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HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved for Order on : 23.09.2019

Order Passed on : 21/10/2019

W.P.(Cr.) No. 375 of 2019

Jayendra Sahu, S/o. Shri Dhaniram Sahu, Aged About 38 Years, Occupation Private Job, Address C1- 807, Royal Castle Society, In Front of Anand Memorial Hospital, Near Dange Chowk, Thergaon, Pune- 411033, Phone 7507999250, Email Jay.Sahu1@Gmail.Com., District : Pune, Maharashtra

---- Petitioner

Versus

1. State of Chhattisgarh, Through : District Magistrate Bilaspur Chhattisgarh.
2. Family Court, Bilaspur, District Bilaspur Chhattisgarh.
3. Mamta Sahu, W/o. Jayendra Sahu, aged About 34 years, Q.No. B/153, Ujjawal Nagar, NTPC Township Sipat, Bilaspur Chhattisgarh, 495555, Phone 9425281148, 9406297260.
4. Saumya Sahu, D/o. Jayendra Sahu, Aged About 6 Years, Q.No. B/153, Ujjawal Nagar, NTPC Township Sipat, Bilaspur , Chhattisgarh, 495555, Phone 9425281148, 9406297260.

-----Respondents

For Petitioner	: Mr. Jayendra Sahu, Petitioner in person.
For Respondent/State	: Mr. Ghanshyam Patel, G.A.
For Respondents No. 3 & 4	: Mr. Achyut Tiwari, Advocate

Hon'ble Shri Justice Rajendra Chandra Singh Samant

C A V ORDER

21/10/2019.

1. This petition has been brought under Article 226 of the Constitution of India praying for issuance of writ of certiorari for quashing the order dated 08.04.2019 of Family Court, passed in M.J.C. No.274 of 2016, issuance of writ of mandamus, for direction to the Family Court, Bilaspur to initiate proceeding under Section 340 and 195 of Cr.P.C and also for issuance of mandamus directing the Family Court, Bilaspur to allow the documents and electronic evidence, which may be produced by the petitioner.
2. Respondent No.3 and 4 Mamta Sahu and Saumya Sahu Sahu have filed a petition under Section 125 of Cr.P.C. before the Family Court, Bilaspur, which has been registered as M.J.C. No.329 of 2015. At the stage of evidence of the parties, these respondents have filed affidavits before the Court below under Order 18 Rule 4 of C.P.C. to be read as their examination-in-chief. The petitioner has assailed the contents of the affidavit on the ground that the witnesses have made false statement before the Court and the petitioner has evidence in his possession to disprove the statement given by the witnesses. On that basis an application was filed referring to Section 340 and 195 of Cr.P.C. praying that order be passed for registration of offence against the private respondents. The Court below has considered on the

application and passed the impugned order dated 08.04.2019 by dismissing the application filed by the petitioner.

3. It is submitted by the petitioner, who is appearing in person before this Court, that affidavit filed by the respondent No.3—Mamta Sahu, Ramavtar Sahu and their statement in cross-examination recorded before the Family Court very clearly establishes the offence of perjury has been committed in this case. The petitioner in person has demonstrated by referring to the evidence, which has been recorded before the Court below and also referring to the other evidence, which he intends to produce before the Court below that the offence of perjury has been committed. It is also submitted that the petitioner has in his possession recording of telephone calls made which may be produced before the Court below if required. The details of these reference need not to be mentioned in this order as that is still subject for consideration by the trial Court itself. On this basis, prayer has been made that relief be granted as prayed for.
4. The petitioner has also placed reliance on the judgment of Supreme Court in case of ***Perumal Vs. Janki***, reported in **(2014) 5 SCC 377**, ***Sunny Bhumbla Vs. Shashi***, in ***Cr.A. No.197/SB 2010, decided on 25.01.2010***, judgment of Allahabad High Court (Lucknow Bench), in case of ***Syed Nazim Hussain Vs. The Additional Principal Judge, Family Court and another***, passed in ***Writ Petition (M/S) 56/2002 decided on 09.01.2003*** and

judgment of Kerala High Court in case of **Santhosh Madhavan @ Swami Amritha Chaithanya Vs. State, represented by Public Prosecutor, High Court of Kerala, Ernakulam, passed in CRL.A. No.1599/2009 (D), decided on 19.12.2013**, in these cases, the Courts have held that grounds were present for proceeding under Section 340 of Cr.P.C. With respect to the admissibility of electronic evidence, the petitioner has placed reliance on the judgment of Supreme Court in case of **Shafhi Mohammad Vs. The State of Himachal Pradesh**, passed in **SLP (Crl) 2302/2011, decided on 30.01.2018**, in which it has been held that the electronic evidence can be produced subject to procedural requirement under Section 65 -B of the Evidence Act by a person, who is in position to produce such certificate being in control of the said device, therefore, the petitioner, who has made the recording from his own mobile phones, he is in position to produce such evidence.

5. The submission made by the petitioner in person have been opposed by the State counsel appearing for respondent No.1 and it is submitted that the documents that have been filed along with the petition shows that the petitioner has least regard for the judicial system and Judges, because of which he has made derogatory and defamatory remarks against them, therefore, he should be proceeded for Contempt of Court. Replying to the arguments regarding audio video recordings made by the petitioner, it is submitted that the petitioner has made video or

audio recording of the Court proceedings without the permission of the Court, therefore, he is liable to be penalized for the same.

6. Counsel appearing for the private respondents submits that the petition has been wrongly brought under Article 226 of the Constitution of India, whereas, the petitioner has remedy of filing revision petition under Section 397 of Cr.P.C., therefore, the order made has become final without being challenged by the petitioner under the provision in Statute. It is submitted that the petitioner has shown great disregard to the judicial system and procedural law, therefore, there is need for taking strict action against him. Recording that he has made are not permissible in evidence. It is submitted that since the case is pending, therefore, any application brought under Section 340 of Cr.P.C. praying for prosecution of perjury is premature. Therefore, it is prayed that the petition be dismissed.
7. In reply, it is submitted by the petitioner in person that recording on mobile phone has been made for the reasons that it is permissible according to the directions of Supreme Court in ***Shafhi Mohammad case (supra)***. Therefore, it is prayed that petition be allowed.
8. I have heard the learned counsel for the parties and perused the documents placed on record.
9. Section 340 of Cr.P.C. is reproduced as under :-

“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 interests 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 or by such officer of the Court as the Court may authorise in writing in this behalf.

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

10. Key word in this Section are this that, "when the Court is of the opinion that it is expedient in the interests of justice that any 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."
11. Firstly, the Court has to form an opinion and make up its mind that it is expedient in the interest of justice that any inquiry should be made. For making up of mind by the Court, the first thing that is essential and necessary is this that the substance and material should be present and available before the Court in the record of the proceeding. In the present case, the stage of recording of applicant evidence is in progress for which the affidavits for examination-in-chief have been filed by the private respondents and the petitioner has been given the opportunity to cross-examination the same. So far the petitioner, who is non-applicant in that proceeding has not produced any evidence and he has before proceeding to adduce evidence, filed an application

praying for action under Section 340 of Cr.P.C. against the private respondents.

12. The Family Court has observed in its order dated 08.04.2019 that on perusal of the record, it appears that the petitioner has claimed that affidavits filed by the respondents are false for which before coming to any conclusion it is necessary that the evidence should be produced by both the parties and it is premature stage to conclude that the statements in affidavits filed by the private respondents are false.
13. It is evident from the submission made from both the sides that the affidavits of some of the witnesses of respondent side have been filed and they have been cross-examined. After completion of respondent/applicant's evidence, the petitioner as non-applicant will himself have opportunity to present his evidence before the Court to rebut and disprove the statement made by the applicants side and it is at that stage, he has liberty to apply to the Court for presenting recorded statement etc., which are in his possession subject to certification as it required under Section 65-B of the Evidence Act and as per the direction given in case of **Shafhi Mohammad (supra)**. Therefore, it is found that the petitioner has brought this application under Section 340 of Cr.P.C. at a very initial and premature stage. The evidence that has been produced by the applicant side so far is record of the Court proceeding, whereas, the material and substance on which

the petitioner is relying are not part of the record of the Court below. The substance and the material on which the petitioner relies if produced before the Court shall become the record of Court proceeding and on that basis the Court holding inquiry shall be in a position to make up mind and draw conclusion or form an opinion to find whether it is expedient in the interest of justice that an enquiry may be made as it is mentioned in Section 340 Sub-section (1) of Cr.P.C.. Therefore, I do not find any reason to disagree with the opinion formed by the Court below.

14. In ***K.T. M.S. Mohd. Vs. Union of India***, reported in ***(1992) 3 SCC 178***, the Supreme Court has made observations in paragraph 34, 35 and 36, which reads as under :-

“34. We think it is not necessary to recapitulate and recite all the decisions on this legal aspect. But suffice to say that the core of all the decisions of this Court is to the effect that the voluntary nature of any statement made either before the Custom Authorities or the officers of Enforcement under the relevant provisions of the respective Acts is a sine quo non to act on it for any purpose and if the statement appears to have been obtained by any inducement, threat, coercion or by any improper means that statement must be rejected brevi manu. At the same time, it is to be noted that merely because a statement is retracted, it cannot be recorded as involuntary or unlawfully obtained. It is only for the maker of the statement who alleges inducement, threat, promise etc. to establish that

such improper means has been adopted. However, even if the maker of the statement fails to establish his allegations of inducement, threat etc. against the officer who recorded the statement, the authority while acting on the inculpatory statement of the maker is not completely relieved of his obligations in at least subjectively applying its mind to the subsequent retraction to hold that the inculpatory statement was not extorted. It thus boils down that the authority or any Court intending to act upon the inculpatory statement as a voluntary one should apply its mind to the retraction and reject the same in writing. It is only on this principle of law, this Court in several decisions has ruled that even in passing a detention order on the basis of an inculpatory statement of a detenu who has violated the provisions of the FERA or the Customs Act etc. the detaining authority should consider the subsequent retraction and record its opinion before accepting the inculpatory statement lest the order will be vitiated. Reference may be made to a decision of the full Bench of the Madras High Court in *Roshan Beevi V. Joint Secretary to the Govt. of Tamil Nadu, Public Deptt.* [1983] Law weekly (Cri.) 289 = [1984] 15 ELT 289 to which one of us (S. Ratnavel Pandian, J.) was a party.

35. In this context, reference may be made to Section 340 of the Code of Criminal Procedure under Chapter XXVI under the heading "Provisions as to offences affecting the administration of justice". This section confers an inherent power on a Court to make a complaint in respect of an offence 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, if that Court is of opinion that it is expedient in the interest of justice that an enquiry should be made into an offence referred to in clause (b) of sub-section (1) of Section 195 and authorises such Court to hold preliminary enquiry as it thinks necessary and then make a complaint thereof in writing after recording a finding to that effect as contemplated under sub-section (1) of Section 340. The words "in or in relation to a proceeding in that Court" show that the Court which can take action under this section is only the Court operating within the definition of Section 195 (3) before which or in relation to whose proceeding the offence has been committed. There is a word of caution inbuilt in that provision itself that the action to be taken should be expedient in the interest of justice. Therefore, it is incumbent that the power given by this Section 340 of the Code should be used with utmost care and after due consideration. The scope of Section 340 (1) which corresponds to Section 476 (1) of the old Code was examined by this Court in *K. Kanunakaran Vs. T.V. Eachara Warriar and Another*, [1978] 1 SCC 18 and in that decision, it has observed:

"At an enquiry held by the Court under Section 340 (1) of Cr.P.C., irrespective of the result of the main case, the only question is whether a prima facie case is made out which, if unrebutted, may have a reasonable likelihood to establish the specified offence and whether it is also expedient in the

interest of justice to take such action.

.....The two pre-conditions are that the materials produced before the High Court make out a prima facie case for a complaint and secondly that it is expedient in the interest of justice to permit the prosecution under Section 193 IPC."

36. The above provisions of Section 340 of the Code of Criminal procedure are alluded only for the purpose of showing that necessary care and caution are to be taken before initiating a criminal proceeding for perjury against the deponent of contradictory statement in a judicial proceeding."

15. In case of ***Amarsang Nathaji Vs. Hardik Harshadbhai Patel & Others***, reported in ***(2017) 1 SCC 113***, the Supreme Court has observed in Para – 6 & 7, which is as under :-

"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 "the I.P.C."); 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) of the Cr.P.C., having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S. Mohd. and Another Vs. 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.

7. In the process of formation of opinion by the court that it is expedient in the interests of justice that an inquiry should be made into, the requirement should only be to have a prima facie satisfaction of the offence which appears to have been committed. It is open to the court to hold a preliminary inquiry though it is not mandatory. In case, the court is otherwise in a position to form such an opinion, that it appears to the court that an offence as referred to under Section 340 of the Cr.P.C. has been committed, the court may dispense with the preliminary inquiry. Even after forming an opinion as to the offence which appears to have been committed also, it is not mandatory that a complaint should be filed as a matter of course. (See *Prithvi v. State of Maharashtra and Others*)”

16. Therefore, much emphasis and importance has been given to the initial part of Section 340 Sub-Section (1) of Cr.P.C., when a Court can form an opinion, as it has been discussed herein above, that it was too early stage for filing application under Section 340 of Cr.P.C. and the reasons for the same also have

been discussed herein above. The statement of any witnesses which is part of Court record can be contradicted or disproved only on the basis of the recorded evidence of other party, which is the part of the Court proceeding. This goes to show that opportunity of filing repeat application under Section 340 of Cr.P.C. is not taken away from the petitioner and he is at liberty to file such repeat application when circumstances are present and the Court can form an opinion as it is required under Section 340 (1) of Cr.P.C. to consider on the prayer made.

17. Hence after over all consideration, I am of this opinion that the petition brought by the petitioner is without any substance at present as well as premature and also that the petitioner has other remedy available to file a revision petition against the order passed by the Court below, hence for these reasons, the petition is dismissed.

Sd/-
(Rajendra Chandra Singh Samant)
Judge