

(1999) 04 OHC CK 0013

In the Orissa High Court

Case No : Criminal Appeal No. 104 of 1998

Laxminarayan Deepak Ranjan Das

APPELLANT

Vs

K.K. Jha and Others

RESPONDENT

Date of Decision : 16-04-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 195, 195(1), 340, 340(1), 464
Penal Code, 1860 (IPC) — Section 193, 196

Citation : (1999) CriLJ 4200 : (1999) 17 OCR 7

Hon'ble Judges : A. Pasayat, Acting C.J.; Pradipta Ray, J

Bench : Division Bench

Advocate : S.C. Sahoo, S.K. Sahoo, G.G. Swain and A. Ray, for the Appellant;
Bijay Pal, Ramesh Mohanty and Pramila Mohanty, for the Respondent

Final Decision : Dismissed

Judgement

A. Pasayat, Actg. C.J.

1. Refusal by the Central Administrative Tribunal, Cuttack Bench (in short, the "Tribunal") to initiate a proceeding u/s 340 of the Code of Criminal Procedure, 1973 (in short, the "Code") has led to filing of this appeal, Appellant prayed before the Tribunal to initiate a suo motu preliminary enquiry u/s 340 of the Code relating to the alleged offence of perjury committed by the respondents by filing their reply dated 27-11-1996 along with letters dated 14-8-1996, 23-8-1996 and 10-10-1996 before the Tribunal in O.A. No. 499 of 1996 which contained false statements and referred to forged and non-existent document. Grievance is that in O.A. No. 499 of 1996 pending before the Tribunal, respondents have stated in their counter that the notification dated 2-3-1965 relied upon by the applicant in that case is non-existent and the correct circular dated 2-3-1965 has been enclosed to the counter. According to the respondents the correct circular dated 2-3-1965 deals with giving preference to handicapped persons in Government employment whereas the case of the applicant in the original application is that the circular dated 2-3-1965 is for giving preference to

cured leprosy patients. Applicant's case is that there is another circular for cured leprosy patients issued on the same day, i.e., 2-3-1963 and therefore, the respondents have deliberately misled the Court and are prima facie guilty of criminal contempt. Three contempt petitions were filed before the Tribunal and they were dismissed. Against the order dated 3-4-1997 dismissing the contempt petition filed by one Sk. Apsaruddin, the petitioner went to the Supreme Court in SLP No. (Criminal) No. 1498 of 1997 and the Supreme Court by order dated 2-3-1998 on a perusal of the record held that no cause is made out for initiation of contempt proceeding. On the same issue some other persons went to the, Principal Bench in O.A. No. 2494 of 1992 and by order dated 17-12-1997 it was held that by issuing the letter dated 27-11-1996 saying that the two notifications of 1971 and 1981 were non-existent, the respondents could not be said to have committed any contempt. In case the said notifications were in force or could be enforced, the applicant would be free to urge the same at the time of argument. It was further held that no case of criminal contempt against the respondents was made out. It was observed that if the allegations are true, same may amount to perjury punishable u/s 193 or Section 196 of the Indian Penal Code, 1860 (in short, "IPC"), but it would not make out a case of criminal contempt. Basing on the aforesaid observation that the allegations, if true, may amount to perjury, the applicant filed an application before the Tribunal for holding a suo motu enquiry u/s 340 of the Code. Tribunal did not accept the prayer. It was held that at that stage it would not be proper to initiate such enquiry. It was observed as follows :

...As earlier noted, O.A. No. 499/96 is pending before the Tribunal and the petitioners would be free to argue, at the time of hearing of the case, if there is a circular dated 2-3-1965 giving preference in employment to cured leprosy patients. It is only after this position is established that the question of initiating, if at all, any action for prosecution of the respondents for perjury u/s 340, Cr.P.C. read with Section 195, IPC would arise. At present, we hold that there is no case for holding on enquiry into the alleged commission of offence of perjury by the respondents. The observation of the Principal Bench is not a decision or finding that perjury has in fact been committed. We, therefore, hold that the petition is without any merit and the case is rejected.

2. Learned counsel for appellant submitted that the Tribunal has misconceive the scope and ambit of Section 340 of the Code. Even at an interim stage, the provisions have application. Respondents have relied upon non-existent and fabricated documents thereby committing perjury. Learned counsel for the respondents submitted that the Tribunal's order is justified and additionally, if any body has committed it is the appellant as he has filed forged documents.

3. The object of the Legislature in enacting Section 340 of the Code was to sweep away the cloud of rulings which threatened to smother the original enactment (i.e., Section 476(1) and Section 476-A of the 1898 Code) and to lay down a simplified procedure on the lines of the existing procedure as to

complaints. There has been complete overhauling of the old provisions, though law substantially remains the same. Section 340. of the Code incorporates following principles :

(i) Only cases where Courts, on objective consideration of the facts and circumstances are of honest belief and opinion that interests of justice require the laying of a complaint, should form subject of an enquiry.

(ii) Conducting preliminary enquiry or dispensing with it is not mandatory, but is discretionary.

(iii) A proceeding under the provision is an independent and different proceeding from that of the original sessions case.

(iv) The proceeding being penal in nature, in accordance with principles of natural justice the accused should be issued show cause notice to afford a reasonable opportunity to establish by adducing oral and documentary evidence that it is not expedient in the interest of justice to prosecute him.

(v) As a condition precedent to filing a complaint; the Court should record a finding that it is expedient in the interests of justice that an enquiry should be made....

(vi) The provision to record a finding is not merely discretionary but is mandatory, for, an appeal lies against the order of the Court.

(vii) The order recording such a finding must be a speaking one supported by valid and justifiable grounds to enable the appellate Court to know the material on which the Court formed the opinion that it was expedient in the interest of justice to launch a prosecution.

(viii) The language recording the finding as contemplated under the provision must be such that it leaves no doubt that it was a fit and proper case.

(ix) It is incumbent on the Court to give a specific finding before making a complaint.

(x) The omission or failure to record a finding that it is expedient in the interests of justice to enquire into the offence is not a mere irregularity curable under Sections 464 and 465 of the Code as it goes to the root of the matter and the Court will have no jurisdiction to file a complaint without recording such a finding.

4. As the Code now stands, both the sanction by a Court and the order by a Court directing a prosecution are done away with and the procedure in all cases is one of complaint by the Court. Section 195 describes the offences in respect of which a complaint is necessary and Section 340 prescribes the procedure under which a complaint is to be made. Sections 340 and 195 have the same scope and must be read together, with the result that it is not open to a Court to file a complaint u/s 195 when it is not so open u/s 340. Section 195(1) lays down a bar to the cognizance of certain offences while Section 340 lays down the

procedure as to how the bar imposed by Section 195(1)(b) is to be removed. Where there is no bar created by Section 195(1)(b), Section 340 has no application. Section 195 of the Code creates a bar on the filing of complaint by all and sundry and Section 340 of the Code confers exclusive jurisdiction on the Court to proceed for the offences after satisfying itself prima facie about the correctness of the offences said to have been committed and covered by Section 195(1)(b) of the Code. Thus Sections 195 and 340 of the Code are supplementary to each other and must be read together.

There is no doubt that not only cognizance of offences referred to in Section 195 of the Code without the complaint in writing of the Court concerned is barred but also the investigation into such offences, because that will amount to taking over the function of the Court by the investigating agency which is against the mandate of Section 340 of the Code.

5. The words "whether on application made to it in this behalf or otherwise" have been introduced in the present Section It, therefore, contemplates an application being made by a party for institution of proceedings. But it is for the Court to decide whether to take action and initiate the proceedings.

6. The jurisdiction to make a complaint under Sub-section (1) of Section 340 is limited to such cases as are provided for in Sub-section (1), Clause (b) of Section 195 only. Section 340 does not authorise a complaint with reference to offences described in Section 195(1)(a). There is a distinct difference between the procedure to be adopted by the presiding officer of a civil Court under the provisions of Section 195(1)(a) and those of Section 195(1)(b). In the first case such an officer is in the position of an ordinary public servant. He exercises no quasi-judicial function of any kind. In the second case, he is in the position of a presiding officer of a Court and exercises quasijudicial function.

7. The power given by the Section should be used with care and after one consideration. It is by no means in every instance in which a party fails to prove his case that the Judge who has decided against such party is justified in exercising the powers given to him by this Section So long as it is a case to which there is any possible doubt, or in which it is not perfectly certain that the Judge's decision must be upheld in the event of there being an appeal, the Judge acts indiscretely and wrongly if the moment he has given his judgment in the case he exercises the power given to him by this Section At the same time, if in the course of the trial the Judge has before him clear and unmistakable proof of a criminal offence and if after the trial is over, he, on consideration thinks it necessary to proceed at once, of course, it may be right to do so. It should be borne in mind that criminal prosecutions are frequently suggested by successful litigants merely to prevent an appeal in the case; and they should be careful not to lend themselves to such suggestions too readily. They should also re-collect that when they proceed under this Section, the responsibility of the prosecution rests upon the Judge entirely: such a prosecution being a very different thing from a prosecution instituted on the complaint of a private party.

8. Before an order is made u/s 340 of the Code there must be grounds of a nature higher than mere surmise or suspicion for directing a judicial enquiry. Before the proceedings u/s 340 to be instituted there must be direct evidence fixing the offence upon the persons whom it is sought to charge either in the preliminary enquiry or in the earlier proceedings out of which the enquiry arises. It is not sufficient that the evidence in the earlier case may induce some sort of suspicion that these persons had been guilty of an offence but there must be distinct evidence of the commission of an offence by such persons. A complaint under this section should not be made against a person where the indications of his guilt do not amount to anything more than mere suspicion.

9. A Court taking action under this Section must not only have ground for inquiry into an offence referred to in the Section, but must also be prima facie satisfied that the offence has been committed by some definite person or persons against whom proceedings ought to be taken. The use of the words "appears to have been committed" in Section 340 of the Code is significant and merely shows that there should be prima facie material before Court to indicate that the offences complained of are likely to have been committed. The danger of parties vindictively proceeding against their opponents by initiating proceedings u/s 340 of the Code has to be kept in mind and must make the Court pause and consider the expediency of prosecution in a particular case with reference to its facts and not launch prosecution at the instance of parties in every case where perjury is discovered. In cases where no materials are available before the Court which decided the original case to enable it to form an opinion that a particular witness had given false evidence and such materials are only later on brought to the notice of the Court, proceedings u/s 476 of the Code are maintainable. The prosecution for perjury should be sanctioned by Courts only in those cases where there is prima facie case of deliberate falsehood on a matter of substance and the Court should be satisfied that there is reasonable foundation for the charge. Before exercising its discretion to lay a complaint u/s 340 of the Code, the Court should find first that it is in the interest of public justice that a complaint should be made and secondly that there is reasonable probability of a conviction resulting on the complaint. The prosecution for perjury should be sanctioned by Courts only in those cases where perjury is deliberate and conscious and conviction is reasonably probable. Where the element of mens rea is absent in the offences imputed against the person concerned, it is not expedient in the interest of justice to initiate prosecution on petition u/s 340 of the Code.

10. As pointed out by the Supreme Court in *K. Karunakaran Vs. T.V. Eachara Warriar and Another*, in a proceeding u/s 340(1) of the Code the reasons recorded in the principal case, in which a false statement has been made, have a great bearing and indeed action is taken having regard to the overall opinion formed by the Court in the earlier proceedings. The only question at an enquiry u/s 340(1) of the Code is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the interest of justice to take such action. The

party may choose to place all its materials before the Court at this stage, but if it does not, it will not be, estopped from doing so later if the trial of prosecution is sanctioned by the Court. An enquiry u/s 340(1) of the Code is in the nature of affording a locus paenitentiae to a person and if at that stage the Court chooses to take action, it does not mean that he will not have full opportunity in due course of the process of justice to establish his innocence.

11. There is no restriction contained in the words used "in relation to a proceeding in that Court" so as to relate it to a proceeding otherwise than a proceeding u/s 340 of the Code. The plain and simple language of the Section means that the offence can be in relation to a proceeding in that Court and which can also be a proceeding u/s 340 of the Code itself. It is discretionary for such Court to make a preliminary inquiry and it would depend upon the facts and circumstances of each case whether any preliminary inquiry is to be held or not before making an order. As indicated above, before exercising its discretion to lay a complaint, the Court should find first that it is in the interests of public justice that a complaint should be made and, secondly, that there is a reasonable probability of a conviction resulting from the complaint. In regard to the first point although no time-limit for the institution of such prosecution is laid down in the section yet prompt action is desirable and delay on the part of a party in making his application to move the Court to lay a complaint may, if unexplained be, fatal to the application. When the application is delayed and the delay is not satisfactorily explained, evidence called in support thereof naturally comes under suspicion and the inference arises that the interests of public justice are less likely to be served than the interest of the applicant by the laying of a complaint. Moreover a party, who has been unsuccessful in a case should not remain indefinitely under the threat that an application for his prosecution may be filed, such a weapon is likely to be used for improper purposes. These considerations apply with more force when the application is not founded on materials to be founded on the record of the trial, but on evidence of the additional facts which the applicant alleges to be available. In such cases, strict explanation of the reasons for the delay in making the application is necessary; otherwise it cannot be held that it is in the interest of justice to make a complaint. Although an enquiry u/s 340 of the Code is a preliminary inquiry, the Court may find it necessary to consider and discuss the entire evidence for the purpose of coming to a finding whether the alleged offence was committed or not and may then decide whether it would be expedient in the interest of justice to launch prosecution.

12. The Tribunal has not finally closed the matter. On the contrary it has said that presently it would not be proper to proceed in the matter. This is evident from the observations of the Tribunal quoted above. It is not the view of the Tribunal that at an interim stage action u/s 340 cannot be taken. Such a conclusion is not culled out from the impugned order.

13. During the course of hearing Mr. Bijay Pal, learned counsel appearing for

respondents 3 and 4 has submitted that there has already been adjudication in an original application holding that the documents relied upon by the appellant are forged and fabricated ones and therefore, if at all any perjury has been done, it has been done by the appellant. Learned counsel for appellant submitted that in the said original application the present appellant is not a party. Since the Tribunal has observed in the impugned order that the question whether any action has to be taken and if to be taken against whom, has to be determined at the time of final adjudication, we do not find any infirmity in the conclusions of the Tribunal to warrant any interference. In view of the position of law and the factual position highlighted, the appeal fails and is dismissed.

Pradipta Ray, J.

14. I agree.