

Order Below Exhibit-1

(1) The present charge-sheet of offense of G.P. Act sec.135 filed against the accused. Accused disobeyed the order of removing him from certain area & found inside the area of removal without permission. The punishment for the same is imprisonment which may extend to two year but shall not be less than six months & shall also be liable to fine. Relying upon punishment & reading schedule-1, Part-2 of CrPC classification of offences against other laws sub point 3, if offence is punishable with imprisonment for less than 3 years or with fine only, it will be non-cognizable (afterwards referred as NC) offence. As per sec.155(2) of CrPC, no police officer shall investigate a NC case without the order of a magistrate having power to try such case or commit the case for trial. As per sec.155(2) & looking to the punishment, this offence is NC one & police have no power to investigate without order / permission of the magistrate. Looking to the chargesheet there is no order / permission of magistrate permitting police to investigate the case. Hence, the charge-sheet is filed without the order / permission of the magistrate.

(2) Going through the whole GP Act, there is no specific provision for the trial for the offences of the Gujarat Police Act,1951. Therefore, in that circumstances, sec.4 of the code of Criminal Procedure,1973 is applicable and it is *clear from section-4 of the code, when ever no specific provision provided in special or local act, the investigation, trial and inquiry will be conducted according to provisions of Cr.P.C.*

(3) Similarly in Gujarat Police Act, there are certain provisions in which police officer has power to arrest but nowhere it is written that for violation of these sections, the offences are made cognizable. The power to arrest seems to be given to the police officer to meet emergent conditions but the power to arrest it self does not convert non cognizable offence into cognizable. In this Act no general power of arrest is given to police but limited power of arrest under different circumstances is given like under section 62 if externment order is passed against any person under section 55, 56, 57 and 57-A and that person fails to remove himself or having removed but enters with out permission or breaches condition of permission then that person be arrested and removed in police custody to such place outside the area as that authority may in each case prescribed. Similarly limited power of arrest is given to police in section 79 of this Act when any offence punishable under section 117 or section 125 or section 130 or sub section (I),(IV) or (V) of section 131 or Cl (i) of section 135 in respect of contradiction of any order made in section 39 or 40 if committed in the presence of police. It means if offence is not committed in the presence of police then police has no power to arrest without warrant. Similar power of arrest like in section 42 Cr.P.C. is given to

police under section 81 where if non cognizable offence is committed in the presence of police then police has power to arrest without warrant. If we correlate power of police to arrest without warrant as cognizable offence then it means if non-cognizable offence is committed in the presence of police then the offence becomes cognizable one and police get the power to investigate the non-cognizable offence without the permission of concerned magistrate. Legislation specifically in schedule-I part I make the offences in IPC as cognizable or non-cognizable, bailable or non-bailable and for other laws clearly made the provision in schedule-I part II that if punishment prescribed by law is for less than three years or fine or with both then the offence is non-cognizable one.

(4) From these provisions it is therefore, clear that whenever the Legislature wants to give power to the police officers to effect an arrest of a person or to investigate into an offence falling under any of the provisions of the Act, they have accordingly so provided, but so far as section 142 of The Act is concerned, there is no such reference is given to investigate the offence without prior permission of the competent Magistrate. Further the offence cannot be said to be cognizable, only because a power is conferred to arrest any person committing such offence, without warrant. Section 142 of The Act does not specifically prescribe, whether the offence is cognizable or non-cognizable and therefore, in the absence of any such specific reference therein, in order to determine as to whether an offence under section 142 of The Act is cognizable or non-cognizable, one has to fall back upon the definition contained under section 2(c) and 2(l) read with part II of the First Schedule of the Criminal Procedure Code. The maximum punishment provided for offence punishable under sec.142 is two year / six months. Therefore conjoint reading of schedule-I part-II of the Code and section 142 of G.P. Act made the offence non cognizable and bailable. Now the question arises in non-cognizable offence which of the provision of the Criminal Procedure Code would govern the investigation in the cases like the present. When the offence is non cognizable then Police is required to investigate the offence with the permission of the court and as per section 155(2) of Cr. P.C. "(2) No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case or commit the case for trial.." **It is clear from this provision that, Non Cognizable offence is required to be investigated after the order of the Magistrate having power to try such case.**

(5) In Keshav Lal Thakur v. State of Bihar, 1996(11) SCC 557 Honourable Supreme Court of India held as under:- We need not go into the question whether in the facts of the instant case the above view of the High Court is proper or not for the impugned proceeding has got to be quashed as neither the police was entitled to investigate into the offence in question nor the Chief Judicial Magistrate to take cognizance upon the report submitted on completion of

such investigation. On the own showing of the police, the offence under Section 31 of the Act is non cognizable and therefore the police could not have registered a case for such an offence under Section 154 Cr. P.C. of course, the police is entitled to investigate into a non-cognizable offence pursuant to an order of a competent Magistrate under Section 155 (2) Cr. P.C. but, admittedly, no such order was passed in the instant case. That necessarily means, that neither the police could investigate into the offence in question nor submit a report on which the question of taking cognizance could have arisen. While on this point, it may be mentioned that in view of the proviso to Section 2 (d) Cr. P.C., which defines 'complaint', the police is entitled to submit, after investigation, a report relating to a non-cognizable offence in which case such a report is to be treated as a 'complaint' of the police officer concerned, but that explanation will not be available to the prosecution here as that related to a case where the police initiates investigation into a cognizable offence - unlike the present one - but ultimately finds that only a non-cognizable offence has been made out. On the conclusions as above we allow this appeal and quash the impugned proceedings.

(6) That The Honorable High Court of Gujarat in the case of Waghari Vs State of Gujarat on 14th December, 2009 in Criminal Misc. Application No. 15226 of 2007 observed that even if the section 79 and 80 of The Act empower the police officer to cause arrest of the petitioner, there is no provision pointed out either in the The Act or under the Criminal Procedure Code to show as to how the entire incident was investigated without permission of the Magistrate. Admittedly, the offence alleged was non-cognizable offence. Under section 155(2) of The Criminal Procedure Code, therefore no police officer could have investigated such an offence without order of Magistrate having power to try such a case.

(7) In MOIN BASHA KURNOOLI S/O LATE HAJI ABDUL GAFOOR V/S STATE OF KARNATAKA, 2014 Law Suit(Kar) 2048, Hon'ble Karnatka High observed in para 39 to 41 that Power to arrest with out warrant in the offences where punishment prescribed is less then three years in Karnatka Police Act under different circumstances does not confer the power to investigate the offence to police with out prior permission of the Magistrate. Further Honourable Kerla High Court in Kunhumammed Vs. State of Kerala in Cri. M.C. No. 702 of 2011 held, that as per explanation to section 2(d) of the Criminal Procedure Code the report of the police officer cannot be deemed as a complaint and police officer can not be deemed as a complainant because said explanation has no application to the case where non-cognizable offence alone is alleged at the ab initio of Investigation.

(8) Gujarat Police Act is made for maintaining public peace and order and power to arrest is given to police for urgent action so that for every breach of order police has not to rush to concerned Magistrate for taking permission to arrest. It is the principle of interpretation of

Statute that when the Statute it self expressly provides express provisions then it is to be read as it is. In G.P. Act, only three offences are made cognizable. **Therefore, except Section 90(A), 118 and 143(B), the other offences are deemed to be non cognizable.**

(9) In cognizable case police has power to arrest and investigate with out the permission of concerned magistrate and subsequently police files charge-sheet under section 173 of Cr. P.C. but if power to arrest under different circumstances is given under any law then as per above discussion it does not mean that police automatically get the power to investigate the offence without prior permission of the concerned Magistrate. In the present case that there is no confusion in the mind of a Investigation Officer that he is going to investigate only offence of section 142 G.P. Act and such investigation is carried out by the police in respect of Non-cognizable offence without the prior permission of concerned Magistrate under section 155(2) of Criminal Procedure code, which is illegal and bad in law.

(10) In the present case also, police has investigated the offence without the permission of this court. It is clear from record that no permission is sought for by the police for the investigation. Therefore, charge sheet filed by the police against accused is illegal in the eye of law. Considering the above situation, when the charge sheet is illegal in the eye of law, in that circumstances “ principle of nullity” will apply and all the subsequent proceedings are also become illegal. Upon discussion of aforesaid provision of law and Judgment Pronounced by the Hon'ble Supreme Court in Keshav Lal (Supra) and various Honorable High Courts, it is clear that if police investigated the non cognizable offence without the prior permission of the concerned Magistrate and subsequently filed the charge sheet then as per law it is not proper for the Court to take cognizance or to conduct the trial on that charge-sheet or to treat that charge sheet as complaint. So, this Court passes the following final order in the interest of Justice.

Final Order

- The Proceeding against the accused person u/s 135 of G.P. Act is hereby dropped with liberty to prosecution to take such steps as deems fit in accordance with law.
- Police to take necessary action for disposal of muddamal as per law / prior order of resale muddamal of court if any is hereby made permanent.

Order declared on dt.11/09/2021 in special sitting L.A.

Date- 11/09/2021
Place- Rajkot

(Ms.P.N.JAIN)
Special sitting Magistrate Rajkot