

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

% **Date of decision: 9th January, 2015.**

+ **LPA No.8/2015, CM No.385/2015 (for condonation of 17 days delay in filing the appeal)**

**INDRAPRASTHA POWER GENERATION
CO. LTD.**

..... Appellant

Through: Mr. A.S. Dateer, Adv.

Versus

FAHEEM BAIG & ORS

..... Respondents

Through: None.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

RAJIV SAHAI ENDLAW, J.

1. This intra-court appeal impugns the order dated 13th August, 2014 of the learned Single Judge of this Court of dismissal of CM No.13032/2012 under Section 340 of the Code of Criminal Procedure, 1973 (CrPC) filed by the appellant in Cont. Cas.(C) No.484/2011 filed by the respondent no.3 herein i.e. Ajmera Steel Pvt. Ltd. against the officers of the appellant. This appeal is accompanied with an application for condonation of delay of 17 days in filing thereof and is listed subject to office objection as to the maintainability thereof.

2. As far as the aspect of maintainability of the appeal is concerned, the Full Bench of this Court in *Weizmann Ltd. Vs. Ms. Shoes East Ltd.* 200 (2013) DLT 257 has held that a decision either way on an application filed under Section 340 of the CrPC decides valuable rights of parties and therefore an appeal would lie under Clause 10 of the Letters Patent, as applicable to this Court. Office objection qua maintainability of the appeal is thus overruled.

3. However being *prima facie* of the opinion, though for reasons other than those given by the learned Single Judge, that there is no merit in the application filed by the appellant under Section 340 of the CrPC, we have without regard to the application for condonation of delay heard the counsel for the appellant at length on the admissibility of this appeal.

4. The factual position may be stated thus. Certain disputes and differences arose between the appellant and the respondent no.3 Ajmera Steel Pvt. Ltd. with respect to a contract containing an arbitration clause. Respondent no.3 invoked the arbitration clause and also filed OMP No.632/2010 and OMP No.186/2011 in this Court under Section 9 of the Arbitration and Conciliation Act, 1996. Vide order dated 20th May, 2011 in OMP No.186/2011, certain interim measures were ordered and the objection

of the appellant that the respondent no.1 herein namely Faheem Baig who had on behalf of the respondent no.3 invoked the arbitration as well as signed and filed the said OMPs was not authorized and competent to do so, was kept open for decision by the Arbitral Tribunal. The respondent no.3 acting through the respondent no.1 then filed Cont. Cas.(C) No.484/2011 supra against the officials of the appellant alleging them to be in violation of the interim measures ordered on 20th May, 2011 in OMP No.186/2011. Notice of the said contempt case appears to have been ordered to be issued to the said officials of the appellant.

5. In the meanwhile, the Arbitral Tribunal upheld the objection of the appellant that the respondent no.1 was not authorized by the respondent no.3 and was thus not competent to invoke the arbitration or to sign and file the claim petition. Accordingly vide order dated 14th August, 2012 the arbitration proceedings were closed with liberty however to the respondent no.3 to in accordance with law initiate arbitration afresh.

6. The Advocate appearing for the respondent no.3 in the contempt petition sought discharge and was discharged vide order dated 9th October, 2012 and since none else had appeared for the respondent no.3 (who was the petitioner in the contempt petition), Court notice was ordered to be issued to

the respondent no.3. In the meanwhile, the appellant filed the application aforesaid under Section 340 of the CrPC. On 1st April, 2013 none appeared in the contempt case aforesaid and accordingly the contempt case filed by the respondent no.3 as well as the application of the appellant under Section 340 of the CrPC were dismissed in default. Thereafter the appellant applied for restoration of the application under Section 340 of the CrPC and which was allowed on 22nd May, 2013 and notice of the said application under Section 340 of the CrPC was issued to the respondents herein namely Sh. Faheem Baig,, Shri Hari Lal, Ajmera Steel Pvt. Ltd., Shri Sushil Ajmera and Shri Gaurav Ajmera. However none of the respondents appeared.

7. The case of the appellant in the application under Section 340 of the CrPC is that the respondents herein, in the Cont. Cas.(C) No.484/2011 filed by them, falsely averred that the officials of the appellant were in violation of the interim measures ordered on 20th May, 2011 in OMP No.186/2011 with the intent to pressurize the appellant and its officials to allow the respondents what they were not entitled to under the contract.

8. The learned Single Judge, notwithstanding the respondents having not appeared to defend the application of the appellant under Section 340 of the CrPC, has dismissed the said application finding / observing / holding:-

- (i) though the respondent no.3 acting through the respondent no.1 had alleged violation by the officials of the appellant of the interim measures ordered on 20th May, 2011 in OMP No.186/2011 but had not pursued the same;
- (ii) the Courts are not to be used as platforms by the parties to satisfy their personal grudges;
- (iii) the Courts are inundated with cases and are finding it difficult to grapple with the huge backlog; in such a contingency, entertaining the application under Section 340 of the CrPC would amount to luxurious litigation and set a wrong precedent; and,
- (iv) if the officials of the appellant are still aggrieved, they are free to put the criminal justice machinery into motion by filing a private complaint rather than burdening the Court to hold an enquiry into the matter and then prosecute the respondents.

Accordingly the application of the appellant under Section 340 of the CrPC was dismissed with liberty to the appellant to take such recourse in law as may be available to it.

9. In the face of the aforesaid reasoning of the learned Single Judge, the star argument of the counsel for the appellant of course is that the learned Single Judge was under a misconception of law that the appellant by filing a private complaint can seek redressal of its grievance, of the respondents having indulged in falsehood on oath in filing the contempt case. Attention is invited to Section 195 of CrPC which prohibits a private complaint in such matters except on complaint in writing of that Court in which falsehood has been pleaded on oath.

10. There can be no dispute qua the said position and we have no hesitation in stating that the learned Single Judge erred in proceeding on the premise that it was open to the appellant to file a private complaint in relation to an offence committed in relation to a proceeding in the Court. We also do not approve of another reasoning given by the learned Single Judge for not entertaining the application of the appellant i.e. of the Courts being inundated with cases and finding it difficult to grapple with the huge backlog. That, to say the least, cannot be a reason for not entertaining the application or a proceeding if otherwise maintainable in law.

11. It is however not on every application under Section 340 of the CrPC complaining, of a party to a litigation having committed an offence within the meaning of Section 340 of the CrPC, that the Court in which the offence is stated to have been committed is bound to make an enquiry and to make a complaint to the Magistrate of the offence committed. For the Court to act under Section 340 of the CrPC formation of an opinion, that making of an enquiry and if necessary of a complaint to the Magistrate thereafter is expedient in the interests of justice, is essential. Section 195 CrPC prohibits private complaints in the said subject matter and requires the Court, in relation to a proceeding before which the offence is alleged to have been committed, to make a complaint. Thus, complaint of offences covered by Section 340 CrPC lies not when offence is committed but only when the Court, in a proceeding before which the offence is committed, is of the opinion that it is expedient in the interest of justice that such complaint be made.

12. 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 Vs. State of Maharashtra* (2002) 1 SCC 253 held that the object 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 Vs. 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.

13. This Bench in judgment dated 2nd September, 2014 in LPA No.322/2014 titled ***Mr. Vishal Kapoor Vs. Mrs. Sonal Kapoor*** it was held, (i) that an application under Section 340 of the CrPC ought to be normally considered at the time of final decision of the case only and not at the interim stage; (ii) the very genesis of Section 340 of the CrPC is to prevent complaints being filed of offences having been committed in relation to the Court proceedings; it was felt that if such complaints are permitted to be filed, the same may be used to force the other party into giving up its claim/defence or to dissuade witnesses from appearing before the Courts under threat of criminal prosecution; (iii) proceedings under Section 340 of

the CrPC should not be resorted to when the criminal case is calculated to hamper fair trial of issue before the Civil Court where it would probably go on for longer; (iv) a prosecution for perjury should not be ordered by the Court before the close of the proceedings in the case in which false evidence is given; it is highly wrong for a Court to take action under the said provision against a witness or a party for giving false evidence when trial is underway; (v) the existence of *mens rea* or criminal intention behind act complained of will have to be looked into and considered before any action under Section 340 of the CrPC is recommended; (vi) before setting the criminal law into motion, the Court should exercise great care and caution and it must be satisfied that there is reasonable foundation for the charge in respect of which prosecution is directed; (vii) in criminal prosecution normally, a direction for filing of a complaint is not made during the pendency of the proceeding before the Court and this is done at the stage when the proceeding is concluded and the final judgment is rendered; (viii) that re-course under Section 340 of the CrPC is to be on only if the interest of justice requires and not in every case; (ix) expediency would normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but

having regard to the effect or impact such commission of offence has upon administration of justice; and, (x) where the forged document or forgery may cause a very serious or substantial injury to a person but where such document is just a piece of evidence, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice is minimal, the Court may not consider it expedient in the interest of justice to make a complaint.

14. If we apply the aforesaid principles, we find that though the respondent no.1 acting for the respondent no.3 did file the contempt case supra alleging violation of the interim orders during the pendency of arbitration by the officials of the appellant but chose not to pursue the same. The counsel for the appellant, in all fairness also informs that the respondent no.3 after the order dated 14th August, 2012 supra of the Arbitral Tribunal, has invoked arbitration afresh and which is now underway. The interim order during the pendency of arbitration was of preservation of certain items which the respondent no.3 was claiming to be belonging to the lot of goods / machinery auctioned by the appellant and purchased by the respondent no.3 and which according to the appellant did not belong to the said lot. It appears to have been the case of the respondent no.3 in the contempt case

filed through the respondent no.1 that the officials of the appellant despite the said interim order had removed and sold the said items. The appellant of course denied the same.

15. It was the case of the appellant in the application under Section 340 CrPC, (i) that the respondent no.1 in the claim before the Arbitral Tribunal had falsely pleaded being authorized to act on behalf of the respondent no.3 and which had been found to be false by the Arbitral Tribunal; (ii) that it was further the case of the respondent no.3 acting through the respondent no.1 before the Arbitral Tribunal that some of the goods purchased by the respondent no.3 in auction from the respondent no.1 were missing; however in the visit by the Arbitrator it had been found otherwise; and, (iii) that the Arbitral Tribunal in the visit to the site had also found that the goods with respect to which interim restraint had been obtained by the respondent no.3 did not belong to the lot purchased by the respondent no.3.

16. We are of the view that since the arbitral proceedings are still underway and further since the respondent no.3 acting through the respondent no.1 though in the contempt case alleged violation of the interim order by the officials of the appellant but did not choose to pursue and prove the same, the magnitude of the falsehood even if any practised by the

respondent no.1 acting on behalf of the respondent no.3 is not such which makes it expedient to order prosecution of the respondents. There is nothing to show that the opinion formed by the respondent no.1, acting on behalf of the respondent no.3, that the appellant and its officials were in violation of the interim order, was not *bona fide*.

17. Further, merely because the respondent No.3 failed to prove that it had authorised respondent No.1 to act on its behalf is not reason enough to order prosecution for having falsely claimed that he was so authorised, particularly when such actions, under the law, are permitted to be ratified and from a reading of the order dated 14th August, 2012 of the Arbitral Tribunal indicates that the respondent No.3 had so ratified the actions of the respondent No.1. This is also evident from the respondent No.3 having thereafter invoked arbitration afresh.

18. We therefore, instead of for the reasons given by the learned Single Judge, for the reasons aforesaid, are of the opinion that no case of proceeding under Section 340 of the CrPC is made out. We however tend to agree with the learned Single Judge that the application under Section 340 of the CrPC was the outcome of the assault on their dignity perceived by the officials of the appellant by filing of the contempt petition against them.

We can only observe that the said officials need not be so sensitive.

19. The appeal is dismissed.

No costs.

RAJIV SAHAI ENDLAW, J.

CHIEF JUSTICE

JANUARY 09, 2015

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