bound to restore it to man in possession as per section 9 of the Specific Relief Act, 1877; same is the mandate of section 145 of Cr.P.C. Thus, law is very clear on the subject. The observation of learned Additional Sessions Judge that *“If present case is decided earlier, the same would prejudice civil suit pending between the parties while question regarding status of petitioner as employee or business partner is a civil issue/matter to be decided in civil suit”* shows his lack of knowledge on the subject. It is settled principle of law that decision of a criminal Court does not affect any question pending in civil Court between same parties because the outcomes and standard of proof in both proceedings are different, i.e., ‘preponderance of evidence’ in civil cases and ‘proof beyond reasonable doubt’ in criminal cases. Thus, neither the principle of Res-judicata nor principle of Double jeopardy is applied in any manner. Case reported as *“TARIQ IRSHAD Versus SPECIAL JUDGE and others”* (2022 P Cr. L J 1050), and case approved for reporting as *“Rasoolan Bibi versus The State etc.”* (Writ Petition No. 82843 of 2023) decided on 14.05.2024 are referred in this respect.

04. Learned Counsel for the petitioner while referring cases reported as *“THE STATE through Prosecutor General Sindh Versus SHAHZAD RIAZ and others”* (2021 P Cr. L J 656): *“GULAN Versus The STATE and 2 others”* (2015 YLR 190): *“S. MASOODUL*

HASSAN NAQVI Versus THE STATE” (1986 P Cr. L J 1272) urged that when the evidence was complete and case was fixed for final arguments, the learned revisional Court should have directed the trial Court for decision of case on merits because if the fact in issue ‘criminal breach of trust by an employee’ is not proved, then Court can see under sections 237/238 of the Code of Criminal Procedure, 1898 (Cr.P.C.) as to what offence has in fact been committed, or at the most can acquit the accused but not to stop the proceedings under section 249 of Cr.P.C., which is meant for a situation when evidence on record is not sufficient to convict the offender but Court expects a later progress or development into the matter. Learned Deputy District Public Prosecutor also supported the above contention. However, learned Counsel for the respondent defended the impugned order on the ground that it is discretionary with the Court to order for stay of proceedings which cannot be interfered, and in this respect placed reliance on reported cases referred in the impugned order as “MUHAMMAD AKBAR versus (1) THE STATE AND (2) Maulvi MUHAMMAD YASIN KHAN” (PLD 1968 Supreme Court 281), “MUHAMMAD TUFAIL versus THE STATE AND ANOTHER” (1979 SCMR 437), “ABDUL HALEEM Versus THE STATE AND OTHERS”(1982 SCMR 988), “RIAZ-UL-HAQ versus MUHAMMAD ASHIQ JORAH, JUDICIAL MAGISTRATE, PIND DADAN KHAN and 2 others” (2000 SCMR 991), “A. HABIB AHMED versus M.K.G. SCOTT CHRISTIAN and 5 others” (PLD 1992 Supreme Court 353), “SHERAZ AHMAD and others Versus FAYYAZ-UD-DIN and others” (2005 SCMR 1599), “ABDUL AHAD Versus AMJAD ALI and others” (PLD 2006 Supreme Court 771), “AKHLAQ HUSSAIN KAYANI Versus ZAFAR IQBAL KIYANI and others” (2010 SCMR 1835). The learned Counsel for the respondent however conceded that such discretion has not been exercised by the learned trial Court. It has been observed that the learned Additional Sessions Judge has also not discussed in the impugned order the contours of order of trial Court so as to override or supersede the discretion exercised by the Magistrate. The cited judgments were examined

carefully which hardly apply on the facts of present case. Gist of such judgments has been referred in later part of this order to show in what situations the criminal proceedings can be stayed. However, in following two judgments from above cluster, Supreme Court has declined to order for stay of criminal proceedings; they are as under;

Petitioner obtained an amount of Rs. 83,000/- for sending the respondent abroad and issued a receipt in this respect. Petitioner claimed such receipt as forged and sought stay of criminal proceedings, which request was turned down even by the Supreme Court. **(1995 SCMR 1621)**.

An agreement to sell for a landed property between Bahawal Khan and Sharif Hussain was brought before civil court against the legal heirs of Sharif Hussain for specific performance and legal heir got lodged criminal case against Bahawal Khan for forgery. Quashing and stay of criminal proceedings were refused up to the Supreme Court. **(1979 SCMR 437)**.

05. Learned counsel for the petitioner urged that section 249 Cr.P.C. though empowers the Magistrate to stop the proceedings but guidelines are not available as to when, where and in what situations it can be invoked. It was attended accordingly, reading of section and relevant provisions of Cr.P.C. coupled with examining of relevant case laws, contours of section 249 Cr.P.C. needs to be looked again. For the sake of reference section is reproduced;

249. Power to stop proceeding when no complaint: In any case instituted otherwise than upon complaint, a Magistrate of the First Class, or with the previous-sanction of the Sessions Judge, any other Magistrate may for reasons to be recorded by him, stop the proceedings at any stage without pronouncing any judgment either of acquittal or conviction; and may thereupon release the accused.

This section authorizes the Magistrate to stop the criminal proceeding, at any stage, initiated through any mode except through private complaint, without pronouncing the judgment either of acquittal or conviction and then release the accused. Order passed by Magistrate under this section is required to be backed by reasons which makes it a judicial order, amenable to revisional jurisdiction; however, it does not seek execution of bond by the accused conditional to his release. This connotation is very strong because wherever in Cr.P.C. the word 'release' appears it is made conditional to executing a bond or sufficient security. Sections 57(2), 124(6),

173, 426, 435, 466, 496 and 497 of Cr.P.C., are referred in this respect. Whereas like section 249 of Cr.P.C., sections 59(3) and 124(1) Cr.P.C., also talk about a simple release without executing a bond or providing sufficient security. Bond is executed by the accused as an assurance to appear before the Court but when he does not remain in the process any more, execution of bond is not required. Cases reported as “S. MASOODUL HASSAN NAQVI Versus THE STATE” (1986 P Cr. L J 1272); “MUHAMMAD YAMIN Versus The STATE” (2022 YLR Note 10); “Mst. SARDARAN BIBI versus THE STATE” (PLD 1990 Karachi 233), are referred in this respect.

6. Section 249 of Cr.P.C., cannot be think of a remedy available to order for stay of criminal proceedings because firstly, if the proceedings are pending through a private complaint, rescue under this section is not available; secondly, not requiring a bond for release of accused is an indicator that a novel situation has arisen in the proceedings which require a sine die adjournment of case without a time-bound schedule. Case reported as “GULAN Versus The STATE and 2 others” (2015 YLR 190), is referred in this respect. Thus, ‘to stop the proceeding’ stands distinguished to ‘stay of proceedings’ and ‘stay of prosecution’. Stay of proceedings is done to meet the situation when further proceeding is conditional to an order to be made by other Court, the higher Court or by the government. Instances are like as under;

1. Where any person denies the existence of public right pursuant to an order made by magistrate for removal of nuisance and magistrate considers that there is reliable evidence of such denial, he shall stay the proceeding until the matter of the existence of such right has been decided by a competent Civil Court. (Section 139-A Cr.P.C.).
2. On information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries, Magistrate after inquiry can pass an order in favour of the party but if later finds that no such dispute exist, he shall stay the proceedings. (Section 145(5) of Cr.P.C.).
3. Stay of proceedings if prosecution of offence in altered charge requires previous sanction (Section 230 of Cr.P.C.).

4. When during the course of an inquiry or trial, it appears to a magistrate that case is one which should be tried or sent for trial to the Court of Session or the High Court or by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to the Sessions Judge or to such other Magistrate, having jurisdiction, as the Sessions Judge, directs. (Section 346 Cr.P.C.)
5. If any party intends and intimates the Court for filing of a transfer application of case, though it shall not require the Court to adjourn the case, but the Court shall not pronounce its final judgment or order until the application has been finally disposed of by the High Court. Section 526 (8) Cr.P.C.
6. Any matter pending before higher Court with an injunctive order as not to pronounce final judgment.
7. Matter for witness protection is pending with government under Witness Protection Act, 2018.
8. Stay of criminal proceedings due to pending matter in any other Court conditional to further proceedings.

7. Though there is no express provision in Cr.P.C., for stay of criminal proceedings on the ground that subject matter is pending determination before civil Court yet there is no specific prohibition in this respect. Therefore, trial Court is competent to stay criminal proceedings as held in case reported as “MUHAMMAD AKBAR versus (1) THE STATE AND (2) Maulvi MUHAMMAD YASIN KHAN” (PLD 1968 Supreme Court 281).

8. ‘Stay of prosecution’ is discontinuation of criminal prosecution on all or any of charges in order to give a go to government decision based on public policy which is regulated through section 10(3)(f) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006 which says;

“at any stage of a trial before any trial court subordinate to the High Court before the judgment is passed, the Prosecutor General or any Prosecutor specifically authorized by him, may, for reasons to be recorded in writing, inform the court on behalf of the Government that the Prosecutor shall not prosecute the accused upon the charge and thereupon all proceedings against the accused shall be stayed and he shall be discharged of and from the same:

Provided that such discharge shall not amount to an acquittal unless the court directs otherwise.”

The above section is verbatim of section 265-L of Cr.P.C., which empowers the Advocate-General to seek stay of prosecution before the High Court.

Likewise, when an accused is facing a charge containing one or more heads and is convicted in any of them, the rest of the charges can be withdrawn by the prosecution or the Court at its own can stay the inquiry into, or trial of such charges till the conviction attains finality through Court of appeal. (Section 240 Cr.P.C.)

9. From the practice and procedure, it can be summarized that the most suitable situations to stop the proceedings under section 249 Cr.P.C. could be like as under but are not exhaustive;

- 1) During the trial witnesses of case are reported to have gone abroad, or
- 2) Whereabouts of witnesses are not known, or
- 3) Witnesses have become absconders in another case.
- 4) Sanction for prosecution has not been received to the Court for taking cognizance.
- 5) Prosecution has recommended the case as not fit for trial in the case review report under section 9(7) of the Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act, 2006, (the CPS Act 2006) and Court considers that the evidence is forthcoming.
- 6) On receipt of an interim police report under section 173 of Cr.P.C. when prosecutor examines the reasons assigned for the delay in the completion of investigation and considers the reasons compelling, can request the Court for the postponement of trial as authorized under section 9(6) of the CPS Act, 2006.

Of course, before resorting to stop the proceedings in situations mentioned at serial No.1 to 3, the Court in order to procure the attendance of witnesses shall adopt coercive measures of the nature as mentioned in a case reported as “MUHAMMAD SHAFI Versus ADDITIONAL SESSIONS JUDGE, KHARIAN DISTRICT GUJRAT and 8 others” (PLD 2011 Lahore 551). Stoppage of proceedings is always contingent to return of witnesses for revival of situation from

the stage it was discontinued. Case reported as “Mst. SHIREEN TAJA versus THE STATE and 2 others” (2002 P Cr. L J 159) is referred in this respect.

10. No settled criterion is available to stay criminal proceedings and it varies from case to case confining to pure discretion of the Court; however, for guidance we have some precedents of Supreme Court which the learned Counsel for the complainant has highlighted and learned judge has made it part of impugned order and are also referred in para-4 of this order; gist of such precedents is as follows;

Forged promissory note for the sale of motor car by father of petitioner was prepared in year 1997 while his father has already died in year 1992. Stay of criminal proceedings. (2010 SCMR 1835).

Civil suit regarding ownership of property had already been filed... proceedings in private complaint stayed. (PLD 2006 Supreme Court 771).

An allottee of disputed quarter entered into agreement to sell with respondent and delivered the possession, both parties filed civil suits. Interim injunction was granted in favour of respondent. Quashing of criminal proceedings by High Court was converted to one stay of criminal proceedings by the Supreme Court. (1999 SCMR 1475).

In order to return overdraft facility availed of, petitioner surrendered his 30% shares in favour of bank but same were sold out to persons dealing in stock market, such criminal misappropriation was brought into notice through criminal action by the petitioner but Special Judge (offences in banks) quashed the criminal proceedings, but Supreme Court converted it into stay of criminal proceedings till decision of civil matter. (PLD 1992 Supreme Court 353).

Power of Attorney executed in favour of respondent was misused by him, civil suit was brought for cancellation of said document and criminal action was also initiated for preparation of forged agreement to sell on the basis of said power of attorney. Proceedings quashed by the High Court but stood converted to stay of criminal proceedings by the Supreme Court till the decision of civil suit. (1982 SCMR 988).

Company lodged a complaint of embezzlement against his employee who claimed that he was coerced upon and got documents signed therefore, on the very next day he had brought a civil suit. Criminal proceedings were ordered to be stayed. (2000 SCMR 991).

Acquittal of accused under section 249-A of Cr.P.C. on the ground that on same subject matter civil suit is pending was set aside by the Supreme Court with the consent of parties that pending civil suit, criminal proceedings shall remain stayed. (2005 SCMR 1599).

Petitioner obtained an amount of Rs. 83,000/- for sending the respondent abroad and issued a receipt in this respect. Petitioner claimed such

receipt as forged and sought stay of criminal proceedings, which request was turned down even by the Supreme Court. **(1995 SCMR 1621).**

An agreement to sell for a landed property between Bahawal Khan and Sharif Hussain was brought before civil court against the legal heirs of Sharif Hussain for specific performance and legal heir got lodged criminal case against Bahawal Khan for forgery. Quashing and stay of criminal proceedings were refused up to the Supreme Court. **(1979 SCMR 437).**

11. Keeping in view the observations made in paragraph 3 & 4 above, this Criminal Miscellaneous is allowed and impugned order passed by learned Additional Sessions Judge is, therefore, set aside with the direction to learned trial Court to decide the pending criminal case forthwith.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

Approved for reporting:

Judge

Signed on 02.07.2024

*M. Azhar**