
(1975) 03 BOM CK 0017

In the Bombay High Court

Case No : Criminal Revision Application No. 733 of 1973

Aruna Gajanan Bhatte and others

APPELLANT

Vs

Govindbhai Appaji Bhatte and others

RESPONDENT

Date of Decision : 11-03-1975

Acts Referred:

Evidence Act, 1872 — Section 3

Citation : (1975) MhLj 398

Hon'ble Judges : N.B. Naik, J

Bench : Single Bench

Advocate : K.H. Parsurampuriah, for the Appellant; M.V. Paranjpe with S.H. Doctor instructed by Hooseini Doctor and Co., For respondents Nos. 1 to 4, V.T. Gambhirwala, Asstt. Govt. Pleader, For State, for the Respondent

Final Decision : Dismissed

Judgement

N.B. Naik, J.—By this revision application, the original respondents challenge the order of the learned Judge of the City Civil Court, Bombay, directing that an enquiry be made u/s 475 of the Code of Criminal Procedure.

2. The facts leading to this revision application which are not in dispute, are briefly these: The four plaintiffs-respondents filed suit No. 6132 of 1972 against seven defendants - first seven revision petitioners for dissolution of partnership and accounts. It appears that thereafter defendants took out a notice of motion directing the plaintiffs to complete an agreement of sale which was entered into by the firm in favour of the President of India. The Court having granted the motion, an appeal against the Order No. 227 of 1971 was filed against that order. On March 6, 1972, the defendants took out another notice of motion for a direction against the plaintiffs to complete another alleged transaction of agreement of sale of the land of the firm in favour of one Himat-lal Wadilal, revision petitioner No. 9. That notice of motion was resisted by the plaintiffs. Having regard to the fact that a similar order in the earlier notice of motion was the subject-matter of appeal against the Order No. 227 of 1971, the learned

Principal Judge passed an order on April 13, 1972 staying the subsequent notice of motion. In spite of that on December 4, 1972, the plaintiffs took out a notice of motion for the Court to take action against the defendants and one Deepchand S. Gardi, the legal adviser of the suit firm who is revision petitioner No. 8 and one Himatlal Vadilal Shah, revision petitioner No. 9 for taking action u/s 476 of the Code of Criminal Procedure, by contending, *liter alia*, that the alleged agreement of sale relied upon by the defendants in the notice of motion was a fabricated document and that defendant No. 2 had intentionally given false evidence on affidavit in support of the second notice of motion taken out by the defendants. On February 7, 1973, the appeal against the Order No. 227 of 1971 against the order of the earlier notice of motion with which we are not concerned, was allowed by this Court, holding, *inter alia*, that the Court had no power to direct the completion of an agreement of sale pending a suit for dissolution of partnership and accounts. In view of that decision of this Court on February 20, 1973, the defendants withdrew their notice of motion on March 6, 1972 by which a request was made for a direction to the plaintiffs to complete an alleged transaction of sale in favour of Himatlal Shah, revision petitioner No. 9, which had given rise to the notice of motion dated December 4, 1972 taken out by the plaintiffs for action being taken u/s 476 of the Code of Criminal Procedure. In spite of the notice of motion being served on the defendants they did not file an affidavit in reply. The matter was, however, argued before the learned Judge of the City Civil Court and he directed that the Court will merely hold an enquiry preliminary to the making of a complaint if any and that it would be open to the respondents viz. the present revision petitioners to urge all the points which they had urged before him, in addition to other points which they may like to urge.

3. It is the propriety of this order which is challenged in this revision application.

4. Mr. Parsurampur, learned advocate for the revision petitioners, has challenged the order of the learned Judge of the City Civil Court on the ground that having regard to the provisions of sub-section (6) of section 479A of the Code of Criminal Procedure, the order passed by the learned Judge expressing an opinion about his proceeding to make an enquiry u/s 476 of the Code of Criminal Procedure, is without jurisdiction. He also submits that having regard to the fact that the civil suit between the parties is still pending, the learned Judge has not acted properly in directing that an enquiry be made u/s 476 of the Code of Criminal Procedure. I find no force in any of these submissions of Mr. Parsurampur.

5. Now section 479A is to this effect:

"479A. (1) Notwithstanding anything contained in sections 476 to 479 inclusive, when any Civil, Revenue or Criminal Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the

interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceeding, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the presiding officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the first class having jurisdiction, and may, if the accused is present before the Court, take sufficient security for his appearance before such Magistrate and may bind over any person to appear and give evidence before such Magistrate:

Provided that where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.

Explanation.-For the purposes of this sub section a Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made u/s 200.

(3) No appeal shall be from any finding recorded and complaint made under subsection (1).

(4) Where, in any case, a complaint has been made under sub-section (1) and an appeal has been preferred against the decision arrived at in the judicial proceeding out of which the matter has arisen, the hearing of the case before the Magistrate to whom the complaint was forwarded or to whom the case may have been transferred shall be adjourned until such appeal is decided; and the appellate Court, after giving .. complaint has been made an opportunity of being heard, may, if it so thinks fit, make an order directing the withdrawal of the complaint; and a copy of such order shall be sent to the Magistrate before whom the hearing of the case is pending.

(5) In any case, where an appeal has been preferred from any decision of a Civil, Revenue or Criminal Court but no complaint has been made under subsection (1), the power conferred on such Civil, Revenue or Criminal Court under the said sub-section may be exercised by the appellate Court; and where the appellate Court makes such complaint, the provisions of sub-section (1) shall apply accordingly, but no such order shall be made, without giving the person affected thereby an opportunity of being heard.

(6) No proceedings shall be taken under sections 476 to 479 inclusive for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under this section."

(Italics supplied.)

6. Now, reading the above provisions which are introduced in the Code of

Criminal Procedure by the amending Act 26 of 1955, it would appear that the Legislature expressly provided that in respect of the persons whose cases are covered by sub-section (1) of section 479A, the jurisdiction of the Court to take action under sections 476 to 479 is clearly ousted by sub-section (6) of section 479A, thereby providing, inter alia, an exclusive procedure u/s 479A, for the class of persons mentioned in sub-section (1) of section 479A. It would further appear that unlike the provisions of section 476B, which provide for an appeal, any action taken u/s 479A (1) or (5) could not be challenged by way of appeal having regard to the provisions of sub-section (3) of section 479A, which provide, inter alia, that no appeal shall lie from any finding recorded and complaint made under sub-section (1). It would, therefore, appear that in spite of the fact that provisions did exist for taking action against the persons intentionally giving false evidence or fabricating false evidence, since the Legislature thought that the said provisions were dilatory and ineffective, it was evidently necessary to empower the Courts to forthwith complain against witnesses of the type mentioned in sub-section (1) of section 479A. It is precisely for that reason that a summary procedure has been provided by section 479A. Having regard to this fact, it would appear that section 479A has got to be construed very strictly.

7. Now, the important expression in sub-section (1) of section 479A is "any person appearing before it as a witness", which expression does not find place in section 476. It is also significant to note that the expression, "any person appearing before it as a witness", qualifies both (1) a witness who has intentionally given false evidence in any stage of the judicial proceeding, and (2) or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding. Therefore, it would appear that in order that this special provision and exclusive provision may apply, the person against whom action is sought to be taken must be a person appearing before the Civil, Revenue or Criminal Court as a witness. There is no dispute that except defendant No. 2 none of the other eight respondents-revision petitioners has either filed an affidavit or appeared before the Court as a witness in the proceedings, viz. the notice of motion, out of which proceedings the notice of motion for taking action u/s 476 arose. Therefore, it would appear that so far as the remaining eight revision petitioners are concerned, since they have not even filed an affidavit, they could not be said by any stretch of imagination to be persons who have appeared before the Court as witnesses,

8. The short question which I have, therefore, to consider is, Whether even with regard to defendant No. 2-revision petitioner No 2, it could be said that he is a person appearing before the Court as a witness, by reason of his having filed the affidavit in support of the notice of motion taken out by the defendants. It is impossible to say that by reason of his filing an affidavit in Court, a person could be said to be a person appearing before the Court as a witness. No doubt this evidence may be evidence under the Oaths Act and affidavit evidence is also permissible in certain cases, like Order XIX, rule 2 of the Civil Procedure Code, in

writ petitions and also by the provisions of section 145 of the Code of Criminal Procedure.

9. If we turn to the provisions of section 3 of the Indian Evidence Act, "'evidence" has been defined as under:

" "Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry: such statements are called oral evidence;

(2) all documents produced for the inspection of the Court;- such documents are called documentary evidence."

10. It would appear that even in the definition of "evidence", which is called oral evidence under the Indian Evidence Act, the statement is required to "be made before the Court as a witness, which indicates that oral evidence should be given by a witness by being physically present before the Court, Therefore, the expression, "the person appearing before it", Occurring in sub-section (1) of section 479A, could only mean a person physically appearing before the Court. It could not with any stretch of imagination refer to a person whose evidence is tendered in the form of an affidavit. If persons who have given evidence in the form of affidavit were to be covered by the provisions of section 479A (1), the legislature would not have used the expression, "person appearing before it as a witness." Since the Legislature has advisedly used the expression "person appearing before it as a witness," it would follow, that the Legislature intended, that the person against whom action could be taken u/s 479A, should have in fact appeared before the Court physically as a witness. Apart from the fact that the expression "person appearing before it as a witness" does not permit of any other interpretation than the physical appearance of the witness before the Court, there are also pointers in the section itself to show that, that expression means physical appearance only. Now, it would appear that in the case of an original civil, criminal or revenue Court acting under sub-section (1) of section 479, it is only discretionary and not mandatory to give the witness concerned an opportunity of being heard before making a complaint. As against that, sub-section (5) which deals with the power of an appellate Court provides, that even while exercising the powers of the original Court under sub-section (1), it could not pass an order without giving the person affected thereby an opportunity of being heard. Therefore, in the case of an appellate Court, it is mandatory for it, to give an opportunity of being heard to the persons concerned, before proceeding to pass an order directing a complaint being filed. The reason obviously is, that the Legislature must have thought that since the original Court has the advantage of seeing and marking the demeanour of a witness appearing before it physically and in a given case it has also the additional advantage of giving the witness an opportunity to retrace his steps in persisting in falsehood by putting Court questions or otherwise, the appellate Court by its very nature

has no such opportunity and that is how it appears to me, that the deliberate distinction between the two provisions about giving an opportunity to the person concerned could be explained. If that is so, that is one more reason for holding that the expression, "person appearing before it as a witness" occurring in subsection (1) must have necessarily reference to the physical appearance of a witness and not to his filing or tendering an affidavit. If I am right in that view, it would appear that since in the instant case evidence is given by defendant No. 2 only by filing an affidavit in support of the notice of motion, sub-section (1) of section 479A has absolutely no application even with regard to him and, therefore, sub-section (6) of the said section also would have no application and the result, therefore, is that the action if any, which could be taken in the circumstances of this case, could only be u/s 476 and not u/s 479A, as contended by Mr. Parsurampuriah.

11. In this connection my attention is drawn to the decisions of Rajas-than, Calcutta and Madras High Courts.

12. In State Vs. Ugam Singh and Another, , it is observed (p. 271):

"Sub-section (1) of section 479A. must be construed strictly as it takes away the protection provided in sections 476 to 479, Criminal Procedure Code and cases which do not directly come under that sub-section should not be brought within its purview by giving the words "appearing before it as a witness" a wider meaning. The case of a person whose affidavit has been filed but who has not personally appeared as witness does not fall therein."

13. Kalipada Maity and Others Vs. Sukumar Bose, , it is observed (p. 641);

"...Section 479A, Criminal Procedure Code is however, limited to persons appearing before any Court as witness, and the fact that the term "witnesses" by itself may include persons who have made affidavits filed before any Court, cannot be taken to mean that such persons are also persons appearing before any Court as witnesses."

14. In In re : S.R. Ramalingam, , it is observed (p. 103):

"...In our view, the words "any person appearing before it as a witness" employed in section-109-A are not words of art but are only intended to convey the idea of a witness physically appearing in Court and giving evidence or producing documents. It follows that the procedure adopted for filing the complaint against the petitioner u/s 479-A cannot be accepted as being in accordance with law. The proper procedure will be the one prescribed by section 476, Criminal Procedure Code,"

15. With respect, the above observations are in consonance with my own view and I, therefore, see no substance in the only substantial objection which is taken to the order of the learned Judge of the City Civil Court.

16. As regards the submission of Mr. Parsurampuriah that since the civil suit is still

pending, no criminal proceeding should be proceeded with, I feel that I need not express any opinion on the same at this stage. It is enough to state that when the plaintiffs took out a notice of motion for taking action, the defendants did not choose to file any affidavit in reply or to urge any grounds. That apart, all that the learned Judge of the City Civil Court has done is to express an opinion that an enquiry should be made u/s 476 of the Criminal Procedure Code, and he has in terms observed, that it would be open to the respondents to urge all the points that were urged before him in addition to other points which they may like to urge. It would, therefore, appear that no order as such is passed which could be challenged by way of revision either on the ground of want of jurisdiction or otherwise. As I have already pointed out since section 479A has no application to the facts of this case, it is section 476 alone which could apply. the learned Judge, according to his own view, has still to hear the contentions if any of the revision petitioners and it is only thereafter that he has to make up his mind to file a complaint. It would, therefore, appear that this is not a stage at which this Court should be called upon to interfere in This discretion u/s 439 of the Criminal Procedure Code. After all it is open to the revision petitioners to urge such points as they may like both before and after the complaint if any is filed and it is equally open to them to avail of the provisions of section 476B.

17. In the result, it would appear that it is too premature for this Court to interfere with the peculiar nature of the order which is passed by the lower Court. The revision application, therefore, fails and is rejected. The rule is discharged.