

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION (ST.) NO. 4899 OF 2017

Union of India & Ors.	...Petitioners.
Versus	
Haresh Virumal Milani	...Respondent

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Dr. G.R. Sharma i/b. Mr. Dharendra P Singh for the Petitioners.
Mr. Nilesh C. Ojha for the Respondent.

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CORAM: Mrs. MRIDULA BHATKAR, J.
DATED: APRIL 17, 2017

JUDGMENT :

Rule. Rule made returnable forthwith. By consent, the Petition is heard finally and disposed of at the stage of admission.

2. In this petition under Article 227 of the Constitution of India the orders dated 11.01.2017 and 16.02.2017 passed by the learned 3rd Jt. Civil Judge, Senior Division, Pune in Misc. Application No. 946 of 2012 in Regular Civil Suit No. 881 of 2011 are challenged.

3. The original plaintiff i.e. the respondent has filed the Suit for simplicitor injunction against the defendants i.e. the petitioners from obstructing his possession on the suit land or from dispossessing him and also to restrain the defendants from destroying any documents in their possession relating to the suit land. During the pendency of the trial, the application was filed by the plaintiff that the defendants i.e. the petitioners have made a false statement on oath in their written

statement that the suit property i.e. land is owned by the defendants and they have acquired the suit land under Acquisition Act in February 1970. The plaintiff has pleaded that on account of false statement made on oath in the written statement, the defendants have committed offence and therefore, cognizance is required to be taken. The defendants have committed offence which is covered under section 195 of Code of Criminal Procedure and therefore, he prayed that the inquiry be conducted and the notice be issued to the defendants under section 340 of Code of Criminal Procedure. Inter alia in the Civil Suit, the original plaintiff i.e. the respondent has filed the application below Exhibit 32A under section 340 of Code of Criminal Procedure. It is a separate independent inquiry within the suit and therefore, it is numbered as Misc. Case No. 946 of 2012 in Regular Civil Suit No. 881 of 2011. In the said Misc. case, another application dated 04.10.2016 below Exhibit 43 under section 30 of Code of Civil Procedure and Order XI Rule 12 of Code of Civil Procedure was filed by the original plaintiff i.e. the respondent seeking directions that the Collector to produce the documents in respect of acquisition proceeding of the suit property. The learned trial Judge, vide order dated 11.01.2017 has allowed the said application dated 04.10.2016 holding the application not under

Order XI of Code of Civil Procedure but an application made under section 311 of Code of Criminal Procedure and issued summons to the Collector, Pune with directions to submit the certified copies of the revenue record, mutation entries and acquisition proceedings in respect of the suit land i.e. survey no. 233A of Village Lohogaon, Pune. The said order is a subject matter of the challenge.

4. Thereafter, the petitioners had filed an application for recalling or reviewing the order dated 11.01.2017 passed by the learned 3rd Joint Civil Judge, Senior Division, Pune in M.A. No. 946 of 2012 on the ground that at the time of allowing the application for summons to the Collector, it was necessary for the trial Court to give audience to the opponent i.e. accused against whom the inquiry is conducted. The said application was also turned down by the learned Judge, vide order dated 16.02.2017 is also challenged before this Court.

5. The learned counsel for the petitioner has submitted that the orders dated 11.01.2017 and 16.02.2017 passed by the learned Judge are illegal and not tenable in law. He has further submitted that the order dated 11.01.2017 is grossly erroneous, as the Civil Court has no right to use the powers under Code of Criminal Procedure much less under section 311 of Code of Criminal

Procedure to call or recall a witness. The learned counsel has made three submissions which are as under:

- (1) Sections quoted by the plaintiff while moving application below Exhibit 43 is wrong. The order dated 11.01.2017 passed by the learned Judge under section 30 of CPC and Order XI Rule 12 of CPC are incorrect.
- (2) The said application filed under Order X Rule 12 of Code of Civil Procedure should not have been entertained by the Court, as only a party to the proceeding can be considered under Order XI Rule 12 of C.P.C. The direction can be given only to the party to the proceeding and the Collector is not a party to the proceeding and therefore, he cannot be summoned for production of documents of evidence by the Court.
- (3) The trial Judge himself has wrongly entertained the application under section 340 of Cr.P.C. and invoked the powers by taking recourse of section 311 of Cr.P.C. which is illegal as the learned Judge was conducting inquiry as a Civil Judge and the learned Judge does

have powers under Code of Criminal Procedure in a Civil Suit, but should restrict himself to Code of Civil Procedure. If such application is made, then Court should have heard the petitioners.

6. In support of his submission, the learned counsel relied on the judgment dated **14.08.2006 passed by the Supreme Court in Appeal (crl.) No. 834 of 2006 (U.T. of Dadra & Haveli vs. Fatehsinh Mohansinh Chauhan)**. He has submitted that the powers under section 540 of the old Code i.e. section 311 of the new Code of Criminal Procedure can be utilized by the Criminal Courts only. He also relied on the judgment of Supreme Court in **Mohanlal Shamji Soni vs. Union of India & Anr.** reported in **AIR 1991 SC 1346**. He has further submitted that section 311 of Code of Criminal Procedure can be used by the Court only during the trial where in the final hearing is taken by the Criminal Court of law. It cannot be used at the stage of any inquiry by the Civil Court.

7. The learned counsel for the respondent while opposing this petition has supported the order passed by the learned Civil Judge, Pune alongwith the relevant law laid down by the Supreme Court and also by the Bombay High Court. He referred to the definition of

inquiry under section 2(g) of Code of Criminal Procedure. The inquiry conducted under section 340 of Code of Criminal Procedure is the same inquiry contemplated under section 2 (g) of Code of Criminal Procedure. He has further submitted that the Civil Court who is conducting inquiry under section 340 of Code of Criminal Procedure can invoke the power under section 311 of Code of Criminal Procedure as it is a separate proceedings.

8. In support of his submission, the learned counsel for the respondent mainly relied on the judgment of full bench of the Supreme Court in the case of ***Pritish v. The State of Maharashtra and Ors.*** reported in ***AIR 2002 SC 236***, wherein the judgment of single Judge of this Court was challenged, but the said judgment was confirmed by the Hon'ble Supreme Court. He relied on the judgment of Supreme Court in the case of ***N. Natarajan v. B.K. Subba Rao*** reported in ***AIR 2003 SC 541***. He has further submitted that in the said judgment, the scope of section 340 of Code of Criminal Procedure and the powers given to the Court are discussed and also the judgment of ***Bhagwandas Narandas Vs. D.D. Patel*** reported in ***AIR 1940 Bom. 131*** of the single Judge of Bombay High Court has referred to and relied on therein.

9. The chronology of the applications and the orders is not disputed by the parties. In the present case in the Civil Suit, the application was filed under section 340 of Code of Criminal Procedure and therefore, a separate proceeding within the said Civil Suit was numbered and initiated.

10. The issues are formulated as under:

(1) Is it obligatory to give audience to the person against whom the Court wants to proceed while exercising powers under section 340 of Code of Criminal Procedure?

(2) Whether the Civil Court conducting inquiry under section 340 of Code of Criminal Procedure has power to call witness and can exercise the power under section 311 of Code of Criminal Procedure?

11. In the present case, the inquiry is initiated on the basis of statements made in the written statement in respect of acquisition of the suit land. I am not supposed to give any finding about the truthfulness of the statement made in the written statement as it is a subject matter of section 340 of Code of Criminal Procedure and the concerned Court will have to deal with the said issue on merit. Therefore, I restrict myself to legal aspect of this matter in

accordance with the issues framed above. Section 340 of Code of Criminal Procedure reads as under:-

“340. Procedure in cases mentioned in section 195- (1) When upon an application made to it in this behalf or otherwise, any Court is of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in clause (b) of sub-section (1) of section 195, which appears to have been committed in or in relation to a proceeding in that Court or, as the case may be, in respect of a document produced or given in evidence in a proceeding in that Court, such Court may, after such preliminary inquiry, if any, as it thinks necessary,-

- (a) record a finding to that effect;
- (b) make a complaint thereof in writing;
- (c) send it to a Magistrate of the first class having jurisdiction;
- (d) take sufficient security for the appearance 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.

(2) The power conferred on a Court by sub-section (1) in respect of an offence may, in any case where that Court has neither made a complaint under sub-section (1) in respect of that offence nor rejected an application for the making of such complaint, be exercised by the Court to which such former Court is subordinate within the meaning of sub-section (4) of section 195.

(3) A complaint made under this section shall be signed-

- (a) where the Court making the complaint is a High Court, by such officer of the Court as the Court may appoint;

[(b) in any other case, by the presiding officer of the Court or by such officer of the Court as the Court may authorise in writing in this behalf.]

(4) In this section, "Court" has the same meaning as in section 195.

Section states that the Court is of opinion that an inquiry should be made into offence referred to under section 195 of Code of Criminal Procedure. It means that the Court has to undergo a process of formation of opinion in respect of would be or proposed inquiry. Thus it is a process of not confirming of the offence or guilt, but just formation of opinion that the matter is worth, having some material which apparently constitutes an offence as specified under section 195 of Code of Criminal Procedure, to send it to a magistrate of the First Class having jurisdiction. Thus it is a stage of a preliminary inquiry, wherein the Judge need not go in depth of the assessment.

12. In the process of formation of opinion, the learned Judge if thinks that some more documents which are referred to by the parties are required then he may call and rely on the same to initiate inquiry under section 340 of Code of Criminal Procedure by the Court. To initiate criminal inquiry against someone is a serious matter and therefore, the Court while forming opinion has to consider the relevant documents or the evidence carefully. Generally decision

taking often invites disapproval from the losing party. Forming of opinion is making up mind. Therefore the learned Judge needs to be candid in making up mind. The best source for forming opinion is verification of facts and for the purpose of verification, the true and correct facts should be placed before the Judge. In the process of forming opinion in the inquiry the procedural power to call the witness, to bring the documents revealing the true facts, vests with him. Thus section 311 of Code of Criminal Procedure is helpful not only in the trial but also even in any inquiry or any other proceedings under the Code to get true facts on record. Before registering the complaint by the Magistrate under section 340 of Code of Criminal Procedure hearing the person against whom prosecution is likely to be instituted is not contemplated. A respondent who will face inquiry has every right to know and is to be heard in the proceeding once the complaint is registered and the proceedings are conducted under section 340 of Code of Criminal Procedure, but not at the stage of making of mind by the Judge whether to refer the matter for registering the complaint to the Magistrate under section 340 of Code of Criminal Procedure. In support of this, I rely on the judgment of *Pritish* (supra) passed by Supreme Court. The Hon'ble Apex Court in the judgment of *Pritish* (supra) has observed as under:

“14. Section 341 of the Code confers a power on the party on whose application the court has decided or not decided to make a complaint, as well as the party against whom it is decided to make such complaint, to file an appeal to the court to which the former court is subordinate. But the mere fact that such an appeal is provided, it is not a premise for concluding that the court is under a legal obligation to afford an opportunity (to the persons against whom the complaint would be made) to be heard prior to making the complaint. There are other provisions in the Code for reaching conclusions whether a person should be arrayed as accused in criminal proceedings or not, but in most of those proceedings there is no legal obligation cast on the court or the authorities concerned, to afford an opportunity of hearing to the would be accused...”

13. In the present case, the learned Judge has rightly not heard the respondent against whom the application is made under section 340 of Code of Criminal Procedure. Thus, the order dated 16.02.2017 rejecting the review of order dated 11.01.2017 cannot be faulted with.

14. The application filed under section 340 of Code of Criminal Procedure is separately numbered because it is a different proceeding branching of the main Civil Suit. Section 311 of Code of Criminal Procedure read as under:

“311.Power to summon material witness, or examine person present- Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case”.

Let me advert to definition of inquiry. Section 2 (g) of Code of Criminal Procedure reads as follows :

“2(g) “inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court”.
(emphasis placed)

15. The word “Court” is neither defined under Code of Civil Procedure nor in Code of Criminal Procedure. However, section 340 of Code of Criminal Procedure refers to the offence incorporated and mentioned under section 195 of Code of Criminal Procedure speaks about cognizance to initiate the proceedings. To understand the word “Court”, clause 3 of Section 195 of Code of Criminal Procedure is relied which reads:-

“(3) 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”.

If the offence covered under section 195 of Code of Criminal Procedure is committed then either criminal, civil, tribunal or

revenue court can initiate action under section 340 of Code of Criminal Procedure. Thus, section 195 of Code of Criminal Procedure does not restrict to only the criminal courts but legislature has intended wider meaning by using word “Court”. Thus, the Civil Court while conducting the preliminary inquiry or conducting other proceedings under Code of Criminal Procedure, enjoys similar powers of the Criminal Court under Code of Criminal Procedure for the purpose of the said inquiry or proceedings under section 340 of Code of Criminal Procedure. In support of this, I rely on the ratio laid down by the Single Judge of this Court, Nagpur Bench in ***Pritish R. Tayde and Anr. v. The State of Maharashtra & Ors.*** reported in **2001 CRI. L.J.1594**. This judgment was further confirmed by the full bench of the Supreme Court which is referred above. I rely on paragraph no. 10 of the judgment passed by the Single Judge of this Court, Nagpur Bench, which is reproduced as under:

“10. The last contention of the learned counsel for the appellants that a Court dealing with a reference under the Land Acquisition Act is a civil Court and ought to have followed the procedure prescribed by the Civil Procedure Code, and by adopting the procedure under Section 141 of Civil Procedure Code, has nothing to do with a preliminary inquiry contemplated under sub-section (1) of Section 340 of the Criminal Procedure Code, as the procedure to be adopted for initiation of such proceedings by any Court is the procedure prescribed under sub-section (1) of Section 340 of the

Criminal Procedure Code. So far as adopting of procedure under the Civil Procedure Code is concerned, it has no application to such proceedings. When the law has expressly provided a procedure to be followed by any Court which includes both Civil and Criminal Courts, or any Tribunal exercising the powers of a Court, then to read in it a particular procedure or special procedure would be nothing but misreading a statute”.

16. The Civil Court otherwise is precluded from using the provisions and powers given in Code of Criminal Procedure in conducting civil suit and powers available under Order X, Order XVIII Rule 17 of Code of Civil Procedure are analogous to section 311 of Code of Criminal Procedure. In the case of ***Mohanlal Shamji Soni*** (supra), the learned Judges of the Supreme Court have discussed analogous power of calling witnesses which is available under section 540 of Code of Criminal Procedure of the old Code (corresponding to section 311 of the new Code) and the provision under Order XI Rule 12 alongwith Order XVIII Rule 17 of Code of Civil Procedure which empowers the Court to recall witnesses and to examine them. However, the ratio in the said case is not useful to the petitioner.

17. In the case of U.T.of Dadra & Haveli (supra) Supreme Court has referred the ratio laid down in the case of ***State of West Bengal v. Tulsidas Mundhra*** reported in ***1964 (1) Crl. L.J.443*** about the amplitude of section 540 of the old Code, wherein the Supreme Court

has held that section 540 of Code of Criminal Procedure confers on criminal courts very wide powers. The learned counsel for the petitioners has interpreted this ratio that section 540 of Code of Criminal Procedure confers on criminal courts “**only**” wide powers. This interpretation by the learned counsel by adding the word “**only**” is absolutely incorrect. In fact, it is rightly held that the criminal Courts enjoy wide powers under section 540 of the old Code i.e. section 311 of new Code of Criminal Procedure. The said ruling is in fact in favour of the respondents.

18. 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.

19. Thus, I answer the issue no.1 in negative. It is not necessary for the Court to give notice to the said person or even to hear that person on this point.

Issue no.2 is held in affirmative that the Civil Court conducting the inquiry under section 340 of Code of Criminal Procedure has power to call witness and can exercise the power under section 311 of Code of Criminal Procedure. No interference is required in the order/ orders under challenge. Thus Writ Petition is hereby dismissed.

(MRIDULA BHATKAR, J.)