IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 270 OF 2009

ALONG WITH
CRIMINAL WRIT PETITION NOS.1445 OF 2009, 2031 OF 2009, 2408 OF 2009, 2737 OF 2009 AND 2883 OF 2009

CRMINAL WRIT PETITION NO. 270 OF 2009

1) Mr.Panchabhai Popotbhai Butani)

Age 50 years, Occ. : Business)

2) Bhanubhai Ravjibhai Talaviya)
Age 48 years, Occ. : Business)

3) Jitendra L. Chheda)
Age 42 years, Occ. : Business)

4) M/s Jay Enterprises)
A partnership firm through its partners)
Petitioner Nos.1 to 3, all having address)
at Gouripada, Behind Survodaya Heights)
Building, Near New R.T.O. Office, Birla)
School Road, Kalyan (W), 421 301.)..PETITIONERS

VERSUS

1) The State of Maharashtra)
through Senior Inspector, Mahatma Phule)
Police Station, Kalyan.)

2) M/s Satyam Shelters Pvt. Ltd.)
A Company duly registered under the)
provision of Companies Act, having its)
registered office at BC, 2nd Floor,)
Sudhanshu Chambers, Shivaji Path)
Kalyan (W), through its Director)
Mr. Kundanmal Jiandmal Wadhwa)

3) Hasmukh Vrajlal Dave)

4) Milind Yashwant Parlikar)
Respondent Nos.3 and 4, Directors of)
Respondent No.2, having the same)
address as that of Respondent No.2)..RESPONDENTS

WITH
CRMINAL WRIT PETITION NO.1445 OF 2009

1) Enercon GmbH, a company incorporated)
and existing under the laws of Germany)
and having its registered office at)
Dreekamp 5, D26605, Aurich, Germany.)

2) Dr. Aloys Wobeen, German Inhabitant)
having his office at Dreekamp 5, D26605)
Aurich, Germany.)

3) Hans-Dieter Kettwig, German Inhabitant)
having his office at Dreekamp 5, D26605)
Aurich, Germany.)

4) Stefan Knottnerus Meyer, German)
Inhabitant, having his office at Dreekamp)
5, D 26605, Aurich Germany.)

5) Wolfgang Juilfs, German Inhabitant)
having his office at Dreekamp 5, D26605)
Aurich, Germany.)

6) Nicole Fritsch-Nehring, German Inhabitant)
having her office at Dreekamp 5, D26605)
Aurich, Germany.)

7) Christoph Buttner, German Inhabitant)
having his office at Dreekamp 5, D26605)
Aurich, Germany.)

8) Warner Popkes, German Inhabitant)
having his office at 26789 Leer, Germany)

9) Rainer Boehm, German Inhabitant)
having his office at Zippelhaus 5, 20457)
Hamburg, Germany.)..PETITIONERS

VERSUS

1) The State of Maharashtra (through the)
Sr. Inspector of Police, Economic Offences)
Wing – Unit III, Crime Branch, CID)
Compound of the Office of Commissioner)
of Police, Brihan Mumbai, Annex Building)
III, 2nd Floor, Near Phule Market)
Mumbai 400 001.)

2) Yogesh J Mehra, Indian Inhabitant)
residing at 101, Hare Krishna Residency)
Society, J.V.P.D. Scheme, North South)
Road No.8, Vile Parle (W), Mumbai 400049)
and having his office at Plot No.9A,)
Veera Desai Road, Andheri (West),)
Mumbai 400 053.)

3) The Senior Inspector of Police)
Oshiwara Police Station, Mumbai.)..RESPONDENTS

WITH
CRMINAL WRIT PETITION NO.2031 OF 2009

George Punnackal Joseph)
Indian Inhabitant of Mumbai, age 60 years,)
Senior Citizen, having his Mumbai office at)
Leo Land, Leo Hill Road, I.I.T., P.O. Powai)
Mumbai 400 076, carrying on business in the)
name and style of M/s.G.F. Builders, as a)
Sole Proprietor thereof and presently residing)
at C.P.1/2, Leo Punnackal, South Chellanam,)
Cochin 682008, Kerala.)..PETITIONER

VERSUS

1) The State of Maharashtra)
through Senior Inspector of Police)
Bhandup Police Station, Bhandup (W))
Mumbai 400 078.)

2) Dasharath Patil)
Inspector of Police and Investigation)
Officer, Bhandup Police Station)
Bhandup (W), Mumbai 400 078.)

3) Digamber Rajaram Nakashe)
of Mumbai, Indian Inhabitant residing at)
279/B-26, 1st Floor, Sambhaji Nagar,)
N.M. Joshi Marg, Mumbai 400 013.)..RESPONDENTS

WITH
CRMINAL WRIT PETITION NO.2408 OF 2009

1) Prabodh Artha Sanchay Pvt. Ltd.)
A Company registered under Companies)
Act, 1956 and having its office at Prabodh)
1070, Shukrawar Peth, Subhashnagar)
Lane No.5, Pune 411 002.)

2) Mr. Mohan Chimanlal Gujarati)

3) Mr. Ramchandra Sadashiv Dimble)
both Indian Inhabitants having their)
address at Prabodh, 1070, Shukrawar Peth)
Subhashnagar, Lane No.5, Pune 411002.)..PETITIONERS

VERSUS

1) M/s. Synthesis Equity Research Foundation)
Pvt. Ltd., a company registered under the)
Companies Act, 1956, and having its office)
at 32 Artek, Yojak Apartment, Madhusudan)
Kalelkar Marg, Bandra (East),)
Mumbai 400 051.)

2) The State of Maharashtra)
through the Public Prosecutor)
High Court, (A.S.), Bombay.)

3) The Senior Inspector of Police)
MRA Marg Police Station, Mumbai.)..RESPONDENTS

WITH
CRMINAL WRIT PETITION NO.2737 OF 2009

Shri D.M. Mehta)
Age 44 years, Occ.: Business)
R/o. 202, Vasant Gandhi Gram Road)
Juhu, Mumbai 400 049.)..PETITIONER

VERSUS

1) Niket Mehta)
Residing at 12th Floor, Lilavati Hospital)
Bandra Reclamation, Bandra (West))
Mumbai 400 050.)

2) State of Maharashtra)
through the Public Prosecutor)
High Court, Bombay.)..RESPONDENTS

WITH
CRMINAL WRIT PETITION NO.2883 OF 2009

1) Jignesh Jasvantrai Shah)

2) Aruna Jasvantrai Shah)

3) Kaushik Jasvantrai Shai)

4) Hemal Kaushik Shah)
All Adults, All partners of Crescent)
Builders, a partnership firm regd. Under)
the provisions of Indian Partnership Act,)
1932, having their office at E-1/15,)
Bharat Nagar, 342, Maulana Shaukat)
Road, Mumbai 400 007.)..PETITIONERS

VERSUS

1) Shapoorji Pallonji & Co. Ltd.)
a Company having its registered office)
at 70 Nagindas Master Road, Fort)
Mumbai 400 023 through its)
representative Mrs.Alpa Kapadia having)
her office at S.P. Mistry Building, Ground)
Floor, Shop No.2, R.K. Shirodkar Marg)
Parel, Mumbai 400 012.)

2) Senior Inspector of Police)
Bhoiwada Police Station)
Bhoiwada, Dadar, Mumbai.)

3) State of Maharashtra)..RESPONDENTS

Mr. D.S. Mhaispurkar for the Petitioner in W.P. No.270/2009.

Mr. Satish Maneshinde, Senior Advocate, a/w Mr. Ashish Chavan and Mr. Vivek Vashi i/b M/s.Bharucha & Partners for the Petitioners in W.P. No.1445/2009.

Mr. Shirish Gupte, Senior Advocate, i/b Mr. A.R. Pande for the Petitioners in W.P. No.2031/2009.

Mr. Shirish Gupte, Senior Advocate, a/w Mr. Gaurav Agrawal and Ms.Urvashi Tapas i/b M&M Legal Venture for the Petitioners in W.P. No.2408/2009.

Mr. Ayaz R. Khan a/w Nilofar Sayed for the Petitioners in W.P. No.2737/2009.

Mr. Shirish Gupte, Senior Advocate, a/w Mr. S.A. Sawant, Mr.H.V. Kode and Mr. Sachin Kadam for the Petitioners in W.P. No.2883/2009.

Mr. K.V. Sasta, Additonal Public Prosecutor, for the State in all the Writ Petitions.

Mr. Sharif Shaikh, Mr. Y.K. Mirza and Mr. Santosh Pal for Respondent Nos.2 to 4 in W.P. No.270/2009.

Mr. Amit Desai, Senior Advocate, a/w Mr. Samsher Garud, Mr. Pankaj Sutar and Mr. N. Chaudhary i/b. Khaitan & Jayakar for Respondent No.2 in W.P. No.1445/2009.

Mr. S.G. Shirsat for Respondent No.3 in W.P. No.2031/2009.

Mr. K.G. Menon, Senior Advocate, a/w Mr. J.L. Phoujdar for Respondent No.1 in W.P. No.2408/2009.

Mr. A.P. Mundargi i/b Mr. V.V. Purvant for the Respondents in W.P. No.2883/2009.

CORAM : SWATANTER KUMAR, C.J.,
A.M. KHANWILKAR AND
SMT. R.S. DALVI, JJ.

JUDGMENT RESERVED ON : 25TH NOVEMBER 2009
JUDGMENT PRONOUNCED ON : 10TH DECEMBER 2009

JUDGMENT : (PER SWATANTER KUMAR, C.J.)

Preamble of our Constitution guarantees to a citizen justice, liberty, equality and fraternity. All these are possible only when there is rule of law. The rule of law could discernibly be dissected into two well accepted concepts : (i) governance and (ii) administration of justice. They are not only the pillars of the Constitutional mandate, but are linchpin to the growth, development and independence of any nation or society. Governance obviously means good governance and it refers to the task of running the Government in an effective manner. Right to a legitimate and accountable government under which fundamental rights and human rights are respected and the Government controlled by the rule of law are the basic elements of good governance. Rule of law indicates good governance which requires fair legal framework that enforce law impartially. Impartial enforcement of laws requires an independent judiciary and an impartial and incorruptible police force.

2. Edward W Younkins in "The Purpose of Law and Constitutions" has noted, "The rule of law requires that people

should be governed by accepted rules, rather than by the arbitrary decisions of rulers. These rules should be general and abstract, known and certain, and apply equally to all individuals." Law is the activity of subjecting human behaviour to the rules of governance. The rule of law is concerned with regulating the use of power and its imperative is that this power is not misused. The rule of law ensures that Judges decide disputes in terms of the existing, known and general rules and not according to the perceived desirability of particular outcomes. In a free society, each person has a recognized private sphere, a protected rule which government authority cannot infringe upon and the purpose of law is to preserve freedom and moral agency. (See : www.quebecoislibre.org).

3. Where rule of law is strong, people uphold the law not out of fear but because they have a stake in its effectiveness. Virtually any State, after all, can enact laws and maintain respect and pursue genuine rule of law. Genuine rule of law requires the cooperation of State and society and is an outcome of complex and deeply rooted social processes. (Ref.: "Good Governance: Rule of Law, Transparency and Accountability" by Michael Johnston, Department of Political Science, Colgate University).

4. The primary purpose of law is to regulate the flow of human interaction to prevent and check harm not only to the person and property of an individual but against the society as a whole. Crime is the main reason people believe that societies have law, which is true. If one looks at the expression "crime", it normally could be explained as what society as a whole does not want to be allowed. The Legislature has created laws to have the security to live and work in peace and harmony and not having to worry about concentrating on ways and means to protect themselves against crime of any kind. (Ref.: http:// cjencyclopedia.com/index.php? title-Purpose of Law).

5. Within the realm of codified laws, there are generally two forms of laws with which the Courts are mainly concerned. Civil laws are rules and regulations which govern transactions and grievances between individuals, while criminal law is concerned with action which are dangerous or harmful to a society as a whole in which prosecution is pursued not by an individual but rather by the State. The purpose of criminal law is to provide the specific definition of what constitutes a crime and to prescribe punishments for it. In absence of any of these factors probably the essentials of

criminal law would not be satisfied. (Ref.: Criminal justice – Wikipedia, the free encyclopedia – http://en.wikipedia.org.).

6. It is not only the obligation of the State administration but for that matter even of the Courts to ensure that a fair and effective criminal justice system is in place and is implemented. Administration of criminal justice system has two primary facets – investigation and trial leading to punishing the guilty offender.

7. In India, the administration of criminal justice system is controlled under the provisions of the Criminal Procedure Code, 1973 (hereinafter referred to as "the Code"). Like in many other parts of the world, under the Indian criminal jurisprudence, the system accepts two procedures for redressing the grievance of a victim against the offender including that by the State itself. The Criminal Procedure Code is concerned with "how the law is enforced". Criminal law involves "what law is enforced".

8. The two accepted methods for enforcing administration of criminal justice system are a direct access and invocation of the Courts system, while the other is adopting the channel through the State agency. (Police/Investigating agency). The option is available

to a complainant or a victim or anybody for that matter and the provisions of the Code provide a detailed statutory scheme for invocation, implementation, trial and punishment of a guilty person under these different methodologies. In the event a person chooses to approach a police station and makes a report of a cognizable offence, the police is under an obligation to register First Information Report (FIR) except in certain exceptional cases where some kind of preliminary inquiry may be necessary in the facts and circumstances of that case before registration of an FIR. However, even there, the officer in charge of a police station is under obligation to make an entry in the daily diary register as per police rules and thereafter within the shortest possible time must register an FIR in accordance with law. (Ref.: *Sandeep Rammilan Shukla v State of Maharashtra*, **2009 (1) Mh.LJ 97**).

9. Where a person has approached the police station under Section 154 but the police station does not register FIR as contemplated under law, he has a right to make a complaint to the higher authorities in terms of Section 154(3) of the Code and such higher authority exercising the powers of an officer incharge of a police station would investigate the matter himself or direct the investigation to be conducted by another police officer subordinate to

him. In the event the information of any kind received by the police officer incharge of a police station relates to commission of a non-cognizable offence, he is obliged to proceed in accordance with the provisions of Section 155 of the Code. The Legislature provides a specific protection in terms of Section 156(3) of the Code and gives a right to a person to approach the court of competent jurisdiction for issuance of a direction to a police officer to investigate the matter in accordance with law. Once the investigation is completed by the investigating agency, it is required of the said agency to file appropriate report in terms of Section 173 of the Code, whereupon the Court competent to try such an offence would take cognizance and conduct the trial and punish the offender, if found guilty, in accordance with law.

10. The other branch of the procedural law under the Code is where any one may approach the Court of competent jurisdiction by institution of a complaint in terms of Section 200 of the Code. Once such a complaint is filed and it is shown to the satisfaction of the Magistrate taking cognizance of the offence that offence has been committed, he shall follow the procedure prescribed under Chapter XV of the Code. Interestingly, even when a complaint is received by the Magistrate in terms of Section 200 of the Code, he can issue

summons, conduct an inquiry himself or direct an investigation to be made by a police officer or such other person as he thinks fit.

11. The Magistrate exercising powers under Section 159 is also expected to proceed with the matter in accordance with the provisions of the Code upon receipt of the report in terms of Sections 157 and 158 and either direct an inquiry by a Magistrate subordinate to him or may direct investigation.

12. This is the entire gamut of procedure for any one desirous of putting a criminal justice system into motion. In fact, as stated by the Supreme Court in the case of *A.R. Antulay v Ramdas Sriniwas Nayak and another*, **(1984) 2 SCC 500**, it was clearly stated that scheme underlying the Code of Criminal Procedure clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a police station. It also stated that it was open to the Magistrate but not obligatory upon him to direct investigation by police. Thus, two agencies have been set up for taking offenders to the Court. These observations of the Supreme Court, of course, were made where the Court was not concerned with the ambit, scope and application of

the provisions of Section 154 and for that matter Section 156 of the Code.

13. The purpose of indicating the above enunciated law is to demonstrate that a codified law, as accepted by judicial dictums, only accepts two distinct procedures to be adopted by any one desirous of invoking the provisions and/or putting the mechanism of criminal justice system into motion.

14. A Division Bench of this Court in the case of *Jitendra Chandrakant Mehta v M/s Shamrock Impex Pvt. Ltd. and others*, **2006 Cri.L.J. 3131**, took the view that absence of any prayer of taking action against the accused, does not affect the legality and validity of the complaint. Once the complaint gives the essential ingredients of the offence, the complaint could not be treated as defective. Discussing the scope of Section 156(3) of the Code, the Bench held as under :-

> "18. ….. When Vijay Shankar Nigam lodged the report, police registered an offence and started investigation. Thereafter, the said Vijay Shankar Nigam moved the Magistrate having jurisdiction to take cognizance of the offence that the false report has been lodged against him and therefore by invoking the powers under section 159 of the Code of Criminal Procedure that investigation may

> be stopped and the Magistrate may make further preliminary enquiry. The Magistrate allowed that prayer. The matter went to the High Court. The High Court quashed the order of the Magistrate and held that police were at liberty to conclude the investigation and submit their report to the Magistrate. In that background, the matter went to the Supreme Court. Obviously, the issue before the Supreme Court was whether the Magistrate has powers under section 159 of the Criminal Procedure Code to stop investigation, as prayed. In view of this background, the aforesaid observations of the Supreme Court heavily relied upon by Mr.Chitnis are of no use to him. We do not agree with his submissions and his contention that before filing of the complaint before the Magistrate in respect of cognizable offence without approaching the police, is required to be rejected, and is hereby rejected."

15. Another Division Bench of this Court in the case of *Panchabhai Popotbhai Butani and others v The State of Maharashtra and others*, (**Writ Petition No. 270 of 2009 dated 14th August 2009**) formed the opinion that the Bench was to agree with the conclusions arrived at by the Division Bench in the case of *Jitendra C Mehta* (supra) and directed that the matter may be placed before a larger Bench vide its order dated 14th August 2009. The order of reference reads as under :-

> "1. This petition raises question about the scope of Section 156(3) of the Criminal Procedure Code as to whether in the absence of a complaint to the police, a complaint can be made directly before a

> Magistrate. It also raises a question as to whether without filing a complaint within the meaning of Section 2(d) and praying only for an action under Section 156(3) a complaint before a Magistrate was maintainable. There is a judgment of this Court (Jitendra Chandrakant Mehta v M/s.Shamrock Impex Pvt. Ltd. and others) reported in 2006 (4) Mh.LO.J. 355. We feel large number of cases come to this Court which raises same questions of law and, therefore, this issue needs to be decided by a Larger Bench as we do not find ourselves in agreement with some of the conclusions of the earlier Division Bench. Let the matter be placed before the Hon'ble the Chief Justice for transmission before a Full Bench. ……"

16. From the bare reading of the above Order of Reference, it appears to contain two questions, namely, (i) whether in absence of a complaint to the police, a complaint can be made directly before a Magistrate ? and (ii) whether without filing a complaint within the meaning of Section 2(d) and praying only for an action under Section 156(3), a complaint before a Magistrate was maintainable ?

17. The first question primarily is a question of law simplicitor, while the later relates to the procedural aspect of the same facet of law. The Bench probably was not able to contribute to the view of the Division Bench in *Jitendra Mehta* (supra) that before filing of a complaint before a Magistrate in respect of a cognizable offence, it was not necessary to approach the police. In other words,

the question raised is as to whether filing of a complaint under Section 154 is a condition precedent to invocation of powers of the Magistrate under Section 156(3). The other aspect relates to the format and contents of a complaint/application filed under Section 156(3) of the Code. The earlier Division Bench in *Jitendra Mehta* (supra) had taken the view that the complaint if not containing detailed facts or where there is absence of any specific prayer would not affect the legality and validity of the complaint and the Magistrate competent to take cognizance under Section 190 of the Code was competent to issue directions for investigation in terms of Section 156(3) of the Code.

18. Number of matters were directed to be placed before the Full Bench in view of the Order of Reference made in Writ Petition No.270 of 2009. We are of the considered view that it would be appropriate to refer to necessary facts which led to passing of the Order of Reference. We would be referring only to the limited facts and that too in Criminal Writ Petition No.270 of 2009 and Criminal Writ Petition No.2883 of 2009.

19. In Criminal Writ Petition No.270 of 2009, Respondent No.2 had entered into a registered development agreement on 9th

July 1997 with one Krishna Hari Tiwari in respect of a land admeasuring 6309.19 sq.mtrs. of Survey No.38, Hissa No.1/1 situated at Mauje Gauripada, Taluka Kalyan, District Thane. Respondent No.2 was not able to complete the development agreement and he further agreed to transfer the development rights in favour of Petitioner No.2 by means of a Memorandum of Understanding dated 25th May 2002. Certain rights and obligations were created by the respective parties by means of these documents. Petitioners were to give an additional area of 2000 sq.ft. to the original owner and deposit a sum of Rupees Four lakhs with Respondent No.2 for due performance of the agreement. To implement the agreement between the parties effectively, Respondent No.2 also executed a Power of Attorney dated 24th February 2003 in favour of the Petitioners. The Petitioners initially carried out the development of the said property. Certain disputes arose between the parties. According to the Petitioners, they had carried out the development in terms of the agreement between the parties and even handed over the flats to Respondent No.2, while, according to Respondent No.2, he had disputed the complete and effective execution of the development agreement which was denied by the Petitioners who stated that disputes created by Respondent No.2 were frivolous. Certain demands were raised by the respective

parties against one another. The original owners of the property also raised a dispute that the flats had not been allotted to them as agreed. The KDMC issued a completion certificate on 16th October 2007. Certain correspondence was exchanged between the parties through their Counsel and allegations made by each other were refuted. Somewhere on 15th April 2008, the Petitioners claimed to have handed over the area of 7000 sq.ft. and the original owners executed a writing releasing the Petitioners as well as Respondent No.2 from any liability. Respondent No.2 proceeded with their application that Petitioners had committed the breach of directions of the agreement and not handed over the requisite flat areas to the original owners and the deed was a forged document. On these averments, Respondent No.2 filed a criminal case being Case No. 344/2008 before the learned JMFC Court No.1, Kalyan and prayed in the application that under Section 156(3), the Court should direct the police station to investigate the matter and take appropriate action. Upon the application of Respondent No.2, the Magistrate passed an order directing the concerned police station to investigate the matter. In furtherance thereto, on 8th October 2008, the concerned police station registered an FIR being FIR No.1/369 for an offence under Sections 420 read with 34 IPC. Upon registration of this FIR, Petitioner Nos.1 to 3 were arrested and subsequently

released on bail. Compelled with these circumstances, the Petitioners filed the present Petition on 31st January 2009 praying that CR No.1/369 of 2008 under Section 420 read with 34 IPC registered at Mahatma Phule Police Station be quashed with an interim prayers that the proceedings in furtherance thereto be stayed. The quashing of the FIR was prayed on different grounds including the one that it was a dispute of a civil nature, the complaint was mala fide and the offence of forgery was not made out. It may be noticed that when the matters came up for hearing before the Court, the objection was taken that the Respondent in the Petition had not invoked the provisions of Section 154 of the Code before filing an application under Section 156(3).

20. In other Criminal Writ Petition No. 2883 of 2009, the dispute relates to the property CS No.1/725 (Part) of Malabar Hill Division, the land which was acquired by the Municipal Corporation consisting of 14 structures with nearly 278 tenants who had formed a society on 9th July 1996 and submitted a proposal under Section 33(7) of the DC Regulations, 1991 to the Competent Authority. This was approved finally vide resolution of the Corporation No.752 dated 15th October 1996. A Memorandum of Undertaking was executed between M/s.Crescent Builders and the Society on 17th October 1996

for carrying out the re-development work. Tri-partite agreement was entered into on 16th July 1998 between the Corporation, Society and the Petitioners for providing 278 tenements of 225 sq.ft. each and the Petitioners were permitted to sell 35,392 sq.ft. area in open market. This claim was modified in view of the amendment of Regulation 33(7) of the Development Control Regulations in the year 1999. After issuance of the IOD and NOC in 2005/2006, supplementary agreement was entered into between the Petitioners, Respondent No.1 for opening an escrow account for depositing capitalized value. The said agreement became redundant and another agreement was entered into on 24th August 2007 between the Petitioner firm and Respondent No.1 for purchase of additional FSI of approximately 40000 sq.ft. Litigation with the Corporation was also pending in the Court where after Respondent No.1 filed a Suit in this Court praying that the agreement dated 8th January 1997, 29th June 1997, 24th August 2007 are valid, subsisting and binding and that the Petitioners should be compelled to act in terms thereof. The Petitioners have also filed a Writ Petition No.72 of 2009 challenging the action of the Corporation. The order passed by the Deputy Municipal Commissioner was upheld by the Court vide its order dated 13th August 2009. The order is assailed before the Supreme Court which is stated to be pending. However, in the

meanwhile, on 4th September 2009, Respondent No.1 filed a complaint under Sections 409, 467, 468, 471, 420 read with 34 and 120B IPC before the Metropolitan Magistrate 29th Court at Dadar, Mumbai, praying that the matter be referred for investigation under Section 156(3) and for a report under Section 173(8) of the Code. On this application, on the same day, the Metropolitan Magistrate passed an order directing the Bhoiwada Police Station to investigate the matter in accordance with law, in furtherance to which on 21st September 2009, FIR No MECR 8/2009 for offences under Sections 409, 467, 468, 471, 420 read with 34 IPC is registered. These Petitioners have, therefore, filed the present Writ Petition No.2883 of 2009 under Section 482 of the Criminal Procedure Code for setting aside the order dated 4th September 2009 passed by the Metropolitan Magistrate and also praying for an interim order for stay of the proceedings.

21. Somewhat similar are the facts in other Writ Petitions which had been listed before us. All these matters relate to disputes which are of commercial nature with regard to the offence of cheating, forgery, etc. Even in Writ Petition No.2408 of 2009, the concerned Division Bench dealing with the matter on 17th September 2009 passed an order that the question raised in the Petition was

similar as raised in Writ Petition No.270 of 2009 and, therefore, directed that the matter be listed before this Bench. In other words, all these matters have been listed for answering the question of law as framed by the Bench in Criminal Writ Petition No.270 of 2009.

22. At the very outset, we must notice that none of these cases appears to be of such nature of urgency that time could be treated as the essence. These were primarily commercial transactions and parties themselves have approached the Court by invoking the provisions of Section 156(3) after more than years from the date of entering into agreement and alleged breach of the terms of the agreement or alleged commission of the offence of cheating or forgery.

23. In order to appropriately answer the questions formulated by the Bench in the Order of Reference, it will be desirable to examine the scheme under the Code with particular reference to the matters in issue before us.

24. The Code of Criminal Procedure was subjected to amendments of far reaching consequences on the basis of the recommendations of the Law Commission which were accepted by

the Government. The main considerations were that an accused person should get a fair trial in accordance with the accepted principles of natural justice, every effort should be made to avoid delay in investigation and trial which is harmful not only to the individuals involved but also to the society and the procedure should not be complicated and should ensure fair deal to the poorer section of the community. All these considerations were intended to achieve expeditious and fair trial obviously including the process of investigation. We have, at the opening part of the judgment, clearly stated the two distinct and different procedures which can be adopted by an intending complainant or any person who wishes to set into motion the machinery of criminal investigation and trial under the provisions of the Code. Both these prescribed procedural methodologies operate in different fields and have no intersecting fields of conflict, rather they could come to the aid of the complainant for better enforcement and implementation for fair and expeditious disposal. The Code of Criminal Procedure is an exhaustive Code providing for a complete machinery to investigate and try cases, appeals against the judgments. It has provisions at each stage to correct errors, failures of justice and abuse of process under the supervision and superintendence of the High Court. This aspect was noticed by the Supreme Court in some detail in the case

of *Popular Muthiah v State represented by Inspector of Police*, **(2006) 7 SCC 296**. The same reads as under :

> "21. The Code of Criminal Procedure is an exhaustive code providing a complete machinery to investigate and try cases, appeals against the judgments. It has provisions at each stage to correct errors, failures of justice and abuse of process under the supervision and superintendence of the High Court as would be evident from the following :
>
> (i) The Court has the power to direct investigation in cognizable cases under Section 156(3) read with Section 190 of the Code of Criminal Procedure.
>
> (ii) A Magistrate can postpone the issue of process and inquire into the case himself under Section 202(1) of the Code of Criminal Procedure.
>
> (iii) When a charge-sheet is filed, the court can refuse to accept the same and proceed to take cognizance of the offence on the basis of the materials on record. The court can direct further investigation into the matter.
>
> (iv) The Magistrate may treat a protest petition as a complaint and proceed to deal therewith in terms of Chapter XV of the Code of Criminal Procedure.
>
> (v) Once the case is committed, the Sessions Judge may refer the matter to the High Court.
>
> (vi) In the event, without taking any further evidence, it is found that while passing the order of commitment, the Magistrate has committed an error in not referring the case of an accused or left out an

> accused after evidence is adduced, the court may proceed against a person who was not an accused provided it appears from the evidence that he should be tried with the accused.
>
> (vii) The Revisional Court during pendency of the trial may exercise its revisional jurisdiction under Section 397 in which case, it may direct further inquiry in terms of Section 398 of the Code of Criminal Procedure.
>
> (viii) The revisional powers of the High Court and the Sessions Court are pointed out in the Code separately from a perusal whereof it would appear that the High Court exercises larger power.
>
> (ix) In the event of any conviction by a Court of Session, an appeal thereagainst would lie to the High Court. The appellate court exercises the power laid down under Section 386 of the Code of Criminal Procedure in which event it may also take further evidence or direct it to be taken in terms of Section 391 thereof.
>
> (x) The High Court has inherent power under Section 482 of the Code of Criminal Procedure to correct errors of the courts below and pass such orders as may be necessary to do justice to the parties and/or to prevent the abuse of process of court."

25. Chapter XII of the Code of Criminal Procedure relates to information to the police and their powers to investigate. The chapter exclusively deals with the information to the police and the

manner in which the investigation may be conducted and interestingly provides for the power of the Court to direct investigation under the provisions of Section 156(3), whereupon the police officer is expected to submit a report in terms of Section 173 of the Code which then shall be dealt with by the Court in accordance with the procedure prescribed under Section 190 of the Code. This chapter primarily relates to the commencement of investigation by the police officer upon receiving an intimation in terms of Section 154 in relation to a cognizable offence. Whatever interjection is permissible by the Court has also been stated under the provisions of Sections 156, 159 and 173. In relation to information of claim of non-cognizable cases, the police has to act in accordance with Section 155. It is expected of every person to give information to the police of commission of any cognizable offence and the police is normally bound to register an FIR if a commission of a cognizable offence is made out or atleast make a daily diary entry and then register the FIR within a short time as held by a Full Bench of this Court in the case of *Sandeep Rammilan Shukla* (supra). Despite such information having been received by the police officer, if an FIR is not registered under Section 154(1), the remedy to the aggrieved person is provided under Section 154(3). If action is not taken by the superior officer under Section 154(3), then any person

has a right to invoke the power of the Court under Section 156(3). Section 154 relates to providing of an information to a police officer incharge of a police station, who then in case of a cognizable offence has the power to start investigation forthwith in terms of Section 156(1) where he does not need an order of a Magistrate directing investigation. The investigation by a police officer who may not have been competent or empowered to investigate would not render the investigation illegal or unacceptable in terms of Section 156(2) of the Code. Section 156(3) is a power which could be exercised by the Magistrate directing the investigation to be conducted in accordance with the provisions of the Code. Section 156(3) can hardly come into play if the information of a cognizable offence has been given to a police officer under Section 154 of the Code and he has already started his investigation upon registering of an FIR in terms of Section 156(1) of the Code. The power contemplated under Section 156(3) appears to be the power of the Magistrate which would be exercised primarily in the event of default committed by a police officer or who refuses to register an FIR and exercise investigative powers in terms of Sections 154(1) and 156(1) of the Code. Once the investigation has commenced in terms of Section 154(1) by the police or in furtherance to an order passed by the Magistrate under Section 156(3), then it must culminate in filing of a report under

Section 173 or under Section 169 as the case may be. Therefore, right from providing of information of a cognizable offence to all aspects of investigation and the conclusion thereof culminating into furnishing of a report before the Court in terms of Section 173, all matters are regulated under Chapter XII of the Code.

26. Then comes Chapter XIII. This is a Chapter which deals entirely with the jurisdiction of the Court to inquire and try offences and it primarily provides matters relating to jurisdiction and place of trial. Chapter XIV again deals primarily with matters relatable to Court proceedings. Under Section 190, cognizance of an offence can be taken by a Magistrate of the First Class or such other Magistrate as empowered. The source of taking cognizance could be (a) on the basis of the complaint received by him which constitutes an offence; (b) upon 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. This Chapter then deals with other matters relating to inquiry or trial, mainly, with cognizance of offence by Courts, sanctions, prosecutions of public servants, etc. These two intervening Chapters, i.e. Chapter XIII and Chapter XIV then lead us to Chapter XV which is the other paramount important Chapter under the Criminal Procedure Code.

Under this Chapter, any person can invoke the jurisdiction of the Court and pray before the Court that the person alleged to be guilty of an offence should be summoned, tried and, if found guilty, be punished in accordance with the provisions of the Code. Section 200 gives a right to a complainant to file his complaint before a Magistrate who may take cognizance thereof and proceed with the matter in accordance with the provisions of Sections 200 to 203 of this Chapter and upon taking cognizance he may take the steps and pass order as contemplated under Section 202 of the Code including directing an inquiry or investigation by a police officer of the complaint directly presented to the Magistrate under Section 200 of the Code.

27. We may notice at this stage that Chapter XII is inclusive of powers exercisable by the Magistrate at a pre-cognizance stage, while Chapter XV is a post-cognizable proceedings. Reference to Section 190 in the provisions of Section 156(3) is primarily to clarify the jurisdiction of the Court which is competent to pass an order under Section 156(3). Its reference no way renders the proceedings under Section 156(3) before the court as post-cognizance stage of proceedings by the Court of competent jurisdiction.

28. It is for this reason that taking cognizance of an offence under Section 190 actually requires a judicious application of mind by the Court with regard to the contents of a complaint and to make up its mind whether the offence alleged appears to have been committed prima facie. It is a stage where the Court should exercise its judicial powers to proceed with the matter further by summoning the accused or by directing investigation on certain issues by the police agency or even requiring the complainant to lead evidence at pre-summons stage.

29. The Supreme Court in the case of *State of Karnataka and another v Pastor P Raju*, **(2006) 6 SCC 728**, explained the word "cognizance" and termed it as judicious hearing of a matter and held as under :-

> "10. Several provisions in Chapter XIV of the Code of Criminal Procedure use the word "cognizance". The very first section in the said Chapter viz. Section 190 lays down how cognizance of offences will be taken by a Magistrate. However, the word "cognizance" has not been defined in the Code of Criminal Procedure. The dictionary meaning of the word "cognizance" is - "judicial hearing of a matter". The meaning of the word has been explained by judicial pronouncements and it has acquired a definite connotation. The earliest decision of this Court on the point is R.R. Chari v State of U.P., AIR 1951 SC 207 wherein it was held :

> "... 'taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to be suspected commission of an offence'".

11. In Darshan Singh Ram Kishan v State of Maharashtra, AIR 1971 SC 2372 while considering Section 190 of the Code of 1898, it was observed that :

> "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to be suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint, or on a police report, or upon information of a person other than a police officer."

12. In Narayandas Bhagwandas Madhavdas v State of W.B., AIR 1959 SC 1118, it was held that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1) (a) of the Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of the Chapter-proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. It was observed that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. It was also observed that

what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. The Court then referred to the three situations enumerated in sub-section (1) of Section 190 upon which a Magistrate could take cognizance. Similar view was expressed in Kishun Singh v State of Bihar, (1993) 2 SCC 16, that when the Magistrate takes notice of the accusations and applies his mind to the allegations made in the complaint or police report or information and on being satisfied that the allegations, if proved, would constitute an offence, decides to initiate judicial proceedings against the alleged offender, he is said to have taken cognizance of the offence. In State of W.B. V Mohd. Khalid, (1995) 1 SCC 684, this Court after taking note of the fact that the expression had not been defined in the Code held :

> " In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word `cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons."

13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon

> information received from any other person that an offence has been committed. The issuance of process is at a subsequent 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."

30. Similarly, in the case of *S.K. Sinha, Chief Enforcement Officer v Videocon International Ltd. and others*, **(2008) 2 SCC 492**, the Supreme Court explained that expression "cognizance" has not been defined in the Code but the word is not found of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of and when used with reference to a Court or a Judge, it connotes "to take notice of judicially". Taking cognizance does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a *sine qua non* or condition precedent for holding a valid trial. It is also settled that cognizance is taken of an offence and not of an offender.

31. In fact, this aspect was settled beyond ambiguity that an order under Section 156(3) is at a stage prior to taking of cognizance. In the case of *Tula Ram and others v Kishore Singh*, **(1977) 4 SCC 459**, the Supreme Court held as under :-

"7. The question as to what is meant by taking cognizance is no longer res integra as it has been decided by several decisions of this Court. As far back as 1951 this Court in the case of R.R. Chari v State of Uttar Pradesh, AIR 1951 SC 207 observed as follows :

> "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate as such applies his mind to be suspected commission of an offence"'.

While considering the question in greater detail this Court endorsed the observations of Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v Abani Kumar Banerjee, AIR 1950 Cal 437 which was to the following effect :

> "It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

8. Section 190 of the Code runs thus :

> "Subject to the provisions of this Chapter, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf under sub-section (2) may take cognizance of any offence --
>
> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offfence has been committed.

It seems to us that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. Thus what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. The Court prescribes several modes in which a complaint can be disposed of after taking cognizance. In the first place, cognizance can be taken on the basis of three circumstances : (1) upon receiving a complaint of facts which constitute such offence; (2) upon a police report of such facts; and (3) upon information received from any person other than the police officer or upon his own knowledge, that an offence has been committed. These are the three grounds on the basis of which a Magistrate can take cognizance and decide to act accordingly. It would further appear that this Court in the case of Narayandas Bhagwandas Madhavdas v The State of West Bengal, AIR 1959 SC 1118 observed the mode in which a Magistrate could take cognizance of an offence and observed as follows :

> "It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter – proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202".

9. It is now well settled by the decision of this Court in Abhinandan Jha v Dinesh Mishra, AIR 1968 SC 117 that while a Magistrate can order the police to investigate the complaint he has no power to compel the police to submit a charge-sheet on a final report being submitted by the police. In such cases a Magistrate can either order re-investigation or dispose of the complaint according to law.

10. Analysing the scheme of the Code on the subject in question it would appear that Section 156(3) which runs thus :

> "Any Magistrate empowered under Section 190 may order such an investigation as above mentioned"

appears in Chapter 12 which deals with information to the police and the powers of the police to investigate a crime. This section is therefore placed in a Chapter different from Chapter 14 which deals with initiation of proceedings against an accused person. It is, therefore, clear that Sections 190 and 156(3) are mutually exclusive and work in totally different spheres. In order words, the position is that even if a Magistrate receives a complaint under Section 190 he can act under Section 156(3) provided that he does not take cognizance. The position,

therefore, is that while Chapter 14 deals with post cognizance stage Chapter 12 so far as the Magistrate is concerned deals with pre-cognizance stage, that is to say once a Magistrate starts acting under Section 190 and the provisions following he cannot resort to Section 156(3). Mr.Mukherjee vehemently contended before us that in view of this essential distinction once the Magistrate chooses to act under Section 156(3) of the Code it was not open to him to revive the complaint, take cognizance and issue process against the accused. Counsel argued that the Magistrate in such a case has two alternatives and two alternatives only – either he could direct re-investigation if he was not satisfied with the final report of the police or he could straightaway issue process to the accused under Section 204. In the instant case the Magistrate has done neither but has chosen to proceed under Section 190(1)(a) and Section 200 of the Code and thereafter issued process against the accused under Section 204. Attractive though the argument appears to be we are however unable to accept the same. In the first place, the argument is based on a fallacy that when a Magistrate orders investigation under Section 156(3) the complaint disappears and goes out of existence. The provisions of Section 202 of the present Code debar a Magistrate from directing investigation on a complaint where the offence charged is triable exclusively by the Court of Session. On the allegations of the complainant the offence complained of was clearly triable exclusively by the Court of Session and therefore it is obvious that the Magistrate was completely debarred from directing the complaint filed before him to be investigated by the police under Section 202 of the Code. But the Magistrate's power under Section 156(3) of the Code to order investigation by the police have not been touched or affected by Section 202 because these powers are exercised even before cognizance is taken. In other words, Section 202 would apply only to cases where the Magistrate has taken cognizance and chooses to enquire into the complaint either

himself or through any other agency. But there may be circumstances as in the present case where the Magistrate before taking cognizance of the case himself chooses to order a pure and simple investigation under Section 156(3) of the Code. The question is, having done so, is he debarred from proceeding with the complaint according to the provisions of Section 190, 200 and 204 of the Code after receipt of the final report by the police? We see absolutely no bar to such a course being adopted by the Magistrate. In the instant case, there is nothing to show that the Magistrate had taken cognizance of the complaint. Even though the complaint was filed by (sic before) the Magistrate, he did not pass any order indicating that he had applied his judicial mind to the facts of the case for the purpose of proceeding with the complaint. What he had tone was to keep the complaint aside and order investigation even before deciding to take cognizance on the basis of the complaint. After the final report was received the Magistrate decided to take cognizance of the case on the basis of the complaint and accordingly issued notice to the complainant. Thus, it was on April 2, 1975 that the Magistrate decided for the first time to take cognizance of the complaint and directed the complainant to appear. Once cognizance was taken by the Magistrate under Section 190 of the Code it was open to him to choose any of the following alternatives:

(1) Postpone the issue of process and enquire into the case himself; or

(2) direct an investigation to be made by the police officer; or

(3) any other person.

In the instant case as the allegations made against the accused made out a case exclusively triable by the Court of Session the Magistrate was clearly debarred from ordering any investigation, but he

was not debarred from making any enquiry himself into the trust of the complaint. This is what exactly the Magistrate purported to have done in the instant case. The Magistrate issued notice to the complainant to appear before him, recorded the statement of the complainant and his witnesses and after perusing the same he acted under Section 204 of the Code by issuing process to the accused appellants as he was satisfied that there was sufficient grounds for proceeding against the accused.

....

15. In these circumstances we are satisfied that the action taken by the Magistrate was fully supportable in law and he did not commit any error in recording the statement of the complainant and the witnesses and thereafter issuing process against the appellants. The High Court has discussed the points involved thread-bare and has also cited a number of decisions and we entirely agree with the view taken by the High Court. Thus on a careful consideration of the facts and circumstances of the case the following legal propositions emerge :

1. That a Magistrate can order investigation under Section 156(3) only at the pre-cognizance stage, that is to say, before taking cognizance 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 Section 156(3) though in cases not falling within the proviso to Section 202 he can order an investigation by the police which would be in the nature of an enquiry as contemplated by Section 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 witness.

(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.

4. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above."

32. The law in this regard has been well settled and no judgment to the contrary has been brought to our notice. In fact, right from the case of *Gopal Das Sindhi and others v State of Assam and another*, **AIR 1961 SC 986**, the law has been consistent and both aspects i.e. the matter relating to taking of cognizance by the Court

of competent jurisdiction and the concept of pre and post-cognizance procedure has been well defined. The Supreme Court in that matter unambiguously stated the principle that order of a Magistrate under Section 156(3) is a pre-cognizable order and held as under :-

> "7. When the complaint was received by Mr.Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under S. 156(3) of the Code to the Officer Incharge of Police Station Gauhati for investigation. Section 156(3) states "Any Magistrate empowered under section 190 may order such investigation as above-mentioned". Mr.Thomas was certainly a Magistrate empowered to take cognizance under S. 190 and he was empowered to take cognizance of an offence under receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Ss. 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because S. 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions

of S. 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of an offence. We are unable to construe the word `may' in section 190 to mean `must'. The reason is obvious. A complaint disclosing cognizable offence may well justify a Magistrate in sending the complaint, under S. 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offences is with the police. On the other hand, there may be occasions when the Magistrate may exercise his discretion and take cognizance of a cognizable offence. If he does so then he would have to proceed in the manner provided by Chapter XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance". It is unnecessary to refer to the cases cited. The following observations of Mr. Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v Abani Kumar Banerjee, AIR 1950 Cal 437 :

> "What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation

> under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence"

were approved by this Court in R.R. Chari v State of Uttar Pradesh, 1951 SCR 312 : (AIR 1951 SC 207). It would be clear from the observations of Mr.Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under S. 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr. Justice Das Gupta above referred to were also approved by this Court in the case of Narayandas Bhagwandas Madhavdas v State of West Bengal, 1960 1 SCR 93. It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr.Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr.Thomas to deal with it. Mr.Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under S. 156(3) of the Code. The action of Mr.Thomas comes within the observations of Mr. Justice Das Gupta. In these circumstances, we do not think that the first contention on behalf of the appellants has any substance."

33. Reference in this regard can also be made to another judgment of the Supreme Court in the case of *Kishun Singh and others v State of Bihar*, **(1993) 2 SCC 16** where the Supreme Court

observed that the object of Section 190 is to ensure safety of a citizen against the vagaries of the police by giving him the right to approach the Magistrate directly if police does not take action or he has reason to believe that no such action will be taken by the police. Even though expression "take cognizance" is not defined, it is well settled, that it effectuates when Magistrate takes notice of accusations and applies his mind to the allegations made in the complaint.

34. Taking cognizance of an offence is distinguishable from initiation of proceedings. In fact, as already noticed, it is a step taken in a proceeding by the Magistrate or the Court of competent jurisdiction. Taking cognizance is not the same thing as issuance of process. Taking cognizance is different from initiation of proceedings. Reference can also be made in this regard to the judgment of the Supreme Court in the case of *State of W.B. and another v Mohd. Khalid and others*, **(1995) 1 SCC 684**.

35. From this discussion, it is clear that the order under Section 156(3) is passed at a pre-cognizance stage of a proceeding before the Court and is limited to the extent of directing an investigation in accordance with law. Earlier, the settled principle of

law in Indian Courts was that the Magistrate while exercising powers under Section 156(3) could only direct investigation of a case and not registration of an FIR. However, with the development and expansion of principles of criminal jurisprudence, this has under-gone a definite change. Now, for quite some time the Supreme Court has taken a consistent view that the Magistrate exercising his power under Section 156(3) can direct registration of an FIR and his jurisdiction is not only limited to a direction to investigate the offence.

36. In the case of Madhu Bala v Suresh Kumar and others, (1997) 8 SCC 476, the Supreme Court held that the police is duty bound to register a case and then investigate into it at once and an order under Section 156(3) is made as the Magistrate has the jurisdiction to ask the police to register a case and investigate the same in accordance with law. Interpreting the provisions of Section 156(3), the Supreme Court held as under :-

> "10. .... In our opinion, when an order for investigation under Section 156(3) of the Code is to be made the proper direction to the police would be "to register a case at the police station treating the complaint as the first information report and investigate into the same."

37. This was subsequently followed in different cases and finally in the case of Mohd. Yousuf v Afaq Jahan (Smt.) and another, (2006) 1 SCC 627, the Supreme Court held as under :-

> "11. The clear position therefore is that any Judicial Magistrate, before taking cognizance of the offence, can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. For the purpose of enabling the police to start investigation it is open to the Magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the office in charge of the police station as indicated in Section 154 of the Code. Even if a Magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer in charge of the police station to register the FIR regarding the cognizable offence disclosed by the complainant because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter."

38. Therefore, it cannot be questioned any longer that an order under Section 156(3) by a Magistrate directing registration of an FIR and investigation thereof in accordance with law is an order pre-cognizance. Section 156(3) is part of Chapter XII of the Code

which primarily relates to investigation by police of a cognizable offence. The law casts an abundant statutory duty upon the police officer in charge of a police station to register the case wherever commission of a cognizable offence is brought to his notice in any form. Normally, it will be default of Section 154 which will lead to invoking the power of the Court under Section 156(3) of the Code as if the FIR has been registered and the complaint has been investigated in accordance with law. In other words, the Code takes complete care of dealing with every situation that may arise in the course of the investigation or inquiry being conducted under the two sources to which anybody has an access under the provisions of the Code.

39. Investigation squarely falls within the domain of the investigating agency. It is the phase where the State discharges its obligation through the investigating agency to find out whether the alleged offence was committed or not and if committed by whom and how ? After collecting the entire evidence during the course of investigation, the police officer empowered to investigate is to file a report under Section 173 of the Code.

40. In case of a default in the performance of its statutory duty by the police or the investigating agency, the person aggrieved is not left remediless. He can invoke the provisions of Sections 154(3) and 156(3) as well. This decision is left to the wisdom of the aggrieved person or the complainant, whether he wishes to approach the Court under Section 156(3) or to file a complaint under Section 200 of the Code. There are no limitations and restrictions laid down by the Code for invocation of this power. Section 156(3) in the scheme of the Code appears to be preceding Chapter XV and is referable to the default committed by the police officer in terms of Section 154(1) of the Code.

41. In the case of *Devarapalli Lakshminarayana Reddy and others v V. Narayana Reddy and others*, **(1976) 3 SCC 252**, the Supreme Court specifically held that the order under Section 156(3) is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1) of the Code. Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. In this very case, the Supreme Court also noticed the distinction between an order under Section 156(3) in contra-

distinction to an order under Section 202 of the Code. When the Court orders an investigation within the scope of Section 202, it is not required to initiate a fresh case on a police report but its object is to primarily assist the Court in completing the proceedings already instituted before the Court of competent jurisdiction.

42. In fact, this aspect is further put beyond doubt by the judgment of the Supreme Court in the case of *Dharmeshbhai Vasudevbhai and others v State of Gujarat and others*, **(2009) 6 SCC 576**, where the Court held as under :-

> "6. It is well settled that any person may set the criminal law in motion subject of course to the statutory interdicts. When an offence is committed, a first information report can be lodged under Section 154 of the Code of Criminal Procedure (for short "the Code"). A complaint petition may also be filed in terms of Section 200 thereof. However, in the event for some reasons or the other, the first information report is not recorded in terms of sub-section (1) of Section 156 of the Code, the Magistrate is empowered under sub-section (3) of Section 156 thereof to order an investigation into the allegations contained in the complaint petition. Thus, power to direct investigation may arise in two different situations – (1) when a first information report is refused to be lodged; or (2) when the statutory power of investigation for some reason or the other is not conducted.
>
> 7. When an order is passed under sub-section (3) of Section 156 of the Code, an investigation

> must be carried out. Only when the investigating officer arrives at a finding that the alleged offence has not been committed by the accused, he may submit a final form; on the other hand, upon investigation if it is found that a prima facie case has been made out, a charge-sheet must be filed."

43. Similar view was taken by the Supreme Court in its earlier judgment in the case of *Sakiri Vasu v Statement of Uttar Pradesh and others*, **(2008) 2 SCC 409**, where the Court held as under :-

> "23. In Savitri v Govind Singh Rawat, AIR 1986 SC 984, this Court held that the power conferred on the Magistrate under Section 125 CrPC to grant maintenance to the wife implies the power to grant interim maintenance during the pendency of the proceeding, otherwise she may starve during this period.
>
> 24. In view of the abovementioned legal position, we are of the view that although Section 156(3) is very briefly worded, there is an implied power in the Magistrate under Section 156(3) CrPC to order registration of a criminal offence and/or to direct the officer in charge of the police station concerned to hold a proper investigation and take all such necessary steps that may be necessary for ensuring a proper investigation including monitoring the same. Even though these powers have not been expressly mentioned in Section 156(3) CrPC, we are of the opinion that they are implied in the above provision.
>
> 25. We have elaborated on the above matter because we often find that when someone has a

grievance that his FIR has not been registered at the police station and/or a proper investigation is not being done by the police, he rushes to the High Court to file a writ petition or a petition under Section 482 CrPC. We are of the opinion that the High Court should not encourage this practice and should ordinarily refuse to interfere in such matters and relegate the petitioner to his alternating remedy, first under Section 154(3) and Section 36 CrPC before the police officers concerned, and if that is of no avail, by approaching the Magistrate concerned under Section 156(3).

26. If a person has a grievance that his FIR has not been registered by the police station his first remedy is to approach the Superintendent of Police under Section 154(3) CrPC or other police officer referred to in Section 36 CrPC. If despite approaching the Superintendent of Police or the officer referred to in Section 36 his grievance still persists, then he can approach a Magistrate under Section 156(3) CrPC instead of rushing to the High Court by way of a writ petition or a petition under Section 482 CrPC. Moreover, he has a further remedy of filing a criminal complaint under Section 200 CrPC. Why then should writ petitions or Section 482 petitions be entertained when there are so many alternative remedies ?

27. As we have already observed above, the Magistrate has very wide powers to direct registration of an FIR and to ensure a proper investigation and for this purpose he can monitor the investigation to ensure that the investigation is done properly (though he cannot investigate himself). The High Court should discourage the practice of filing a writ petition or petition under Section 482 CrPC simply because a person has a grievance that his FIR has not been registered by the police, or after being registered, proper investigation has not been done by the police. For this grievance, the remedy lies under Sections 36 and 154(3) before the police officers concerned,

> and if that is of no avail, under Section 156(3) CrPC before the Magistrate or by filing a criminal complaint under Section 200 CrPC and not by filing a writ petition or a petition under Section 482 CrPC."

44. In this very case, the Supreme Court also made an observation that even the investigation can be monitored by the Magistrate exercising powers under Section 156(3). To this, some judgments to the contrary were brought to our notice, but it is not necessary for us to examine the merit or otherwise of this contention inasmuch as that is not the question to be answered by this Bench in light of the Order of Reference.

45. In the case of Divine Retreat Centre v State of Kerala and others, (2008) 3 SCC 542, the Supreme Court held that power to investigate an offence is exclusively reserved for the police. This view has pre-dominantly prevailed in the Indian law now and the investigation is stated to be exclusively in the domain of the investigating agency. How such investigation has to be conducted is primarily stated in Chapter XII of the Code which starts with Section 154.

46. To us it appears to be essential that normally a person should invoke the provisions of Section 154 of the Code before he can take recourse to the powers of the Magistrate under Section 156(3). The provisions of Section 156(3) are consequential upon a default of a police officer failing to comply with the requirements of Section 154 to the prejudice of the aggrieved person or the complainant, as the case may be. Once the police officer fulfills his duty/ obligation and completes investigation in accordance with law, leading to the filing of the report under Section 173, the provisions of Section 156(3) would stand exhausted and can hardly be taken recourse to. Despite this, we find it difficult to lay down any strait-jacket formula in this regard. It may not be very advisable to state it as an absolute proposition of law without any exception. There can be cases where the time lag involved in the commission of the crime, intimation to the police and its inaction in terms of Section 154, make it difficult for a complainant or an aggrieved person including a victim to first take recourse to the provisions of Section 154(3) and then invoke the jurisdiction of the Court under Section 156(3). Such cases could be the ones where there is likelihood of the evidence being destroyed and the delay in investigation may prove fatal to the case of the prosecution or the complainant. In such exceptional circumstances, it cannot be said that any person who has approached

the police under Section 154 for registration of information of commission of an cognizable offence and the police instantly fails to act, is debarred from approaching the Court directly under Section 156(3). As a normal proposition of law, invocation of the provisions of Section 154 in its entirety should be treated as a condition precedent to invocation of the powers of the Court under Section 156(3), but there can be exceptions where the facts and circumstances of the case justify directly approaching the Court by the complainant. If a person is desirous of invoking the judicial process at the very first instance, he can always take recourse to Section 200 as contained in Chapter XV of the Code, but if he wishes to invoke the powers of the Court under Section 156(3), normally, he may exhaust the remedy available to him as is provided by the Legislature in terms of Section 154 of the Code.

47. Particularly in light of the facts of the cases where the question has been referred to us, we do not see any reason to say that it would be unfair, unjust or in any way prejudicial to hold that the complainants concerned should have invoked the provisions of Section 154 of the Code before invoking the powers of the Court under Section 156(3) of the Code. We would certainly hasten to add that this cannot be laid down as an absolute proposition of law or a

strait-jacket formula applicable to all cases uniformly, without reference to the facts and circumstances of a given case. This is a rule which is not free of exception. In other words, there can be cases where strict compliance to the provisions of Section 154(1) and (3) in their entirety may not be insisted upon by the Court. This will be the case where heinous crime is committed and despite intimation to the police, the police failed to take action forthwith and/or cases where there is likelihood of crucial material evidence being destroyed, damaged and/or tampered with to the prejudice of the complainant. In such cases, the Court may have to entertain an application under Section 156(3) without compliance of Section 154(3) but still an averment that the police were approached and have failed to act or why the applicant has chosen to directly approach the Court for issuance of direction under Section 156(3) would be somewhat necessary, to be mentioned in the complaint.

48. Now we shall proceed to deal with other aspect of the order of reference. The word "complaint" has a wide meaning since it includes even oral allegations. It may therefore be assumed that no format is prescribed in which the complainant must be made. There has to be allegation which prima facie discloses commission of

a cognizable offence with necessary facts. Section 2(d) of the Code of Criminal Procedure, 1973 defines a complaint as under:-

> "2(d) "complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report."

As already noticed, the complaint could be made orally, or in writing that some person whether known or unknown has committed an offence but the most important feature of the complaint is that a police report has been excluded from the ambit of a complaint. The police report obviously means a report submitted under Section 173 of the Code. The expression "with a view to his taking action under the Code" is of some significance. This indicates that the allegations should be such which would constitute an offence under the provisions of the Indian Penal Code or under any other law, and therefore, become actionable under the provisions of the Code. In such a complaint, Magistrate may take action in accordance with law keeping in mind the prayer made by the complainant. An information is a complaint only when it is made to a Magistrate while any information under Section 154 given to a police officer orally and/or in writing can be the basis for the police officer in

charge of a police station to proceed with the matter. In fact, in terms of Section 41 of the Code of Criminal Procedure, any police officer may arrest any person without an order from a Magistrate and without a warrant from the Court, a person who is concerned in cognizable offence. Section 41 contemplates that a person, whom a police officer can arrest, is a person against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he is concerned in a cognizable offence. This indicates that the allegations made in an information given to a police officer should be a reasonable or credible information which would show degree of seriousness about commission of a cognizable offence necessary for curtailing liberty of the accused.

49. The Supreme Court in the case of *Mohd. Yousuf v. Afaq Jahan (Smt.) & Anr.,* (2006)1 SCC 627 observed that nomenclature is also inconsequential and there is no specific format for a complaint being made to a Magistrate contemplated under the Code and held as under:-

> "15. A faint plea was made by learned counsel for Respondent 1 that the petition filed by the appellant was not a complaint in the strict sense of the term. The plea is clearly untenable. The nomenclature of a petition is inconsequential.

Section 2(d) of the Code defines "complaint" as follows :

> "2.(d) 'complaint' means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.
>
> Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant.
>
> 16. There is no particular format of a complaint. A petition addressed to the Magistrate containing an allegation that an offence has been committed, and ending with a prayer that the culprits be suitably dealt with, as suitably dealt with, as in the instant case, is a complaint."

50. In the case of *Rajesh Bajaj v. State NCT of Delhi & Ors.,* (1999)3 SCC 259, the Supreme Court again reiterated the principle of law that it was not necessary that a complaint should verbatim reproduce in the body of his complaint all the ingredients of the offence he is alleging. Nor is it necessary that the complainant should state in so many words that the intention of the accused was dishonest or fraudulent. Splitting up of the definition into different components of the offence to make a meticulous scrutiny, whether all the ingredients have been precisely spelt out in the complaint, is not

the need at this stage. If factual foundation for the offence has been laid in the complaint the court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details.

51. "Information" is a wider term than "complaint" and includes any communication relating to the commission of an offence. A complaint is a particular kind of information and is more or less formally made with the definite object that the person to whom the complaint is made will take action under Code of Criminal Procedure. "Information" is the genus of of which "complaint" is a species. (Ref: Aiyar's Judicial Dictionary, eleventh Edition, the Law Book Company (P) Ltd.)

52. A distinction between the complaint and the information was explained by a Bench of Allahabad High Court in *Sheo Pratap Singh v. Emperor,* AIR 1930 Allahabad 820.:

> "That essential difference between a complaint and information is that a Magistrate acts on a complaint because the complainant has asked him to act, but a Magistrate acts on information on his own initiative. In the case of a complaint the Magistrate is asked to prosecute the person named as accused and he has then to decide whether he will accede to the request or not. If he

> does not, then he must record his reasons under S. 202(1), and may either make an enquiry himself or direct an inquiry or investigation or dismiss the complaint under S. 203 after recording his reasons. But in the case of receiving information, the Magistrate is not asked by anyone to issue process and if he does not choose to act on the information, he need not record any reason or pass any order. In the case of information there is no complainant to examine on oath. On a complaint the complainant is first examined on oath unless it has been made by a public servant acting to the discharge of his official duty."

53. We have already noticed that the reference to the provisions of Section 190 in the provisions of Section 156(3) is merely to determine jurisdiction of Magistrate to whom an application has to be made by the aggrieved person or a complainant. It no way controls the power of the Court to direct registration and/or investigation as contemplated in Section 156(3). The proceedings under Section 156(3) are pre-cognizance. Once cognizance is taken by the Magistrate under Section 190 of the Code, he could proceed in his discretion treating under Section 200 of the Code of Criminal Procedure. It is not the legislative intent that in the complaint or application/petition under Section 156(3) detailed factual allegations containing in detail the happening of events from beginning to end should be made. It is sufficient for the person to

make averment of facts disclosing cognizable offence further stating that the police has failed to take action despite intimation under Section 154 of the Code of Criminal Procedure. Unnecessary emphasis on the prayer cannot be laid. However, it is a settled principle that the Court would normally grant relief to a party as per its prayer.

54. However, keeping in view the principles of criminal jurisprudence again no stringent format can be provided or is necessary in relation to a prayer clause. It is for the complainant or the aggrieved person to decide whether he wishes to refer the matter to investigation under Section 156(3) of the Code or whether his application is to be treated as a regular complaint under Section 200 of the Code. We have no hesitation in holding that no particular format of the application or petition to Magistrate under Section 156(3) is provided or is required to be made. Suffice it for the complainant or aggrieved person to bring it to the notice of the Court under Section 156(3) that despite intimation to the police it has failed to act and investigate a cognizable offence in accordance with law or that in the fact situation of the case it was necessary to directly approach the Court. Once such a petition is presented, the learned Magistrate is free to exercise appropriate jurisdiction in

accordance with law and at the request of complainant. But a petition cannot be rejected by the Court merely on the ground that it does not contain a proper prayer clause insofar as it discloses commission of a cognizable offence.

55. Non prescription of statutory or judge made law as to the format of a complaint or a petiton clearly indicates that it would hardly be possible for the Courts to reject a complaint/petition on the ground of its format alone, insofar as it satisfies ingredients of an offence and avers inaction of the police or makes out a case justifying direct intervention of the Court. As already noticed, a crime is an act deemed by law to be harmful to the society in general even though its immediate victim is an individual. (**Ref.: Salmond on Jurisprudence, Twelfth Edition by P.J. Fitzgerald**). The distinction between infringement of civil rights and committing a cognizable offence within the provisions of the Indian Penal Code or any other law is clear and in the later it is beyond the matter of mere compensation. Even to criminal jurisprudence, the law of pleading is applicable to certain extent. Thus where a person files a complaint under Section 200 of the Code of Criminal Procedure, he is expected to state the facts giving details and correct versions which would amount to committing of an offence alleged. It has to satisfy the basic ingredients of such an offence and it is expected of the

complainant to make a proper complaint as contemplated under Section 2(d) of the Code with appropriate prayers. In contra-distinction to this, such strict rule of pleadings cannot be made applicable to the provisions of Section 156(3) of the Code as it is result of a default and even intimation in appropriate format may suffice the purpose in some cases. That certainly does not mean that under Section 156(3) properly drafted petition cannot be moved. Rather if a petition with complete facts, stating detailed and definite events essential to constitute the offence alleged to have been committed is presented and the prayers have been made, discretion of the Magistrate would be much wider than merely directing investigation in terms of Section 156(3) and the Court even could take cognizance of the offence if the complaint is filed under Section 200 of the Code. If a complaint does not disclose a cognizable offence with proper facts, it may be liable to be dismissed and/or rejected by the Magistrate.

56. The American Criminal Jurisprudence requires that the misdemeanor pleadings are subject to the general requirements for valid pleadings. In other words, it must contain a plain and concise factual statement supporting every element of the offence charged and a separate count addressed to each offence charged, by a

reference to the statute or other provision of law that the defendant allegedly violated. The name or other identification of the defendant and the country where the offence took place and the date on which, or time period during which, the offence took place should be specifically mentioned. Amendments are liberally applied nevertheless every pleading must be sufficient to serve the basic purpose illustrated under that law. (*Ref : NC Defendcer Manual/July 2004/(c) Institute of Government, Ch.8 : Criminal Pleadings)*

57. Criminal Procedure Rules 506 of Commonwealth of Pennylvania even provides a format of a private complaint which is filed to a Magisterial District Court after getting approval from Attorney for the Commonwealth office. . It will be therefore appropriate to state that rule of pleadings is not strictly applicable to a petition or an application under Section 156(3) of the Code.

58. The essence of a criminal offence is violation of State Law and harm to the society at large. It is implicit in the constitutional obligation of the State to provide safe life to its people and protect liberty of every subject of the State. Detection of crime, investigation of crime and to prosecute the offender are some of the pertinent duties of the State in terms of the provisions of the Code of Criminal Procedure. Generally it is not expected of an individual to

investigate an offence and collect necessary proof for trial before the Court. It is an option available to an individual whether to invoke powers of the State/Investigating Agency under Section 156(3) or Section 200 of the Code. It is primary duty of the police to immediately register an FIR and to investigate the matter in accordance with law and not to push any individual to knock the doors of the Courts for inquiry, investigation and trial of an offence. Seeking directions from Magistrate to direct police to investigate are the events which should take place as a last measure. The Supreme Court in the case of *Lalita Kumari v. Government of Uttar Pradesh & Ors.,* (2008)7 SCC 164 gave certain directions regarding registration of FIR which read as follows :-

> "6. In view of the above, we feel that it is high time to give directions to the Governments of all the States and Union Territories besides their Director Generals of Police/Commissioner of Police as the case may be to the effect that if steps are not taken for registration of FIRs immediately and copies thereof are not made over to the complainants, they may move the Magistrates concerned by filing complaint petitions to give direction to the police to register case immediately upon receipt/production of copy of the orders and make over copy of the FIRs to the complainants, within twenty-four hours of receipt/production of copy of such orders. It may further give directionn to take immediate steps for apprehending the accused persons and recovery of kidnapped/abducted persons and properties which were the subject-matter of theft or dacoity.

> In case FIRs are not registered within the aforementioned time, and/or aforementioned steps are not taken by the police, the Magistrate concerned would be justified in initiating contempt proceeding against such delinquent officers and punish them for violation of its orders if no sufficient cause is shown and awarding stringent punishment like sentence of imprisonment against them inasmuch as the disciplinary authority would be quite justified in initiating departmental proceeding and suspending them in contemplation of the same."

59. There is hardly any discretion with the police not to register an FIR or take entry in Daily Diary Register, as the case may be. In that behalf, decision of the Full Bench of this Court in *Sandeep Rammilan Shukla v. State of Maharashtra & Ors.,* (2009)1 Mh.L.J. 97, needs to be referred. The Court observed : -

> "70. The provisions of section 154 of the Code impose an absolute obligation and duty upon the officer-in-charge of a police station to record information in the prescribed book of a cognizable offence (FIR register), but it is difficult for the Court to construe in absence of any express language that this provision forbids any kind even preliminary inquiry prior to registration of the FIR. We are unable to notice anything in the language of the section which by necessary implication debars in law such an inquiry. The Supreme Court in the case of Bhagwant Kishore Joshi (supra), a judgment which was delivered by a three Judge Bench, took the view that such an inquiry, of course for a very limited purpose and bona fide object, was not debarred under the

provisions of section 154. Again, a three Judge Bench of the Supreme Court in the case of Jacob Mathew (supra), in unambiguous terms declared that pre-registration inquiry would be permissible, but again for a class of persons i.e. Medical Practitioners. The investigating agency was cautioned in that case not to cause harassment to the Doctors in furtherance to a private complaint unless some prima facie evidence of rash and negligent act on the part of the accused Doctor was brought on record before the investigating officer. The principle enunciated in both these judgments, particularly in the case of Bhagwant Kishore Joshi (supra), is not subject-matter of a detailed discussion by any of the subsequent Benches of the Supreme Court, except in the case of Rajinder Singh Katoch (supra), a judgment pronounced by a two Judge Bench of the Supreme Court after declaration of law in Prakash Singh Badal's case (supra) which also specifically noticed Ramesh Kumar's case (supra) and declared the principle that some kind of preliminary inquiry would be permissible prior to registration of the case. It needs to be noticed at the cost of repetiton that judgments of the Supreme Court delivered by two Judges Bench have taken the view that there is no option with the police officer-in-charge of a police station but to register the FIR. The view is obviously relatable to the facts of those cases and in all those cases the conduct of the investigating agency had been deprecated and the Court took the view that reliability, genuineness and credibility of information are not the condition precedent for registration of a case under section 154 and provisions of section 154 are mandatory and officer-in-charge of police station is duty bound to register the case on receiving the information disclosing a cognizable offence. [See Lallan Chaudhary (supra) and Ramesh Kumari (supra)]. However, in the case of Mohindro (supra), the Court observed on facts of that case that for no reason whatsoever the police had not registered the case and proceeded to pass the

appropriate direction.

71. Thus it is evident that information must relate to `commission of a cognizable offence'. If the information given ex facie is so absurd or lacks essential ingredients of the allegedly committed cognizable offence, the investigating officer after making a due entry in the prescribed books like daily dairy, general diary or station diary or daily roznamachar, could step into the limited preliminary inquiry and then within a very short time and most expeditiously register the FIR unless the information does not disclose commission of a congnizable offence. Such exercise has to be bona fide, fair and must stand to the test of judicious exercise of power. Such cases would be by and large very few and rare cases where the police officer has to conduct preliminary inquiry pre-registration of a FIR for a very limited period. Taking an example of such rare and exceptional cases, an informant by a telephone makes a call that there has been a blast at a railway station causing injury and death of number of persons and names the persons who has alleged to have effected the bomb blast. A police officer is obliged to make an entry in the daily diary register and at least would verify the same by ringing up the nearest police station or the railway authority in charge of the railway station where such an incident is informed to have been occurred. If no incident has occurred at the railway station, the question of registering the FIR would hardly arise and he could proceed in accordance with law on the basis of the entry made in the daily diary register/station diary/roznamachar. In the case of Tapan Kumar Singh (supra), the Supreme Court has even held that an entry in the daily diary/station diary or rozanamachar itself can be a FIR.

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75. The law and particularly the criminal law is an instrument to protect the interest of the

society. The distinction between a cognizable offence and non-cognizable offence is to be kept in mind by the Court for proper appreciation of the arguments raised before us. The officer-in-charge of police station has wide powers and complete freedom in investigating the cognizable offence without any check or interference including arresting of the suspect. While in the case of non-cognizable offence, the investigating officer is not entitled to even take on investigation much less arrest the suspect without the leave of the Court of competent jurisdiction. In order to prevent abuse of such power it is essential that the discretion given to the officer-in-charge of a police station is limited to bare minimum necessary and the provision is not given undue liberal construction or meaning. While following the view expressed by the Supreme Court in three Judge Bench cases of Bhagwant Kishore Joshi (supra) and Jacob Mathew (supra), it can safely be stated that the power to make preliminary inquiry to pre-registration of a case can be exceptionally or rarely exercised by the officer-in-charge of a police station that too after he enters the information in the relevant books like daily diary or general diary as known by different nomenclature at different places, and after concluding the preliminary inquiry expeditiously, preferably not exceeding the period of two days register the FIR in accordance with the law and/or proceed under other provisions of the Code as is evident from proviso (b) to section 157(1) of the Code.

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101. The balanced and practical view in law necessarily is neither to amplify jurisdiction or power not to curtail it unnecessarily. The law commands a person holding a public office to discharge his duties in accordance with the law and without delay. In terms of the provisions of the Code of Criminal Procedure, police officer-in-charge of a police station cannot avoid the

responsibility to record information as contemplated by the provisions of section 154 read with the Police Manual and the Standing Orders issued by the State of Maharashtra Analysis of the above referred judicial decisions thus persuade us to hold that the judgment in Shyam Sundar's case (supra) does not state the entire law correctly. The statement of law spelt out in paragraph 57(b) needs to be clarified to bring it in line with the enunciated law. Intrinsic command of law requires an officer in charge of a police station to record the FIR instantaneously. Further to bring this principle in harmony with the ground realities, it can safely be stated that in exceptional and rare cases, the concerned police officer could penultimately defer instantaneous recording of FIR in the prescribed register (Form No.P.M. 37e) but only and only after recording the information received in the Daily Diary Register while also mentioning reasons for adopting such a course and then to proceed to make preliminary inquiry. Such preliminary inquiry needs to be concluded in the shortest possible time and which, in our opinion, should not exceed two days then the officer should record the FIR as prescribed in law without fail and/or to adopt any course of action as permissible in law. This would satisfy the requirements of achieving legislative object as well as would be suiting the ground reality by adopting a more practical approach. As it may not be possible for the Court to accept ideologue view devoid of any flexibility in exceptional or rare cases. Having deliberated at some length on various aspects of the legal controversies raised in the present reference, in our considered view the following principles can be culled out as correct exposition of law :

(a) The expression "shall" appearing in Section 154 of the Code of Criminal Procedure is mandatory. The Section places an `absolute duty' on the part of the `officer

in charge of a police station' to record information and place substance thereof in the prescribed book, where the information supplied or brought to his notice shows commission of a cognizable offence.

(b) As the law does not specifically prohibit conducting of a limited preliminary inquiry, pre-registration of FIR in exceptional and rare cases by the officer in charge of a police station, he may penultimately thus enter upon a preliminary inquiry in relation to information supplied of commission of a cognizable offence but only and only upon making due entry in the Daily Diary/Station Diary/ Roznamachar instantaneously with reasons as well as the need for adopting such a course of action. Such inquiry should be completed expeditiously and in any case not later than two days. Thereafter, the FIR should be recorded in the prescribed register and/or the officer should take any other recourse permissible to him strictly in accordance with the provisions of the Code of Criminal Procedure under which he is empowered to investigate. Such cases can be illustrated by giving an example i.e. when the information received in regard to commission of a cognizable offence would patently cause absurd results or report of happening of events, authenticity of which ex facie is extremely doubtful.

(c) The law inescapably requires the police officer to register the information (FIR) received by him in relation to commission of a cognizable offence. Under the Scheme of the Code, no choice is vested in the police officer between recording or not recording the information received. The concerned officer would aptly take recourse to clause (a) as a normal rule while could

> adopt the course of action as stated in clause (b) above as an exceptional and rare case."

60. In the backdrop of this settled position of law, the compliance to Section 154 would be necessary in normal cases which do not fall within the exceptions stated by us. It being a power of the Court exercisable in default of action being taken by police. In this regard we may refer to the Full Bench judgment of this Court in *Laxminarayan Vishwanath Arya v. State of Maharashtra & Ors., 2008 Cri.LJ 1,* where the Court has held as under:

> "7. .....It cannot be lost sight of that normally and in fact in accordance with law investigation under Section 156(3) of the Code is preceded by approaching the concerned police station and then higher authorities under Section 154(3). Thus these are the cases where the investigating agency – the police – has failed to act, it pre-supposes that there has been breach of obligation as contemplated under Section 154(1) of the Code. To illustratively state these are the matters where despite complaint, police did not act or consider it not necessary to act in relation to the allegations made in the complaint. The suspected accused was always free and not the subject matter of investigation or agency. After such breach of duty or wrongful act on the part of the investigating agency, the Court on a petition passes direction under Section 156(3) of the Code directing the police to conduct investigation.
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> 24. In view of our above detailed discussion and settled principles of law, we would proceed to answer the three questions referred to the larger bench as under:
>
> (i) Whether the police have to approach the learned Magistrate and take orders from him before arresting the accused against whom FIR is registered pursuant to the orders issued by the learned Magistrate under Section 156(3) of the Criminal Procedure Code, 1973 ?
>
> Ans : It is neither obligatory nor mandatory for a Police Officer to obtain the leave of the Court before arresting an accused against whom FIR is registered in pursuance of the order passed by the learned Magistrate under Section 156(3) of the Criminal Procedure Code, 1973. Certainly, we would hasten to add that exercise of discretion by the arresting officer should be exercised with greater sensitivity and in accordance with the settled canon of criminal jurisprudence, while keeping the facts and circumstances of each case in mind. It needs to be remembered by the Investigating agencies that order under Section 156(3) may be passed by the Court as a result of failure to perform its duty on the part of the investigating agencies. ....."

61. The view taken by the Division Bench of this Court in *Jitendra Chandrakant Mehta v. M/s. Shamrock Impex Pvt. Ltd. & Ors.,* 2006(4) Mh.L.J. 355 largely states the principles of law correctly. It is true that absence of a particular format or a particular prayer would not be fatal to a petition lodged under Section 156(3) of the Code. But we are unable to persuade ourselves to the reasonings recorded by the Division Bench that it is not normally essential for a

person to approach the police in terms of Section 154 of the Code before invoking the powers of the Court under Section 156(3) of the Code. Reliance made to the case of *S.N. Sharma v. Bipen Kumar Tiwari*, **AIR 1970 SC 786** by a Division Bench of this Court is correct to the extent that the Court can direct investigation of a cognizable offence by the police and can pass an appropriate direction in this behalf. But in the scheme of the Code, it is difficult for this Court to hold that even without approaching the police officer incharge of a police station, a complaint can be made to the Court in terms of Section 156(3) of the Code. In *S.N. Sharma's* case (supra), the Supreme Court observed :

> "It may also be further noticed that, even in sub-section (3) of section 156, the only power given to the Magistrate, who can take cognizance of an offence under section 190, is to order an investigation, there is no mention of any power to stop an investigation by the police. The scheme of these sections, thus, clearly is that the power of the police to investigate any cognizable offence is uncontrolled by the Magistrate, and it is only in cases where the police decide not to investigate the case that the Magistrate can intervene and either direct an investigation, or, in the alternative, himself proceed or depute a Magistrate subordinate to him to proceed to enquire into the case."

62. Even in the case of *Minu Kumari and Anr. v State of Bihar and Ors.*, **(2006) 4 SCC 359**, the Supreme Court held that when the information is laid with the police but no action is taken, the complainant is given power under Section 190 read with Section 200 of the Code to make complaint with the Magistrate for taking cognizance of an offence and the Magistrate himself may proceed with the same in accordance with law. The Court observed as under:-

> "16. 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 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 (Reg.) v. Union of India,* (1996)11 SCC 582 : 1997 SCC (Cri) 303. It was specifically observed that a writ petition in such cases is not to be entertained."

63. In the case of *Prakash Singh Badal and Anr. v State of Punjab and Ors.*, **(2007) 1 SCC 1**, the Supreme Court held that obligation to register a case cannot be confused with the remedy if the same is not registered and where it is not registered, Section 156(3) of the Code vests discretionary power in a Magistrate, who is competent to take cognizance of an offence under Section 190 of the Code, to order an investigation by the police officer in accordance with law. The Court held as under: -

> "68. It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer incharge of a police station satisfying the requirements of Section 154(1) of the Code, 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.
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> 69. In this connection, it may be noted that though a police officer cannot investigate a non-cognizable offence on his own as in the case of cognizable offence, he can investigate a non-cognizable offence under the order of a Magistrate having power to try such non-cognizable case or commit the same for trial within the terms under Section 155(2) of the Code but subject to Section 155(3) of the Code. Further, under sub-section (4) to Section 155, where a case relates to two offences to which at least one is cognizable, the case shall be deemed to be a cognizable case notwithstanding that the other offences are non-cognizable and, therefore, under such circumstances the police officer can investigate

such offences with the same powers as he has while investigating a cognizable offence.

70. The next key question that arises for consideration is whether the registration of a criminal case under Section 154(1) of the Code ipso facto warrants the setting in motion of an investigation under Chapter XII of the Code.

71. Section 157(1) requires an Officer Incharge of a Police Station who 'from information received or otherwise' has reason to suspect the commission of an offence-that is a cognizable offence-which he is empowered to investigate under Section 156, to forthwith send a report to a Magistrate empowered to take cognizance of such offence upon a police report and to either proceed in person or depute any one of his subordinate Officers not being below such rank as the State Government may, by general or special order, prescribe in this behalf, to proceed to the spot, to investigate the facts and circumstances of the case and if necessary, to take measures for the discovery and arrest of the offender. This provision is qualified by a proviso which is in two parts (a) and (b). As per Clause (a) the Officer Incharge of a Police Station need not proceed in person or depute a subordinate officer to make an investigation on the spot if the information as to the commission of any such offence is given against any person by name and the case is not of a serious nature. According to Clause (b), if it appears to the Officer Incharge of a Police Station that there is no sufficient ground for entering on an investigation, he shall not investigate the case. Sub-section (2) of Section 157 demands that in each of the cases mentioned in Clauses (a) and (b) of the proviso to Sub-section (1) of Section 157, the Officer Incharge of the Police Station must state in his report, required to be forwarded to the Magistrate his reasons for not fully complying with the requirements of Sub-section (1) and when the police officer decides not to investigate the case for the reasons mentioned in

Clause (b) of the proviso, he in addition to his report to the Magistrate, must forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause the case to be investigated. Section 156(1) which is to be read in conjunction with Section 157(1) states that any Officer Incharge of a Police Station may without an order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of the concerned police station would have power to enquire into or try under provisions of Chapter XIII. Section 156(3) vests a discretionary power on a Magistrate empowered under Section 190 to order an investigation by a police officer as contemplated in Section 156(1). It is pertinent to note that this provision does not empower a Magistrate to stop an investigation undertaken by the police. (See State of Bihar and Anr. v. J.A.C. Saldanha and Ors. (1980 (1) SCC 554) In that case, power of the Magistrate under Section 156(3) to direct further investigation after submission of a report by the investigating officer under Section 173(2) of the Code was dealt with. It was observed as follows:

> "The power of the Magistrate under Section 156(3) to direct further investigation is clearly an independent power and does not stand in conflict with the power of the State Government as spelt out hereinbefore. The power conferred upon the Magistrate under Section 156(3) can be exercised by the Magistrate even after submission of a report by the investigating officer which would mean that it would be open to the Magistrate not to accept the conclusion of the investigating officer and direct further investigation. This provision does not in any way affect the power of the investigating officer to further investigate the case even

after submission of the report as provided in Section 173(8)."

The above position has been highlighted in State of Haryana and Ors. v. Bhajan Lal and Ors. (1992 Supp (1) SCC 335).

72. In State of Punjab and Anr. v Gurdial Singh and Ors. (1980 (2) SCC 471) it was observed as follows:

> "If the use of the power is for the fulfilment of a legitimate object the actuation or catalysation by malice is not legicidal."

73. At this stage it needs to be clarified that the obligation to register a case is not to be confused with the remedy if same is not registered. Issue of the remedy has been decided by this Court in several cases. (See Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. (2004 (7) SCC 768)".

64. In view of our above discussion, we record our answers to the questions of law posed before us, as follow:-

Question No. (i)

Whether in absence of a complaint to the police, a complaint can be made directly before a Magistrate ?

Answer

Normally a person should invoke the provisions of Section 154 of the Code before he takes recourse to the power of the Magistrate competent to take cognizance under Section 190 of the Code, under Section 156(3). Atleast an intimation to the police of commission of a cognizable offence under Section 154(1) would be a condition precedent for invocation of powers of the Magistrate under Section 156(3) of the Code. We would hasten to add here that this dictum of law is not free from exception. There can be cases where non-compliance to the provisions of Section 154(3) would not divest the Magistrate of his jurisdiction in terms of Section 156(3). There could be cases where the police fail to act instantly and the facts of the case show that there is possibility of the evidence of commission of the offence being destroyed and/or tampered with or an applicant could approach the Magistrate under

Section 156(3) of the Code directly by way of an exception as the Legislature has vested wide discretion in the Magistrate.

Question No. (ii)

Whether without filing a complaint within the meaning of Section 2(d) and praying only for an action under Section 156(3), a complaint before a Magistrate was maintainable ?

Answer

A Petition under Section 156(3) cannot be strictly construed as a complaint in terms of Section 2(d) of the Code and absence of a specific or improperly worded prayer or lack of complete and definite details would not prove fatal to a petition under Section 156(3), in so far as it states facts constituting ingredients of a cognizable offence. Such petition would be maintainable before the Magistrate.

65 We answer the questions of law accordingly. The matters be listed before a appropriate bench for disposal in accordance with law.

CHIEF JUSTICE

A.M. KHANWILKAR, J.

SMT.R.S. DALVI, J.