

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 8385 OF 2022

Santilata Behuria

.... *Petitioner*

Mr. Amit Prasad Bose, Advocate

-versus-

Basanta Kumar Behuria

.... *Opp. Party*

CORAM:
JUSTICE K.R. MOHAPATRA

ORDER
08.04.2022

Order No.

01. 1. This matter is taken up through hybrid mode.
2. This writ petition has been filed assailing the order dated 28th March, 2022 (Annexure-I) passed by learned Judge, Family Court, Jajpur in C.P. No.152 of 2020, whereby he rejected an application filed by the Petitioner under Section 340 read with Section 195 (1)(b)(i) Cr.P.C. praying *inter alia* to file a complaint against the Opposite Party alleging commission of offence under Section 199 read with Sections 193 and 209 I.P.C by filing false affidavit in terms of the guidelines in the case of **Rajnish -vrs.- Neha & Another**, reported in (2021) 2 SCC 324. Initially the Petitioner moved the petition before recording of the evidence, which was disposed of by the Family Court vide order dated 13th July, 2021, holding as under:

“So, the materials on record, coupled with surrounding circumstances and the stage of the case, in my considered view are not sufficient to prima facie hold that the respondent has given any false affidavit knowingly or believing to be false. However, if in course of trial/conclusion of trial, it comes to light that such a mischief has been committed by the respondent the Petitioner is at liberty to take steps. Accordingly, the petition is

disposed of. Put up on 23.07.2021 for hearing of this case.”

Assailing the same, the Petitioner filed W.P.(C) No.24580 of 2021 and this Court disposed of the writ petition vide order dated 30th November, 2021 holding as under;

“Court does not find that the Family Court acted with material irregularity or illegality in making impugned order since at the stage of complaint made by Petitioner, she cannot presume that the affidavit, allegedly wherein false evidence is given, will be relied upon for what it says. The adjudication process for determination of maintenance to be paid to her will cause the affidavit to be analyzed for its evidentiary value. It is only on the finding in the maintenance case that it can be said by Court on a complaint to be thereafter made that it is a fit case for Petitioner to be prosecuted.”

3. Relying upon the observations made by this court (supra) and the observation made by Hon'ble Supreme Court at paragraph-72.8 (h) in the case of **Rajnish** (supra), the Petitioner, by filing a petition (Annexure-11), again moved learned Judge, Family Court, Jaipur to file complaint against the Opposite Party before the Magistrate having jurisdiction for alleged commission of offence under Section 199 read with Sections 191 and 193 IPC. For the purpose of our discussion Paragraph-72.8(h) of **Rajnish** (supra) is reproduced hereunder;

“72.8(h) The pleadings made in the applications for maintenance and replies filed should be responsible pleadings; if false statements and misrepresentations are made, the Court may consider initiation of proceeding under Section 340 Cr.P.C. and for contempt of Court.”

Said petition was rejected vide order dated 28th March, 2022 under Annexure-1. Hence, this writ petition has been filed assailing the order under Annexure-1.

4. Mr. Bose, learned counsel for the Petitioner submits that on earlier occasion, learned Judge, Family Court, Jajpur refused to entertain the application on the ground that the parties had not submitted their evidence in affidavit and hearing of the civil proceeding had not begun. Presently, the evidence of the parties has been closed and the matter is at the stage of argument. Thus, learned Judge, Family Court, Jajpur could have appreciated the evidence on record and sent the complaint to the magistrate having jurisdiction to take cognizance of the offence complained of. But, learned Judge, Family Court most illegally and erroneously interpreting the observations made by this Court while disposing of W.P.(C) No.24580 of 2021, rejected the petition under Annexure-1.

4.1. It is his submission that when the evidence of the parties in the civil proceeding has already been closed and the matter is at the stage of argument, learned Judge, Family Court, Jajpur was free to scrutinize and appreciate the evidence on record for consideration of the petition under Annexure-1. As such, learned Judge, Family Court failed to exercise the jurisdiction vested under law, which has resulted in flagrant miscarriage of justice. Hence, he prays for setting aside the impugned order under Annexure-1 and to direct learned Judge, Family Court, Jajpur to entertain the petition filed under Section 340 of Cr.P.C. read with Section 195 (1)(b)(i) of the Cr.P.C. on merit and proceed with the matter accordingly.

5. 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 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.”

Chapter XXVI of Cr.P.C. deals with provisions as to offences affecting administration of justice. Section 340 Cr.P.C. deals with the procedure in cases mentioned in Section 195 Cr.P.C., which deals with procedure for prosecution for contempt of lawful authority or public servants, for offences against public justice and for offences relating to documents in evidence. Further, direction at Paragraphs-72.2 (b) and 72.3 (c) of **Rajnish** (supra) requires an applicant while making claim for maintenance or the respondent thereto while submitting reply, to submit ‘Affidavit of Disclosure’ of Assets and Liabilities, as the case may be, along with their respective pleadings. Thus, ‘Affidavit of Disclosure’ being an integral part of the pleadings, is squarely covered under the rigors of Paragraph-72.8 of **Rajnish** (supra). On perusal of the order passed in W.P.(C) No.24580 of 2021, it is crystal clear that this Court while disposing of the said writ petition has categorically held that cognizance of the offence for filing false affidavit can only be taken after the finding is recorded in the maintenance case (C.P. No.152 of 2020), when the Court will be in a position to entertain such an application for initiating the proceeding against wrongdoer (Opposite Party).

6. Section 340 Cr.P.C. clearly stipulates that when on an application made to it under the provision, the Court is of the opinion that an inquiry should be made into any offence appears to have been committed in or in relation to a proceeding in that Court, or as the case may be,... etc. the Court, after such preliminary inquiry, may act in accordance to the procedure laid down in clauses (a) to (e) of sub-section (1) of Section 340 Cr.P.C.

Thus, before taking action under clauses (a) to (e), as referred to above, the Court must be *prima facie* satisfied that an offence enumerated under Section 195 Cr.P.C. has been committed. If the Court proceeds to make an inquiry into the veracity of the statement made in the 'Affidavit of Disclosure' at any stage before dealing with such affidavits along with other materials available in the case, then it will certainly prejudice the case of either of the parties in the proceeding itself. Thus, such an application, if filed, can only be considered at the time of final hearing of the case. In other words, it can only be considered at the time of final adjudication of the proceeding. In the case of ***Iqbal Singh Marwah and another – vrs -Minakshi Marwah and another*** reported in (2005) 4 SCC 370 it is held that '*Sub-section (1) of Section 340 Cr.P.C. contemplates holding of a preliminary enquiry. Normally, a direction for filing of a complaint is not made during 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.*' (see paragraph-24).

Further, High Court of Bombay in the case of ***Dr. Santosh Chandrasekhar Shetty –vrs- Ameeta Santosh Shetty and Another*** reported in 2019 SCC Online Bom 99, relying upon the ratio in ***Iqbal Singh Marwah*** (supra) and several other case laws summarised the scope of Section 340 Cr.P.C. as follows;

“27. The law laid down by the Apex Court on section 340 of Criminal Procedure Code in the aforesaid decisions can be summarised as under:—

A) The Court is not bound to make a complaint regarding commission of offence and the said course will be adopted only if the Court is of the

opinion that it is expedient in the interests of justice to do so and not in every case;

B) Before ordering filing of complaint, the Court may hold a preliminary enquiry. But it is not necessary to hold preliminary enquiry in every case and when the Court is otherwise in a position to form an opinion which is a condition precedent for initiating action under section 340, the Court may dispense with the enquiry;

C) Even if the Court comes to the conclusion that prima facie, a case of commission of offence is made out, it is not necessary in every case to direct filing of a complaint. The Court cannot direct filing of a complaint unless on the basis of material on record it is of the opinion that it is expedient in the interests of justice to direct filing of a complaint. As held by the Constitution Bench of the Apex Court in the case of Iqbal Singh (supra), expediency will normally be judged by the Court by weighing not the magnitude of injury suffered by the person affected by the alleged offence but having regard to the effect or impact of such commission of offence has upon the administration of justice.

D) As observed in paragraph 24 of the decision of the Constitution Bench in the case of Iqbal Singh, normally a direction for filing of a complaint is not made during the pendency of proceedings and that is done at the stage when proceeding is concluded and final judgment is rendered.”

7. In view of the above, no further discussion is required to consider the scope of entertaining a petition under Section 340 Cr.P.C., which can only be entertained after the final order is passed in the Proceeding, i.e., C.P. No. 152 of 2020.

8. Thus, learned Judge, Family Court, Jajpur has committed no error in not entertaining such an application at the stage of argument in the proceeding. However, the Petitioner, if so advised,

may file a fresh application under Section 340 Cr.P.C. with a prayer to learned Judge, Family Court, Jaipur to consider the same after final disposal of C.P. No. 152 of 2020.

9. With the aforesaid observation, this writ petition is disposed of without interfering with the impugned order.

Urgent certified copy of this order be granted on proper application.

(K.R. Mohapatra)
Judge

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