

(2008) 08 GUJ CK 0048
In the Gujarat High Court

Case No : Special Criminal Application No. 1060 of 2008

Kesarben Jesangji Gabhaji and Another	APPELLANT
Vs	
Babulal Jamnadas Patel and Others	RESPONDENT

Date of Decision : 05-08-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 154, 154(3), 156(3), 173(2), 190(1)
Penal Code, 1860 (IPC) — Section 120B, 406, 420, 465, 467

Citation : (2008) 08 GUJ CK 0048

Hon'ble Judges : Ravi R. Tripathi, J

Bench : Single Bench

Advocate : Y.N. Oza and Roma I. Fidalis, for Srushti A. Thula, for the Appellant;
Tushar Mehta, for Respondent Nos. 1 and 2, Y.S. Lakhani and Pravin Gondaliya
and S.V. Raju, for the Respondent

Final Decision : Allowed

Judgement

Ravi R. Tripathi, J.—On Office submission dated 26.06.2008, the Hon"ble the Chief Justice ordered to list the matters mentioned therein

before this Court. The matters mentioned therein are as under:

- I. Criminal Revision Application No. 252 of 2007.
- II. Criminal Misc. Application No. 7553 of 2008.
- III. Special Criminal Misc. Application No. 1060 of 2008 (the present petition).
- IV. Special Criminal Misc. Application No. 1061 of 2008
- V. Special Civil Application No. 13965 of 2007
- VI. Special Civil Application No. 9334 of 2007
- VII. Special Civil Application No. 28693 of 2007
- VIII. Special Civil Application No. 5256 of 2008

IX. Special Civil Application No. 7572 of 2008

The aforesaid matters are notified before this Court since 08.07.2008.

2. Mr. Y.N.Oza, learned senior advocate for the petitioners, requested that all these matters be taken up as the Hon"ble the Apex Court has

passed order on 05.05.2008 in Civil Appeal No. 3356 of 2008 arising out of SLP (C) No. 10129 of 2008 filed by one Shri Kashiram Patel (D)

through LRS. and Others as under:

SLeave granted.

Having heard learned Counsel for the respective parties, we are of the view that since the Writ Petition is pending decision and the present appeal

is only against an interim order passed therein, the interest of justice would be best served if the High Court could be requested to hear out the

Writ Petition as early as possible.

We accordingly dispose of the appeal with a request to the High Court to dispose of the pending Writ Petition as early as possible, but preferably

within a period of three months from date.

In the meantime, the parties are directed to maintain status quo as far as the appellants' plot No. 533 and any portion thereof, if included in the

proposed road, is concerned.

3. Looking to the controversy involved in the matter, with the consent of the learned advocates, it is deemed fit to take up individual matter rather

than combining all the matters. At the request of the learned advocates for the respondents, the present petition is taken up first for hearing amongst

the matters notified.

4. RULE. Mr. Tushar Mehta, learned advocate, waives service of Rule on behalf of respondent Nos. 1 and 2, Mr. Y.S.Lakhani, learned senior

advocate, waives service of Rule on behalf of respondent No. 3 and Mr. S.V. Raju, learned senior advocate, waives service of Rule on behalf of

respondent No. 4.

5. The present petition is filed by Kesarben Jesangji and Poonamji Jesangji Thakore against as many as four respondents. Respondent Nos. 1 and

2 are represented by learned advocate Mr. Tushar Mehta. Respondent No. 3 is represented by learned senior advocate Mr. Y.S.Lakhani.

Respondent No. 4 is represented by learned senior advocate Mr. S.V. Raju.

6. The learned senior advocate, for respondent No. 3 informs the Court that respondent No. 3 has expired on 04.07.2008 and therefore, the learned senior advocate need not make any submissions on behalf of respondent No. 3.

7. Learned senior advocate for respondent No. 4 made his submissions. The learned advocate for respondent Nos. 1 and 2 adopted the arguments of learned senior advocate Mr. Raju and also made his own submissions.

8. The learned senior advocate for the petitioners submitted that a complaint under Sections 406, 420, 465, 467, 468 and 120B of the Indian Penal Code was filed before the learned Judicial Magistrate First Class, Ahmedabad (Rural) being Criminal Case No. 103 of 2008. A copy of which is produced at Annexure-A to the petition.

8.1 The learned senior advocate for the petitioners invited attention of the Court to the averments made in the petition narrating the circumstances in which the petitioners were constrained to approach the learned Judicial Magistrate First Class. The relevant averments read as under:

3.8 The petitioners state that on 29.3.2008 the petitioners approached Mr. Shashikant Trivedi, District Superintendent of Police Ahmedabad

(Rural) requesting him to exercise his powers u/s 154(3) of the Code of Criminal Procedure, but the petitioners were advised to approach the police station concerned and assured that they will get justice.

3.9 The petitioners state that thereafter the petitioner No. 2 has filed a complaint on 29.03.2008 in this regard before the Sarkhej Police Station,

but the same was not accepted. The petitioners state that as the private respondents are politically influenced and prominent builders hence the

police did not accept the complaint. The petitioners state that the District Superintendent of Police instead of helping the petitioner to get justice

informed the respondent No. 1-Babulal Jamnadas Patel about the said complaint on telephone and did not initiate any action as the respondent

No. 1 is a sitting Member of Legislative Assembly in the ruling government. The petitioners state that if the records of the telephone / mobile of the

District Superintendent of Police and the Police Inspector are called for, it will become crystal clear that there was a communication between the

respondent No. 1 and the above mentioned police officers inter se. The

petitioners state that if the petitioners are proved wrong the present petition may be dismissed with exemplary costs.

3.9A The petitioners state and submit that the D.S.P., Ahmedabad (Rural) instead of helping the petitioners informed the respondent No. 1 about

the said complaint so that he could take remedial measures against the complaint. The petitioners state that the script of the talks taken place inter

se among the D.S.P., Police Inspector, Sarkhej and the respondent No. 1 may be called for from the concerned mobile companies, which may

prove the connivance. The petitioners state that in the similar matter, this Hon"ble Court (Coram: Hon"ble Mr. Justice M.R.Shah) passed an order

dtd.30.11.2007 passed in Special Criminal Application No. 918 of 2007. Copy of the order dtd.30.11.2007 is annexed hereto and marked as

Annexure-"H" to this petition.

The petitioners state that the order passed by the learned Magistrate goes contrary to the order passed by this Hon"ble Court though the learned

Magistrate had taken note of the said order.

The petitioners state that this Hon"ble Court in another similar matter pertaining to the block No. 84 of the same Final Plot No. 63, this Hon"ble

Court (Coram: Hon"ble Smt. Justice Abhilashakumari) was pleased to pass order dtd.15.5.2008 granting status-quo qua land bearing block No.

84 and final plot No. 63. Copy of the order dtd. 15.5.2008 is annexed hereto and marked as Annexure-I to this petition. In another matter

pertaining to Block No. 533 of the same Final Plot, being Civil Appeal No. 3356 of 2008 (Arising out of SLP (C) No. 10129 of 2008), the

Hon"ble Supreme Court of India vide order dtd.5.5.2008 was pleased to grant status quo qua the appellants' plot No. 533 and any portion

thereof, if included in the proposed road. Copy of the order dtd.5.5.2008 is annexed hereto and marked as Annexure-J to this petition.

The petitioners state that in the civil matter filed by the petitioners being Letters Patent Appeal No. 353 of 2008, this Hon"ble Court was pleased

to grant status quo as regards the final plot in consequence of the original plot No. 80, which is the present petitioners land. Copy of the order

dtd.13.5.2008 passed in Civil Application No. 6006 of 2008 in Letters Patent Appeal No. 535 of 2008 is annexed hereto and marked as

Annexure-K to this petition.

3.10 The petitioners state that thereafter they sent copy of the said complaint to District Superintendent of Police, Ahmedabad (Rural) and

Additional Secretary, Home Department with regard to the same on 31.3.2008, but up till now no actions have been initiated by the said authorities.

8.2 The learned senior advocate for the petitioners submitted that the petitioners are therefore before this Court praying that:

9. (B) YOUR LORDSHIPS may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or

direction quashing and setting aside the order dated 11.4.2008 passed by the Judicial Magistrate, First Class, Ahmedabad (Rural) in Criminal

Complaint No. 103 of 2008; and further be pleased to direct the Police Inspector, Sarkhej Police Station, Ahmedabad to initiate investigation u/s

156(3) of the Code of Criminal Procedure.

8.3 The petitioners have also prayed for the interim relief in paragraph No. 9 (C), which reads as under:

9. (C) Pending admission, hearing and final disposal of this petition YOUR LORDSHIPS may be pleased to stay and suspend the implementation,

execution and operation of the order dated 11.4.2008 passed by the Judicial Magistrate, First Class, Ahmedabad (Rural) in Criminal Complaint

No. 103 of 2008; and further be pleased to direct the Police Inspector, Sarkhej Police Station, Ahmedabad to initiate investigation u/s 156(3) of

the Code of Criminal Procedure.

9. The learned senior advocate for the petitioners submitted that the learned Magistrate passed order on 11.04.2008. A typed copy of which is

produced at page Nos. 28A to 28C. The learned senior advocate for the petitioners submitted that the learned Magistrate has taken note of the

fact that the Collector, in its order in Review No. 21 of 2005, has recorded that the application filed by the Power of Attorney was without date

on which the Deputy Collector, Viramgam Prant passed order on 06.02.2002 in Land Appeal Case No. 12 of 2001, whereby, "New tenure land"

was converted into, "Old tenure land. This order was contrary to provisions of law and illegal; that the order was passed without proper

investigation, which was not befitting to a responsible Class-I officer; that the order is passed after thirty nine years of orders of grant which were

passed in the year 1963; that the order is passed without any convincing reasons/affidavit seeking condonation. The Collector has also recorded

that qua some of the survey numbers, the persons whose names do not appear in village Form No. 7/12, have executed Power of Attorney and on

the basis of such Power of Attorney, the holder of Power of Attorney filed the application before the Deputy Collector, which is granted. This

order granting application is a nullity. The Collector has also recorded that in a Power of Attorney executed on 28.04.2000, it is mentioned that, S.

qua this land we have executed a general Power of Attorney on 30.04.2003. The same is cancelled from today.... It is clearly established that the

Power of Attorney dated 28.04.2000, produced before the Deputy Collector, is bogus and concocted one.

9.1 The learned senior advocate for the petitioners submitted that the learned Magistrate has observed in paragraph No. 2 of the order as under:

2. This Court has considered the facts of the case. It is clear from the record that, as per page No. 32 death certificate of Shantaben Thakore,

who expired on 7.8.96, this was registered in record on 25-10-96, now if we see Power of Attorney at page, one it is dt.24-3-2000 or so and

last page also shows deletion & correction of thumb & other signs. This both document prima facie creates suspicion & doubt about its

genuineness in eye of law.

9.2 The learned senior advocate for the petitioners submitted that even after making aforesaid observations, the learned Magistrate did not think it

fit to order inquiry u/s 156(3) of the Criminal Procedure Code (Sthe Code, for short) and directed that the complaint be sent to Sarkhej Police

Station for inquiry u/s 202 of the Code. The learned senior advocate for the petitioners submitted that the learned Magistrate ought to have given

due consideration to the fact that the opponent is powerful enough to dodge the entire machinery of the Government which is evident from the

order of the Collector, who was also transferred after she filed an affidavit before this Court in a matter relating to this very land.

10. The learned senior advocate for the petitioners invited attention of the Court to order dated 15.07.2005 passed by the Collector in a matter

bearing No. LB/Review Case No. 21/05. A copy of which is produced at Annexure-E to the petition. In the said case, the Collector was

considering order dated 06.02.2002 passed by the Deputy Collector, Viramgam Prant, Ahmedabad on the basis of an application dated NIL

made by the Power of Attorney of the opponent in Land Appeal Case No. 12 of 2001, whereby the Deputy Collector was pleased to remove the

condition of, "new tenure and impartiable" and was pleased to grant the lands the status of, "old tenure lands", whereby they become freely

transferable.

10.1 The Collector, after a detailed scrutiny of the entire record, passed a well considered order. The Collector applied its mind to all the relevant

aspects of the case and took trouble to go to the root of the matter. While doing so, it was noticed that a fraud is committed, which resulted into

loss of revenue to the State. The Collector, in its affidavit filed in a matter, has deposed that this very Deputy Collector has passed similar orders in

approximately twenty such cases and has caused loss of about Rs. 60 to 70 crores to the public exchequer.

10.2 The Collector held that mutation entry Nos. 2932, 2952, 2956, 2966, 2947 and 2948 are illegal and are liable to be quashed. The Collector

had issued show cause notices and after hearing all the parties, passed the order aforesaid.

10.3 In the above order itself, the Collector has recorded that the application was filed by one Shri Babubhai Jamnadas Patel respondent No. 1

herein as the Power of Attorney Holder of the applicants of the application which was accepted by the Deputy Collector and order impugned was

passed, which is contrary to express provisions of law and hence illegal.

10.4 The Collector has also recorded in its order that the Deputy Collector in its final order included survey No. 38/2 though the possession

holders of the said land had never filed any application and no material was produced before him to show that the possession holders of survey

No. 38/2 had executed any Power of Attorney in favour of Shri Babubhai Jamnadas Patel. Despite that, the Deputy Collector passed order with

regard to survey No. 38/2 also which was bad in law right from its inception. There are many other illegalities and not the irregularities committed

in the matter which are noted and recorded by the Collector in its order.

10.5 The Collector has also recorded that the application was filed by the Power of Attorney Holder of 23 persons. On perusal of the Power of

Attorney documents produced on the record, the persons mentioned at serial Nos. 1/1, 7 and 9 in the application have not executed any Power of

Attorney. Besides, the co-possession holders of Block No. 84 and six other persons, whose names appear at serial Nos. 15 to 20 in the Power of

Attorney, have though not signed the document, an order is obtained.

10.6 Last but not the least the Collector has also mentioned that the person mentioned at serial No. 4/1 Shantaben Gabhaji has died on

01.08.1996 and still a Power of Attorney was executed on 24.03.2000, wherein a thumb impression was made which was later on scored of.

Acting on the basis of this Power of Attorney, the application was filed before the Deputy Collector and relief was sought. Thus a fraud is

committed. The Collector, has in no uncertain terms, recorded that by creating a Power of Attorney in the name of a deceased person, an

application was filed and order was obtained. Once there is no valid Power of Attorney, even prima facie, the application was made on the basis

of such Power of Attorney, was neither maintainable nor acceptable.

10.7 What falls for consideration of this Court is that the learned Magistrate, having observed as aforesaid in paragraph No. 2 of its order, for no

valid reasons, passed an order of "inquiry and report u/s 202 of the Code only".

11. Mr. Raju, learned senior advocate for respondent No. 4 vehemently opposed the petition. The learned senior advocate analyzed Section 202

of the Code and submitted that u/s 202 of the Code, the Magistrate has four options, (1) of issuing process, (2) of ordering a police inquiry u/s

156(3) of the Code, (3) ordering an inquiry either by Police Officer or by a person who is not a Police Officer u/s 202 of the Code and (4) to

dismiss such complaint.

11.1 Later on, arguing on the next day, the learned senior advocate for respondent No. 4 submitted that Section 202 of the Code is amended. He

invited attention of the Court to the amended Section 202 and submitted that under the amended Section, the legislation has taken away the

discretion of the Magistrate of issuing 156(3) inquiry in case the accused is residing at a place which is beyond the area in which the Magistrate is

exercising his jurisdiction.

11.2 The learned senior advocate for respondent No. 4 submitted that respondent No. 4 is not residing within the jurisdiction of the learned

Magistrate and therefore, qua respondent No. 4, the learned Magistrate had no option and no power to order an inquiry u/s 156(3) of the Code.

He submitted that only order which could have been passed is already passed by the learned Magistrate and that order is not required to be

interfered with by this Court.

05.08.2008

12. The learned senior advocate for respondent No. 4 submitted that the petitioner is not able to suggest any ground on which the request of the

petitioner can be considered and granted and an inquiry u/s 156(3) of the Code can be ordered. The learned senior advocate invited attention of

the Court to Section 465 of the Code and submitted that finding or sentence can be reversed only when there is an error, omission or irregularity.

He relied upon the provisions of Section 465 of the Code which read as under:

465. Finding or sentence when reversible by reason or error, omission or irregularity.--(1) Subject to the provisions hereinbefore contained, no

finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision

on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or

during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the

opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) ...

12.1 In the considered opinion of this Court, this has no role in the facts of the present case.

13. The learned senior advocate for respondent No. 4 relied upon a decision of this Court (Coram: Hon''ble Ms. Justice H.N. Devani) in the matter

of Neel Dilip Shah and Ors. v. The State of Gujarat and Anr. in Criminal Misc. Application No. 3066 of 2007 dated 29.02.2008. The learned

senior advocate for respondent No. 4 relied upon paragraph Nos. 31 and 32 of the said judgment which read as under:

31. The principal contention raised by the learned Senior Advocate is that on account of non-compliance with the mandatory provisions of Sub-

section (1) of the Section 202 of the Code, the issue of process was bad. In this regard, it would be necessary to refer to the provisions of Section

202 of the Code, which reads as under:

Section 202 Postponement of issue of process. -

[1] Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him u/s

192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction]

postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer

or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made-

[a] where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Sessions; or

[b] where the complaint has not been made by a Court, unless the complainant and the witnesses present (if any) have been examined on oath u/s

200.

[2] In an inquiry under Sub-section (1), the Magistrate may, if he thinks fit, take evidence of witness on oath:

Provided that if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the

complainant to produce all his witnesses and examine them on oath.

[3] If an investigation under Sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers

conferred by this Code on an officer in charge of a police station except the power to arrest without warrant.

32. A plain reading of the said provision shows that any Magistrate, on receipt of a complaint of an offence of which he is authorised to take

cognizance or which has been made over to him u/s 192 may, if he thinks fit postpone the issue of process against the accused, and (i) either

inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of

deciding whether or not there is sufficient ground for proceeding. Thus, it is well within the discretion of the concerned Magistrate to postpone the

issue of process if he thinks fit. However, by the amendment of 2005, Sub-section (1) of Section 202 has been amended, which makes it

obligatory upon the Magistrate that before summoning the accused residing beyond his jurisdiction he shall enquire into the case himself or direct

investigation to be made by a police officer or by such other person as he thinks fit, for finding out whether or not there is sufficient ground for

proceeding against the accused. This has been done to see that innocent persons are not harassed by unscrupulous persons. Thus, in view of the

amendment in case where the accused is residing beyond the area in which he exercises jurisdiction, the discretion of the Magistrate is taken away,

and it becomes mandatory for him to postpone the issue of process till inquiry as envisaged under Sub-section (1) of Section 202 is made.

13.1 The submissions of the learned senior advocate for respondent No. 4 do not find support from the aforesaid observations of the learned

Single Judge.

14. The learned senior advocate for respondent No. 4 next relied upon a decision of this Court in the matter of Suresh Kumar Gupta Vs. State of

Gujarat, the learned senior advocate for respondent No. 4 relied upon observations made by this Court in paragraph Nos. 8, 9, 10, 11 and 12. In

paragraph No. 12, the Court has observed as under:

There is a common complaint that the complainants approach the Magistrate with complaints and powers to direct investigation u/s 156(3) are

being exercised indiscriminately and Magistrates fall prey to the wicked mind of the complainants and the alleged accused persons are in the

clutches of the Police who investigate the same. This appears to be an indirect way of empowering Police authority through agency of court in the

matter where Police had no authority to enquire of its own. It may be that complainant had no desire to go to Police. If complainant wanted to go

to Police, where he should have ordinarily gone, why should he have approached the court. This aspect is required to be born in mind before

passing any order, more particularly of investigation u/s 156(3) of the Code. It is the duty of the learned Magistrate to decide whether any

investigation is necessary in the matter or not. I am, therefore, of the opinion that whenever a direction to inquire u/s 156(3) of the Code is given,

the said order of direction should be a speaking one to reflect the reason why for what material to be collected he needs the police to investigate.

14.1 The aforesaid observations make it clear that the facts before the Court

were different in the aforesaid matter. In the present case, it is already pointed out in paragraph No. 3.8 and other paragraphs of the petition quoted hereinabove that the case was reverse. Despite the petitioner approaching the District Head of the Police, the police authorities failed to respond to the request as they did not undertake the exercise which was required of them under the law and therefore, there is no comparison between the facts of the two cases.

15. The learned senior advocate for respondent No. 4 next relied upon a decision of this Court in the matter of Sankalchand Valjibhai Patel v. J.P.

Chavada and Ors. reported in 1979 20 GLR 17. The learned senior advocate relied upon paragraph No. 2 of the judgment which reads as under:

2. The question that has surfaced in the back drop of the aforesaid facts and circumstances is : when upon receipt of a complaint of an offence a

Magistrate instead of issuing process postpones the issue of process against the accused and directs a police officer to make an investigation for

the purpose of deciding whether or not there is sufficient ground for proceeding, can the police officer in charge of the investigation on his own,

place the accused under arrest ? Section 202(1) in so far as material reads as under:

202 (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him

u/s 192, may, if he thinks fit, [and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction]

postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer

or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

The language of Section 202 clearly shows that (1) a Magistrate may direct a police officer to make an investigation when he decides to postpone

the issue of process and (2) the investigation may be directed for the purpose of deciding whether or not there is sufficient ground for proceeding.

On a plain reading of the provision it is, therefore, clear that a police officer may be directed to investigate only when a decision to postpone the

process is taken by the learned Magistrate. The process would eventually be issued on the receipt of the report of the investigating officer if the

learned Magistrate reaches the conclusion that there is sufficient ground for proceeding. In that event the learned Magistrate would have to decide whether or not to issue a process, and if so, whether a summons should be issued or a warrant should be issued. The whole purpose of ordering the investigation is to satisfy himself whether there is sufficient ground for proceeding in the matter. After the receipt of the record if the Magistrate forms the opinion that there are sufficient grounds for proceeding, then only the question of issue of a process and the nature of the process to be issued can arise. Till then such a question cannot arise. The decision to issue a process and the decision to issue either a summons or a warrant is a decision which is in the offing. Section 202 envisions that the question of process will be decided by the learned Magistrate and that the decision will be taken after the receipt of the report of the investigating officer. Till then, therefore, there is no question of arresting an accused person....

15.1 The aforesaid decision is on the aspect of "power of the police officer to arrest an accused". The learned senior advocate for respondent No.

4 apprised the Court that the matter is pending before the Hon"ble the Apex Court for consideration.

16. Last but not the least, the learned senior advocate for respondent No. 4 submitted that even the complaint does not disclose necessity of

issuing an order of investigation u/s 156(3) of the Code. The learned senior advocate for respondent No. 4 submitted that respondent No. 4 is a

bonafide purchaser for value and no offence is disclosed so far respondent No. 4 is concerned either in the complaint or in the petition.

17. As against this, Mr. Y.N.Oza, learned senior advocate for the petitioners, relied upon a decision of the Hon"ble the Apex Court in the matter

of Madhu Bala Vs. Suresh Kumar and others, . The learned senior advocate for the petitioners relied upon the observations made by the Hon"ble

the Apex Court in paragraph Nos. 8 and 12 which read as under:

8. From a combined reading of the above provisions it is abundantly clear that when a written complaint disclosing a cognizable offence is made

before a Magistrate, he may take cognizance upon the same u/s 190(1)(a) of the Code and proceed with the same in accordance with provisions

of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police Station u/s 156(3) for

investigation. Once such a direction is given under Sub-section (3) of Section 156 the police is required to investigate into that complaint under Sub-section (1) thereof and on completion of investigation to submit a "police report" in accordance with Section 173(2) on which a Magistrate may take cognizance u/s 190(1)(b) - but not under 190(1)(a). Since a complaint filed before a Magistrate cannot be a police report in view of the definition of complaint referred to earlier and since the investigation of a "cognizable case" by the police u/s 156(1) has to culminate in a police report the complaint as soon as an order u/s 156(3) is passed thereon - transforms itself to a report given in writing within the meaning of Section 154 of the Code, which is known as the First Information Report (FIR). As u/s 156(1) the police can only investigate a cognizable "case", it has to formally register a case on that report.

12. In Tula Ram and Others Vs. Kishore Singh, the only question that was raised before this Court was whether or not a Magistrate after receiving a complaint and after directing investigation u/s 156(3) of the Code and on receipt of the "Police report" from the police can issue notice to the complainant, record his statement and the statements of other witnesses and then issue process u/s 204 of the Code. From the question itself it is apparent that the said case related to a stage after police report u/s 173(2) of the Code was submitted pursuant to an order u/s 156(3) of the Code and not to the nature of the order that can be passed thereunder (Section 156(3)). The cases of the Punjab and Haryana High Court referred to by the learned Judge in the impugned judgment need not be discussed in details for they only lay down the preposition that u/s 156(3) a Magistrate can only direct investigation but cannot direct registration of a case for no such power is given to him under that section. We repeat and reiterate that such a power inheres in Section 156(3) for investigation directed thereunder can only be in the complaint filed before the Magistrate on which a case has to be formally registered in the Police Station treating the same as the FIR. If the reasoning of the Punjab and Haryana High Court is taken to its logical conclusion it would mean that if a Magistrate issues a direction to submit a report u/s 173(2) of the Code after completion of investigation while passing an order u/s 156(3) it would be equally bad for the said Section only "directs investigation" and nothing

more. Needless to say, such a conclusion would be fallacious, for while with the registration of a case by the police on the complaint, the

investigation directed u/s 156(3) commences, with the submission of the "police report" u/s 173(2) if culminates.

17.1 In the opinion of this Court, the observations of the Hon'ble the Apex Court are applicable to the facts of the case on hand.

18. Mr. Tushar Mehta, learned advocate for respondent Nos. 1 and 2, submitted that it is clear from the conduct of the petitioners that they are

not interested in getting the truth/true facts on the record of the case. He submitted that this can be seen from the prayer made in the petition. He

submitted that though it is prayed in Clause (B) of paragraph No. 9 that order dated 11.04.2008 passed by the Judicial Magistrate, First Class,

Ahmedabad (Rural) in Criminal Complaint No. 103 of 2008 be quashed and set aside and Police Inspector, Sarkhej Police Station, Ahmedabad

be directed to initiate investigation u/s 156(3) of the Code, the petitioners, by way of interim relief, have prayed that order dated 11.04.2008

passed by the learned Judicial Magistrate First Class be stayed. He submitted that the petitioners have obtained this interim relief. He strenuously

submitted that if this interim relief was not obtained, by now, the police could have completed the investigation u/s 202 of the Code and could have

placed the true facts before the Court. He submitted that the fact that the stay of order dated 11.04.2008 is sought and obtained, it exposes the

real intentions of the petitioners. He submitted that the petitioners are interested in something else, viz. the police authorities should be empowered

to investigate u/s 156(3) of the Code as if that is the only mode available to get the truth/true facts on the record of the case.

18.1 The learned advocate for respondent Nos. 1 and 2 also submitted that earlier, the Court while passing order on 03.06.2008 had granted

interim relief in terms of paragraph No. 9 (C), whereby even the Police Inspector, Sarkhej Police Station stood directed to inquire u/s 156(3) of

the Code, but then Speaking to Minutes were filed and the order was modified and that part of the prayer was clarified to have been not granted.

19. The learned advocate for respondent Nos. 1 and 2 submitted that Section 190 of the Code provides for taking cognizance of any offence by

the Magistrate of the First Class- (a) upon receiving a complaint of facts which constitute such offence;; (b) upon a police report of such facts; and

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed. The

learned advocate submitted that in the present case, after the report is submitted by the police, the Magistrate can always take cognizance of the

offence, if it is reported to have taken place in such report. He submitted that insistence for ordering investigation u/s 156(3) is uncalled for and if

order dated 11.04.2008 would have been allowed to operate, by now, the true facts would have been on the record of the case.

20. The learned advocate for respondent Nos. 1 and 2 also submitted that if the Power of Attorney, which is the subject matter of the complaint is

perused, which is produced at Annexure-C, before the same could have been executed, the thumb impression was scored off by the person in

whose favour the Power of Attorney was executed and the name mentioned on the first page of the Power of Attorney was endorsed with a

remark deceased. He submitted that this shows that the Power of Attorney, the person in whose favour the Power of Attorney was executed, was

not interested in getting the Power from of a deceased person.

20.1 This last submission of the learned advocate for respondent Nos. 1 and 2 cannot be taken into consideration in light of the submission made

by the learned senior advocate for the petitioners in this regard. The learned senior advocate for the petitioners submitted that on a subsequent

date, in a proceeding filed before this Court and also before the Government, respondent No. 1 had represented himself as Power of Attorney of

the said deceased person also. Though this statement of the learned senior advocate for the petitioners is controverted by the learned advocate for

respondent Nos. 1 and 2 saying that it was not that respondent No. 1 represented the deceased person either before the High Court or before the

State Government, but it was somebody else who joined respondent No. 1 in that capacity, describing himself as Power of Attorney Holder of the

deceased also, for which respondent No. 1 never had any control.

20.2 The other submissions of the learned advocate for respondent Nos. 1 and 2 are also not found with merit in light of the observations made by

the Collector in its order. So far as obtaining stay of order granting inquiry u/s 202 is concerned, it is not uncalled for, because in absence of that,

the petition would have rendered infructuous.

21. Taking into consideration the totality of the case and taking into consideration the nature of the complaint and the averments made in this

petition and the observations made by the learned Judicial Magistrate First Class, Ahmedabad (Rural) in paragraph No. 2 of the order, this Court

is of the opinion that the learned Magistrate has committed an error in ordering inquiry u/s 202 of the Code and not u/s 156(3) of the Code.

22. In the result, the petition is allowed. Order dated 11.04.2008 passed by the Judicial Magistrate, First Class, Ahmedabad (Rural) in Criminal

Complaint No. 103 of 2008 is quashed and set aside. Inquiry u/s 156(3) of the Code is ordered. Complaint be registered as an FIR by the officer

in charge of the concerned Police Station for the offences disclosed in the complaint. Rule is made absolute.

23. At this juncture, the learned senior advocate for respondent No. 4 and the learned advocate for respondent Nos. 1 and 2 prayed for stay of

this order for a period of six weeks.

Looking to the age of the proceedings, it is deemed fit that the order shall remain stayed for a period of four weeks from today. Unless a specific

order is obtained from the Hon"ble the Apex Court, the order shall be implemented without any delay.