Jayendra Sahu Vs State Of Chhattisgarh And Ors

Writ Petition (Cr.) No. 375 Of 2019

Court: Chhattisgarh High Court

Date of Decision: Oct. 21, 2019

Acts Referred:
Code Of Criminal Procedure, 1973 â€" Section 125, 195, 340, 340(1), 397#Evidence Act 1872 â€" Section 65B#Indian Penal Code, 1860 â€" Section 193, 199, 200#Code Of Civil Procedure 1908 â€" Order 18 Rule 4#Constitution Of India, 1950 â€" Article 226

Hon'ble Judges: Rajendra Chandra Singh Samant, J

Bench: Single Bench

Advocate: Jayendra Sahu, Ghanshyam Patel, Achyut Tiwari

Final Decision: Dismissed

Judgement

Rajendra Chandra Singh Samant, J

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 17,8 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 (Crl.) 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 Secton 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 Warrier 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 11,3 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 Pritish 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.