SYNOPSIS

The Petitioners file this Special Leave Petition against the judgment and order dated 2.11.2007 in Special Criminal Application No.421 of 2007 passed by the High Court of Gujarat at Ahmedabad (Coram: The Hon'ble Mr. Justice M.R. Shah).

By the impugned judgment and order the High Court dismissed the said application filed by the Petitioners herein under Articles 226/227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973.

This case relates to the post Godhra riots which were State sponsored and orchestrated and unprecedented in their magnitude, scale, spread, gruesomeness and brutality of the violence inflicted on a minority community, even for the State of Gujarat.

Out of 25 Districts in the State, in every District, without exception, places of religious worship of the minority community were damaged or destroyed.

In 9 Districts, viz. Ahmedabad, Gandhinagar, Sabarkantha, Anand, Panchmahal, Dahod, Vadodara, Bharuch and Surat, no less than 413 persons went missing of whom more than half (228) are yet to be traced. These and further details were pictorially and graphically depicted in a map (being Annexure "F" at page 2441 of the Petitioners' said application before the High Court) and the same is being appended to this SLP for ready visual reference.

Out of the 25 Districts, 20 Districts were badly affected by the said violence, and the worst affected areas lay in some of these Districts: In Kutch, two areas, Bhuj and Anjar; in Banaskantha, six areas, Dhanera, Panthwada, Palanpur, Badgam, Ghazhipur and Sihori; in Pathan, one area Chanasma, in Mehsana, four areas, Unjha, Sardarpura, Bijapur and Kadih; in Sabarkantha, five areas, Vijaynagar, Biloda, Himmatnagar, Prantij and Modasa; in Gandhinagar,

one area Kalol; in Ahmedabad, eight areas, Vijalpur, Odhav, Vatwa, Naroda, Gomtipur, Chamanpura, Paldi, and Abasana; in Kheda, three areas, Ghodasar, Memdavad, Nadiad; in Panchmahal, six areas, Lunavada, Pandharwada, Godhra, Dailol, Kaalol, and Halol; in Dahod, three areas, Sanjeli, Randhikpur, and Limkheda; in Anand, two areas, Ode and Vasad; in Vadodara, ten areas, Savli, Sokhda, Padra, Vaghodya, Chhota-Udaipur, Kanwat, Panwad, Tejgadh, Tarsali, and Karjan; in Bharuch, three areas, Jambusar, Jhagadiya and Ankleshwar; in Narmada, one area, Rajpipla; in Rajkot, two areas, Gondal and Veraval; and in Surendranagar, one area, Devaliya. These and further details were pictorially and graphically depicted in a map (being Annexure "F" at page 2442 of the Petitioners' said application before the High Court) and the same is being appended to this SLP for ready visual reference.

Besides the spread and permeation of the said violence throughout the State, as an indicator of the State's orchestration of and complicity in the riots, there are other such pointers as well. For one thing, the majority of the complaints were lodged by the police themselves which gave them the leverage to choose the accused and thereby hide and exculpate the real perpetrators, who did so pursuant to the protection given and licence allowed by the police themselves, obviously on instructions from their superiors i.e. the political and executive authorities of the State. On the other hand, in regard to episodes where there were numerous private complaints lodged by the victim survivors, the police authorities purported to club together such complaints and to reduce them to one or two complaints, in that process eliminating from reckoning the real perpetrators of the violence and also truncating the magnitude, intensity and horrendous character of the killings of members of the minority community. Thus, nominally, FIRs were registered, chargesheets filed and cases committed to Sessions for trial. This was all for the record. In substance, however, these

criminal prosecutions were a charade calculated to shield and exculpate the Chief Minister and certain other Cabinet Ministers and high-ranking Police Officers and bureaucrats through whose chain of command the riots were reinforced and fanned so that the minority community was subjugated in terrorem.

If these self serving criminal prosecutions were a true vindication of the Rule of Law, there should have been no necessity, logically, for the State Government to have set in motion a parallel fact finding investigation by constituting a Commission of Inquiry under the Commissions of Inquiry Act, 1952. (The abuse, perversion and scuttling of the processes of the criminal law by the Respondent-State and its officials are already attested to in the records of this Hon'ble Court in …….. ……., which was constrained to stay the proceedings in those prosecutions, viz. in Sessions Case Nos. . See the proceedings in …….). However, a guilty conscience and anxiety seem to have prompted the State Government to constitute such a Commission, now known as the Nanavati Shah Commission.

Affidavits and Statements filed before that Commission have yielded revelations that attest to the complicity of the State Government and its officials in the perpetration of atrocities and grisly violence against the minority community.

Petitioner No.1 is one such traumatized victim. She is the widow of Ali Ahasan Jafri, Ex. M.P. and Ex. M.L.A., who was pulled out of his house by the riotous mob, brutally hacked to death, then his limbs dismembered and mutilated and thereafter his body set on fire, all before her very eyes. This infamous episode is known as the Gulberg Society case. Along with petitioner No.1's husband, some 69 others living in the same complex or in the locality who had sought refuge in their house were massacred by the said mob. In respect of this gory episode, the police filed two complaints and registered two cases of the

self-serving kind aforesaid. The proceedings in the Sessions trial arising out of the charge sheets filed in these two cases have been stayed by this Hon'ble Court as aforesaid.

Petitioner No.2 is a N.G.O. that has throughout been involved in assisting the victims of the said riots and has actively participated in proceedings before and assisted this Hon'ble Court, the Gujarat High Court and the concerned Sessions Courts and Magistrates Courts in Gujarat.

In 2006, on the strength of revelations made before the Nanavati Shah Commission, and facilitated in that behalf by Petitioner No.2, Petitioner No.1 lodged a detailed complaint supported by documentation running to over 2000 pages with the Director General of Police, Gujarat. This was her first complaint in respect of the said riots, both as a victim herself and advocating the cause of other victims like her in the various episodes that took place throughout Gujarat. Her complaint was the first of its kind regarding the said riots in several respects. First, it knit together the seemingly disparate though contemporaneous incidents and locales of the riots throughout the State of Gujarat and brought out a clearly discernible pattern that showed the State Government's complicity in the riots as much as its duplicity in launching ostensible criminal prosecutions in respect of them. Secondly, it levelled specific and detailed allegations against and arraigned as accused the Chief Minister, and eleven of his Cabinet Ministers, three sitting M.L.As., three members of the Ruling Party, three office bearers and three members of an extremist right wing organization, and 38 high ranking police officers and bureaucrats (including IPS and IAS officers) starting from the Director General of Police and the Chief Secretary of the Government of Gujarat. None of the 63 persons named as the accused in Petitioner No.1's complaint figures as an accused in any of the FIRs/charge sheets that formed the subject matter of the various Session Trials regarding the said riots whose proceedings

have been stayed by this Hon'ble Court. Petitioner No.1's complaint runs to 128 pages and is supported by documentation running to over 2000 pages which were sent along with the complaint. Petitioner No.1's complaint was made possible only because of the said documentation being compiled and afforded to her by Petitioner No.2. Nor does Petitioner No.1 have the logistic resources to marshal such documentation and lay such a complaint on her own. Petitioner No.1 thus sought the lodging of a F.I.R. and registration of a case against the said 63 accused for offences punishable under Section 302 r/w Section 120-B, Section 193 r/w Sections 114, 186, 153-A and 187 I.P.C. The complaint was addressed to "Mr. P.C. Pande, The Director General of Police of Gujarat", who also happens to be accused No.29 in the said complaint viz. "P.C. Pande, Former Commissioner of Police, Ahmedabad, then on deputation to the Central Bureau of Investigation, New Delhi; now D.G.P., Gujarat". Copies of the complaint and supporting documentation were also sent to the Police Inspector, Sector 21 Police Station, Gandhinagar; and to the Chief Secretary and the Home Secretary of the Government of Gujarat.

The said addressees of the said complaint refused to even apply their minds to the said complaint. They conveniently prevaricated. In the ensuing correspondence, the said P.C. Pande, D.G.P. and later his immediate subordinate J. Mohapatra, A.D.G.P. insisted that Petitioner No.1 should appear before them and record her statement, while at the same time professing that they had no power or authority to register the F.I.R.

In these circumstances, the Petitioners were constrained to move the High Court invoking its jurisdiction and powers under Articles 226/227 of the Constitution and Section 482 Cr.P.C. The Petitioners prayed for two substantive reliefs: First, that the Hon'ble High Court be pleased to direct the Director General of Police, Gujarat, Respondent No.2, to register the FIR on the first

information dated 8th June, 2006, laid before him by Petitioner No.1; and secondly, that the Hon'ble High Court be pleased to direct that the said FIR be investigated by an independent investigating agency i.e. the Central Bureau of Investigation, Respondent No.3, in the interests of justice.

By the impugned judgment and order the High Court has rejected both prayers and dismissed the Petitioners' said application. Regarding the first prayer, the High Court has held that Petitioner No.1 must be relegated to the remedy of laying her said first information as a private complaint before the Magistrate under Section 190 read with Section 200 of the Criminal Procedure Code. Regarding the second prayer, the High Court has held that no direction to the CBI to investigate the offences can be granted for two reasons: (a) because the documentation submitted by Petitioner No.1 with her said information, in so far as it comprises affidavits and statements filed before the Nanavati Commission, "have no evidentiary value" and that "the allegations and averments in the complaint dated 8.6.2006 are without any further material evidence". (b) The second reason assigned is that the question whether a court can order the CBI to investigate a cognizable offence alleged to have taken place in a State without the consent of the State Government stands referred to a larger Bench of this Hon'ble Court in State of West Bengal vs. Committee For Protection of Democratic Rights reported as (2006) 12 SCC 534.

The Petitioners submit that the impugned judgment and order is unsustainable, in law and on authority, on both counts aforesaid. The reasons for their unsustainability are adduced in the grounds of this SLP.

This SLP raises substantial and far reaching questions of law of general public importance in the context of mass scale communal violence against a minority community in this country which require an authoritative pronouncement of this Hon'ble Court. These questions of law are formulated in

the SLP.

No appeal lies to a Division Bench of the Gujarat High Court against a judgment and order passed in exercise of its Constitutional and Statutory Criminal Jurisdiction under Articles 226/227 of the Constitution and Section 482 Cr.P.C. by a learned single Judge of that High Court. Hence this S.L.P.

Foot Note to the Synopsis:

The impugned judgment and order dated 2.11.2007 is described at its head as an "Oral Judgment". The Petitioners submit respectfully that it is a misdescription. The Petitioners said application was argued before the High Court on 3.9.2007 and 5.9.2007. Hearing concluded on 5.9.2007 and the Court reserved judgment. The case thus became curia advisari vult. On 2.11.2007 the matter was shown on Board "For Orders". At 2.15 p.m. on 2.11.2007 the Court pronounced and delivered judgment and signed the same. The Advocate on Record for the Petitioners as well as the Secretary of the Petitioner No.2 NGO were present in Court to receive judgment. However, no counsel was present on behalf of any of the Respondents Nos.1 to 3 to receive judgment. On 3.11.2007, the Petitioners duly applied for a certified copy as well as an authentic true copy of the impugned judgment and order. The certified copy has not yet been made available to the Petitioners. Hence, the Petitioners file this SLP with an authentic true copy thereof together with an application for exemption from filing the certified copy. The Petitioners were constrained to put these matters on record by way of their counsel's letter dated 21.11.2007 addressed to the Hon'ble The Chief Justice of the High Court on the Administrative Side and the same is annexed to this SLP for record.

LIST OF DATES

27.2.2002: (07.58 to 08.15 Hrs.) That morning, the Sabarmati Express carrying 'kar sevaks' among other passengers, is allegedly attacked after which a coach catches fire causing death of as many as 59 persons.

27.2.2002: (late evening) According to testimony led and records of official State Intelligence laid before the Nanavati Shah Commission, the same evening the Chief Minister of Gujarat presided over a meeting at which the then revenue minister, the late Haren Pandya, and high ranking officers of the administration and police were present. At that meeting the Chief Minister directed these senior civil servants and police officers to allow the 'Hindus' to vent their anger on the minority community on account of the Godhra incident. Consequently, against the advice and protestations of the Collector, Godhra (Ms. Jayanti Ravi), the burnt corpses were carried to the Ahmedabad Civil Sola Hospital from Godhra in a motor cavalcade escorted by Vishwa Hindu Parishad General Secretary, Gujarat, Dr. Jaideep Patel.

28.2.2002 onwards: From 7.30 a.m. the onslaught on the minority community started and the conflagration was activated throughout the State. The very first attack was on Gulberg Society, Meghaninagar, Ahmedabad, where Petitioner No.1, her husband and family were residing. Her husband and 69 others met with gruesome deaths at the hands of the riotous mob. By 9 a.m. at Naroda Gaon and patiya, hardcore communal militias were galvanized with top political patronage to openly come out to attack people of the minority community. The violence took brutal and macabre forms of killing, sexual violence and looting and burning of minority property.

The Police filed a nominal complaint and registered a formal FIR, more to shield the offenders than to vindicate the criminal law. That case stands committed to Sessions but the proceedings had been stayed by this Hon'ble Court. In those proceedings, some of the victim families/prosecution eye witnesses have filed applications for further investigation under Section 173 (8) Cr.P.C. and the same are pending. (These aspects are already on record before this Hon'ble Court in W.P. (Crl.) No. and batch: National Human Rights Commission v. State of Gujarat and others).

2002-2003 Some of the major riot cases ended in acquittals with key witnesses turning hostile. [BEST Bakery case, Pandharwada mass carnage case and Kidiad case]

2004-2005: Testimonial and documentary revelations before the Nanavati Shah Commission manifested shocking extent of complicity of the State Government with the rioters.

8.6.2006: Reinforced inter alia, by the aforesaid revelations, and the moral logistic support afforded by Petitioner No.2, Petitioner No. 1 laid a detailed first information against 63 accused who constituted the political, executive and police authorities of the Gujarat Government the said information itself ran into 128 pages with supporting documentation running to over 2000 pages. The said information was addressed to the Director General of Police, Gujarat, who happen to be one of the said 63 persons aforesaid. Instead of applying his mind to the information, the D.G.P. simply prevaricated.

07.10.2006 After some initial exchange of correspondence in the matter, Petitioner No.1 received a letter dated 7.10.2006 from the

Additional D.G.P., Intelligence, Gujarat, asking her to come from Surat to Ahmedabad to record her statement on 16.10.2006.

16.10.2006 Petitioner No.1 gave her statement before the said Addl. D.G.P., Intelligence, in which she stated inter alia, as follows:

> "… But today, you have explained to me, regarding this, regarding application given by me the offence has not been registered, and for making an enquiry of my application in the form of my complaint you want to record my statement. So till an offence regarding my complaint regarding this will not be registered, I am not ready to give my any statement regarding this. Regarding my complaint given by me if it will be treated as FIR at Police Station, Gandhinagar an offence will be registered, only thereafter if my statement will be recorded then I am ready to give my statement. I have come to give cooperation in the investigation today as stated by you. But, as stated by you, you have only come to make an enquiry of application only. The power to register offence is not with you. When complaint will be registered, thereafter I will give complete cooperation in investigation."

2.11.2006 Despite Petitioner No.1's said categorical statement, the said Addl. D.G.P., Intelligence, again pressed her to give a statement stating as follows:

> "In the context of the offences took place at different places and time specified in your present application, the offences are registered in the police stations holding jurisdiction, and its investigations are carried out or being carried out. At that time in the context of the same offences in your application

you have raised additional accused and additional allegations. When in the context of the same offences the additional accused and additional allegations are raised, at that time, for examining the legal action which can be taken, I am making completely impartial and transparent enquiry at that time, it is requested to make your statement and to give any other evidence you have with you. Therefore, your cooperation is expected in the interests of justice".

1.3.2007 Petitioners filed the subject application under Articles 226/227 of the Constitution r/w Section 482 Cr.P.C. in the High Court. The petitioners specifically relied inter alia, upon the judgment reported in the case of **Prakash Singh Badal & Anr v/s State Of Punjab and others reported on (2007)1 SCC 1**

3/5.9.2007 The application was finally heard and orders were reserved. Advocates for the petitioners as well as the respondents were asked orally to file their written submissions on or before 11.9.2007.

10.9.2007 The petitioners filed their written submissions by way of affidavit of the petitioner no. 2.

12.9.2007 Upon mentioning by the learned Advocate General, the Hon'ble Court called for the papers and orally directed the advocate on record for the petitioners to withdraw the affidavit filed on 10.9.2007. No formal proceedings were drawn up but the said affidavit was returned by the Registry of the Court. The computerized entry of the status report still indicates the receipt of the said affidavit. The Hon'ble Court also orally directed the Advocate on record for the Petitioners to file the written

submissions otherwise than on affidavit on or before 17.09.2007.

17.9.2007 The Advocate for the Petitioners duly filed written submissions as directed. No written submissions were filed on behalf of the Respondents.

29.10.2007 While judgment was thus pending certain subsequent and sensational developments took place that had a direct and important bearing on the subject matter of the case. An investigation made by a news magazine Tehelka, the revelations of which were telecast in the visual media and transcribed in the Tehelka news magazine and also reported in other print media, provided an affirmation of many of the allegations laid in the said First Information dated 08.06.2006 of Petitioner No.1. As such, the Petitioners promptly filed on 29.10.2007 an affidavit placing on record the issue of the Tehelka news magazine as additional information bearing upon the adjudication of the said application of the Petitioners. The filing of the said affidavit was duly registered and entered in the Registry's computer entries of 29.10.2007.

2.11.2007 The case was shown in the cause list "For orders". At 2.15 p.m. the Court pronounced and delivered judgment in the said Special Crl. Application No.421 of 2007 by reading out the operative order. The Advocate on record for the Petitioners and the Secretary of the Petitioner No.2 NGO were present in Court to receive judgment. No counsel was present on behalf of the Respondents to receive judgment. His Lordship, the Hon'ble Mr. Justice M.R. Shah, after pronouncement duly signed the judgment. Thereafter, His Lordship informed the advocate for the Petitioners that the judgment required certain minor typographical corrections and would be

made available thereafter.

3.11.2007 The Advocate on record for the Petitioners applied for a certified copy of the judgment to enable the Petitioners to expeditiously move this Hon'ble Court under Article 136 of the Constitution.

6.11.2007 The advocate for the Petitioners applied additionally for an authentic true copy of the judgment. Even an ordinary copy, however, was not made available till 21.11.2007.

21.11.2007 Under these circumstances, the advocate for the Petitioners was constrained to submit an application to the Hon'ble the Chief Justice of the High Court on the Administrative side regarding non availability of even an ordinary copy of the judgment.

Thereafter, the same day, an ordinary true copy of the impugned judgment was made available and this S.L.P. is being filed accordingly.

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (CRIMINAL) NO. OF 2007

(Against the final judgment and order dated 2.11.2007 passed by the High Court of Gujarat at Ahemadabad in Special Crl. Application No. 421 of 2007)

BETWEEN:-

	Position of parties	
	In the High Court	In this Court.
1. Mrs. Jakia Nasim Ahesan Hussain Jafri, at present resident of 203, Siddiqi Square Apartments, Adajan Patia, B/h Dhanmora Complex, Surat: 395009, Gujarat.	Petitioner No.1	Petitioner No.1
2. Citizens For Justice & Peace, Through its secretary, Ms. Teesta Atul Setalvad, Having its office at "Nirant", Juhu-Tara Road, Juhu, Mumbai.	Petitioner No.2	Petitioner No.2

AND

1. State of Gujarat, Notice to be served through Learned Public Prosecutor, High Court of Gujarat, Sola, Ahmedabad.	Respondent No.1	Respondent No.1
2. The Director General Of Police, The State Of Gujarat, "Police Bhavan", Sector: Gandhinagar, Gujarat.	Respondent No.2	Respondent No.2
3. Central Bureau of Investigation, Through its Having its Office at Near Police Bhavan, Ahmedabad, Gujarat.	Respondent No.3	Respondent No.3 (All contesting Respondents)

To,

The Hon'ble the Chief Justice of India
and His Hon'ble Companion Justices of
the Hon'ble Supreme Court of India.

The humble petition of the
Petitioners' above named

MOST RESPECTFULLY SHOWETH:-

(1) The petitioners are citizens of India. The petitioners are therefore entitled to invoke the constitutional rights enshrined within the Constitution of India. The petitioners herein beg to challenge the impugned judgment and order passed by this Hon'ble Court in Special Criminal Application No. 421 of 2007 dated 2.11.2007 whereby the Hon'ble Court has rejected the prayer of the petitioners herein seeking directions to the respondent no. 2 to register the FIR of the petitioner no. 1.

(2) The short question that requires consideration before this Hon'ble Court is whether the police is required to register First Information Report when there is clear and substantive evidence that a series of cognizable offences have taken place.

(3) The petitioners respectfully state that the allegations against the accused persons are briefly summarized by a separate chart for the sake of convenience. Annexed as **ANNEXURE: P-2** is the copy of the said chart.

(4) <u>QUESTIONS OF FACT:</u>

The brief facts leading to the present appeal are as under:-

(a) The petitioner no. 1 has lost her husband who happened to be Ex-Member Of Parliament Mr. Ahsan Jaffri in the 'conspiracy offence' that occurred at least between 27th February, 2002 and September 2002, specifically on February 28, 2002. The husband of the petitioner no. 1 was brutally killed

alongwith at least sixty eight others on 28th February, 2002 by the miscreants by surrounding the Gulberg Society where the petitioner no. 1 lived along with her family at that time. The incident was one of the three dozen mass carnage cases that occurred over 19 districts of Gujarat. In the space of five days 2,500 lives were lost, 300 women were victims of brute sexual violence, more than 18,000 homes burnt down and broken and property and businesses worth Rs 4,000 crores destroyed. Over 270 Masjids and Dargahs, associated with the worship and culture of the minority community also fell victim in this genocidal carnage. The petitioners crave leave to attach as **Annexure _ two maps** that graphically illustrate the scale and intensity of the state sponsored genocide. The petitioners state that the police registered a FIR being CR No. I 67 of 2002 with Meghaninagar Police Station, Ahmedabad related to the specific incident were 70 of the 2,500 were slaughtered at Gulberg society but there is no composite FIR relating to the vast extent and serial crimes committed by state functionaries in Gujarat. This individual case, the Gulberg society case, is committed to the court of Sessions, Ahmedabad but the trial has been stayed by the Hon'bvle Supreme Court on 21.11.2002 The present petitioner no. 1 is not the complainant in the aforementioned FIR.

(b) The petitioners respectfully state that the petitioners herein have obtained certain documented material to show that the offences occurred during the period mentioned in para 3 (a) of this appeal, were aided, abetted and conspired to by the co-accused persons involved in the mass carnage and masterminded by the chief minister Shri Narendra Modi himself. Further the serial offences by persons in positions of power and responsibility, aided by top brass in the administration and the police shook at the very foundations of Constitutional Governance. Over 1,68,000 were turned by a cynical regime into refugees in their own land, overnight. Considering the gravity of the offences

and the danger to public order and security if mass murderers and conspirators are allowed to go scot free, petitioner no.1 therefore sought to register the First Information Report against the accused named in the FIR dtd. 8th June, 2006 FIR for the offences punishable u/s 302 r/w 120-B, of the Indian penal Code with sections 193 r/w 114 IPC, 186 & 153 A, 186, 187 of the Indian Penal Code and u/s Section 6 of the Commission of Inquiry Act; The Gujarat Police Act and The Protection of Human Rights Act [PHRA], 1991. Annexed to the complaint sent by registered post were over 2,000 pages of substantive evidence obtained in certified copies from the Nanavati Shah Commission.

(c) The petitioner no. 1 had tendered the above proposed FIR on 8th June, 2006, however, the same has not yet been registered by the respondent no. 2 herein. Instead, the petitioner no. 1, aged 70 years approximately, had been personally called by the respondent no. 2. In the course of the conversation and meeting, no attempts were made to register the FIR; instead the petitioner no.1 was humiliated and respondent no 2 refused to register the FIR. The pre-condition of any investigation under the Code of Criminal Procedure [CRPC] and the Indian Penal Code [IPC] is the registration of the FIR. In the instant case, by not doing so, the opponent no. 2 not only assigns himself the role of adjudicator and the "court' but in furtherance of this role intends to let the state government and its functionaries off the hook by completing the investigation without the registration of the FIR. The role of the Gujarat 'state's ' police has been called into question after being accused of complicity and bias in the mass carnage of 2002 and subversion of the criminal justice system post 2002. The faith in the ordinary person, especially the victim community in the Gujarat police has been seriously eroded. Therefore, following the registration of the FIR the same is required, for the purposes of honest free and impartial investigation, to be handed over to an independent investigating agency i.e., the CBI. The petitioner

no. 1 had entered into the correspondence with the opponent no. 2 following the complaint being sent to the authorities for due registration on June 8, 2006. Annexed as **ANNEXURE: P-3** is the copy of the FIR that is sought to be registered dtd. 8.6.2006.

(5) The petitioners respectfully state that the Hon'ble Supreme Court on several occasions has been pleased to hold through its reported judgments that the police is duty bound to register the FIR. The petitioners relies upon the judgment reported in the case of Prakash Singh Badal & Anr v/s State Of Punjab and others reported on (2007)1 SCC 1 wherein the relevant portion of the impugned judgment reads as under:

(65). The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(c) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2 (o) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act entering the information in the said form is know as registration of a crime or a case.

(66). At the stage of registration of a crime or a case on the basic of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code the police officer concerned cannot embark upon an genuine or otherwise and refuse of register a case on the ground that the information is not reliable or credible. On the other hand the officer in charge of a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which

is empowered under Section 156 of the Code to investigate subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him. The person should aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in manner provided by sub-section (3) of Section 154 of the Code.

(68). It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge 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** basic of such information.

(6) The petitioner no. 2 is an Association of persons from Gujarat and Mumbai constituted to lead and support the struggle for justice and peace in Gujarat. The petitioner no. 2 is a Non-Governmental Organization that has won national and international acclaim for its objective and fearless crusade against the politics of division and hatred, be it of the majority or the minority. The petitioner no.2, Non-Government all Organization works for the cause of Human Rights. The petitioner no. 2 herein has been instrumental in the struggle for the justice for the victims including the petitioner no. 1 and several other victims, thus the petitioner no. 2 is personally interested in the welfare of the petitioner no. 1 and other victims. The petitioners further state that the role of the state government in not protecting its citizens and in defending the accused has

shown its ugly face in several matters. The non-governmental organizers had to venture forth, intervene and make sincere attempts to seek redressal for the victims. The petitioners say and submit that the hostility shown by the state of Gujarat to the victim survivors' fight continues until today, making it impetrative and necessary that citizens of the country believing in the secular values enshrined in the Constitution step forward to offer succour to the victims. That the Hon'ble Supreme Court while deciding Criminal M.P. No. 3740-42/2004 in Writ Petition (Cri) No. 109/2003 in the matters of National Human Rights Commission v/s The State of Gujarat and allied matters had observed that the non-governmental organizations be asked to do the needful for poor victims; though the petitioners relied upon the said order at the time of the hearing of the writ petition. Moreover, the petitioner no. 2 has made strenuous efforts to enable justice to absolutely poor victims of the state. Annexed hereto as **ANNEXURE : P-4 Colly** are the copies of the impugned order passed in Criminal M.P. No. 3740-42/2004 in Writ Petition (Cri) No. 109/2003 as well as the affidavits and other relevant material supporting the version of the complainant.

The respondent no. 1 had filed the affidavit in reply and rejoinder contending that there was alternative remedy etc. The rejoinder was filed on behalf of the petitioners as well as the written submissions in the form of the synopsis of the arguments before the Hon'ble High Court. Annexed hereto and marked as **ANNEXURE: P-5 Colly** are the copies of the aforementioned replies filed by the petitioners as well as the respondents and the written arguments placed on record on behalf of the petitioners.

(7) The petitioners respectfully submits that the aforementioned matter was last heard on 5.9.2007 and the Hon'ble Court had orally asked the petitioners to place on record the written submissions on or before 11.9.2007. Accordingly the

written submissions were placed on record by way of affidavit of the petitioner no. 2. The registry accepted the same on 10.9.2007. Thereafter it was mentioned on behalf of the respondent no. 1 on 12.9.2007 asking the court not to accept the written submissions as the same were on affidavit. The court asked the petitioner's lawyer to withdraw the written submissions immediately and tender the fresh written submissions without the same being on affidavit on 17.9.2007. The advocate for the petitioners sought two days time to seek instructions to withdraw the written submissions tendered by way of affidavit. The Hon'ble Court refused to grant time as the court wanted to dictate the judgment immediately. Thus, the written submissions tendered by way of affidavit were returned back on 12.9.2007 without any endorsements and the Hon'ble Court asked the petitioners to tender the written submissions without affidavit. It may be noted that on 12.9.2007 the matter was not notified on board, however, the advocate for the respondents had mentioned orally to the court. The Hon'ble Court Coram: M. R. Shah J was on leave and therefore the same was tendered in the registry on 17.9.2007. The writ petition was kept for dictation of judgment and the same was shown as pending as per the registry. Thus the written arguments were given in form of synopsis by the petitioners through the registry and the status report of the petition shows the above details. In the meantime on 25.10.2007 the media carried the 'Tehelka' exposure supporting the material already placed as being extra-judicial confession and being admissible under sec. 29 of the Indian Evidence Act on record by the petitioners and therefore on 29.10.2007 the affidavit of the petitioner no. 1 was filed along with the copy of the 'Tehelka' report through the registry as the matter was shown to have been pending and not reserved as C.A.V judgment. The respondents were given advanced copy of the affidavit, however, there was no résistance from any of the respondents. The registry was

orally asked by the court on 30.10.2007 not to accept the affidavit and therefore the registry deleted the entries pertaining to the affidavit. The petitioners state that 31.10.2007 was a court holiday and therefore on 1.11.2007 the registry was directed to place the writ petition for 'orders' on 2.11.2007. The Hon'ble Court signed the judgment in open court and pronounced the operative part of the judgment stating that the petition was dismissed without going into the merits of the complaint and that the petitioner no. 1 has alternative remedy of approaching the Ld. Magistrate. The petitioner no. 2 had no locus to seek writ of mandamus. Annexed hereto as **ANNEXURE: P-6 Colly** are the copies of the affidavit dtd. 29.10.2007 alongwith the 'Tehelka' report and the copies of the entries on the registry pertaining to the writ petition being Special Criminal Application No. 421 of 2007.

(8) The petitioners respectfully state that the petitioners had tendered the written submissions by way of affidavit on 10.9.2007 and the same were written back by the Hon'ble Court without passing any orders. Thereafter as per court's oral directions the written submissions were tendered through the registry on 17.9.2007. The petitioners state that pursuant to the sting operation by 'Tehelka' the affidavit was tendered by the petitioner no. 1 through the registry on 29.10.2007, however on the next day, surprisingly, the entries about acceptance of the affidavit of the petitioner no. 1 were deleted without any order from the Hon'ble Court. Thus, gross prejudice is caused to the petitioners. The petitioners crave leave to annex the copies of the computerized 'status reports' of the Hon'ble Gujarat High Court as **ANNEXURE: P-7** Colly to this petition.

(9) The petitioners respectfully states that the Ld. Single Judge who passed the impugned judgment and order had also taken a contrary view relying upon

the judgment of the Hon'ble Supreme Court in (2007)1 SCC 1. The petitioners crave leave to annex the said judgment passed in Special Criminal Application No. 1158 of 2007 as **ANNEXURE: P-8** to this petition.

(10) That within the State of Gujarat, since 2002, when a mass carnage was orchestrated by the most powerful in the State Executive using pressure and connivance of the State Administration and Law and Order Machinery there has been continued and consistent attempts to further this unlawful and unconstitutional worldview and mandate by using State Terror and Pressure to intimidate victim survivors, marginalize (socially and economically the community they hail from], destroy and/or manipulate evidence to influence the course of justice for victims of Mass Crimes when criminal trials or other such legal procedures have been initiated. In a nutshell the core and substance, letter and law of Constitutional governance has been successfully subverted for over five years the state of Gujarat.

(11) The utter failure of large sections of the Gujarat police to fulfill their constitutional duty and prevent large-scale massacre, rape and arson - in short to maintain law and order - has been the subject of extensive debate and discourse, post the Godhra mass arson and subsequent carnage. Paralysis and inaction at best, and active connivance and brutality (shooting dead young men even minors) at worst were in full public view in Gujarat. The civil service was paralyzed, as was the police machinery, which was influenced, manipulated and bullied into singing the murderous tune of the conspirators who were bent on destroying Constitutional Governance in the state, a style of governance that ensures core principles of equity, justice and non-discrimination.

(12) The blatant and transparent actions of the Gujarat State Executive in using a carrot and stick policy to reward those members of the police and administration who fell in with their illegal and unconstitutional plans to permit [or participate in mass murder and sexual violence and systematic destruction of property] and maliciously punish those who stuck, stoically to their Constitutional Oath is a blatant and continued example of non-Constitutional Governance in the state of Gujarat.

(13) That, as the official rehabilitation reports show, the government has been callous and discriminatory in the rehabilitation of the victims and the disbursement of compensation.

(14) As other official documents, including crime reports of 2002, Missing persons reports etc show the state government has at all levels abdicated its responsibility as the Constitutionally Elected government.

(15) The cynical subversion of the law and deliberate non compliance with known and time-tested measured to maintain public peace began prior to the Godhra mass arson of February 27, 2002. Intelligence silence or failure, and subsequent lack of precautionary measures (including calling in the army as a precaution], in 2002, is shocking and startling given the reported background and potential threat to peace by the provocative behavior by kar sevaks, demonstrated repeatedly in their journeys to and from Gujarat in the past (between 1989-2002]. In 1992, such incidents were reported from Palej, Dahod and Godhra soon after the Babri Masjid demolition. With this history, should not the police have kept strict watch and vigil over the departure and return of kar sevaks, especially when the climate in the country was tense and belligerent?

Although the police had known of tension between kar sevaks and residents of Singal Falia in Godhra, the crucial intelligence failure was in not knowing or communicating to the local authorities, that the kar sevaks were returning by Sabarmati Express on February 27. Sources said that the police only had information that kar sevaks were returning from March 1 onwards. One may well ask whether this was, actually, a case of intelligence failure on part of the police force, or a deliberate absence of preemptive action against those returning from Ayodhya.

(16) In the Godhra Arson, 59 persons, not who were all kar sevaks returning from Ayodhya unfortunately lost their lives as they were burnt alive when some miscreants attacked [and presumably then set fire] to the train compartment. This was a very tragic and unfortunate incident and those found guilty through due and exacting process of a criminal trial, should be severely dealt with.

(17) Following February 27, 2002, what transpired in many parts of Ahmedabad [especially Gulberg Society and Naroda Gaon and Patiya], Sardarpura in Mehsana, Vadodara city, Kidiad and Sesan in Banaskantha, Pandharwada and Eral in Panchmahals, Sanjeli and Randhikpur in Dahod and Ode in Anand are incidents that have cast a severe blot on Gujarat and India, of the faith in the ordinary man and woman in the rule of law and fairplay.

QUESTIONS OF LAW:

The present Special Leave Petition raises the following inter alia the important questions of law of public importance for the consideration of this Hon'ble Court:

(i) Where mass scale, pandemic and horrific communal violence, with a State

Government's complicity, is unleashed against a minority community in virtually every District of a State, and a traumatized and bereaved victim of such violence lays a first information before the highest ranking Police authority of that State implicating and arraigning as accused persons constituting the political, executive and police authorities of that State, and such police authority prevaricates on such first information, whether or not the law requires that such first informant must take recourse to Sections 190 and 200 of the Code of Criminal Procedure, 1973?

(ii) Where such first information is laid not on a clean slate but in the wake of nominal complaints lodged and FIRs registered by the Police themselves to exculpate and shield the said political, executive and police authorities, whether or not the law hitherto laid down by this Hon'ble Court in the line of decisions culminating in Aleque Padamsee v. Union of India reported as (2007) 6 SCC 171, is at all attracted? Whether or not the fact matrix and context and the constitutional and statutory regime governing the present case render the said line of decisions distinguishable both on facts and in law?

(iii) Whether the perpetration of such concerted and complicit communal violence by the majority community and State power and the targeted victimization and massacre of a minority community are not the obverse and reverse of the same coin of constitutional dispensation, namely, that just as the perpetrators are entitled to the protection of the fundamental rights guaranteed by Articles 14 and 21(1) of the Constitution in the course of their prosecution and trial for the alleged offences, likewise the victims are entitled to enforce their fundamental rights under the very same articles by ensuring the prosecution and trial of the real perpetrators of those offences?

(iv) Where testimonial statements are made and official documentation laid before a Commission of Inquiry constituted under the Commissions of Inquiry Act, 1952, reveal the complicity of the higher echelons of the State Government in the perpetration and fanning of such communal violence against a minority community, whether or not such statements or documentation can be used for laying information under the Code of Criminal Procedure 1973, for registration and investigation of offences thus disclosed against accused persons who are not the authors of such statements before such Commission? Whether the provisions of Section 6 of the Commissions of Inquiry Act, 1952 constitute any bar in that behalf?

(v) Article 355 of the Constitution makes it the express constitutional duty of the Union "to ensure that the government of every State is carried on in accordance with the provisions of this Constitution". Likewise, Article 356(1) posits a situation "if the President, ….. otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". On the constitutional fundamentals underlying these provisions, and those underlying Article 21 read in the light of Articles 38(1) ("the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life") and Article 39-A ("the State shall secure that the operation of the legal system promotes justice, …. and shall, ……. ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"), where a State Government is discernibly complicit in the perpetration of such violence as aforesaid, whether the provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 can

constitute a bar to the entrustment to the Central Bureau of Investigation of criminal investigation of the offences alleged against political, executive and police personages of that State simply because the Government of that State has not consented to such investigation? Whether Section 6 of the said 1946 Act can be posed as a counter point to the constitutional mandates of Articles 21, 38(1), 39-A, 355 and 356 of the Constitution of India?

(vi) Whether in the instant case the High Court could have declined the Petitioners prayer for investigation of the FIR sought for by the Petitioners on the ground that the question as to whether a court could order the CBI to investigate a cognizable offence alleged to have been committed in a State without the consent of the State Government stands referred to a larger Bench of this Hon'ble Court in the decision reported as State of West Bengal v. Committee for Protection of Democratic Rights: (2006) 12 SCC 534?

(vii) Whether or not the High Court was right in holding (vide Paragraph 30 of the impugned judgment) that the Petitioner No.2-NGO had no locus standi to join in and maintain the said application under Articles 226/227 of the Constitution and Section 482 Cr.P.C. before it?

(3) The petitioners respectfully state that the allegations against the accused persons are briefly summarized by a separate chart for the sake of convenience. Annexed as **ANNEXURE: P-1** is the copy of the said chart.

(4) The brief facts leading to the present appeal are as under:-

(a) The petitioner no. 1 has lost her husband who happened to be Ex-Member Of Parliament Mr. Ahsan Jaffri in the 'conspiracy offence' that occurred

at least between 27th February, 2002 and September 2002, specifically on February 28, 2002. The husband of the petitioner no. 1 was brutally killed alongwith at least sixty eight others on 28th February, 2002 by the miscreants by surrounding the Gulberg Society where the petitioner no. 1 lived along with her family at that time. The incident was one of the three dozen mass carnage cases that occurred over 19 districts of Gujarat. In the space of five days 2,500 lives were lost, 300 women were victims of brute sexual violence, more than 18,000 homes burnt down and broken and property and businesses worth Rs 4,000 crores destroyed. Over 270 Masjids and Dargahs, associated with the worship and culture of the minority ommunity also fell victim in this genocidal carnage. The petitioners crave leave to attach as **Annexure _ two maps** that graphically illustrate the scale and intensity of the state sponsored genocide. The petitioners state that the police registered a FIR being CR No. I 67 of 2002 with Meghaninagar Police Station, Ahmedabad related to the specific incident were 70 of the 2,500 were slaughtered at Gulberg society but there is no composite FIR relating to the vast extent and serial crimes committed by state functionaries in Gujarat. This individual case, the Gulberg society case, is committed to the court of Sessions, Ahmedabad but the trial has been stayed by the Hon'bvle Supreme Court on 21.11.2002 The present petitioner no. 1 is not the complainant in the aforementioned FIR.

(b) The petitioners respectfully state that the petitioners herein have obtained certain documented material to show that the offences occurred during the period mentioned in para 3 (a) of this appeal, were aided, abetted and conspired to by the co-accused persons involved in the mass carnage and masterminded by the chief minister Shri Narendra Modi himself. Further the serial offences by persons in positions of power and responsibility, aided by top brass in the administration and the police shook at the very foundations of

Constitutional Governance. Over 1,68,000 were turned by a cynical regime into refugees in their own land, overnight. Considering the gravity of the offences and the danger to public order and security if mass murderers and conspirators are allowed to go scot free, petitioner no.1 therefore sought to register the First Information Report against the accused named in the FIR dtd. 8th June, 2006 FIR for the offences punishable u/s 302 r/w 120-B, of the Indian penal Code with sections 193 r/w 114 IPC, 186 & 153 A, 186, 187 of the Indian Penal Code and u/s Section 6 of the Commission of Inquiry Act; The Gujarat Police Act and The Protection of Human Rights Act [PHRA], 1991. Annexed to the complaint sent by registered post were over 2,000 pages of substantive evidence obtained in certified copies from the Nanavaty Shah Commission.

(c) The petitioner no. 1 had tendered the above proposed FIR on 8th June, 2006, however, the same has not yet been registered by the respondent no. 2 herein. Instead, the petitioner no. 1, aged 70 years approximately, had been personally called by the respondent no. 2. In the course of the conversation and meeting, no attempts were made to register the FIR; instead the petitioner no.1 was humiliated and respondent no 2 refused to register the FIR. The pre-condition of any investigation under the Code of Criminal Procedure [CRPC] and the Indian Penal Code [IPC] is the registration of the FIR. In the instant case, by not doing so, the opponent no. 2 not only assigns himself the role of adjudicator and the "court' but in furtherance of this role intends to let the state government and its functionaries off the hook by completing the investigation without the registration of the FIR. The role of the Gujarat 'state's ' police has been called into question after being accused of complicity and bias in the mass carnage of 2002 and subversion of the criminal justice system post 2002. The faith in the ordinary person, especially the victim community in the Gujarat police has been seriously eroded. Therefore, following the registration of the FIR the same is

required, for the purposes of honest free and impartial investigation, to be handed over to an independent investigating agency i.e., the CBI. The petitioner no. 1 had entered into the correspondence with the opponent no. 2 following the complaint being sent to the authorities for due registration on June 8, 2006. Annexed as **ANNEXURE: P-3** is the copy of the FIR that is sought to be registered dtd. 8.6.2006.

(5) The petitioners respectfully state that the Hon'ble Supreme Court on several occasions has been pleased to hold through its reported judgments that the police is duty bound to register the FIR. The petitioners relies upon the judgment reported in the case of Prakash Singh Badal & Anr v/s State Of Punjab and others reported on (2007)1 SCC 1 wherein the relevant portion of the impugned judgment reads as under:

(65). The legal mandate enshrined in Section 154(1) is that every information relating to the commission of a "cognizable offence" [as defined under Section 2(c) of the Code] if given orally (in which case it is to be reduced into writing) or in writing to "an officer in charge of a police station" [within the meaning of Section 2 (o) of the Code] and signed by the informant should be entered in a book to be kept by such officer in such form as the State Government may prescribe which form is commonly called as "first information report" and which act entering the information in the said form is know as registration of a crime or a case.

(66). At the stage of registration of a crime or a case on the basic of the information disclosing a cognizable offence in compliance with the mandate of Section 154(1) of the Code the police officer concerned cannot embark upon an genuine or otherwise and refuse of register a case on the ground that the information is not reliable or credible. On the other hand the officer in charge of

a police station is statutorily obliged to register a case and then to proceed with the investigation if he has reason to suspect the commission of an offence which is empowered under Section 156 of the Code to investigate subject to the proviso to Section 157 thereof. In case an officer in charge of a police station refuses to exercise the jurisdiction vested in him and to register a case on the information of a cognizable offence reported and thereby violates the statutory duty cast upon him. The person should aggrieved by such refusal can send the substance of the information in writing and by post to the Superintendent of Police concerned who if satisfied that the information forwarded to him discloses a cognizable offence either investigate the case himself or direct an investigation to be made by any police officer subordinate to him in manner provided by sub-section (3) of Section 154 of the Code.

(68). It is, therefore, manifestly clear that if any information disclosing a cognizable offence is laid before an officer in charge 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** basic of such information.

(6) The petitioner no. 2 is an Association of persons from Gujarat and Mumbai constituted to lead and support the struggle for justice and peace in Gujarat. The petitioner no. 2 is a Non-Governmental Organization that has won national and international acclaim for its objective and fearless crusade against the politics of division and hatred, be it of the majority or the minority. The petitioner no.2, Non-Government all Organization works for the cause of Human Rights. The petitioner no. 2 herein has been instrumental in the struggle for the justice for the victims including the petitioner no. 1 and several other victims, thus the petitioner no. 2 is personally interested in the welfare of the petitioner no. 1

and other victims. The petitioners further state that the role of the state government in not protecting its citizens and in defending the accused has shown its ugly face in several matters. The non-governmental organizers had to venture forth, intervene and make sincere attempts to seek redressal for the victims. The petitioners say and submit that the hostility shown by the state of Gujarat to the victim survivors' fight continues until today, making it impetrative and necessary that citizens of the country believing in the secular values enshrined in the Constitution step forward to offer succour to the victims. That the Hon'ble Supreme Court while deciding Criminal M.P. No. 3740-42/2004 in Writ Petition (Cri) No. 109/2003 in the matters of National Human Rights Commission v/s The State of Gujarat and allied matters had observed that the non-governmental organizations be asked to do the needful for poor victims; though the petitioners relied upon the said order at the time of the hearing of the writ petition. Moreover, the petitioner no. 2 has made strenuous efforts to enable justice to absolutely poor victims of the state. Annexed hereto as **ANNEXURE : P-4 Colly** are the copies of the impugned order passed in Criminal M.P. No. 3740-42/2004 in Writ Petition (Cri) No. 109/2003 as well as the affidavits and other relevant material supporting the version of the complainant.

The respondent no. 1 had filed the affidavit in reply and rejoinder contending that there was alternative remedy etc. The rejoinder was filed on behalf of the petitioners as well as the written submissions in the form of the synopsis of the arguments before the Hon'ble High Court. Annexed hereto and marked as **ANNEXURE: P-5 Colly** are the copies of the aforementioned replies filed by the petitioners as well as the respondents and the written arguments placed on record on behalf of the petitioners.

(7) The petitioners respectfully submits that the aforementioned matter was

last heard on 5.9.2007 and the Hon'ble Court had orally asked the petitioners to place on record the written submissions on or before 11.9.2007. Accordingly the written submissions were placed on record by way of affidavit of the petitioner no. 2. The registry accepted the same on 10.9.2007. Thereafter it was mentioned on behalf of the respondent no. 1 on 12.9.2007 asking the court not to accept the written submissions as the same were on affidavit. The court asked the petitioner's lawyer to withdraw the written submissions immediately and tender the fresh written submissions without the same being on affidavit on 17.9.2007. The advocate for the petitioners sought two days time to seek instructions to withdraw the written submissions tendered by way of affidavit. The Hon'ble Court refused to grant time as the court wanted to dictate the judgment immediately. Thus, the written submissions tendered by way of affidavit were returned back on 12.9.2007 without any endorsements and the Hon'ble Court asked the petitioners to tender the written submissions without affidavit. It may be noted that on 12.9.2007 the matter was not notified on board, however, the advocate for the respondents had mentioned orally to the court. The Hon'ble Court Coram: M. R. Shah J was on leave and therefore the same was tendered in the registry on 17.9.2007. The writ petition was kept for dictation of judgment and the same was shown as pending as per the registry. Thus the written arguments were given in form of synopsis by the petitioners through the registry and the status report of the petition shows the above details. In the meantime on 25.10.2007 the media carried the 'Tehelka' exposure supporting the material already placed as being extra-judicial confession and being admissible under sec. 29 of the Indian Evidence Act on record by the petitioners and therefore on 29.10.2007 the affidavit of the petitioner no. 1 was filed along with the copy of the 'Tehelka' report through the registry as the matter was shown to have been pending and not reserved as

C.A.V judgment. The respondents were given advanced copy of the affidavit, however, there was no résistance from any of the respondents. The registry was orally asked by the court on 30.10.2007 not to accept the affidavit and therefore the registry deleted the entries pertaining to the affidavit (TO BE DELETED). The petitioners state that 31.10.2007 was holiday and therefore on 1.11.2007 the registry was directed to place the writ petition for 'orders' on 2.11.2007. The Hon'ble Court signed the judgment in open court and pronounced the operative part of the judgment stating that the petition was dismissed without going into the merits of the complaint and that the petitioner no. 1 has alternative remedy of approaching the Ld. Magistrate. The petitioner no. 2 had no locus to seek writ of mandamus. Annexed hereto as **ANNEXURE: P-6 Colly** are the copies of the affidavit dtd. 29.10.2007 alongwith the 'Tehelka' report and the copies of the entries on the registry pertaining to the writ petition being Special Criminal Application No. 421 of 2007.

(8) The petitioners respectfully state that the petitioners had tendered the written submissions by way of affidavit on 10.9.2007 and the same were written back by the Hon'ble Court without passing any orders (should we say- affidavit was not accepted and ultimately the advocate for the petitioners had to withdraw). Thereafter as per court's oral directions the written submissions were tendered through the registry on 17.9.2007. The petitioners state that pursuant to the sting operation by 'Tehelka' the affidavit of the petitioners was filed by the petitioner no. 1 through the registry on 29.10.2007. (however on the next day, surprisingly, the entries about acceptance of the affidavit of the petitioner no. 1 were deleted without any order from the Hon'ble Court.-THIS WE ARE DELETING RIGHT ?) Thus, gross prejudice is caused to the petitioners. The petitioners crave leave to annex the copies of the computerized 'status reports'

of the Hon'ble Gujarat High Court as **ANNEXURE: P-7** Colly to this petition.

(9) The petitioners respectfully state that the Ld. Single Judge who passed the impugned judgment and order had also taken a contrary view relying upon the judgment of the Hon'ble Supreme Court in (2007)1 SCC 1 and had directed the police to register the FIR. The petitioners crave leave to annex the said judgment passed in Special Criminal Application No. 1158 of 2007 as **ANNEXURE: P-8** to this petition.

(10) That within the State of Gujarat, since 2002, when a mass carnage was orchestrated by the most powerful in the State Executive using pressure and connivance of the State Administration and Law and Order Machinery there has been continued and consistent attempts to further this unlawful and unconstitutional worldview and mandate by using State Terror and Pressure to intimidate victim survivors, marginalize (socially and economically the community they hail from], destroy and/or manipulate evidence to influence the course of justice for victims of Mass Crimes when criminal trials or other such legal procedures have been initiated. In a nutshell the core and substance, letter and law of Constitutional governance has been successfully subverted for over five years the state of Gujarat.

(11) The utter failure of large sections of the Gujarat police to fulfill their constitutional duty and prevent large-scale massacre, rape and arson - in short to maintain law and order - has been the subject of extensive debate and discourse, post the Godhra mass arson and subsequent carnage. Paralysis and inaction at best, and active connivance and brutality (shooting dead young men even minors) at worst were in full public view in Gujarat. The civil service was

paralyzed, as was the police machinery, which was influenced, manipulated and bullied into singing the murderous tune of the conspirators who were bent on destroying Constitutional Governance in the state, a style of governance that ensures core principles of equity, justice and non-discrimination.

(12) The blatant and transparent actions of the Gujarat State Executive in using a carrot and stick policy to reward those members of the police and administration who fell in with their illegal and unconstitutional plans to permit [or participate in mass murder and sexual violence and systematic destruction of property] and maliciously punish those who stuck, stoically to their Constitutional Oath is a blatant and continued example of non-Constitutional Governance in the state of Gujarat.

(13) That, as the official rehabilitation reports show, the government has been callous and discriminatory in the rehabilitation of the victims and the disbursement of compensation.

(14) As other official documents, including crime reports of 2002, Missing persons reports etc show the state government has at all levels abdicated its responsibility as the Constitutionally Elected government.

(15) The cynical subversion of the law and deliberate non compliance with known and time-tested measured to maintain public peace began prior to the Godhra mass arson of February 27, 2002. Intelligence silence or failure, and subsequent lack of precautionary measures (including calling in the army as a precaution], in 2002, is shocking and startling given the reported background and potential threat to peace by the provocative behavior by kar sevaks,

demonstrated repeatedly in their journeys to and from Gujarat in the past (between 1989-2002]. In 1992, such incidents were reported from Palej, Dahod and Godhra soon after the Babri Masjid demolition. With this history, should not the police have kept strict watch and vigil over the departure and return of kar sevaks, especially when the climate in the country was tense and belligerent? Although the police had known of tension between kar sevaks and residents of Singal Falia in Godhra, the crucial intelligence failure was in not knowing or communicating to the local authorities, that the kar sevaks were returning by Sabarmati Express on February 27. Sources said that the police only had information that kar sevaks were returning from March 1 onwards. (One may well ask- to be deleted, doesn't sound to be court's language) It requires to be considered whether this was, actually, a case of intelligence failure on part of the police force, or a deliberate absence of preemptive action against those returning from Ayodhya.

(16) In the Godhra Arson, 59 persons, not who were all kar sevaks returning from Ayodhya unfortunately lost their lives as they were burnt alive when some miscreants attacked [and presumably then set fire] to the train compartment. This was a very tragic and unfortunate incident and those found guilty through due and exacting process of a criminal trial, should be severely dealt with.(THIS PARA CAN BE DELETED-repetetion??)

(18) Following February 27, 2002, what transpired in many parts of Ahmedabad [especially Gulberg Society and Naroda Gaon and Patiya], Sardarpura in Mehsana, Vadodara city, Kidiad and Sesan in Banaskantha, Pandharwada and Eral in Panchmahals, Sanjeli and Randhikpur in Dahod and Ode in Anand are incidents that have cast a severe blot on Gujarat and India, of

the faith in the ordinary man and woman in the rule of law and fairplay.

(18) The petitioners beg to approach this Hon'ble Court challenging the impugned judgment and order passed in Special Criminal Application No. 421 of 2007 dtd. 2.11.2007 on following amongst other grounds:

G R O U N D S

I. The impugned judgment and order dated 2.11.2007 in Special Crl. Application No.421 of 2007 passed by the High Court is contrary to law and to the material on record. Where mass scale, pandemic and horrific communal violence, with a State Government's complicity, is unleashed against a minority community in virtually every District of a State, and a traumatized and bereaved victim of such violence lays a first information before the highest ranking Police authority of that State implicating and arraigning as accused persons constituting the political, executive and police authorities of that State, and such police authority prevaricates on such first information, the law does not require that such first informant must take recourse to Sections 190 and 200 of the Code of Criminal Procedure, 1973. In the present case, the State Government's complicity and the culpability of the 63 political, executive and police personages arraigned as accused in Petitioner No.1's first information dated 8.6.2006 stand starkly exposed and the same justifies a criminal investigation into the roles played by them and their criminal prosecution.

II. In the present case, Petitioner No.1's first information is laid not on a clean slate but in the wake of nominal complaints lodged and FIRs registered by the Police themselves to exculpate and shield the said political, executive and police authorities. The law hitherto laid down by this Hon'ble Court in the line of decisions culminating in Aleque Padamsee

v. Union of India reported as (2007) 6 SCC 171, is not at all attracted. The fact matrix and context and the constitutional and statutory regime governing the present case render the said line of decisions distinguishable both on facts and in law.

III. The perpetration of such concerted and complicit communal violence by the majority community and State power and the targeted victimization and massacre of a minority community are the obverse and reverse of the same coin of constitutional dispensation, namely, that just as the perpetrators are entitled to the protection of the fundamental rights guaranteed by Articles 14 and 21(1) of the Constitution in the course of their prosecution and trial for the alleged offences, likewise the victims are entitled to enforce their fundamental rights under the very same articles by ensuring the prosecution and trial of the real perpetrators of those offences.

IV. Where testimonial statements are made and official documentation laid before a Commission of Inquiry constituted under the Commissions of Inquiry Act, 1952, reveal the complicity of the higher echelons of the State Government in the perpetration and fanning of such communal violence against a minority community, such statements or documentation can be used for laying information under the Code of Criminal Procedure 1973, for registration and investigation of offences thus disclosed against accused persons who are not the authors of such statements before such Commission. The provisions of Section 6 of the Commissions of Inquiry Act, 1952 do not constitute bar in that behalf.

V. Article 355 of the Constitution makes it the express constitutional duty of the Union "to ensure that the government of every State is carried on in accordance with the provisions of this Constitution". Likewise, Article

356(1) posits a situation "if the President, ….. otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of this Constitution". On the constitutional fundamentals underlying these provisions, and those underlying Article 21 read in the light of Articles 38(1) ("the State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life") and Article 39-A ("the State shall secure that the operation of the legal system promotes justice, …. and shall, ……. ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities"), where a State Government is discernibly complicit in the perpetration of such violence as aforesaid, the provisions of Section 6 of the Delhi Special Police Establishment Act, 1946 cannot and do not constitute a bar to the entrustment to the Central Bureau of Investigation of criminal investigation of the offences alleged against political, executive and police personages of that State simply because the Government of that State has not consented to such investigation. Section 6 of the said 1946 Act cannot be posed as a counter point to the constitutional mandates of Articles 21, 38(1), 39-A, 355 and 356 of the Constitution of India. (See: State of West Bengal v. Sampatlal: (1985) 1 SCC 317 (3 Judges) at 327, para 13 followed in Mohammed Anis v. Union of India: (1994) Supp.1 SCC 145 (2 Judges) at 148, Para 6 and in Kalyan Chandra Sarkar v. Rajesh Ranjan: (2005) 3 SCC 284 (2 Judges) at 295, paras 29 and 31.

VI. On the contrary, in Kazi Lhendup Dorji v. Central Bureau of Investigation: (1994) Supp.2 SCC 116 (3 Judges) at 123, para 15, in the context of

withdrawal of consent given by the State Government under Section 6 of the said 1946 Act, this Hon'ble Court held:

> "15. …… Having regard to the seriousness of the allegations of corruption that have been made against a person holding the high public office of Chief Minister in the State which have cast a cloud on his integrity, it is of utmost importance that the truth of these allegations is judicially determined. Such a course would subserve public interest and public morality because the Chief Minister of a State should not function under a cloud. It would also be in the interest of Respondent No.4 to have his honor vindicated by establishing that the allegations are not true….."

The Petitioners submit that the present case is an a fortiori case where the Chief Minister is accused of having led and directed the communal violence against a minority community residing in the State of Gujarat.

VII. In the instant case the High Court gravely erred in rejecting the Petitioners' prayer for investigation of the FIR sought for by the Petitioners on the ground that the question as to whether a court could order the CBI to investigate a cognizable offence alleged to have been committed in a State without the consent of the State Government stands referred to a larger Bench of this Hon'ble Court in the decision reported as State of West Bengal v. Committee for Protection of Democratic Rights: (2006) 12 SCC 534. The High Court erred for the following reasons, inter alia,

(i) In Mohammed Anis v. Union of India and others: (1994) Supp.I SCC 145 (2 Judges) at 148 to 150 in para 6, this Hon'ble Court observed, inter alia, as under:

> "6. True it is, that a Division Bench of this Court made an

order on March 10, 1989, referring the question whether a court can order the CBI, an establishment under the Delhi Special Police Establishment Act, to investigate a cognizable offence committed within a State without the consent of that State Government or without any notification or order having been issued in that behalf. In our view, merely because the issue is referred to a larger Bench every thing does not grind to a halt. The reference to the expression 'court' in that order cannot in the context mean the Apex Court for the reason that the Apex Court has been conferred extraordinary powers by Article 142(1) of the Constitution so that it can do complete justice in any cause or matter pending before it. …….. (Ramesh to give SC citations on this point ?? is it (1998)1 SCC 500 at 502 ?) True it is, that the power must be exercised sparingly for furthering the ends of justice but it cannot be said that its exercise is conditioned by any statutory provision. Any such view would defeat the very purpose and object of conferment of this extraordinary power. ……. That is so for the obvious reason that statutory provisions cannot override constitutional provisions and Article 142(1) being a constitutional power cannot be limited or conditioned by any statutory provision. It, therefore, seems clear to us that the power of the Apex Court under Article 142(1) of the Constitution cannot be diluted merely because the statute, namely, the Delhi Special Police Establishment Act, stipulates that the State Government's permission will be necessary if the CBI is to investigate any offence committed within the territorial jurisdiction of a State Government. That may be a statutory obligation governing the relations between the Central Government and the

State Government but it cannot control this Court's power under Article 142(1)……. The statute does not prohibit investigation by CBI but only requires certain formalities to be completed which have no relevance when the Apex Court makes an order in exercise of its power under Article 142(1). Therefore, we do not think that merely because a question is referred to a larger Bench this Court is prohibited from exercising the powers conferred on it by Article 142(1) of the Constitution. In any case so far as the powers of the Apex Court under Article 142(1) are concerned, the position in law is now well settled by the aforementioned Constitution Bench rulings and hence if the reference includes the Apex Court it must be taken as impliedly answered."

(ii) The Petitioners submit that by parity of reasoning the same principles equally apply to the exercise of jurisdiction by a High Court of its powers under Articles 226/227 of the Constitution of India and Section 482 Cr.P.C. The said constitutional power cannot be trammeled by any statute and the said statutory power expressly saves the inherent powers of the High Court to secure the ends of justice. In this vein, this Hon'ble Court has held, for instance, in Vineeta M. Khanolkar v. Pragna M. Pai: (1998) 1 SCC 500 (2 Judges) at 502, Para-3: "Now it is well settled that any statutory provision barring an appeal or revision cannot cut across the constitutional power of a High Court".

(iii) The decisions in Mohammed Anis's case (supra) has been followed by this Hon'ble Court in Kalyan Chandra Sarkar v. Rajesh Ranjan: (2005) 3 SCC 284 (2 Judges) at 295, para 29.

(iv) The decision of this Hon'ble Court in State of West Bengal v.

Committee for Protection of Democratic Rights: (2006) 12 SCC 534 (2 Judges) at 537, para 9, is not based on a complete and correct reading of the three Judges Bench decision in Kazi Lhendup Dorji's case (supra) and does not notice the decision in Mohammed Anis's case (supra) or the three Judges Bench decision in State of West Bengal v. Sampatlal (supra) and the two Judges Bench decision in Kalyan Chandra Sarkar's case (supra) and hence is rendered per incuriam.

VIII. The High Court erred in holding that the Petitioner No.2-NGO had no locus standi to join with Petitioner No.1 in maintaining the subject application under Articles 226/227 of the Constitution and Section 482 Cr.P.C. before it? For one thing, the learned Advocate General appearing for Respondent Nos.1 & 2 had fairly stated that he was not canvassing the locus standi of Petitioner No.2 and the same is expressly recorded in the written submissions filed on behalf of the Petitioners before the High Court (and not controverted by the respondents ?). Secondly, it was essentially because of the moral and logistic support provided by the Petitioner No.2-NGO that Petitioner No.1 was empowered and enabled to lay the said first information dated 8.6.2006 before Respondent No.2. Thirdly, the Petitioner No.2-NGO is actively involved in the amelioration of the riot victims and the criminal prosecutions concerning them pending before the various Magistrates Courts and Sessions Courts and the High Court in Gujarat as well as in this Hon'ble Court. The Petitioners submit very respectfully but firmly that the High Court's approach to locus standi of the Petitioner No.2-NGO amounts to judicial trivialization of a fundamental rights/human rights issue by a Constitutional Court exercising constitutional and statutory criminal jurisdiction to secure the ends of

justice.

IX. The Petitioners submit that the findings and conclusions in Paragraphs 31 to 42 of the impugned judgment are erroneous in law and unsustainable and that the case law cited and relied upon therein has been misread and misapplied to the present case. In this behalf, the Petitioners crave leave to make detailed submissions at the time of hearing. The Petitioners reiterate herein their contentions and propositions contained in their written submissions and urged before the High Court.

X. That there is sufficient material placed alongwith the complaint of the petitioner no. 1 before the respondent no. 2 that makes out a case for registration of the FIR for the cognizable offences. The petitioners relies upon the judgment reported in the case of Prakash Singh Badal & Anr v/s State Of Punjab and others reported on (2007)1 SCC 1.

XI. That the Learned Single Judge has erred in holding that the affidavits of senior police officers filed before the Nanavati-Shah Commission relied upon by the petitioner no. 1 have no evidentiary value. With profound respect it was never the contention of the petitioners that the material produced before the 'commission' be treated as evidence. The High Court ought to have considered the contention of the petitioners that the affidavits and deposition of the senior police officers before the 'Commission' have more value than a police statement u/s 161 Cr.P.C., and therefore those affidavits and depositions ought to have been considered by the police for registration of the FIR and thereafter completion of investigation to file an appropriate report. That the Ld. Single Judge, Hon'ble Gujarat High Court has materially erred in holding that the FIR sought to be registered is based solely on the affidavits of one Shri R. B. Sreekumar, former Additional Director General of Gujarat, filed before the Nanavati-Shah commission. The Ld. Single Judge

ought to have appreciated that the depositions and the affidavits of other senior IPS officers and other superior officers also. The written arguments advanced by the petitioners appear to have been overlooked by the Ld. Single Judge.

XII. That the Ld. Single Judge has erred in ignoring the affidavit of the petitioners filed on 29.10.2007 placing on record the copy of the sting operation as published in 'Tehelka' which contain transcripts of interviews that amount to extra-judicial confessions and are, therefore, admissible in evidence as per the Indian Evidence Act. That the Ld. Single Judge of the Hon'ble Gujarat High Court has materially erred in refusing to accept this affidavit of the petitioners filed on 29.10.2007 without even passing any orders and without there being any resistance from the respondents, especially because these extra-judicial confessions add significant material to that already amassed against the respondent-accused. The Ld. Single Judge has often repeated sec. 216 of the 'Code' in its judgment which reads as under:-

Sec. 216- Court may later charge- (1) Any Court may alter or add to any charge **at any time before judgment is pronounced…. '** In line with this consistent reasoning, it is our humble submission that it was not proper practice for

the Hon'ble Court to direct the registry orally to delete the entries in the computer showing the acceptance of the affidavit filed on behalf of both the petitioners.

XIII. That the Ld. Single Judge has materially erred in not even keeping the matter C.A.V. for dictation of the judgment. The matter was kept simply kept for 'orders'. The status report supplied by the registry showed the matter to be pending. Hence, the affidavit of the petitioners tendered through the registry on 29.10.2007 along with the admissible evidence in the form of the extra-judicial confession was accepted by the registry and on the next day pursuant to the court's oral direction the said affidavit has

been removed as is clear from the 'status report'.

XIV. The petitioners have challenged before this Hon'ble Court the final judgment dtd. 2.11.2007. Thus, though the matter was kept "For Orders" to avoid certain technicalities, the Hon'ble Court had pronounced "Oral Judgment". That the Ld. Single Judge has materially erred in not even keeping the matter C.A.V. for dictation of the judgment. The matter was kept simply kept for 'orders'. The status report supplied by the registry showed the matter to be pending till 2.11.2007.

XV. That the Ld. Judge has materially erred in pronouncing only the operative portion of the judgment on 2.11.2007 and dictating the judgment thereafter during 'diwali vacation'. The practice has been deprecated by the Hon'ble Supreme Court on more than one occasion. The reasons for not keeping the judgment as C.A.V are obvious.

XVI. The judgment copy too was not made available to the petitioners despite notes to the registry dtd. 6.11.2007 tendered personally as well as by fax and thereafter sent by Regd. AD. It was only when the note was personally served upon the office of the Hon'ble Chief Justice of Gujarat High Court on 21.11.2007 the judgment was actually delivered. The files too were received by the registry thereafter.

XVII. That due to the unfortunate passage of time between conclusions of the arguments and the delivery of judgement, the Ld. Single Judge, has erred materially in not considering the judgments (judicial decisions) relied upon by the petitioners in their written arguments placed by way of the affidavit tendered through the registry on 10.9.2007 and also the written arguments tendered through the registry on 17.9.2007. The petitioners had relied upon the judgments in the case of Ram Krishna Dalmia v/s S. R. Tendolkar reported in 1959 SCR 279 at 293, 295 and in State Of Karnataka v/s Union Of India reported in (1977)4 SCC 608 at page 639 para 20, 653 para 53 and 68 as well at at page 699 para 184, at page 701 para 186, at 705 para 199, at 719 para 227, at 720 para 230. In the former judgment mentioned above the Hon'ble Supreme Court held that

"… the Commission has no power of adjudication in the sense of passing an order which can be enforced proprio vigore. A clear distinction must, on the authorities, be drawn between a decision which, by itself, has no force and no penal effect and a decision which becomes enforceable immediately or which may become enforceable by some action being taken. Therefore, as the Commission we are concerned with is merely to investigate and record its findings and recommendations without having any power to enforce them, … "

In the later judgment the Hon'ble Supreme Court in para 20 states, "…… If the basic rights of the people are not to be stultified and to appear chimerical, those in charge of the affairs of the State, at the highest levels, must be above suspicion. This is only possible if their own bonafides and utterly unquestionable integrity are assured and apparent in the context of the high purposes of our Constitution and the dire needs of our poverty stricken masses…. " The Hon'ble Supreme Court in para 53 states, "… A Commission of Inquiry could not properly be meant, as is sometimes suspected, to merely whitewash ministerial or departmental action rather than to explore and discover, if possible, real facts. It is also not meant to serve as a mode of prosecution and much less of persecution. Proceedings before it cannot serve as substitutes for proceedings which should take place before a court of law investied with powers of adjudication as well as of awarding pubishments or affording reliefs. Its report or findings cannot relieve Courts which may have to determine for themselves matters dealt with by a Commission. Indeed, the legal relevance or evidentiary value of a Commission's report or findings on issues which a Court may have to decide for itself, is very questionable. … "

Thus, it cannot be said that merely because the Commission of Inquiry is adjudicated with the issue the present FIR sought to be registered in not tenable. The Ld. Single Judge has not referred, much less dealt with the aforementioned judgments.

XVIII. That the offences at various places as narrated in the petition as well as the annexures placed on record before the Hon'ble High Court show role of the accused persons in the commission of the serious and multiple cognizable offences. That the ruling of the Hon'ble Supreme Court in Prakash Singh Badal's case is binding and for the enforcement and the implementation of the guidelines stated in the aforementioned judgment the petitioners had no alternative remedy except to approach the Hon'ble High Court under article 226 of the Constitution Of India.

XIX. That the Hon'ble High Court has erred in holding that the petitioners had alternative remedy of approaching the Ld. Magistrate by filing a private complaint. That the magistrate has two options. Either to direct the investigation to police u/s 156(3) Cr. P. C. or hold an inquiry as envisaged under the provisions of sec. 202 and 204 Cr.P.C. However, the magistrate cannot inquire into a bunch of serious and multiple offences, committed with highest connivance in 20 0f the 25 districts of a state, all of them traveling beyond his limited territorial jurisdiction. In the present case the offences have occurred beyond the jurisdiction of any magistrate as the offences have been spread over various districts.

XX. The learned Advocate General contended, alternatively, that if the Petitioners had any grievance against the non-registration of the FIR on the complaint of Petitioner No.1, they must take recourse to the jurisdictional Magistrate under Section 190/200 of the Code. This contention was premised upon the law as laid down by this Hon’ble Court

in Alyque Padamsee's case supra. However, the learned Advocate General did not dispute the fact that earlier charge sheets relating to the same incidents filed by the Police were already pending. Nor did the learned Advocate General meet the "clean slate" argument advanced on behalf of the Petitioners through which the line of authority culminating in Alyque Padamsee's case stood distinguished and rendered inapplicable to the present case. Moreover, the wide amplitude of this Hon'ble Court's jurisdiction under Articles 226/227 ("for the enforcement of any of the rights conferred by Part-III and for any other purpose"); (emphasis supplied) certainly extends to serious, widespread and heinous offences, as in the present case. The graphic representation of the scale, expanse and magnitude of the alleged offences leaves little room for doubt, ex facie, that the commission of the alleged offences was perpetrated and facilitated, both by act and omission, as well as by deep-rooted conspiracy, by the accused arraigned in the present complaint dated 08.06.2006.

XXI. The learned Advocate General further contended in the alternative that the said complaint dated 08.06.2006 of Petitioner No.1 was not a counter complaint to those already lodged by the Police on which they had registered FIRs and filed charge sheets. If that be so, a fortiori, since the Petitioner No.1's complaint plainly discloses the commission of cognizable offences, the Police were bound under Section 154 of the Code to register the FIR on the basis thereof. Moreover, the law as it has culminated in Upkar Singh's case (supra) clearly postulates that a further complaint covering an enlarged ambit of offences as compared to a previous/subsisting complaint is permissible.

XXII. That the Ld. Single Judge has erred in para 17 of the judgment by putting

certain judgments in the mouth of the Ld. Advocate General. If the same were actually cited at the time of arguments, the petitioners would have replied the same and could have provided proper assistance to the Hon'ble Court. The judgment reported in AIR 1997 SC 3104 in the case of Madhu Bala v/s Suresh Kumar states that whenever the magistrate orders investigation u/s 156 (3), the police has to register FIR. However, the para 9 of the said judgment deals with the powers and duties of the police under the police manual. The petitioners therefore contends that if the police does not abide by its duties as considered by this Hon'ble Court in the case of Prakash Singh Badal, the only remedy to give effect to the same is sec. 482 of the Code and article 226 of the Constitution. The other judgment relied in para 17 of the impugned judgment is the case of Union Public Service Commission v/s Papaiah reported in (1997) 7 SCC 614 wherein para 13 says that if the investigation is not found to be satisfactory, the magistrate has powers to order further investigation. That if ever the police had intended to impart justice to the poor victims, the police through prosecutor could have filed an application u/s 173 (8) of the Code. The petitioners are not the complainants in any of the FIRs registered so far. Moreover, the petitioner no. 1 is a witness in the FIR registered as CR No. I 67/02 with Meghaninagar Police Station and cannot seek any relief in the series of multiple offences in different districts. However, the present FIR is sought to be registered because in the incident where her husband was killed the petitioner no. 1 has found evidentiary information of a pre-planned, major conspiracy and abettment of the commission of the offences spread over different parts of the State.

XXII. That para 20 of the impugned judgment deals with the judgments cited by the Ld. Advocate General namely the case of Binay Kumar Singh & Ors

v/s State Of Bihar reported in (1997) 1 SCC 283 wherein para 9 states that the police is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the cognizable offence. This judgment is not applicable to the facts of this case as the FIR sought to be registered is not a cryptic report but is based on detailed compilation running into over 2000 pages. Yet another decision considered by the Ld Judge in para 20 of the impugned judgment is the case of Rajeevan and Another v/os State Of Kerala reported in (2003) 3 SCC 355 para 12 and 14 relate to grant of benefit of doubt to the accused after completion of entire trial due to delay in registration of FIR. This judgment has no relevance to the fact of the present case where an FIR has not even been registered.

XIV. That the Ld. Single Judge has materially erred in holding that the Chief Judicial Magistrate had power to inquire into an offence even if the same were committed outside his/her jurisdiction. In para 39 of the impugned judgment, the Hon'ble Gujarat High Court has relied upon the judgment reported in (1999) 8 SCC 686 in the case of Trisuns Chemicals Industry V/s Rajesh Agarwal & Others. In fact this judgment was never relied upon by the respondent state and therefore the same was not answered by the petitioners in the written arguments. This reported judgment has crept in merely due to delay of two months in dictating the judgment. The Ld. Single Judge erred in considering the fact that the above reported judgment pertains to the offence of cheating and the allegations were with regard to non-delivery of goods. The relevant provisions of sec. 181 of the Code of Criminal Procedure 1973 reads as under:-

Sec. 181. Place of trial where act is offence by reason of relation to other offence-(4) Any offence of criminal misappropriation or of criminal breach

of trust may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or any part of the property which is the subject of the offence was received or retained, or was required to be returned or accounted for, by the accused person.

It appears that considering the facts of that case the Hon'ble Supreme Court passed the aforementioned judgment. Had this judgment been cited during the course of arguments the same would have been answered and the Hon'ble Gujarat High Court would have been assisted by the counsel appearing for the petitioners.

It is under these circumstances, the relevant provisions of the Code are required to be stated. The provisions of Sec. 181 relates to Place of trial where act is offence by reason of relation to other offence- (1) Any offence of being a thug, or murder committed by a thug, of dacoity, of dacoity with murder, of belonging to a gang of dacoits, or of escaping from custody, may be inquired into or tried by a Court within whose local jurisdiction the offence was committed or the accused person is found.

Moreover, sec. 187 of the 'Code' gives power to the magistrate to issue summons or warrant for offence committed beyond local jurisdiction if such offence is NOT punishable with death or imprisonment for life…. Thus, the judgment referred to by the Ld. Single Judge is not applicable to the facts of this case.

The other relevant provisions are sec. 174, 176 and 177 Cr. P. C. Thus, in cases of **murder**, the place of inquiry is the place where the offence the persons dies or disappears [sec. 176(1-a) and sec. 174(1)] or where the inquest takes place.

Thus, the Ld. Single Judge has committed an error in relying upon a judgment that was based on the facts of that case.

XV. That in the present case the offences of murder, dacoity etc have been reported in different districts of Gujarat. The deceased had died and even inquest had taken place at different districts. Thus, magistrates of respective talukas of those districts will have jurisdiction to inquire into the offences. Thus, the complaint filed in a court of Ld. Magistrate, Ahmedabad cannot be divided into different incidents and offences and re-distributed to different magistrates. It is under these circumstances the petitioners had submitted that looking to the peculiar facts of this case the petitioners cannot go to the Magistrate and the only remedy was to approach the Hon'ble Gujarat High Court under article 226 of the Constitution Of India.

XVI. That the petitioners do not repeat the specific role of each of the accused as the Hon'ble High Court has not gone into the "Merits Of The Allegations Leveled In The Proposed FIR". The details of the role played by each of the accused has already been annexed by way of the chart. The petitioners crave leave to rely upon the same as well as the contentions already raised before the Hon'ble High Court. However, for the sake of brevity some crucial and pertinent issues that have therefore, as a result been left unexamined by the Commission and which have a direct relevance to the both terms of reference to the Commission, dtd. (1) 6 th March, 2002 and (2) 20th July, 2004 are:

(a) Why no minutes of the meetings held by the CM and other senior officers for review of the situation from 27th Feb., 2002, onwards were prepared and circulated to the concerned officials?

(b) Why dead bodies of the Godhra train fire victims were paraded through the streets of Ahmedabad city and that too when over 50 % of the deceased persons belonged to places out side Ahmedabad city and a

few dead bodies were not even identified at that juncture ?

(c) Did CP, Ahmedabad (PC Pandey) or DGP, Gujarat (K Chakravarty) report to CM or higher officers about the possible adverse repercussions on law and order about parading of dead bodies ?

(d) Why was no preventive action against communal elements taken on February 27/28, 2000, even after the announcement of Bandh call by the Sangh parivar on 27 th February, 2000 ?

(e) Why was the Communal Riot scheme was not put into operation in relevant areas, from 27 th Feb., 2002, evening onwards ?

(f) Why was no prompt and effective action against the rioters by the officers of the rank of Dy.SP and above, particularly in Ahmedabad city (nearly 40 of them) and Vadodara city (nearly 30), who were having striking forces of additional policemen moving with them ?

(g) Why was no action by nearly 100 police mobiles on the move in Ahmedabad city and similarly in Vadodara city against crowds which congregated in small numbers in the morning of 28 th February, 2002 onwards?

(h) Why was no action taken, when the enforcers of the Bandh indulged in traffic disturbance and petty nuisance, more for testing the mood and strategy of police, on the morning of 28.2.2002 ?

(i) Why was there an inordinate delay on the imposition of curfew, particularly in Ahmedabad city ? (In Ahmedabad city curfew was imposed as late as 13.00 hrs on 28th February, 2002)

(j) Despite regulations, why there was no arrangement for videography of the violent mobs ?

(k) Why police failed to videograph mobs, while electronic media succeeded ? Was There any constraint from higher authorities ?

(l) Why was no effective action by policemen in static points and by mobile patrolling groups, both by vehicles and on foot, against rioters from 27 th Feb., 2002, evening onwards?

(m) Why was there such delayed response in distress calls from prominent Muslim citizens, like Ahsan Jafri, (Ex.MP), despite their contacting the Chief Secretary, the DGP, the CP Ahmedabad city, etc.

(n) Why were there higher casualties of police firing and riots among the Muslims communities?

(o) Why were the instructions in the compilation of Circulars captioned "Communal Peace", issued to all District Magistrates and police officers in the rank of SPs and above not implemented ?

(p) Why "Instructions to deal with communal riots (strategy and approach)" prepared by Shri Z. S. Saiyed, IPS Retd., Officer on Special Duty and forwarded to all executive police officers for strict implementation, vide DGP, K.V.Joseph's, No. SB / 44 / OSD / 1175, dtd. 19.11.1977, had not been implemented ?

(q) Why no monitoring of the implementation of instructions issued by the Chief Secretary, Home Department, DGP and other higher officers, from 28 th Feb., 2002 onwards ?

(r) Why no action against vernacular press publishing communally inciting news and articles, despite proposals from SP Bhavnagar, CP Ahmedabad and ADGP (Int.), Sreekumar ? Please note that ADGP (Int.), Sreekumar had even presented one of such reports as an exhibit to the Nanavati Commission, on 31.8.2004, during his cross-examination ?

(s) Why no action or enquiry against police officers, to date, for their alleged failure to record FIRs and provide proper response to the complaints of riot victims, mostly minorities, though this matter was

reported graphically and repeatedly by ADGP (Int.), R.B.Sreekumar , in his reports to Govt. dtd. (1) 24.4.2002, (2) 15.6.2002, (3) 20.8.2002 and (4) 28.8.2002, etc.?

(t) Why no action or enquiry against officers of the Executive Magistracy, particularly, the District Magistrates of the Districts, who failed to initiate prompt action against rioters, particularly, from 27 th Feb., 2002 to 4th March, 2002 ? Similarly, why no action or enquiry against the DM and his staff for recommending pro BJP, VHP advocates for appointment as Public Prosecutors, to present cases against Hindu rioters ?

(u) Why no action on Supervisory Officers, i.e. from Supdt. of Police of Districts, Range IGs / DIGs, Commissioners of Police and the DGP, who violated Rules 24, 134, 135 and 240 of Gujarat Police Manual, Vol. III, by not properly supervising investigation of serious riot-related crimes and thereby committing culpable omission and grave misconduct ?

(v) Why no action on the supervisory officers i.e. the Range IG, Vadodara Range and CP Vadodara, who had done the misconduct of negligent supervision of Bilkis Banu and Best Bakery cases, whose trials had been transferred by the Hon'ble Supreme Court to the Maharashtra State?

XVII. The specific and sharp queries that this FIR addresses are:

[a] There are some State Intelligence Reports of a VHP meeting in Ahmedabad around 4 p.m on February 27, 2002. Who attended this meeting? Were any elected members of the Gujarat legislature, and the state cabinet present?

[b] Why were there no minutes of the meetings held by the CM and other senior officers for review of the situation from 27 th Feb., 2002, onwards prepared and circulated to the concerned?

[c] Why are there no copies of such minutes, if any existed, were not presented to the Nanavaty-Shah Commission of Inquiry?

[d] Why were the dead bodies of Godhra train fire victims brought in a motor cavalcade to Ahmedabad despite the local administration advising otherwise, paraded through the streets of Ahmedabad city and that too when many of the deceased persons belonged to places out side Ahmedabad city and a few dead bodies were not even identified at that juncture ?

[e] Did CP or DGP report to CM or higher officers, in writing, about the possible adverse repercussions on law and order about parading of dead bodies ?In case any such letters were sent to higher authorities, why these were not informed to the Nanavaty-Shah Commission ?

[f] Why was no preventive action against communal elements on February 27/28, 2000 strictly enforced and taken, even after the announcement of Bandh call by the Sangh parivar on 27th February, 2002?

[g] Why the Communal Riot scheme was not put into operation in relevant areas, from 27th Feb., 2002, evening onwards?

[h] Why was no prompt and effective action against the rioters by the officers of the rank of Dy.SP and above, particularly in Ahmedabad city (nearly 40 of them) and Vadodara city (nearly 30), who were having striking forces of additional policemen moving with them?

[i] Why was no action taken by nearly 100 police mobiles in Ahmedabad city and similarly in Vadodara city against crowds which congregated in small numbers in the morning of 28 th February, 2002 ?

[j] Why was no action taken when the enforcers of the Bandh indulged in traffic disturbance and petty nuisance, more for testing the mood and strategy of police, in the morning of 28.2.2002?

[k] Why was there such preposterous delay in the imposition of curfew, particularly in Ahmedabad city? In Ahmedabad city curfew was imposed as late as 13.00 hrs on 28th February 2002?

[l] When was curfew imposed in different parts of Gujarat on February 28, 2002?

[m] Despite regulations, why there was no arrangement for videography of the violent mobs in all districts? Why police failed to videograph mobs, while electronic media succeeded ? Was there any constraint from higher authorities ?

[n] Why was there no effective action by policemen in static points and by mobile patrolling groups, both by vehicles and on foot, against rioters from 27 th Feb., 2002, evening onwards?

[o] Why was there such a delayed response in distress calls from prominent Muslim citizens, like Ahsan Jafri, (Ex.MP), despite their contacting the Chief Secretary, the DGP, the CP Ahmedabad city, etc.

[p] Why were there more casualties of police firing and riots among the Muslims ?

[q] Why were the instructions in the compilation of Circulars captioned "Communal Peace", issued to all District Magistrates and police officers in the rank of SPs and above were not implemented ?

[r] Why were the "Instructions to deal with communal riots (strategy and approach)" prepared by Shri Z.S.Saiyed, IPS Retd., Officer on Special Duty and forwarded to all executive police officers for strict implementation, vide DGP, K.V.Joseph's, letter No. SB / 44 / OSD / 1175, dtd. 19.11.1977, not been implemented ?

[s] Why was there no monitoring of the implementation of instructions issued by the Chief Secretary, Home Department, DGP and other higher

officers, from 28 th Feb., 2002 onwards?

[t] Why was and has then and has not been since, no action against vernacular press publishing communally inciting news and articles, despite proposals from SP Bhavnagar, CP Ahmedabad and ADGP (Int.), Sreekumar ? Please note that ADGP (Int.), Sreekumar had even presented one of such reports as an exhibit to the Nanavati Commission, on 31.8.2004, during his cross-examination?

[u] Why was no action taken or any enquiry held against police officers for their alleged failure to record FIRs and provide proper response to the complaints of riot victims, mostly minorities, though this matter was reported graphically and repeatedly by ADGP (Int.), R.B.Sreekumar, in his reports to Govt. dtd. (1) 24.4.2002, (2) 15.6.2002, (3) 20.8.2002 and (4) 28.8.2002, etc. ?

[v] Why was no action taken or enquiry held against officers of the Executive Magistracy, particularly, the District Magistrates of the Districts, who failed to initiate prompt action against rioters, particularly, from 27 th Feb., 2002 to 4th March, 2002 ? Similarly, why no action or enquiry against the DM and his staff for recommending pro BJP, VHP advocates for appointment as Public Prosecutors, to present cases against Hindu rioters ?

[w] Why was no action taken against Supervisory Officers, i.e. from Supdt. of Police of Districts, Range IGs / DIGs, Commissioners of Police and the DGP, who violated Rules 24, 134, 135 and 240 of Gujarat Police Manual, Vol. III, by not properly supervising investigation of serious riot-related crimes and thereby committing culpable omission and grave misconduct ?

[x] Why was no action taken on the supervisory officers i.e. the Range

IG, Vadodara Range and CP Vadodara, who had done the misconduct of negligent supervision of Bilkis Banu and Best Bakery cases, whose trials had been transferred by the Hon'ble Supreme Court to the Maharashtra State?

[y] Why has there been no further investigation on the deposition of Shri Rahul Sharma, IPS, the then S.P., Bhavnagar, on 30.10.2004, before the Commission, about the location of BJP leaders and senior officers ? In November, 2004, the newspaper Indian Express, published a investigative report in this matter ?Why no clarification on inadequate implementation of recommendations of NHRC, National Commission for minorities, etc.?"

[z] Repeated phone calls made to Chief Minister Modi, Ahmedabad Police Commissioner PC Pandey, then DGP Chakravarti and senior policemen, cabinet ministers and officials. Phone records of these top men would be critical in unearthing aspects of the criminal conspiracy.

XVIII. That petitioners contend that the accused named in the FIR are very head strong persons with malicious and vile motivations that strike at the soul of India and the core of Indian democracy. That, considering their clout in the administration it would be almost impossible for the State's police to investigate the offence freely and fairly. It is under these circumstances, impartial investigation by the independent investigating agency i.e., the respondent no. 3 would be required and therefore the investigation of the offence after registration of the same is required to be taken over by the respondent no. 3 i.e., the C.B.I. The Hon'ble Gujarat High Court had not found it proper to issue notice to the respondents and therefore the CBI had not filed it's reply before the Hon'ble high court. Also, as far as respondents number 1 and 2 are concerned, notice was not issued by the High Court because the state government had requested the

Court not to issue notice stating that they would file their reply to avoid 'undue publicity.'

XIX. That the Code "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".

Section 154 of the Code is mandatory and the officer concerned is duty bound to register the case if any information disclosing a cognizable offence is laid before him.

That the learned Advocate General categorically stated and submitted that the State is not against investigation on the complaint dated 08.06.2006 of Petitioner No.1 per se but only against the mode of investigation. The learned Advocate General also clarified that by the mode of investigation he meant any mode within the four corners of the Code. The learned Advocate General, however, did not contest the proposition buttressed by authority advanced on behalf of the Petitioners that if a complaint is lodged disclosing the commission of a series of grave and cognizable offences, it is a statutory right as well as duty of the Police to register a FIR under Section 154 of the Code and to proceed to investigation. The learned Advocate General also did not meet the Petitioners' contention, again supported by authority, that the Code "gives to the police unfettered power to investigate all cases where they suspect that a cognizable offence has been committed". If that be so, it is wholly

idle and vexatious for the State/Police (Respondent Nos.1 & 2) to expect or contend that the Petitioner No.1 complainant must first approach the jurisdictional Magistrate under Section 190/200 of the Code and obtain a direction for investigation. Given his undoubted power and authority under Section 36 of the Code r/w Section 4 of the Bombay Police Act 1951, as in force in the State of Gujarat, nothing prevented the Director General of Police, Gujarat, (to whom the complaint was addressed) or the Chief Secretary and Home Secretary of the Government of Gujarat (to whom copies of the complaint were endorsed) from ordering investigation on the Petitioner No.1's complaint. In any event, on receipt of notice on the Writ Petition filed before the Hob'ble Gujarat High Court, Respondent Nos.1 & 2 would and should undoubtedly have been advised to register the FIR on the Petitioner No.1's complaint and to proceed to investigation thereon, without procrastination or prevarication or awaiting any Court's order to investigate.

XX. That the learned Advocate General submitted that the Hon'ble Gujarat High Court could not shut its eyes to the conduct of the Petitioners. (This submission was made in the context of the technical objection of delay in lodging the complaint raised by the Respondent-State). Truly speaking, however, the boot is on the other leg. It is for the State to justify its masterly inactivity in not lodging the complaint as FIR even though the complaint undisputedly disclosed commission of cognizable offences, based on "further evidence" garnered between 2003 and 2006, which came to light subsequent to the subsisting charge sheets in respect of the same incidents.

The fact remains that the allegations against the accused are not restricted to what they did in the year 2002 alone. The allegations travel

upto March 2005 and beyond, in fact continue until this day. The report of the Food Commissioner, N.C. Saxena, on the state of internally displaced persons/refugees within the State of Gujarat, filed in March 2007, shows how the subversion continues until this day. In any case, collecting the data and relevant material through certified copies, would take some time. Merely because the petitioner no. 2 produced some material in a compensation writ petition in 27.9.2005 cannot be a reason for not accepting the said material alongwith other material obtained later on and submitted by the petitioner no. 1 after about 8 months in June, 2006. The observations in para 19 were required to be dealt accordingly.

XXI. The learned Advocate General contended that there was inordinate delay in lodging her complaint by Petitioner No.1 and cited and relied upon the decisions reported as (1972) 3 SCC 393, para 12 (a decision rendered before the present Code was enacted), (1997) 1 SCC 283, para 9 and (2003) 3 SCC 355, Paras 12 to 14. The said contention is untenable and the authorities relied upon are wholly distinguishable. They are cases in which, after the trial and in final judgment, the alleged delay in lodging the FIR in those cases was a factor taken into account in determining the culpability or otherwise of the accused. In any event, the said contention of the learned Advocate General completely overlooks the provisions of Section 468 of the Code. The bar of limitation under that provision does not extend to taking cognizance of offences which are punishable with imprisonment for terms exceeding three years. In the present case, Petitioner No.1's complaint alleges commission by the accused of offences punishable under 302 r/w 120-B, 193 r/w 114 IPC all of which carry punishment of imprisonment for a term far exceeding three years.

XXII. The learned Advocate General contended that the present Writ Petition is

not maintainable because the Petitioners have not availed of the alternative remedy of approaching the jurisdictional Magistrate concerned under Sections 190/200 of the Code before invoking the writ jurisdiction of this Hon'ble Court. For this purpose, the learned Advocate General cited the entire line of decisions cited, referred to and culminating in the decision in Aleque Padamsee's case (supra). These decisions are wholly distinguishable on facts and have no application even in principle to the present case.

(AA) The 'State' has missed the fact that the allegations in this complaint travel beyond the jurisdiction of the competent court or police station. Thus, a particular officer incharge of a police station or a particular magistrate concerned cannot inquire or investigate into the allegations leveled in the complaint and assume jurisdiction over the territorial width and expanse forming the subject matter of the present complaint. The offences alleged against the accused are not alleged in the earlier FIRs. The allegations leveled in this complaint travel beyond the scope of the FIRs already registered, both in terms of the time duration as also in terms of the location of the offence(s) i.e. the territorial jurisdiction. The further investigation can be ordered provided charge sheets are already filed. In the present case, various allegations such as attempts to tutor and intimidate Shri R.B. Sreekumar during the proceedings before the Nanavati Shah Commission; the presence of I.K. Jadeja (State Cabinet Minister) in the control room during the riots; the pre-planned conspiracy conceived and implemented by the Chief Minister of the State in the mass carnage; (former Revenue Minister) Haren Pandya's deposition before the 'Concerned Citizens Tribunal' headed by retired Supreme Court Judges, Justice V.R. Krishna Iyer and Justice P.B. Sawant and retired Bombay High

Court Judge, Justice H. Suresh, that the accused no. 1, the Chief Minister of the State of Gujarat had "advised" them to be 'soft' on the 'anger of Hindus' and so on are matters of record. All these cannot be restricted to a particular 'scene' of offence or the jurisdiction of a particular police station or magistrate. Hence, further investigation cannot be ordered through registration of the crime in a particular crime register.

(BB) A given magistrate has no power to direct investigation by any officer other than one in charge of the concerned police station under his jurisdiction. Hence, the prayer that for fair investigation, the FIR, once registered, should be transferred to an independent investigating agency i.e., the CBI, cannot be granted by any such Magistrate. Therefore, the petitioners have no other alternative or equally efficacious remedy except approaching this Hon'ble Court under Article 226 of the Constitution of India, as held in (2001) 3 SCC 333, 2001 GLR 907 (SC), 2001 (1) GLR 913 (Guj), 2001 AIR SCW 3064 and 1997 Cri. L.J. 3866 (Guj).

(CC) Some of the decisions in which the Hon'ble Supreme Court had directed the CBI to investigate are:

(1994) 6 SCC 275 Inder Singh; (1998) 1 SCC 226 Vineet Narain; (1996) 7 SCC 20 Paramjit Kaur; (1996) 6 SCC 593 Common Cause a registered society; (1996) 3 SCC 682 State Of Bihar & Anr; (1996) 2 SCC 199 Vineet Narain; 1995 Supp (3) SCC 736 Secretary Hailakandi Bar Association; (1994) 1 SCC 616 Punjab and Haryana..

(DD) The learned Advocate General fairly stated that Respondent Nos.1 & 2 have not pleaded, i.e. questioned, the locus standi of the Petitioner No.2, a non-governmental organization, in fact a citizens group struggling for the legal rights of victim survivors of mass crimes. On the contrary, he

submitted that the Petitioner No.2 organization is a party to the Nanavati Shah Commission of Inquiry and is associated with the proceedings before it since the year 2003. The said submission is factually incorrect, not based on proper instructions and not borne out from the record. Thus, there was obvious delay in obtaining the certified copies from the Nanavati-Shah Commission.

(EE) That the Ld. Single Judge has materially erred in holding in para 30 of the impugned judgment that the petitioner no. 2 has no locus. That the 'state' is represented by the Ld. Advocate General who had stated before the Hon'ble Court that the respondents are not raising the objection with regard to the locus of the petitioner no. 2. That the petitioners have placed on record the judgment of Hon'ble Supreme Court in Crl.MP No. 3740-42/2004 in Writ Petition (Crl) No. 109/2003 in the matter of National Human Rights Commission v/s State Of Gujarat and Others. In para 5 page 10 of the said order the Hon'ble Supreme Court permitted the NGOs to draw the attention of the range inspector general to particular case and the Range Inspector General would consider the same before deciding whether further /fresh investigation or what action, if any, needed to be taken in connection with the FIRs filed. It is under this circumstances the petitioner no. 2, who has been strenuously trying hard for imparting justice to the poor victims in Gujarat, had to step in to help the petitioner no. 1 who is aged about 70 years. This coupled with the fact that the Ld. Advocate General had not objected to the locus of the petitioner no. 2. Thus, the Ld. Single Judge has materially erred in focusing on the minor issue.

(FF) The learned Advocate General submitted that the Petitioners' remedies lie under Section 154 of the Code and stated that no Annexures were filed

with the complaint dated 08.06.2006 when it was lodged with Respondent No.2. No such plea is taken in the Affidavit-in-Reply dated 23.07.2007 filed on behalf of the Respondent-State. In any event, such a plea is false and incorrect to the knowledge of Respondent Nos.1 & 2. The complaint along with the voluminous documentation in support running to well over 2000 pages, filed as Annexures "A" and "B" to the present Writ Petition, were all tendered to and received by the addressee Director General of Police, Gujarat, on the day of filing the complaint i.e., in June 2006 itself.

(GG) The learned Advocate General fairly stated that Petitioner No.1's said complaint is a meticulous compilation of records collated from those filed in various places. This was in response to the submission on behalf of the Petitioners that the Annexures to the Complaint, constituting "further evidence" under Section 173(8) of the Code, came to light and on judicial record in cognate proceedings before the Hon'ble Supreme Court of India or the Nanavati Shah Commission of Inquiry and so on. In these circumstances, the first prayer in the Writ Petition is liable to be granted.

(HH) The Ld. Advocate General had relied upon 1998 (1) Gujarat Law Herald 992 the case of Samji Ladha & Ors, and it was argued that the High Court has no powers to direct the CBI to hold any enquiry invoking the jurisdiction under Article 226. No such issue was raised or any contention advanced in that case. It is clearly distinguishable.

On the other hand, the judgment reported in (2001)3 SCC 333 clearly states that High Court under Article 226 can direct the CBI to investigate, though the powers may be used sparingly.

(II) That the same Ld. Single Judge has exercised its powers under Article 226 of the Constitution Of India and has directed the police to register the FIR considering the facts of the case in Special Criminal Application No.

1158 of 2007 in the matter between Girishbhai Bhurjibhai Ninama v/s State Of Gujarat & Others vide order dtd. 5.7.2007 Coram: M. R. Shah J. Although it was a case wherein it was submitted by the Ld. Prosecutor that the offences were of civil nature. Thus, the extraordinary powers of the Hon'ble High Court provided under Article 226 of the Constitution are unfettered. Even in a case wherein there were some indications or doubts of the offences/dispute being of a civil nature this Hon'ble Court has been pleased to direct registration of the FIR. The case on hand i.e., the present petition, discloses serious offences and that too allegedly committed by the head of the 'State' and other elected representatives of the people. This, then, is the fittest case for registration of the FIR and thereafter impartial and independent investigation. The copy of the said judgment and order has already been annexed as annexure- P-8 to this petition memo. The petitioners had tendered the certified copy of the aforementioned judgment and the same was mentioned in para 12 page 2505 of the written arguments of the petitioners. However, the delay in passing the judgment could be the reason for not dealing with the aforementioned contention.

(JJ) It was argued by the Ld. Advocate General that the petitioner no. 2 is unnecessarily targeting the State of Gujarat and that women were unsafe in other States of the country where they could not even move out of their respective homes after dark. In reply, it was argued on behalf of the petitioners that it is this very climate of safety and tolerance of the people of Gujarat that had empowered women through the years, but which the present government, under the present the chief minister, who has been arraigned as accused no. 1 in the present petition, has severely sought to erode. Over the years, in the past when Gujarat was headed by various

governments the women were safe. Hence a deliberately political colour should not be given to the present complaint that deals with grave evidence of commitment of serious crimes by the Chief Executive of the State assisted in the conspiracy by cabinet colleagues and senior functionaries of the administration and the police. It was also mentioned that the petitioner no. 2 herein has also filed a writ petition in the Andhra Pradesh High Court praying for the de-recognition of member of the legislative assembly, Andhra Pradesh, Akhbaruddin Owaisi for attacking and threatening to kill Bangladeshi writer, Taslima Nasreen, thereby committing breach of oath of safeguarding the Indian Constitution. This matter was heard on 3.9.2007 and the Division Bench of the Andhra Pradesh High Court has issued notice to the respondents. Thus, the petitioners have no grievance against Gujarat alone but the culture of violence and mass crimes that not only affect the rule of law but violate the mandates of the Indian Constitution.

(KK) It was argued on behalf of the 'State' that the petitioner no. 2 being a vigilant citizen ought to have filed the petition much earlier in 2002, and that on the ground of delay the petition was required to be dismissed.

On behalf of the petitioners it was argued that the depositions before the said Commission of Inquiry are ongoing, and the offences of tutoring the officers etc too continued well into the year 2005. Besides Tehelka's Operation Kalank exposes subversion at the very highest levels including at the level of advocate for the state of Gujarat in the Commission who has hurled abuse at the Judiciary in 2007. Further the expose shows deep seated conspiracy behind the manufacture and importing of firearms into Gujarat to execute he mass murder rape and destruction. Further the expose shows how, the accused are not only roaming free but exulting in

vicious criminal acts, enjoying political patronage at the highest levels. The expose reveals the specific role of Shri Narendra Modi in executing th carnage exulting over its success and brazenly protecting the accused. This establishes beyond reasonable doubt how mass murderers can be elected to democratic government and abusing their positions, subvert the rule of law and the Indian Constitution. Other affidavits heavily relied upon as "further evidence" within the meaning of Section 173(8) CrPC, filed as annexures to the present complaint/petition were also gathered from the records before the Hon'ble Supreme Court and the said Commission of Inquiry. Thereafter certified copies of the same were obtained, and this took appreciable time. It was also argued that the bar under sec. 468 Cr.P.C. would not be applicable in this case considering the nature and seriousness of the offences allegedly committed and the punishments they carried.

(LL) That so far as the prayer for transfer of investigation is concerned, the petitioner submits that considering the attitude of the respondent no. 2 as also the clout of the accused persons and the allegations faced by the high ranking officers and politicians, the investigation is required to be transferred to the respondent no. 3. The petitioners relies upon the judgment in the case of **Sanjiv Kumar v. State of Haryana**: (2005) 5 SCC 517 at 522-523, Paras-13 to 17.

"In the peculiar facts and circumstances of the case, looking at the nature of the allegations made and the mighty people who are alleged to be involved, we are of the opinion, that the better option of the two is to entrust the matter to investigation by CBI……. Yet, the fact remains that CBI as a Central Investigating Agency enjoys independence and confidence of the people. It can fix its priorities and programme the

progress of investigation suitably so as to see that any inevitable delay does not prejudice the investigation of the present case. They can think of acting fast for the purpose of collecting such vital evidence, oral and documentary, which runs the risk of being obliterated by lapse of time. The rest can afford to wait for a while. We hope that the investigation would be entrusted by the Director, CBI, to an officer of unquestioned independence and then monitored so as to reach a successful conclusion; the truth is discovered and the guilty dragged into the net of law. Little people of this country, have high hopes from CBI, the prime investigating agency which works and gives results. We hope and trust the sentinels in CBI would justify the confidence of the people and this Court reposed in them".

R.S. Sodhi v. State of U.P.: (1994) Supp.1 SCC 143 - Case of "Encounters" between Punjab militants and the local police. The Supreme Court found it "desirable to entrust the investigation to an independent agency like the Central Bureau of Investigation" because "however faithfully the local police may carry out the investigation, the same will lack credibility since the allegations are against them". The Court entrusted the investigation to the CBI "forthwith ……. guided by the larger requirements of justice".

In **A.R. Antony v. R.S. Nayak**: (1988) 2 SCC 602 at 672, 673, para 85, per Sabyasachi Mukharji, (as His Lordship then was) for himself, Oza and Natarajan, JJ. Per majority, observed:

"…… Yet, we must remind ourselves that purity of public life is one of the cardinal principles which must be upheld as a matter of public policy. Allegations of legal infractions and criminal infractions must be

investigated in accordance with law and procedure established under the Constitution. Even if he has been wronged, if he is allowed to be left in doubt, that would cause more serious damage to the appellant. Public confidence in public administration should not be eroded any further. One wrong cannot be remedied by another wrong."

Followed in **State of Haryana v. Bhajanlal**: (1992) Supp.1 SCC 335 at 389, para 137.

Very recently in **Vishwanath Chaturvedi (III) v. Union of India**: (2007) 4 SCC 380 at 394, para 36, on a PIL under Article 32 of the Constitution, in moulding the prayer in the Writ Petition and directing the CBI to make an enquiry, the Hon'ble Supreme Court observed:

"Respondent No.2, ……. is a senior politician and holding a very high public post of Chief Minister in a very big State in India and the allegations made by the Petitioner against him have cast a cloud on his integrity. Therefore, in his own interest, it is of utmost importance that the truth of these allegations is determined by a competent forum. Such a course would sub-serve public interest and public morality because the Chief Minister of a State should not function under a cloud and that it would also be in the interests of Respondent 2 and the members of his family to have their honor vindicated by establishing that the allegations are not true. In our view, these directions would sub-serve public interest."

(MM) That the Ld. Judge ought to have considered the case of State Of Bihar And Another v/s Ranchi Zila Samta Party And Another reported in (1996) 3 SCC 682 wherein as many as 40 FIRs were ordered to be investigated by the CBI. The para 8 reads as under:

" The question then is whether the direction given by the High Court

needs any modification. It is pointed out by Shri Nariman that the State police have already instituted 40 first information reports against different persons, arrested 44 offenders and attached the properties of 239 persons. There is no gainsaying that all persons involved in these offences need to be identified. Not only all the aforementioned persons but also all other persons involved need to be dealt with according to law…"

Para 9 of the aforementioned judgment reads thus,

" We are also of the opinion that, to alleviate the apprehensions of the State about the control of the investigation by the CBI, it should be under the overall control and supervision of the Chief Justice of the Patna High Court. The CBI officers entrusted with the investigation shall, apart from the criminal court concerned, inform the Chief Justice of the Patna High Court from time to time of the progress made in the investigation and may, if they need any directions in the matter of conducting the investigation, obtain them from him. The learned Chief Justice may either post the matter for directions before a Bench presided over by him or constitute any other appropriate Bench. After the investigation is over and reports are finalized, as indicated by the Division Bench of the High Court in the impugned judgment, expeditious follow-up action shall be taken. The High Court and the State Government shall cooperate in assigning adequate number of Special Judges to deal with the cases expeditiously so that no evidence may be lost."

Para 6 of the aforementioned judgment reads thus,

" In view of the contentions, the question that arises for consideration is whether this Court would be justified in interfering with the order passed by the High Court. The parameters of the power of the High Court under Article 226 of the Constitution to direct an investigation

by the CBI, though without the consent of the State concerned, is the subject – matter of a reference pending consideration of a Constitution Bench of five Judges of this Court. (This is in WPs Nos. 531-36 of 1985 by order dated 10.3.1989). Therefore, the frontiers of the power of the High Court under Article 226 to give directions to the CBI to investigate into offences without the State's consent, are already before this Court and shall be gone into. All arguments addressed by the learned counsel on either side would be considered and dealt with by the Constitution Bench. "

Thus, looking to para 6 it becomes clear that the Hon'ble Supreme Court was cautious of the fact that the issue with regard to transferring the investigation to CBI was pending before the larger bench.

However, the Ld. Single Judge relied upon judgment in the case of State Of W.B. And Others v/s Committee For Protection Of Democratic Rights, W.B. And Others reported in (2007) 2 SCC (Cri)100 wherein the matter was sent to larger bench as the issue was already referred to larger bench earlier. However, as mentioned earlier, in a case wherein as many as 40 FIRs were ordered to be investigated by the CBI, the issue before the larger bench was still pending. Moreover, it is not that after the aforementioned judgment reported in (1996)3 SCC 682 the Hon'ble Supreme Court had not transferred investigation the CBI. The petitioners had relied upon the judgment reported in (2001) 3 SCC 333 in para 11 of rejoinder to arguments of 'state' at page 2504 of the compilation. Thus, even after the Hon'ble Supreme Court had kept the issue before the larger bench for considering whether the courts are empowered to transfer the investigation to CBI without the consent of the state government, the Hon'ble Supreme Court has transferred investigation to CBI. Thus, the Ld.

Judge has materially erred in dismissing the petition of the petitioners instead of referring to the larger bench or even issuing notices to the respondents including the respondent no. 3.

(NN) That the Ld. Single Judge has materially erred in holding that the petitioners ought to have approached the court of Ld. Magistrate for further investigation u/s 173(8) of the 'Code'. That the Ld. Single Judge has committed an error by considering the same to be alternative remedy on the part of the complainant who has no locus to do so in a case instituted upon police report. It is only the 'state' i.e., the police through the prosecutor who can file an application for further investigation. Considering the facts of this case and the clout of the accused and the nature of the allegations leveled against them, this 'state' is never going to file any such application before the Ld. Magistrate. This coupled with the fact that when the Ld. Advocate General states that the 'state' has no objection to investigation of the proposed complaint but the same should be within the frame work of the provisions of the 'code', it was high improper to accept the same as nobody prevented the 'state' to further investigate u/s 173(8) of the code. However, the 'state' does not want to investigate the offences against the superior officers and the politicians and therefore it was necessary for the Hon'ble Gujarat High Court to show indulgence under article 226 of the constitution.

(OO) That the Ld. Single judge materially erred in holding that the petitioners had alternative remedy of seeking further investigation u/s 173 (8) of the Code. That the major offences narrated in the FIR have been registered in different police stations in different districts. Therefore the complaint cannot be divided into several parts for each allegation and to that extent the same cannot be ordered to be further investigated in different police

stations of different districts of the state. Thus, considering the facts of this case and the nature of the FIR sought to be registered, the remedy provided u/s 173(8) of the Code would not be efficacious remedy.

(PP) The affidavit of the 'State' has already been replied to by the petitioners in their rejoinder and therefore the details are not being repeated as the rejoinder as well as further affidavit affirmed by the petitioner no. 1 are tendered to the Hon'ble Court. That the Ld. Single Judge has materially erred in not issuing notices to the respondents in a serious case this the present one. The respondent no. 3 i.e., the CBI had not filed any reply to the petition merely because the Hon'ble Court had not issued notice to any of the respondents. The respondents including the 'State Of Gujarat' and 'The CBI' were represented by way of advanced copy served upon them.

(QQ) That the Ld Single Judge has erred in relying upon para 23 of the impugned judgment whereby it was alleged that the petitioner no. 1 was not co-operating with the respondent no. 2 herein. However, the rejoinder -affidavit of the petitioners at page 2326-2328 the petitioner no. 1 has mentioned the details of the correspondence. The correspondence annexed between page no. 252 and 266 show that the petitioner no. 1 though aged about 70 had tried her best to co-operate the respondent no. 2 however, for one or other reasons the respondent no. 2 had adopted the dilatory tactics. At page no. 264 the statement of the petitioner no. 1 dtd. 16.10.2006 recorded by the Addl. DGP(Intel.) Gujarat State on behalf of the respondent no. 2 has been annexed. It was clearly stated that the concerned officer who had approached the petitioner no. 1 had no powers to register the FIR. Thus, for obvious reasons the petitioner no. 1 had no reason to give entire complaint orally and record the same

very lengthy statement.

XIII.

[19] The petitioners have no other alternative efficacious remedy except filing this petition before this Hon'ble Court.

[20] The petitioners have not filed any application either before this Hon'ble Court or any other court of law except this petition under this subject matter of registration of the FIR.

(21) The petitioners therefore pray that:

PRAYER

Considering the facts and circumstances stated hereinabove it is Most Respectfully prayed that this Hon'ble Court may be pleased to:

(a) grant special leave to appeal against the final judgment and order dated 2.11.2007 passed by the Hon'ble High Court of Gujarat in Special Criminal Application No. 421 of 2007; and

(b) pass such further and other order or orders as this Hon'ble Court may deem fit and proper in the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS THE PETITIONER IN DUTY BOUND SHALL EVER PRAY.

DRAWN BY: FILED BY:
Mr. M.M. TIRMIZI,
Advocate

SETTLED BY:

Mr. M.S. GANESH,
SENIOR ADVOCATE.

(APARNA BHAT)
ADVOCATE FOR THE PETITIONERS

DRAWN ON:
FILED ON: