Farsubhai Muljibhai Goklani vs State Of Gujarat & 3 on 22 February, 2017

Author: J.B.Pardiwala

Bench: J.B.Pardiwala

R/SCR.A/1417/2017 JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION (DIRECTION - TO LODGE FIR/COMPLAINT) NO. 1417 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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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 or any order made thereunder ?

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FARSUBHAI MULJIBHAI GOKLANI....Applicant(s)

Versus

STATE OF GUJARAT & 3....Respondent(s)

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Appearance:
MR BM MANGUKIYA, ADVOCATE for the Applicant(s) No. 1
MS BELA A PRAJAPATI, ADVOCATE for the Applicant(s) No. 1
MR. P.K. JANI, ADDL. ADV. GENERAL with MR. MITESH AMIN, LD. PUBLIC PROSECUTOR for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 22/02/2017

ORAL JUDGMENT

1. By this writ application under Article 226 of the Constitution of India, the writ applicant, a social worker and member of the District Panchayat, Patan, has prayed for the following reliefs;

> "(A) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction and to direct the police officer of Vav Police Station to record FIR against Mr. Shankar Chaudhry, punishable under sections 33A read with section 124A of the Act.
>
> (B) Be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction and to hold and declare that the reply given by the police officer is ex-facie illegal and ultra vires and, therefore, same may be quashed and further held and declared that the police officer has no right, authority or competence to adjudicate upon the facts or assess the veracity of the facts consisting commission of the criminal offence.

(C) Pending admission and final disposal of the present petition, be pleased to direct the police officer to place on record all the evidence and materials collected in course of the preliminary inquiry conducted by him in pursuance of the information given by the petitioner vide his application dated August, 21, 2016- Annexure H to this petition.

(D) Be pleased to pass such other and further orders as may be deemed fit and proper."

2. The facts, giving rise to this writ application, may be summarized as under;

3. This litigation, on the face of it, appears to be a personal fight between the writ applicant and one Mr. Shankar Chaudhary, a sitting Minister in the State Government. It is the HC-NIC Page 2 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT case of the writ applicant that Mr. Chaudhary contested the Gujarat Legislative Assembly Elections in the years 2007 and 2012. On both the occasions, Mr. Chaudhary came to be elected as a member of the Legislative Assembly.

4. The elections are held and conducted by the Chief Election Commissioner in accordance with the provisions contained in the Representation of People Act, 1951 (Act No.43 of 1951). The Central Government, in exercise of its powers conferred under section 169 of the Act, 1951, has framed the rules called the Conduct of Election Rules, 1961. The Central Government amended the rules by SO 935(E) dated 3rd November, 2002, which came into force from 3rd September, 2002.

5. Rule 4A of the rules, reads as under;

> "Form of affidavit to be filed at the time of delivering nomination paper- The candidate or his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under subsection (1) of section 33 of the Act, also deliver to him an affidavit sworn by the candidate before a Magistrate of the first class or a Notary in Form 26."

6. The Central Legislature, amended the Act and brought into force section 125A, which reads as under;

> "125A. Penalty for filling false affidavit, etc:- A candidate who himself or through his proposer, with intent to be elected in an election-
>
> (I) fails to furnish information relating to sub-section (1) of section 33A; or (II) give false information which he knows or has HC-NIC Page 3 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT reason to believe to be false;or (III) conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-

section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force be punishable with imprisonment for a term which may extend to six months, or with fine, or with both."

7. Section 33A also came to be inserted by the Central Legislature by enacting the Act No.72 of 2002, which came into force from 24th August, 2002. Section 33A reads as under;

> "33A. Right to information:-(1) A candidate shall, apart from any information which he is required to furnish, under this Act or the rules made thereunder, in his nomination paper delivered under sub-section (1) or section 33, also furnish the information as to whether-
>
> (i) he is accused of any offence punishable with imprisonment for two years or more in a pending case in which a charge has been framed by the court of competent jurisdiction.
>
> (ii) he has been convicted of an offence [other than any offence referred to in sub-section (1) or sub-section (2) or covered in sub-section (3), of section 8] and

sentenced to imprisonment for one year or more.

(2) The candidate of his proposer, as the case may be, shall, at the time of delivering to the returning officer the nomination paper under sub-section (1) of section 33, also deliver to him an affidavit sworn by the candidate in a prescribed form very fine the information specified in sub-section (2).

(3) The returning officer shall, as soon as may be after the furnishing of information to him under sub-section (1), display the aforesaid information by affixing a copy of the affidavit, delivered under sub-section (2), at a conspicuous place at this office for the information of the electors relating to a constituency for which the HC-NIC Page 4 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT nomination paper is delivered."

8. It is the case of the writ applicant that Mr. Chaudhary contested the Assembly Election in December, 2007 from 94 Radhanpur Constituency. Mr. Chaudhary filed an affidavit disclosing his educational qualifications, wherein it was shown that he cleared his S.S.C Examination in the year 1987 conducted by the Gujarat Secondary Education Board, Gandhinagar. It is stated that Mr. Chaudhary filed two affidavits, wherein he disclosed that he was S.S.C. passed.

9. Mr. Chaudhary, thereafter, contested the State Legislative Assembly Election in December, 2002. In 2012, Mr. Chaudhary contested the election from 7-Vav Constituency of the State Legislative Assembly. At the time of filing his nomination, he is said to have disclosed his educational qualifications as under;

(1) passed the S.S.C examination from the Sheth K.B. Vidyalay, Radhanpur, conducted by the Gujarat Secondary & Higher Secondary Education Board, Gandhinagar.

(2) Passed the H.S.C Examination from the Sheth K.B. Vidyalay, Radhanpur.

(3) Did M.B.A from the institute of INM (Private Institution).

10. According to the writ applicant, no sooner he learnt about the false affidavits alleged to have been filed by Mr. Chaudhary, then he sought the information under the R.T.I. HC-NIC Page 5 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT Act, 2005. Under the R.T.I, the following information was provided to the writ applicant;

(a) Passed the S.S.C Examination in March, 1987.

(b) Passed the H.S.C Examination in July, 2011. The seat number alloted was G-922981. However, the information revealed that Mr. Chaudhary had passed the examination of the subject of computer only in July, 2011. Mr. Chaudhary appeared in the subject of English in March, 2011.

11. After gathering the necessary information as regards the educational qualifications, the writ applicant herein preferred a writ petition in public interest being the Writ Petition (PIL) No.215 of 2015, and prayed for issue of a writ of mandamus to the State Election Commission as well as to the Police Authorities to register the first information report for the offence punishable under section 125A of the Act, 1951 as well as section 191 of the Indian Penal Code.

12. The writ petition in PIL came to be rejected vide judgment and order rendered by a Division Bench of this Court dated 30th March, 2016. It appears that the judgment and order passed by the Division Bench of this Court, rejecting the PIL, was challenged before the Supreme Court by filing an SLP No.18630 of 2016. The Supreme Court, vide order dated 1 st August, 2016, dismissed the special leave petition. It appears that while rejecting the PIL, this Court reserved the liberty for the writ applicant to initiate appropriate proceedings on his own in accordance with law.

13. The writ applicant preferred a complaint in writing addressed to the Police Inspector, LCB, Banaskantha at Palanpur with a prayer to register the first information report for the offences as alleged.

14. The Police Inspector, LCB, Banaskantha, on receipt of such complaint in writing, thought fit to initiate a preliminary inquiry, and at the end of it, reached to a conclusion that the complaint failed to disclose commission of any cognizable offence and thereby declined to register the first information report. The writ applicant was informed in writing by the Police Officer concerned vide communication dated 6th January, 2017, Annexure-K to this writ application, Page-183, that no case was made out for registration of the first information report.

15. It appears from the materials on record that during the pendency of the preliminary inquiry, the writ applicant came before this Court by filing the Special Criminal Application No.6841 of 2016, seeking a writ of mandamus to the police to register the first information report against Mr. Chaudhary. The said writ application came to be disposed of vide order dated 30th November, 2016, in the following terms;

> "2. Mr. Mitesh Amin, the learned Public Prosecutor appearing for the State, upon instructions from the Officers, who are present in the Court, states that the inquiry is going on. The matter is being looked into and appropriate decision in accordance with law shall be taken at the earliest. The decision shall be communicated in writing to the writ-applicant.

3. With the above, writ-application is disposed of. Direct service is permitted.

4. It shall be open for the applicant herein to avail of HC-NIC Page 7 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT an appropriate legal remedy before the appropriate forum in accordance with law. "

16. Being dissatisfied with the communication dated 6th January, 2017 as well as the inaction on the part of the police to register the first information report, the writ applicant has come up with this writ application, seeking a writ of mandamus under Article 226 of the Constitution of India.

17. Submissions on behalf of the writ applicant:-

17.1 Mr. Mangukiya, the learned counsel appearing for the writ applicant vehemently submitted that the decision of the police not to register the first information report is absolutely contrary to the dictum of law laid down by the Supreme Court in the case of Lalita Kumari vs. State of U.P, reported in (2014) 2 SCC Page 1.

17.2 He would submit that more than a prima facie case could be said to have been made out for any prudent person to reach to a conclusion that Mr. Chaudhary committed an offence by disclosing the false information as regards his educational qualifications by way of an affidavit.

17.3 Mr. Mangukiya submitted that having regard to the nature of the allegations and the evidence adduced by his client before the police, no preliminary inquiry was warranted, and the police should have immediately registered the first information report. He would submit that even after registering the first information report, the police could have reached to a conclusion that no case is made out or the first information report was false and could have filed an appropriate report HC-NIC Page 8 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT under section 169 of the Cr.P.C. However, the action on the part of the police in closing the matter, by conducting a preliminary inquiry, needs to be deprecated.

17.4 Mr. Mangukiya submits that a bare reading of the communication dated 6th January, 2017 goes to show that the police officer has virtually conducted a trial and has acquitted the writ applicant. He submitted that the police officer has also gone into the issue that the registration of the first information report would not serve any good purpose in view of section 468 of the Cr.P.C. Mr. Mangukiya submits that the interpretation put forward by the police officer of section 125(A) of the Act, 1951, could be termed as perverse.

17.5 Mr. Mangukiya submits that nobody is above the law. The law is supreme and it is expected of the police to discharge their duties without any fear or favour and in accordance with law.

17.6 Mr. Mangukiya submitted that the doctrine of locus is quite alien to the criminal jurisprudence. Any citizen of this Country can put the criminal machinery into motion if it comes to his knowledge or has the necessary information as regards commission of an offence. Mr. Mangukiya submitted that the M.B.A degree, which Mr. Chaudhary is talking about, is said to have been obtained in the

year 2009 from an institute, which got closed in 2008. He submitted that the certificates, which are being shown to the Court by the State, are all false and concocted documents.

17.7 Mr. Mangukiya submits that the complaint lodged by his HC-NIC Page 9 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT client has not been entertained only for the reason that Mr. Chaudhary is a sitting Minister in the State Government. The police could be said to have failed to discharge their duties in accordance with law. In such circumstances referred to above, Mr. Mangukiya, the learned counsel prays that there being merit in this writ application, the same be allowed and a writ of mandamus be issued to the Officer, In-charge of the concerned police station to register the first information report and undertake the investigation in accordance with law.

18. Submissions on behalf of the respondents.

18.1 Mr. P.K. Jani, the learned Additional Advocate General appearing with Mr. Mitesh Amin, the learned Public Prosecutor for the State, vehemently submitted that this writ application is nothing but an attempt on the part of the writ applicant to settle his personal score and seek vengeance. Mr. Jani submits that this writ application is actuated by bias and is also politically motivated. According to Mr. Jani, this writ application deserves to be rejected on such grounds alone without going into the merits.

18.2 Mr. Jani submits that it is always open for the police to conduct a preliminary inquiry, more particularly,, in this type of cases and it is not mandatory that the first information report should be registered. It is submitted that at the end of the preliminary inquiry, it has been revealed that no case worth the name is made out for registration of the first information report. According to Mr.Jani, the allegations levelled by the writ applicant are not only far from truth, but are false, frivolous and vexatious.

18.3 Mr. Jani would submit that the form was filled up in the year 2012. The information on affidavit was disclosed in the year 2012. The writ applicant has raised this issue after almost a period of five years.

18.4 Mr. Jani submitted that the public interest litigation filed by the writ applicant was also not entertained by a Division Bench of this Court, and the judgment rendered by the Division Bench has been affirmed by the Supreme Court.

18.5 Mr. Jani submits that if the police deems fit to conduct a preliminary inquiry into the complaint, and at the end of it, for the reasons assigned, declines to register the first information report, then the remedy for the complainant is to invoke the provisions of section 200 of the Cr.P.C. before the court concerned. The remedy is not to file a writ application and seek a writ of mandamus.

18.6 In such circumstances referred to above, Mr. Jani submits that the writ application, being devoid of any merit, deserves to be rejected.

19. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether this Court should issue a writ of mandamus to the police to register the first information report.

20. I would like to look into the matter posing four questions:-

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>
> (i) whether in the face of the remedies under sections 154(3), 156(3), 190 and 200 of the Cr.P.C., a writ of mandamus can be issued to the police authorities to perform their statutory duties under section 154(1) of the Cr.P.C. in a writ application complaining about the non-registration of the first information report, despite furnishing first information of commission of cognizable offence?
>
> (ii) Whether the Constitution Bench of the Apex Court, in the case of Lalita Kumari (supra) is an answer to the above said principal issue No.1?.
>
> (iii) Should this Court deny the relief of writ of mandamus to the writ applicant merely on the ground that the writ applicant is not an aggrieved person or victim and whether such person becomes functus officio after informing the police of the commission of the cognizable offence?.
>
> (iv) Should this Court entertain this writ application under Article 226 of the Constitution of India, seeking for a writ of mandamus if it appears that the writ applicant wants to wreck personal vengeance and the writ litigation is politically motivated?.

21. Before adverting to the four questions referred to above, I must look into the observations made by the Division Bench of this Court while rejecting the writ application filed by the writ applicant herein in public interest. I may quote the relevant observations as under;

> "8.1 For the purpose of deciding the issue involved in this HC-NIC Page 12 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT petition, relevant provisions of The Representation of the People Act, 1951 are reproduced

hereinbelow:

PART II QUALIFICATIONS AND DISQUALIFICATIONS.

CHAPTER I QUALIFICATIONS FOR MEMHERSHIP OF PARLIAMENT.

CHAPTER II QUALIFICATIONS FOR MEMBERSHIP OF STATE LEGISLATURES
CHAPTER III DISQUALIFICATIONS FOR MEMBERSHIP OF PARLIAMENT AND STATE LEGISLATURES.

Section 7. Definitions [a] `appropriate Government' [b] `disqualified' Section 8. Disqualification on conviction for certain offences. [1] A person convicted of an offence punishable under [a] section 153A (offence of promoting enmity between different groups on ground of religion, race, place of birth, residence, language, etc., and doing acts prejudicial to maintenance of harmony) or section 171E (offence of bribery) or section 171F (offence of undue influence or personation at an election) or sub-section (1) or sub-section (2) of section 376 or section 376A or section 376B or section 376C or section 376D (offences relating to rape) or section 498A (offence of cruelty towards a woman by husband or relative of a husband) or sub-section (2) or sub-section (3) of section 505 (offence of making statement creating or promoting enmity, hatred or ill-will between classes or offence relating to such statement in any place of worship or in any assembly engaged in the performance of religious worship or religious ceremonies) of the Indian Penal Code (45 of 1860); or [b] the Protection of Civil Rights Act, 1955 (22 of HC-NIC Page 13 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT 1955) which provides for punishment for the preaching and practice of "untouchability", and for the enforcement of any disability arising therefrom; or [c] section 11 (offence of importing or exporting prohibited goods) of the Customs Act, 1962 (52 of 1962); or [d] sections 10 to 12 (offence of being a member of an association declared unlawful, offence relating to dealing with funds of an unlawful association or offence relating to contravention of an order made in respect of a notified place) of the Unlawful Activities (Prevention) Act, 1967 (37 of 1967); or [e] the Foreign Exchange (Regulation) Act, 1973 (46 of 1973); or [f] the Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985); or [g] section 3 (offence of committing terrorist acts) or section 4 (offence of committing disruptive activities) of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (28 of 1987); or [h] section 7 (offence of contravention of the provisions of sections 3 to 6) of the Religious Institutions (Prevention of Misuse) Act, 1988 (41 of 1988); or [i] section 125 (offence of promoting enmity between classes in connection with the election) or section 135 (offence of removal of ballot papers from polling stations) or section 135A (offence of booth capturing) of clause (a) of sub-

section (2) of section 136 (offence of fraudulently defacing or fraudulently destroying any nomination paper) of this Act; [or] [j] section 6 (offence of conversion of a place of worship) of the Places of Worship (Special Provisions) Act, 1991; [or] HC-NIC Page 14 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT [k] section 2 (offence of insulting the Indian National Flag or the Constitution of India) or section 3 (offence of preventing singing of National Anthem) of the Prevention of Insults to National Honour Act, 1971 (69 of 1971), [or] [l] the Commission of Sati (Prevention) Act, 1987 (3 of 1988); or [m] the Prevention of Corruption Act, 1988 (49 of 1988); or [n] the Prevention of Terrorism Act, 2002 (15 of 2002),] [shall be disqualified, where the convicted person is sentenced to [i] only fine, for a period of six years from the date of such conviction;

[ii] imprisonment, from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.] [2] A person convicted for the contravention of [a] any law providing for the prevention of hoarding or profiteering; or [b] any law relating to the adulteration of food or drugs; or [c] any provisions of the Dowry Prohibition Act, 1961 (28 of 1961), and sentenced to imprisonment for not less than six months, shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release].

[3] A person convicted of any offence and sentenced to imprisonment for not less than two years [other than any offence referred to in sub- section (1) or sub-section (2)] shall be HC-NIC Page 15 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT disqualified from the date of such conviction and shall continue to be disqualified for a further period of six years since his release.] [4] Notwithstanding anything [in sub-section (1), sub-section (2) or sub-section (3), a disqualification under either subsection shall not, in the case of a person who on the date of the conviction is a member of Parliament or the Legislature of a State, take effect until three months have elapsed from that date or, if within that period an appeal or application for revision is brought in respect of the conviction or the sentence, until that appeal or application is disposed of by the court.

Explanation In this section -

[a] "law providing for the prevention of hoarding or profiteering" means any law, or any order, rule or notification having the force of law, providing for [i] the regulation of production or manufacture of any essential commodity;

[ii] the control of price at which any essential commodity may be bought or sold;

[iii] the regulation of acquisition, possession, storage, transport, distribution, disposal, use or consumption of any essential commodity;

[iv] the prohibition of the withholding from sale of any essential commodity ordinarily kept for sale;

[b] "drug" has the meaning assigned to it in the Durgs and Cosmetics Act, 1940 (23 of 1940);

[c] "essential commodity" has the meaning assigned to it in the Essential Commodity Act, 1955 (10 of 1955);

[d] "food" has the meaning assigned to it in the Prevention of Food Adulteration Act, 1954 (37 of 1954).

Section 8A. Disqualification on ground of corrupt practices.

Section 9. Disqualification for dismissal for corruption or disloyalty.

Section 9A. Disqualification for Government contracts, etc. Section 10. Disqualification for office under Government company.

Section 10A. Disqualification for failure to lodge account of election expenses.

Section 11. Removal or reduction of period of disqualification.

CHAPTER IV DISQUALIFICATIONS FOR VOTING.

Section 11A. Disqualification arising out of conviction and corrupt practices.

Section 11B. Removal of disqualifications.

PART V CONDUCT OF ELECTIONS CHAPTER I NOMINATION OF CANDIDATES Section 36.

36. Scrutiny of nominations [1] On the date fixed for the scrutiny of nominations under section 30, the candidates, their election agents, one proposer of each candidate, and one other person duly authorized in writing by each candidate, but no other person, may attend at such time and place as the returning officer may appoint; and the returning officer shall give them all reasonable facilities for examining the nomination papers of all candidates which have HC-NIC Page 17 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT been delivered within the time and in the manner laid down in section 33.

[2] The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion,

after such summary inquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds:

> [a] that on the date fixed for the scrutiny of nominations the candidate] either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely:
>
> Articles 84, 102, 173 and 191, [Part II of this Act, and sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963)]; or [b] that there has been a failure to comply with any of the provisions of section 33 or section 34 ; or [c] that the signature of the candidate or the proposer on the nomination paper is not genuine.
>
> [3] Nothing contained in 10[clause (b) or clause
>
> (c) of sub-section (2) shall be deemed to authorize the rejection of the nomination of any candidate on the ground of any irregularity in respect of a nomination paper, if the candidate has been duly nominated by means of another nomination paper in respect of which no irregularity has been committed.

[4] The returning officer shall not reject any nomination paper on the grounds of any defect which is not of a substantial character.

[5] The returning officer shall hold the scrutiny on the date appointed in this behalf under clause HC-NIC Page 18 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT (b) of section 30 and shall not allow any adjournment of the proceedings except when such proceedings are interrupted or obstructed by riot or open violence or by causes beyond his control:

> Provided that in case 2 [an objection is raised by the returning officer or is made by any other person] the candidate concerned may be allowed time to rebut it not later than the next day but one following the date fixed for scrutiny, and the returning officer shall record his decision on the date to which the proceedings have been adjourned.
>
> [6] The returning officer shall endorse on each nomination paper his decision accepting or rejecting the same and, if the nomination paper is rejected, shall record in writing a brief statement of his reasons for such rejection.
>
> [7] For the purposes of this section, a certified copy of an entry in the electoral roll for the time being in force of a constituency shall be conclusive evidence of the fact that the person referred to in that entry is an elector for that constituency, unless it is proved that he is subject to a disqualification mentioned in section 16 of the Representation of the People Act, 1950 (43 of 1950).

[8] Immediately after all the nomination papers have been scrutinized and decisions accepting or ejecting the same have been recorded, the returning officer shall prepare a list of validly nominated candidates, that is to say, candidates whose nominations have been found valid, and affix it to his notice board.] PART VI DISPUTES REGARDING ELECTIONS.

CHAPTER I INTERPRETATION.

Section 79. Definitions.

CHAPTER II PRESENTATION OF ELECTION

PETITIONS TO HIGH COURT.

80.Election petitions No election shall be called in question except by an election petition presented in accordance with the provisions of this Part.

80A. High Court to try election petitions [1] The Court having jurisdiction to try an election petition shall be the High Court.

[2] Such jurisdiction shall be exercised ordinarily by a single Judge of the High Court and the Chief Justice shall, from time to time, assign one or more Judges for that purpose:

> Provided that where the High Court consists only of one Judge, he shall try all election petitions presented to that Court.
>
> [3] The High Court in its discretion may, in the interests of justice or convenience, try an election petition, wholly or partly, at a place other than the place of seat of the High Court.
>
> CHAPTER III ELECTORAL OFFENCES Section 125. Promoting enmity between classes in connection with election Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable, with imprisonment for a term which may extend to three years, or with fine, or with both.] Section 125A. Penalty for filing false affidavit, etc A candidate who himself or through his proposer, with intent to be elected in an election, [i] fails to furnish information relating to sub- section (1) of section 33A; or [ii] give false information which he knows or has HC-NIC Page 20 of

> 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT reason to believe to be false; or [iii] conceals any information, in his nomination paper delivered under sub-section (1) of section 33 or in his affidavit which is required to be delivered under sub-section (2) of section 33A, as the case may be, shall, notwithstanding anything contained in any other law for the time being in force, be punishable with imprisonment for a term which may extend to six months, or with fine, or with both].
>
> 8.2 In the constitution of India disqualification of members of both Houses of the Legislature of a State provisions are made.

Article 190 - Vacation of Seats Article 191 Disqualification for membership.

Article 192 is with regard to Decision on questions as to disqualifications of such member, who has become subject to any of the disqualifications mentioned in clause [1] of Article 191 and the question shall have to be referred to the Governor for the decision and such decision of the Governor shall be final. While taking such decision, the Governor shall have to obtain opinion of the Election Commission and shall have to act according to such opinion.

All the above provisions of the Act, 1951 and provisions of Constitution of India reveal an elaborate and extensive mechanism.

8.3 Thus, a detailed provisions are prescribed under the Act, 1951 and in the Constitution of India along with specific Chapter IXA of Indian Penal Code, which is pertaining to offences relation to elections.

8.4 Even in paragraph 5 of the affidavit in reply dated 04.12.2015 filed by Secretary on behalf of Election Commission of India, it is stated as under:

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5. I say that the Election Commission of India has issued a Circular dated 26.04.2014 to the Chief Electoral Officers of All State and Union Territories in respect to the subject of filing false affidavits. A copy of circular is annexed hereto and marked as ANNEXURE R/1 to this Reply. I say that as so explained in the circular, there is no stipulation that complaints under Section 125A have to be made by the public servant i.e. the Officers of the Election Commission i.e. the concerned Returning Officer. It is for the complaint to prove the allegation made by him against the candidate and not for the Election Commission or its machinery which is not in possession of any evidence in this regard. I therefore state and submit that the communication dated 24/7/2015 issued by the CEO, Gujarat is in line with the circular and in accordance thereto it would be open for the Petitioner / Aggrieved person to initiate an appropriate proceeding before the competent court / jurisdiction under Section 125A of the Act. I say that it is not necessary for the Returning Officer to file a complaint and therefore such a complaint can be filed by the complainant/ petitioner herein who has the requisite

information to substantial his allegation to move an appropriate court of law for action under the provisions of Section 125A of the Representation of Peoples Act, 1951.

8.5 As seen above, the petitioner, an arch political rival of respondent No.2, has invoked extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and prayer is made to treat this petition as a Writ Petition [PIL] with prayers to move Election Commission of India to take necessary action under the Act, 1951 in spite of availability of various remedies for redressal of very grievances in accordance with law.

8.6 The petitioner has failed to take any objection at the stage of scrutiny of nomination, as prescribed under Section 36 of the Act, 1950. Prima facie, no allegation of adopting any unfair means or corrupt practice during course of contesting and canvassing the candidature as a HC-NIC Page 22 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT Member of Legislative Assembly of the State of Gujarat by respondent No.2 appears on record, much less any election petition for any irregularity or illegality during the election under Sections 80 or 80A of Act, 1951 under Chapter II Election petition is presented to the High Court challenging election of respondent No.2.

8.7 Thus, nowhere in Section 125A of Act, 1951, it prevents the petitioner from taking action in accordance with law. Without taking recourse to Election Commission or if the Election Commission expresses its inability or declined to take any action in this regard, for which guidelines are issued by way of communication dated 26.04.2014 to all concerned about filing of false affidavit in Form-26, the petitioner has filed the present Public Interest Litigation. It is thus open for the petitioner to file complaint himself before the concerned court having jurisdiction in this regard.

8.8 We have also perused affidavit in reply filed by respondent No.6 about passing of examination for Standard 10th and Standard 12th respectively by the respondent No.2 and that whether mentioning of MBA in the requisite column in the form for declaration about certain information of educational qualification by respondent No.2 and availing such qualification from NIM was in accordance with law or not need not to be tested at this stage, more particularly, when we hold that adequate, efficacious, lawful remedy is available to the petitioner and facts and circumstances of the case do not warrant exercise of extraordinary PIL jurisdiction under Article 226 of the Constitution of India by a specious plea of false declaration about educational qualification by respondent No.2 while contesting election from Vav Constituency of Gujarat State Legislative Assembly in the year 2012.

8.11 In the facts of this case no such objection was raised even at the stage of Section 36 nor any election petition is filed and though the jurisdiction of the Election Commission is wide enough for conduct of smooth and fair elections, we are not convinced that the question raised by the petitioner is of such public importance for which powers can be exercised as prayed for.

8.12 In the case of State of Uttaranchal vs. Balwant Chaufal [2010(1)SCALE 492] the Apex Court has traced out history of PIL and scrutinized various decisions of the Apex Court in this regard and sounded a note of caution to the courts exercising jurisdiction and powers in writ petitions of the nature of PIL to be more cautious and careful to see that the case before such courts involves paramount importance of public at large for which no other statutory provision for redressal of grievances exist.

8.13 Nothing shall be construed in this decision as reflecting to the merit of the compliant of the petitioner against the respondent No.2 for which any action already taken, pending or to be taken before the appropriate court / authority / forum and even any observations made in this order shall have no bearing on such proceedings."

22. Thus, the Division Bench of this Court took notice of the fact that the writ applicant had failed to take any objection at the stage of scrutiny, as prescribed under Section 36 of the Act, 1950. It also observed that, Prima facie, no allegations of adopting any unfair means or corrupt practice during the course of contesting and canvassing the candidature as a Member of the Legislative Assembly of the State is on record. It also took notice of the fact that no election petition for any irregularity or illegality during the election under Sections 80 or 80A of Act, 1951 was presented to the High Court challenging the election of Mr. Chaudhary. The Division Bench also made itself clear that section 125(A) of the Act, 1951, in no manner, prevented the writ applicant from taking action in accordance with law and there was no good reason for the Court to issue a mandamus to the election commission.

23. However, since the Division Bench permitted the writ HC-NIC Page 24 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT applicant to avail the remedy available in law, no fault could be found with the writ applicant in filing a complaint in writing addressed to the Police Officer, In-charge of the concerned police station.

24. The question is to what extent I should interfere, more particularly, when it is the case of the police that no case is made out for registration of the first information report on conclusion of the preliminary inquiry.

25. Without questioning the locus of the writ applicant to file a complaint in writing as regards the commission of a cognizable offence addressed to the police officer, in-charge of the concerned police station, if the same is filed to wreck vengeance, to settle the personal score and is politically motivated, then the Court of law should not come in aid of such complainant to satisfy his personal vengeance.

26. Mandamus is one of the prerogative writs issued by the superior Courts (High Court or Supreme Court), which is in the shape of command to the State, its instrumentality or its functionaries to compel them to perform their constitutional / statutory / public duty.

27. A writ of mandamus is an extraordinary remedy to be invoked only upon special occasion and in exceptional circumstances. It is intended to supply deficiency in law. It cannot be granted merely for the asking but has to be obtained where there is no alternative, efficacious and adequate remedy. It cannot be used as an appeal against the decision of a court, tribunal or an authority exercising statutory HC-NIC Page 25 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT power.It can only be issued as a last resort where the court is satisfied that without its aid there would be failure of justice.

28. Mandamus is an action or judicial proceeding of a civil nature extraordinary in the sense that it can be maintained only when there is no other adequate remedy, prerogative in its character to the extent that the issue is discretionary, to enforce only clear legal rights, and to compel courts to take jurisdiction or proceed in the exercise of their jurisdiction, or to compel corporations, public and private, and public boards, commissions, or officers, to exercise their jurisdiction or discretion and to perform ministerial duties, which duties result from an office, trust, or station, and are clearly and peremptorily enjoined by law as absolute and official (P.R. Aiyar, Advanced Law Lexicon, (2005), Vol. III P. 2873.)".

29. Mandamus is not a writ of right and is not granted as a matter of course (ex debito justitiae). Its grant or refusal is at the discretion of the court. A court may refuse mandamus unless it is shown that there is a clear legal right of the applicant or statutory duty of the respondent and there is no alternative remedy available to the applicant. (Union of India v. S.B. Vohra, (2004) 2 SCC 150)

30. The discretion of the court, however, is not arbitrary and it must be exercised fairly, reasonably and on sound and well- established legal principles.

31. The court in the exercise of discretion must take into account a Wide variety of circumstances. It must consider the facts of the case, the exigency which calls for the exercise of HC-NIC Page 26 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT discretion, the consequences of granting or refusing the writ, the nature and extent of injury likely to ensue by the grant or refusal of the writ, etc. In short, court's discretion must be governed by considerations of public policy, public interest and public good.

32. Before an applicant could get a writ of mandamus or an order in the nature of mandamus, he has to satisfy the court that the following conditions are fulfilled.

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(a)     The applicant has a legal right.
(b)     The opposite party has a legal duty
(c )    The application is made in good faith
(d)     The applicant has no other alternative remedy; and
(e)     The opposite party has refused relief, i.e., demand and
refusal."
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33. To clarify the extracts of decisions of Apex Court explaining the discretionary limitations adopted by the Writ Court while issuing writ of mandamus are as follows :-

(I) Thansingh Nathmal Vs. Supdt. of Taxes, AIR 1964 SC 1419 :-

"The jurisdiction of the High Court under Art. 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or HC-NIC Page 27 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Art. 226, where the petitioner has an alternative remedy which, without being unduly onerous, provides an equally efficacious remedy."

(ii) Nivedita Sharma Vs. Cellular Operators Association of India and Ors. (2011) 14 SCC 337:-

"Rather, it is settled law that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation."

34. The power to issue writ of mandamus has its own well defined self imposed limitations, one of which is availability of alternative efficacious remedy on the basis of which the Writ Court can deny issuance of the said writ unless the following exceptions are found to exist. These exceptions are as follows :-

"(a) Violation of principles of natural justice.

(b) the impugned action being bereft of authority of law.

(c) when the vires of any provision is challenged.

(d) Issue of enforcement / breach of fundamental rights is involved. [vide (1998) 8 SCC 1, Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Ors.,) "

35. The relief as is evident from the grounds raised and the submissions canvassed by the learned counsel appearing for the writ applicant is sought on the basis of the verdict by the Supreme Court in the case of Lalita Kumari vs. State of U.P., (2014) 2 SCC 1, wherein it is held as under;

"In view of the aforesaid discussion, we hold:

i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.

iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the HC-NIC Page 29 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above. "

36. The decision of Lalitakumari (supra) arose out of a petition under Article 32 of the Constitution of India, seeking issuance of writ of habeas corpus or directions of like nature against the respondents therein for the protection of minor daughter who was kidnapped. Although, the Apex Court, while formulating the question in para-6, made reference to sections 156 and 157 of the Code, yet the entire judgment of Lalitakumari and the final directions issued therein center around the statutory obligation of the police to register the offence under section 154 of the Cr.P.C. with only passing reference of sections 156 and 157 of the Code without laying down any law as regards these provisions. The Apex Court, while interpreting the statutory provisions under section 154 Cr.P.C. Said nothing further as regards the remedy available to the informant whose information of commission of the cognizable offence does not invoke any response from the police. The judgment of Lalitakumari (supra), as such, does not lay down any law in respect of the remedies available to the informant under the Cr.P.C to be invoked in cases of the failure on the part of the police to perform its statutory duties under section 154 (1)/154(3) Cr.P.C as a sine qua non for seeking a HC-NIC Page 30 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT writ of mandamus.

37 In this context, reference can be had of the decision in Priyanka Srivastava vs State of U.P. (2015) 6 SCC 287, wherein their Lordships, while dwelling upon the issue as arises for consideration in the present petition, were pleased to observe:

> "26. At this stage, we may usefully refer to what the Constitution Bench has to say in Lalita Kumari v. Govt. of U.P. in this regard. The larger Bench had posed the following two questions:-
>
> "(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and
>
> (ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

Answering the questions posed, the larger Bench opined thus:

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty- bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

. .

72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent. ..

111. The Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence. ..

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the

allegations in the complaint."

After so stating the Constitution Bench proceeded to state that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. After laying down so, the larger Bench proceeded to state:-

"120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in HC-NIC Page 32 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT which preliminary inquiry may be made are as under:

(a) Matrimonial disputes/family disputes

(b) Commercial offences

(c) Medical negligence cases

(d) Corruption cases

(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry."

We have referred to the aforesaid pronouncement for the purpose that on certain circumstances the police is also required to hold a preliminary enquiry whether any cognizable offence is made out or not.

27. Regard being had to the aforesaid enunciation of law, it needs to be reiterated that the learned Magistrate has to remain vigilant with regard to the allegations made and the nature of allegations and not to issue directions without proper application of mind. He has also to bear in mind that sending the matter would be conducive to justice and then he may pass the requisite order. The present is a case where the accused persons are serving in high positions in the bank. We are absolutely conscious that the position does not matter, for nobody is above law. But, the learned Magistrate should take note of the allegations in entirety, the date of incident and whether any cognizable case is remotely made out. It is also to be noted that when a borrower of the financial institution covered under the SARFAESI Act, invokes the jurisdiction under Section 156(3) Cr.P.C.

and also there is a separate procedure under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, an attitude of more care, caution and circumspection has to be adhered to.

28. Issuing a direction stating "as per the application" to HC-NIC Page 33 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT lodge an FIR creates a very unhealthy situation in the society and also reflects the erroneous approach of the learned Magistrate. ..

..

30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an the application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

38. Similarly, in Ramdev Food Products Private Limited vs State of Gujarat (2015) 6 SCC 439, their Lordship, while placing reliance on the decision in Lalita Kumari (supra), were pleased to observe :

> "19. Thus, this Court has laid down that while prompt registration of FIR is mandatory, checks and balances on power of police are equally important. Power of arrest or of investigation is not mechanical. It requires application of mind in the manner provided. Existence of power and its exercise are different. Delicate balance had to be maintained between the interest of society and liberty of an individual. Commercial offences have been put in the category of cases where FIR may not be warranted without enquiry."

39. In Divine Retreat Centre v. State of Kerala (2008) 3 SCC 542, while dwelling upon the scope of indulgence in a petition under Article 226 of the Constitution of India and relying on the decision in Gangadhar Janardan Mhatre vs State of Maharashtra (2004) 7 SCC 768, their Lordships were pleased to hold :

> "42. Even in cases where no action is taken by the police on the information given to them, the informants remedy lies under Sections 190, 200 Cr. P.C., but a Writ Petition in such a case is not to be entertained. This Court in Gangadhar Janardan Mhatre (supra) held:
>
> "13. When the information is laid with the police, but no action in that behalf is taken, the complainant is given power under Section 190 read with Section 200 of the Code to lay the complaint before the Magistrate having jurisdiction to take cognizance of the offence and the Magistrate is required to enquire into the complaint as provided in Chapter XV of the Code. In case the Magistrate after recording evidence finds a prima facie case, instead of issuing process to the accused, he is HC-NIC Page 35 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT empowered to direct the police concerned to investigate into offence under Chapter XII of the Code and to submit a report. If he finds that the complaint does not disclose any offence to take further action, he is empowered to dismiss the complaint under Section 203 of the Code. In case he finds that the complaint/evidence recorded prima facie discloses an offence, he is empowered to take cognizance of the offence and would issue process to the accused. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees Union (Regd.) V. Union of India. It was specifically observed that a writ petition in such cases is not to be entertained. These aspects have been highlighted by this Court in All India Institute of Medical Sciences Employees Union (Regd.) vs Union of India (1996) 11 SCC 582. It was specifically observed that a writ petition in such cases is not to be entertained."

40. Similar view has been expressed in Aleque Padamsee v. Union of India (2007) 6 SCC 171, Sakiri Vasu v. State of Uttar Pradesh (2008) 2 SCC 409 and Kunga Nima Lepcha v. State of Sikkim AIR 2010 SC 1671.

41. Furthermore, scope of interference in a petition under Article 226 of the Constitution has been delineated in Sudhir Bhaskarrao Tambe vs. Hemant Yashwant Dhage (2016) 6 SCC 277, wherein it is held -

> "2. This Court has held in Sakiri Vasu v State of U.P. (2008) 2 SCC 409 that if a person has a grievance that his FIR has not been registered by the police, or having been registered, proper investigation is not being done, then the remedy of the aggrieved person is not to go the High Court under Article 226 of the Constitution of India, but to approach the Magistrate concerned under Section 156(3) CrPC. If such an application under Section 156(3) CrPC is made and the Magistrate is, prima facie, satisfied, he can direct the FIR to be registered, or if it has already been registered, he can direct proper investigation to be HC-NIC Page 36 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT done which includes in his discretion, if he deems it necessary, recommending change of the investigating officer, so that a proper investigation is done in the matter. We have said this in Sakiri Vasu case because what we have found in this country is that the High Courts have been flooded with writ petitions praying for registration of the first information report or praying for a proper investigation.
>
> 3. We are of the opinion that if the High Courts entertain such writ petitions, then they will be flooded with such writ petitions and will not be able to do any other work except dealing with such writ petitions.

Hence, we have held that the complainant must avail of his alternate remedy to approach the Magistrate concerned under Section 156(3) CrPC and if he does so, the Magistrate will ensure, if prima facie he is satisfied, registration of the first information report and also ensure a proper investigation in the matter, and he can also monitor the investigation."

42. The Supreme Court in the case of Rajinder Singh Katoch vs. Chandigarh Administration, reported in AIR 2008 SC 178 took the view that if the authorities bound by law have investigated into the matter and found that the allegations made by the complainant are not correct or do not disclose commission of any cognizable offence, then it would not be proper for the Supreme Court to issue any direction to lodge a first information report. I may quote the relevant observations made by the Supreme Court;

> "In any event, in a case of this nature where the authorities bound by law have already investigated into the matter and found that the allegations made by the appellant against respondent No.4 were not correct, it would not be proper for us to issue any direction to the respondent Nos.1 to 3 to lodge a first information report. We are not oblivious to the decision of this Court in Ramesh Kumari v. State (NCT of Delhi) & Ors. [(2006) 2 SCC 677] wherein such a statutory duty has been found in the Police Officer. But, as indicated hereinbefore, in an HC-NIC Page 37 of 39 Created On Sun Aug 13 22:19:53 IST 2017 R/SCR.A/1417/2017 JUDGMENT appropriate case, the Police Officers also have a duty to make a preliminary enquiry so as to find out as

to whether allegations made had any substance or not

43. I am at one with Mr. Jani, the learned Additional Advocate General appearing for the State that assuming for the moment that the police officer, in the case at hand, committed a mistake in reaching to the satisfaction as to whether the allegations are sufficient to attract the ingredients of commission of a cognizable offence or not, this Court, in exercise of its writ jurisdiction under Article 226 of the Constitution of India, should not go into the question as to whether the non-satisfaction of the police officer is proper or not to issue a writ of mandamus or any other writ directing the police officer to register the first information report as it is a matter to be considered by the Magistrate under section 190 read with section 200 of the Code on a complaint filed by the aggrieved party on account of the inaction on the part of the police in not registering the first information report in such cases.

44. I have no doubt in my mind that this writ application is nothing but an outcome of the personal vendetta and actuated by political considerations. What is the writ applicant trying to prove or achieve?. It is so obvious that the person against whom allegations have been levelled being an arch political rival of the writ applicant, all attempts are sought to be made to malign him. I am conscious of the position of law that if otherwise an offence is made out then the malafides, by itself, will not be sufficient to ignore the offence.

45. I would not like to observe anything further as it

come in the way of the writ applicant if he decides to avail the remedy under section 200 of the Cr.P.C., but I would definitely like to say that the High Court should be loath and circumspect in entertaining the writ applications of the present nature, more particularly, when the same is actuated by bias, malice and politically motivated. In a given case, having regard to the serious nature of the crime and dereliction of duty on the part of the police, the High Court may be justified in issuing a writ of mandamus to register the first information report, but the case should be of such a nature and not like the one at hand.

46. In view of the above, this writ application fails and is hereby rejected. It shall be open for the writ applicant to avail of the legal remedy under section 200 of the Cr.P.C.. If the writ applicant files any complaint in the court concerned, then the same shall be looked into expeditiously on its own merits in accordance with law without , in any manner, being influenced by any of the observations made by this Court in this order or without being influenced, in any manner, by the reasons

assigned in the communication dated 6th January, 2017 of the police officer concerned addressed to the writ applicant. The Magistrate concern shall apply his own mind and look into the averments made in the complaint as well as the materials on record and take an appropriate decision in that regard.

(J.B.PARDIWALA, J.) Vahid HC-NIC Page 39 of 39 Created On Sun Aug 13 22:19:53 IST 2017