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Applicability of Perjury Provisions (340 of CrPC) in NCLT Proceedings

False oral submissions or affidavit with false averment (**perjury**) is too often encountered which not only cuts at the root of the proceedings but gives a subtle advantage to the perjurer unless the Tribunal comes down heavily against them. Often than not the Tribunal responds '**we will see the issue of perjury – at the end…**' handing the perjurer an unintended advantage – at times prolonging the case and the honest litigant is left frustrated to his wits, forced to undertake compromise inclined or weighing in favour of the perjurer **– justice and faith in judiciary is the obvious casualty striking the roots of an orderly society**.

This article is pin focussed to the offence of perjury in Tribunal proceedings, hence at the outset it is fundamental to ascertain whether the offence of perjury which is cognizable under section 340 of Cr PC can at all be tried by NCLT/NCLAT; in other words whether or not NCLT is a court to take cognizance of offence of perjury within the ambit of Sec 340 of Cr PC. The answer lies in Section 195 (3) of Cr PC – wherein in clause (b) of sub section (1), the term" Court" means a Civil, Revenue or Criminal Court, and includes a tribunal 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. The riddle is settled vide Section 424 (4) of the Companies Act, 2013 – profitable to extract the same:

> All proceedings before the Tribunal or the Appellate Tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code, and the **Tribunal and the Appellate Tribunal shall be deemed to be civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973**.

Thus from the standpoint of statute, it is settled that NCLT/NCLAT is competent rather duty bound to take cognizance of the offence of perjury like any other court – Recognising the menace of perjury even the NCLT e-filing link just after login itself warns the would be offender of the consequences of perjury. Given the loud and clear intent and mandate of the statute, and at-times in the face of crying evidences of perjury which can actually decide the fate of the case, the Judicial Officers more often than not are reluctant to take cognizance of the offence of perjury – 'thereby prolonging the litigation', thereby rendering an unintended fall-out of gifting the offender/perjurer an unfair advantage. To curb such menace perjury/profiting from delays of judicial proceedings, the Full

Bench of Hon'ble Supreme Court in Dnyandeo Sabaji Naik v. Pradnya Prakash Khadekar, **(2017) 5 SCC 496** ruled:

> **Para 13.** This Court must view with disfavour any attempt by a litigant to abuse the process. The sanctity of the judicial process will be seriously eroded if such attempts are not dealt with firmly. ***A litigant who takes liberties with the truth or with the procedures of the Court should be left in no doubt about the consequences to follow. Others should not venture along the same path in the hope or on a misplaced expectation of judicial leniency. Exemplary costs are inevitable, and even necessary, in order to ensure that in litigation, as in the law which is practised in our country, there is no premium on the truth.***

The procedural part of handling perjury application, *interalia* is laid out by Bombay High Court in the matter of **Keneth Desa V/s Gopal Leeladhar Narang** Criminal Application No.1115 of 2007 leaving little or no discretion in refusing to adjudicate perjury application.

> **Para 7:** Whenever an application under Section 340 of Code of Criminal Procedure is filed, the Civil Manual Chapter XIX para 337 requires that it should be registered as Miscellaneous Judicial Case i.e. a case where a Judicial Enquiry is contemplated. Section 340 of Code of Criminal Procedure reads thus –
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> (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 subsection (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 –
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> (a) record a finding to that effect ;
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> (b) make a complaint thereof in writing;
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> (c) send it to a Magistrate of the first class having jurisdiction;
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> (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
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> (e) bind over any person to appear and give evidence before such Magistrate.

The spirit of the afore-said ruling is affirmed in T. Dhinakaran & Anr. V/s V. Ranganathan & Ors. **2017 SCC OnLine Mad 30109**:

> **Para 12.** The scrutiny of the particular provision would show "any Court is of opinion," so when any application is filed under Section 340 of Cr.P.C., the Court has to record its opinion that it is expedient in the interest of justice to hold an enquiry. So, the opinion of the Court is very much essential. At the same time, the Court cannot mechanically draw the opinion as to whether the petition filed under Section 340 of the Code of Criminal Procedure is entertainable or not. Each case has its own facts and circumstances. Hence, ***the Court***

> ***concerned has the duty to apply its mind and come to the conclusion the said application is entertainable. So, no cryptic and order cannot be passed while disposing of an application filed under section 340 of Code of Criminal Procedure***.

The section emphasises, the court should be of opinion that an enquiry should be held. Even for forming an opinion, there should be some evidence and not mere surmises. **If there is a prima facie evidence, the court must enter into an enquiry and record a finding as to whether an offence referred to in Section 195 of Code of Criminal Procedure is committed**.

De-fragmenting the ratio of Kenneth Desa's and T. Dhinakaran ruling it emerges – an application for perjury preferred as an Interlocutory Application (IA) in the main Company Petition (CP) – be registered as a separate case and **may** proceed simultaneously – the word '**may**' as is commonly understood in legal connotation has to read as '**shall**' – In any case *if there is a prima facie evidence, the court must enter into an enquiry and record a finding as to whether an offence referred to in Section 195 of Code of Criminal Procedure is committed* – the mandate is clear that an enquiry has to be made and a decision to be rendered either for directing the NCLT/NCLAT registry to make a complaint to the criminal court of appropriate jurisdiction or declining the request of perjury by way of a reasoned order.

A divergence of opinion is prevalent, whether or not an application of perjury takes precedence over the main proceedings from which it emanates – the controversy has largely been addressed by the Constitution Bench of Supreme Court in the matter of Iqbal Singh Marwah V/s Meenakshi Marwah **(2005) 4 SCC 370** the relevant excerpts opens the latches to the doors to this controversy –

> Para 11 of the ruling infers Section 195(1) mandates a complaint in writing to the court for taking cognizance of the offences enumerated in clauses (b)(i) and (b)(ii) thereof. Sections 340 and 341 CrPC which occur in Chapter XXVI of Cr PC, heading of this Chapter is *"Provisions as to Offences Affecting the Administration of Justice"*. Thus is a clear pointer to the legislative intent that the offence committed should be of such type which directly affects the administration of justice (***deflects the course of justice***) viz. which is committed after the document is produced or given in evidence in court. *Simply stating a forged document or a false affidavit unless produced in evidence in the court can't be said to be an offence affecting the administration of justice*.
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> Para 14 of Iqbal Singh Marwah's ruling refers to a Full Bench ruling of the Allahabad High Court in Emperor V/s Kushal Pal Singh [AIR 1931 All 443] which considered the scope of the perjury provision and held, that clause (c) of Section 195(1) applies only to cases where an offence is committed by a party, as such, to a proceeding to any court in respect of a document which has been produced or given in evidence in such proceeding. **A person who does not become a party after the commission of the offence, cannot be within the scope of Sec 340 of Cr PC**. The underlying purpose of enacting Sections 195(1) (b) and (c) and Section 476 of Cr PC (corresponding to the present Section 340 of Cr PC) seems to be to control the temptation on the part of the private parties to start criminal prosecution on frivolous vexations or insufficient grounds inspired by a revengeful desire to harass or spite their opponents. These offences have been selected for the court's control because of their direct impact on the judicial process. It is the judicial process or the administration of public justice which is the direct and immediate object or the victim of these offences. **As the purity of the proceedings of the court is directly sullied by the crime of perjury, the court is**

> **considered to be the only party entitled to consider the desirability of complaining against the guilty party**.

So far as sequence of precedence in respect of the perjury application and the main proceedings from which the perjury application has emanated, the same is answered in para 32 of Iqbal Singh Marwah which in turn relies on another Constitution Bench ruling of MS Sherief V/s State of Madras **AIR 1954 SC 397**, which gives a complete answer to the problem which proceedings are to be dealt in precedence –

> Coming to the last contention that an effort should be made to avoid conflict of findings between the civil and criminal courts, it is necessary to point out that the standard of proof required in the two proceedings are entirely different. Civil cases are decided on the basis of preponderance of evidence while in a criminal case the entire burden lies on the prosecution and proof beyond reasonable doubt has to be given. **There is neither any statutory provision nor any legal principle that the findings recorded in one proceeding may be treated as final or binding in the other, as both the cases have to be decided on the basis of the evidence adduced therein**. Para 15 & 16 of MS Sherief states – As between the civil and the criminal proceedings **we are of the opinion that the criminal matters should be given precedence**. There is some difference of opinion in the High Courts of India on this point. No hard-and-fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment. **Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime**. **The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust**. This, however, is not a hard-and-fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. **For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under Section 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished**.

It would be fair to state that the menace of perjury in NCLT proceedings is very much prevalent, as an instance cited an order by NCLT Mumbai in M.A. 2775/2019 & M.A. 2347/2019 IN C.P. 1356/ 2019, the relevant is extracted hereunder:

> We are of the prima facie opinion, after hearing the professional representing the petitioner, that the respondent no. 2, 3 and 6 had indulged in illegal activity by filing false affidavit before this bench which amounts to perjury. **In case respondents failed to appear on the next date of hearing and file their defense to the said application**. **This bench would proceed against them under the relevant provisions of law by remitting the matter to the criminal court to try the offence of perjury against the said respondent**.

The afore order of NCLT is apposite of its intent; however giving the accused an opportunity of

defense is against the binding precedents of the Supreme Court, where the Court having formed a *prima facie* opinion of perjury can't let the accused-respondent to tender any defense until the Magistrate calls the accused to appear. The ruling of Full Bench ruling of Supreme Court in Pritish V/s State of Maharashtra **(2002) 1 SCC 253**, extracted for reference:

> **Para 12.** Thus, the person against whom the complaint is made has a legal right to be heard whether he should be tried for the offence or not, **but such a legal right is envisaged only when the Magistrate calls the accused to appear before him**. The person concerned has then the right to participate in the pre-trial inquiry envisaged in Section 239 of the Code. It is open to him to satisfy the Magistrate that the allegations against him are groundless and that he is entitled to be discharged.
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> **Para 17**. Learned Senior Counsel cited the decision of a Single Judge of the High Court of Andhra Pradesh in Nimmakayala Audi Narrayanamma v. State of A.P. [AIR 1970 AP 119 : 1970 Cri LJ 443] in which the **learned Judge observed that it is just and proper that the court issues a show-cause notice to the would-be accused as to why they should not be prosecuted**. This was said while interpreting the scope of Section 476 of the old Code of Criminal Procedure (which corresponds with Section 340 of the present Code). The following is the main reasoning of the learned Single Judge: (AIR p. 121)
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> > "The proceedings under Section 476 Criminal Procedure Code being judicial and criminal in nature, the interpretation that should be placed in construing the section should be just, fair, proper and equitable and must be in accordance with the principles of natural justice. **By adopting such interpretation and procedure, the aggrieved party would be afforded with an adequate opportunity to show and satisfy the court that it was not in the interests of justice, to launch the prosecution and thereby avoid further proceeding**. That apart, the appellate court also would be in a position to appreciate the reasons assigned in each case and would have the advantage of coming to its own conclusion without any difficulty about the justification or otherwise of launching the prosecution in a particular case. When once the prosecution had been launched, the accused will not be having an opportunity thereafter to raise the question of expediency in the interests of justice to launch the very prosecution itself. The case thereafter will have to be gone into on the merits."

NCLT Mumbai in M.A. 2775/2019 & M.A. 2347/2019 in letting the accused to have his say/defense have accorded its order largely corresponding the ruling stated in the preceding para, Supreme Court however disapproved Nimmakayala Audi's ruling in para 18 of Pritish judgment, extracted as under :

Para 18. **We are unable to agree with the said view of the learned Single Judge as the same was taken under the impression that a decision to order inquiry into the offence itself would prima facie amount to holding him, if not guilty, very near to a finding of his guilt**. We have pointed out earlier that the purpose of conducting preliminary inquiry is not for that purpose at all. **The would-be accused is not necessary for the court to decide the question of expediency in the interest of justice that an inquiry should be held**. We have come across decisions of some other High Courts which held the view that the persons against whom proceedings were instituted have no such right to participate in the preliminary inquiry (vide M. Muthuswamy v. Special Police Establishment [1985 Cri LJ 420 (Mad)]).

The offence of perjury constitutes a separate offence and an offence against the Court, where the accused does not have any say as to whether or not he should be tried is further accentuated by the Bombay High Court in the matter of Union of India V/s Haresh Milani in **Writ Petition (St.) No. 4899 Of 2017** wherein it was ruled:

Thus in so far as section 340 of Code of Criminal Procedure is concerned, it is not necessary for the Judge to hear other side, but he may hear the applicant. It is not a requirement to hear the person against whom the proceedings are going to be initiated. It is entirely upto the Court to decide whether to initiate the proceedings under section 340 of Code of Criminal Procedure. Thus the proceedings of the application under section 340 of Code of Criminal Procedure are Kangaroo Baby proceedings within the civil trial and still it is of an independent character and therefore, for the purpose of the said inquiry the powers under Code of Criminal Procedure can be enjoyed the Civil Court.

NCLT rightly having recognised the menace of perjury, it is, but earnestly looked forward that prospectively NCLT comes down far more frequently and heavily against the offenders of perjury, sending a stern message of zero tolerance against deceit deflecting the course of justice delivery.

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