Cri.Case No. 35/2023

Order Below Exhibit-1

(1) This case is filed under The Gujarat Police Act for the violation of orders passed byappropriate authority under the provision of the G.P. Act, 1951 (Here in after referred as TheAct). The Act has been enacted for regulating the method of working through out the state by the police and for the maintenance of public order. One of the purpose of The Act is embedded in the preventive measures taken by police, such preventive measures are often spontaneous and requires arrest without warrant, otherwise without such power the preventive measures will become infructuous. After the preventive measures are taken and when circumstances so require then the situation ripes into registration of case. At this stage, the scheme of the Act is also required to be looked into, it clear from provisions of the act that section 90A is declared cognizable through its sub clause (4) and section 118 through its sub clause 1C and section 143-B thus whenever legislature intends to make particular provision cognizable, the same is specifically made while rest are left undeclared.

(2). In the case of State Of Gujarat v. Bhimji Manji and Ors. reported in 1968 Cr.L.J.156, Divisional Bench of Hon'ble High Court observed in para-3 that, "This is subject only to an enactment, if any, which regulates the manner or place of investigation, enquiry, trial or otherwise dealing with such offence. Thus, it appears that even when an investigation is to be made and an enquiry , trial or otherwise dealing with such offence. Thus, it appears that even when an investigation is to be made and an enquiry and a trial have to be held for offences against other laws, the Courts have to look to the provisions of the Code, unless it appears that any special enactment in force at the material time makes a special provision in the matter of dealing with such offences." Further The Hon'ble High Court of Gujarat held in para 4 as under:-

4. This will take us to a consideration of the relevant rules. The Rules are made by the Central Government in exercise of its emergency powers conferred by sec. 3 of The Defence of India Act (No. 51 of 1962). Rule 125(9)(a) of the Rules, which is the material rule for our consideration, corresponds to rule 81(4) of the Defence of India Rules made under the Defence of India Act, 1939, with the only difference that the proviso to clause (a) of rule 125(9)(a) of the Rules in not to be found in the 1939 Rules. Rule 125(9)(a) of the Rules is the punishing rule for contravention of any provision of rule 125 or of any order made under the rule. Rule 152 of the Rules, which corresponds to rule 128 of the Defence of India Rules, 1939, deals with the general powers of any police officer to arrest without a

warrant. It reads as under:

"152. General powers to arrest without warrant. - Any police officer may arrest without warrant any person who is reasonably suspected of having committed or of committing or of being about to commit a contravention of Rules 13, 19, 26, 31, 57, 64, 65, 66, 78, 80, 85, 88, 118, 121, 122, 129, 131, 134, 140, 141 or 142 or of any order or direction made or given under any of the said rules. " It is only in respect of the stated rules that a provision is made for the arrest of the offenders without a warrant. The power is given to any police officer. A close analysis or examination of the relevant rules referred to in Rule 152 will go to show that save and except for rule 26 of the Rules, all other rules referred to therein are punishable with imprisonment of less than three years. Rules 13, 19, 31, 57, 64, 65, 66, 78, 80, 85, 118, 121, 122, 131, and 141 are all rules which provide that the contravention of any order or direction made or given thereunder shall be punishable with imprisonment for a term which may extend to six months or with fine or with both. It appears from the scheme of the Rules that a sub-rule of each relevant rule confers a power upon the Government or the appropriate authority to make a particular order or give a particular direction or injunction and another sub-rule of the same rule provides for the punishment.

These rules, which have been examined by us, show that the contravention of the order, direction or injunction made or given under the said rules is made punishable for a lesser term of imprisonment and these offences appear relatively to be minor offences. Sub-rule (3) of rule 88 of the Rules makes the contravention of the order made under sub-rule (1) punishable with imprisonment which may extend to one year and also to a fine. Rules 129, 140 and 142 prescribe the maximum imprisonment awardable for the contravention of the relevant orders made under the rules as two years imprisonment. Sub-rule (2) of rule 26, which is one of the rules for which special provision is made in Rule 152, provides that the contravention of any order made under sub-rule (1) shall be punishable with imprisonment for a term which may extend to five years or fine or with both. Rule 26 is the only rule, the contravention whereof is made punishable for a higher term of imprisonment. It will thus appear that all the rules mentioned in rule 152 except rule 26 have relation relatively to minor offences.

The said offences fall within the category of non-cognizable offences as defined in clause (n) of sub-sec. (1) of sec. 4 of the Code read with relevant entry in Schedule II thereof. The part of Schedule II of the Code which has relation to offences against other laws provides that if the offence is punishable with imprisonment for one year and upwards, but less than three years, the police shall not arrest without a warrant. The rules referred to in rule 152 except rule 26 thus relate to non-cognizable offences. An examination of some

other rules contained in the Rules will reveal that contravention of orders made under rules 6, 8, 10, 12, 16 21 and 22 will constitute relatively major offences, made punishable with imprisonment for a term which may extend to three years or with fine or with both. These are not the rules for which any provision is made in rule 152. Rules 14, 15, 25, 28, 33, 38 and 39 make provision for punishment of contravention of the sub-rule embodied in the said rules. The punishment provided for the contravention of any order made under the relevant sub-rule is imprisonment which may extend to five years or with fine or with both. Then are the rules 9, 11 and 32 which provide for more serious offences and the punishment provided is imprisonment for a term which may extend to seven years. Rule 152 which confers general power on a police officer to arrest, without warrant, persons contravening the stated rules or any order or direction made or given under the said rules does not include these rules which provide for higher punishment. It will thus appear that rule 152 has been enacted for a special purpose, viz., to invest police officers with powers to arrest without a warrant any person who is reasonably suspected of having committed or of being about to commit a contravention of the rules specifically mentioned therein, which appear to provide for relatively minor offences, punishable with an imprisonment for less than three years and this appears to be with a view to clothe police officers with larger powers to meet emergent conditions. Thus, it cannot be said that rule 152 is exhaustive of the powers of police officers to arrest persons without warrant in respect of all offences considered as cognizable offences as defined in the Code. To say so would mean that major offences under the various Rules aforesaid, the contravention whereof is made punishable with higher terms of imprisonment under the Rules, will have to be treated as non-cognizable offences and minor ones as cognizable offences. This would create an anomalous position. In our view, such could not have been the legislative intent.

(3). There is no specific provision provided for the trial in 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.

(4). Similarly in Gujarat Police Act, there are certain provisions for instance Section 62,70,71,72,73,79,80,81 where in a police officer has been given the power to arrest but no where it is written that for violation of these sections, the offence is 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 without 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 if 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 noncognizable, 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.

(5). 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 135/135(1) 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. Section135/135(1) 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 135/135(1) 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.135/135(1) is One year/4 months.

Therefore conjoint reading of schedule-I part-II of the Code and section 135/135(1) 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 .

(6). 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 noncognizable offence has been made out. On the conclusions as above we allow this appeal and quash the impugned proceedings.

(7). 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.

(8). In MOIN BASHA KURNOOLI S/O LATE HAJI ABDUL GAFOOR V/S STATE OF KARNATAKA, 2014 Law Suit(Kar) 2048, Hon'ble Karnatka High Court observed in para 39 to 41 that Power to arrest without 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 without prior permission of the Magistrate. Further Honourable Kerla High Court in Kunhumuhammed 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.

(9). 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.

(10). It is established that in cognizable case police has power to arrest and investigate without 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 135/135(1) 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.

(11). 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 chargesheet 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 Honorble 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.

Necessary action to be taken for disposal of muddamal as per law / prior order for disposal of muddamal of court if any is hereby made permanent.

Pronounced today on Dt.11/02/2023 during Special Sitting of Magistrates.

Ahmedabad
Date:- 11-02-2023

(Pareshgiri Natvargar Goswami),
Additional Chief Metropolitan Magistrate,
Court No.21, Ahmedabad.
GJ01037