IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO. 552 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS JUSTICE SONIA GOKANI

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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 ?

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SARITA SHARMA....Applicant(s)

Versus

STATE OF GUJARAT & 2....Respondent(s)

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Appearance:

MR VIRAT G POPAT, ADVOCATE for the Petitioner No. 1

DELETED for the Respondent(s) No. 2

MR KB ANANDJIWALA, ADVOCATE for the Respondent(s) No. 3

MR RC KODEKAR, ADDL.PUBLIC PROSECUTOR for the Respondent No. 1

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CORAM: **HONOURABLE MS JUSTICE SONIA GOKANI**

Date : 30/01/2015

CAV JUDGMENT

1. By way of this petition under Articles 226 and 227 of the Constitution of India read with section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), the petitioner seeks to challenge the Final Report ('B' Summary) dated September 09, 2008 filed by the Investigating Agency in the first information report registered vide I-C.R. No.4/1997 with Vatva Police Station, Ahmedabad as well as the order dated February 27, 2009 passed by the learned Chief Metropolitan Magistrate, Ahmedabad, in Criminal Case No.435 of 1999, accepting such Final Report after issuance of process.

2. The brief facts leading to filing of the present petition are as under :

2.1 The petitioner-original complainant filed the first information report against the respondent No.3, who is an IPS Officer of Gujarat Cadre. Since the petitioner was having

homely relations with the respondent No.3, on December 27, 1996, the respondent No.3 visited the house of petitioner's mother and expressed his desire to marry the petitioner. When such request was refused, he threatened the petitioner with dire consequences. The petitioner was also forced to divorce her husband and further threat was given of killing her husband. When her family members came to her rescue, the respondent No.3 took out his service revolver and threatened the petitioner. Incidentally, the husband of the petitioner arrived at the said place and took the respondent No.3 in his car for lodging the complaint against the respondent No.3. As such the complaint was not entertained initially, a Writ Petition being Special Criminal Application No.1714 of 1996 was preferred before this Court, wherein it was directed that the concerned Director General of Police shall investigate the case and a senior officer shall be entrusted such case under the supervision of the Director General of Police.

2.2 A first information report also came to be filed by the respondent No.3 vide I-C.R. No.509/1996 with Navrangpura Police Station on December 24, 1996, *inter alia* stating that when he had gone to congratulate the sister of the petitioner on account of her newly born baby, the petitioner asked for respondent No.3's favour in respect of her husband's case, whose matter was to come up on Board. When such talk was going on, the husband of the petitioner started quarrelling with the respondent No.3. Not only that, but he and the petitioner assaulted the respondent No.3. The respondent No.3 was detained and taken to Judges' Bungalow, where he was made to sit in the car under the custody of two persons. Two police officers had relieved him of this situation. On the strength of these facts, the aforesaid first information report came to be lodged by the respondent No.3 against the present petitioner and her family members.

2.3 Both the first information reports being I-C.R. No.4/1997 and I-C.R. No.509/1996 registered with Vatva Police Station and Navrangpura Police Station respectively, were transferred to Vatva Police Station for investigation and the then Deputy Commissioner of Police Shri Gurdayal Singh investigated the crime.

2.4 After such investigation in the first information report of the present petitioner being I-C.R. No.4/1997, 'B' summary report came to be submitted, whereas 'A' summary report was filed in the first information report lodged by the respondent No.3 i.e. I-C.R. No.509/1996.

2.5 The learned Metropolitan Magistrate did not accept the 'B' summary report and issued the process under section 448 and 506 of the Indian Penal Code qua the first information report registered vide I-C.R. No.4/1997.

2.6 The respondent No.3 aggrieved by the same

preferred Criminal Miscellaneous Application No.4366 of 1999 before this Court for quashing and setting aside such process. This Court rejected such application vide order dated March 28, 2000 and thereby, confirmed the order of issuance of process. In the meantime, the respondent No.3 secured the direction of reopening of investigation in the first information report being I-C.R. No.509/1996. Therefore, Special Criminal Application No.595 of 1999 came to be preferred by the petitioner for setting aside such direction of the Director General of Police for reopening of the case, where 'A' summary was submitted after investigation. The petitioner also preferred Criminal Revision Application No.439 of 1999 with a prayer that the process under sections 307, 354, 450, 451, 201 and 509 of the Indian Penal Code may be issued against the respondent No.3. This Court by a common judgment dated March 28, 2000, directed further investigation in the first information report registered vide I-C.R. No.509 of 1996 by an officer having the

same rank as that of the respondent No.3 or any other officer not below the rank of Director General of Police. However, no direction was issued for any further investigation in relation to the first information report registered vide I-C.R. No.4/1997.

2.7 The respondent No.3 had sought further investigation in both the matters, which came to be refused by the learned Magistrate and two Criminal Revision Applications bearing Nos.348 and 349 of 2006 were preferred before the Sessions Court qua first information report being I-C.R. No.509/1996 and I-C.R. No.4/1997 respectively. The Court directed further investigation in both the matters. Despite there being no direction of this Court of any further investigation in I-C.R. No.4/1997, the support was taken of a common order passed by this Court on March 28, 2000.

2.8 The crux of the problem begins at this stage. As a result of further investigation in

a first information report filed by the petitioner being I-C.R. No.4/1997, the Investigating Agency submitted 'B' summary report, where earlier the process issued by the competent Court had been confirmed by this Court and thereafter by the Apex Court by not entertaining the Special Leave Petition. Such report of 'B' summary came to be accepted by the learned Chief Metropolitan Magistrate vide order dated February 27, 2009, which is impugned in the present petition.

3. The affidavit-in-reply filed by the respondent No.3, being the main contesting party, requires some consideration at this stage. He has challenged the very jurisdiction of this Court under Article 226 of the Constitution of India in the wake of other effective and efficacious remedies with the petitioner. Various judgments have been relied upon to make good the point. Ordinarily, the extraordinary jurisdiction of the Court under Article 226 of the Constitution of India need not be entertained and the person

concerned be directed to resort to other remedies under various statutes. It is urged that by-passing the remedy of preferring Revision Application before the Sessions Court as also before this Court, the present petition has been filed, which ought not to have been entertained. It is further urged that the Investigating Officer filed a report under section 173(2) of the Code as *"'B' Final with Prosecution"*. Meaning thereby, it is concluded that the first information report is maliciously filed, for which the complainant therein should be prosecuted and such report was filed by none other than the then Director General of Police. Moreover, the further investigation after hearing the petitioner had also been approved by the learned Chief Metropolitan Magistrate and the Investigating Officer Shri H.R. Gehlot, who is senior to the respondent No.3, had rejected the same. It is further alleged that the order of the learned Chief Metropolitan Magistrate directing further investigation was challenged before the Sessions Court vide Criminal Revision Application

No.134 of 2000, which was rejected by the Court. According to the Court, this was by way of a direction given by the High Court that the police papers have been returned to the Investigating Officer for further investigation. Such order came to be challenged before the High Court by way of Special Criminal Application No.537 of 2001, whereby this Court rejected such petition. It is pointed out that the learned Counsel appearing for the petitioner did not dispute the legal proposition in respect of section 173(8) of further investigation being permissible after issuance of process by the concerned Magistrate. The only objection raised was with regard to further investigation and also on the fact that the Court had no power to hand over original papers, including the report submitted by the Investigating Officer. In light of such submissions, the Court did not go into the merits of the matter and did not examine the legality and validity of the order impugned. It is, therefore, urged that 'B' Summary Report accepted by the learned Magistrate pursuant to the report

of further investigation need not be interfered with. It is also urged that the first information report lodged by the respondent No.3 at Navrangpura Police Station being I-C.R. No.509/1996 was transferred to Vatva Police Station registering the same as I-C.R. No.509/1996. It is the say of the respondent NO.3 that the entire chronology of facts have been twisted. The petitioner, in fact, had complained to the respondent No.3 that he was not doing anything about the murder case pending against her husband Shri Jatin Desai. It is further alleged that further investigation was ordered by the Director General of Police, Gujarat State and after hearing both the sides, the learned Chief Metropolitan Magistrate had handed over the papers of investigation and such order was challenged not only before the Sessions Court, but also before the High Court, where the petitioner had not succeeded and, therefore, 'B' Final Summary under section 173(2) of the Code was filed. When the said report has been accepted, it would not be correct to state that

the learned Magistrate cannot switch back to pre-cognizance stage once the cognizance is taken.

4. Both the sides have been heard at length. In support of their rival pleadings, detailed submissions have been made by Shri Virat Popat, learned advocate appearing for the petitioner; Shri R.C. Kodekar, learned Additional Public Prosecutor appearing for the respondent-State supporting the respondent No.3 and Shri K.B. Anandjiwala, learned advocate appearing for the respondent No.3, who has fervently made his submissions.

5. It is alleged by Shri Popat that the respondent No.3 being a Senior Police Officer, the 'B' Summary Report was filed just to favour him. He urged that it is a neat question of law, whether for the offences for which the process has been issued and confirmed upto the Apex Court, can be permitted to be scrapped merely because further investigation under section 173(8) of the Code was permitted. He urged that the material which

was already before the Court at the time of taking cognizance under section 204 of the Code, simply cannot vanish. He, therefore, urged that acceptance of 'B' Summary Report by the learned Chief Metropolitan Magistrate, deserves quashment. He relied on the following decisions :

(i) Devarpalli Reddy v. Narayan Reddy

(1976) 3 SCC 252

(ii) Sureshchand Jain v. State of M.P. and anr.

(2001) 1 SCC 594

(iii) Parshottam Surani v. Chandrikaben Surani

(2008) 2 GLH 6

(iv) Devdas Babubhai Moti v. State of Gujarat

2011 (2) GCD 1552

(v) Adalat Prasad v. Rooplal Jindal and others,

(2004) 7 SCC 338

(vi) Ramlal Narang v. State of Delhi

(1979) 2 SCC 322

(vii) State of Maharashtra v. Sharadchandra Vinayak Dongre and others,

1995 (2) GLH 57

(viii) Pepsi Foods Ltd.v. Special Judicial

Magistrate

(1998) 5 SCC 747

(ix) Raj Kapoor v. State and others

(1980) 1 SCC 43.

(x) Dhariwal Tobacco Products Limited and others v. State of Maharashtra and another

(2009) 2 SCC 370

(xi) D.N. Bhattacharjee and others v. State of Bengal and another

(1972) 3 SCC 414

(xii) Devdas Babubhai Modi v. State of Gujarat

2011 (2) GCD 1552

6. The learned Senior Counsel Shri K.B. Anandjiwala appearing for the respondent No.3, has urged that at the time of challenging the direction of further investigation before this Court, the learned Senior Counsel appearing for the petitioner had in no uncertain terms conceded that further investigation can be directed even after issuance of process and, therefore, that issue cannot now be raised and challenged in the present petition. He urged that the entire first

information report being malicious, the petition deserves to be dismissed. He urged that actuated by the deep rooted conspiracy to malign the image of the respondent No.3, the first information report has been filed by the petitioner. When the truth of its hollowness has come to the surface, the learned Magistrate committed no mistake in accepting the 'B' Summary. He urged this Court not to interfere, particularly when the other remedies under the statutes are also available. He sought to rely on the following authorities to substantiate his version :

(i) Ahmedabad Cotton Mfg. Co.Ltd. v. Union of India

AIR 1977 GUJ. 76

(ii) Krishnakunj Cooperative Housing Society Ltd. and others v. Special Land Acquisition Officer (I) Mehsana and others

1989 (1) GLH 57

(iii) T.P.Kumaran v. R.Kothandaraman,CIT, Gujarat

AIR 1963 GUJ. 6

(iv) Punjabhai Dahyabhai Patel v. Shah

Jayantilal Manilal

1965 GLR 849

(v) Gujarat Heavy Chemicals Ltd. v. Assistant Collector, Customs, Porbandar and another

1990 (1) GLH 488

(vi) Chinubhai Keshavlal Nanavati v. K.J. Mehta, Commi. for Taking Accounts

1977 GLR 1022

(vii) Miteshkumar Rameshbhai Patel v. State of Gujarat

2006(3) GLR 1935

(viii) Hasanbhai Valibhai Qureshi v. State of Gujarat

(2004) 5 SCC 347

(ix) Miteshkumar Rameshbhai Patel v. State of Gujarat

2006(3) GLR 1935

(x) Surendrabhai Babubhai Patel v. State of Gujarat

1985 GLH 299

7. Shri R.C. Kodekar, learned Additional Public Prosecutor, also took a stand that the State was

within its right to ask for further investigation and whatever report that has been submitted at the end of such investigation, if is found to be truthful, the Court would be within its right to accept the 'B' Summary Report. In support of his submission, he has relied on the decision of this Court in the case of ***Essar Oil Limited and others v. Central Bureau of Investigation and another, reported in 2010 CR.L.J. 224.***

8. Upon thus hearing both the sides and considering the entire material on record, at the outset the law on the subject deserves consideration.

8.1 Chapter XII of the Code under the heading of "*Information to Police and their powers to investigate*" provides for lodging of first information report qua the cognizable offences under section 154 of the Code, which states that every information relating to the commission of a cognizable offence, shall be reduced in writing, even if conveyed orally. If given in writing, the same shall be signed by

the person giving it. Section 155 speaks of information as to non-cognizable cases and investigation in such cases. Section 156 provides for Police Officer's powers to investigate the cognizable cases. Sub-section (3) of section 156 provides that any Magistrate empowered under section 190 may also order such an investigation as provided under sub-sections (1) and (2) of section 156. Section 157 provides for procedure for investigation. Section 158 contemplates the report to be sent to the Magistrate and if the State Government directs, through such senior Police officer, such report requires to be submitted. Section 159 provides that such Magistrate on receiving such report may direct an investigation and if he thinks fit, at once proceed, or depute any Magistrate to hold preliminary inquiry or dispose of the case in the manner provided under the Code. Section 161 provides for examination of the witnesses by the Police. Section 162 speaks of the manner in which the statements are to be recorded by the Police and

the use of such statements during the course of proceedings. Section 164 speaks of recording of statements and confessions in the course of investigation by Metropolitan or Judicial Magistrate.

8.2 Relevant also would be to refer to section 190 of the Code provided under Chapter XIV under the heading of "*Conditions requisite for initiation of proceedings*".

8.3 Section 190 empowers the Magistrate of the First Class and any Magistrate of the Second Class to take cognizance of any offence subject to the provisions of this Chapter : (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. Sub-section (2) of section 190 empowers the learned Chief Judicial Magistrate to empower any Magistrate of the second class

to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try. Section 191 provides for transfer on application of the accused. After once cognizance is taken by the Magistrate under clause (c) of sub-section (1) of section 190, in the event of any objection raised by him for further proceedings, cognizance is taken by the Magistrate. It will be the prerogative of the Chief Judicial Magistrate to transfer the case to another Magistrate. Section 192 empowers the Chief Judicial Magistrate to make over of cases of inquiry or trial to another Magistrate subordinate to him.

8.4 Chapter XV under the heading of "Complaints to Magistrate" provides for examination of the complainant under section 200, which reads as under :

> *"200. Examination of complainant: A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if*

any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate: Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses-

(a) if a public servant acting or- purporting to act in the discharge of his official duties or a Court has made the complaint; or

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192: Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them."

8.5 Section 201 provides for procedure by Magistrate not competent to take cognizance of the case. Section 202 provides for postponement of such issue of process. Any Magistrate on receipt of a complaint of an offence of which he is authorized to take cognizance or which

has been made over to him under section 192 and choose to postpone to issue process against the accused, if he deems it proper, he can either inquire into the case himself or direct an investigation to be made by the Police Officer or any other person of his choice before he decides whether sufficient grounds exist for proceeding against the accused. No such direction, however, for investigation can be made by him, where the offence is exclusively triable by the Court of Sessions and where the complaint has not been made by the Court, of course, unless the complainant and the witnesses have been examined on oath under section 200. The proviso to this section also empowers the Magistrate in such an event to call upon the complainant to produce all his witnesses and examine them on oath. Section 203 provides for dismissal of the complaint by the Magistrate if upon considering the statement on oath of the complainant and the witnesses and the result of inquiry or investigation if any made under section 202, no sufficient ground in

the opinion of the Magistrate exists for proceeding against the accused. This, however, he shall do by recording reasons for such dismissal.

8.6 Chapter XVI provides for *"Commencement of Proceedings before Magistrates"*, where section 204 speaks of issuance of process, which deserves to be reproduced for better appreciation of the controversy in question, which reads as under :

> *"204. Issue of process.*
> *(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be-*
> *(a) a summons- case, he shall issue his summons for the attendance of the accused, or*
> *(b) a warrant- case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.*

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process- fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87."

This provision empowers the Magistrate to take cognizance of an offence if in his opinion the grounds exist for proceeding against the accused. If he so thinks, in a summons triable case, he is required to issue summons to the accused for the attendance of the proceedings, whereas in a warrant case he may issue warrant or summons as he may deem fit. Any proceedings instituted upon the complaint made in writing while issuing summons

or warrant against the accused under sub-section (1) of such provision, a copy of such complaint shall be sent along with the same. Such warrant or summons are to be issued only after a list of the prosecution witnesses has been furnished to the Court.

9. This Court in the case of ***Parshottambhai Karshanbhai Surani (supra)***, had an occasion to consider whether after having taken cognizance of the offence by examining the complainant on oath, the Magistrate would be justified in directing investigation by the Police under provision of section 156(3) of the Code and the Court held that once the cognizance is taken by examining the complainant on oath and directing the police to investigate under section 202 of the Code, it would not be legally permissible for him to switch back to the pre-cognizance stage and direct investigation under section 156(3) of the Code. It would be beneficial to reproduce relevant paragraphs from the said decision, which read as under :

"15. In the facts of the present case the learned Judicial Magistrate has examined the complainant on oath and has reduced the same in writing and has directed the concerned police officer to investigate into the matter and submit a report within 30 days. The fact that the learned Judicial Magistrate has examined the complainant on oath makes it evident that the learned Judicial Magistrate has taken cognizance of the case. Therefore presumably the direction to the concerned police officer to investigate the case is passed under section 202 (1) of the Code. Thereafter by the impugned order dated 14th November, 2007 the learned Judicial Magistrate has directed investigation by the police under the provisions of section 156(3) of the Code. A perusal of the certified copies of the complaint and the orders passed thereon does not indicate any further application having been moved before the learned Judicial Magistrate so as to necessitate the passing of another order on the complaint. Hence, it is not clear as to what prompted the learned Judicial Magistrate to pass the subsequent order directing investigation under section 156(3) of the Code. However without delving into that aspect of the matter, the main

issue which this Court is called upon to determine is as to whether after having taken cognizance of the offence by examining the complainant on oath, the learned Judicial Magistrate was justified in directing investigation by the police under the provisions of section 156(3) of the Code?

16. In the light of the decisions cited hereinabove, the only answer to the said issue can be that once having taken cognizance of the offence by examining the complainant on oath and directing the police to investigate the case under section 202 of the Code, it was not legally permissible to the learned Judicial Magistrate to switch back to the pre-cognizance stage and direct investigation under section 156(3) of the Code. Though the order dated 13th November, 2007 does not clearly specify the provision under which it is made, considering the fact that the said direction has been given after examining the complainant on oath, the same can be construed to be an order under section 202(1) alone, as that is the only provision under which such direction could have been issued post-cognizance. In the circumstances, the impugned order dated 14th November, 2007 suffers from the legal

infirmity of being contrary to the statutory provisions and as such cannot be sustained."

9.1 The legal propositions that emerge in the case of ***Tula Ram (supra)***, decided by the Supreme Court, are as under :

"1. A Magistrate can order investigation under S. 156 (3) only at the pre-cognizance stage, that is to say, before taking cogniSance under Sections 190, 200 and 204 and where a Magistrate decides to take cognizance under the provisions of Chapter 14 he is not entitled in law to order any investigation under Sec. 156 (3) though in cases not falling within the proviso to Sec. 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by S. 202 of the Code.

2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives :

(a) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so

he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.

(b) The Magistrate can postpone the issue of process and direct an enquiry by himself.

(c) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint."

9.2 The Supreme Court in the case of ***H.S. Bains (supra)*** has held and observed that a Magistrate who on receipt of a complaint orders an investigation under section 156(3) of the Code, he may receive the report under section 173(1) and on such receipt, he could do three functions : (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the

offence under section 190(1)(b) and issue process. This he can do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of an offence under section 190(1)(a) on the basis of the original complaint and proceed to examine on oath the complainant and the witnesses. If he adopts the third alternative of taking cognizance under section 190(1)(a) on the strength of the original complaint and proceed to examine the complainant on oath, he may hold or direct an inquiry under section 202 and, thereafter he may dismiss the complaint or issue process, as the case may be.

9.3 In the decision in case of ***Ram Lal Narang (supra),*** the Apex Court held and observed that there was no provision in the Code of Criminal Procedure (1898) which, expressly or by necessary implication barred the right of the police to further investigate after cognizance of the case had been taken by the Magistrate.

Notwithstanding that a Magistrate had taken cognizance of an offence upon a police report submitted under section 173 of the 1898 Code, the right of the police to further investigation is not exhausted and the police can exercise such right as often as necessary when fresh information comes to light. The Court further held that neither section 173 nor section 190 exhausts the powers of the police to further investigate after the Magistrate has taken cognizance. Practice, convenience, preponderance of the Investigating Agency, permits repeated investigation on discovery of fresh facts.

9.4 In a decision of this Court in the case of ***Devdas Babubhai Modi (supra),*** the respondent No.2 lodged a private complaint against the petitioner and two other family members. The complainant was examined on oath on the very same day and the Court after considering the facts on record postponed the issuance of process. A detailed inquiry was conducted by

the Police Sub-Inspector. On the basis thereof, the learned Magistrate held that the petitioner committed an offence punishable under section 420 of the Indian Penal Code and ordered investigation under section 156(3) of the Code. It was held and observed by this Court that the order of inquiry under section 202 of the Code passed by the learned Magistrate with further opinion of the Police, which was substantiated by the documentary evidence and statements recorded of numerous persons, the petitioner and the original accused made out a clear case of setting aside the order of trial Court who had apparently misinterpreted the provisions of section 156(3) of the Code. After having directed inquiry under section 202 of the Code, he ought not to have put the clock back by reverting to pre-cognizance stage. Quoting the judgment of the Apex Court rendered in the case of ***Jamuna Singh and others v. Bhadai Shah, reported in AIR 1964 SC 1541*** and ***Tula Ram (supra)***, it is held and observed as under:

"11. From the sequence of events of filing of the complaint on 18.11.2006 and verification recorded by the learned Judicial Magistrate First Class of Dhandhuka Court and the Court on having found that the issues involved in the complaint were of a serious nature and require substantiation from the documentary evidence and that further inquiry would be necessitated under Section 202 of the Code of Criminal Procedure, directed the Police Sub-Inspector Dhandhuka police station to complete the inquiry within 60 days and submit his report.

12. Under these circumstances, the present petitioner and the original accused have made out a clear case of setting aside the order of trial Court, who has apparently misinterpreted the provisions contained in the Code, specially of Section 156(3) of the Code. After having directed the inquiry under Section 202 as discussed hereinabove, he ought not to have put the clock back by reverting to the pre-cognizance stage and, therefore, the order needs to be quashed.

13. The possibility as contended by the other side cannot be ruled out of a further inquiry also resulting into the dismissal of complaint as contemplated under the Code of

Criminal Procedure. However, that may not permit the learned Magistrate to pass an order which is not permissible under the law and in this premise the following order needs to be passed:-

The order passed by learned Magistrate, Dhandhuka dated 20.10.2007 in Criminal Inquiry Case No.53 of 2006 is hereby quashed and set aside. It would be open to the Court of learned Judicial Magistrate First Class to independently apply its mind as regards the requirement of further and other documents to proceed further in the Criminal Inquiry Case No. 53 of 2006."

9.5 In a decision in the case of ***Miteshkumar Rameshbhai Patel (supra)***, the Court held that the powers of the police under section 173(8) of the Code even when the chargesheet is filed, are unfettered. However, the Court after taking cognizance of the offence cannot direct police, on his own, to investigate further under section 173(8) of the Code. Such powers can be exercised only at a pre-cognizance stage by the Courts. Order passed by the trial Court, thus, was held without jurisdiction and was set

aside. The independent investigation, if any, shall not be affected and influenced by order passed by the said Court. The Court has sought to rely on the decision in the case of ***K. Chandrasekhar v. State of Kerala, reported in AIR 1998 SC 2001***, to hold that literal meaning of provision of section 173(8) of the Code in unequivocal terms the Magistrate or the Court concerned is not to direct re-investigation, but the provision enables the Investigating Agency to further investigate the offence.

9.6 In a decision in the case of ***Surendrabhai Babubhai Patel (supra)*** also this Court reiterated that even after submission of chargesheet, further investigation in respect of an offence for which report is submitted, is permissible. Section 173(2) empowers the Investigating Officer to obtain further evidence, oral or documentary, and a further report regarding such evidence in the prescribed form as provided under sub-sections (2) to (6) of section 173 of the Code in

relation to the report forwarded under sub-section (2) needs to be forwarded by him. The Court further held that if the Investigating Officer is entitled to carry on further investigation with the permission of the Court, there would hardly be any reason to hold that the Magistrate is not empowered to direct Investigating Agency to further investigate once he takes the cognizance. Thus, this decision recognizes the right of the Magistrate to direct further investigation. The learned Single Judge relied on the decision of this Court rendered in the case of ***Bachubhai v. State, reported in 25(2) GLR 897***. The Court also sought to rely on the decision in the case of ***Deepak Dwarkadas v. State, reported in 21 GLR 135***, where the Court negatived the contention that after submitting the chargesheet, the Investigating Officer becomes *functus officio*. The Court further held that the chargesheet could be submitted by the Police Station Officer if and only if there was further investigation in the course of which

some further evidence, oral or documentary, was available.

It further held that sub-section (8) of section 173 is added to negative such controversy being raised and to set at rest the earlier controversy that once the chargesheet is filed, the police officer becomes *functus officio*.

9.7 In a decision in the case of ***Hasanbhai Valibhai Qureshi (supra),*** this Court held that even after the Court has taken cognizance of the offence, further investigation conducted by the police is permissible. The Court further held that mere fact that there may be further delay in conducting the trial should not bar further investigation.

9.8 In a decision in the case of ***Nupur Talwar (supra),*** the Apex Court has held that for the purpose of issuing process, the concerned Court shall have to determine as to whether the

material placed before him is sufficient to proceed against the accused. It further held that after once the process had been issued and affirmed in appeal, the recall of the order of upholding the issuance of the process has been deprecated with further caution to the petitioner that any uncalled or frivolous proceeding initiated by the petitioner may evoke exemplary costs. In the Revision preferred against the order issuing process, it held that it was not for the Revisional Court to go into the question whether reasons given by Magistrate were good or bad, sufficient or insufficient. It can only see whether there was sufficient material before the learned Magistrate and that there was sufficient ground for issuance of process. It would be profitable to reproduce relevant paragraphs of the said decision, which read as under :

> *"19. Rolled along with the contention in hand, it was the submission of learned counsel representing the petitioner, that if the defences raised by the petitioner are*

taken into consideration, the entire case set up by the prosecution would fall. I shall now advert to the defences raised on behalf of the petitioner. All the defences raised on behalf of the petitioner have already been summarized above. Based on the said defences it was sought to be canvassed, that the Magistrate (while passing the order dated 9.2.2011) had taken into consideration some facts incorrectly (while the factual position was otherwise), and certain vital facts were overlooked. On the subject under reference, it would first be appropriate to examine the settled legal position. In this behalf reference may be made to the decision rendered by this Court in Chandra Deo v. Prokash Chandra Bose alias Chabi Bose and Anr., AIR 1963 SC 1430, wherein it was observed as under :

"*(7)Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on. But since the very question for consideration*

being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued; nor can he examine any witnesses at the instance of such a person. Of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No.1 that the very object of the provisions of Ch. XVI of the Code of Criminal Procedure is to prevent an accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions, can according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects behind the provisions of Section

202, Cr. P.C. is to enable the Magistrate to scrutinize carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under Section 202 can in no sense be characterized as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in the case before us that the two persons who were

examined as court witnesses were so examined at the instance of respondent No.1 but from the fact that they were persons who were alleged to have been the associates of respondent No.1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for respondent No.1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection, the observations of this court in Vadilal Panchal v. Dattatraya Dulaji, (1961) 1 SCR 1 at p.9 : (AIR 1960 SC 1113 at p. 1116) may usefully be quoted :

"The enquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage, for the person complained against can be legally called upon to answer

the accusation made against him only when a process has issued and he is put on trial."

Recently an examination of the defence(s) of an accused, at the stage of issuing process, came to be examined by this Court in CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd. and Anr., (2005) 7 SCC 467 : (AIR 2005 SC 4284), wherein this Court held as under :

"10. In the instant case, the appellant had filed a detailed complaint before the Magistrate. The record shows that the Magistrate took cognizance and fixed the matter for recording of the statement of the complainant on 1-6-2000. Even if we assume, though that is not the case, that the words "cognizance taken" were not to be found in the order recorded by him on that date, in our view that would make no difference. Cognizance is taken of the offence and not of the offender and, therefore, once the court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. Cognizance is taken at the initial stage

when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure. We can conceive of many other situations in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority, etc. These are cases where the Magistrate will

refuse to take cognizance and return the complaint to the complainant. But if he does not do so and proceeds to examine the complainant and such other evidence as the complainant may produce before him then, it should be held to have taken cognizance of the offence and proceeded with the inquiry. We are, therefore, of the opinion that in the facts and circumstances of this case, the High Court erred in holding that the Magistrate had not taken cognizance, and that being a condition precedent, issuance of process was illegal.

11. Counsel for the respondents submitted that cognizance even if taken was improperly taken because the Magistrate had not applied his mind to the facts of the case. According to him, there was no case made out for issuance of process. He submitted that the debtor was the Company itself and Respondent 2 had issued the cheques on behalf of the Company. He had subsequently stopped payment of those cheques. He, therefore, submitted that the liability not being the personal liability of Respondent 2, he could not be prosecuted, and the Magistrate had erroneously issued process against him. We find no merit in the submission. <u>At this stage, we do not wish to express any considered opinion on the argument advanced</u>

by him, but we are satisfied that so far as taking of cognizance is concerned, in the facts and circumstances of this case, it has been taken properly after application of mind. The Magistrate issued process only after considering the material placed before him. We, therefore, find that the judgment and order of the High Court is unsustainable and must be set aside. This appeal is accordingly allowed and the impugned judgment and order of the High Court is set aside. The trial court will now proceed with the complaint in accordance with law from the stage at which the respondents took the matter to the High Court."

A perusal of the legal position expressed by this Court reveals the unambiguous legal position, that possible defence(s) of an accused need not be taken into consideration at the time of issuing process. There may be a situation, wherein, the defence(s) raised by an accused is/are factually unassailable, and the same are also not controvertable, it would, demolish the foundation of the case raised by the prosecution. The Magistrate may examine such a defence even at the stage of taking cognizance and/or issuing process. But then, this is not the position in the present controversy. The defences raised by the learned counsel for the petitioner are

factual in nature. As against the aforesaid defences, learned counsel for the CBI has made detailed submissions. In fact, it was the submission of the learned counsel for the CBI, that the defences raised by the petitioner were merely conjectural. Each of the defences was contested and controverted, on the basis of material on the file. In this case it cannot be said that the defences raised were unassailable and also not controvertable. As already noticed above, I do not wish to engage myself in the instant disputed factual controversy, based on assertions and denials. The factual position is yet to be established on the basis of acceptable evidence. All that needs to be observed at the present juncture is, that it was not necessary for the Magistrate to take into consideration all possible defences, which could have been raised by the petitioner, at the stage of issuing process. Defences as are suggested by the learned counsel for the petitioner, which were based on factual inferences, certainly ought not to have been taken into consideration. Thus viewed, I find no merit in the instant contention advanced at the hands of the learned counsel for the petitioner. The instant determination of mine, should not be treated as a rejection of the defences raised on behalf of the

petitioner. The defences raised on behalf of the accused will have to be substantiated through cogent evidence and thereupon, the same will be examined on merits, for the exculpation of the accused, if so made out.

20. The submissions dealt with hereinabove constituted the primary basis of challenge, on behalf of the petitioner. Yet, just before the conclusion of the hearing of the matter, learned counsel representing the petitioner stated, that the petitioner would be satisfied even if, keeping in mind the defences raised on behalf of the petitioner, further investigation could be ordered. This according to learned counsel will ensure, that vital aspects of the controversy which had remained unravelled, will be brought out with the possibility of identifying the real culprits. This according to the learned counsel for the petitioner would meet the ends of justice."

(Emphasis in original)

9.9 In a decision in the case of ***Anju Chaudhary v. State of Uttar Pradesh, reported in (2013) 6 SCC 384***, the Apex Court has held and observed that for the same offence if more than

one First Information Report is lodged, it is a mixed question of law and fact. The test of *"sameness"* is to be applied. It is explained whether different offences have been committed in the course of same transaction. Meaning of "same transaction" would apply to the determining factors, which would be gathered from the facts and circumstances of the case. The Court held and observed that the second First Information Report in respect of the same offence or incident forming part of same transaction as contained in the first FIR, is not permissible. However, second First Information Report for an unrelated incident and for offence of such magnitude which does not fall within the ambit of first FIR, is permissible.

9.10 This Court in the case of ***Essar Oil Limited (supra)*** held that even after final report is laid before the Magistrate and is accepted, the Investigating Agency can carry out further investigation. There would be no bar in

conducting further investigation under section 173(8) of the Code after the final report submitted under section 173(2) of the Code, has been accepted and it is not necessary for the Magistrate to review or recall the order accepting the final report. It would be profitable to reproduce the relevant paragraphs of the said decision as under :

> *"57. Thus, in view of the law laid down by the Supreme Court in the decisions cited hereinabove, it is well settled that sub-section (8) of Section 173 of the Code permits further investigation, and even dehors any direction from the court, it is open to the police to conduct proper investigation, even after the court takes cognisance of any offence on the strength of a police report earlier submitted.*
>
> *58. The question before this Court is whether sub-section (8) of section 173 permits further investigation after the Magistrate has accepted a Final Report (Closure report) under sub-section (2) of Section 173 of the Code. The contention raised on behalf of the petitioners is that acceptance of a closure report would*

terminate the proceedings finally so as to bar the investigating agency from carrying out any further investigation in connection with the offence.”

10. It can, thus, be deduced from these decisions that :

(i) investigation under sub-section (3) to section 156 can be ordered only at pre-cognizance stage by the learned Magistrate. Once cognizance is taken under sections 190, 200 or 204, he can direct inquiry as contemplated under section 202 of the Code only in cases not falling under the proviso to section 202 of the CrPC.

(ii) It is also well concluded by plethora of decisions that the Court once takes cognizance and issues the process, it is not for him to direct the investigation under section 156(3) of the CrPC putting the clock back.

(iii) Again, there is no fetter to the powers of the police to further investigate, where the

Court has already taken the cognizance. Even in the case where Final Report is laid before the Magistrate and is accepted, the Investigating Agency can carry out further investigation. Sub-section (8) of section 173 of the CrPC negatives the contention that the police officer becomes *functus officio* once the chargesheet is laid.

11. In the present case, before adverting to the facts of the case and applying the said principles of law to the factual matrix, yet another vital issue raised requires consideration which is with regard to the existence of the alternative remedy. It is a well-known principle that in the event of existence of effective alternative efficacious remedy, the Court should be very slow in exercising powers under section 482 of the Code in quashing any proceedings.

11.1 In ***Pepsi Foods Ltd. (supra)***, the Apex Court held that it is a settled law that the High Court can exercise its power of judicial review in criminal matters under Article 227 of the

Constitution of India. The power of superintendence by the High Court is not only of administrative nature, but is also of judicial nature. Such Article confers vast powers on the High Court to prevent the abuse of the process of law by the inferior Courts and to see that the stream of administration of justice remains clean and pure. The power conferred on the High Court under Articles 226 and 227 of the Constitution and under section 482 of the Code, have no limits, but more the power more due care and caution is to be exercised while invoking these powers. It also held that the exercise of powers could be under Article 227 of the Constitution or under section 482 of the Code, it may not be necessary to invoke the provisions of Article 226.

11.2 In a decision in the case of ***Dhariwal Tobacco Products Limited (supra)***, the Apex Court was examining the scope of powers under section 482 read with section 397 of the Code.

After examining various provisions and pronouncements on the subject, it held that the availability of alternative remedy of filing Revision under section 397 of the Code could not be a ground to dismiss the application under section 482 of the Code. It held that even where Revision Application is barred, remedies under Articles 226 and 227 would be applicable. In the matter before the Apex Court, the High Court had dismissed the application preferred under section 482 of the Code without entering into the ground of availing alternative remedy of filing Revision under section 397 of the Code. The High Court's judgment has been set aside as unsustainable for considering the matter afresh on merits.

11.3 The Apex Court in the case of ***Raj Kapoor (supra)*** held that the Court's inherent jurisdiction can be invoked only against final and not purely interlocutory orders. The availability of revisional jurisdiction under section 397 of the Code does not exclude

jurisdiction under section 482 of the Code. Also it cautioned that such powers need to be exercised in extraordinary situations.

11.4 The Apex Court in a decision in the case of ***D.N. Bhattacharjee (supra),*** while discussing as to under which circumstances the dismissal of a complaint under section 203 of the Code has to be made, held that it has to be made on judicially sound grounds. However, the same needs to be made where reasons given disclose that the proceedings do not terminate. If a bare perusal of the complaint or the evidence led in support of it reveals that the essential ingredients of the offences are absent or that the dispute is only of civil nature or that there are such patent absurdities in evidence produced that it would be a waste of time to proceed further, the complaint could be dismissed under section 203 of the Code. What the Magistrate needs to determine at the stage of issuance of process, is not the correctness or the probabilities or improbability of

individual items of evidence on disputable grounds, but the existence or otherwise of a *prima facie* case, on the assumption that what is stated in the complaint is true. It is further held that the Magistrate is not debarred from going into the merits of the evidence produced by the complainant, but the object of such consideration of the merits of the case, at this stage, could only be to determine whether there are sufficient grounds for proceeding further or not.

12. Thus, what can be deduced is that in an appropriate case, the inherent powers under section 482 of the Code can be exercised within four corners of law, even where the alternative remedy is available. Such alternative remedy is, at this stage, to invoke the powers under Article 227 of the Constitution. For securing the ends of justice, the exercise of powers of inherent jurisdiction in a case which is of exceptional nature, is held to be permissible. Such inherent jurisdiction is to be exercised against final and

not purely an interlocutory order.

13. In light of the discussion of law made hereinabove, the facts in the present case require to be revisited. At the time of incident on December 22, 1996, the respondent No.3 herein was a highly placed Police Officer working as Special Inspector General of Police (Special IGP), Intelligence Bureau, Gujarat State, whereas the petitioner was a practicing advocate since the year 1987 and was residing with her parents near Ram Vadi Bus Stand, Isanpur, Ahmedabad. The respondent No.3, a married person, having two children was residing at Officer's Flat at Mithakhali, Ahmedabad. The petitioner's father had in the year 1982 good terms with the father of the respondent No.3 and both the families, therefore, shared good terms. It is the version of the petitioner in the complaint that the petitioner was selected for the post District Judge along with other advocates and when the respondent No.3 came to know about it, he visited her house under some pretext and exhibited his

feelings towards the petitioner and insisted that he would still like to marry her. It is the case of the petitioner that she got married on July 31, 1996 to one Shri Jatin Desai. However, the respondent No.3 allegedly had blackmailed her and her husband before the marriage. He also allegedly threatened her that he would see to it that she never becomes a Judge and asked her to take divorce from her husband. He is alleged to have come to her parents' house on December 22, 1996 and took out his revolver and threatened her and her family of dire consequences. Since the entire incident gave rise to preferring of Special Civil Application No.3714 of 1996 before this Court and the Court after detailed examination of the facts confirmed the *ad interim relief* and gave directions, one of which was to treat the complaint filed on December 22, 1996 at 10-00 p.m. as First Information Report and the same was accordingly registered as I-C.R. No.4/1997 before the Vatva Police Station.

14. It would be apt to reproduce the other

directions issued by this Court in the case of ***Sarita d/o.Vasudev Ramjibhai Sharma v. O.P. Mathur, Spl. IGP (IB) and others, reported in (1997) 1 GLH 711***, which read as under :

> *"10. In the result, this petition is allowed, and accordingly confirming the ad interim order passed on 22.12.1996, the following order is passed:*
>
> *(i) The allegations made in the petition filed on 22.12.1996 at 10.15 p.m. shall be deemed to be treated as (a) FIR, (b) filed on 22.12.1996 at 10.15 p.m., the copy of which is annexed herewith.*
>
> *(ii) The same shall be registered and numbered now by the Police Station Officer, Vatva Police Station, Ahmedabad. Thereafter, the Director General of Police (DGP), Gujarat State, Ahmedabad, shall investigate the case either by himself or through any responsible Senior Officer of his choice, in case of latter one, with day-to-day supervision by him.*
>
> *(iii) Muddamal revolver and other articles produced by the petitioner which have been taken in the Court custody as per*

the earlier order of this Court shall at once, be handed over to the DGP who shall treat the same as muddamal articles seized during the course of investigation.

(iv) The sample of the blood of the respondent No. 1 drawn by the Civil Hospital, Ahmedabad as well as the blood found at the scene of the offence shall be taken on record as part of the investigation.

(v) Having regard to the facts and circumstances of this case, the DGP, is further directed to see that the investigation of the case is over as expeditiously as possible without any unreasonable delay.

(vi) The petitioner Sarita Desai and her sister Shobhana shall be provided with police protection till the time trial is over and thereafter from time to time, as decided by the Court, if needed. So far as the petitioner's husband Jatin Desai is concerned, he shall be given police protection for the time being, only for one month at his cost and thereafter, as directed by the Court, if asked for, at his cost.

(vii) The moment the chargesheet, if any, is filed, the learned Metropolitan Magistrate, Ahmedabad City shall as expeditiously as possible hold the committal inquiry and on the committal order, if any, passed by him, the learned Sessions Judge or any learned Addl. Sessions Judge, Ahmedabad City to whom the Sessions Case is transferred, shall as expeditiously as possible inquire into and try the Sessions Case and decide the same.

(viii) Turning to protection of the petitioner and her sister granted earlier by this Court in terms of terms of para 20(j) shall continue and according to the petitioner, the necessary and appropriate application for the anticipatory bail before the appropriate Court shall be made on or before 3rd January 1997, if so desired.

(ix) Having regard to the facts and circumstances of the case, the respondent No. 1 is directed to make an appropriate application for anticipatory bail before the appropriate Court tomorrow, i.e. 27.12.1996 and until the same is decided, he shall not be arrested. Rule is made absolute accordingly."

15. The respondent No.3 filed a First Information Report being I-C.R. No.509/1996 before the Navrangpura Police Station for the offences punishable under sections 448, 506(2), etc. of the Indian Penal Code and both the First Information Reports were investigated and Final Reports were submitted, whereby 'B' Summary Report in First Information Report bearing I-C.R. No.4/1997 and 'A' summary report in the First Information Report bearing I-C.R. No.509/1996 were filed.

16. The learned Magistrate after considering the Final Report of the Investigating Officer in connection with I-C.R. No.4/1997 directed issuance of process against the accused for the offences punishable under sections 448 and 506(2) of the Indian Penal Code on June 19, 1999. Section 448 provides that whoever commits house-trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both.

17. Section 506 provides for punishment for criminal intimidation if the threat be to cause grievous hurt or death or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life or with imprisonment for a term which may extend to seven years, or to impute, unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

18. Aggrieved by such order of issuance of the process, the respondent preferred Criminal Miscellaneous Application No.4366 of 1999 for quashment of such proceedings.

19. Vide order dated March 28, 2000, the order of issuance of process against the respondent No.3 was confirmed by this Court. The petitioner had also prayed for quashment of the process issued under sections 307, 442 and 509 of the

Indian Penal Code, by urging that the Court ought to have committed the case to the Court of Sessions. However, such request was not acceded to in Criminal Revision Application No.439 of 1999.

20. It could be thus noticed that the 'B' Summary Report which was filed by the Investigating Agency was not found acceptable by the learned Magistrate, who in connection with the First Information Report being I-C.R. No.4/1997 deemed it fit on the strength of the material on record to issue process under section 448 and 506(2) of the Indian Penal Code.

21. These proceedings were challenged by both the sides respectively by preferring Special Criminal Application and the Revision Application and both of them had failed and accordingly, the order of the learned Magistrate continued to govern the field as far as the process under those two offences are concerned. The respondent approached the Director General of Police for

further investigation, who ordered the further investigation in the matter, where the process was issued and cognizance was taken. The learned Chief Judicial Magistrate was approached by the Investigating Officer to return the case papers for further investigation and the same was accordingly ordered by the Court.

22. On June 13, 2000, the said order of return of case papers was challenged by the petitioner before the Sessions Court by way of Revision Application, whereby the Court rejected the plea of the petitioner and, thus, the original papers were returned and the further investigation was carried out. On March 10, 2003, such papers were returned to the Court. However, there was no report accompanying these documents. The respondent No.3 addressed to the Director General of Police on June 02, 2003, requesting him to file an appropriate report.

23. On March 24, 2005, an application was filed by the respondent for further investigation in

the First Information Report of the petitioner. Such application was rejected by the Court on June 15, 2006, against which a Revision Application was preferred being Revision Application NO.349 of 2006 and on September 05, 2006, the Court directed fresh investigation in First Information Report bearing I-C.R. No.4/1997. Pursuant to the said order, on September 09, 2008, a Final Report was filed before the Court with 'B' Summary stating that there is no material to proceed against the respondent No.3 even for the offence for which cognizance was taken. Such 'B' Summary Report came to be accepted on February 27, 2009 and all the proceedings against the respondent No.3 came to be terminated. This appears to be a case where the Magistrate turned back the clock where after taking cognizance he recalled the process issued against the respondent No.3, which got confirmed till the High Court insofar as the offence punishable under sections 448 and 506(2) of the Indian Penal Code are concerned.

24. In the wake of powers of the Investigating Agency to make further investigation, assuming that such unfettered powers may not come in the way of the Investigating Agency to further investigate the matter, it surely cannot affect the proceedings before the learned Magistrate when such issuance of the process under section 204 of the Code had already been challenged before this Court and to a limited extent when the issuance of process qua the offences punishable under sections 448 and 506(2) of the Indian Penal Code, had been confirmed. The petitioner's challenge to the further investigation was not entertained by the Court when she had preferred Special Criminal Application No.537 of 2001 vide order dated July 17, 2001, wherein as mentioned hereinabove, the legal proposition was also under dispute. Of course, power to carry out further investigation even after issuance of process by the concerned Magistrate was acquired. The only limited challenge was with regard to handing over original papers to Investigating Agency,

including the report submitted by the Investigating Officer. The Court also observed that while handing over the original papers of investigation in connection with Criminal Case No.435 of 1999, pending trial may not be delayed and the same shall not be adjourned on that ground only. It appears that after 'B' Summary Report had been laid, the learned Chief Judicial Magistrate accepted such report without prosecution. Thus, in the wake of earlier challenge not only his predecessor had issued process under both the provisions as mentioned hereinabove, but subsequently in two rounds of litigations, the same had been challenged and it was confirmed by this Court.

25. It has been stated by the learned Senior Counsel Shri K.B. Anandjiwala for the respondent No.3 that this is under challenge before the High Court. Be that as it may, insofar as such issuance of process under sections 448 and 506(2) of the Indian Penal Code was concerned, merely by a subsequent report submitted after further

investigation at the behest of the respondent, it is impermissible to upturn the decision of this Court, which confirmed the orders of the learned Metropolitan Magistrate as well as the Sessions Court. Since further investigation is permissible, the report would be produced, the Court can examine such report, which would entitle the respondent No.3 to move either for discharge or otherwise use such material for his defence. Even otherwise, the acceptance of 'B' Summary Report after issuance of process in the wake of earlier round of litigation, is impermissible to be accepted. This will give wrong signal to the Investigating Agency, which can, as in the present manner misuse such powers, where despite issuance of process and even confirmed by the High Court, can submit the report which would go contrary to the earlier record. Assuming that new facts and record subsequently emerged, the Court cannot be oblivious of the fact that even while challenging further investigation, when the Court had not acceded to the request of the petitioner-original

complainant, it had been categorical that there should not be any delay because of handing over of original case papers of Criminal Case No.435 of 1999 and thus, all along the Court had been conscious that further investigation though is permissible, it would not in any manner nullify the earlier proceedings. The question that would arise is, whether there could be any use of the material which is collected during the course of further investigation and as stated hereinabove, either by preferring an application for discharge the accused can make use of the same or can make use of the same for his defence in the trial with regard to other offences, but as far as sections 448 and 506(2) of the Indian Penal Code are concerned, the Court earlier having found *prima facie* material had issued the process and all the Courts subsequently thereafter when had confirmed the same, permitting the Investigating Agency to bring completely the report to quash the process which had not been done by the High Court and which was never challenged before the Supreme Court, would amount to succeeding without

approaching the Hon'ble Supreme Court and this is wholly impermissible.

26. Resultantly, this petition requires to be allowed. The order of learned Magistrate accepting 'B' summary without prosecution even in respect of offences punishable under sections 448 and 506(2) of the Indian Penal Code, for which earlier process had been issued and confirmed shall need to be interfered with. Mere availability of the Revision and other alternative remedies would not preclude this Court from interfering where this is not only a travesty of justice, but, this would amount to playing in the hands of the Investigating Agency, which is never contemplated under the Code.

27. For the foregoing reasons, the present petition succeeds and the same is, accordingly, allowed. The impugned Final 'B' Summary Report dated September 09, 2008 filed in connection with the first information report registered vide I-C.R. No.4/1997 with Vatva Police Station,

Ahmedabad, is rejected and the order dated February 27, 2009 passed by the learned Chief Metropolitan Magistrate in Criminal Case No.435 of 1999 below Exhibit 1 accepting Final 'B' Summary Report, is quashed and set aside. Rule is made absolute.

(MS SONIA GOKANI, J.)

Aakar