

Dismissal of application for initiation of proceedings under Section 340 CrPC read with Section 195 IPC in a SARFAESI proceeding: DRAT KOLKATA

Sri Partha Banerjee

...Appellant

State Bank of India

...Respondent

Case No: Appeal No. 97 of 2023

Date of Judgement: 9th August, 2023

Judges:

Anil Kumar Srivastava, J – Chairperson

For Appellant: Mr. Ranjan Kali, Advocate.

For Respondent: Mr. S. Pal Chowdhury, Advocate.

Facts:

The appellant, Mr. Partha Banerjee, had taken a loan from the respondent bank, State Bank of India, which was classified as NPA. The bank initiated SARFAESI action against the appellant. The appellant filed an application under Section 17 of the SARFAESI Act challenging the SARFAESI action on the ground that notice under Section 13(2) and 13(4) was not served on him. While the Section 17 application was pending, the appellant filed I.A. No. 1819/2019 and 1820/2019 seeking initiation of proceedings under Section 340 CrPC read with Section 195

IPC against the Authorized Officer of the bank and one Mr. Debasish Nath for alleged forgery of appellant's signatures in bank's reply affidavit. The bank opposed the applications stating no forgery was committed. The DRT dismissed the I.As finding no prima facie case warranting initiation of proceedings under Section 340 CrPC. Aggrieved, the appellant filed the present appeal.

Appellant's Arguments:

The DRT erred in not ordering an enquiry under Section 340 CrPC and dismissing the I.As merely on the ground that an authorized officer will not commit forgery. No notice under Section 13(2) or 13(4) was served upon the appellant. In bank's initial reply, there was no claim of personal service. Only later, a forged notice was filed claiming appellant's signatures. The DRT failed to appreciate the provisions of Section 340 CrPC requiring a preliminary enquiry. Hence, the impugned order is bad in law.

Respondent Bank's Arguments:

The DRT rightly held no case is made out for initiating proceedings under Section 340 CrPC. The appellant has not disclosed the source of the alleged forged reply/notice. In initial reply, notice was annexed without admitting/denying appellant's signatures. Only later, when allegations were made, a copy of notice bearing admitted signatures was filed. The appellant has received the notice. No forgery or fabrication of evidence was committed. The objective is to delay the SARFAESI proceedings which are summary in nature.

Court's Reasoning and Decision:

Section 340 CrPC can be invoked only when false evidence is fabricated. Mere contradictory statements may not warrant prosecution under Section 195 IPC (Para 10). The onus lies on the appellant to show fabrication of false evidence. As per Kapil Corepacks case, answer to interrogatories which are not evidence cannot attract Section 195 or 340 CrPC (Para 11). Preliminary enquiry under Section 340 CrPC is not mandatory in every case. Court can form opinion otherwise if possible (Amarsang Nathaji case). The expediency of initiating proceedings is determined not by injury caused but by impact on administration of justice (Iqbal Singh Marwah case) (Paras

12-15). In the present facts, the alleged forged reply/notice has unestablished source. The issue of service of notice under Section 13 is yet to be decided in Section 17 application. Circumventing the adjudicating process by seeking final relief via I.As cannot be permitted (Para 16). The proceedings are summary in nature warranting expeditious disposal. No illegality in DRT's order of dismissal. Appeal devoid of merits. (Para 17).

Order:

Appeal dismissed. Impugned order upheld.

Sections Discussed:

Section 340 Criminal Procedure Code

Section 195 Indian Penal Code

Section 17 Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act

Cases Referred:

Kapil Corepacks Pvt. Ltd. v. Harbans Lal (2010)

Amarsang Nathaji v. Hardik Harshadbhai Patel (2016)

Iqbal Singh Marwah v. Meenakshi Marwah (2005)

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Court

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Full Text of Judgment:

1. Instant Appeal has arisen against a judgment and order dated 3rd August, 2021 passed by Ld. DRT -I Kolkata dismissing the I.A. No. 1819 of 2019 and 1820 of 2019 arising out of S.A. No. 59 of 2019 in Partha Banerjee versus State Bank of India and another. It appears from the pleadings of the parties that the Appellant has taken certain loan from the Respondent which was classified as NPA and subsequently SARFAESI actions were initiated by the Bank. Challenging the SARFAESI action initiated by the Respondent Bank, Appellant preferred the SARFAESI Application under Section 17 of the SARFAESI Act with a ground that notice under Section 13(2) and 13(4) of the SARFAESI Act were never served upon him. Pending SARFAESI application under Section

17 of the SARFAESI Act. I.A. No. 1819 2019 and 1820 of 2019 were filed for initiation of proceedings under Section 340 of Cr.P.C. read with Sec. 195 IPC against the Authorised officer of the Respondent Bank and against Sri Debasish Nath, who affirmed the affidavit in opposition by forging the signatures of the Applicant on the Court record.

2. Opposition have been filed by the Bank before the Ld. DRT to the effect that no forgery is ever committed by any officer of the Bank. Notices were duly served upon the Appellant, who accepted the notices. He had full knowledge of the SARFAESI proceedings. After hearing Learned Counsel for the parties, Learned DRT recorded a finding that no prima facie case is made out by the Applicant which may result into initiation of proceedings under Section 340 read with Sec. 195 IPC. Accordingly, both the IAs were dismissed.

3. Feeling aggrieved by the order, Appellant preferred the Appeal.

4. I have heard the Learned Counsel for the parties and perused of the record.

5. Learned Counsel for the Appellant submits that the Ld. DRT has erred in recording a finding that no case under Section 340 of the Cr.P.C. read with Sec. 195 IPC is made out. It is further submitted that no enquiry under Section 340 of the Cr.P.C. read with Sec. 195 IPC was conducted by the Learned DRT rather I.A.s are dismissed merely on the ground that the authorized officer who is on the rank of Chief Manager will not commit any fraud or forgery. It is further submitted that the SARFAESI Application was filed with the allegation that no notice under Section 13(2) or 13(4) were ever served upon the Applicant. In initial reply by the Respondent no such assertion is made that the notices were received by the Appellant in person. But when the Appellant moved an application under RTI to the District Magistrate Hooghly for certain information regarding submission of any application under Section 14 of the SARFAESI Act, then only a reply is submitted which shows that the notices under Section 13(2) of the SARFAESI Act was received by the Appellant by putting signature on the copy of it which is forged one. No copy of such notices was ever received by the Appellant. His signatures were forged upon the copy of

the notice.

6. Learned Counsel for the Appellant further submits that Ld. DRT has erred by appreciating the provisions of Section 340 of CrPC read with Sec. 195 IPC. No preliminary enquiry is conducted by the Ld. DRT. Accordingly, the order is bad in law.

7. Learned Counsel for the Respondent Bank vehemently opposed the prayer and submits that the Ld. DRT has rightly arrived at a conclusion that no case is made out in favour of the Appellant. It is submitted that source of the alleged reply and notice under Section 13(2) of the SARFAESI Act bearing the signatures of the Appellant is not disclosed by the Appellant. It is further submitted that in the initial reply, a statement was made annexing the copy of notice. There was no denial or admission regarding the signatures of the Appellant on the notice. When I.A. was moved by the Appellant, copy of the notices under Section 13(2) bearing signatures of the Appellant were filed. It is further submitted that the Appellant himself has received the notice. There was no need of enquiry at this stage as neither forgery was committed nor any document was fabricated. It is further submitted that no false evidence was either given or fabricated by the Respondent.

8. It is further submitted that the SARFAESI Application is still pending before the Learned DRT. Appellant intends to get a decision in his favour by simply moving an I.A.

9. As far as provisions of Section 340 of CRPC are concerned, it would be relevant to quote the provisions which reads as under:

Section 340 Procedure in cases mentioned in section 195 of IPC.

(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 proceedings 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 subsection

(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.

10. Learned DRT has placed reliance upon a judgment of Hon'ble Apex Court in Kapil Corepacks Pvt. Ltd. V. Harbans Lal reported in AIR 2010 SC 2809. Learned Counsel for the Appellant submits that judgment is not applicable in the facts of the present case. I am unable to accept the submission made by the Learned Counsel for the Appellant as in Para No. 28 of the judgment it is held that:

"Section 340 CrPC provides that when upon an application made to it in that behalf or otherwise, any court is of 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 CrPC which appears to have been committed in or in relation to a proceedings in that court, or as the case may be, in respect of a document produced or given in evidence in a proceedings in that court, such court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect, make a complaint thereof in writing, send it to a Magistrate of the First Class having jurisdiction, etc. Thus the power under Section 340 CrPC read with Section 195 IPC can be exercised only where someone fabricates false evidence or gives false evidence. By no stretch of imagination, a

party giving an answer to a question put under Order 10 Rule 2 of the Code when not under oath and when not being examined as a witness, can attract Section 195 IPC and consequently cannot attract Section 195(1)(b) and Section 340 CrPC.”

11. The initial burden lies upon the Appellant to prove that some false evidence is fabricated for giving as evidence in any judicial proceedings. In the case of Kapil Corepacks Pvt. Ltd.(supra), there was a case wherein an answer to a question put under order X Rule 2 CPC was given which was not given on oath and not being examined as a witness. It was held that neither the provisions at Section 195 (1) (b) IPC nor Section 340 of CrPC may be attracted.

12. Learned Counsel for the Appellant has placed reliance upon a judgment of the Hon’ble Apex Court in Civil Appeal No. 11120 of 2016 arising out of S.L.P. (C) No. 13749 of 2016 Amarsang Nathaji As himself and as Karta and Manager Versus Hardik Harshadbhai Patel and others decided on 23rd November, 2016. It was held by the Hon’ble Apex Court that:

“7. The mere fact that a person has made a contradictory statement in a judicial proceedings is not by itself always sufficient to justify a prosecution under Sections 199 and 200 of the Indian Penal Code (45 of 1860) (hereinafter referred to as “the IPC”); 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 ha emerged also, still the court has to form an opinion that it is expedient in the interests of justice to initiate any inquiry into the offences of false evidence and offences against public justice and more specifically referred in Section 340(1) of the CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. The court must be satisfied that such an inquiry as required in the interests of justice and appropriate in the facts of the case.

8. 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 CrPC 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."

13. Further, the Hon'ble Apex Court has placed reliance upon a judgment of the Constitution Bench in Iqbal Singh Marwah and another versus Meenakshi Marwah and another para 9 (2005) 4 SCC 370 wherein in Para 23 it was held that:

"23. In view of the language used in Section 340 CrPC the Court is not bound to make a complaint regarding commission of an offence referred to in Section 195(1) (b), as the section is conditioned by the words "court is of opinion that it is expedient in the interests of justice". This shows that such a course will be adopted only if the interest of justice requires and not in every case. Before filing of the complaint, the court may hold a preliminary enquiry and record a finding to the effect that it is expedient in the interests of justice that enquiry should be made into any of the offences referred to in Section 195 (1) (b). This expediency will normally be judged by the court by weighing not the magnitude of injury suffered by the person affected by such forgery or forged document, but having regard to the effect or impact, such commission of offence has upon administration of justice. It is possible that such forged document or forgery may cause a very serious or substantial injury to a person in the sense that it may deprive him of a very valuable property or status or the like. But such document may be just a piece of evidence produced or given in evidence in Court, where voluminous evidence may have been adduced and the effect of such piece of evidence on the broad concept of administration of justice may be minimal. In it expedient in the interest of justice to make a complaint."

14. It was further held by the Hon'ble Apex Court that opinion can be formed without conducting a preliminary enquiry. 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 compliant.

15. It means that as far as holding a preliminary enquiry is concerned, it is not mandatory provision which is to be made in each and every matter wherein an application is moved by the Applicant. It has been left to the discretion of the Judicial authority to make the enquiry or to form its opinion otherwise is possible.

16. As far as facts of the present case are concerned, no doubt SARFAESI action initiated by the Respondent were challenged by the Appellant by filing an application under Section 17 of the SARFAESI Act on the ground that there is no service of notice under Section 13(2) and 13(4) of the SARFAESI Act. SARFAESI application is pending disposal before the DRT. Initially a reply is filed annexing the copy of notice under Section 13(2) of the Act but subsequently when an application under Section 6 of the Right to Information Act was filed before the District Magistrate Hooghly to obtain certain information regarding filing of the application under Section 14 of the SARFAESI Act by the Bank, a copy of the notice under Section 13(2) was filed with the reply before the competent Authority i.e. DRT stating that the notice is received by the Appellant in person. As far as the question of moving the application under Section 6 of the RTI Act is concerned, reply is given by the office of the District Magistrate. Reply or the three queries was given by the Appellant but no document was annexed with the reply. So the source of the document could not be established by the Appellant.

17. As far as holding of preliminary enquiry is concerned, statement of object and reasons of the SARFAESI Act would show that these proceedings are summary in nature. Act was enacted with an object to expedite the matters of recovery of loan disbursed by the Bank or Financial Institution. In the application under Section 17 of the SARFAESI Act itself, a ground is taken regarding non service of notice under Section 13(2) of the SARFAESI Act which is yet to be decided and adjudicated by the DRT. In such circumstances, there is an option open to the Learned DRT to decide the issue as to whether the notice under

Section 13(2) and 13(4) of the SARFAESI Act were duly served upon the Appellant or not. But merely by circumventing the provisions of law in order to get the final relief by moving an interim application cannot be permitted under the law. Appellant tries to raise an issue which was directly and substantially an issue in an application under Section 17 of the SARFAESI Act. He cannot be permitted to circumvent the process of law. Accordingly, I do not find any material illegality or irregularity in the impugned order. Appeal lacks merit and is liable to be dismissed.

Appeal is dismissed. Impugned order passed by the Ld. DRT dated 3rd August 2021 is confirmed. No Order as to costs. File be consigned to Record Room.

Copy of the order be supplied to Appellant and the Respondents and a copy be also forwarded to the concerned DRT.

Copy of the Judgment/ Final Order be uploaded in the Tribunal's Website.

Order signed and pronounced by me in the open Court on this the 9th day of August, 2023.