IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No. 551 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

E RADHAKISHAN - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

==========

Appearance :
MR RM CHHAYA for Applicant(s) : 1,
MS. MS PANCHAL APP for Respondent(s) : 1,
MR SK PATEL for Respondent(s) : 2,

==========

CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 30/03/2007

ORAL JUDGMENT

1. Petitioner has invoked Article 226 of the Constitution to challenge the judgment and order dated 17.06.1995 of learned J.M.F.C. Idar below application Exh.20 in Criminal Case No.1807 of 1993. Respondent No.2, who was joined as late as in December 2006, had filed the complaint in the

said criminal case on 27.12.1993 against the District Superintendent of Police and the Police Sub-inspector for the offences punishable under Sections 147, 148, 149, 323, 354, 452, 455, 456, 504, 506(2) and 34 of the Indian Penal Code. After recording the statement of the complainant, the Court had ordered inquiry under Section 202 and after recording some statements, had issued summons. The petitioner then made an application Exh.20 raising the objection of want of sanction required under the provisions of Section 197 of the Code of Criminal Procedure, 1973 (for short the 'Code') and that objection was rejected by the impugned order. There were *prima facie* findings of injuries to several witnesses but the petitioner herein had pleaded that reasonable and necessary force was applied by the accused persons for carrying out arrest of husband of the original complainant.

2. During the course of arguments before this Court, learned counsel Mr.S.K. Patel, appearing

for the original complainant, submitted that as stated in para-2 of the complaint itself, the petitioner had, indeed, during the fateful night of arrest of her husband on 13.10.1993, visited her home for the purpose of arrest in connection with the offence registered with Vadali Police Station. He, however, submitted that the petitioner and 20 other police personnel had unnecessarily and in an inhuman manner beaten the womenfolk and children when they pleaded that the person to be arrested was sick and in need of proper medical treatment. Thus, the factual issue of necessity, propriety or sufficiency of the force used by the police party was arising but the fact remained that the accused police officers were at the place of the complainant at odd hour of 2:00 p.m. and had applied force in discharge or in purported discharge of their duty of arresting the accused person. Therefore, *prima facie,* sanction under Section 197 was necessary to take cognizance of the alleged offences.

3. Learned counsel Mr.B.B. Naik relied upon the judgment of the Constitution Bench of the Supreme Court in **Matajog Dobey V/s. H.C. Bhari [AIR 1956 SC 44]** and its recent judgment in **Sankaran Moitra V/s. Sadhna Das and another [(2006)4 SCC 584],** in support of the submission that, without prejudice to the rights of the complainant in any prosecution after obtaining the necessary sanction, the proceedings were required to be quashed at this stage. According to the aforesaid judgments, if the act in question was done in performance of duty or purported performance of duty, Section 197(1) of the Code cannot be by-passed. It is clarified by the Constitution Bench of the Supreme Court in para 17 of Matajog Dobey (Supra) that it does not matter even if the act exceeds what is strictly necessary for the discharge of the duty, as that question will arise only at the later stage when the trial proceeds on merits.

4. In above view of the matter, the petition is

required to be allowed even though a writ petition for the purpose of quashing may strictly not be the proper remedy and the original complainant was not initially made a party even as the relief of stay of the proceedings of the trial court operated practically *ex-parte* for a decade.

5. In the above facts and peculiar circumstances, the petition is allowed and the impugned order dated 17.06.1995 below application Exh.20 and the order dated 27.12.1993 to issue summons for taking cognizance of the offences are set aside with the clarification that it would be open for the complainant to apply for sanction to prosecute the petitioner as envisaged in the provisions of Section 197 of the Code and, if the sanction were granted, press the same complaint for further proceeding in accordance with law. If no sanction is obtained and produced by the complainant within a reasonable period of three months, the complaint shall have to be disposed for want of sanction. The amount of Rs.10,000/-

deposited by the petitioner under the earlier order dated 07.12.2006 is, in the peculiar facts, awarded to the newly joined respondent No.2 and may be paid to her by the Registry by an A/c.payee cheque in her name. Rule is made absolute accordingly.

(D.H.WAGHELA, J.)

Hitesh