

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CRM-M No.1595 of 2012 (O&M)
Decided on: 31.10.2017**

Gurwinder Singh and others

....Petitioners

Versus

State of Punjab

....Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Ms. Amanpreet Kaur, Advocate
for Mr. H.N.S. Gill, Advocate
for the petitioners.

Mr. Amandeep S. Gill, Sr. DAG, Punjab.

ARVIND SINGH SANGWAN J.

The present petition has been filed under Section 482 of the Code of Criminal Procedure, 1973 (in short 'Cr.P.C.') seeking quashing of complaint No.55 dated 12.11.2011 (Annexure P1), charge-sheet dated 29.11.2011 (Annexure P2) as well as the summoning order of even date i.e. 29.11.2011 initiated under Section 340 Cr.P.C. in pursuance to the judgment dated 16.04.2011 (Annexure P4).

Brief facts of the case are that on the complaint of petitioner No.2 – Jaswinder Singh, FIR No.70 dated 05.03.2011 under Sections 307, 341, 323 read with Section 34 of the Indian Penal Code (in short 'IPC') was registered at Police Station Kharar, in which petitioner No.1 – Gurwinder Singh and petitioner No.3 – Harjit Singh were injured witnesses.

During pendency of the trial, there was a compromise arrived at between the parties and the petitioners, as a witnesses, did not

support the prosecution version due to the compromise. The trial Court, thereafter, vide its judgment dated 16.04.2011 acquitted the accused persons and directed to initiate proceedings under Section 340 Cr.P.C. against the petitioners. In pursuance to this judgment, the impugned complaint No.55 dated 12.11.2011 under Sections 211 and 193 IPC has been filed and charges have been framed vide order dated 29.11.2011. The petitioners have challenged the aforesaid persons vide which the prosecution against the petitioners has been initiated by invoking the provisions of Section 340 Cr.P.C.

Vide order dated 17.01.2012, while issuing notice of motion, further proceedings before the trial Court were stayed by this Court by passing the following order:-

“Contends that the FIR No.70 dated 05.03.2011 under Sections 307/341/323/34 IPC was registered at the behest of the present petitioners on account of having received grievous injuries. However, since both the sides were students, the matter was compromised and accordingly, the accused were acquitted. However, while acquitting accused, the Additional Sessions Judge, SAS Nagar, Mohali, vide his order dated 16.04.2011 held that it would be proper to hold an enquiry under Section 340 Cr.P.C. to find out as to if it would be expedient in the interest of justice to prosecute them for launching prosecution against the accused on the false allegations. It is further contended that while filing the said complaint, no such enquiry was held and the complaint was, accordingly, entertained and the petitioners were summoned. Thus, the very complaint is neither maintainable nor should have been filed in view of the fact that the said accused were acquitted on account of the

lack of evidence due to compromise having been arrived at between the parties.

Notice of motion for 15.05.2012.

Meanwhile, further proceedings before the trial Court in pursuance to the same shall remain stayed.”

Subsequent thereto, this petition is pending for the last 05 years and reply dated 20.11.2012 by way of affidavit of Deputy Superintendent of Police, Kharar, District Mohali has been filed.

Counsel for the petitioners has submitted that before instituting the impugned complaint (Annexure P1) no enquiry was conducted under Section 340 Cr.P.C. and the charges have been framed summarily on 29.11.2011 under Sections 211 and 193 IPC. Counsel for the petitioners has relied upon the judgment passed in **“B.K. Uppal vs State of Punjab and other connected cases”**, 2015(1) RCR (Criminal) 338, wherein this Court while discussing the scope of Section 340 Cr.P.C. has held as under:-

“43. Further the Hon'ble Supreme Court of India in the case of *Rakesh Kumar Mishra v. State of Bihar and others*, 2006(1) R.C.R.(Criminal) 456 : AIR 2006 Supreme Court 820(1) has held in paragraph No. 6 as under :-

"6. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged

act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties. It is not the duty which requires examination so much as the act, because the official act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. One safe and sure test in this regard would be to consider if the omission or neglect on the part of the public servant to commit the act complained of could have made him answerable for a charge of dereliction of his official duty, if the answer to his question is in the affirmative, it may be said that such act was committed by the public servant while acting in the discharge of his official duty and there was every connection with the act complained of and the official duty of the public servant. This aspect makes it clear that the concept of Section 197 does not get immediately attracted on institution of the complaint case."

44-45. *Thus, from a conspectus of aforesaid decisions, in my considered opinion, it is clear that for claiming protection under Section 197 of the code, it has to be shown by the prosecution that there is a reasonable connection between the act complained of and the*

discharge of official duty. In the present case, since the prosecution has miserably failed to prove the act complained of viz-aviz discharge of official duty by the appellants, therefore the present complaint is not maintainable in view of the provisions of Section 197 Cr.P.C. in the absence of sanction.

46. *Under Chapter 8 of the High Court Rules and Orders, Vol-III, powers to take cognizance has been laid down in Part-A Offences Affecting the Administration of Justice, which are culled out herein below :-*

"1. Under section 195 of the Code of Criminal Procedure, no Court can take cognizance of the offences mentioned in that section, except on the complaint in writing of the public servants or Courts mentioned in the section. The institution of proceedings does not now depend on the discretion of a private individual as was the state of law before the amendment of this section by Act XVIII of 1923.

2. Sections 476 and 479-A are supplementary to Section 195. The Civil, Revenue or Criminal Courts can take action either suo motu or on application. The power to make a complaint is conferred on the Court and not on the particular officer who presides over the Court. Consequently the successor of a Magistrate or Judge is competent to direct prosecution in respect of an offence committed before his predecessor. (Vide I.L.R 4 Lahore 58 and section 559 of the Code).

3. The main point which the Court has to consider in initiating proceedings under section 476 of the Code is whether it is expedient in the interests of justice that an inquiry should be made and a complaint filed (vide, 1954 Supreme Court Reports 1144). The mere fact that there is reason to believe that an offence has been committed is not sufficient to justify a prosecution. It is equally well settled that prosecution should not be ordered unless a prima facie case is made out and unless there is a reasonable chance of conviction. It must be borne in mind in this connection that indiscriminate institution of prosecution does not promote the "interests of justice" as failure of such cases is apt to encourage rather than discourage the offences. Section 476 of the Code gives the Court power to make a preliminary inquiry and this power should be freely used. Notice should ordinarily be given to

the persons concerned and any explanation and evidence given by them should be carefully considered before ordering prosecution."

47. It was thus the argument of the Ld. counsel for the appellants that the impugned complaint could not have been filed by the Ahlmad of the Court being cloaked as an 'Officer of the Court' on behalf of the State and that if it all, any complaint was required to be filed, it could only have been filed by the Presiding Officer. Reliance in this regard is placed on Section 340 Cr.P.C. which is culled out herein below :-

"Section 340 in The Code Of Criminal Procedure, 1973 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 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.*

(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."

48. *In view of the unambiguous provisions envisaged under Section 340 Cr.P.C., there is no power or authorisation bestowed upon an Ahlmad of the Court to act as an 'Officer of the Court' so as to launch proceedings in relation to the offences committed under the said chapter and thus in my considered opinion under the facts and circumstances of the present case, I have no hesitation to hold that Rajiv Verma, Ahlmad attached to the Court of Rajender Aggarwal, Special Judge, SAS Nagar, Mohali under the cloak of an 'Officer of the Court' on behalf of the State was neither competent nor authorised to institute the complaint in its present form against the appellants and, accordingly, the present complaint is held to be not maintainable.*

49. *Answering the 4th question framed hereinabove, it has been argued by the Ld. counsel for the appellants that for initiating proceedings qua perjury, the Court must be prima facie satisfied that the evidence on record is sufficient and complete so as to probably lead to conviction of the accused- appellants. In the present case there is nothing on record to show that the appellants deliberately and wilfully scuttled the investigation in the present case and forced the witnesses to turn hostile. It is not so the case of the prosecution either. Just because the witnesses have turned hostile in the present case and have not supported the version recorded under section 161 Cr.P.C. before the Court, the same cannot be made a ground to punish the appellants in the present case. All procedures and formalities were carried out and followed*

during investigation of the present case pertaining to amass wealth and disproportionate assets of Badal family. There is no evidence on record that the appellants indulged in fabricating false evidence and record. From the observations of the trial Court it appears that had the case not failed on account of witnesses turning hostile in the same, probably neither the appellants nor the investigation in the present case would have been called in question. It is just because the case having failed on account of trustworthy evidence, the appellants have been ordered to be proceeded against and prosecuted for dereliction of duties in the present case. This to my mind cannot be permitted, as the same would not only deter a public servant/police officer to impartially and in a fair and free manner investigate a case properly but would also send a wrong signal to the society who look forward upon the Government machinery to cater to their day-to-day needs and turmoil. The Hon'ble Supreme Court of India in Chajoo Ram's case (supra) has dealt with precisely the same situation in paragraph No. 7, which is reproduced herein above in the preceding Paras.

*50. The Hon'ble Supreme Court of India in the case of **Har Gobind and others v. State of Haryana, AIR 1979 SC 1760**, has held that in the absence of exact offence committed by the appellant having been disclosed in the complaint and a clear-cut finding viz. the same by the Court, the complaint cannot be sustained and thus is hereby quashed.*

51. Thus, it cannot be presumed by any stretch of imagination that the allegations purportedly made in the complaint against the appellants were sufficient and complete so as to lead to their conviction in the present case for the offence of perjury especially in the absence of any finding to that effect by the trial Court and hence the

impugned complaint as well as the summoning order deserves to be quashed. Ordered accordingly.

52. That takes me to the 5th and 6th question which I intend to answer collectively. It has been argued before me that the charge of fabrication based on statements recorded under section 161 Cr.P.C. cannot be tried under section 340 Cr.P.C. in as much as the statements made under sections 161 Cr.P.C. cannot be treated as evidence. It has further been argued that the appellants were only assigned the task of supervising the investigation and hence they were only discharging their official duties in the capacity of supervisors and any act of bona fides or omission, if any, on the part of such an officer could not result in his prosecution.

*53. The Hon'ble Supreme Court of India in the case of **Omkar Namdeo Jadhao and others v. Second Additional Sessions Judges, Buldana and others, AIR 1997 SC 331** has held thus :-*

"3. It is seen that the observation made by the Sessions Judge, as confirmed by the of Bombay High Court, Nagpur Bench in the impugned judgment dated 10.3.1992 made in Criminal Application No. 20/91 is based on 161 statements recorded during the investigation. Admittedly, no evidence has been recorded. The court should not come to the conclusion on the basis of 161 statements which are not evidence. It can be used at the trial only for contradictions or omissions when the witness was examined. Nor it could be contradicted by looking at the physical features of the witnesses even before they are examined. The Additional Sessions Judge had discharged them concluding that the police officers had fabricated the record. It would appear that the learned Sessions Judge had overstepped his jurisdiction in recording a finding, while looking at the physical features of the accused, that the police had fabricated the record. The High Court has also not properly considered the matter while going into the question regarding discharge of the accused for other offences. Under these circumstances, we hold that in view of the finding recorded by the Sessions

Judge of fabrication of the record and that the case is false one, issuance of notice under Section 340, Cr.P.C. is wholly unjustified. The said order of the Sessions Judge is accordingly quashed.

54. In the case of *Dr. S.P. Kohli v. The High Court of Punjab and Haryana*, AIR 1978 SC 1753, the Hon'ble Supreme Court observed as under:-

"19. The notice besides being not happily worded is laconic. It does not satisfy the essential requirements of law. Nor does it specify the offending portions in the appellant's lengthy statement which in the opinion of the High Court were false. In cases of this nature, it is highly desirable and indeed very necessary that the portions of the witness's statement in regard to which he has, in the opinion of the Court, perjured himself, should be specifically set out in or form annexure to the notice issued to the accused so that he is in a position to furnish an adequate and proper reply in regard thereto and be able to meet the charge."

55. Further in the case of *State of Orissa v. Ganesh Chandra Jew* (supra), the Hon'ble Supreme Court held in paragraph No. 12 as under :-

"It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be

*construed so as to advance the objective of the Section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty and without any justification therefor then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by this Court in **Matajog Dobey v. H. C. Bhari**, (AIR 1956 SC 44) thus :*

"The offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner with the discharge of official duty ... there must be a reasonable connection between the act and the discharge of official duty; the act must bear, such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

56. Ld. State Counsel as well as the amicus curiae have failed to refute and effectively rebut the very basic ground of attack launched by the appellants' counsel that no procedure, as prescribed under Section 340 Cr.P.C., has been followed in the present case. They have also failed to substantiate the observations of the Trial Court made in the case relating to disproportionate assets of Badal family. There is nothing on record to comprehend that if the alleged acts or omission on the part of the appellants were deliberate and conscious and the State was highly confident of conviction of the appellants in the same, then what stopped the State machinery to proceed in the matter in accordance with the prescribed procedure. The Ld. State Counsel as well as the amicus curie have also failed to bring on record any material to throw light on the fact that the appellants were the sole investigating officers responsible for investigation in the principal case and were not assigned the work and task of supervising

the investigation in league with other officers. Even no inquiry as contemplated under Section 340 Cr.P.C. was held to substantiate the veracity of allegations made against the appellants.

57. In view of the attending facts and circumstances, ratio of the law laid down herein above and applying the same to the facts and circumstances of the present case, I am of the considered view that the present complaint as well as the summoning order deserves to be quashed as it is not proved on record, either it is even not the case of the prosecution that the appellants have acted or omitted to act in a biased and partial manner so as not only to scuttle the entire investigation in the present case but also to defeat the process of law by not supervising the investigation in the present case properly. For reasons beyond the control, if the prosecution witnesses have not supported the case and have turned hostile, the same cannot be made a ground available to the Court to order initiation of proceedings under Section 340 Cr.P.C. against them. This to my mind, is certainly not the scope and ambit of the said section especially in the absence of any evidence on record to that effect.”

Counsel for the petitioners has further submitted that the compromise arrived at between the parties was effected in the larger interest of brotherhood and to maintain peace and harmony and, therefore, there was no intention on the part of the petitioners – complainant/injured witnesses, not to support the prosecution version and, therefore, the acquittal of the accused persons in the aforesaid FIR No.70 dated 05.03.2011 was not intentional and was rather an outcome of a compromise in the brotherhood as the petitioners and the accused persons belong to the same place. It is also submitted that the complaint

(Annexure P1) filed through the Clerk of the Court Rajiv Verma is not maintainable as he was not competent to institute the complaint in view of the fact that under Section 340 Cr.P.C., there is no power or authorization with the Court to appoint a Clerk of the Court as an officer of the Court to launch prosecution in relations to the offences committed.

Counsel for the State, on the other hand, has opposed the prayer made by counsel for the petitioners.

It is held by the Hon'ble Supreme Court of India in ***“Amarsang Nathaji as Himself and as Karta and Manager vs Hardik Harshdbhai Patel and others”***, 2017(1) RCR (Criminal) 92, as under:-

“10. Having heard the learned counsel appearing on both sides and having gone through the impugned order and also having regard to the subsequent development whereby the parties have decided to amicably settle some of the disputes, we are of the view that the matter needs fresh consideration. We are also constrained to form such an opinion since it is fairly clear on a reading of the order that the court has not followed all the requirements under Section 340 of the CrPC as settled by this Court in the decisions referred to above regarding the formation of the opinion on the expediency to initiate an inquiry into any offence punishable under Sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228 of the IPC, when such an offence is alleged to have been committed in relation to any proceedings before the court. On forming such an opinion in respect of such an offence which appears to have been committed, the court has to take a further decision as to whether any

complaint should be made or not.

11. No doubt, such an opinion can be formed even without conducting a preliminary inquiry, if the formation of opinion is otherwise possible. And even after forming the opinion also, the court has to take a decision as to whether it is required, in the facts and circumstances of the case, to file the complaint. Only if the decision is in the affirmative, the court needs to make a complaint in writing and the complaint thus made in writing is then to be sent to a Magistrate of competent jurisdiction.

12. Under Section 343 of the CrPC, the Magistrate has to deal with the complaint referred to in Section 340 of the CrPC as if it was instituted on a police report. Therefore, on the offences referred to under Section 195(1)(b)(i) of the CrPC, all falling within the purview of warrant case, the Magistrate has to follow the procedure for trial of warrant cases under Chapter XIX Part A comprising of Sections 238 to 243 of the CrPC. It is only in view of such seriousness of the matter, Section 340 of the CrPC has provided for a meticulous procedure regarding initiation of the inquiry.

13. We find that the court in the impugned order has not followed the procedure in making the opinion that it was expedient in the interests of justice to file a complaint against respondent no.1 in exercise of the powers conferred under Section 340 of the CrPC and directing the Registrar (Judicial) of the High Court of Gujarat, Ahmedabad "to make complaint against respondent no.1 in view of the findings recorded by the court for the offence under Sections 199 and 200 of the IPC....". Having regard to the subject matter of the complaint and subsequent developments, we are of the view that in the interests of justice the matter needs to be laid to rest.

14. The appeal is hence allowed. The impugned order to the extent of initiation of the proceedings under Section 340 of the CrPC is set aside.

15. There shall be no orders as to costs.”

After hearing counsel for the parties, the present petition deserves to be allowed. The complaint which has been instituted by Clerk of the Court attached to the Court of Additional Sessions Judge SAS Nagar, Mohali who has passed the order of acquittal was not competent or authorized to institute the complaint against the petitioners and the same is not maintainable as under Section 340 Cr.P.C., there is no power or authorization bestowed upon a Clerk of the Court to act as an officer of the Court to launch prosecution in relation to the offences committed.

In reply filed by the Investigating Officer, this fact is not denied that prior to filing of the complaint, no preliminary enquiry under Section 340 Cr.P.C. against the petitioner/accused was made and no such evidence has come on record warranting summoning of the petitioners. As per Full Bench judgment of this Court in ***“Kulwinder Singh and others vs State of Punjab”***, 2007 (3) RCR (Criminal) 1052, *this Court has power under Section 482 Cr.P.C. to allow the compounding of non-compoundable offence and quash the prosecution where the High Court felt that the same was required to prevent the abuse of the process of any Court or to otherwise secure the ends of justice. This power of quashing is not confined to matrimonial disputes alone.*

Since, the petitioner as a complainant/injured witnesses has compromised the matter with the accused persons and has not

supported the prosecution version, it does not amount to commission of offences punishable under Sections 211 and 193 IPC.

For the foregoing reasons, the petition is allowed; the complaint No.55 dated 12.11.2011, charge-sheet and the summoning order dated 29.11.2011 are ordered to be quashed.

(ARVIND SINGH SANGWAN)
JUDGE

31.10.2017
yakub

Whether speaking/reasoned	Yes/No
Whether reportable:	Yes/No