
(2016) 11 RAJ CK 0065

In the Rajasthan High Court

Case No : Criminal Misc.(PET.) NO. 946 of 2013

Manju Rajpal

APPELLANT

Vs

State of Rajasthan

RESPONDENT

Date of Decision : 19-11-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 340

Citation : (2017) 2 Crimes 407 : (2017) 2 Crimes 31 : (2017) 2 WLC 111

Hon'ble Judges : Mr. P.K. Lohra, J.

Bench : Single Bench

Advocate : Mr. Sanjeet Purohit, Advocate, for the Petitioner; Mr. V.S. Rajpurohit, PP, for the Respondent

Final Decision : Allowed

Judgement

P.K. Lohra, J. (Oral)—Petitioner has laid this criminal misc petition under Section 482 Cr.P.C. imploring annulment of impugned Notice dated 9th of March 2013 (Annex.1), issued by Additional District & Sessions Judge, Dungarpur (for short, "learned trial Court").

2. The facts, apposite for the purpose of this petition, are that one Murtaza (plaintiff) instituted a civil suit for damages against State of Rajasthan complaining alleged illegal demolition of his three storied house, situated at Dungarpur, by District Administration, Dungarpur. The plaintiff has, inter alia, averred in the suit that District Administration has acted in a high handed manner throwing rule of law to winds and without adhering to proper procedure of law demolished his house on 21st of August, 2006. The suit was registered as Civil Original Suit No.21/2007. Upon service of summons, on behalf of defendant-State, an application is submitted stating therein with clarity and precision that removal/demolition of plaintiff's house was carried out, pursuant to the order passed in proceedings under Sections 133 and 134 Cr.P.C., by the District Magistrate concerned on the report of Tehsildar, Dungarpur. It is also averred in the application that as the entire demolition was carried out pursuant to a lawful

order passed by Executive Magistrate in adherence of powers conferred under Sections 133 and 134 Cr.P.C., the said action cannot be made subject-matter of civil suit for claiming unliquidated damages. Precisely, State, as a defendant, by the aforesaid application, resisted the suit for damages by urging that it has not committed any civil wrong so that tortious liability can be fastened on it. The application submitted on behalf of State did not find favour of the learned trial Court and consequently the same was rejected on 17th of March, 2008 with the specific observation that defendant-State can take shelter of this plea in its written statement. Later on, State filed its written statement denying all the allegations contained in plaint while reiterating averments contained in the application submitted on its behalf earlier. Trial in the suit proceeded and upon completion of trial, the learned trial Court decreed the suit of the plaintiff and awarded him damages to the tune of Rs. 26,00,000/- along with 30% of the said amount, i.e. Rs. 7,80,000/-, and interest @ 12% per annum w.e.f. 21st of August, 2006.

3. The learned trial Court, while decreeing the suit, also initiated proceedings against petitioner and Tehsildar, Dugarpur under Section 340 Cr.P.C. and as a consequence thereof impugned notice has been issued to her. By the impugned notice, petitioner has been called upon to submit her explanation in respect of contemplated preliminary inquiry for offences punishable under Sections 120-B, 420, 467, 468, 471, 166, 167, 181, 191/193, 192/193, 196, 199, 200 IPC. It is in that background, petitioner has invoked inherent jurisdiction of this Court to assail impugned notice and the proceedings pursuant thereto.

4. Learned counsel for the petitioner, Mr. Sanjeet Purohit, submits that the learned trial Court has committed manifest error of law in issuing impugned notice inasmuch as there is no recital in the notice that any document was custodia legis, which is pre-requisite for initiation of proceedings under Section 340 Cr.P.C. Learned counsel has strenuously urged that the petitioner, in the capacity of Executive Magistrate, has acted on the report of Tehsildar and exercised her powers under Sections 133 and 134 Cr.P.C. for removal of alleged public nuisance in the form of demolition of house of plaintiff, and therefore, by no stretch of imagination order passed by her as a quasi-judicial authority can be categorized as high handed action much less constituting any cognizable offence. Mr. Purohit would contend that the learned trial Court by issuing impugned notice has ex-facie abused the process of the Court, and therefore, entire proceedings pursuant thereto, if allowed to continue, would result in grave miscarriage of justice. Learned counsel has urged that in absence of any complaint by plaintiff in the matter, issuance of impugned notice by the learned trial Court to the petitioner is a glaring example of exercising powers in clear negation of Section 340 Cr.P.C. Lastly, learned counsel for the petitioner has argued that impugned notice is per se vulnerable for being bereft of reason as to why the learned trial Court felt it expedient in the interest of justice to hold inquiry under Section 340 Cr.P.C. In support of his various arguments, learned counsel, Mr. Purohit has placed reliance on following legal precedents:-

Sachida Nand Singh & Anr. v. State of Bihar & Anr. [(1998) 2 SCC 493].

Iqbal Singh Marwah & Anr. v. Meenakshi Marwah & Anr. [(2005) 4 SCC 370].

5. E.converso, learned Public Prosecutor, Mr. Rajpurohit, submits that legal proposition adumbrated in the authoritative pronouncements of Supreme Court, on which learned counsel for the petitioner has placed reliance, requires judicial scrutiny by the Court in correct perspective taking into account factual backdrop of the instant case. Learned Public Prosecutor further submits that State of Rajasthan has assailed the judgment and decree passed by learned trial Court by preferring Civil Regular First appeal No.232/13 before this Court wherein judgment of the learned trial Court has been assailed wholesomely, which is pending adjudication.

Heard learned counsel for the petitioner as well as learned Public Prosecutor and perused the materials available on record.

6. The question sought to be raised by the petitioner, in the instant petition, requires meticulous examination for tracing out the element of abuse of the process of Court in issuance of impugned notice and taking further proceedings pursuant thereto by the learned trial Court.

7. In order to explicate the genuine issue, it has become imperative for the Court to examine the judgment passed by learned trial Court, more particularly, observations and findings of the Court for initiation of impugned action against the petitioner. The learned trial Court, while deciding Issue No.6, has made certain observations against petitioner and Tehsildar in Para 89 of judgment. The recitals contained in Para 89 of the trial Court's judgment, in vernacular, read as infra :-

"blfy, mDr vfHker dks rFkk mDr nksuksa yksd lsodksa }kjk yksd nLrkostkr dh dwVjpuk djus ds fd, x, nqLlkgl dks n`f"Vxr j[krs gq, ukSdj"kkgh dh fujadq"k] vU;k;iw.kZ] vuqfpr] voS/k ,oa euekuh dk;Zokgh rFkk yksd nLrkostkr dh dwVjpuk dh nqLlkfgd izo`fRr ij vadq"k yxkus rFkk gLrxr izdj.k ds oknh ds lkFk iw.kZ:is.k U;k; djus ds fy, rRdkyhu ftyk dysDVj] Mwaxjiqj o rRdkyhu rglhynkj] Mwaxjiqj MhMCY;w&2 /khjsUnz O;kl ds fo:) vkijkf/kd "kM+;a= dh jpuk djus o vkijkf/kd "kM+;a= ds vxzlj.k esa oknh o bl U;k;ky; ds lkFk Ny djus] Ny ds iz;kstu ls eY;oku izfrHkwfrLo:i rRdkyhu rglhynkj] Mwaxjiqj dh fjiksVZ izn"kZ&8 rRdkyhu ftyk dysDVj] Mwaxjiqj ds vkns"k izn"kZ&,1 dh dwwVjpuk djus] mUgsa dwVjfr tkurs gq, vlyh ds :i esa mi;ksx ysus] fof/k ds funs"k dh oknh dks {kfr dkfjr djus ds vk"k; ls yksd lsod gksrs gq, voKk djus] oknh dks {kfr igqapkus ds vk"k; ls v"kkq) nLrkost dh jpuk djus] "kiFk ij >wBk dFku djus] feF;k lk{; x<+us] >wBh lk{; dks okLrfod ,oa lPph lk{; ds :i esa Hkz"VrkiwoZd mi;ksx esa ysus] fjiksVZ izn"kZ&8 o vkns"k izn"kZ&,1 esa >wBs dFku djus] bu nLrkostkr dks lgh nLrkost ds :i esa mi;ksx esa ysus] U;kf;d dk;Zokgh esa Hkz"VrkiwoZd fof/k ds izfrdwy fjiksVZ rS;kj djus] ds d`R; ds fy, Hkk0na0la0 dh /kkjk 120ch] 420] 467] 468] 471] 166] 167] 181] 191@193] 192@193] 196] 199] 200 o 219 ds v/khu n.Muh; vijk/kksa ds fy, /kkjk 340 n.M izfdz;k lafgrk ds rgr izkjafHkd tkWap fd;k

tkuk U;k;fgr esa lehphu ik;k tkrk gS] ftlds fy, loZizFke mDr nksuksa vf/kdkfj;ksa dks bl fu.kZ; dh IR;izfr layXu djrs gq, uksfVI tkjh djuk rFkk Li"Vhdj.k fy;k tkuk o rn~uqlkj vkxkeh dk;Zokgh vey esa yk;k tkuk vko";d gks tkrk gSA"

8. The observations and findings recorded by the learned trial Court, referred to *supra*, now merits examination on the pre-requisites envisaged under Section 340 Cr.P.C. A bare reading of Section 340 Cr.P.C. makes it abundantly clear that any preliminary inquiry initiated thereunder has to be confined to offences referred to in clause (b) of sub-section (1) of Section 195 Cr.P.C. That apart, initiation of an inquiry in respect of any offence described under Section 463 or punishable under Section 471, 475, or Section 476 IPC is permissible 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. In that background, if the finding recorded by learned trial Court in above quoted Para 89 of the judgment is properly construed then it is clear and unequivocal that there is no whisper to draw an inference that petitioner has allegedly committed such offence in respect of a document produced or given in evidence in the proceeding before the Court.

9. Legal position is no more *res integra* that where a power is required to be exercised by a certain authority in a certain way, it should be exercised in that manner or not at all and that all other modes of performance are necessarily forbidden. This sound legal proposition is founded on maxim "*Expressio unius est exclusio alterius*" based on the assumption of legislative omniscience, because it would make sense only if all omissions in the legislative drafting were deliberate.

10. Upon conjoint reading of both the sections and after spelling out the cumulative legislative intent, the legal position has no more remained fluid inasmuch as proceedings under Section 340 Cr.P.C. can be resorted to by the Court on an application or *suo moto* when it is considered expedient in the interest of justice to punish the delinquent and not merely because there is some inaccuracy in the statement/document, which may be immaterial. The law also mandates that endeavour of the Court in such matters must reflect the requisite judicial deliberation and not merely mechanical and superficial approach.

11. A threadbare examination of the finding the learned trial Court in Para 89 of the judgment and the recitals contained in the impugned notice further unfurls one more glaring infirmity which cannot lose sight of this Court. Perusal of the judgment passed by learned trial Court makes it crystal clear that while castigating the petitioner for the alleged offences, it has not recorded any finding worth the name that public document is forged when it was *custodia legis*. As a matter of fact, it is rather difficult to fathom that petitioner can be prosecuted and penalized for alleged offences in absence of *factum* of *custodia legis* regarding public document in question. This sort of situation has *per se* rendered the impugned notice vulnerable.

12. Supreme Court, in case of *Sachida Nand Singh* (*supra*), while harmoniously construing Section 340(1) and 195(1)(b)(ii) Cr.P.C., observed that there must be

allegation that an offence described in Section 463 IPC or any other offence punishable under Section 471, 475, 476 IPC has been committed by a delinquent and that such offence has been committed in respect of a document produced or given in evidence in any proceeding in any Court. The Court held:-

6. A reading of the clause reveals two main postulates for operation of the bar mentioned there. First is, there must be allegation that an offence (it should be either an offence described in Section 463 or any other offence punishable under Sections 471, 475, 476 of the IPC) has been committed. Second is that such offence should have been committed in respect of a document produced or given in evidence in a proceeding in any court. There is no dispute before us that if forgery has been committed while the document was in the custody of a court, then prosecution can be launched only with a complaint made by that court. There is also no dispute that if forgery was committed with a document which has not been produced in a court then the prosecution would lie at the instance of any person. If so, will its production in a court make all the difference?

7. Even if the clause is capable of two interpretations we are inclined to choose the narrower interpretation for obvious reasons. Section 190 of the Code empowers "any magistrate of the first class" to take cognizance of "any offence" upon receiving a complaint, or police report or information or upon his own knowledge. Section 195 restricts such general powers of the magistrate, and the general right of a person to move the court with a complaint is to that extent curtailed. It is a well-recognised canon of interpretation that provision curbing the general jurisdiction of the court must normally receive strict interpretation unless the statute or the context requires otherwise (*Abdul Waheed Khan v. Bhawani*).

The Court elucidated an interlink between Sections 340(1) and 195(1)(b) and observed that the scope of preliminary inquiry envisaged under Section 340(1) is to ascertain as to whether any offence affecting administration of justice has been committed in respect of a document produced in court or given in evidence in a proceeding in that Court. Emphasizing the factum of custodia legis, the Court held:-

9. As Section 340(1) of the Code has an interlink with Section 195(1)(b) it is necessary to refer to that sub-section in the present context. The said sub-section reads as follows:

"340. 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 clause (b) of sub-section (1) of Section 195, which appears to have been committed in or in relation to a proceeding in that Court 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 first 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."

10. The sub-section puts the condition that before the Court makes a complaint of "any offence referred to in clause (b) of Section 195(1)" the Court has to follow the procedure laid down in Section 340. In other words, no complaint can be made by a court regarding any offence falling within the ambit of Section 195(1)(b) of the Code without first adopting those procedural requirements. It has to be noted that Section 340 falls within Chapter XXVI of the Code which contains a fasciculus of "Provisions as to offences affecting the administration of justice" as the title of the chapter appellates. So the offences envisaged in Section 195(1)(b) of the Code must involve acts which would have affected the administration of justice.

11. The scope of the preliminary enquiry envisaged in Section 340(1) of the Code is to ascertain whether any offence affecting administration of justice has been committed in respect of a document produced in court or given in evidence in a proceeding in that Court. In other words, the offence should have been committed during the time when the document was in custodia legis.

12. It would be a strained thinking that any offence involving forgery of a document if committed far outside the precincts of the Court and long before its production in the Court, could also be treated as one affecting administration of justice merely because that document later reached the court records.

x x x

23. The sequitur of the above discussion is that the bar contained in Section 195(1)(b)(ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a court. Accordingly we dismiss this appeal.

13. The aforesaid view is further reiterated and confirmed by a Constitution Bench of Supreme Court in *Iqbal Singh Marwah* (supra). The Court, after examining the scheme of statutory provision, has observed:

10. The scheme of the statutory provision may now be examined. Broadly, Section 195 CrPC deals with three distinct categories of offences which have been described in clauses (a), (b)(i) and (b)(ii) and they relate to (1) contempt of lawful authority of public servants, (2) offences against public justice, and (3) offences relating to documents given in evidence. Clause (a) deals with offences punishable under Sections 172 to 188 IPC which occur in Chapter X IPC and the heading of the Chapter is - "Of Contempts of the Lawful Authority of Public

Servants". These are offences which directly affect the functioning of or discharge of lawful duties of a public servant. Clause (b)(i) refers to offences in Chapter XI IPC which is headed as - "Of False Evidence and Offences Against Public Justice". The offences mentioned in this clause clearly relate to giving or fabricating false evidence or making a false declaration in any judicial proceeding or before a court of justice or before a public servant who is bound or authorised by law to receive such declaration, and also to some other offences which have a direct correlation with the proceedings in a court of justice (Sections 205 and 211 IPC). This being the scheme of two provisions or clauses of Section 195 viz. that the offence should be such which has direct bearing or affects the functioning or discharge of lawful duties of a public servant or has a direct correlation with the proceedings in a court of justice, the expression "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" occurring in clause (b)(ii) should normally mean commission of such an offence after the document has actually been produced or given in evidence in the court. The situation or contingency where an offence as enumerated in this clause has already been committed earlier and later on the document is produced or is given in evidence in court, does not appear to be in tune with clauses (a)(i) and (b)(i) and consequently with the scheme of Section 195 CrPC. This indicates that clause (b)(ii) contemplates a situation where the offences enumerated therein are committed with respect to a document subsequent to its production or giving in evidence in a proceeding in any court.

11. Section 195(1) mandates a complaint in writing to the court for taking cognizance of the offences enumerated in clauses (b)(i) and (b)(ii) thereof. Sections 340 and 341 CrPC which occur in Chapter XXVI give the procedure for filing of the complaint and other matters connected therewith. The heading of this Chapter is - "Provisions as to Offences Affecting the Administration of Justice". Though, as a general rule, the language employed in a heading cannot be used to give a different effect to clear words of the section where there cannot be any doubt as to their ordinary meaning, but they are not to be treated as if they were marginal notes or were introduced into the Act merely for the purpose of classifying the enactments. They constitute an important part of the Act itself, and may be read not only as explaining the sections which immediately follow them, as a preamble to a statute may be looked to explain its enactments, but as affording a better key to the constructions of the sections which follow them than might be afforded by a mere preamble. (See Craies on Statute Law, 7th Edn., pp. 207, 209.) The fact that the procedure for filing a complaint by court has been provided in Chapter XXVI dealing with offences affecting administration of justice, is a clear pointer to the legislative intent that the offence committed should be of such type which directly affects the administration of justice viz. which is committed after the document is produced or given in evidence in court. Any offence committed with respect to a document at a time prior to its production or giving in evidence in court cannot, strictly

speaking, be said to be an offence affecting the administration of justice.

14. Finally, while answering the reference, the Constitution Bench reiterated the principles propounded in *Sachida Nand Singh* (supra) and held:-

33. In view of the discussion made above, we are of the opinion that *Sachida Nand Singh* has been correctly decided and the view taken therein is the correct view. Section 195(1)(b)(ii) CrPC would be attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in a proceeding in any court i.e. during the time when the document was in custodia legis.

15. Supreme Court, in a later judgment in case of *Rugmini Ammal (Dead) by LRs. v. V. Narayana Reddiar & Ors.* [(2007) 12 SCC 611] reiterated the same principle for initiation of proceeding under Section 340 Cr.P.C.

16. Now, advertent to offence under Section 193 IPC and other offences under the Penal Code, mentioned in Section 195(1)(b)(i), suffice it to observe that the learned trial Court while passing its judgment has not recorded a finding of any prima facie case and deliberate falsehood on a matter of substance. Therefore, sans reasonable foundation for the charge and expediency for initiation of proceedings in the interest of justice, the impugned notice is clearly vitiated in law.

17. My aforesaid view is also fortified by a judgment of Division Bench of Delhi High Court in *Indraprastha Power General Co. Ltd., v. Faheem Baig* [2015 (148) DRJ 167], wherein the Division Bench has held:

"Whether or not prosecution is expedient in the interest of justice has to be determined with reference to the facts and circumstances of each case. The question whether it is worthwhile in public interest or not to prosecute can be decided even before conducting an enquiry under Section 340 of the CrPC. The Supreme Court in *Pritish v. State of Maharashtra*, (2002) 1 SCC 253 held that hub of Section 340 is formation of an opinion by the Court that it is expedient in interest of justice that an enquiry should be made into an offence which appears to have been committed; in order to form such an opinion, the Court is empowered to hold a preliminary enquiry; it is not peremptory that such a preliminary enquiry be held; even without such preliminary enquiry the Court can form such an opinion; the purpose of the preliminary enquiry is only to find whether it is expedient in the interest of justice to enquire into the offence which appears to have been committed. It is not every false declaration or statement that is intended to be the subject matter of prosecution. Reference in this regard can be made to *Rugmini Ammal v. Narayana Reddiar*, (2007) 12 SCC 611. The purpose of Section 340 CrPC is to provide a safeguard against vexatious or frivolous prosecution. Section 340 is not permitted to be employed as handmaid of private persons to achieve their revengeful attitude against another person. Care has to be taken that a Court of law is not employed as a tool by litigants for achieving their own ends. The Court has to see whether prosecution is

undertaken in the interest of justice and not to satisfy the private grudge of litigant. Before setting the criminal law into motion the Court has to exercise great care and caution and has to arrive at a satisfaction that there is reasonable foundation for the charge in respect of which prosecution is directed. No prosecution is to be directed unless there is reasonable probability of conviction. The legislature by using the words "appears to have been committed" in Section 340 of the CrPC has shown an intention that there must be sufficient material before the Court to show that an offence within the meaning of Section 340 of the CrPC is likely to have been committed. Proceedings under Section 340 of the CrPC are not to be resorted to, to hamper the fair trial of a civil dispute."

18. A very vital fact that judgment and decree passed by the learned trial Court is under challenge before this Court in Civil Regular First Appeal No.232/2013, which is pending consideration, also deserves cognizance of the Court inasmuch as appeal is continuation of the proceedings of the main suit.

19. While Legislature has conferred discretion on a Court to initiate proceedings under Section 340 Cr.P.C. suo moto but then looking to the nature of the suit wherein plaintiff has claimed damages from the State on the principle of torturous liability attributing serious omissions on the part of its officials, exercise of power by the Court suo moto without there being any complaint of the plaintiff, ought to have been with utmost restraint and circumspection. Undeniably, the plaintiff has not submitted any application seeking prosecution of the petitioner and the learned trial Court has suo moto initiated the proceedings without recording any finding that public document in question was custodia legis and initiation of proceedings is considered expedient in the interest of justice. Therefore, in totality, I feel persuaded to record my indignation that before initiation of the proceedings under Section 340 Cr.P.C. by the learned trial Court, there was no proper judicial deliberation. Thus, initiation of proceedings under Section 340 Cr. P.C. against the petitioner is per se a glaring example of abuse of the process of the Court and it has become imperative for this Court to exercise inherent jurisdiction ex debito justitiae to upset the impugned notice for securing ends of justice.

20. The upshot of the above discussion is that instant criminal misc. petition is allowed, the impugned notice dated 9th of March 2013 issued by Additional District & Sessions Judge, Dungarpur and the entire proceedings pursuant thereto against the petitioner are hereby quashed and set aside.

21. Without mincing any words, it is also clarified that the observations made by the Court, for deciding this misc. petition and its final outcome, shall have no ramification on the Civil Regular First Appeal No.232 of 2013 preferred by the State against judgment & decree of learned trial Court.