

(2020) 02 BOM CK 0018
In the Bombay High Court
Case No : Criminal Appeal No. 153 Of 2019

Tarun Keshrichand Shah And Anr

APPELLANT

Vs

M/S. Kishore Engineering Company A Partnership Firm And
Ors

RESPONDENT

Date of Decision : 05-02-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 195, 195(1)(b)(i), 340, 341, 340(1), 479A

Companies Act, 1956 — Section 561(i)(b), 565(i)(b), 574

Indian Penal Code, 1860 — Section 193, 199, 200

Citation : (2020) 02 BOM CK 0018

Hon'ble Judges : Prithviraj K. Chavan, J

Bench : Single Bench

Advocate : Abhinav Chandrachud, Naresh Ratnani, Ashwin Ankhad, Ankit Lohia, Chetan R. Shah, Arun Mehta, Akshar, M.H. Mhatre

Final Decision : Disposed Of

Judgement

1. Feeling aggrieved with and dissatisfied by an order dated 5th October, 2018 passed in Notice of Motion No.823 of 2018 in Suit No.6117 of 2007 by

the learned Judge, City Civil Court, Greater Mumbai, the appellants have approached this Court under section 341 of the Code of Criminal Procedure

(for short as Cr. P.C.).

2. Facts germane for the decision of the appeal can be summarized thus:

The appellants have filed a civil suit in City Civil Court at Greater Mumbai against respondent No.1-M/s. Kishore Engineering Company for recovery

of amount of Rs.75,600/- towards arrears of service charges @ Rs.2100/- per month for the period from November, 2004 to October, 2007. The

appellants are legal heirs of Mr. Keshrichand B. Shah deceased Proprietor of M/s.

Union Commercial Corporation which came to be dissolved on the demise of its Proprietor on 22nd January, 1980.

3. Respondent No.1 is a partnership firm and was a licensee of the subject premises which is situated on the third floor of Churchgate House 32, Veer

Nariman Road, Fort, Mumbai - 400 023. Appellant No.2 is the Director of M/s. Modern Products Private Limited. It is contended that respondent

No.1 were liable to pay service charges @ Rs.2100/- per month to M/s. Union Commercial Corporation for the use of furniture and fixtures in the

said licence premises. After the death of Mr. Keshrichand B. Shah, respondent No.1 had paid service charges to the appellants till October, 2004.

Thereafter, they were in arrears of charges with effect from November, 2004 to October, 2007 amounting to Rs.75,600/-.

4. Despite due service upon respondent No.1 in June, 2008 by registered post, none appeared and, therefore, the suit proceeded further before this

Court. Subsequently, the suit came to be transferred on the list of un-defended suits. The suit thereafter came to be transferred to the City Civil Court,

Mumbai and proceeded ex-parte against respondent No.1. The appellants tendered their affidavit in lieu of evidence as well as written arguments on

6th May, 2015.

5. The judgment could not be delivered by the trial Court for a period of three years. Meanwhile, respondent No.2 came to be inducted as a defendant

qua licensed premises by respondent No.1 which, according to the appellants, is a trespass and wrongful as well as illegal occupation of the subject

premises by respondent No.2. Respondent No.2 took out a Notice of Motion No.1925 of 2017 for setting aside the order dated 11th February, 2014

for closing the evidence and order dated 12th November, 2014 for proceeding ex-parte in the aforesaid suit and Notice of Motion No.1346 of 2018 for

being joined as a party defendant in place and stead of respondent No.1.

6. It is the specific contention of the appellants that respondent No.3 in an affidavit dated May, 2017 in support of Notice of Motion No.1925 of 2017

and an affidavit dated 2nd April, 2018 in support of Notice of Motion No.1346 of 2018 deliberately and intentionally made a false statement on oath

that respondent No.2-Company i.e Nak Engineering Private Limited Company is the successor of respondent No.1-firm i.e M/s. Kishore Engineering

Company under part IX of the Companies Act, 1956, inter alia, contending that

respondent No.1 which is a registered partnership firm bearing registration No.65205 registered with Registrar of Firms, Government of Maharashtra was converted and registered as respondent No.2 a Private Limited Company under the provisions of Part IX of the Companies Act, 1956.

7. It is contended that respondent No.2 has falsely contended that respondent No.2-company was not aware and had not received any notice about aforesaid matter, as even respondent No.1-firm was not served with any notice and, therefore they could not appear in the matter.

8. Admittedly, appellant No.1 has already initiated eviction proceedings i.e L.E. & C Suit No.139/158 of 2007 in the Small Causes Court of Mumbai

against respondent No.1 as their licensee and respondents No.2 and 3 as the unauthorized occupants in respect of the subject premises. In an order

dated 6th September, 2008, it has been observed that respondent No.2 and respondent No.3 are not licensee of M/s. Modern Products Private Limited

of which appellant No.1 is a Director. It is held that respondents No.2 and 3 have been unlawfully inducted by respondent No.1 in the said premises

without permission of M/s. Modern Products Private Limited.

9. In Revision Application No.32 of 2009 in Exhibit 11 in L.E & C Suit No.139/158 of 2007, Division Bench of the Small Causes Court, by an order

dated 6th April, 2009 upheld the order of the Judge, Small Causes Court. Thus, it is contended that respondent No.2 is trying to make a backdoor entry

by projecting themselves as successor of respondent No.1.

10. Thus, according to the appellants, respondent No.2 had made a totally false statement through respondent No.3 who is the Director of respondent

No.2 and is also a full time practicing Chartered Accountant having full and complete knowledge of the provisions of Part IX of the Companies Act,

1956 who on oath stated that respondent No.2-Company is converted into and consequently it is the successor of respondent No.1-Firm, under Part

IX of the Companies Act 1956 only to dishonestly deceive and manipulate the appellants and the trial Court.

11. It is thus, contended that the learned trial Judge has failed to appreciate and consider all the aforesaid aspects while passing the impugned order.

The appellants have assailed the impugned order on the ground that the learned trial Judge had failed to appreciate that the only document relied on by

respondent No.2 in support of their claim being successor of respondent No.1-

Firm is the memorandum of association in which one of objects is to take over, acquire, undertake and carry on the business activities presently carried out by respondent No.1-Firm and two other partnership firms which merely indicates the intention of respondent No.2 and does not amount to actually taking over respondent No.1-partnership firm, and that even a single document for conversion furnished under Part IX of the Companies Act 1956 and even take over, for that matter, was produced which clearly shows neither conversion nor take over of respondent No.1-Firm by respondent No.2.

12. While countering the submissions made by the learned Counsel for the appellant, learned Counsel for the respondents contends that the appellants are habitual litigants who have filed various civil and criminal proceedings before several Courts. The learned Counsel has drawn my attention to paragraphs 2 and 6 of the plaint in Suit No.6117 of 2007, more particularly to the fact that M/s. Modern Products Private Limited itself is a tenant in respect of the suit premises who had granted licence to the respondents on a monthly compensation of Rs.400/-.

13. Learned Counsel has also drawn my attention to memorandum of association of respondent No.2, more particularly, main objects of the Company to be pursued by the Company on its incorporation. He emphasized that a certificate came to be duly issued by the Registrar of the Companies, Maharashtra. There is no question of fabricating a single document by respondent No.2. Respondent No.2 is, therefore entitled to the benefit of part IX of the Companies Act, 1956.

14. Learned Counsel for the respondents has further drawn my attention to the three orders passed by the trial Court in Notice of Motion No.1925 of 2017 in Suit No.6117 of 2007 dated 5th October, 2018, Notice of Motion No.1346 of 2018 dated 5th October, 2018 and the main Notice of Motion No.823 of 2018 dated 5th October, 2018. It is vehemently urged that since respondent No.2 is the successor company of respondent No.1, it should be given an opportunity to defend the suit. The learned Counsel, therefore, supported the impugned order passed by the trial Court.

15. A short question which needs determination is as to whether respondent No.3-Mr. Himanshu Patwa, director of Nak Engineering Company Private Limited, knowingly and intentionally had sworn false affidavits in Notices of Motion No.1925 of 2017 and 1346 of 2018 so as to say that

respondent No.2-Company was the successor of respondent No.1-Firm under Part IX of the Companies Act, 1956 which tantamounts to giving or

fabricating false evidence at any stage of judicial proceedings? The answer is in the affirmative for the reasons to follow.

16. I have meticulously gone through the entire record vis-a-vis, the impugned order. A detailed procedure is laid down in the Companies Act, 1956 for

converting a partnership firm into a Limited Company under Part IX of the Companies Act.

17. Following are the few basic requirements and procedure contemplated in Companies Act, 1956;

(a) There should be at least seven or more members to form a Limited Company under Part IX of the Companies Act, 1956;

(b) There is a requirement of Form No.1A filed with ROC;

(c) There has to be a supplementary partnership deed under settlement deed filed with ROC;

(d) There should be mention in the memorandum of association of the Company about reconstituting partnership having seven or more partners and

then only a Company under Part IX of the Companies Act, 1956 can be formed.

18. It is apparent from the record that respondent No.1-firm has only four partners and as such is incapable as well as statutorily barred and cannot be

said to be eligible for being converted into a Private Limited Company under Part IX of the Companies Act, 1956. Memorandum of Association and

Article of the Company indicates four subscribers as against minimum seven. No documents of whatsoever nature have been tendered by respondent

No.1 to indicate any such procedure as provided in Part IX of the Companies Act, 1956 has been followed. It would be apposite to refer section 561

(i) (b) of Part IX of the Companies Act, 1956 which requires seven or more persons for converting a partnership Firm into a Company. It is pertinent

to note that respondent No.1 continues to exist even today as per the certified extract issued by the Registrar of Firm, Government of Maharashtra.

The certificate of incorporation of respondent No.1-Company has been issued under section 574 of the Companies Act, 1956 which specifically

provides and mentions that the Company is incorporated under Part IX of the Companies Act, 1956. The certified extract of respondent No.1-Firm

from the Registrar Firms dated 20th September, 2016 indicates that respondent

No.1 continues to be an existing partnership firm.

19. An additional affidavit sworn by one of the appellants on 10th January, 2020 which is annexed with an information provided by the Assistant

Registrar of Companies Maharashtra, Mumbai under Right to Information Act buttressed the fact that as per the incorporation certificate issued by

that office on 22nd February, 1988, the Company was registered as Private Limited and not Part IX Company. This information was sought for by the

appellant as to whether Nak Engineering Company Private Limited registered under the Companies Act, 1956 and having CIN No.

U74210MH1988PTCO46288 is a Company converted under Part IX of the Companies Act, 1956. Thus, this information hammers a last nail in the

coffin of the respondent's contention.

20. The documents referred hereinabove, if juxtaposed with affidavit sworn in by respondent No.3 who is admittedly a full time practicing Chartered

Accountant and a Member with the Institute of Chartered Accountants of India and also a Proprietor of Himanshu Y Patwa and Company has had

complete knowledge as regards the provisions of Part IX of the Companies Act, 1956. Despite being aware about legal niceties, he appears to have

knowingly made a statement on oath that respondent No.2-Company is converted and consequently is the successor of respondent No.1-Firm under

Part IX of the Companies Act, 1956 which can only be said to be with a dishonest intention.

21. The learned Counsel for the appellants has, therefore, rightly placed a useful reliance on a decision of the Supreme Court in case of Amarsang

Nathaji Vs. Hardik Harshadbhai Patel, AIR 2017 Supreme Court Cases 11.3 It would be apposite to refer to paragraphs 5 and 6 of the judgment

which read thus;

5. There are two preconditions for initiating proceedings under Section 340 Cr. PC:

(i) materials produced before the court must make out a prima facie case for a complaint for the purpose of inquiry into an offence referred to in

clause (b) (i) of sub-section (1) of Section 195 CrPC, and

(ii) it is expedient in the interests of justice that an inquiry should be made into the alleged offence.

6. The mere fact that a person has made a contradictory statement in a judicial

proceeding is not by itself always sufficient to justify a prosecution under sections 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "IPC"); but it must be shown that the defendant has intentionally given a false statement at any stage of the judicial proceedings or fabricated false evidence for the purpose of using the same at any stage of the judicial proceedings. Even after the above position has emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate an inquiry into the offences of false evidence and offences against public justice and more specifically referred to in Section 340 (1) CrPc, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S. Mohd. v. Union of India). The court must be satisfied that such an inquiry is required in the interests of justice and appropriate in the facts of the case.

22. The ratio decidendi is squarely applicable to the case in hand wherein the material tendered on record, prima facie, makes out a case for the purpose of inquiry into an offence referred to in clause (b) (i) of sub section (1) of Section 195 of the Criminal Procedure Code. The material is quite sufficient to indicate that there has been a deliberate and intentional false evidence for using the same in a judicial proceeding.

23. In case of Prem Sagar Manocha Vs. STATE (NCT OF DELHI), (2016) 4 Supreme Court Cases 5,7 the Hon'ble Supreme Court while dealing with section 193 of the Indian Penal Code observed that if an expert changes his stand in the Court as a witness from that taken in his written opinion whether to help the accused or otherwise then if it is deliberate or based on the insistence of trial Court then whether the change of stand in the case amounted to perjury by such expert witness.

24. It would be apposite to reproduce paragraphs 10, 11 and 12 of the judgment to understand scope of section 340 of Cr.P.C prior to amendment in 1973 which was section 479A in 1998 and thereafter the position of the sub section post amendment. Paragraphs 10,11 and 12 read as under:

10. Section 340 CrPC falls under Chapter XXVI of the Code - "Provisions as to Offences Affecting the Administration of Justice". Either on an application or otherwise, if any court forms an opinion that it is expedient in the interest of justice that an inquiry should be made in respect of an offence referred to under Section 195 CrPC which appears to have been

committed in relation to a proceeding in that court, the court after such preliminary inquiry, enter a finding and make a complaint before the Magistrate of competent jurisdiction. It is this jurisdiction which has been invoked suo motu by the High Court in the criminal appeal, leading to the impugned order.

11. Section 340 CrPC, prior to amendment in 1973, was Section 479-A in the 1898 Code and it was mandatory under the pre-amended provision to record a finding after the preliminary inquiry regarding the commission of offence; whereas in the 1973 Code, the expression “shall” has been substituted by “may” meaning thereby that under the 1973 Code, it is not mandatory that the court should record a finding. What is now required is only recording the finding of the preliminary inquiry which is meant only to form an opinion of the court, and that too, opinion on an offence “which appears to have been committed”, as to whether the same should be duly inquired into.

12. We are unable to appreciate the submission made by the learned Senior Counsel that the impugned order is liable to be quashed on the only ground that there is no finding recorded by the court on the commission of the offence. Reliance placed on *Har Gobind v. State of Haryana* is of no assistance to the appellant since it was a case falling on the interpretation of the pre-amended provision of the Cr.P.C. A three- Judge Bench of this Court in *Prithvi v. State of Maharashtra* has even gone to the extent of holding that the proceedings under section 340 of CrPC can be successfully invoked even without a preliminary inquiry since the whole purpose of the inquiry is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed. To quote:

“9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a

complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a

complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest

of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is

always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion.

It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or

not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of

justice to inquire into the offence which appears to have been committed.â??

25. Thus, it is quite clear that after having gone through the entire material on record, prima facie opinion can be formed that an inquiry needs to be

initiated into an offence/s referred to in clause (b) of sub section (i) of section 195 Cr. P.C. It must be noted that an inquiry contemplated in sub

section (i) is not for finding whether the respondents are guilty or not but it is restricted only to the extent as to whether it is expedient in the interest of

justice to inquire into the offence which appears to have been committed. The ratio is, therefore, squarely applicable to the present set of facts.

26. The learned Counsel for the respondents has also placed reliance upon a judgment of the Supreme Court in the case of Chajoo Ram Vs. Radhey

Shyam, AIR 1971 Supreme Court 1367. The essence of the judgment can be found in paragraph 7 which reads thus;

â??7. The prosecution for perjury should be sanctioned by Courts only in those cases where the perjury appears to be deliberate and conscious and

the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavit is an evil which must be effectively curbed

with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful

material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and

not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be 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. In the present case we do not think the material brought to our notice was sufficiently adequate to justify the conclusion that it is expedient in the interests of justice to file a complaint. The approach of the High Court seems somewhat mechanical and superficial: it does not reflect the requisite judicial deliberation : it seems to have ignored the fact that the appellant was a Panch and authorized to act as such and his explanation was not implausible. The High Court further appears to have failed to give requisite weight to the order of the District Magistrate which was confirmed. by the Sessions Judge, in which it was considered inexpedient to initiate prosecution on the charge of alleged false affidavit that the appellant had not acted as Sarpanch during the period of the stay order. The subject matter of the charge before the District Magistrate was substantially the same as in the present case. Lastly, there is also the question of long lapse of time of more than ten years since the filing of the affidavit which is the subject matter of the charge. This factor is also not wholly irrelevant for considering the question of expediency of initiating prosecution for the alleged perjury. In view of the nature of the alleged perjury in this case this long delay also militates against expediency of prosecution. And then by reason of the pendency of these proceedings since 1962 and earlier similar proceedings before the District Magistrate also the appellant must have suffered both mentally and financially. In view of all these circumstances we are constrained to allow the appeal and set aside the order directing complaint to be filedâ??.

(emphasis supplied)

27. The ratio laid down by the Honâ??ble Supreme Court in this judgment is in consonance with the judgment of the Supreme Court in case of Premsagar (supra). Thus, giving of false evidence in the form of an affidavit or fabricating false evidence in the judicial proceeding needs to be dealt with an iron hand. Nevertheless, for initiating prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose as has been observed in the case of Chajoo Ram (supra). As already stated that the material on record qua the conduct of the respondents clearly indicates that it is expedient in the interest of justice to initiate an inquiry. There is, prima facie, case of

deliberate falsehood on the part of the respondents. The ratio, I am afraid, is not of any assistance to the respondentsâ?? case.

28. As such, the learned trial Judge has erred not only in fact but also in law to take into consideration the true scope and ambit of Part IX of the

Companies Act, 1956 as well as clause (b) of sub section (i) of Section 565 of the said Act by reaching an erroneous conclusion in the impugned

order. The impugned order, therefore needs to be quashed and set aside and as such, it stands quashed and set aside.

29. Upshot of the aforesaid discussion is that there is a prima facie case and deliberate falsehood on a matter of substance. There is an adequate

foundation for framing a charge. It is, therefore, expedient in the interest of justice that there should be a complaint.

30. Needless to say that the respondents will have full and adequate opportunity in due course of the proceedings to establish their innocence.

31. As such, the impugned order dated 5th October, 2018 in Notice of Motion No.823 of 2018 in Suit No.6117 of 2007 is hereby quashed and set

aside.

32. The learned trial Judge shall proceed further in accordance with section 340 of the Cr. P.C independently, un-influenced by the observations made

hereinabove.

33. The appeal stands disposed of in the aforesaid terms.

[PRITHVIRAJ K. CHAVAN, J.]

At this stage, the learned Counsel for the respondents prays for staying the effect and operation of the judgment for a period of four weeks to

facilitate the respondents to approach the Higher forum.

In the interest of justice, the prayer is granted for a period of three weeks.