

(1980) 02 AHC CK 0020
In the Allahabad High Court
Case No : Cr.R. No. 1464 of 1979

A. P. SHARMA and Another

APPELLANT

Vs

STATE.

RESPONDENT

Date of Decision : 20-02-1980

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195, 340, 341, 342, 401
Limitation Act, 1963 — Section 5
Penal Code, 1860 (IPC) — Section 109, 193, 194, 195, 196

Citation : (1980) 17 CTR 59

Hon'ble Judges : P. N. Bakshi, J

Bench : Division Bench

Judgement

JUDGMENT : P. N. Bakshi, J. - Sri G. N. Srivastava, ITO, Meerut filed a complaint against 5 accused (accused Nos. 1 & 3 have since died) on the allegations that the accused are assessee in the name of M/s Modi Industries Ltd. Modinagar, Police Station Modinagar, Meerut. The said concern has several units, one of which is M/s Modi Paint and Varnishes Works, Modinagar, Meerut. The company filed an Income Tax return on 16-11-1964 at Meerut. Sri P. R. Kumawat, ITO and predecessor in office of the complainant considered the said return on 16-11-1964. The return was completed on 25-3-1969. In the accounts of the firm, the Company claimed a deduction of Rs. 31,647/- paid as commission to M/s Mehra and Co., Babarpur Road, Delhi. In order to prove this claim, the company filed an agreement dated 1-11-1962 at Rs. 2/- stamp before Sri P. R. Kumawat, ITO during the course of assessment proceeding. This stamp paper has actually been purchased on 16-7-1963, but the date has been interpolated. It was alleged that M/s Mehra and Company was a bogus firm which did not have any existence. Thus the records were manipulated. It is said that during the assessment proceeding Madan Lal, accused, admitted that the firm was a bogus firm. However, later on changed his stand in appeal by filling an affidavit before AAC on 11-10-1971. It was further alleged that Sri Kumawat and he admitted he was only scapegoat of the firm and that there was no Mehra and Company in

existence. On these allegations, the accused persons are alleged to have committed an offence punishable u/s 193/196/109 I.P.C.

2. An application was filed on behalf of the accused on 9th August, 1978 praying that the complaint be dismissed as the provisions of s. 340 Cr. P. C. have not been followed. That application was rejected by the Judicial Magistrate, Meerut on 8th June, 1979, hence this revision.

3. I have heard learned counsel for both the parties, and have also perused the impugned orders.

4. Counsel for the opposite parties has raised a preliminary objection that the revision is not maintainable. For this purpose, he has placed reliance upon s. 401(4) Cr. P. C., which runs as follows :

Sec. 401(4) - "Where under this code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party, who could have appealed."

The contention is that the accused should have filed an appeal u/s 342 Cr. P. C., and since that has not been done, the instant revision is not maintainable. In order to decide this question, it would be relevant to quote s. 341 Cr. P. C.

Sec. 341 - "Any person on whose application any Court other than a High Court has refused to make a complaint under sub-s. (1) or sub-s. (2) of s. 340, or against whom such a complaint has been made by such court, may appeal to the court to which such former court is subordinate within the meaning of sub-s. (4) of s. 195, and the superior court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint which such former court might have made u/s 340, and if it makes such complaint, the provisions of that section shall apply accordingly."

(2) An order under this section and subject to any such order, an order u/s 340, shall be final and shall not be subject to revision."

5. A perusal of sec. 341 Cr. P. C. clearly indicates that the appeal preferred to therein would lie to the court to which such former court is subordinate. In the instant case the complaint had been filed by ITO and he would be subordinate to the Appellate IT authority i.e. AAC, Thus, the order of the appellate authority would be the final order and the appellate authority has the jurisdiction to direct the withdrawal of the complaint. In the instant case this remedy had not been followed. Even if it is assumed that for some valid reason, the order filing a complaint could not be assailed before the appellate, Income Tax authority within the period prescribed by law, yet there was nothing to prevent the accused from filing appeal before that appellate authority supported by an application u/s 5 of the Limitation Act for condonation of such delay. It has been argued by the opposite party that under sub-s. (2) of s. 341 Cr. P. C. an order filing the complaint which is not challenged in appeal before the appellate court concerned, becomes a final order and can not be challenged in revision. On the other hand,

the learned counsel for the applicant has relied upon the Full Bench decision of the Allahabad High Court, reported in AIR 1968, Alld. page 296. That case concerned itself with the question as to when and under what circumstances a party aggrieved has a right to appeal against the filing of the complaint. It has been observed in para 42 of the aforesaid judgment that "the right of appeal arises as soon as the finding is recorded u/s 476(1) that it is expedient in the interest of justice that a complaint The giving of the finding and passing of a complaint". On this basis he submits that no appeal could be filed before the Appellate IT authority.

6. Assuming that an appeal could be filed, the question arises whether this court is powerless to grant any relief to the application if the circumstances of the case justify the same. In the instant case the accused has challenged the very jurisdiction of the court to take cognizance of the offence. The mere filing of a complaint cannot be challenged in revision, except as mentioned above, but where the initial jurisdiction of a court to take cognizance of an offence is challenged, in that event this court cannot be barred from exercising its inherent powers. Even if we accept for the purpose of argument that the revision does not lie, there is ample power provided in this court under provisions of s. 482 Cr.P.C. to interfere with an order without jurisdiction in that court to take cognizance of the offence, and therefore, I am of the opinion that if the applicant succeeds in convincing the court that there is inherent lack of jurisdiction in the Judicial Magistrate 1st Class, Meerut, to take cognizance of the complaint filed against him, then the arms of this court are along enough to provide adequate relief to the accused.

7. Coming now to the facts of the case and the relevant law to the facts of the case and counsel for the applicants has placed reliance upon s. 195(1)(b) Cr.P.C. r/w s. 340 Cr. P.C. Sec. 195(1)(b) reads as follows :

"195(1) : No Court shall take cognizance :

(b)(i) of any offence punishable under any of the following sections of the India Penal Code, namely Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) & 228, when such offence is alleged to have been committed in or in relation to, any proceeding in any court, or

(ii) of any offence described in sections 463, or punishable u/s 471, s. 475 or s. 476, of the said code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or

(iii) of any criminal conspiracy to commit, or attempt to commit, or the abatement of, any offence specified in Sub-clause (i) or Sub-clause (ii),

Except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate."

This section bars the taking cognizance of an offence by a Court for offence by a

Court for offences mentioned therein except on a complaint in writing by that court or some other court to which that court is subordinate.

The procedure to be followed in such cases has been laid down u/s 340 Cr.P.C. which runs thus.

Section 340(1) :

"When, upon an application made to it in this behalf or otherwise, any court is of opinion that it is expedient in the interest of justice that an inquiry should be made into any offence referred to in cl. (b) of sub-s. (1) of s. 195 which appears to have been committed in or as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary. -

(a) record a finding to that effect,

(b) make a complaint thereof in writing;

(c) send it to a Magistrate of the class having jurisdiction;

(d) take sufficient security for the appearance of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and

(e) bind over any person to appear and give evidence before such Magistrate."

Two questions have arisen in this connection; one is whether it is mandatory to hold a preliminary inquiry before sending the accused for trial; secondly, whether it is necessary for the court before whom the offence is alleged to have been committed to form a definite opinion, that it is expedient in the interest of justice to prosecute the accused, and whether such opinion must be explicitly given in the order. In this connection reliance has been placed by the counsel for the Opp. parties on a decision of the Allahabad High Court reported in Lal Behari Vs. State, . Having regard to all the facts and circumstances of the present case, I am in agreement with the opinion of the Court below that there has been a sufficient compliance of the requirement of holding a preliminary inquiry by the court concerned, before the filing of the complaint, but so far as the requirement of recording a finding that is necessary in the interest of justice to file a complaint against the accused is concerned, the aforesaid decision of the Allahabad High Court was to the effect a failure to record such a finding is a mere irregularity which is not fatal to the complaint.

8. It is not unknown that circumstances may arise, where a party is guilty of fabricating evidence and also of giving false evidence in court. Practical Judicial experience discloses that such a situation is not uncommon, and every case does not warrant the filing of a complaint for trying the delinquent for the offence of perjury or fabrication of false evidence. It is only when the interest of justice requires, that such a prosecution is ordered. Inclusion of the expression "expedient in the interest of justice" in s. 340 is not without meaning. In may

opinion, it is an integral part of this section and in order to prosecute an accused for such offences, it is essential that the court must form this opinion prior to ordering prosecution by the filing of a complaint, but in view of the fact, that a Division Bench of this Court has held otherwise in AIR 1962, Allahabad, 251, I am bound by this decision inspite of holding a contrary view.

9. For the reasons given above, I am of the opinion that there is no merit in this revision which is hereby dismissed. The interim order passed by this court is hereby vacated.