

IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.M.C. 1130/2008 & CRL.M.A.4231/2008

JAGDISH PRASAD Petitioner Through: Mr.R.B. Pandey, Advocate.

versus

STATE & ORS. Respondents Through: Mr.Jaideep Malik,APP.

Mr. R.P. Kaushik, Advocate for

Respondent No.2.

CORAM:

HON'BLE DR. JUSTICE S. MURALIDHAR

1. Whether Reporters of local papers may be allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes ORDER

23.03.2009

1. This petition under Section 482 of the Code of the Criminal Procedure (CrPC) is directed against an order dated 22nd February 2008 passed by the learned Additional Sessions Judge (ASJ) Delhi allowing CrI.A.No.18 of 2005 filed by the Respondent No.2 against an order dated 9 th September 2005 passed by the learned Metropolitan Magistrate (MM) Delhi in an application filed by the Petitioner herein under Section 340 CrPC. By the said order dated 9th September 2005, the learned MM came to the prima facie conclusion that Respondent No.2 had committed an offence under Section 193 of the Indian Penal Code (IPC) and ought to be prosecuted for the same. The learned ASJ has, in the CrI.M.C.1130/08 Page 1 of 11 impugned order, set aside the order dated 9 th September 2005 on the ground that the learned MM had not determined if it was expedient in the interests of justice that an inquiry should be held for ascertaining whether the Respondent No.2 should be prosecuted for the offence under Section 193 IPC.

2. The brief facts leading to the filing of the present petition are that Respondent No.2 wife filed an application under Section 125 CrPC seeking maintenance from the Petitioner husband for herself and the minor female child. In her petition she stated in Para 15 that she was "not employed anywhere and is unable to maintain herself and her said minor girl Shruti and they presently are survived on the mercy of parents of the petitioner No.1 (wife) who themselves have limited resources to maintain the large family."

3. According to the Petitioner in the month of June 2001, the Respondent No.2 wife had joined Tirath Ram Shah Charitable Hospital, Rajpur Road, Delhi as a `Receptionist' and was receiving salary from the said hospital. On this basis, Petitioner had earlier filed an application under Section 340 CrPC which, according to Respondent No.2, was dismissed on 16th September, 2003.

4. On 12th February 2004, Respondent No.2 was examined in chief in the maintenance petition. She stated: "I was not working anywhere after my marriage, I was not working till today anywhere from the date when I CrI.M.C.1130/08 Page 2 of 11 was kicked out from my matrimonial home." She was cross examined on 7th April 2004 and was asked whether she was doing any job during the pendency of the petition. She replied that "since after coming to my parental home, I am not doing any job. I have one bank account in Co- operative Bank. It is incorrect to suggest that after coming to my parental home, I have worked with Tirath Ram Shah Charitable Hospital, Rajpur Road, Delhi." In response to another specific question whether she was holding a bank account at Punjab National Bank, Civil Lines she stated as under:

"It is wrong to suggest that I am holding an account which is 427791 in the above said

bank i.e., PNB"

5. Consequent upon the above replies in cross examination, the Petitioner filed an application under Section 340 CrPC seeking the prosecution of the Petitioner for committing perjury punishable under Section 193 CrPC.

6. It appears that a reply was filed to the said petition by Respondent No.2. Even evidence appears to have been led by examining the officials from both the Punjab National Bank as well as the Tirath Ram Shah Charitable Hospital.

7. RW-2 D.S. Bandari, Senior Manager, Punjab National Bank, Civil Lines, Delhi was examined on 28th September 2004. He confirmed that CrI.M.C.1130/08 Page 3 of 11 an account had been open by Respondent No.2 with the bank with the addresses "C/o Tirathram Shah Hospital, 2 Battery Lane, Rajpur Road, Delhi -54." He stated:

"On 20.07.01 Smt. Veena Bhatt opened her

account in Punjab National Bank, Civil Lines, Delhi. The account was introduced by Sh.B.Arora, SF account No.11908 with the address C/o

Tirathram Shah Hospital, 2 Battery Lane(sic Lane), Rajpur Road, Delhi-54 with a initial amount of Rs.500/-. She was allotted account No.427791. Statement of the account since opening of the account till today is exhibited as Ex.RW2/A, Ex.RW2/B, Ex.RW2/C, Ex.RW2/D. At the time of opening of account Smt. Veena Bhatt stated her occupation "service" which has been written in point A over Ex.RW2/D.

8. RW-3 Manoj Nair, AAO, Tirath Ram Shah Hospital in his examination in chief stated as under:-

"The authority letter given by Dr.A.K.Dubey, Director is Ex.RW3/A. That from 06.06.01 to

10.06.02 Mrs.Veena served in Tirath Ram

Shah Hospital. She was working as a

receptionist on fixed term contract basis. The gross salary of Mrs.Veena was Rs.3,572/-

only. Her employment no. was 1225. I

identify Mrs. Veena who is present in the

court. There was break in service for one day. Smt. Veena Bhatt was working as a

receptionist and not as a trainee as per the record. In my hospital no receptionist trainee CrI.M.C.1130/08 Page 4 of 11 are engaged. She has not applied for the

renewal of her further contract after 10.06.02. I can submit a copy of the application form

and record of salary if required. The original is before this hon'ble court. Application for employment form is Ex.RW3/B (four pages)

and the copy of salary register for the month of June, 2001 to June, 2002 are collectively Ex.RW3/C (12 pages)."

9. The cross examination only elicited the following clarification by Respondent No.2:-

"It is correct that Smt. Veena had not worked in the hospital as a permanent hospital (sic) or on ad hoc basis or on temporary basis she had worked only on contract basis.

10. The learned MM in the order dated 9th September 2005 came to the following conclusion:-

"I have gone through the record of the present application as well as the petition under

Section 125 Cr.P.C., which is pending in the present court. Smt. Veena may have had a

genuine cause for having worked as proved

against her in her case and also admitted by her in the present proceedings. Nevertheless her pressing requirements for income does not exonerate her from the offence of having

given false testimony in the court.

I am, therefore, of the opinion that Smt.

CrI.M.C.1130/08 Page 5 of 11 Veena has committed an offence under

Section 193 IPC and she ought to be

prosecuted for the same."

11. Aggrieved by the above order, Respondent No.2 filed an appeal in the Court of learned ASJ. Among the grounds urged in the appeal were that an earlier petition under Section 340 CrPC having been dismissed, a further application ought not to have been entertained by the learned MM. It was further urged that there was never any intention on the part of Respondent No.2 to commit any offence and that her only intention was to claim maintenance as per law. It was sought to be urged that in the recording of the answers to the questions put to Respondent No.2 in her cross examination there were chances of inadvertent mistakes "unless it is in the language of the appellant/witness i.e. Hindi/vernacular language .". It was also urged that the learned MM had, in fact, pronounced a final judgment on the guilt of the Respondent No.2 for the offence under Section 193 IPC and, therefore, the order dated 9th September 2005 stood vitiated.

12. In the impugned order dated 22nd February 2008, the learned ASJ has referred to the judgments of the Supreme Court in Afzal v. State of Haryana and others AIR 1996 SC 2326, Murrari & Company 2002 (2) SCC 367 and Pritish v. State of Maharashtra and others AIR 2002 SC 236 to hold that it was incumbent on the learned MM to come to a definite conclusion that it was expedient in the interest of justice that an CrI.M.C.1130/08 Page 6 of 11 action should be taken against respondent No.2 under Section 193 IPC. The

learned ASJ proceeded to observe as under:- "Mere recording of a finding to the effect that an offence punishable under section 193 of

the Penal Code was committed would not

answer requirement of section 340 of the

Code. When primary question was answered

in affirmative then secondary and most

effective proposition was to be answered to

the effect whether it was expedient in the

interest of justice to initiate an action in the matter. No such step was taken by the Trial

Court to see that it was expedient in the

interest of justice to take such action. In such a situation, order impugned is shrouded with illegality. In cannot be allowed to stand. Consequently, order impugned is set-aside

and appeal is granted. Trial Court record be sent back. File be consigned to Record

Room."

13. Learned counsel for the Petitioner makes a two-fold submission. According to him, the learned ASJ, hearing the criminal appeal had to specifically direct the complainant to withdraw the complaint and could not have passed any other order. Secondly, he submits that a reading of the order dated 9th September 2005 passed by the learned MM shows that, in fact, the learned MM had come to a conclusion about the expediency in the interest of justice for prosecuting Respondent No.2 thus satisfying the requirement of the law under Section 340 CrPC. CrI.M.C.1130/08 Page 7 of 11

14. Learned counsel for the Respondent No.2 urged that there was no illegality in the order of learned ASJ mandating a full-fledged inquiry prior to the formation of opinion that it was expedient in the interest of justice to prosecute Respondent No.2. He submits that inasmuch as there was no specific conclusion drawn by the learned MM to that effect, the order dated 9th September 2005 stood vitiated. He also submits that with the learned MM already having concluded on the guilt of Respondent No.2, nothing really remained as far as the prosecution of Respondent No.2 was concerned. It would be an empty formality.

15. The submissions of both sides have been heard. As regards the first contention, a reference may be made to Section 341 CrPC which reads as under:-

(1) Any person on whose application any

Court other than a High Court has refused to make a complaint under sub-section (1) or

sub-section (2) of section 340, or against

whom such a complaint has been made by

such Court, may appeal to the Court to which such former Court is subordinate within the

meaning of sub-section (4) of section 95, and the superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be,

making of the complaint which such former

Court might have made under section 340,

and if it makes such complaint, the provisions of that section shall apply accordingly."

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16. A plain reading of the above provisions would show that an appeal can be filed by either a complainant seeking to invoke Section 340 CrPC or by a person against whom the Court below has invoked the provision. In the instant case, the provision was successfully invoked by the Petitioner before the learned MM and it was Respondent No.2 who filed an appeal. While accepting her submission, learned ASJ set aside an order dated 9th September 2005. The effect of this was the withdrawal of a complaint itself. Therefore, there was no illegality committed by learned ASJ as far as the order that should have been passed under Section 341 CrPC. The first submission of learned counsel for the Petitioner is accordingly rejected.

17. That brings us to the merits of the case. The only ground on which the learned ASJ appears to have set aside the order dated 9th September 2005 passed by the learned MM is that a definite opinion was not formed by the learned MM that it was expedient in the interest of justice to prosecute Respondent No.2 for the offence under Section 193 IPC. The learned ASJ unfortunately does not appear to have referred to the record of the detailed inquiry conducted by learned MM. This involved not only considering the reply filed by Respondent No.2 but also the evidence recorded of RW-2 i.e. the Senior Manager D.S.Bandari of the PNB and RW-3, the official of the `Tirath Ram Shah Hospital Manoj Nair. In the light of the evidence of these witnesses, the relevant portion of which have been extracted hereinbefore, there was no question of Crl.M.C.1130/08 Page 9 of 11 learned MM having to hold any further inquiry in order to determine whether Respondent No.2 ought to be prosecuted or not.

18. In the considered view of this Court, when the learned MM in the order dated 9th September 2005 observed "I am, therefore, of the opinion that Smt. Veena has committed an offence under Section 193 IPC and she ought to be prosecuted for the same", the requirement of Section 340 CrPC as explained by the Supreme Court stood satisfied. In other words, the opinion formed by learned MM was obviously only a tentative or a prima facie one. This is plain from the expression "ought to be prosecuted". Further, the same expression "ought to be prosecuted" also indicates the formation of an opinion that it was expedient in the interest of justice that Respondent No.2 should be prosecuted. Therefore, both the requirements of law as explained by the Supreme Court in relation to Section 340 CrPC stood completely satisfied by the order dated 9th September 2005 passed by the learned MM. This Court is, therefore, unable to agree with the conclusion reached by learned ASJ to the contrary.

19. The order dated 22nd February 2008 passed by the learned ASJ is accordingly set aside. The order dated 9th September 2005 passed by the learned MM and the consequent application presented to the learned Additional Chief Metropolitan Magistrate for prosecuting Respondent No.2 are revived. The further steps will proceed in accordance with law. Crl.M.C.1130/08 Page 10 of 11

20. The petition is accordingly allowed with no order as to costs. The pending application is also disposed of.

S. MURALIDHAR, J.

MARCH 23, 2009

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