IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 3771 of 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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GUJARAT PIPAVAV PORT LIMITED - Petitioner(s)
Versus
SHARDA STEEL CORPORATION - Respondent(s)

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Appearance :
MR MIHIR THAKOR, SR.ADVOCATE with MR DIPEN C SHAH for Petitioner : 1,
MR MUKUL M.TALY, SR.ADVOCATE with MR NILESH PANDYA and MR HARESH H PATEL for Respondent:1,
MR HARIN P RAVAL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 26/03/2012

CAV JUDGMENT

By way of this petition under Article 227 of the Constitution of India, the petitioner - a company seeks to challenge order dated 3rd March 2004 passed by the Civil Judge (S.D.), Amreli below Application Exh.45 in Special Civil Suit No.36/2000 and thereby Civil Judge

ordered preliminary inquiry under Section 340 of the Code of Criminal Procedure.

Facts relevant for the purpose of deciding this petition may be summarized thus :-

(1) Respondent no.1 herein (original complainant) filed Special Civil Suit No.36/2000 against the petitioner (original defendant) for recovery of Rs.23,31,26,538=84 with interest and costs. Along with the said suit the plaintiff filed an application for interim injunction (Exh.5) as well as an application for adjournment before judgment (Exh.6). The trial Court granted ex-parte ad-interim relief in favour of the plaintiff i.e. against the petitioner herein.

(2) It appears that the ex-parte ad-interim relief granted in favour of the complainant was challenged by the petitioner herein before this High Court. This High Court, after hearing both the sides, modified the ex-parte order to a certain extent. Thereafter application Exh.5 was heard at length and the trial Court allowed the same in favour of the original plaintiff and against the petitioner herein. The said order was challenged by the petitioner before this Hon'ble Court by filing Appeal from Order, wherein consent terms were arrived at between the parties and as per the consent terms filed by both the sides, this Court modified the order passed by the Trial Court below the said application.

(3) In the meantime the respondent herein preferred an application Exh.45 before the Civil Judge (S.D.) and prayed to initiate criminal prosecution against the responsible Directors/ Executives/Officers of the petitioner - company in respect of offences committed under Sections 191 and 192 of IPC. It is not necessary for me to go into the merits of the application i.e. as to the grounds on which such application was preferred. However, record reveals that the application was considered by the Civil Court and after hearing the plaintiff and the defendant the Court concerned passed an order of preliminary inquiry as contemplated under Section 340 of Cr.P.C.

(4) Aggrieved by this order of preliminary inquiry, the petitioner – original defendant has come-up before this Court by way of this petition.

Thus, the only question for my consideration in this petition is as to whether the Civil Court has committed a substantial error of law in passing order to hold preliminary inquiry under Section 340 of Cr.P.C.

It may not be out of place to state at this stage that before deciding the application Exh.45 preferred by the original plaintiff, the Civil Court permitted the defendant (petitioner herein) to file his written statement/reply vide Exh.65 and also gave an opportunity of hearing to the defendant.

I) Contentions of the Petitioner :

Learned Senior Counsel Mr.Mihir Thakore appearing with learned Advocate Mr.Dipen C.Shah, vehemently submitted that the impugned order under challenge is erroneous in law and deserves to be quashed and set aside. The main plank of the submission of learned counsel is to the effect that if a particular judicial or legal proceedings relates to trial of civil proceedings or the contentious issues in a legal proceedings, raised therein by respective pleadings of the parties, to which require final adjudication of the trial court on the merits of the evidence to be led in on record by the parties in support of their respective case, then in that case the most appropriate stage for the trial Judge in such a trial proceeding is to formulate his opinion on filing or non-filing of complaint contemplated under Section 340 of Cr.P.C. would be at the final stage of disposal of the main matter on merits. Mr.Thakore submitted that otherwise, if the trial Court is to take a decision relating to alleged *perjury* or false statement at the initial stage of the proceeding, then in all probability, it will prejudicially affect the fair disposal of the main matter on its merit and therefore it would certainly deflect the course of justice. Mr.Thakore submitted that in a trial proceeding pending before a trial Court involving contentious issues for its determination on the basis of merit of evidence led in record, the Civil Court is not bound to first deal with and dispose of an application made by a party to the proceedings under Section 340 of the Code even at a preliminary

stage of the proceedings itself, formulating his definite opinion as to the falsity of *perjury* or otherwise of certain material fact alleged by one party and denied by other in such a proceeding. Mr.Thakore vehemently submitted that the trial Court has straightway ordered to initiate preliminary inquiry under Section 340 of the Code without actually adverting to the contents of the plaint, the written statement and the documents on record. He submitted that this reflects absolute non-application of mind on the part of the trial Court.

Mr.Thakore in support of his contentions has relied upon the following decisions of the Supreme Court and the High Courts:

1) Iqbal Singh Marwah and another v/s. Meenakshi Marwah and another, reported in (2005) 4 SCC 370.

2) Sardool Singh and another v/s. Smt. Nasib Kaur, reported in 1987 (supp) SCC 146.

3) Rewashanker Mulchand v/s. Emperor, reported in AIR 1940 Nagpur 72.

4) Mayapur Shree Chaitanya Math and others v/s. Sachidanand Brahmacharya and others, reported in 1984 Cr.L.J. 1692.

5) Fozdar Rai v/s. Emperor, reported in AIR 1926 Patna 25

6) Arun Kumar Agarwal v/s. Mrs. Radha Arun, reported in 2001 Cr.L.J. 3561.

7) In re. Indrachand Bachraj, reported in AIR 1932 Bombay 185

8) Bierendranatha Dasgupta v/s.Emperor, reported in AIR 1915 Calcutta 265.

9) Umed Raja and another v/s. Emperor, reported in AIR 1914 Bombay 21.

10) Maharashtra State Electricity Distribution Co. Ltd. and another

v/s. Datar Switch Gear Ltd. and others, reported in (2010)10 SCC 479.

II) Contentions of Respondents :

Learned senior counsel Mr.Mukul M.Taly appearing with learned Advocate Mr.Nilesh A.Pandya and learned Advocate Mr.Haresh H.Patel, vehemently submitted that there is no merit in this petition, as no error, much less an error of law can be said to have been committed by the trial court in passing the impugned order under challenge warranting any interference at the end of this Court in exercise of supervisory jurisdiction under Article-227 of the Constitution.

The main contention of Mr.Taly is that the petitioner herein has no locus to challenge the order passed by the trial Court below Exh.45 ordering preliminary inquiry under Section 340 of the Code as the trial Court was not obliged to hear the defendant or give any opportunity of hearing to the defendant before passing any order below Exh.45 preferred by the plaintiff. In short, the sum and substance of the contention is that if any party to the proceeding in the suit files an application under Section 340 of the Code alleging commission of an offence of *perjury* for which only such court before whom the offence is said to have been committed, can take cognizance, then in such a case the court is not obliged under law to issue any notice against whom allegations are leveled so as to give an opportunity of hearing. He submitted that in the present case all that the trial Court has done is to order a preliminary inquiry under Section 340 of the Code an no

decision has been taken to file a complaint before the competent Court of Magistrate. He further submitted that the Code itself provides a remedy to the aggrieved party by way of an appeal under Section 341 of the Code, if at all a decision or final order has been passed to file a complaint before the competent Court of Magistrate against such party. He submitted that the trial Court in the present case adopted a very unusual procedure by giving an opportunity to the defendant to file his objections to the application Exh.45 and also heard the learned advocate appearing for the defendant before deciding the application Exh.45. Mr.Taly submitted that this issue is fully covered by a Supreme Court decision in the case of Pritish v/s. State of Maharashtra and others, reported in AIR 2002 SC 236.

The learned counsel further submitted that the petition itself is not maintainable because the impugned order under challenge is an interlocutory order.

III) Analysis :

The only question which falls for my determination in this petition under Article 227 of the Constitution of India is as to whether the trial Court is obliged to hear a party against whom an application under Section 340 of the Code has been preferred, alleging commission of offence of *perjury* in relation to, any proceeding in any court and upon such application being preferred under Section 340 of the Code if the trial Court decides to hold a preliminary inquiry, then

whether such an order can be challenged by the party against whom the allegations of *perjury* are levelled. To put it in another way, if the defendant in the present case i.e. the petitioner herein had no right to be heard by the trial Court before deciding application Exh.45 in any manner and if the trial Court under a misconception of law gave an opportunity of hearing to the defendant to oppose the application Exh.45 and thereafter if thought fit to pass an order of preliminary inquiry, then whether the defendant can challenge such an order before this Court under Article 227 of the Constitution.

I am of the view that the position of law is no longer res-integra after the pronouncement of judgment in the case of Pritish (supra). I have no hesitation in coming to the conclusion that the petitioner (original defendant) has no locus or any right to challenge the order passed by the trial Court below Exh.45 ordering preliminary inquiry under Section 340 of the Code. In taking this view I may take assistance of the analogy or the position of law so far as the magisterial inquiry under Section 202 of the Code is concerned. In a private complaint, if a Magistrate, after taking cognizance, decides to initiate a Magisterial Inquiry under Section 202 of the Code, then whether the accused in such a case can participate in the inquiry. The answer is in the negative. An accused against whom process is yet to be issued under Section 204 of the Code cannot come before the Magistrate at the stage when a Magisterial Inquiry under Section 202 is being ordered. It is a settled law that he cannot participate in the

said inquiry nor can he tell the Magistrate that the complaint deserves to be dismissed by adducing evidence at that stage in his favour. Ultimately, at the end of such Magisterial Inquiry if the Magistrate decides to take cognizance and issues process, then such an accused can challenge the order of issuance of process before the appropriate forum saying that the process ought not to have been issued. The reason is very simple. An inquiry under Section 202 of the Code is not for the purpose of ascertaining whether the accused persons are likely to be convicted but only for the purpose of deciding whether summons should be issued or not. In the same manner, when an application is made before the Court by a party to a proceeding under Section 340 of the Code, then the Court has to form an 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, record a finding to that effect and make a complaint thereafter in writing. Plain reading of Section 340 of the Code goes to show that it is within the discretion of the concerned Court to hold a preliminary inquiry or not before deciding the application under Section 340 finally. Court may, upon a preliminary inquiry, deem fit to reject the application at the threshold or Court may, after a preliminary inquiry, make a complaint in writing. In the same manner, even without holding a preliminary

inquiry if the Court is satisfied, can make a complaint in writing against the party who is said to have committed an offence of *perjury*. Thus, the preliminary inquiry is only for the purpose to decide whether any case has been made out for filing of a complaint or not. At the stage when the Court decides to file a complaint, Court is not holding the person against whom the complaint is lodged guilty of the offence but only records a *prima facie* finding that it is expedient in the interest of justice to make a complaint. Therefore, at the stage of deciding the application under Section 340, the accused has no right of hearing or participating in the preliminary inquiry if ordered by the concerned Court. Ultimately, even without holding a preliminary inquiry or after holding a preliminary inquiry if the trial Court decides to file a compliant, then under such circumstances such an order will become appealable order under Section 341 of the Code. When the Legislature has thought fit to provide for an appeal to the aggrieved party only against the final order passed under Section 340 of the Code, then under such circumstances it cannot be said that the party concerned can challenge an order of the trial Court to hold a preliminary inquiry.

It appears that this issue for the first time came-up for consideration before the Nagpur Bench of the Bombay High Court in the case of Pritish R.Tayde and another v/s. State of Maharashtra which is a reported decision in 2001 Cr.L.J. 1594. In the said case of Pritish (supra), the appellants approached the Bombay High Court

against the decision of the Civil Judge (S.D.) in initiating prosecution against them after holding preliminary inquiry under Section 340 of the Code. The matter was carried by the appellants in Misc. Civil Appeal before the Court of Additional District Judge, Kusad impugning the said order. The said Misc. Civil Appeal came to be disposed of with a direction to make appropriate complaint against respondent nos.4 and 5 of the said case before the learned JMFC, Kusad. The respondents before the Civil Judge (SD), Kusad, alleged that the appellants committed offences under Sections 191, 192, 196, 199 as well as 195 of IPC by tendering in evidence forged documents and thereby committed offences under Sections 463 and 464 which were punishable under Section 465 IPC. The Court conducted a preliminary inquiry by examining the persons whose sale-deeds were forged by the appellants and the Sub-Registrar before whom such documents were registered and after being *prima facie* satisfied that such offences as alleged were committed, proposed to file a complaint before the learned JMFC. The Appellate Court confirmed the said finding arrived by the Civil Judge (S.D.) in the preliminary inquiry and directed him to file such complaint. Before the Bombay High Court it was contended by the appellants that the Court concerned overlooked the basic principles of rules of natural justice and without giving an opportunity to the appellants to be heard in the matter, proceeded to make an inquiry and came to a decision to file a compliant against them. It was contended before the Bombay High Court that this approach of the court concerned greatly prejudiced the appellants as

it has deprived them of an opportunity to be heard and, therefore, prayed to quash and set aside the order. His Lordship of the Bombay High Court, after examining the contentions, more particularly, the main contention of not affording an opportunity of hearing before passing the final order of filing of complaint and after examining the entire scheme of Section 340 of the Code, held that the contention of the appellants that the court before initiating any inquiry into the matter, ought to have given notice to the appellants and that the appellants have a right to be heard, cannot be accepted. The High Court proceeded to observe that one can understand if the Court had decided to proceed against the appellants summarily under Section 344 of the Code and in that case, it was obligatory on the Court to have given notice to the appellants as required under the summary procedure for trial, but not in a case where the Court has chosen to hold preliminary inquiry under Section 340(1) of the Code to determine whether a complaint should be filed against the appellants or not.

Being aggrieved by the judgment and order passed by the Nagpur Bench of the Bombay High Court dismissing the appeal preferred by the appellants of that case, the appellants preferred Special Leave to Appeal before the Supreme Court. The Supreme Court dismissed the appeal confirming the judgment and order of the Bombay High Court and held as under :

“8. Chapter XXVI of the Code contains provisions "as to offences affecting the administration of justice". Among the 12 sections subsumed therein we need consider only three. Section 340 consists of four sub-sections of which only the first sub-section is relevant for the purpose of this case. Hence the said sub-section is extracted below:

"*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 of the accused before such Magistrate, or if the alleged offence is non-bailable and the Court thinks it necessary so to do, send the accused in custody to such Magistrate; and
(e) bind over any person to appear and give evidence before such Magistrate."

9. Reading of the sub-section makes it clear that the hub of this provision is formation of an opinion by the court (before which proceedings were to be held) that it is expedient in the interest of justice that an inquiry should be made into an offence which appears to have been committed. In order to form such opinion the court is empowered to hold a preliminary inquiry. It is not peremptory that such preliminary inquiry should be held. Even

without such preliminary inquiry the court can form such an opinion when it appears to the court that an offence has been committed in relation to a proceeding in that court. It is important to notice that even when the court forms such an opinion it is not mandatory that the court should make a complaint. This sub-section has conferred a power on the court to do so. It does not mean that the court should, as a matter of course, make a complaint. But once the court decides to do so, then the court should make a finding to the effect that on the fact situation it is expedient in the interest of justice that the offence should further be probed into. If the court finds it necessary to conduct a preliminary inquiry to reach such a finding it is always open to the court to do so, though absence of any such preliminary inquiry would not vitiate a finding reached by the court regarding its opinion. It should again be remembered that the preliminary inquiry contemplated in the sub-section is not for finding whether any particular person is guilty or not. Far from that, the purpose of preliminary inquiry, even if the court opts to conduct it, is only to decide whether it is expedient in the interest of justice to inquire into the offence which appears to have been committed.

10. "Inquiry" is defined in Section 2(g) of the Code as "every inquiry, other than a trial, conducted under this Code by a magistrate or court." It refers to the pre trial inquiry, and in the present context it means the inquiry to be conducted by the magistrate. Once the court which forms an opinion, whether it is after conducting the preliminary inquiry or not, that it is expedient in the interest of justice that an inquiry should be made into any offence the said court has to make a complaint in writing to the magistrate of first class concerned. As the offences involved are all falling within the purview of "warrant case" [as defined in Sec. 2 (x)] of the Code the magistrate

concerned has to follow the procedure prescribed in Chapter XIX of the Code. In this context we may point out that Section 343 of the Code specifies that the magistrate to whom the complaint is made under Section 340 shall proceed to deal with the case as if it were instituted on a police report, That being the position, the magistrate on receiving the complaint shall proceed under Section 238 to Section 243 of the Code.

11. Section 238 of the Code says that the magistrate shall at the outset satisfy that copies of all the relevant documents have been supplied to the accused. Section 239 enjoins on the magistrate to consider the complaint and the documents sent with it. He may also make such examination of the accused, as he thinks necessary. Then the magistrate has to hear both the prosecution and the accused to consider whether the allegations against the accused are groundless. If he finds the allegations to be groundless he has to discharge the accused at that stage by recording his reasons thereof. Section 240 of the Code says that if the magistrate is of opinion, in the aforesaid inquiry, that there is ground for presuming that the accused has committed the offence he has to frame a charge in writing against the accused. Such charge shall then be read and explained to the accused and he shall be asked whether he pleads guilty of the offence charged or not. If he pleads not guilty then the magistrate has to proceed to conduct the trial. Until then the inquiry continues before the magistrate.

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.

13. The scheme delineated above would clearly show that there is no statutory requirement to afford an opportunity of hearing to the persons against whom that court might file a complaint before the magistrate for initiating prosecution proceedings. Learned counsel for the appellant contended that even if there is no specific statutory provision for affording such an opportunity during the preliminary inquiry stage, the fact that an appeal is provided in Section 341 of the Code, to any person aggrieved by the order, is indicative of his right to participate in such preliminary inquiry.

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. In any event appellant has already availed of the opportunity of the provisions of section 341 of the Code by filing the appeal before the High Court as stated earlier.

15. Once the prosecution proceedings commence the person

against whom the accusation is made has a legal right to be heard. Such a legal protection is incorporated in the scheme of the Code. Principles of natural justice would not be hampered by not hearing the person concerned at the stage of deciding whether such person should be proceeded against or not.

16.Be it noted that the court at the stage envisaged in Section 340 of the Code is not deciding the guilt or innocence of the party against whom proceedings are to be taken before the magistrate. At that stage the court only considers whether it is expedient in the interest of justice that an inquiry should be made into any offence affecting administration of justice. In M.S. Sheriff and anr. v. State of Madras and ors. (AIR 1954 SC 397) a Constitution Bench of this Court cautioned that no expression on the guilt or innocence of the persons should be made by the court while passing an order under Section 340 of the Code. An exercise of the court at that stage is not for finding whether any offence was committed or who committed the same. The scope is confined to see whether the court could then decide on the materials available that the matter requires inquiry by a criminal court and that it is expedient in the interest of justice to have it inquired into."

Thus, the authoritative pronouncement of the Supreme Court in the case of Pritish (supra) makes the position of law abundantly clear. At the cost of repetition, I may state that the purpose of conducting preliminary inquiry is not for holding the would-be accused guilty of the charge of *perjury* alleged to have been committed in relation to a proceeding in the Court. 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.

Thus, in view of the settled position of law as laid down by the Supreme Court in the case of Pritish (supra), it is not necessary for me to discuss the judgments which have been relied upon by the petitioner.

I may only say that the judgments which have been relied upon by the learned counsel for the petitioner are not on the issue as to whether the would-be accused has a right to participate in a preliminary inquiry which the Court may conduct under Section 340 of the Code or whether the would-be accused has a right to be heard before the concerned Court proceeds to pass any order upon the application under Section 340, be it of preliminary inquiry or filing of complaint against the would-be accused. The decisions which have been relied upon by learned counsel for the petitioner lays down the proposition of law that ordinarily the most appropriate stage for the trial Court to take decision relating to alleged *perjury* would be at final stage of disposal of main matter on merits. This proposition of law may be helpful to the petitioner herein if at all the petitioner has to file an appeal under Section 341 of the Code if after preliminary inquiry the Court proceeds to file a complaint against the petitioner. It is at that stage before the appellate Court that these judgments which have been relied upon may be perhaps helpful. However, the ratio propounded in each of the judgments relied upon on behalf of the petitioner will not help the petitioner in any manner so far as the present petition is concerned.

I am of the view that the petitioner-original defendant had no right to be heard by the trial Court while deciding the application Exh.45 preferred by the respondent – original plaintiff. Such being the position, this petition would not be maintainable at the instance of the petitioner-original defendant challenging the order passed by the trial Court to hold preliminary inquiry under Section 340 (1) of the Code. The petition, therefore, fails and the same is hereby rejected. However, there shall be no order as to costs. Rule is discharged. Ad-interim relief granted earlier stands vacated forthwith.

On the facts and in the circumstances of the case and more particularly taking into consideration the fact that the Civil Suit is of the year 2000 and the impugned order under challenge was also passed way back on 3rd May 2004, I direct the Civil Judge (S.D.), Amreli to immediately proceed with the preliminary inquiry as ordered by his predecessor-in-office and complete the same within a period of three months from the date of receipt of this judgment & order and pass appropriate orders in accordance with law without being influenced in any manner by any of the observations made by this Court in this judgment. I also clarify that I have not expressed any opinion so far as the merits of the application Exh.45 is concerned as the entire petition has been decided only on a pure question of law as regards the right of the would-be accused to challenge the order of preliminary inquiry under Section 340 of the Code.

Registry is directed to communicate this order to the Civil Judge (S.D.), Amreli at the earliest.

(J.B.Pardiwala, J.)

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Upon pronouncement of the judgment and order passed by this Court today, learned advocate Mr.Dipen C.Shah requested to stay the operation of this judgment for a period of three weeks.

For the reasons recorded in the judgment and in the facts and circumstances of the case, the request is not acceded.

(J.B.Pardiwala, J.)

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