

(2019) 08 UK CK 0023

In the Uttarakhand High Court

Case No : Criminal Revision (CRLR No. 447 Of 2019), Stay Application No. 2104 Of 2019

Kirti Bhushan Mishra

APPELLANT

Vs

State Of Uttarakhand And Another

RESPONDENT

Date of Decision : 02-08-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 125, 172, 178, 193, 195, 195(1), 195(1)(b), 195(1)(b)(2), 340, 340(1), 341, 343(2), 482
Indian Penal Code, 1860 — Section 193

Citation : (2019) 08 UK CK 0023

Hon'ble Judges : Sharad Kumar Sharma, J

Bench : Single Bench

Advocate : Ankit Shah, Siddharth Singh

Final Decision : Dismissed

Judgement

Sharad Kumar Sharma, J

1. The present revision has been preferred by the revisionist, challenging the order dated 16th May 2019, as rendered by the learned Additional Family Court, Roorkee District Haridwar, wherein the learned Family Court, while considering the Application, preferred by the revisionist herein by invoking the provisions of Section 340 Cr.PC, the same has been rejected by the impugned order in question holding thereof that the offence as contended by the revisionist to have been carried at the behest of the respondent was by way of filing a false affidavit, with a false assertion in it, it would amount to commission of an offence under Section 340 of Cr.P.C. and the Court ought to have taken cognizance to it and the proceedings after compliance of the procedure contemplated under Section 195 (1) ought to have been initiated the proceedings against the respondents.

2. This plea of the revisionist did not find favour with the Court and the Court, after considering the application under Section 340 Cr.PC and the rival contention

raised by the respondent came up to the conclusion that looking to the averment which has been made in the pleadings and the counter pleadings filed by the respondent, the averments contained therein do not satisfy the conditions for initiation of the proceedings under Section 340 of Cr.PC until and unless application satisfies the conditions contained under Section 195 (1) to be read with Section 195 (1) clause (b) of Cr.P.C.

3. As per the finding(s), which has been recorded by the Court while rejecting the application under Section 340 Cr.P.C. the Court has held that in case if any concealment or placement of a fraudulent document has been made by the respondent, then it is absolutely open to the Court to take into consideration those documents in the light of the provisions contained under Section 172 of Cr.P.C. to be read with Section 178 of Cr.P.C. and draw a proceedings for convicting a person for the commission of offence under Section 340 of Cr.P.C. But, this Court is of the view that any order which is likely to be passed under Section 340 of Cr.P.C, since it will have a bearing on the conduct of the person against whom the proceedings have been drawn and on its establishment of offence after resorting to the proceedings under Section 195 and if the offence is made punishable under Section 172 to be read with Section 178, in such an eventuality, the person concerned against whom the proceedings under Section 340 of Cr.P.C. is being drawn, he has had to be provided with ample of opportunity to defend himself as it is not that merely because of filing of an application under Section 340 Cr.P.C. based upon certain set of averments made by the applicant that in itself will constitute to be a foundation for the Family Court to initiate the proceedings under Section 340 of Cr.P.C., the application for drawing proceedings under Section 340 of Cr.P.C. should have same logical foundation and reasoning based on the material on record for invoking the said provision.

4. In the instant case when the application under Section 340 of Cr.P.C. was moved by the revisionist before the Court below, the learned Family Court on considering the material, which was placed before it and also considering the fact that no counter evidence was produced in relation to the amount conveyed and the interest payable on the same, any misleading averments, pertaining to the pleadings of playing a fraud by filing a false affidavit before the Court in the proceedings under Section 125 of Cr.P.C., apparently does not seems to be made out and consequently, the application under Section 340 Cr.PC was rejected. It was also rejected on the premise that as far as the present revisionist-husband, who was the respondent in the proceedings under Section 125 of Cr.P.C, he has not produced any original document nor has proved that in accordance with the provisions contained under Section 125 Cr.P.C, the factum of the applicant to Section 125 i.e. the respondent herein was working anywhere hence it cannot be settled down to be a false averments in the absence of proof being extended by the respondent to the contrary who if he claims that she was working somewhere the burden to prove the same was casted upon him to prove it otherwise, that respondent was working and having a source of income.

5. In response to it, this Court was of the view that the reasoning which has been assigned by the family Court while rejecting the application by its order dated 16th May 2019, it was on the ground that the nature of offence alleged and the set of allegations as levelled by the revisionist against the respondent since was not made out in the application filed by him under Section 340 of Cr.P.C, no cognizance could be taken on the same and accordingly the same was rejected by the Court of Additional Judge/Family Court, Roorkee, District Haridwar.

6. The learned counsel for the revisionist in support of his contention has placed reliance on a judgement which has been rendered by the Allahabad High Court in a writ jurisdiction in Writ Petition (M/S) No. of 2002, Syed Nazim Husain v. The Additional Principal Judge Family Court & another, reported in 2003 SCC OnLine All 2358, wherein, in the said case the Court it has been held that while scrutinizing order dated 24th October 2002, as it involved in the said case passed by the learned Family Court in the said case being an order passed on an application under Section 340 of Cr.P.C, the co-ordinate Bench has expressed a view that the application moved in a pending case bringing notice to the Court, pertaining any false averments, being made by adversary to the proceedings, the same could be disposed of on the first day of the proceedings even before any further proceedings is taken in the principal case which was instituted before the Family Court. Para 4 of the said judgement reads as under:-

"4. In my view, if an application is moved in the pending case bringing to the notice of the court that any false evidence knowing well has been filed or fabricated in such proceedings, the court should dispose of the said application first before proceeding any further or before recording of further evidence."

7. With all humility in my command, first of all, this judgement rendered by the co-ordinate Bench of Allahabad High Court will not have any binding effect except, that it can only have a persuasive value. But with all profound respect, the opinion expressed by the co-ordinate bench of Allahabad High Court is not acceptable by this Court for the simple reason that the false averments made in an application in a proceedings, its gravity is to be first tested in the principal proceedings itself after providing ample of opportunity to the parties concerned than when Court comes to the conclusion that particular averments made in an affidavit if it is false and the Court draws a positive inference in relation thereto, then it is always the choice of the Court to invoke the proceedings under Section 340 of Cr.P.C. against the person filing a wrong affidavit. The effect of filing of mere application under Section 340 of Cr.P.C, would be inferred to be decided first, before proceedings in the main case, as held by Allahabad High Court, may have a wider adverse implication where the filing of application under Section 340 Cr.P.C., could be resorted as a device to install the main proceedings.

8. But the ratio which has been laid down by the Allahabad High Court that Section 340 of Cr.P.C. could be initiated even before the said false averments or evidence is taken into consideration on its own merits and is judicially scrutinized

in the principal proceedings is not acceptable by this Court, because it would be too preposterous to draw a proceedings under Section 340 Cr.P.C. and conclude the same even without scrutinizing the veracity of the affidavit which is being alleged in the application to have been falsely filed with a false averments in it, hence, this Court is in an absolute disagreement with the judgement rendered by the Allahabad High Court, hence ratio it has laid down it is not accepted by this Court.

9. The learned counsel for the revisionist has placed reliance yet on another judgement rendered by yet another coordinate Bench of the Delhi High Court, reported in (2009) 160 DLT 599, Jagdish Prasad v. State & Ors., wherein, in a proceedings under Section 482, which was directed against an order passed by the Additional Sessions Judge in a proceedings for commission of an offence under Section 193 in relation to prosecution of a person concerned under Section 340 Cr.P.C. as explained in those proceedings before the Delhi high Court, the Court has held that the intention of Section 340 Cr.P.C. thus contemplate a forum for prosecuting a person who has given wrongful information or an opinion by way of an affidavit before a Court, but in the said case the factual backdrop was slightly different then what it is involved in the instant case. Relevant paragraph Nos. 2, 3, 5, 6 and 10 of the said judgement read as under:-

"2. The brief facts leading to the filing of the present petition are that Respondent No.2 wife filed an application under Section 125 CrPC seeking maintenance from the Petitioner husband for herself and the minor female child. In her petition she stated in Para 15 that she was "not employed anywhere and is unable to maintain herself and her said minor girl Shruti and they presently are survived on the mercy of parents of the petitioner No.1 (wife) who themselves have limited resources to maintain the large family."

3. According to the Petitioner in the month of June 2001, the Respondent No.2 wife had joined Tirath Ram Shah Charitable Hospital, Rajpur Road, Delhi as a 'Receptionist' and was receiving salary from the said hospital. On this basis, Petitioner had earlier filed an application under Section 340 CrPC which, according to Respondent No.2, was dismissed on 16th September, 2003.

5. Consequent upon the above replies in cross examination, the Petitioner filed an application under Section 340 CrPC seeking the prosecution of the Petitioner for committing perjury punishable under Section 193 CrPC.

6. It appears that a reply was filed to the said petition by Respondent No.2. Even evidence appears to have been led by examining the officials from both the Punjab National Bank as well as the Tirath Ram Shah Charitable Hospital.

10. The learned MM in the order dated 9th September 2005 came to the following conclusion:-

"I have gone through the record of the present application as well as the petition under Section 125 Cr.P.C., which is pending in the present court. Smt. Veena may

have had a genuine cause for having worked as proved against her in her case and also admitted by her in the present proceedings. Nevertheless her pressing requirements for income does not exonerate her from the offence of having given false testimony in the court.

I am, therefore, of the opinion that Smt. Veena has committed an offence under Section 193IPC and she ought to be prosecuted for the same."

10. Even in this case, the fact of wife being profitably engaged and having an independent source of earning was a plea raised in defence by husband in proceedings under Section 125 Cr.P.C. But even in the said case, the parties were provided an opportunity to prove their respective case and its consequent to the culmination of proceedings after providing complete opportunity the Court of Metropolitan Magistrate has drawn a conclusion regarding commission of an offence under Section 340 Cr.P.C. and not before it, before directing to prosecute the wife regarding false averment made in the affidavit regarding her engagement.

11. In the instant case, as it has been already observed above, the false averments is yet to be justified and cross through the test of evidence based on the rival pleading in relation to the affidavit alleged to be false, on basis of evidence to be adduced by the parties, that upto what extent the averments made therein are false and what was the intention behind those averments and its effect on misleading the Court whether it was intentional or deliberate effort for getting a wrongful order. This is not the situation contemplated herein, because the ratio which was being provided by the Delhi High Court was with regard to a consequential action of prosecution contemplated under Section 340 Cr.P.C. on an establishment of the ingredients provided under Section 340 Cr.P.C., the proceedings can be drawn and not before actual establishment of an offence under Section 340 Cr.P.C. after complying with the procedure provided under Section 195 of Cr.P.C.

12. In the judgement of the Delhi High Court, it was at that stage when respondent No. 2 was examined in examination-in-chief in the maintenance petition and test was to the effect as to whether he was working in any establishment from where he is getting an income to meet the liability of maintenance at the risk of writ petition, once again this Court is constrained to observe that before making a person responsible for an offence under Section 340 of Cr.P.C. in relation to an averments made in the affidavit, it could only be on the culmination of the proceedings when the Court holds after opportunity being provided to person against whom an averment to be false and misleading is made and not before it, because if this proposition is permitted and the liberty is granted to the Courts to initiate Section 340 of Cr.P.C, merely because of an assertion is made in the complaint by the complainant in the application under Section 340 of Cr.P.C., it would absolutely be deceiving the procedural aspect contemplated under Section 195 Cr.P.C. which has been made applicable for the purposes of establishment of an offence under Section 340 of Cr.P.C. and hence it

may not be sustained thus this judgement too, this Court declines to take it as to be an exemplar and to be based on the same and similar conditions which are prevailing in the instant case.

13. Lastly, the learned counsel for the revisionist has placed reliance on a judgement as reported in 2005 (4) SCC 370, Iqbal Singh Marwah and another v. Meenakshi Marwah and another, rendered by the Constitution Bench. On reading of the said judgement, yet again, the same proposition has been floated by the Hon'ble Apex Court too that as soon as the Court comes to the conclusion after the culmination of the proceedings under Section 195(1) (b) (2) that a person is responsible for placing a wrongful affidavit or document on record, it was far only it becomes an incumbent on the Court to initiate the proceedings under Section 340 and no one should be spared who has submitted a false affidavit to make it as a foundation and as an effort for procuring an order in his or her favour. Relevant paragraph Nos. 23, 24 and 26 of the said judgement read as under:-

"23. In view of the language used in Section 340 Cr.P.C. the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1)(b), as the Section is conditioned by the words "Court is of opinion that it is expedient in the interest of justice." This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the Court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195(i)(b). This expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like, but such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In such circumstances, the Court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remedyless. Any interpretation which leads to a situation where a victim of a crime is rendered remedyless, has to be discarded.

24. There is another consideration which has to be kept in mind. Sub-section (1) of Section 340 Cr.P.C. contemplates holding of a preliminary enquiry. Normally, a direction for filing of a complaint is not made during the pendency of the proceeding before the Court and this is done at the stage when the proceeding is concluded and the final judgment is rendered. Section 341 provides for an appeal against an order directing filing of the complaint. The hearing and ultimate

decision of the appeal is bound to take time. Section 343(2) confers a discretion upon a Court trying the complaint to adjourn the hearing of the case if it is brought to its notice that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen. In view of these provisions, the complaint case may not proceed at all for decades specially in matters arising out of civil suits where decisions are challenged in successive appellate fora which are time consuming. It is also to be noticed that there is no provision of appeal against an order passed under Section 343(2), whereby hearing of the case is adjourned until the decision of the appeal. These provisions show that, in reality, the procedure prescribed for filing a complaint by the Court is such that it may not fructify in the actual trial of the offender for an unusually long period. Delay in prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost. This important consideration dissuades us from accepting the broad interpretation sought to be placed upon clause (b)(ii).

26. Judicial notice can be taken of the fact that the Courts are normally reluctant to direct filing of a criminal complaint and such a course is rarely adopted. It will not be fair and proper to give an interpretation which leads to a situation where a person alleged to have committed an offence of the type enumerated in clause (b)(ii) is either not placed for trial on account of non-filing of a complaint or if a complaint is filed, the same does not come to its logical end. Judging from such an angle will be in consonance with the principle that an unworkable or impracticable result should be avoided. In Statutory Interpretation by Francis Bennion (Third ed.) para 313, the principle has been stated in the following manner :

"The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. Sometimes however, there are overriding reasons for applying such a construction, for example where it appears that Parliament really intended it or the literal meaning is too strong."

14. Meaning thereby, in a nutshell, even the Hon'ble Apex Court too has postulated that before a cognizance under Section 340 of Cr.P.C. is taken, it become necessary and precondition which is unavoidable that the Court should draw inference on culmination of the proceeding drawn before it, it should come to a logical conclusion pertaining to the gravity of the averments and sanctity of allegation regarding an attempt of misleading the Court, which is made by the person, submitting an affidavit before any proceedings are drawn under Section 340 of Cr.P.C. The logical conclusion has to be drawn after an opportunity to the person, who is alleged to have filed a false affidavit or has attempted to derive an order by misleading the Court. But before an action is taken under Section 340 Cr.P.C., process contemplated to hold a person responsible, he must be given an opportunity to prove his innocence.

15. The judgement of the Hon'ble Apex Court does not anywhere contemplated

that merely if an application has been filed by adversary alleging of filing an affidavit containing a misleading observations or a pleading that in itself will suffice to draw the proceedings under Section 340 of Cr.P.C. is not the mandate which is contemplated in the ratio of the Hon'ble Apex Court, as provided therein in the judgement (Supra).

16. In that view of the matter, since in the instant case the proceedings under Section 125 Cr.P.C. is yet to be decided on merits in which an affidavit, which the revisionist contends that a false averment has been made regarding the engagement and source of income, that is yet to be determined by the Court, while deciding the application on its merits even before culmination of the proceedings under Section 125 of Cr.P.C., testing the averment made in the affidavit, its impact on the proceedings, this Court is of the view that Section 340 of Cr.P.C. ought not to be drawn against the person until and unless the affidavit falsely filed by him is proven in a proceedings to be misleading with deliberate intention containing false averment intending to mislead the Court, for the purposes of processing a favourable order.

16. In that view of the matter, this revision lacks merit and is hereby dismissed. However, there would be no order as to cost.