IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.1937 OF 2010

Mrs. Charu Kishor Mehta,)
Age: years, Occ.-Permanent Trustee,)
Social Worker, R/o, 37, Usha Kiran,)
18th Floor, Carmichael Road,)
Mumbai 400 026.) ..Petitioner.

V/s.

1. State of Maharashtra)
)
2. Addl.Commissioner of Police,)
Economic Offences Wing, Mumbai.) ..Respondents.

WITH

CRIMINAL APPLICATION NO.308 OF 2010
IN
CRIMINAL WRIT PETITION NO.1937 OF 2010

1. Dr.Narendra D. Trivedi.)
2. Dr.Sanjay P. Kapadia.)
3. Mr.Rosario Pachecho)
4. Mr. Mulky A. Kamath)
5. Mr. Lawrence Pareira)
6. Mr. Charanjitsingh Rekhi)
7. Mr.Rajendra Khairnar.)
all adult, Indian inhabitants, having)
their office at Lilavati Hospital &)
Research Centre, A-791, Bandra)
Reclamation, Bandra(West))
Mumbai 400 050.)..Applicants/interveners.

And

Mrs. Charu Kishor Mehta,)
Age: years, Occ.-Permanent Trustee,)
Social Worker, R/o, 37, Usha Kiran,)
18th Floor, Carmichael Road,)
Mumbai 400 026.) ..Petitioner.

V/s.

1. State of Maharashtra)
)
2. Addl.Commissioner of Police,)
Economic Offences Wing, Mumbai.) ..Respondents.

Mr. Mahesh Jethmalani, Sr. Advocate with Pranava Badheka & Pranav Sampat i/b. Thakore Janiwala & Associates for the petitioner.

Mr. Amit Desai, Sr. Advocate with Mr. Kunal Vajani & Pranaya Goyal i/b. Wadia Gandy for interveners.

Mr. K.V.Saste, APP for State.

CORAM: A.M.KHANWILKAR &
A.P.BHANGALE, JJ.

DATE : NOVEMBER 26, 2010.

JUDGMENT :(Per A.P.Bhangale, J)

1. Rule made returnable forthwith by consent of learned Counsel representing the parties. Heard submissions.

2. The Petitioner prayed for issuance of the writ of Mandamus or any other appropriate writ, order or direction, commanding Respondent no. 2 to forthwith file a FIR and carry out a thorough investigation in to the offences set out in the complaint of in the said complaint for punishment of the Accused therein and all persons connected with the said offence in accordance with law.

3. Facts briefly stated are-

The Petitioner- Complainant had by an communication dated 25th April 2008 addressed to the Additional Commissioner of Police, Economic Offences Wing, Crime branch C.I.D., Mumbai, made accusations that Shri Vijay Kirtilal Mehta, in pursuance of Criminal Conspiracy alongwith Dr. Narendra Trivedi, Dr Sanjay Prabhat Kapadia, Shri Rozario F. Paacheco, Shri Anant Kamath, Shri Lawrence Pareira, Shri Rajendra Kairnar, Shri Charanjit Singh Rekhi, Shri Dushyant Madhukant Mehata, Smt Jasmin Dushyanta Mehata, Shri Ganpat Balu Malap, Shri Sharan P. Khanna, Shri Jagdish B. Ahuja and 28 others forged or caused to be forged various documents including alleged Agreements of Assignment /Transfer, used the same as genuine knowing fully well that the same are fake /forged

documents and thereby cheated the Public Charitable Trust of Leelavati Hospital and Research Center to an extent of Rs 13.67 crores. Thus, offence of Criminal Breach of Trust in pursuance of criminal conspiracy was alleged. It is contention of the petitioner that Shri Vijay kirtilal Mehta was Trustee in Charge and control of the affairs of Lilavati Hospital and Medical research Center (hereinafter referred as Lilavati Hospital) during the period between February, 2005 to June, 2005. He was dismissed by the Joint Charity Commissioner on the ground of his misdeeds of criminal misappropriation of property(although order was stayed by The City Civil Court, Mumbai). Dr. Narendra Trivedi, Dr Sanjay Prabhat Kapadia, Mr. Rozario F. Pacheco, Shri M. A. Kamath, Mr. Lawrence Pareira, Shri Rajendra Khairnar and Shri Charanjit Singh Rekhi are still acting as senior officials of the Lilavati Hospital Trust. Shri Dushyant Madhukant Mehta, though unqualified chemist is managing the medical supplies of the Lilavati Hospital and records would show that the entire management has been abdicated in favour of the said unqualified chemist by the senior officials. Shri Dushyant Madhukar Mehta with his wife Smt. Jasmine Dushyant Mehta and his assistant Shri Ganpat Balu Malap are part of the criminal conspiracy and co-perpetrators of the fraud committed upon Lilavati

Hospital Trust resulting in huge loss to the State aided Public Charitable Trust. It is further contention of the petitioner that Shri Sharan P. Khanna who is Chief promoter of the Golden sea shell Co-operative Housing society Ltd., having his office at 309, Dalamal Tower, Nariman Point, Mumbai-21 (hereinafter referred to as 'Golden') and Shri Jagdish B Ahuja, proprietor of Ahuja platinum Properties, Bandra(hereinafter referred to as 'Ahuja') have together with dubious deals with Vijay K. Mehta made the Trust poorer by crores of Rupees, in pursuance of their criminal conspiracy, dishonestly forged and fabricated documents including the alleged Deed of Assignment/Transfer, using the same as genuine knowing fully well that the same were fake /forged documents causing loss to the Trust to the tune of Rs. 13.67. Crores for the sake of personal gains. The petitioner who had to live abroad during the medical treatment of her Husband Kishor Mehta (permanent Trustee of the Lilavati Hospital), had protested and advised Shri Vijay Mehta to mend his ways, who got infuriated and in retaliation sought to illegally and unlawfully remove Shri Kishor K Mehta as a Trustee and wrongfully and deliberately kept him away from the affairs of the Trust. According to the petitioner on or about 28-02-2005 the Golden participated in a tender floated by the Administrator of the specified undertaking of the

Unit Trust of India ("UTI") for sale 28 flats along with 20 covered car parking spaces within the compound of the building no 16, MHB colony, K.C. Road, Bandra (west), Mumbai-52 along with the right to hold corresponding proportionate land on which the building is situated together with the right in common with the authority and the occupiers of the adjoining premises of the authority ("premises") Along with the Bid, 'Golden' paid sum of Rs 17,00,000/- to Ahuja. On or about 11-3-2005 Trust paid sum of Rs.17,00,000/-purportedly for stamp duty and registration charges in respect of the said premises. This was an illegal and unauthorized payment from the Trust to Ahuja as the said Trust had no any stake or involvement in the allege transaction in respect of the premises. The payment of Rs 17 lacs exactly corresponded with the down payment made to UTI by 'Golden'. Ahuja brokered a deal with between the 'Golden' and Vijay K Mehta and 10 others for the alleged Assignment dated 13 May 2005 of benefits of the acceptance of the Bid in respect of the premises from the Golden to Shri Vijay Mehta and 10 others. On 22-3-205 the bid was announced as successful by the UTI at Rs. 11,21,21,000/- plus stamp duty, registration charges, transfer charges and other expenses which may be payable. 'Golden' was required to pay a sum of Rs.95,12,100/- being

balance EMD(10% of the bid) by 8th April 2005. On 7th April 2005, a payment of Rs 95,12,100/- was made by the Trust to UTI on account of 'Golden' and it was forwarded by the 'Golden' to UTI under its letter dated 8th April 2005. This was also unauthorized and illegal payment made from the Trust as the Trust had no stake/involvement in the said transaction. 'Golden' by the Deed of Assignment date 8th April, 2005 agreed to assign benefits to Shri Vijay Mehta and others 10 for a consideration of Rs. 2,45,79,000/- payable as under-

i) By way of reimbursement of the amount of Rs.17 lacs paid by Golden; and

ii) Balance of Rs. 2, 28, 79,000/-simultaneous to the execution of the building conveyance and assignment in favor of the Golden (in the meantime the amount shall remain deposited with Kirit N. Damania & co., Advocates & Solicitors).

Without any stake/ involvement in the purported Deed of Assignment, On 8-04-2005 a payment of Rs.2,45,79,000/- was made by the Trust, unauthorizedly and illegally to Kirit Damania and Co. Advocates and Solicitors. The above document was purported to be a Deed of Assignment between the aforesaid assignors and the assignees for eventual acquisition of the premises by the Assignees in their individual capacity. Payment vouchers of Lilavati Hospital Trust confirmed that it was dubious transaction

as the Trust had nothing to do with the purported Deed of Assignment. This Agreement was totally swept under the carpet as it does not find any mention in the subsequent Deed of assignment dated 13-05-2005 between the Assignors and Assignees. Trust was not party to purchase the premises. Internal note made by Shri M.A. Kamath for to pay Rs. 2, 45, 79,000/- in favor of Kirit Damania & Co. was clearly an act of embezzlement/misuse of the funds of the Trust. Payment of Rs. 17 lacs made by the Trust to 'golden' on 18-04-2005 was also unauthorized and illegal payment from the Trust as Trust was not party to the Agreement and transfer, registration, stamp duty charges were not payable by the Trust. On 03-05-2005, a special power of attorney was executed by Shri Vijay K. Mehta and others 10 in favor of Shri Vijay K. Mehta, pursuant to the Deed of Assignment dated 8-04-2005 for eventual acquisition of the premises in their individual names. Strangely, without any locus on the part of the donor to do so the special power of attorney authorized Vijay K. Mehta to avail of a loan on behalf of the Trust for discharge of their personal liability under the purported Deed of Assignment dated 08-04-2005. On 13-05-2005 another purported Deed of Assignment was entered in to between the Golden and Vijay K. Mehta and 10 others (as Assignees) for the alleged assignment of the benefits of the

acceptance of the bid in respect of the premises. At this stage, there was no any mention that the benefits of the Assignment will be transferred to the Trust which was purportedly done under the Agreement of assignment dated 29-06-2005 between the Assignees and the Trust, with recitals that the payment was made by the Assignees, though in fact the Trust had made payments. This document was executed to camouflage the misappropriation of Trust funds by the Assignees as Golden is not party to this document and the Trust had not authorized it so as to make it binding upon the Trust. Shri.M. A. Kamath has signed as executant transferor and also as Transferee which is unknown to law. The purported agreement contained false statements in respect of the payments made by the Trust. It was got up /forged/fabricated document by Shri Vijay K. Mehta in collusion and in conspiracy with others to swindle Trust funds for personal benefits. On 22-08-2005 Shri Vijay K Mehta engineered an alleged Resolution from the Board of Trustees authorizing him to negotiate and finalize the purchase of the said premises. The entire dubious transaction has resulted in unjust personal enrichment of Shri Vijay K. Mehta and 10 others at the cost of Trust. Joint Charity Commissioner had dismissed Vijay K. Mehta as Trustee upon various charges including the charge of clandestine transaction. Till

today there is no NOC from MHADA to transfer all the rights, title, interest of the UTI. UTI has refused to accept the sum of Rs. 10,09,08,900/- as final payment, which amount was already parted with by the Trust to Golden after the Trust had incurred loan from Cosmos Co-operative Bank Ltd. The Trust repaid the said loan with interest to the Bank. Thus, Vijay Mehta and 10 others have used and misappropriated the Trust funds to earn their own personal benefits and committed various criminal acts of misappropriation, criminal breach of Trust and fraud, forgery, fabrication of documents i.e. Assignment/Transfer knowing that they are not genuine etc. Additional Commissioner of Police, Economic Offences Wing, Mumbai to whom complaint was made, did not take requisite steps to record FIR and to register a Criminal case though long time had elapsed and chose to seek approval from his superior officer Joint Commissioner of Police, (Crimes) for to start a preliminary inquiry as to whether offence is disclosed or not and for to forward the complaint and a set of documents to the office of the Charity Commissioner, Mumbai, who may inquire into irregularities and illegalities in the administration of any Public Charitable Trust, regarding misappropriation of Trust funds by the Trustees under the provisions of Bombay Public Trust Act. Joint Commissioner of Police had approved the

proposed necessary action on 16-05-2008 for to hold preliminary inquiry in as proposed and to send a set of documents to the office of the Charity commissioner, Mumbai. The petitioner was later informed about the action of closure of preliminary inquiry in to accusations made by her.

4. The grievance of the petitioner is as detailed above that during the period between February 2005 to June 2005 Shri Vijay Kirtilal Mehta in criminal conspiracy with others committed various criminal acts of criminal breach of trust and severely impaired the financial position of the Trust by siphoning away Rs 13.67 crores approximately through dubious, illegal, and untenable transactions for personal expenses and gains. Shri Vijay Mehta has forged / caused to be forged, fabricated various documents including alleged agreements of Assignments, used the same as genuine knowing fully well that the same were fake/forged documents and thereby cheated the Trust and caused loss to the Trust to an extent of about Rs 13.67 crores. According to the Petitioner, despite the detailed communication sent by the Petitioner, the police inaction was unjust by not registering the FIR and a criminal case and by not making thorough investigation in to the accusations made.

5. The petition is opposed by the State of Maharashtra and second respondent Additional Commissioner of Police, Economic Offences wing Mumbai. Interveners Dr Narendra Trivedi and others 7 also by criminal Application no. 308 of 2010 sought to oppose relief in the writ Petition. An affidavit in reply was filed by Shri. Ashok Kisan Kakad, police Inspector, Economic Offences Wing Unit III, Crime Branch, Mumbai. It is contended that dispute was going on between the Petitioner and the Trustee Vijay Mehta in connection with the Trust of Lilavati Hospital and it was necessary to verify the facts mentioned by the petitioner in his complaint to know as to whether prima facie a cognizable offence is made out or not. Thus it was decided to conduct preliminary inquiry in to the matter. The Petitioner had challenged the powers, rights, actions and the decisions and the transactions of the Trustees and alleged on that basis that they have committed offences. The deponent on behalf of the respondents claims that during the course of inquiry, prima facie no criminal offence was made out and no loss or misappropriation was found. The Police authority to whom the complaint-application was addressed felt that the issue as to whether the Trustees have right to make the transactions as alleged was found a question pertaining to jurisdiction of the Charity Commissioner, Worli, at Mumbai. Thus having

concluded that the dispute was of a civil nature and no cognizable offence was made out, the complaint application of the petitioner was forwarded to the office of the Charity Commissioner, Mumbai with a request for a necessary action and disposal. The petitioner was informed accordingly. Thus contending that neither offence of Criminal beach of Trust nor any commission of cognizable offence was disclosed the respondents prayed for dismissal of the Petition. The interveners against whom complaint is filed have supported the plea of the Respondents that this Court ought not to entertain writ petition as the Petitioner has alternative efficacious remedy. The Petitioner on the other hand, has opposed the intervention application on the argument that the Applicants therein have no locus to intervene in this Petition. They are neither necessary nor proper parties in the context of the relief claimed in the Petition.

6. We have heard submissions at the Bar including submissions from the interveners and perused the rival contentions in the Petition in view of the rulings cited.

7. The decision by the police in this case to undertake preliminary inquiry, their inaction or evasiveness to register FIR and investigate in to

serious accusations and their conduct of simply leaving it to the Charity Commissioner, Mumbai, is vehemently assailed by Learned counsel for the Petitioner as a colorable exercise of power. Mr. Mahesh Jethmalani submitted with reference to the Full bench rulings of this Court in Panchabhai Popatbhai Vs. State of Maharashtra 2010 Cri. L.J. 2723 and in Sandeep Rammilan Shukla vs. State of Maharashtra 2009(1) Mah. L. J. 97 that it is absolute duty of the officer in charge of the police station concerned to record information and place substance thereof in the prescribed book, if the information disclosed the commission of the cognizable offence. It is further submitted that the power to make preliminary inquiry to pre-registration of the case can be exceptionally and rarely exercised by the officer in charge of a police station. Such inquiry even if undertaken has be completed expeditiously and in any case within two days. In **Panchabhai's case** Full Bench of this court had observed in Para 6.

> "6. That 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 ."

2

The questions of law were formulated and answered by the full Bench thus:-

> "64.In view of our above discussion , we record our answers to the questions of law posed before us , as follows:
>
> Question no. (i)
>
> Whether in the 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). At least an intimation to the police of a commission of a cognizable offence under section 154(1) would be a condition precedent for invocation of the powers of Magistrate under section 156(3) of the Code.
>
> We would hasten to add here that this dictum of law is not free from an 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 police fail to act instantly and the facts of the case show that there is possibility of the evidence of commission of 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 the 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) can not 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 is maintainable before the Magistrate."

Issue of the availability of alternative remedy is thus decided by answers to the questions formed in the **Panchabhai's case(Supra)**.

8. The scheme of the Code of Criminal Procedure indicate that in order to set the machinery of criminal justice in motion, the procedure require lodging of a complaint as contemplated by Cr.P.Code. It may arise from the information received by the Police Officer in charge of the police station concerned in any cognizable offence. Under Section 154 of Cr.P.C.; FIR is not an encyclopedia. It is only to set the law in motion. It need not be elaborate but should contain necessary allegations to constitute cognizable offences. The provision of Section 154 of the Code is mandatory and the concerned officer who is in charge of the police station is duty bound to register the case on the basis of such information if it is disclosing any cognizable offence. Full Bench of this Court in Sandeep Rammilan Shukla vs. State of Maharashtra 2009(1) Mah L. J.97 concluded that the expression "shall" appearing in section 154 of the Code is mandatory. The section 154

placed an absolute duty on the part of the 'Police officer in charge of the 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 cognizable offence. 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 and not recording of the information received. In Ramesh Kumari Vs. State (NCT of Delhi) & others 2006 All MR (Cri) 1187 (SC) the Apex Court while making reference to State of Haryana Vs. Bhajan Lal 1992 SCC (cri) 426 =AIR 1992 SC 604 made it clear that genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words, reliability, genuineness and credibility of the information are not the

conditions precedent for registering a criminal case under Section 154 of the Code. The Rule 113 (12) of the Bombay Police Manual, 1959 postulates that a note be taken in the station diary by the Police Station House officer (SHO) if the information received do not disclose the commission of an cognizable offence but there may be a necessity for further inquiry by him so that he can proceed to the spot/place concerned and inquire so as to know whether the facts disclosed the commission of an cognizable offence. In view of the proviso to Section 157 of the Code, the police may not investigate a complaint even if an FIR is filed, when:

(i) The case is not serious in nature;

(ii) The police feel that there is no sufficient ground to investigate.

However, when the police arrive at a decision not to investigate in to the accusations made, they must record all such reasons for not conducting full and complete investigation and in the latter case must also inform the reasons recorded to the informant/complainant. Police station House officer shall and is always expected to deal with the information in accordance with law. Police officer investigating can interrogate the suspects and may arrest the accused once the adequate evidence is available against the accused. In

Sandeep Shukla's case (supra) it is concluded that the law does not prohibit the conducting of a limited preliminary inquiry pre- registration of FIR in exceptional and rare cases by the officer in charge of the police station and therefore he may penultimately 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 undertaken if any has to be completed expeditiously within period of two days. FIR should be registered 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. In the process of investigation which follows thereafter for collection of evidence pertaining to any crime, the accused therein at the stage of investigation cannot have any locus to raise adverse objection to the investigation, since the investigation to be done is a domain of investigating machinery with the principles to be borne in mind that the real culprits /offender must be brought to justice and at the same time an innocent person should never be harassed on the basis of tactics likely to be adopted by any person vindictively poised against the

accused as a result of any private dispute of a civil nature. It is for the investigating machinery to impartially conduct the full investigation to explore the truth and to collect the evidence in the manner that real culprits can be booked and conviction as a logical consequence can be achieved at the time of conclusion of a trial by producing the necessary evidence before the competent Criminal Court. It is only when, if in the course of investigation any accused is required to be arrested, it may result into affecting his personal liberty and at this stage the accused may have first opportunity to have say in the matter, but to the extent of his own personal liberty and not to canvass for liberty of other co-accused or for about the roles of other co-accused for interrogation or after interrogation. Thereafter, in the next stage when any accused concerned is charge-sheeted he will have opportunity to say in the matter in as much as of defending the case against the accusations, for which he is charged. Even after the charge-sheet is filed when any question arises for induction of any of the additional accused in the case in connection with the same offence or for any other offence in the case, the other co-accused would have no say in the matter, unless and until the remand is prayed for against him. Even at the time of filing of charge-sheet, the accused would be merely entitled to claim for all papers and

evidence, which were collected by the prosecution and he will have every right to defend the case at the time of trial. The evidence of the witnesses so collected by the prosecution is required to be produced before the trial Court and at this stage, the accused concerned has right to cross-examine the witnesses for the purpose of defending himself in the case and thereafter when a particular accused is called upon to make statement as against the evidence led by the prosecution and produced before the trial Court. This is briefly the scheme of the code for a criminal trial.

In Union of India Vs. W. N. Chaddha AIR 1993 SC 1082 in Para 90 it is observed thus:

> "90. Under the scheme of Chap. XII of the Code of Criminal Procedure, there are various provisions under which no prior notice or opportunity of being heard is conferred as a matter of course to an accused person while the proceeding is at the stage an investigation by a Police officer."

It is for these reasons we feel that the learned counsel Mr. Desai can not claim that interveners have any locus to object registration of FIR and investigation pursuant thereto in the case.

9. The investigation once undertaken pursuant to registration of FIR must proceed expeditiously, smoothly, unhampered and without there being any opportunity for the accused to tamper with it. The accused therefore have no right to say in the matter regarding the manner and method of investigation while it remains pending.

Chapter XII of the Code of Criminal Procedure, 1973 (in short the 'Code') relates to "Information to the Police and their Powers to Investigate". Section 154 reads as under:

> Information in cognizable cases.
>
> (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.
>
> (2) A copy of the information as recorded under sub-section (1) shall be given forthwith, free of cost, to the informant.
>
> (3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either

> investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence."

Section 156 deals with "Police officer's power to investigate cognizable cases" and the same reads as follows:

> "(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII.
>
> (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.
>
> (3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned."

10. It can not be disputed that the remedy which is inbuilt in the Code for the complainant, when the information is laid with the police, but no action in that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code 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 discussed by Hon'ble the Supreme Court in All India Institute of Medical Sciences Employees' Union (Reg.) through its President v. Union of India and Others [(1996) 11 SCC 582]. It is true that as a normal rule writ petition in such cases is not to be entertained. This was reiterated in Gangadhar Janardan Mhatre v. State of Maharashtra [(2004) 7 SCC 768] and in Minu Kumari and Another v. State of Bihar and Others [(2006) 4 SCC 359]. But dealing with exceptional case the Hon'ble Apex Court in the matter of S.N. Sharma v. Bipen Kumar Tiwari reported in AIR 1970 SC 786 : (1970 Cri LJ 764) has held that the High Court can invoke the jurisdiction under Article 226 of the Constitution, if the High Court is convinced that the

power of investigation has been exercised malafide. In the ruling of Lalan Chaudhary & others vs state of bihar & another (2006) 12 SCC 229 ; following the decision in Ramesh Kumari vs. State (NCT of Delhi) and others (2006) 2 SCC 677, the Apex court considered the scheme of the Code thus;

> "8. Section 154 of the Code thus casts a statutory duty upon police officer to register the case, as disclosed in the complaint, and then to proceed with the investigation. The mandate of Section 154 is manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge of a police station, such police officer has no other option except to register the case on the basis of such information.
>
> 9. In the case of Ramesh Kumari v. State (NCT of Delhi) and Ors. (2006) 2 SCC 677, this Court has held that the provision of Section 154 is mandatory. Hence, the police officer concerned is duty-bound to register the case on receiving information disclosing cognizable offence. Genuineness or credibility of the information is not a condition precedent for registration of a case. That can only be considered after registration of the case.
>
> 10. The mandate of Section 154 of the Code is that at the stage of registration of a crime or a case on the basis of the information disclosing a cognizable offence, the police officer concerned cannot embark upon an enquiry as to whether the information, laid by the informant is reliable and genuine or otherwise and refuse to register a case on the ground that the information is not relevant or credible. In other words,

> reliability, genuineness and credibility of the information are not the conditions precedent for registering a case under Section 154 of the Code."

11. It was observed by the Apex Court in the aforesaid case that no case was registered by SHO of Police station concerned against the accused for offences disclosed in the complaint under Sections 147, 148, 149, 448 and 395 IPC and no investigation was carried out by the Police in respect of the aforesaid sections of law and therefore grave miscarriage of justice was committed. The Apex Court observed thus;-

> "In the present case, undisputedly, the cognizable offences disclosed in the complaint, were under Sections 147, 148, 149, 448, 452, 323 and 395 IPC. The complaint was filed before the Sub-Divisional Judicial Magistrate and the same was endorsed to SHO of concerned Police Station for registering the FIR under Section 154 of the Code. The concerned SHO of the Police Station registered the case only under Sections 452/380/323/34 IPC. Section 395 IPC, which had been disclosed in the complaint, was excluded from the purview of the FIR and resultantly no investigation was carried out by the Police in terms of Section 156 and 157 of the Code of Criminal Procedure. "

12. Thus, in view of the well settled principle of law that in criminal trial, investigation is preceded by an FIR on the basis of written complaint or otherwise disclosing the offence said to have been committed by the accused. In that case it was observed that, a grave miscarriage of justice has

been committed by the SHO of concerned Police Station by not registering an FIR on the basis of offence disclosed in the complaint petition. It was held that the concerned police officer is statutorily obliged to register the case on the basis of the offence disclosed in the complaint petition and proceed with investigation in terms of procedure contained under Sections 156 and 157 of the Code. The FIR registered by the Police would clearly disclose that the complaint for offence under Section 395 IPC has been deliberately omitted and, therefore, no investigation, whatsoever, was conducted for the offence under Section 395 IPC. Under the circumstances, Patna High Court had directed the Magistrate to proceed with inquiry in accordance with law under section 209 of the Code. In appeal the Apex Court had refused to interfere with the order passed by the Patna High court.

13. If we take panoramic view of Chapters XII and XV of the Code of Criminal Procedure, it is quite clear that the legislature in its wisdom contemplated two different situations. Chapter XII deals with the power of the police authorities to investigate in respect of cognizable offence on receipt of information thereof. While Section 156, which forms part of Chapter XII, deals with the power of an Officer in-charge

of a police station to investigate cognizable cases. Chapter XV is about the complaints to Magistrates which is compartmentalized separately to deal with the inquiry and procedure required to be followed by the Magistrate while dealing with the complaint filed. In our view, therefore a complaint is made to police about the cognizable offence; the police have duty to record the information, register a criminal case and to investigate so as to book the real culprits before the competent criminal court. In this case, the complainant made serious accusations against functionaries of Public Charitable Trust that they in criminal conspiracy with each other as well as outsiders, indulged in to acts of commission and omissions, forged and fabricated record of the Trust, committed criminal breach of Trust to swindle huge sums of money belonging to Trust for their own pecuniary gains. Therefore police had their statutory duty to record the information, register a criminal case, investigate and report to the competent criminal court, whatever may be outcome of their investigation, stopping the preliminary inquiry at mere reference to the charity commissioner, Mumbai about such serious accusations was nothing but evasiveness or merely an eyewash under the circumstances. The police, in our opinion, with lawful means at their

command ought to have taken the accusations to their logical end as contemplated by law. Talking about the lawful means, the powers of the police authorities to investigate in to a cognizable offence is not dependent on an order of the Magistrate. But at the same time, such powers may be exercised by the police officer concerned, also upon an order being passed by any Magistrate empowered under Section 190 of the Code for making such an investigation. Chapter XII deals with the conduct of investigation of both cognizable and non-cognizable offences and the steps to be taken in that regard culminating in the filing of the report of the investigation on completion thereof under Section 173(2) of the Code. It may also be indicated that under Sub-section (8) of Section 173 the police is empowered to conduct further investigation in respect of an offence even after a report under Sub-section (2) is forwarded to the Magistrate. Offenders can be brought to justice accordingly.

15. Learned Counsel for intervenor made reference to unreported ruling of Bombay High Court in Criminal Writ Petition No.934 of 2008, Minakshi

Dyaneshwar Vs. State of Maharashtra decided on 12.09.2008 to argue that powers under Section 482 of Criminal Procedure Code are exercised in rarest of rare cases and petitioner must be left to follow alternative remedy to approach Magistrate. He also invited our attention to the ruling of the Supreme Court in Hari Singh vs. State of U.P., (2006) 5 SCC 733, in order to submit that when the information is laid with the police but no action on that behalf is taken, the complainant can under Section 190 read with Section 200 of the Code 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. It was further held that 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 the offence under Chapter XII of the Code and submit a report. If he finds that 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. After pointing out the same, the Supreme Court concluded with

dismissal of the writ petition filed under Article 32, constitution of India.

16. Our attention was also invited to the judgment of Hon'ble the Supreme Court in Aleque Padamsee and others v. Union of India & others, (2007) 6 SCC 171, wherein it is concluded thus:-

> "8. The writ petitions are finally disposed of with the following directions:
>
> (1) If any person is aggrieved by the inaction of the police officials in registering the FIR, the modalities contained in Section 190 read with Section 200 of the Code are to be adopted and observed.
>
> (2) It is open to any person aggrieved by the inaction of the police officials to adopt the remedy in terms of the aforesaid provisions.
>
> (3) So far as non-grant of sanction aspect is concerned, it is for the concerned government to deal with the prayer. The concerned government would do well to deal with the matter within three months from the date of receipt of this order.
>
> (4) We make it clear that we have not expressed any opinion on the merits of the case."

Thus, in **Aleque Padamsee(Supra)**, Hon'ble the Supreme Court clarified that in those cases where police refuses to register an FIR, filing of a writ petition is not the remedy .The Apex Court reiterated its decision in **Hari Singh's (supra)** case.

17. Our attention is then invited by Learned Counsel for interveners to the ruling of Sakiri Vasu vs. State of U.P (2008) 2 SCC 409 wherein the Supreme Court observed thus:-

> "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) Cr.P.C. to order registration of a Criminal offence and /or to direct the officer in charge of the concerned Police station 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) Cr.P.C. 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 Cr.P.C. 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 alternative remedy, firstly under Section 154(3) and Section 36 Cr.P.C. before the concerned police officers, and if that is of no avail, by approaching the concerned Magistrate 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) Cr.P.C. or other police officer referred to in Section 36 Cr.P.C. 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) Cr.P.C. instead of rushing to the High Court by way of a writ petition or a petition under Section 482 Cr.P.C. Moreover he has a further remedy of filing a criminal complaint under Section 200 Cr.P.C. 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 Cr.P.C. 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 concerned police officers, and if that is of no avail, under Section 156(3) Cr.P.C. before the Magistrate or by

> filing a criminal complaint under Section 200 Cr.P.C. and not by filing a writ petition or a petition under Section 482 Cr.P.C.
> 28. It is true that alternative remedy is not an absolute bar to a writ Petition, but it is equally well settled that if there is an alternative remedy the High Court should not ordinarily interfere."

18. Our attention is also invited to the ruling in Divine Retreat Center Vs. State of Kerala & others (2008) 3 SCC 542 in Para 21 & 22, making reference to the earlier rulings the Apex Court observed thus:

> "21. In S.N. Sharma vs. Bipen Kumar Tiwari & ors. this Court took the view that there is no mention of any power to stop an investigation by the police. 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, 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. The power of the police to investigate has been made independent of any control by the Magistrate. It is further held:
>
> Though the Code of Criminal Procedure gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed, in appropriate cases an aggrieved person can always seek a remedy by invoking the power of the High Court under Article 226 of the Constitution under which, if the High Court could be convinced that the power of investigation has been exercised by a police officer

mala fide, the High Court can always issue a writ of mandamus restraining the police officer from misusing his legal powers."

22. This position has been made further clear by this Court in its authoritative pronouncement in State of Bihar & anr. Vs. J.A.C. Saldanha & ors. thus:

> 25. There is a clear-cut and well demarcated sphere of activity in the field of crime detection and crime punishment. Investigation of an offence is the field exclusively reserved for the executive through the police department the superintendence over which vests in the State Government. The executive which is charged with a duty to keep vigilance over law and order situation is obliged to prevent crime and if an offence is alleged to have been committed it is its bounden duty to investigate into the offence and bring the offender to book. Once it investigates and finds an offence having been committed it is its duty to collect evidence for the purpose of proving the offence. Once that is completed and the investigating officer submits report to the Court requesting the Court to take cognizance of the offence under Section 190 of the Code its duty comes to an end. On a cognizance of the offence being taken by the Court the police function of investigation comes to an end subject to the provision contained in Section 173(8), there commences the adjudicatory function of the judiciary to determine whether an offence has been committed and if so, whether by the person or persons charged with the crime by the police in its report to the Court, and to award adequate punishment according to law for the offence proved to the satisfaction of the Court. There is thus a well defined and well demarcated

> function in the field of crime detection and its subsequent adjudication between the police and the Magistrate."

The Apex court further observed in para 23.

> "23. The observations of this Court in M.C. Abraham & Anr.Vs. State of Maharashtra & ors. (2003)2 SCC 649 in this regard deserve to be noticed. In the said case it was held:
>
> > "The principle, therefore, is well settled that it is for the investigating agency to submit a report to the Magistrate after full and complete investigation. The Investigating agency may submit a report finding the allegations substantiated. It is also open to the investigating agency to submit a report finding no material to support the allegations made in the first information report. It is open to the Magistrate concerned to accept the report or to order further enquiry. But what is clear is that the Magistrate cannot direct the investigating agency to submit a report that is in accord with his views. Even in a case where a report is submitted by the investigating agency finding that no case is made out for prosecution, it is open to the Magistrate to disagree with the report and to take cognizance, but what he cannot do is to direct the investigating agency to submit a report to the effect that the allegations have been supported by the material collected during the course of investigation."

In para 41 it is further observed thus

> "41. It is altogether a different matter that the High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if the High Court is convinced that the power of investigation has been exercised by an Investigating Officer mala fide. That power is to be exercised in rarest of the rare cases where a clear case of abuse of power and non-compliance with the provisions falling under Chapter XII of the Code is clearly made out requiring the interference of the High Court. But even in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code."

19. It is no doubt true that normal/general rule is to leave the party to adopt remedy available under the Code, but this Court is not powerless to issue an appropriate writ when police have failed or avoided to use their powers available under the code to unearth serious economic crimes complained of, if evasiveness to book the real culprits is apparent in the facts and circumstances of the case. In the present case, the petitioner had sent a typed and detailed communication addressed to Shri Rakesh Maria I.P.S., heading Economic Offences Wing, Crime branch C.I.D. in Police Commissioners Compound Annex -1 Building, 2nd floor opp. Mahatma Phule Market at Mumbai -1. In view of the accusations made in details, in our view it was not a case of preliminary inquiry at all considering the

serious nature of the accusations. The case, obviously, was not covered within the excepted category so as to resort to preliminary enquiry before registration of FIR. The police were duty bound to register the FIR and to proceed with the investigation, in the facts and circumstances of the case. Economic offences wing did not, except making few diary entries, bother to inquire with the suspects. Dilly-dallying tactics and evasiveness of police is apparent to us, while we went through diary entries of EOW with the help of Learned Addl. Public Prosecutor. Preliminary inquiry in this case did not really move further except for stopping at mere reference made to the Charity Commissioner, Mumbai. Even assuming that preliminary enquiry in this case has rightly been resorted to, even then the police machinery was expected to delve into details in respect of accusations made by the complainant to make it a real, effective, meaningful preliminary inquiry to summon & inquire with persons acquainted with facts of the case. In our opinion, the preliminary inquiry herein was to do mere paper compliance so as to record that the nature of complaint is a civil dispute. Notably, for the nature of allegations were serious such as fabrication of record, criminal breach of trust, fraud, criminal conspiracy etc., by no stretch of imagination all of them can be passed off as a civil dispute.

20. It is well settled that the High Court in exercise of its power under Article 226 of the Constitution of India can always issue appropriate directions at the instance of an aggrieved person if it is convinced that the power of investigation has been exercised by an Investigating Officer mala fide. The malafide exercise of power need not be malafide in fact. It can be a case of malafide in law. We are conscious that this power is to be exercised in exceptional and rarest of the rare cases where a clear case of abuse of power and non-compliance with the provisions falling under Chapter XII of the Code is clearly made out requiring the interference of the High Court. It is true that in such cases, the High Court cannot direct the police as to how the investigation is to be conducted but can always insist for the observance of process as provided for in the Code, i.e. recording of FIR, and to register a criminal case and to conduct full and complete investigation and to file the final report in competent criminal court upon completion thereof.

21. The Petitioner in this case was simply informed by the police authority that the preliminary inquiry in to the written complaint sent by the Petitioner has been closed. Further, the complaint petition was being

forwarded to the Charity Commissioner, Worli at Mumbai for necessary action in the matter. In our opinion although under these circumstances, it is open for the Petitioner, if she is dissatisfied by the said police inaction to avail of an alternative remedy to lodge a private complaint by moving the competent criminal court as indicated in **Hari Singh's case** or in **Aleque Padamsee's case(Supra**) under the circumstances mentioned we hold that in the fact situation of the present case interference by this Court is inevitable in view of the finding that the police machinery acted malafide. It had lawful means at its command to inquire and investigate more effectively against the accused on the basis of FIR and material which can be collected by them by interrogating the suspects, if necessary, by custodial interrogation, as may be permissible. Moreso when the grievance or complaint pertains to serious economic offences in relation to public trust, interrogation of accused or suspects as permissible according to law may become sine qua non to unearth the crime and to bring real offenders to justice. The function of investigation is of executive nature reserved for the police subject to superintendence by the State Government. The Executive limb of the Government is responsible to maintain law and to prevent as well as investigate serious crimes so as to book the real culprits. We are of the

opinion that the inaction/failure by the police in this case is lamentable because specific detailed serious accusations of forgery, criminal breach of Trust, fabrication of record, swindling of Trust funds of the Trust were made by the complainant. The police ought to have followed the mandate of law to record FIR, and to register a criminal case and investigate it instead of passing it off merely as a civil dispute. That is nothing short of colourable exercise of power, as rightly criticized by Mr. Jethmalani. For the reasons stated, therefore, we do find this as an exceptional case with a valid ground made out to entertain the petition in the facts and circumstances stated by the Petitioner. It is noteworthy that in this case, the police acted from the day one as if no offence was committed. The police did not register any FIR. It is stated that a preliminary inquiry was made. However, the result of that inquiry has not been disclosed in the record as to what inquiry was made, from whom it was made and what was the conclusion of this inquiry made by Police. The stand taken by the police that it was a civil dispute only and therefore the matter was refereed to the Charity Commissioner, Mumbai is not acceptable as it smacks of malafides and evasive of duty to investigate completely and fully. We consider that the whole effort of the Police had been to find an excuse for not investigating in

to accusations made and it is for this reason that the statement made by complainant petitioner remained unheeded for long. If the complainant had made a statement on 25th April, 2008, there was no reason why this statement was not brought on record by registering a case at the police station concerned in any manner. No FIR was recorded on the basis of statement of complainant. In our opinion there was no reason for EOW to ignore accusations in the complaint when the complainant narrated how the Public Trust had been deprived of huge property for private gains by the accused. What is more surprising is that no inquiry was even attempted in this case in respect of manner of disposal of the property of the Trust allegedly by the accused persons. The investigating officer could have interrogated each of the accused even for the purpose of preliminary inquiry. We cannot countenance the fact as to why police did not record the FIR though it was their mandatory duty under section 154 of the Code and furthermore, why no investigation was undertaken despite a detailed statement sent by the complainant Petitioner. There was no excuse for Police to kill time and then merely say that it was a civil dispute, despite serious nature of accusations made in the complaint. Deliberate inaction or shoddy approach or failure to complete full and proper investigation can only help

the real culprits to go scot free. The provisions referred to above occurring in Chapter XII of the Code show that detailed and elaborate provisions have been made for securing that an investigation takes place regarding an offence of which information has been given and the same is done in accordance with the provisions of the Code. The manner and the method of conducting the investigation are left entirely to the officer in charge of the police station or a subordinate officer deputed by him. The formation of the opinion whether there is sufficient evidence or reasonable ground of suspicion to justify the forwarding of the case to a Magistrate or not is as contemplated by Sections 169 and 170. Where the involvement of persons comes to the notice of the investigating agency, the investigating agency cannot keep quiet and refuse to investigate the information received. It is their duty to investigate and submit a report to the Magistrate upon the innocence or involvement of the persons concerned. Every police-officer, to the best of his ability, should collect and obtain evidence concerning the commission of cognizable offences or designs to commit such offences and lay such information and take such other steps consistent with law and with the orders of his superiors, as shall be best calculated to bring offenders to justice. This duty of police to investigate includes, in our opinion, the duty

and authority conferred by the section 156 of the Code of Criminal Procedure. Section 156, therefore, is wide, and any officer in charge of a Police station may without the order of a Magistrate may investigate any cognizable case within the local area limits of the police station and the court concerned. The proceedings of the police officer shall not be called in question on the ground that such police officer was not empowered to investigate under this section. Section 159 of the Code defines the powers of a Magistrate, which he can exercise on receiving a report from the police of the cognizable offence under section 157 of the Code. In our opinion, section 159 is intended to give power to the Magistrate to ensure that the police shall investigate all cognizable offences and do not refuse to do so by abusing the right granted for certain limited cases of not proceeding with the investigation of the offence. Section 2(h) Cr.P.C. defines "investigation" and it includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf. It ends with the formation of the opinion as to whether on the material collected, there is a case to place the accused before a Magistrate for trial and if so, taking the necessary steps for the same by filing of a charge-sheet under Section 173.

Chapter XII of the Code of Criminal Procedure deals with "Information to the Police and Their Powers to Investigate". Section 154 provides that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf (in the present case detailed typewritten complaint was sent in respect of the commission of serious economic offences). Accusations of fraud, embezzlement etc. that too in relation to a public trust property ought not to have been taken lightly by EOW. We therefore think it necessary to invoke extra-ordinary writ jurisdiction under Article 226 of the Constitution of India so as to direct the respondent police in this case to record FIR, register a criminal case, investigate it and file a final report in respect thereof in the competent criminal court, in accordance with law.

22. In the result, the Writ petition is allowed. Rule is made absolute accordingly. Criminal Application No.308 of 2010 is also disposed of.

(A.P.BHANGALE,J) **(A.M.KHANWILKAR,J)**