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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 12.03.2015**

% **CRL.A. 693/2012 & CRL.M.A. 7278/2012**

ABULIAS JAED & ANR Appellants

Through: Mr. Vimal Duggal, Advocate
versus

STATE & ANR Respondents

Through: Mr. Lovkesh Sawhney, APP.
Mr. Salar M Khan and Mr. Wasiq
Khan, Adv for R-2.

% **CRL.A. 905/2012 & CRL.M.A. 13680/2012**

NISHAT JAVED Appellant

Through: Mr. Vimal Duggal, Advocate
versus

STATE & ANR. Respondent

Through: Mr. Lovkesh Sawhney, APP.
Mr. Salar M Khan and Mr. Wasiq
Khan, Adv for R-2.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. These two appeals are preferred under Section 341 Cr PC to assail the common order dated 21.04.2012 passed by Ms. Madhu Jain, ASJ, Saket, New Delhi, whereby the application preferred by respondent no.2 under

Section 340 Cr PC was allowed and the matter was directed to be placed before the ACMM (South Distt.) to proceed with the trial of the appellants under Section 340 Cr PC either on his own, or by assigning the same to the concerned Court of P.S. Jamia Nagar.

2. FIR No.7/2009 was registered at P.S. Jamia Nagar, Delhi on the complaint of respondent no.2 herein. The appellants were the named accused in the said FIR under Section 448/380/341/34 IPC.

3. The appellants applied for anticipatory bail sometime in April 2009. The learned ASJ directed the IO to issue 3 days advance notice in the event of the appellants arrest. The appellants were issued the requisite notice on 20.05.2009 for their arrest.

4. The appellants preferred a petition under Section 482 Cr PC to seek the quashing and cancellation of FIR No.7/2009 before this Court, being Crl MC No.1692/2009. This petition was listed before the Court of Ms. Justice Reva Khetrpal on 26.05.2009, when the following order came to be passed:

“Crl.M.A.No.6158/2009 (Exemption)

Exemption granted subject to all just exceptions.

Application stands disposed of accordingly.

CRL.M.C. 1692/2009 and Crl.M.A.No.6157/2009 (stay)

Notice. Mr.U.L.Watwani, the learned Addl. Public Prosecutor accepts notice on behalf of the State/respondent No.1. Notice shall now issue to the respondent No.2, on the petitioners taking the necessary steps, returnable for 15th July, 2009.

List for consideration on 15th July, 2009.

REVA KHETRAPAL, J

MAY 26, 2009”

5. The appellants thereafter moved an application to seek bail in the Court of the District & Sessions Judge, Patiala House, New Delhi under Section 438 Cr PC. The averment made by the appellants in para 2 of the said application reads as follows:

“That on 26.05.2009, the applicants herein approached the Hon’ble High Court of Delhi for quashing of the aforesaid FIR. The Hon’ble Court of Smt. Reva Khetrapal was pleased to issue notice in CRL M.C. 1692/2009 (Abulais Javed & Ors Vs State & Anr) and directed Ld. Counsel for State to inform the IO to not to harass the applicants herein. A copy of the information sent by the Ld. Counsel for the State to the IO dated 26.05.2009 is annexed herewith as Annexure-2”.

6. The appellants filed as Annexure-2 along with the bail application the index of their quashing petition (Crl MC 1692/2009), which had the following inscription in hand:

“Learned IO was directed through learned Advocate for State not to unduly harass the petitioners.

*Sd/
(Illegible)
26.05.09”*

7. The averment of the appellants in the bail application, extracted herein above, was to the effect that the aforesaid endorsement was *“the information sent by the learned Counsel for the State to the IO dated*

26.05.2009". The said application for anticipatory bail was disposed of by the learned ASJ Ms. Pinky on 01.06.2009. The appellants were granted anticipatory bail.

8. Respondent no.2 preferred the application under Section 340 Cr PC in the said Bail Application proceedings on or about 27.07.2010 on the premise that the appellants had made deliberately and knowingly false averments in para 2 of their bail application to mislead the learned ASJ hearing the anticipatory bail application, supported by the affidavit, to the effect that on 26.05.2009 this Court (Ms. Justice Reva Khetrapal) while issuing notice in CrI MC No.1692/2009, directed the counsel for the State to inform the IO not to harass the appellants. Respondent no.2 stated that no such direction was passed by this Court in the aforesaid CrI MC No.1692/2009. Respondent no.2 produced the certified copies of the order dated 26.05.2009, 16.07.2009 and 17.09.2009 passed by this Court in the aforesaid CrI MC No.1692/2009.

9. The learned ASJ while allowing the said application of respondent no.2, by placing reliance on the judgment of this Court in **Sanjeev Kumar v. State**, 174 (2010) DLT 214, observed as follows:

"Thus, applying the principles of abovesaid authoritative pronouncement in the case in hand, it is clear that the accused/non applicants without any orders from the Hon'ble High Court mentioned such facts in the application for anticipatory bail which weighed in the mind of the court to grant them bail. Even in their reply to the application under Section 340 Cr.P.C, the non applicants/accused have not denied this fact and it has been simply stated by them that oral directions were given by the Hon'ble High Court to the counsel appearing for the State who assured the court that he will direct

the Investigating officer. All this was done by accused/non applicants despite knowing the fact that there are no such directions by the Hon'ble High Court but still the non applicant's/accused mentioned the same in their applications for grant of anticipatory bail. If oral directions given by the Hon'ble High Court to the Ld. Counsel for the state were their, then it was the duty of the non applicant's/accused to mention this fact in their application also. Neither it has been mentioned that these were only the oral directions nor it was mentioned that the Ld. Counsel for state gave in writing these directions of the Hon'ble High Court on the copy of the petition received by the counsel for the accused. This clearly shows the manipulation on behalf of the nonapplicants/ accused only with the sole motive to get bail/relief from the court.

6. *This is a clear cut case of perjury, misrepresentation by the non applicant/accused in the court in order to get relief of bail”.*

10. The submission of counsel for the appellants is that this Court (Ms. Justice Reva Khetrpal) had made an oral direction to the IO through the learned APP for the State not to unduly harass the appellants (the petitioners in CrI MC No.1692/2009). He submits that while passing the impugned order, the learned ASJ has not conducted any preliminary inquiry as mandated by Section 340 Cr PC. The learned ASJ should have recorded the statement of the learned APP, who appeared in CrI.M.C. No.1692/2009; called for the record of the State pertaining to the said case, and; only thereafter formed the opinion whether or not it was expedient in the interest of justice to make an inquiry into the alleged act of making a false claim in Court. In support of his submission that it was mandatory to hold a preliminary inquiry before directing registration of a complaint, reliance has been placed on the decisions reported as *Sanjeev Arora v. State of*

Rajasthan, 2007 (5) RCR (Crl) 443, and **Sri Chand v. State of U.P.**, 2003 Crl LJ 4094.

11. Learned counsel submits in relation to the endorsement made on the index of Crl MC No.1692/2009 – which was filed as Annexure-2 to the bail application, that it should have been first examined as to who had made the said endorsement. However, he candidly admitted that the said index copy was taken from the record of then counsel of the appellants, and was not the index of the copy supplied to the learned APP for the State.

12. Learned counsel submits that it is not uncommon for this Court to issue oral direction of the nature described by the appellants in para 2 of their bail application. He submits that the appellants did not even highlight the allegedly fake averment, while advancing arguments on the bail application. The said aspect has not weighed with the learned ASJ while granting anticipatory bail to the appellants, as it does not find mention in the said order dated 01.06.2009. The learned ASJ had granted the anticipatory bail on the premise that the complainant and the accused were related, and the dispute was primarily a property dispute. Learned counsel, therefore, submits that no undue advantage was sought to be drawn by the appellants by making the said averment.

13. Learned counsel submits that the alleged forgery of the document, namely, the index of Crl.M.C. No.1629/2009 – with the endorsement thereon, if at all, was committed not in the Court as it was not committed “*in respect of a document produced or given in evidence in a proceeding in*” the Court as the endorsement on the index of Crl.M.C. No.1629/2009 had been made before the filing of the said document along with the bail application.

Therefore, submits learned counsel, that Section 340 Cr.P.C. could not be invoked. In support of this submission, learned counsel places reliance on the judgment of this Court in ***C.L. Manchanda Vs. State & Another***, 2007 (98) DRJ 409. In this decision, this Court had considered the judgment of the Constitution Bench of the Supreme Court in ***Iqbal Singh Marwah & Another Vs. Meenakshi Marwah & Another***, 2005 III AD (SC) 489. This Court had observed as follows:

“16. In Iqbal Singh's case (supra) after analysis of the relevant provisions and noticing a number of earlier decisions, the Supreme Court recorded its conclusion in paragraph 25 which is being reproduced below:-

“25. 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) Cr.P.C. 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.”

17. Thus it is no longer res integra that the bar contained in Section 195(1)(b)(ii) of the Code of Criminal Procedure 1973 would not apply where forgery of a document was committed before the said document was produced in Court.

18. In the instant case, the alleged forged document Page 9 of 10 were produced in the Court of Civil Judge subsequently. It is nobody's case that any offence was as enumerated in Section 195(1)(b)(ii) in respect to said forged documents after it has been produced or filed in the Court of Civil Judge. Therefore, the bar created by Section 195 (1)(b)(ii) of the Code of Criminal Procedure 1973 would not come into play and there is

no embargo on the power of the learned ACMM to take cognizance of the offence on the basis of the complaint filed by the complainant. The view taken by the learned ACMM is perfectly correct and calls for no interference.”

Therefore, submits learned counsel that the impugned order is laconic and cannot be sustained.

14. On the other hand, the submission of learned APP Mr. Sawhney and learned counsel for the respondent No.2/ complainant is that the appellant had, firstly, not claimed that only an oral direction had been issued by this Court (Ms. Justice Reva Khetrpal) on 26.05.2009 that while dealing with CrI.M.C. No.1629/2009 as claimed by the appellants. The impression given was that the alleged direction formed part of the order passed by this Court in CrI.M.C. No.1629/2009. Respondents further submit that the appellants did not stop at making the said averment, and proceeded to attribute the endorsement made on the index of CrI.M.C. No.1629/2009 (filed as Annexure-2) as that made to learned counsel for the State to communicate the so-called oral direction to the IO.

15. The respondents submit that the endeavour to produce the index of CrI.M.C. No.1629/2009, with the alleged endorsement made by learned counsel for the State, leaves no manner of doubt that the appellants intended to mislead the Court hearing the anticipatory bail application into believing, firstly, that such an oral direction had been issued to learned counsel for the State by the Court hearing CrI.M.C. No.1629/2009, and secondly, that the said oral direction had also been noted and communicated by the learned counsel for the State to the IO. Learned counsel submit that both these representations held out by the appellants were false to the record.

16. Learned counsel submit that the learned ASJ while passing the impugned order had undertaken a preliminary inquiry, and it cannot be said that the learned ASJ had directed the conduct of trial on the application of respondent No.2 under Section 340 Cr.P.C. without conducting even a preliminary inquiry. They argued that the learned ASJ was not obliged to conduct a full-fledged trial on her own while dealing with an application under Section 340 Cr.P.C., since the learned ASJ has not returned any definite findings with regard to the commission of an offence enumerated under Section 195(1)(b).

17. Learned counsels have also submitted that the judgment rendered in **C.L. Manchanda** (supra) would have no application in the facts of the present case for the reason that the said decision was rendered in the context of Section 195(1)(b)(ii) of the Cr.P.C., whereas the present case falls under Section 195(1)(b)(i), since the offence allegedly committed by the appellants is that of dishonestly making a false claim in Court which falls under Section 209 I.P.C. Section 290 I.P.C. reads as follows:

“209. Dishonesty making false claim in Court.--Whoever fraudulently or dishonestly, or with intent to injure or annoy any person, makes in a Court of Justice any claim which he knows to be false, shall be punished with imprisonment of either description for a term which may extend to two years, and shall also be liable to fine.”

18. It is submitted that the appellants fraudulently, or dishonestly made, in a Court of justice, a claim that this Court (Ms. Justice Reva Khetrapal) had directed learned counsel for the State to direct the IO not to harass the appellants, while dealing with CrI.M.C. No.1629/2009, and that the learned counsel for the State had made an endorsement on the index of CrI.M.C.

No.1629/2009 to that effect, and that the appellants knew that the said claim was false.

19. Learned counsel submit that the decision rendered by this Court in **Sanjeev Kumar** (supra) was the one that was squarely applicable in the facts of the present case.

20. Section 340 Cr.P.C. reads as follows:

“340. Procedure in cases mentioned in Section 195:-

(1) 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 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.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such

complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of Section 195.

(3) A complaint made under this section shall be signed-

(a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

(b) in any other case, by the presiding officer of the Court.

(4) In this section, "Court" has the same meaning as in Section 195."

21. A perusal of Section 340 Cr.P.C. would show that it sets out the procedure to be adopted by the Court in which, or in relation to which the offence under Section 195(1)(b) appears to have been committed. It is, firstly, to be noticed that the procedure set out in Section 340 Cr.P.C. applies in respect of clause (b) of Section 195(1) of the Cr.P.C, which has 3 sub-clauses viz. sub-clauses (i), (ii), and (iii).

22. Learned counsel for the appellants is right in his submission that Section 340 Cr.P.C. cannot be invoked in respect of a document produced, or given in evidence in a proceedings in a Court, where the offences enumerated in Section 195(1)(b)(ii) Cr.P.C. are alleged to have been committed before a document has been so produced, or given in evidence in a proceeding in the Court. Section 340 Cr.P.C. would apply where one of the enumerated offences [in Section 195(1)(b)(ii)] is committed after the document has been produced, or given in evidence in a proceedings in the Court, i.e. during the time when the document was in custodia legis. However, this submission of the appellants does not advance the case of the appellants in the present appeal, for the reason that the present cases appear

to be covered by sub-clause (i) of clause (b) of Section 195(1). The decision in *C.L. Manchanda* (supra), therefore, would have no application in the facts of the present case.

23. On the other hand, in *Sanjeev Kumar* (supra), this Court after examining a host of earlier decisions, including those of the Supreme Court, has held that false averments and pleadings, which are made with an attempt to inviting the Court into passing a wrong judgment, constitute an offence, to which Section 340 Cr.P.C. would apply.

24. Section 340 Cr.P.C. mandates the Court before whom, or in relation to whose proceedings, an offence referred to in clause (b) of sub-section (1) of Section 195 appears to have been committed, to conduct a preliminary inquiry so as to form an opinion whether an inquiry should be made into the offences referred to in clause (b) of sub-section (1) of Section 195. Section 340 Cr.P.C. states that “*such Court may, after such preliminary inquiry, if any, as it think necessary take the steps set out therein.*” Therefore, the Court is only required to conduct a preliminary inquiry, if any, as it thinks necessary. The preliminary inquiry is conducted so as to enable the Court to form an opinion whether, or not, it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of Section 195. The Court is not obliged to conduct a full-fledged inquiry at the stage of forming the opinion, as aforesaid, since a detailed inquiry into the aspect as to whether, or not, an offence referred to in Section 195(1)(b) has been committed, would be inquired into by the Magistrate of the First Class having jurisdiction, to whom the complaint is made in writing. The nature and extent of the

preliminary inquiry is, however, not defined as Section 340 Cr.P.C. itself says that “such Court may, after such preliminary inquiry, if any, as it thinks necessary”. Therefore, it has been left to the concerned Court, in the facts of the case before it, to determine the nature, and the extent of the preliminary inquiry that it may undertake. The preliminary inquiry should be such that the Court is able to form an informed opinion that the conduct of an inquiry would be expedient in the interest of justice into an offence referred to in Section 195(1)(b) Cr.P.C. The purpose of the preliminary inquiry is to form the requisite opinion. It is not to determine the guilt or innocence of the person suspected for commission of an offence referred to in Section 195(1)(b) Cr.P.C.

25. The decisions relied upon by the appellants in *Sanjiv Arora* (supra) and *Sri Chand* (supra) merely reiterated the statutory scheme contained in Section 340 Cr.P.C. to the effect that a preliminary inquiry contemplated by Section 340 Cr.P.C. must be held before forming the opinion that it is expedient in the interests of justice that an inquiry should be made into the offence under Section 195(1)(b) apparently committed in, or in relation to the proceeding in the concerned Court. However, this submission of learned counsel for the appellants is also of no avail, for the reason that in the facts of the present case, it cannot be said that a preliminary inquiry was not conducted by the learned ASJ while passing the impugned order to form its requisite opinion.

26. The learned ASJ has taken note of the averments made in the anticipatory bail application by the appellants and, in particular, in paragraph 2 thereof. It has also taken note of the fact that no such directions

were recorded in the order dated 26.05.2009 passed in CrI.M.C. No.1629/2009. The learned ASJ has, *inter alia*, observed:

“..... it is clear that the accused/non applicants without any orders from the Hon'ble High Court mentioned such facts in the application for anticipatory bail which weighed in the mind of the court to grant them bail. Even in their reply to the application under Section 340 Cr.P.C, the non applicants/accused have not denied this fact and it has been simply stated by them that oral directions were given by the Hon'ble High Court to the counsel appearing for the State who assured the court that he will direct the Investigating officer. All this was done by accused/ non applicants despite knowing the fact that there are no such directions by the Hon'ble High Court but still the non applicant's/ accused mentioned the same in their applications for grant of anticipatory bail. If oral directions given by the Hon'ble High Court to the Ld. Counsel for the state were their, then it was the duty of the non applicant's/accused to mention this fact in their application also. Neither it has been mentioned that these were only the oral directions nor it was mentioned that the Ld. Counsel for state gave in writing these directions of the Hon'ble High Court on the copy of the petition received by the counsel for the accused. This clearly shows the manipulation on behalf of the non applicants/accused only with the sole motive to get bail/relief from the court.”

27. Thus, it cannot be said that no preliminary inquiry was conducted by the learned ASJ while passing the impugned order. It was not necessary for the learned ASJ to go deeper into the issue as to whether, or not, an oral direction had been issued by this Court (Ms. Justice Reva Khetrapal) while passing the order dated 26.05.2009 in CrI.M.C. No.1629/2009. The appellants not only made the averment, as extracted in the impugned order

in paragraph 2 of the bail application, but also annexed to index of CrI.M.C. No.1629/2009 containing the endorsement, as aforesaid, thereby giving the impression that the learned counsel for the State had been directed to instruct the IO not to harass the appellants.

28. The inquiry required to be conducted by the concerned Court under Section 340 Cr.P.C. is only a preliminary inquiry so as to form the opinion whether, or not, to make a complaint to inquire into the commission of an offence enumerated in Section 195(1)(b) of the Cr.P.C. The opinion formed by the Court would be founded upon a, *prima-facie* evaluation and appreciation of the relevant materials. Consequently, the observations made by the Court acting under Section 340 Cr.P.C. would not bind the concerned Magistrate to whom the complaint is made in pursuance of Section 340 Cr.P.C., who would undertake a full-fledged inquiry on his own in accordance with the Cr.P.C.

29. Accordingly, while dismissing these appeals, it is directed that the learned ACMM, South District, or the Court to which the complaint under Section 340 Cr.P.C. is assigned, shall not be influenced by any observation made either in the impugned order, or in this order. The same shall be examined on its own merits uninfluenced by any such observations.

30. The appeals stand dismissed with the aforesaid observations.

VIPIN SANGHI, J.

MARCH 12, 2015

sr/B.S. Rohella