

Ms Brand Protectors India Pvt Ltd vs Anil Kumar on 25 January, 2025

DLSH010074192024

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CR No.251/24

M/s. Brand Protectors India Pvt. Ltd.,
Vs. Anil Kumar, Proprietor of M/s. Shiva Export
House

IN THE COURT OF SPECIAL JUDGE (NDPS), SHAHDARA,
KARKARDOOMA COURTS, DELHI

Criminal Appeal No. 251/2024

In the matter of :-

M/s. Brand Protectors India Pvt. Ltd.
122, Sector-15, Part-1,
Gurgaon, Haryana-122001

.....Revisionist
(proposed accused before
the Ld. Trial Court)
(through Sh. Shubham Dayma, Advocate)

Versus

Anil Kumar
S/o. Late Mr. Shamlal Abrol
R/o. Ward No.8, near Dangeswar Mandir,
Samba, Jammu-184121
also at
M/s. Shiva Export House
Veer Nagar, Sanoli Road, Ward No.12,
Veer Nagar, Bapoli,
Panipat, Haryana
also at
Chamber No.312,
New Chambers Block,
Patiala House Courts,
New Delhi-110001

.....Respondent
(complainant before the
Ld. Trial Court)
(through Sh. Arjun Bhaskar, Advocate)

CRIMINAL REVISION UNDER SECTION 438 BNSS 2023

Date of institution : 30.11.2024
Date when judgment reserved : 20.01.2025
Date of Judgment : 25.01.2025

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CR No.251/24

M/s. Brand Protectors India Pvt. Ltd.,
Vs. Anil Kumar, Proprietor of M/s. Shiva Export
House

JUDGMENT :

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1. The present revision petition is filed u/s.438 BNSS 2023 on behalf of revisionist / proposed accused against the order dated 19.07.2024 passed by Ld. Magistrate in case bearing CC No.980/2024, titled Anil Kumar, Proprietor of M/s. Shiva Export House Vs. M/s. Branch Protectors India Pvt. Ltd., vide which cognizance was taken by the Ld. Trial Court without hearing the proposed accused / revisionist.

2. The impugned order, which is under challenge by way of the present revision petition is reproduced as under :

"19.07.2024 Present : Sh. Arjun Bhaskar, Ld. Counsel for complainant.

Arguments heard. Cognizance taken.

Put up the matter for PSE on 09.08.2024.

(Anubhav Jain) ACMM (Shahdara)/KKD/Delhi 19.07.2024"

3. The said order has been challenged primarily in view of Section 223 BNSS, which is reproduced as under :

"Examination of complainant.

(1) A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses--

(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:

Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless--

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."

4. Earlier, the said section was Section 200 Cr.P.C., which is also reproduced as under :

"Examination of complainant A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate;

PROVIDED that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses, [a] if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or [b] if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 192;

PROVIDED FURTHER that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re- examine them."

5. Under the old law, there was no provision regarding giving accused an opportunity of being heard before the cognizance of an offence is taken by the Magistrate. It is only by way of M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House proviso to Sub-section 1 of Section 223 BNSS, that the legislature thought it fit to give an opportunity to the accused of being heard before the cognizance of the offence is taken by the Magistrate. The aforesaid order dated 19.07.2024 of Ld. Trial Court of taking cognizance without issuing notice to the accused and hearing the accused before taking cognizance is, therefore, assailed on the ground that the order was passed by the Ld. Magistrate without complying with the proviso to Section 223 of BNSS, which came into force on 01.07.2024.

6. In the revision petition and during the course of arguments, the impugned order has been assailed primarily on the ground that the cognizance of the offence was taken by the Ld. Magistrate in violation of Section 223 BNSS as no opportunity of being heard was given to the accused /

revisionist.

7. The matter was heard on 20.01.2025 and Ld. Counsels for both the parties acknowledged the change of law in light of the proviso to Section 223 BNSS and also acknowledged that as per the new law, the accused needs to be given an opportunity of being heard before cognizance is taken by the Court. However, while Ld. Counsel for the revisionist submitted that the impugned order needs to be set-aside and that before the complainant and the witnesses are examined, the accused / revisionist needs to be given an opportunity to be heard, per- contra, Ld. Counsel for the complainant / respondent submitted that the impugned order may be set-aside as far as taking of cognizance is concerned, but as far as the said order relates to examination of complainant and witnesses is concerned, the M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House same need not be set-aside as the Ld. Magistrate may in view of the proviso to Section 223 BNSS give an opportunity to the accused / revisionist to make their submissions before the cognizance is taken and the accused are summoned.

8. In support of their arguments, Ld. Counsel for the revisionist relied upon two judgments titled as Anibha Saini Vs State of UP Neutral Citation No.2024 :AHC-LKO : 83319 and Thoufeeque Vs State of Kerala O.P. (Crl) No.123/24.

9. Ld. Counsel for the complainant respondent has relied upon the judgment titled as Sri Basanagouda R Patil (Yatnal) Vs Sri Shivananda S Patil decided on 27.09.2024.

Observations

10. Before advertng to the aforesaid three judgments cited during the course of arguments, it would be appropriate to refer to certain judgments of Constitutional Courts, wherein the jurisprudence regarding cognizance has been laid and discussed.

11. It was in Emperor vs Sourindra Mohan Chuckerbutty (1910)ILR 37CAL412, that the meaning of cognizance was first deciphered. The court held that the cognizance does not involve any formal action or indeed action of any kind, but occurs as soon as Magistrate, as such, applies his mind to the suspected commission of an offence. Para 2 and 3 of the judgment are reproduced as under:

"2. The facts relating to this matter are as follows. A dacoity, commonly referred to as the Nettra dacoity, took place on the 24 th April 1909. On the 20th January 1910, the Local Government made an order under Section 2 of the Criminal Law Amendment Act, 1908, purporting to apply the provisions of Part I of that Act to the offence. On the 24th January 1910 the petitioner was arrested on suspicion of being concerned in it, and so having committed M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House offences under Sections 395 (dacoity) and 397 (dacoity with attempt to cause death or grievous hurt) of the Indian Penal Code. On the 28th January he applied to the District Magistrate to be released on bail, which was refused, and a similar application was afterwards made on the 5th February and likewise refused. On the 17th February he made a third application to the Sessions

Judge, and this also was refused. On this rule two points have been taken: the first is that the Local Government had no power to make the order of the 20 th January; and the second, that we ought to admit the petitioner to bail on the merits of the case.

The first point rests on the assertion that a Magistrate had not taken cognizance of the Nettra dacoity on the 20 th January. The appellant's advocate has laboured under the disadvantage of not having seen the record in the case, as the magisterial inquiry was, according to Section 4 of the Act, ex parte, and we have not thought it right to allow him access to it. He had, therefore, a right to make any suppositions as to the facts appearing on the record, asking us to verify them afterwards. On looking at the record, we find that a police report was made to the Sub-divisional officer of Diamond Harbour on the 24th April, the day when the dacoity is alleged to have taken place, and that the case was afterwards transferred to head-quarters. Cognizance had, therefore, been taken of the offence on the 20th January 1910, as recited in the order of the Local Government of that date; for taking cognizance does not involve any formal action, or indeed action of any kind, but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence." (emphasis supplied)

12. In *Gopal Marwari v. Emperor A.I.R. 1943 Pat. 245*, it was observed that the word 'cognizance' is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings. It is the condition precedent to the initiation of proceedings by the Magistrate. The court noticed that the word 'cognizance' is a word of somewhat indefinite import and it is perhaps not always used in exactly the same sense.

13. In *Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee: AIR 1950 Cal 437*, it was held *M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House* as under:-

" What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any magistrate has taken cognizance of any offence under section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter - proceeding under section 200 and thereafter sending it for inquiry and report under section 202. When the magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence."

(emphasis supplied)

14. The observation made in the Superintendent and Remembrancer of Legal Affairs, West Bengal (supra) was quoted with by Full Bench of Hon'ble Apex Court in R.R. Chari vs. The State of Uttar Pradesh 1951 INSC 20.

15. Hon'ble Supreme Court in Tula Ram v Kishore Singh 1977 INSC 192 made the following observations:

"7. The question as to what is meant by taking cognizance is no longer res integra as it has been decided by several decisions of this Court. As far back as 1951 this Court in the case of R.R. Chari v State of Uttar Pradesh MANU/SC/0025/1951 : 1951:INSC:20 : AIR 1951 SC 207 observed as follows:

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

While considering the question in greater detail this Court endorsed the observations of Justice Das Gupta in the case of Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee MANU/WB/0167/1950 : AIR 1950 Cal 347 which was to the following effect:

It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(a), Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House particular way as indicated in the subsequent provisions of this Chapter-proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind, e.g. ordering investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence. *****

11. Mr. Mukherjee however submitted that the moment the Magistrate directed investigation he must be deemed to have taken cognizance, and, therefore, he could not have taken any of the steps excepting summoning the accused straight-away or directing re-

investigation. We have already pointed out that Chapter 12 and Chapter 14 subserve two different purposes: One pre-cognizance action and the other post cognizance action. That fact was recognised by a recent decision of this Court in the case of Devarpalli Lakshminaryana Reddy and Ors. v. V. Narayana Reddy and Ors. MANU/SC/0108/1976 : 1976:INSC:136 : [1976] Supp SCR 524 where the Court observed as follows :

The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operates in a distinct spheres at different stages. The first is exercisable at the pre-cognizance stage, the second at the post cognizance stage when the Magistrate is in seisin of the case. That is to say in the case of a complaint regarding the commission of a cognizance offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre- cognizance stage and avail of Section 156(3).

12. In the case of Gopal Das Sindhi and Drs. v. State of Assam and Anr. MANU/SC/0413/1961 : AIR 1961 SC 986 this Court while approving the observations of Justice Das Gupta in the case referred to above, observed as follows:

It would be clear from the observations of Mr. Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of investigation, he cannot be said to have taken cognizance of any offence.

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

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

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

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

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

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

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

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

4. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 as described above." (emphasis supplied) M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House

16. In State of West Bengal v Mohd Khalid MANU/SC/0154/1995 :

1994:INSC:545 : (1995) 1 SCC 684, the Supreme Court held, on the aspect of taking of cognizance by the Magistrate, thus:

"43. Similarly, when Section 20-A(2) of TADA makes sanction necessary for taking cognizance - it is only to prevent abuse of power by authorities concerned. It requires to be noted that this provision of Section 20-A came to be inserted by Act 43 of 1993. Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

44. Cognizance is defined in Wharton's Law Lexicon 14th Edn., at page 209. It reads:

"Cognizance (Judicial), knowledge upon which a judge is bound to act without having it proved in evidence: as the public statutes of the realm, the ancient history of the realm, the order and course of proceedings in Parliament, the privileges of the House of Commons, the existence of war with a foreign State, the several seals of the King,

the Supreme Court and its jurisdiction, and many other things. A judge is not bound to take cognizance of current events, however notorious, nor of the law of other countries."

It has, thus, reference to the hearing and determination of the case in connection with an offence. By the impugned judgment the High Court has quashed the orders of sanction and the Designated Court taking cognizance in the matter." (Emphasis supplied)

17. State of Karnataka v Pastor P Raju MANU/SC/3533/2006 :

2006:INSC:490 : (2006) 6 SCC 728 are even more instructive:

"10. Several provisions in Chapter XIV of the Code of Criminal Procedure use the word "cognizance". The very first section in the said Chapter viz. Section 190 lays down how cognizance of offences will be taken by a Magistrate. However, the word "cognizance" has not been defined in the Code of Criminal Procedure. The dictionary M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House meaning of the word "cognizance" is - "judicial hearing of a matter".

The meaning of the word has been explained by judicial pronouncements, and it has acquired a definite connotation. The earliest decision of this Court on the point is R.R. Chari v State of U.P. wherein it was held:

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

13. It is necessary to mention here that taking cognizance of an offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offenders against whom a prima facie case is made out." (Emphasis supplied)

18. From the aforesaid judgments, it is clear that before BNSS 2023 came into force w.e.f. 01.07.2024, the law as regards cognizance was well settled to the effect that taking cognizance of an offence is not the same thing as issuance of process and that the cognizance is taken at initial stage, when the Magistrate has applied his judicial mind to the facts mentioned in the complaint. It was well settled till 01.07.2024, that a Magistrate is said to have taken cognizance of an offence mentioned in a complaint, when he intends to proceed with the complaint under Chapter XV of Cr.P.C.

19. It may be noted that a Magistrate obviously goes through the complaint and applies his mind even when an application u/s.156(3) Cr.P.C. is taken up for consideration and decided by the Magistrate, but despite the fact that the Magistrate takes note of the allegations in the complaint at that stage, it is not said that M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House the Magistrate has taken cognizance of the offence. Therefore, taking cognizance of the offence is a stage, when the Magistrate applies the mind to the complaint not for any other purpose, but particularly for the purpose of proceeding and dealing with the complaint as per the provisions of Chapter-XV of Cr.P.C. Till the time BNSS 2023 came into force, it was clear that at the stage of cognizance, the accused has no role, as the cognizance is w.r.t. the offence and not w.r.t. the accused. At that stage, there is no accused, rather, there is a proposed accused, who may or may not be summoned by the Magistrate, after the proceedings under Chapter-XV are completed and the complaint reaches the stage of 204 Cr.P.C. However, the said position seems to have been changed when the new criminal procedure by way of BNSS 2023 came into force on 01.07.2024 as in Section 223, it was categorically mentioned that no cognizance of an offence shall be taken by a Magistrate on a complaint, without giving an opportunity to the accused of being heard. This change in law has also been acknowledged by Ld. Counsels for both the parties. Therefore, as far as the impugned order w.r.t. taking of cognizance is concerned, the said portion of the order is in teeth of the proviso to Sub-section 1 of Section 223 BNSS 2023 and is liable to set-aside.

20. However, one more question still remains to be answered by the Court, as by the impugned order dated 19.07.2024, the matter was also listed for 09.08.2024 for the purpose of recording pre-summoning evidence, which portion of the order has also been assailed by way of the present revision petition.

M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House

21. As stated earlier, it was argued by Ld. Counsel for the revisionist that the complainant and witnesses produced by the complainant cannot be examined u/s.223 (1) BNSS 2023 until and unless cognizance is taken by the Magistrate. In this regard, he also relied upon two judgments.

22. In the case cited by Ld. Counsel for the revisionist, titled Anibha Saini Vs State of UP 2024:AHC-LKO:83319, the issue before Hon'ble Allahbad High Court was whether the order of the Ld. Magistrate issuing notice to proposed accused persons, even before the cognizance was taken, was illegal in view of judgment titled Indian Bank Association & Ors. Vs. Union of India & Ors. (2014)2SCC(CRL652). The Hon'ble High Court observed while taking note of the proviso of Section 223 BNSS that notice to the proposed accused persons was rightly issued by the Ld. Magistrate for affording proposed accused an opportunity to be heard. The relevant portion of the said order is reproduced as under :

"Having heard learned counsel for the applicant, learned A.G.A. for the State and upon perusal of the record, it transpires that a private complaint came to be lodged by the applicant under Section 138 of the Negotiable Instruments Act which was registered on 14.08.2024. Admittedly, the new B.N.N.S., 2023 has come into force on

01.07.2024. Therefore, having regard to the aforesaid admitted facts, there cannot be any doubt as to the fact that the provisions contained in Chapter XVI of B.N.N.S., 2023, shall be applicable in the instant case. Therefore, having regard to the provisions contained in Section 223 (1) of B.N.N.S., 2023, the impugned order dated 14.11.2024, whereby the notice has been issued to the proposed accused person after affording him an opportunity to be heard, cannot be said to be illegal.

Section 223 (1) of B.N.N.S., 2023, being relevant, is quoted herein below :

M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House "Section 223 Examination of Complainant - (1) - A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate.

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:

Thus, having regard to the provisions contained in Section 223 (1) of B.N.N.S., 2023, no illegality or irregularity appears in the impugned order dated 14.11.2024.

Accordingly, the instant application lacks merit and is, accordingly, dismissed."

23. In another judgment cited by the revisionist titled Thoufee Vs State of Kerala 2024 KER 91186, the question before Hon'ble Kerala High Court was whether after initiating proceedings u/s.202 Cr.P.C., the Magistrate was prevented from referring the case for investigation u/s.156(3) Cr.P.C. While deciding the said issue, the Hon'ble Court made reference to the proviso to Sub-section 1 of Section 223 BNSS and made the following observations in para-20 :-

20. In this context, it needs to be mentioned that there was a time when confusion prevailed regarding when cognizance is to be taken in a case. The Supreme Court finally held in R. R. Chari V. State of Uttar Pradesh, (AIR 1951 SC 207) that cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in the complaint or a police report or upon information received from any other person that an offence has been committed. The words employed in section 200 Cr.P.C that "A Magistrate taking cognizance of an offence..." created the doubts.

However, in the new statute i.e., Bharatiya Nagarik Suraksha Sanita 2023, the position has been made clear as evident from the first proviso to section 223. The aforementioned provision reads as follows: "provided that no cognizance of an offence shall be taken without giving the accused an opportunity of being heard". Hence M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House after the coming into force of the new statute, cognizance is

taken only after the accused appears and he is heard. This is a marked departure and sets at rest the confusion regarding when the cognizance was taken." (emphasis supplied)

24. After discussing the case law, specifically the judgment titled Veenubhai Haribhai Malviya & Ors. Vs. State of Gujarat, (2019)17SCC1 and Devarapalli Laxminarain Reddy & Ors. Vs. V. Narain Reddy & Ors. (1976)SCC252, Hon'ble Court observed in para 21 that even after the stage of Section 202 Cr.P.C, the Magistrate is competent to direct registration of FIR.

25. It may be noted that in para-20 of Thoufeeq (supra), Hon'ble Kerala High Court categorically observed that as per the new statute, cognizance is taken only after the accused appears and he is heard. The Court specifically noted that this is a mark departure from what was the law before the new statute came into force.

26. This Court subscribes to the aforesaid observation of the Hon'ble Kerala High Court, as the proviso which makes it mandatory to hear the accused before the cognizance is taken is a mark departure from the law relating to cognizance, as under

the old law i.e. Cr.P.C. 1973, the cognizance was said to have been taken by the Magistrate at the stage, when the Magistrate made up its mind to proceed with the complaint under Chapter- XV of Cr.P.C.

27. However, now after the new statute i.e. BNSS 2023 has been implemented from 01.07.2024, the old law cannot be said to be applicable as such, as now it is necessary to hear the accused before cognizance of the offence is taken by the Magistrate. The M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House question, which arises is as to at which stage the Magistrate takes cognizance of the offence under the new statute i.e. BNSS 2023.

28. The answer to this question is not direct for the reason that term "cognizance" was neither defined under Cr.P.C. 1973 nor it has been define in the new legislation i.e. BNSS 2023. Though, the Parliament had the opportunity to define the term "cognizance" in the new legislation, but in legislative wisdom, the same has not been defined in Section 2 of BNSS 2023.

29. Therefore, the meaning of the term "cognizance" needs to be derived on the basis of the provisions contained in Chapters-XV and XVI of BNSS 2023.

30. From the perusal of Section 223 BNSS, it is clear that the Magistrate has to mandatorily examine on oath the complainant and witnesses produced by the complainant "while taking cognizance of an offence on complaint". The use of the words "while taking cognizance" in Section 223(1) BNSS 2023 shows that the legislature in its wisdom deliberately and purposely used those words, instead of using the words "upon taking cognizance", to indicate that the process of taking cognizance does not culminate when the Magistrate examines the complainant and witnesses on oath.

31. It was argued that Section 223(1) BNSS is in pari materia to Section 200 Cr.P.C. However, the Court do not agree with the said submission, as in Section 200 Cr.P.C., the words used by the

legislature were "A Magistrate taking cognizance of an offence", while the words used in Section 223(1) BNSS are "A Magistrate M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House having jurisdiction while taking cognizance of an offence". Thus, under the BNSS 2023, the legislature has specifically stated in Section 223(1) BNSS that cognizance of an offence is a process which starts when the Magistrate proceeds with the complaint under Chapter XVI of BNSS 2023 and examines the complaint and the witnesses and takes further steps and before the cognizance is finally taken, as per the proviso, the Magistrate is required to give an opportunity of hearing to the accused.

32. Meaning thereby, that under the new legislation in Chapter XVI, a Magistrate on receiving a complaint shall examine the complainant and the witness as produced by the complainant and may take further steps u/s.224 or 225 of BNSS. Thereafter, the Magistrate would give an opportunity to the accused against whom allegations and evidence have come on record u/s.223 or 225 BNSS, to make submissions before the Court, before the cognizance of the offence is finally taken.

33. In this regard, the Court relies upon the judgment titled as Sri Basanagouda R Patil (Yatnal) Vs Sri Shivananda S Patil in CRL PT. No.7526 of 2024 cited by Ld. Counsel for respondent. In the said judgment, the question before the Hon'ble Karnataka High Court was directly regarding interpretation of Section 223 of BNSS. The facts of the said case are similar to that of the present case, therefore, paras-7 to 12 of the said judgment are reproduced as under :

"7. The registration of the private complaint for offences punishable under Section 356(2) of the BNSS is not in dispute. The fulcrum of the complaint was that the petitioner made a defamatory speech against the respondent at an election rally. The issue that is brought M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House before the Court, at this juncture, is not on the merit of the matter. The complaint is filed by the respondent invoking Section 223 of the BNSS, which is Section 200 in the earlier regime - Cr.P.C. The moment complaint is registered, a notice is issued to the accused. Issuance of notice to the accused has driven the petitioner to this Court, in the subject petition, contending that it is contrary to the procedure to be adopted in law. Therefore, it becomes germane to notice certain provisions of the BNS 2023. Filing of the private complaint is dealt with under 5 Section 223 of the BNSS, which was Section 200 of Cr.P.C., it reads as follows: "

223. Examination of complainant.--(1) A Magistrate having jurisdiction while taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:

Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard: Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses--

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

(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 212: Provided also that if the Magistrate makes over the case to another Magistrate under Section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.

(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless--

(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and

(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received." (Emphasis supplied) M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House Proviso to sub-section (1) of Section 223 of the BNSS mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine upon oath, the complainant and the witnesses present if any and reduce it into writing. The proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the BNSS deals with issuance of process which is akin to Section 204 of the Cr.P.C. This stage is yet to arrive in the case at hand.

8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.

10. Therefore, the procedural drill would be this way:

A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned

Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.

11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.

12. Swinging back to the facts of the case the concerned Court has passed the following order:

"This complaint is filed against the Accused alleging the offence P/U/Sec.356(2) of BNS, 2023.

Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.

For hearing.

Call on 13.08.2024."

The moment complaint is filed, notice is issued to the accused. This procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order." (emphasis supplied)

34. The Hon'ble Karnataka High Court in the aforesaid judgment, particularly in para-10 has mentioned the procedural drill u/s.223 BNSS and categorically observed that when a complaint is taken up by a Magistrate u/s.223 BNSS, the Magistrate will examine the complainant and witnesses on oath and at this juncture, the question of taking cognizance would not arise. The notice to the accused would be issued only subsequently. The Hon'ble Court in para-11 further clarified that an opportunity of being heard given to the accused at the very initial stage of the filing of the complaint would be an empty formality, which could not be the intention of the legislature. Therefore, to give the accused an effective opportunity of hearing, it is necessary that the notice is M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House sent to the accused in terms of proviso to Sub-section 1 of Section 223 BNSS together with copy of the complaint, sworn statements of the complainant and witnesses, for the accused to appear and argue and his case before taking of cognizance.

35. In the opinion of the Court, the aforesaid procedure is the only manner in which Section 223 BNSS can be interpreted for the following reasons :

1. At initial stage of filing of the complaint, sometimes the names of the accused persons or the alleged culprits are not even known to the complainant. Further, even if the names are known, it may be that the address of the accused persons is not available with the complainant, which the Magistrate can gather during an enquiry or investigation u/s.225 BNSS.

For example, in a complaint case of theft, the accused persons may not be known, OR in a case of hurt and wrongful restrain, the complainant may not know all the accused persons by name and address. At this juncture, a thought comes to the mind of the Court that if complainant files a complaint mentioning that complaint is not aware of name or address of accused, whether, the only course available would be registration of FIR u/s.175(3) BNSS 2023 or the Magistrate could proceed u/s.225 BNSS to make enquiry into the matter or get it investigated, collect evidence as well as the details of accused.

2. It may also be that at the stage of filing of the complaint, the complainant may have made several persons as proposed M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House accused, though, their roles may not be clear in the complaint. In such situation, it is only upon examining of the complainant u/s.223 BNSS or by conducting an enquiry or investigation u/s.225 BNSS that the Magistrate can reach a proper conclusion, as to which of the accused persons, notice need to be issued under the proviso to Sub-section of Section 223 BNSS 2023.

3. There may be cases where in the initial complaint, certain allegations are not made, which are subsequently found to be made by the complainant and the witnesses during their examination on oath u/s.223(1) BNSS. In such a situation, the very purpose of having heard the accused at the very initial stage would stand defeated as the summoning of the accused may be for different or aggravated offences than those mentioned in the complaint. It would be an arduous exercise to again issue notice to the accused persons to give them a hearing, as the Court thinks of taking cognizance of a different / graver offence than that mentioned in the complaint.

4. As pointed out in the aforesaid judgment of Basanagouda (supra), it is only after the examination of the complainant and witnesses u/s.223(1) BNSS and investigation or enquiry u/s.225 BNSS that the complete material on the basis of which cognizance of an offence is taken would be available before the Court and by providing that material to the accused, an effective hearing will be given to the accused to make submissions against taking cognizance of the offence M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House alleged to be committed by the accused.

5. Last but not the least, it would be time taking and futile exercise to give notice to the accused at the very initial stage to make submissions on cognizance and thereafter, permitting the accused to withdraw from the proceedings and then again bringing the process serving agency into action at the stage of 227 BNSS for again summoning of the accused. If this procedure is followed in a case, where

there are multiple accused persons, the entire process of summoning the accused persons, that too, twice may take considerable time. Further, an accused aware of the filing of the complaint by the complainant may try to avoid taking the process and thereby delay the taking of the cognizance u/s.223(1) BNSS and may again do so at the stage of 227 BNSS, which cannot be the intention of the legislature, as the very object of enacting BNSS 2023 is to expedite the trial and not to delay it.

Order

36. In view of the aforesaid discussion, it is held that the impugned order dated 19.07.2024 is illegal to the extent that Magistrate took cognizance of the offences alleged in the complaint filed by the respondent without giving the revisionist an opportunity of being heard. That portion of the order i.e. "Cognizance taken" is set-aside.

37. The second portion of the said order regarding listing the matter for pre-summoning evidence and consequently examining the complainant on 05.12.2024 cannot be said to be in violation of M/s. Brand Protectors India Pvt. Ltd., Vs. Anil Kumar, Proprietor of M/s. Shiva Export House the provisions of Section 223 BNSS. However, it is made clear that as the complainant has been examined u/s.223(1) BNSS and as per order dated 05.12.2024, the Ld. Trial Court has not proceeded to conduct enquiry or investigation u/s.225 BNSS, hence, the Ld. Trial Court would give an opportunity to the proposed accused persons including the revisionist to make submissions regarding cognizance. The revisionist is also directed to be present through AR or counsel before the Ld. Trial Court on the next date of hearing i.e. 28.02.2025 to make submissions on cognizance.

38. Revision Petition is disposed of accordingly.

39. Revision file be consigned to Record Room.

40. TCR, if any, be sent back alongwith copy of this judgment.

Announced in the open Court

on 25th January 2025

SAURABH

PARTAP SINGH LALER
SINGH

LALER Date: 2025.01.26
05:08:41 +0530

(Saurabh Partap Singh Laler)
Special Judge (NDPS Act)
Shahdara, Karkardooma Courts
Delhi/25.01.2025