Dr. Sanotsh Shetty vs Mrs. Ameeta Santosh Shetty on 25 January, 2019

Equivalent citations: AIRONLINE 2019 BOM 63

Author: A.S. Oka

Bench: A.S. Oka, Anuja Prabhudessai

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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL APPLICATION NO.72 OF 2017
IN
FAMILY COURT APPEAL NO.113 OF 2014

Dr. Santosh Chandrashekar Shetty
Aged - 42 years, An Adult Indian Inhabitant,
Occupation - Doctor,
R/o : 4004 B, Imperial Heights, BST Colony,
Oshiwara, Goregaon (W), Mumbai - 400 104. ... Applicant
(Original Appellant)

Versus

1. Mrs. Ameeta Santosh Shetty
Aged - 41 years, An Adult Indian Inhabitant,
Occ. - Fashion Designer,
C/o RaghuramShetty, Gangadeep Society,
Near Hotel Chenab Sagar Vihar Lane,
Vashi, New Mumbai.

2. State of Maharashtra
(Through Vashi Police Station,
New Bombay) ... Respondents
(Original Respondent)

Mr. Nilesh C. Ojha a/w Mr. Partho Sarkar, Mr. Tanveer Nizam, Mr. Vijay Kurle, Mr. Jay Shah, Ms. Shweta Doshi, Ms. Tanvi Kambli, Ms. Madhuri Gamre, Ms. Reena S. Rana, Ms.Shashikala Chauhan and Ms. Shraddha Chaurasiya for the Applicant.
Mrs. Ameeta Santosh Shetty, Respondent in person.

CORAM : A.S. OKA &
ANUJA PRABHUDESSAI, JJ.

DATE ON WHICH SUBMISSIONS WERE HEARD : 24.10.2018
DATE ON WHICH JUDGMENT IS PRONOUNCED : 25.01.2019

JUDGMENT (PER A.S. OKA, J.):

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1 By Administrative order dated 24th July 2017, the Hon'ble the Chief Justice assigned this Application as well as Civil Application No.71 of 1 of 27 2 cam-72.17 2.docx 2017 to this Bench. This application in Family Court Appeal is by the husband - appellant praying for an action against the first respondent - wife under section 340 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."). The case made out in the application in short is that the first respondent - wife made false and misleading statements on oath in her reply filed to Civil Application No.67 of 2016 and in Civil Application No.220 of 2016 filed by her. On 24 th November 2017, submissions were heard in this application. Thereafter, this Bench noticed that there is a transfer application signed and affirmed by the applicant - husband seeking transfer of Family Court Appeal along with interim applications to any Bench other than the Bench headed by one of us (A.S.Oka, J.). Therefore, by the order dated 24 th November 2017, this Court directed that the present application along with Civil Application No.71 of 2017 which was assigned to this Bench will be taken up only after transfer application is decided depending upon the outcome of the transfer application. By the order dated 14th June 2018 passed by the Hon'ble the Acting Chief Justice on the Administrative Side, the transfer application was ordered to be filed and accordingly, we have reheard the present application.

2 The applicant - husband filed a petition for divorce against the first respondent - wife in the Family Court Appeal at Mumbai. By judgment and order dated 25th November 2015, the prayer for grant of divorce was dismissed by the learned Judge of the Family Court. The learned Judge of the Family Court, inter alia, ordered and decreed the applicant to pay permanent alimony of Rs.30,000/- pm to the first respondent - wife and Rs.15,000/- pm to the daughter. Family Court Appeal No.113 of 2014 is preferred by the applicant - husband against the said judgment and decree. The first respondent - wife has filed cross-objections.

2 of 27 3 cam-72.17 2.docx 3 Civil Application No.11 of 2015 was taken out by the first respondent - wife seeking a direction to dismiss the appeal preferred by the applicant - husband on the ground of non-compliance of the decree for payment of maintenance. On 5th October 2015, a Division Bench of this Court passed the following order :-

> "1. The Appellant/husband shall pay to the Respondent/wife an amount of Rs.1,00,000/- within one week; an amount of Rs.2,00,000/- within four weeks thereafter; and balance amount of Rs.5,40,000/- within six weeks from today towards arrears of maintenance @ Rs.60,000/- per month from the date of the impugned Judgment and Order. The Appellant/husband shall continue to pay Rs.60,000/- per month to the Respondent/wife, which amount shall be paid in the first week of each month.
>
> 2. Stand over to 29th October, 2015.
>
> 3. In view of the undertaking given by the Appellant/husband to this Court, the

> execution of the impugned Judgment and Order is stayed."

The undertaking dated 8th February 2017 filed by the Applicant is on record by which the Applicant has undertaken to pay a sum of Rs.60,000/- per month to the first respondent - wife on or before 7th day of every month.

4 Civil Application No.67 of 2016 was filed by the applicant - husband for seeking extension of time by nine months for payment of arrears of maintenance as per the order dated 5 th October 2015. On 23rd March 2016, the Court passed the following order on Civil Application No.67 of 2016 as well as other Applications:-

> "1. The Respondent appearing in person states that even as of today, the Applicant is in arrears of a sum of Rs.50,000/. Perused the order dated 5th October, 2015. Gross default has been committed by the Applicant. The submission of the Respondent appearing in person is that the stay be vacated.
>
> 3 of 27 4 cam-72.17 2.docx 2 If the Applicant wants indulgence, the Applicant will have to clear arrears of Rs.50,000/within a period of one week from today and will have to pay costs quantified at Rs.50,000/. Indulgence can be shown provided the Applicant gives an unconditional undertaking to this Court to keep on paying the amount in terms of order dated 5 th October, 2015. The learned counsel appearing for the Applicant seeks time. Place the application on 6th April, 2016. We make it clear that unless the amounts as aforesaid are paid by the Applicant and undertaking is produced before the Court, no indulgence can be shown to the Applicant."

5 On 13th April 2016, Civil Application No.67 of 2016 along with Civil Application Nos.11 and 14 of 2015 were placed before the Court on which the following order was passed :

> "2 The direction of the Family Court in the impugned decree is to make payment of permanent alimony of Rs.30,000/- per month to the wife and Rs.15,000/- per month to the daughter with effect from 13th November, 2007. Clause (6) of the impugned decree directs the applicant to provide separate accommodation to the wife or else to pay rent of Rs.15,000/- per month.
>
> 3 It prima facie appears from the record that the applicant
>
> - husband who is an Orthopaedic Surgeon has a very large income. Moreover, what is challenged is a money decree. In the Appeal preferred by the applicant - husband, this Court is not powerless to pass an order of interim maintenance by taking recourse to Section 24 of the Hindu Marriage Act, 1955.
>
> 4 Considering the nature of the impugned decree and considering the fact that the impugned decree is a money decree, the applicant will have to deposit the entire amount due and payable as per the impugned decree as a condition for grant of stay.

> 5 Even otherwise, this is a fit case to exercise power of the Appellate Court under Sub-Rule 3 of Rule (1) of order XLI of the Code of Civil Procedure, 1908 for directing the applicant appellant to comply with the monetary part of the decree.
>
> 4 of 27 5 cam-72.17 2.docx 6 Place the Civil Application No.14 of 2015 along with connected applications for hearing on 17th June, 2016.
>
> 7 There will be ad-interim stay to the monetary part of the decree subject to the condition of deposit of the maintenance amount due and payable as per the impugned decree with the Family Court within a period of six weeks from today. If the entire amount is not deposited within a period of six weeks from today, the ad-interim stay shall stand vacated without any further reference to the Court."

(emphasis added) 6 Being aggrieved by the order dated 13 th April 2016, the applicant filed Special Leave Petition (C) No.14517 of 2016 before the Apex Court. The SLP was dismissed by order dated 30 th June 2016. However, the Apex Court granted time of six months to the applicant husband to deposit the amount in terms of clause 7 of the order dated 13th April 2016.

7 In the order dated 13th January 2017, when Civil Application Nos.11 of 2015, 15 of 2015 and 220 of 2016 were placed before this Bench, it was observed that the applicant husband did not comply with the order dated 5th October 2015 passed in Civil Application No.11 of 2015. It was also held that the applicant did not comply with clause 7 of the order dated 13th April 2016 even within the time of six months extended by the Apex Court. In paragraphs 12 to 19 of the said order, this Bench observed thus :-

> "12. Thus, the scenario which emerges to day is that the Appellant-husband did not comply with order dated 5 th October, 2015 passed in Civil Application No.11 of 2015. Consequently, the Appellant-husband did not comply with clause 7 of the order dated 13th April, 2016 passed by this Court even though the time was extended by six months as per the order of the Apex Court.
>
> 13. Paragraph 3 of the order dated 13th April, 2016 records a prima facie finding that the Appellant-husband is an Orthopaedic Surgeon and he has a very large income. The decree of the Family Court directs that the husband shall pay 5 of 27 6 cam-72.17 2.docx permanent alimony of Rs.30,000/ per month to the wife and Rs.15,000/ to the daughter. The learned counsel for the Appellant-husband on instructions of the Appellant-husband has expressed inability to comply with the condition imposed by clause 7 of the order dated 13th April, 2016.
>
> 14. Thus, there is a gross breach committed by the Appellant-
>
> husband of the aforesaid orders. The Appellant- husband has not deposited entire arrears of maintenance payable as per the impugned decree. We may reiterate here that under the order dated 13th April, 2016 time of six weeks was granted to deposit

> the entire arrears, which was extended by six months by the Apex Court, which expired on 30th December, 2016.
>
> 15. Therefore, considering this conduct, even assuming that as of today ad-interim order dated 5th October, 2015 passed in Civil Application No.11 of 2015 continues to operate, the same will have to be forthwith vacated.
>
> 16. Accordingly, we hold that the order of stay dated 5 th October, 2015 stands vacated. We also make it clear that the ad- interim stay of the operative part of the decree is not operative as the same stood vacated on the failure of the Appellant-husband to comply with the clause 7 of the order dated 13th April, 2016.
>
> 17. We therefore, direct that the Civil Application No.11 of 2015 shall be fixed for hearing on 10th February, 2017.
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> 18. We make it clear that even the show cause notice issued in terms of clause 2 of the order dated 22nd July, 2016 will be heard on that day.
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> 19. We also make it clear that the question of initiating the action against the Petitioner under the Contempt of Courts Act, 1971 for breach of undertaking recorded in the order dated 5th October, 2016 will be considered on the next date."

(emphasis added) 8 Civil Application No.71 of 2017 has been filed by the applicant

- husband for recall of the order dated 13 th January 2017. By the administrative order dated 24th July 2017, the Hon'ble the Chief Justice directed that Civil Application Nos.71 and 72 of 2017 be placed before this Bench. As the submission of the learned counsel appearing for the applicant 6 of 27 7 cam-72.17 2.docx is that Civil Application No.72 of 2017 should be heard first, we have taken up the said application for hearing.

9 In the present application, the contention of the applicant is that deliberate false and misleading statements have been made by the first respondent wife in her reply to Civil Application No.67 of 2016. The case made out in the application is that false statements have been made about the material facts by the first respondent - wife in her Civil Application No.220 of 2016 filed for enhancement of maintenance. The alleged false and misleading statements on the basis of which relief is claimed have been set out in the present application. The learned counsel appearing for the applicant invited our attention to the said averments.

10 Firstly, he relied upon the following averments in paragraph 8 of the reply to Civil Application No.67 of 2016 :-

> ".....The Applicant is partner in Orbit Hospital and is also owner of 2 hospitals further stating that the Applicant owns 1 Mercedes Car and 2 BMW Cars, That the Applicant owns an apartment on the 40th Floor Imperial which has 7 - star Super

> luxury apartments, Applicants owns Sai Sparsh Hospital and is owner of Hospital in Boisar which is in collaboration with the TATA group...."

The learned counsel appearing for the applicant submitted that the applicant is not the owner of any house and he is staying on rental basis in Mumbai. He submitted that the applicant is not the owner of any hospital and is not carrying out any business in partnership. He submitted that Mercedes Car belongs to applicant's sister and BMW Car belongs to a business group where his sister works as C.E.O. 11 The second instance of false allegations is pointed out in clause

(c) of paragraph 5 of the present application which reads thus :-

> 7 of 27 8 cam-72.17 2.docx "(c) That the Respondent No.1 has also dishonestly and falsely mentioned in the same Paragraph no.17 of the said Petition that "..... The Applicant is First Surgeon in India to use Oxinim Implants. The Applicants owns Hospital wherein he was paying Rs.1,00,000/- p.m. as rent and had 4 assistants whom he was paying Rs.25,000/- each per month....".

The learned counsel appearing for the applicant submitted that the applicant is a visiting a consultant attached to various hospitals and gets work from these hospitals. He submitted that if according to the case of the first respondent, the applicant is the owner of a hospital, there is no question of paying rent. The learned counsel appearing for the applicant submitted that with the malafide intention, the applicant has not mentioned the name of the hospital allegedly owned by the applicant and no document is produced is support. He submitted that the allegations made are patently false without any proof.

12 The learned counsel appearing for the applicant thereafter pointed out the averments made in paragraph 14 of Civil Application No.220 of 2016. The said averments read thus :-

> "..... Stridhan - Jwellery (Worth Rs.3 Crores as of today) Rs. 40 lakhs which was paid in cheque. It may be noted that the issue of Stridhan is absolutely undisputed by the Respondent No.1 - husband..."

He urged that the aforesaid statement is contrary to the written statement filed in the Family Court. He stated that in the FIR lodged with Vashi Police Station, it has been alleged that the same amount was paid in cash. He pointed out that the first respondent has mentioned value of Stridhan as Rs. 25 lakhs in her written statement filed in the Family Court and Rs.27,35,000/- in the FIR. He relied upon the order dated 7 th March 2016 passed by the Court of the Judicial Magistrate at Belapur. He also 8 of 27 9 cam-72.17 2.docx invited our attention to the statements made in the cross-examination of the first respondent.

13 Thereafter, the learned counsel relied upon the statements made in paragraph 22(b) by the first respondent in the aforesaid civil application. The said portion of paragraph 22(b) which is quoted in clause

(e) of paragraph 5 of the present Civil Application reads thus :-

> "…. The Respondent No.1 husband is the first surgeon he was paying 1 lakh per month as rent and had four assistants whom he was paying Rs.25,000/- each per month in the year 2010 as per the orders of the Hon'ble Judge Abhay S. Oka dated 02/03/2010 ….
>
> The above statement is a distorted judgment of order passed by Hon'ble Justice A.S.Oka. In fact in the order it is observed that "…. In the financial year 2008, 2009 the Applicant has contributed to the extent of 4,12,339/- towards paid up share capital as the partner of the firm…
>
> "… The account shows that the Applicant has paid a sum of Rs.2,00,000/- to his assistants during the said year….."

The learned counsel appearing for the applicant submitted that the said statement is based on misreading of the order dated 2 nd March 2010. No such observation was made in the order.

14 The learned counsel appearing for the applicant also invited our attention to the averments made in paragraph 23(2) of Civil Application No.220 of 2016 which has been quoted in clause (f) of paragraph 5 of this Civil Application. The said averments read thus :-

> "…. The Respondent No.1 Husband has acquired his super speciality qualifications because of the money he forcefully extracted from Applicant wife and her family members. It may be noted that the Respondent No.1 Husband's parents were financially not in a position to finance their son's education given the fact that they had mortgaged their flat for Rs.3 lakhs in the year 1999…."

9 of 27 10 cam-72.17 2.docx The learned counsel appearing for the applicant submitted that this contention is completely false and devoid of any supporting evidence. He pointed out the statements made by the first respondent in various proceedings in support of his contention that false statements have been made. His contention is that the first respondent is guilty of offences under sections 191 to 193, 196, 199, 200, 465 to 468, 471 and 474 of Indian Penal Code. In support of the application, the learned counsel appearing for the applicant has relied upon large number of decisions.

15 The submission of the learned counsel appearing for the applicant is that all that he is seeking is a preliminary enquiry on the basis of which this Court can come to the conclusion whether action under section 340 of Cr.P.C. is warranted. He pointed out the manner in which the first respondent - wife is taking undue advantage of the sympathy of the Court. The false allegations are being made by wife for securing maintenance. He pointed out that at the stage when the Court considers the prayer under section 340 of Cr.P.C., the respondent has no right of hearing and therefore, in the present case, the first respondent - wife is not entitled to be heard in the matter. We must note that he relied upon certain decisions in support of this proposition including the decision of the learned

single Judge of this Court in the case of Union of India Vs. Haresh Virumal Milani1. However, as this legal position appears to be fairly well settled supported by even the decisions of the Apex Court, we are not referring to other decisions cited by the learned counsel appearing for the applicant in support of this proposition. In fact, we have not heard the first respondent - wife appearing in person.

1. 2017(4) Mh. L.J. 441 10 of 27 11 cam-72.17 2.docx 16 He relied upon several decisions of various High Courts on the procedure to be followed while dealing with the applications under section 340 and laid emphasis on the fact that it is the duty of the Court to hold at least a preliminary inquiry with a view to find out the truth. He relied upon several observations of the learned Single Judge of the Delhi High Court in the case of H.S. Bedi Vs. National Highway Authority of India2. He submitted that the offence of perjury cannot be taken lightly as tendency to commit such offences is on rise. Relying upon the said decision, he submitted that it is the duty of the Court to ensure that every litigant comes to the Court with clean hands and when there is material on record to show that a litigant has not come to the Court with clean hands, the Court should come down very heavily on such litigant. He submitted that the tendency to make false claims before the Court is on rise. He also pointed out the observations made by another learned Single Judge of the Delhi High Court in the case of Mrs. Geeta Monga Vs. Ram Chand S. Kimat Rai & Ors. in decision dated 11th January 2005 in Criminal Application No.76 of 2004 3. He pointed out that the Delhi High Court criticized approach of Sessions Court while rejecting the application under section 340. He also relied upon another decision of the learned Single Judge of the Delhi High Court dated 7 th August 2018 in the case of Louis Vitton Malletier Vs. Omi and Ors.4. He relied upon the decision of the Apex Court in the case of Meghmala & Ors. Vs. G. Narasimha Reddy and Ors.5 which lays down as to what should be the approach of the Court while dealing with the cases of abuse of process of law and fraud. He submitted that fraud vitiates all judicial proceedings.

2. (2016) SCC OnLine Del 432

3. MANU/DE/0021/2005

4. MANU/D/2769/2018

5. (2010) 8 SCC 383 11 of 27 12 cam-72.17 2.docx 17 By way of illustration, he relied upon an order of this Court in the case of Mr. Bhavesh Dinesh Doshi Vs. Mamta Bhavesh Doshi 6. He pointed out that this Court directed discreet enquiry into a claim made by the husband who contended that he had no income. He relied upon the decision of this Court on anticipatory bail application in the case of Ashok Motilal Saraogi Vs. State of Maharashtra 7. He relied upon certain decisions in support of the legal proposition that though the decisions of other High Courts do not bind this Court, they have persuasive efficacy. He relied upon the observations made by the Delhi High Court in the case of Sanjeev Kumar Mittal Vs. State8 on the procedure to be followed while dealing with the application under section 340 of Cr.P.C. He invited our attention to a decision of the Apex Court in the case of State of Goa Vs. Jose Maria Albert Vales9. He relied upon a decision of this Court in the case of Farheed Ahmed Qureshi Vs. The State of Maharashtra 10 as an illustration where an action under section 340 was ordered. He invited our attention to the decision of the Apex Court in the case of

Pritesh Vs. State of Maharashtra and Ors.11.

18 He relied upon an order of the learned Single Judge in the case of Union of India Vs. Harish Virumal Milani12. He urged that the first respondent whose case is based on falsehood has no right to insist that the Family Court Appeal should be heard and therefore, the present application will have to be heard on merits before other proceedings are heard. He invited our attention to the decision of the Apex Court in the case of Perumal Vs. Janaki13. He relied upon a decision of the learned Single Judge of Delhi High Court in the case of Jagdish Prasad Vs. State and Ors.14.

6. 2016 SCC Online Bom 12799

7. 2016 All MR (Cri.) 3400

8. 2011 (121) DRJ 328

9. (2018) 11 SCC 659

10. 2018 SCC Online Bom 960

11. (2002) 1 SCC 253

12. 2018 SCC Online Bom. 2080

13. (2014) 5 SCC 377

14. MANU/DE/0302/2009 12 of 27 13 cam-72.17 2.docx 19 He urged that it is the duty of the Courts to ascertain the truth. He relied upon the decision of the Apex Court in the case of Maria Margarida Sequeira Fernandes and others Vs. Erasmo Jack De Sequeira 15. He relied upon the guidelines laid down by Delhi High Court in the case of Kusum Sharma Vs. Mahinder Sharma16. The learned counsel submitted that the offending statements made by the first respondent are only for the purposes of getting favourable order from the Court which are made without any supporting evidence. He submitted that all that the applicant is seeking is holding of a preliminary enquiry so that the Court can come to a conclusion whether a case is made out to direct filing of a complaint. He submitted that either this Court can hold an enquiry or can direct any other authority to hold an enquiry. He submitted that there are litigants such as the wife in this case who have no regard for the truth and therefore, it is all the more necessary for this Court to order enquiry.

20 We have considered the submissions. We have carefully perused each and every decision relied upon by the learned counsel for the Applicant. The law seems to be well settled on one aspect. When the Court considers an application under section 340 of the Cr.P.C., the respondent against whom action is sought has no right of hearing at that stage. That is the reason why we have not heard the first respondent - wife appearing in person. As far as section 340 of Cr.P.C. is concerned, there are certain material decisions of the Apex Court which have not been cited by the applicant. The first decision is of a Constitution Bench in the case of Iqbal Singh Marwah and Anr. Vs. Meenakshi

Marwah and Anr.17. In the said decision, the Apex Court has considered the scheme of Chapter XXVI of Cr.P.C. and the scope of section 340. The Constitution Bench considered

15. (2012) 5 SCC 370

16. 2017 SCC OnLine Delhi 12534

17. (2005) 4 SCC 370 13 of 27 14 cam-72.17 2.docx earlier decisions dealing with section 476 of the Code of Criminal Procedure, 1898 which is pari materia with section 340 of Cr.P.C. Section 195 of Cr.P.C imposes embargo on the power of the Criminal Court to take cognizance of certain offences concerning administration of justice. Section 195 of Cr.P.C. reads thus :-

> "195. Prosecution for contempt of lawful authority of public servants, for offences against public justice and for offences relating to documents given in evidence -
>
> (1) No Court shall take cognizance --
>
> (a) (i) of any offence punishable under sections 172 to 188 (both inclusive)of the Indian Penal Code (45 of 1860), or
>
> (ii) of any abetment of, attempt to commit, such offence, or
>
> (iii)of any criminal conspiracy to commit, such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;
>
> (b) (i) of any offence punishable under any of the following section of the Indian Penal Code (45 of 1860), namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or (ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Court, or (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate (2) Where a complaint has been made by a public servant under clause
>
> (a) of sub-section (1) any authority to which he is administratively subordinate may order the withdrawal of the complaint and send a copy of such order to the Court; and upon its receipt by the Court, no further proceedings shall be taken on the complaint:

Provided that no such withdrawal shall be ordered if the trial in the Court of first instance has been concluded (3) In clause (b) of sub-section (1), the term "Court" means a Civil, Revenue or Criminal Court, and includes a tribunal 14 of 27 15 cam-72.17 2.docx constituted by or under a Central, provincial or State Act if declared by that Act to be a Court for the purposes of this section (4) For the purposes of clause (b) of sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from appealable decrees or sentences of such former Court, or in the case of a civil Court from whose decrees no appeal ordinarily lies, to the principal Court having ordinary original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that--

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed Comments."

21 Section 340 of the Cr.P.C. reads thus :-

"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 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 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 for 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.

15 of 27 16 cam-72.17 2.docx (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.

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

195."

(underline supplied) 22 The Constitution Bench of the Apex Court in the case of Iqbal Singh Marwah (supra) interpreted section 340. Paragraphs 23 and 24 of the said decision reads thus :-

"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 16 of 27 17 cam-72.17 2.docx administration of justice may be minimal. In such circumstances, the court may not consider it expedient in the interest of justice to make a complaint. The broad view of clause (b)(ii), as canvassed by learned counsel for the appellants, would render the victim of such forgery or forged document remediless. Any interpretation which leads to a situation where a victim of a crime is rendered remediless, has to be discarded.

24. There is another consideration which has to be kept in mind. Sub-section (1) of Section 340 CrPC contemplates holding of a preliminary enquiry. Normally, a direction for filing of a complaint is not made during the 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. Section 341 provides for an appeal against an order directing filing of the complaint. The hearing and ultimate decision of the appeal is bound to take time. Section 343(2) confers a discretion upon a court trying the complaint to adjourn the hearing of the case if it is brought to its notice that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen. In view of these provisions, the complaint case may not proceed at all for decades specially in matters arising out of civil suits where decisions are challenged in successive appellate fora which are time-consuming. It is also to be noticed that there is no provision of appeal against an order passed under Section 343(2), whereby hearing of the case is adjourned until the decision of the appeal. These provisions show that, in reality, the procedure prescribed for filing a complaint by the court is such that it may not fructify in the actual trial of the offender for an unusually along period. Delay in prosecution of a guilty person comes to his advantage as witnesses become reluctant to give evidence and the evidence gets lost. This important consideration dissuades us form accepting the broad interpretation sought to be placed upon clause (b)(ii).

(emphasis added) 23 The Bench of three Hon'ble Judges of the Apex Court in the case of Chajoo Ram Vs. Radhey Shyam and Anr.18 had an occasion to consider the scope of section 476 of the Code of Criminal Procedure, 1878.

18. 1971(1) SCC 774 17 of 27 18 cam-72.17 2.docx This provision is pari materia to section 340 of Cr.P.C. In paragraph 7, the Apex Court has held thus :-

> "7. The prosecution for perjury should be sanctioned by courts only in those cases where the perjury appears to be deliberate and conscious and the conviction is reasonably probable or likely. No doubt giving of false evidence and filing false affidavits is an evil which must be effectively curbed with a strong hand but to start prosecution for perjury too readily and too frequently without due care and caution and on inconclusive and doubtful material defeats its very purpose. Prosecution should be ordered when it is considered expedient in the interests of justice to punish the delinquent and not merely because there is some inaccuracy in the statement which may be innocent or immaterial. There must be prima facie case of deliberate falsehood on a matter of substance and the court should be satisfied that there is reasonable foundation for the charge. In the present case we do not think the material brought to our notice was sufficiently adequate to justify the conclusion that it is expedient in the interests of justice to file a complaint. The approach of the High Court seems some-what mechanical and superficial : it does not reflect the requisite judicial deliberation : it seems to have ignored the fact that the appellant was a Panch and authorised to act as such and his explanation was not implausible. The High Court further appears to have failed to give requisite weight to the order of the District Magistrate which was confirmed by the Sessions Judge, in which it was considered inexpedient to initiate prosecution on the charge of alleged false affidavit

> that the appellant had not acted as Sarpanch during the period of the stay order. The subject- matter of the charge before the District Magistrate was substantially the same as in the present case. Lastly, there is also the question of long lapse of time of more than ten years since the filing of the affidavit which is the subject-matter of the charge. This factor is also not wholly irrelevant for considering the question of expediency of initiating prosecution for the alleged perjury. In view of the nature of the alleged perjury in this case this long delay also militates against expediency of prosecution. And then by reason of the pendency of these proceedings since 1962 and earlier similar proceedings before the District Magistrate also the appellant must have suffered both mentally and financially. In view of all these circumstances we are constrained to allow the appeal and set 18 of 27 19 cam-72.17 2.docx aside the order directing complaint to be filed."

(emphasis added) 24 In a recent decision in the case of Sergi Transformer Explosion Prevention Technologies Private Limited and Anr. Vs. CTR Manufacturing Industries Limited and Anr.19, a Bench of three Hon'ble Judges of Hon'ble the Apex Court had again an occasion to deal with the scope of section 340. In paragraph 9, the Apex Court held thus :-

> "9. The High Court while considering the matter has in our opinion, failed to appreciate the defence that had been set up by the appellants. The explanation offered by the appellants was a plausible one which ought to have been kept in mind by the High Court while examining whether the present was a fit case for prosecution of the appellants. At any rate, the High Court has not adverted to the question whether it was expedient "in the interest of justice" to launch the prosecution against the appellants for the mistake which according to the respondents was deliberate but unintentional according to the appellants. According to the appellants the mistake occurred out of a certain communication gap between the higher officers of the Company and the operational staff. That prosecution cannot be lunched just at the asking of a party, is well established. A long line of decisions of this Court have examined the circumstances in which the court ought to invoke that power. The High Court has, while considering the question of launching prosecution for perjury, to examine whether it is expedient in the interest of justice to do so, having regard to the totality of the circumstances. Inasmuch the High Court has failed to advert to that aspect and record a finding that it is expedient in the interest of justice to direct prosecution, the order passed by the High Court falls short of the legal requirements."

(emphasis added) 25 In another recent decision of the Apex Court in the case of Amarsang Nathaji Vs. Hardik Harshadbhai Patel and Ors. 20, the Apex Court

19. (2016) 12 SCC 713

20. (2017) 1 SCC 113 19 of 27 20 cam-72.17 2.docx had an occasion to consider the scope of section 340. The Apex Court heavily relied upon the decision of its Constitution Bench in the case of Iqbal

Singh (supra). In paragraphs 6 to 10, the Apex Court held thus :-

> "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 Section 199 and 200 of the Penal Code, 1860 (45 of 1860) (hereinafter referred to as "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 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) CrPC, having regard to the overall factual matrix as well as the probable consequences of such a prosecution. (See K.T.M.S Mohd. v. 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 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. (See Pritish v. State of Maharashtra [Pritish v. State of Maharashtra, (2002) 1 SCC 253 : 2002 SCC (Cri) 140])
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> 8. In Iqbal Singh Marwah v. Meenakshi Marwah, a Constitution Bench of this Court has gone into the scope of Section 340 CrPC. Para 23 deals with the relevant consideration: (SCC pp. 386-87) 20 of 27 21 cam-72.17 2.docx "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 such circumstances, the court may not consider it expedient in the interest of justice to make a complaint.
>
> 9. Having heard the learned counsel appearing on both sides and having gone through the impugned order and also having regard to the subsequent development whereby the parties have decided to amicably settle some of the disputes, we are of the view that the matter needs fresh consideration. We are also constrained to form such an opinion since it is fairly clear on a reading of the order that the Court has not followed all the requirements under Section 340 CrPC as settled by this Court in the decisions referred to above regarding the formation of the opinion on the expediency to initiate an inquiry into any offence punishable under Section 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228 IPC, when such an offence is alleged to have been committed in relation to any proceedings before the court. On forming such an opinion in respect of such an offence which appears to have been committed, the court has to take a further decision as to whether any complaint should be made or not.

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10. No doubt, such an opinion can be formed even without conducting a preliminary inquiry, 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 complaint. Only if the decision is in the affirmative, the court needs to make a complaint in writing and the complaint thus made in writing is then to be sent to a Magistrate of competent jurisdiction."

(emphasis added) 26 In another decision in the case of Kailash Vijayvargiya Vs. Antar Singh Darbar and Ors.21, the Apex Court reiterated the law laid down in paragraph 6 of the decision in the case of Amarsang Nathaji (supra).

27 The law laid down by the Apex Court on section 340 of Cr.P.C. 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

21. (2018) 12 SCC 373 22 of 27 23 cam-72.17 2.docx 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.

28 Thus, from the law laid down by the Apex Court it is apparent that action under section 340 is to be initiated at the discretion of the Court and the discretion will have to be exercised considering the aforesaid parameters laid down. It is in the light of the legal position that the facts of the case will have to be considered. The decree under challenge is a decree directing the applicant who is a medical practitioner to pay maintenance of Rs.30,000/- pm to the first respondent - wife and Rs.15,000/- pm to the daughter. Even in the present application, in clause (c) of paragraph 5, the applicant has accepted that he is a Visiting Consultant attached to various hospitals and gets his work from these hospitals. In the present application, the applicant has not come out with material particulars with supporting documents such as his income for the relevant period and the assets held by him. In the impugned judgment, which is the subject matter of challenge in 23 of 27 24 cam-72.17 2.docx Family Court Appeal, in paragraph 82, the learned Judge of the Family Court, held thus :-

"82. The petitioner is renowned surgeon/medical practitioner.

Various documents relating to loan obtained by petitioner clearly shows that he is successful medical practitioner. The respondent in her affidavit has stated that he earns at least 2 lacs per surgery and performs 8-10 surgery in a month. At the same time the evidence placed in the form of I.T. return can not be taken as true income to infer about earning of the petitioner. He is having ancestral property and he must have share in it. He is being attached to various hospitals, like SL. Raheja hospital, Mahim, Seven Hills hospital Andheri and other hospitals. This shows that he is earning handsome income. He has not disputed that he is not attached to various hospitals and earning handsome income. He claims that he is earns Rs.10 lacs per annum. That can not be accepted. There is absolutely no whisper or sound about to show that he earns just Rs.10 lacs/p.a. Therefore, the claim of maintenance of respondent will have to be accepted. Considering the income capacity of the petitioner, needs of the respondent her child-Sarayu, considering standard of living

> of the parties, their dependents, it would be appropriate to award maintenance of Rs.30,000/- to the petitioner and Rs.15,000/- to daughter - Sarayu, will meet the ends of justice. Hence, I answer issue No.6 accordingly."

(emphasis added) 29 As stated earlier, these findings are under challenge in the Family Court Appeal which is pending and there is a cross-objection filed by the first respondent - wife for enhancement. The issue regarding the income and assets of the applicant will have to be decided at the time of final hearing of the appeal.

30 By the order dated 5th October 2015 which is quoted above, more than one direction was issued to the applicant. The first direction was to pay total amount of Rs.8,40,000/- by three installments towards arrears of maintenance. The applicant was directed to pay Rs.60,000/- pm to the 24 of 27 25 cam-72.17 2.docx first respondent in the first week of each calender month. Civil Application No.67 of 2016 was filed by the applicant - husband for grant of extension of time by nine months for payment of arrears as per order dated 5 th October 2015.

31 On Civil Application No.14 of 2015 filed by the applicant and on Civil Application No.11 of 2015 filed by the first respondent - wife, on 13th April 2016 this Court granted stay to the monetory part of the decree subject to the condition of deposit of maintenance amount due and payable as per the impugned decree within six weeks from the date date. The Court observed that if the amount of arrears was not deposited within six weeks, the ad-interim stay shall stand vacated. SLP No.14517 of 2016 was filed by the applicant before the Apex Court for challenging the order dated 13 th April 2016. By order dated 30th June 2016, the SLP has been dismissed. However, the Apex Court extended the time granted by clause 7 of order dated 13th April 2016 to pay the decretal amount by a period of six months. In the order dated 13th January 2017 passed by this Court, in paragraph 8, it is noted that the applicant has not complied with the order of the Apex Court and therefore, ad-interim stay stands vacated. There is nothing placed on record to show that the applicant has complied with the order. On the contrary, the applicant has taken out Civil Application No.71 of 2017 for recall of order dated 13th January 2017. There is nothing placed on record to show that the applicant applied for extension of time before the Apex Court after the expiry of the period of six months granted by the said Court.

32 As stated earlier, the allegations of making false statements are based on the statements made by the first respondent - wife in reply to Civil Application No.67 of 2016 as well as in her Civil Application No.220 of 2016. There is also an allegation that there is inconsistency in the statements made by the first respondent as regards quantum of Stridhan.

25 of 27 26 cam-72.17 2.docx Though Civil Application No.71 of 2017 for recall of order dated 13 th January 2017 is pending, the said order dated 13 th January 2017 has been confirmed by the Apex Court by extending time. The issue involved in the appeal is as regards the right of the first respondent to claim maintenance and the quantum of maintenance. The issue regarding income of the applicant, the issue whether he is the owner of hospital and the issue of the extent of the assets held by him will have to be gone into in Appeal and Cross-objections. The issue of Stridhan will have to be gone into at the time of final hearing. There is no adjudication made so far on the averments

made by the wife on the basis of which this Civil Application is filed. As held by the Constitution Bench in the case of Iqbal Singh, while deciding expediency of taking action, the Court cannot weigh magnitude of injury suffered by the person affected, but the Court is more concerned with the effect or impact of such commission of offence on the administration of justice. In view of the facts which are stated above, we are of the view that at this stage it cannot be stated that the alleged false or misleading allegations made by the first respondent have any serious impact upon administration of justice and therefore, at this stage, the prayer made by the applicant cannot be entertained. We are of the view that as the allegations and counter allegations will have to be gone into at the time of final hearing of the Family Court Appeal, at this stage, it is not expedient in the interests of justice to take action. When we say so, the conduct of the Applicant as reflected from the record is also taken into consideration. The Applicant has to come clean by making disclosure of his true income, sources of income, his assets, etc during the relevant period supported by documents. If a case is made out, at appropriate stage, this Court can direct recording of evidence by the Family Court on the case made out by the parties regarding the income of the husband and the case made out by the wife. We make it clear that when the appeal is heard on merits, the issues raised by the 26 of 27 27 cam-72.17 2.docx applicant in this application as well as prayers will have to be considered by the Court.

33 Subject to what is observed above, the application is rejected. We make it clear that we have made no factual adjudication on factual aspects of the case.

(ANUJA PRABHUDESSAI, J) (A.S. OKA, J)

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