

FARAD CONTINUATION SHEET.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION No.1115/07.

APPLICANT:

1. Kenneth Desa s/o Late John Desa,
aged about 61 years, Occu:Retired from
Service in Railways.
2. Miss. Maud d/o Late John Desa,
aged about 70 years, Occu: Household,
Both r/o 895, Clarke Town,
Nagpur.

..VERSUS..

NON-APPLICANT:

Gopal s/o Leeladhar Narang,
aged about 60 years, Occu:Business,,
r/o Clarke Town Nagpur.

Applicant in person.

Shri T.C.Shukla, Advocate for the non-applicant.

CORAM: C.L.PANGARKAR,J.

DATE : 11th July, 2007.

ORAL JUDGMENT.

1. Rule. Heard Finally with consent of parties.
2. This petition under Section 482 of the Code of Criminal Procedure seeks to quash the order passed by Civil Judge (Jr.Dn.) and the Sessions Judge on an application under Section 340 of Code of

Criminal Procedure and appeal thereon under Section 341 of Code of Criminal Procedure.

3. A few facts may be stated thus -

The petitioner had filed Civil Suit against the non-applicant for injunction and other reliefs. In the said civil suit, it is alleged that the respondent had filed an affidavit in which the petitioner claims that the respondent has made patently false statement. The petitioner, therefore, filed an application purporting to be an application under Section 340 of Code of Criminal Procedure. As said earlier, it is the contention of the petitioner that respondent had made a false statement on oath in the affidavit as regards the height of the compound wall constructed by the respondent. It appears that the petitioner's contention is that respondent while answering to the allegations in para no.6 of the plaint had undertaken not to increase the height of wall beyond 7 feet even though sanction was given by the Municipal Corporation for construction of a wall of having height of 2 meters equivalent to 6 ft. 6 inches. The petitioner's grievance is that how could defendant/respondent on oath say that he will not increase the height above 7 feet when Corporation has granted sanction for 6.6 ft. and this amounts to making false statement on

oath.

4. The learned Civil Judge rejected the application saying that the evidence of both sides is closed and matter is fixed for arguments and in such circumstances it would not be appropriate to hold separate enquiry and give a finding which may even cause prejudice to both the parties. Holding so, he rejected the application.

5. The learned Sessions Judge concurred with the Civil Judge and dismissed the appeal.

6. I have heard the petitioner-in-person and the learned counsel for the non-applicant.

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. The learned Civil Judge should have, therefore, directed the application to be registered as Miscellaneous Judicial Case. Section 340 of Code of Criminal Procedure 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.

(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 authroise in writing in this behalf.
- (4) In this section, "Court" has the same meaning as in Section 195.

8. The section thus says that 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. It was, therefore, not proper on part of Judges of the lower courts to have rejected the application. The learned Civil Judge should have, in fact, upon consideration of the

application, decided whether it was necessary to hold the enquiry and if found necessary should have held an enquiry. Merely because civil suit was pending, that did not prevent and could not prevent the Civil Judge from entering into an enquiry. I would, therefore, set aside both the orders and direct the civil judge to register Exh.52 as Miscellaneous Judicial Case and then proceed to decide the application according to the provisions contained in Section 340 of Code of Criminal Procedure. Pendency of this application shall not be and cannot be a constraint on the Civil Judge in deciding the Civil suit on merits. The civil judge may proceed to decide the suit and may also proceed to decide the application under Section 340 of Code of Criminal Procedure separately. The application under Section 482 of Code of Criminal procedure is thus disposed of in the above terms.

JUDGE

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