

Order Below Exhibit-1

In the present case the grievance of the state for the violation of the provision of The Gujarat Police Act, 1951 (Here in after referred as The Act) is redressed before this court, through the submission of Charge sheet against the accused for violation of section 135,37(1) G.P.Act under section 173(2) of The Criminal Procedure Code,1973. Submission of charge sheet in every violation of the Provision of The Act, requires scrutiny by the court.

That the basic 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 ripens into registration of case, but such registration shall be non-cognizable or cognizable as described in the Act, itself i.e. 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.

In Gujarat Police Act, there are certain provisions for instance Section 62,72, 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. In this Act no absolute power of arrest is given to police but limited power of arrest 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 135,37(1) 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 with out 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 with out 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 with out 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.

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 135,37(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. It is clear from The Finance Act 1994, that only power to arrest does not makes the offence cognizable or non cognizable. In Finance Act Legislature has given power of arrest in section 91, though the offence is non cognizable one and also bifurcates cognizable and non cognizable offences in section 89.

Section 135,37(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 135,37(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. If one read these provisions together then there can be no manner of doubt that the offence under section 135,37(1) of The Act is non cognizable. 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.

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.

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.

In MOIN BASHA KURNOOLI S/O LATE HAJI ABDUL GAFOOR V/S STATE OF KARNATAKA, 2014 Law Suit(Kar) 2048, Hon'ble Karnataka High held in para 39 to 41 as under:-

[39] On careful perusal of the above tabular column, it shows that some of the provisions under the KP Act, though punishable with imprisonment for less than three years or with fine, the Police Officers are not empowered to arrest a person without warrant whenever such offences are committed. Some other provisions, which are though punishable with imprisonment less than three years or with fine, the Police Officers are empowered to arrest a person without warrant. The intention of the legislature while enacting the K.P. Act is made it clear that under certain circumstances for particular nature of offences, though they are punishable less than three years or with fine, the Police are empowered to arrest a person without warrant. This gives me a clear indication

that, depending upon the nature, gravity, need and urgency to empower a Police Officer to arrest a person without warrant, search and seize certain articles, the Police Act empowered them clothing with the power to arrest a person without warrant. Therefore, at any stretch of imagination, the entrustment of such power of arrest without a warrant cannot be called as a unfettered or general power in nature, in order to convert a noncognizable offence into a cognizable offence.

[40] It is also an important aspect to be noted is that, the K.P. Act does not contain any schedule as contained in the Cr.PC or there are no distinct and separate definitions for cognizable offences or noncognizable offences, in contrast to the definitions under the Code. Therefore, the Court has to apply the definition of 'non cognizable offence' as per section 2(e) coupled with the Schedule of offence given under the code.

[41] The creation of two schedules to the Criminal Procedure Code play a decisive role in order to ascertain the real intention of the law makers i.e. to say the intention of the law makers must be not to give absolute power to the police to arrest a person invariably but depending upon the punishment prescribed for the said offence i.e. to say arrest without a warrant if the offences are punishable with imprisonment for more than three years and not to arrest without a warrant, if the offences are punishable with imprisonment less than three years. It should be noted that, it all depends upon the nature and gravity of the case. Power of arrest is conferred on the police declaring under the schedule whether the offence

is cognizable or non-cognizable, otherwise, the law makers would have simply given the definition as per Section 2 (c) and (l) of the Code without inserting Schedule I & II to the Code. Therefore, the real inbuilt and latent intention of the law maker is that the power of arrest depends on the declaration by law whether it is cognizable offence or non-cognizable offence as per the Schedule to the Code. I can understand, if there is no Schedule appended to Cr.PC the simple definition under Section 2 (c) of the Code could have come to the help of Police Officer or if there is any Schedule appended to the Police Act, declaring the particular offence as cognizable or non-cognizable and particularly Section 78(3) of the Act as cognizable so far as this particular case is concerned. Therefore, I am of the opinion, that the Schedule appended to the Cr.PC is the basis for the purpose of considering whether the offences under Indian Penal Code or any other law for the time being in force, is cognizable or non-cognizable in nature, irrespective of the power of arrest given to the Police under special circumstances by special enactment.

Further Honorable Calcutta High Court in Subodh Singh V State 1974

Cri.LJ 185, held that in a case of non-cognizable offence if the provisions of section 155(2) are not followed then non conformance with the procedure established by law and the investigation under section 155 (2) of the Code is vitiated and further held that this is illegal and can not be cured under the Criminal Procedure Code.

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.

In Gujarat Police Act only three offences are made cognizable and this 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. In this case it is clear that maximum punishment prescribed is not more than two years and no absolute power of arrest is given to police and as per schedule-I part II of Cr.P.C., this offence is non cognizable one.

It is established that in cognizable case police has power to arrest and investigate with out the permission of concerned magiastate and subsequently police files charge-sheet under section 173 of Cr.P.C. but if power to arrest only is given under any law then as per above discussion it does not mean that police automatically get the power to investigate the offence with out 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 135,37(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.

If the courts have taken the cognizance of offence punishable under section 135,37(1) of GP Act without complying with the mandatory requirement of section 155(2) of Cr.P.C. then courts are supposed to be guided by the ratio laid down in **Gauri shankar Jha Vs. State Of Bihar** in which it is specifically held that when it comes to the knowledge that the court has no jurisdiction to proceed with the matter then no order as to acquittal or discharge be passed and it is better to drop the proceedings and dismiss the case.

If the court has taken the cognizance of the offences punishable from section 135,37(1) of GP Act and proceeded with the matter to convict or acquit

the accused inspite of lack of jurisdiction then it is bad in law. In the similar way if the accused is acquitted or discharged on the basis that court has no jurisdiction to take cognizance then this will curtail the right of prosecution to file fresh proceedings as per procedure prescribed by law.

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. So, this Court passes the following final order in the interest of Justice.

Final Order

- The Proceeding against the accused person u/s 135,37(1) of G.P.Act is hereby dropped with liberty to prosecution to take such steps as he deems fit in accordance with law.
- The order is pronounced today on 9th March, 2019 in open court
- No order of cost.

Rajkot
Dt.09/03/2019

(Mahesh Jayantidan Gadhavi)
J.M.F.C (Traffic)
(Judge Code-GJ00898)