

**(2002) 05 P&H CK 0135**

**High Court Of Punjab And Haryana At Chandigarh**

**Case No:** Criminal Miscellaneous No. 14943 of 2002

Devinder Mohan Zakhmi

APPELLANT

Vs

Amritsar Improvement Trust and  
Another

RESPONDENT

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**Date of Decision:** May 9, 2002

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 11 Rule 15, Order 39 Rule 1, Order 39 Rule 2
- Criminal Procedure Code, 1973 (CrPC) - Section 195, 195(1), 2, 238, 243

**Citation:** (2002) CriLJ 4485 : (2002) 3 RCR(Criminal) 328

**Hon'ble Judges:** R.C. Kathuria, J

**Bench:** Single Bench

**Advocate:** Malkeet Singh, for the Appellant;

**Final Decision:** Allowed

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**Judgement**

@JUDGMENTTAG-ORDER

R.C. Kathuria, J.

Petitioner, Devinder Mohan Zakhmi, seeks quashing of order dated 2-4-2002 (Annexure P-4) passed by Civil Judge (Junior Division), Amritsar, on an application filed by him u/s 340 of the Code of Criminal Procedure (hereinafter referred to as the Code).

2. The facts have to be noticed briefly in order to focus the controversy raised in the present petition.

3. Petitioner had filed suit for mandatory injunction seeking directions against the Amritsar Improvement Trust, Amritsar, through its Chairman (respondent No. 1) and others to allot alternative plot in lieu of plot No. 2564 which was earlier allotted to the petitioner on 16-9-1997 in pursuance to the order passed by this Court as the plot so allotted, was located in a low lying area and it was not possible for the

petitioner to carry out any construction on the same. It, was also alleged by the petitioner in the suit that a number of other vacant plots were available with the respondent - Improvement Trust at Ranjit Avenue, Amritsar but in the reply filed by respondent No. 1, controvert the stand of the petitioner, the availability of plots was denied.

4. During the pendency of the suit, an application under Order XXXIX, rules 1 and 2 of the CPC was filed by the petitioner on which the trial Court had directed respondent No. 1 to file an affidavit of the competent Authority to specify that no vacant plot measuring 150 sq. yards was available in Block "B & E" of Ranjit Avenue, Amritsar, Parkash Singh, respondent No. 2, who is posted as Senior Assistant in the office of respondent - Trust filed affidavit dated 23-12-1998 before the trial Court stating therein that no plot measuring 150 sq. yards was available in Blocks B and E in Ranjit Avenue, Amritsar. Thereafter, the petitioner filed an application under Order XI, Rule 15 of the CPC so as to seek direction to respondent No. 1 to produce the allotment Register relating to Block B and E in Ranjit Avenue, Amritsar, which was allowed by the Court. During inspection of the register, the petitioner detected that bogus and fictitious allotments were shown by respondent No. 1 in order to deny the claim of the petitioner. His enquiry disclosed that some vacant plots were available as on 16-7-1999 which was in contradiction to averments made in affidavit dated 23-12-1998. With this back-ground, on 30-7-1999 the petitioner filed an application u/s 340 of the Code for taking action against respondent No. 2 for having committed offence referred to in clause (b) of Sub-section (1) of Section 195 of the Code. Upon this, a preliminary enquiry was conducted by the trial Court in terms of requirement of Section 340 of the Code. Petitioner himself appeared as a witness and thereafter closed his evidence on 29-10-2001 whereafter the trial Court adjourned the application for consideration for 22-11-2001 which was again adjourned to 14-12-2001. Thereafter, written arguments were filed by the petitioner and the matter was adjourned to 4-1-2002. On 4-1-2002, respondents filed an application u/s 195 of the Code for permission to adduce evidence which was allowed by the Civil Judge (Junior Division), Amritsar, as per order dated 2-4-2002. It is this order which has" been assailed in the present petition.

5. Notice of the petition was given to the respondents. No one has put in appearance on their behalf.

6. I have heard learned counsel for the petitioner at length.

7. Learned counsel for the petitioner has vehemently contended before me that during the course of preliminary enquiry proceedings in terms of Section 340 of the Code, respondents have no right to participate and adduce evidence and the prayer made by the respondents in this regard allowed by the Civil Judge (Junior Division), Amritsar, as per order dated 2-4-2002 is wholly unjustified and not tenable in law. He placed reliance on the observations made in case [Madan Lal Sharma Vs. Punjab and Haryana High Court Thr. Its Registrar](#), wherein it was laid down that no hearing

is required to be given to the accused before filing of the complaint because the accused can raise all defences before the Magistrate when the complaint is filed. Further reference was made to observations of the Apex Court in [Pritish Vs. State of Maharashtra and Others](#), wherein it was observed in paras 9 and 10 as under :-

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 Section 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 u/s 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 u/s 238 to 243 of the Code."

The entertainment of the application of, respondents by the trial Court in order to enable them to produce evidence in defence, as such was against the mandate of law. The findings of the trial Court that the provisions of Section 340 of the Code do

not propose to shut down all gates for the respondents to place their case before the Court, and these provisions are only directive in nature, as such cannot be accepted in the face of the dictum of law laid down in the above-mentioned cases. Manifestly, the trial Judge has committed a patent error in passing order dated 2-4-2002 and for that reason, the same cannot be sustained.

For the foregoing reasons, the petition is allowed and order dated 2-4-2002 set aside.