Vishnu Kumar Tiwari vs The State Of Uttar Pradesh on 9 July, 2019

Author: K.M. Joseph

Bench: K.M. Joseph, Sanjay Kishan Kaul

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1015 OF 2019
(Arising out of SLP (Crl.) No.9654 of 2017)

VISHNU KUMAR TIWARI ... APPELLANT(S)

VERSUS

STATE OF UTTAR PRADESH THROUGH
SECRETARY HOME, CIVIL SECRETARIAT
LUCKNOW AND ANOTHER ... RESPONDENT(S)

J U D G M E N T

K.M. JOSEPH, J.

1. The second respondent, in this appeal generated by special leave, got registered a First Information Report which invoked Sections 201, 304B and 498A of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC' for short) and Sections 3 and 4 of the Dowry Prohibition Act, 1961. Briefly, the contents of the complaint are as follows The appellant married the second respondent's daughter on 22.04.2004. The father of the appellant made a demand for an Alto car and Rs. 2 lakhs for admission of Vishnu in B.Ed. He did not accept the demand for dowry, and even at the time of marriage, he made a demand of Rs. 4 lakhs. There is reference to his daughter informing her mother that her mother-in-law, father-in-law, husband, brother-in-law and sister-in-law used to beat her and torture her to bring dowry. There is reference to telephone call that his daughter was critical. It was made on 08.09.2010 and when they reached there, the daughter was not there. Upon insisting, the mother-in-law of second respondent's daughter told them that they had taken her somewhere to some hospital. Search was made at many hospitals but the daughter could not be found. Thereafter, they found that the daughter had died. Reference was made to the demand for dowry by appellant and father-in-law, mother-in-law, brother-in-law and sister-in-law of the second respondent's daughter and that they have killed his daughter. It would appear that on the basis of the same, Crime No. 721 of 2007 was registered. The Investigating

Officer, however, on the basis of the investigation, after taking the statements, filed a final report under Section 178 of The Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Cr.PC.' for short).

2. The second respondent thereupon filed a protest petition. The Chief Judicial Magistrate passed an order concluding that the daughter of the second respondent/complainant, wife of the appellant, died due to her illness. It was further found that the accused persons had not caused any harassment or torture to her nor has committed dowry death. There was no prima facie case made out against the accused persons under Section 498A, 304B and 201 of the IPC and Sections 3 and 4 of the Dowry Prohibition Act,1961. It was found that there is no sufficient ground made out for action and the protest petition was dismissed and final report accepted.

3. The second respondent thereupon lodged revision petition before the Additional Sessions Judge. The Additional Sessions Judge did not find merit and dismissed the criminal application. This led to a writ petition before the High Court at Allahabad. This petition was filed invoking Article 226 of the Constitution of India. A Writ of Certiorari was sought to quash the impugned order passed by the Additional Sessions Judge and the order passed by the Chief Judicial Magistrate. A further direction was sought to be passed to investigate the case by taking statements of victim's family and other witnesses and submit a report before the Chief Judicial Magistrate. Direction was sought to the Chief Judicial Magistrate for looking into the matter afresh for taking cognizance against the accused persons in the case.

4. By the impugned judgment, the High Court set aside the orders passed by the Chief Judicial Magistrate and the Additional Sessions Judge. The Chief Judicial Magistrate was directed to consider the protest petition afresh in the light of the observations made therein. Feeling aggrieved by the said order, the special leave petition was filed, for which permission was sought and was granted by order dated 04.12.2017.

5. We have heard the learned Counsel for the parties and granted leave in the matter.

6. The learned Senior Counsel for the appellant would point out that the High Court has not noticed that the Chief Judicial Magistrate has in fact considered the protest petition. He makes the complaint in the light of the following findings recorded by the High Court:

> "11. In the light of above law, I am of the opinion that, if the protest petition was submitted by the petitioner against the final report submitted by the police, then it was the duty of the learned Magistrate to go through the protest petition and if there was any substance in the protest petition then he may took cognizance under Section 190(1)(b) of Cr.P.C.
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> 12. The perusal of the record of learned Magistrate disclose that he has not taken into consideration the protest petition of the petitioner. Since there was a protest petition that is why it was the pious duty of the learned CJM to consider the facts mentioned in the protest petition and to decide it according to law."

7. The order passed by the Chief Judicial Magistrate shows that there is consideration of the protest petition. Neither the Chief Judicial Magistrate nor the Additional Sessions Judge have failed to apply the correct principles of law. In this regard, it is apposite to notice the following observations made in the impugned judgment of the High Court:

> "10. In the case 2001 (43) ACC 1096 Pakhando & others Vs State of UP & another, it is opined by the Court that in the case of final report the Magistrate has four options:-
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> (1) He may agree with the conclusion of the police and accept the final report and drop the proceeding.
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> (2) He may take cognizance under Section 190(1)(b) Cr.P.C. and issue process straightaway to the accused without being bound by the conclusion of the investigating agency where he is satisfied that upon the facts discovered by the police, there is sufficient ground to proceed.
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> (3) He may order for further investigation if he is satisfied that the investigation was made in a perfunctory manner.
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> (4) He may without issuing process and dropping the proceedings under Section 190(1)(a) Cr.P.C. upon the original complaint or protest petition treating the same as complaint and proceed to act under Sections 200 and 202 Cr.P.C. and thereafter whether complaint should be dismissed or process should be issued."

8. He would emphasise that it is a case where the late wife of the appellant/daughter of the second respondent had died a natural death. There is a case for the appellant that the marriage was solemnized in the year 2004. It was after some time that the wife of the appellant conceived and the child was delivered. It is further the case of the appellant that unfortunately illness struck the daughter of the second respondent. Treatment was afforded and, as found by the Chief Judicial Magistrate, the complainant's daughter died due to her illness. There was no case made out for interfering with the orders impugned before the High Court.

9. Per contra, the learned counsel appearing on behalf of the second respondent/complainant drew our attention to the death certificate issued by Priti Hospital:

> "DEATH CERTIFICATE This is to certify that Patient Smt. Jaya Tiwari aged about 31 year, female W/o. Shri Vishnu Tiwari. R/o Village Saorai, Saifabad, Patti Pratapgarh U.P. Who was admitted in this Trust on 09.10.07 at 10.29 P.M. as a case of septicaemia c respiratory distress under Doctor A. Gupta has expired on 10.10.2007 at 8.00 A.M. due to cardio pulmonary arrest."

10. He would point out that on the one hand, there is reference to the case of the daughter of the complainant being one of septicaemia c respiratory distress but it is also stated that the daughter of the second respondent/complainant died due to cardio pulmonary arrest. This raised questions

which are not dealt with by the orders impugned before the High Court.

11. He also referred to the statements given by the witness to contend that there was material which should have persuaded the Chief Judicial Magistrate to treat the protest petition as a complaint and the matter should have been proceeded on the said basis.

12. The court put a question to the appellant as to why the Additional Sessions Judge has found that there is prima facie no case made under Section 304B and 201 of the IPC against the accused persons by the Chief Judicial Magistrate but why there is no reference to Section 498A of IPC. The learned counsel drew our attention to the order passed by the Additional Sessions Judge and contended that the second respondent/complainant did not press the case under Section 498A of the IPC. The contention was confined to Section 304B and 201 of the IPC.

A LOOK AT WHAT THIS COURT SPOKE IN THE MATTER

13. In Abhinandan Jha and others v. Dinesh Mishra 1 , the question arose as to whether when a report is submitted that there is no material that any case is made out for sending the accused for trial, the Magistrate can direct the police to submit a charge-sheet. This Court took the view that the Magistrate cannot compel the Police to change their opinion. However, it was held that the Magistrate is free to not accept such report and he may take suitable action. The Magistrate may direct further investigation under Section 156 (3) of the Code. It was further held that it would be in a case where the Magistrate feels that the investigation is unsatisfactory or incomplete. It may be also in a case where there is scope for further investigation.

1 AIR 1968 SC 117 / (1967) 3 SCR 668

14. It may not be inapposite that we refer to the following discussion by this Court in Abhinandan Jha (supra) as to what is a final report:

> "13. It will be seen that the Code, as such, does not use the expression 'charge-sheet' or 'final report'. But it is understood, in the Police Manual containing Rules and Regulations, that a report by the police, filed under Section 170 of the Code, is referred to as a 'charge-sheet'. But in respect of the reports sent under Section 169 i.e. when there is no sufficient evidence to justify the forwarding of the accused to a Magistrate, it is termed variously, in different States, as either 'referred charge', 'final report', or 'summary'."

15. In H.S. Bains, Director, Small Saving-cum-Deputy Secretary Finance, Punjab, Chandigarh v. State (Union Territory of Chandigarh) 2 , the Police submitted a final report. However, the Magistrate disagreed with the conclusion of the Police and directed issue of process upon taking cognizance of the case. A contention was taken that the Magistrate acted illegally in not recording statements on oath of the complainant and the witnesses under Section 200 of the Code and the Magistrate must, therefore, be treated as having taken cognizance upon the Police report for which he was not competent as it was not a report under Section 173, but a final report within the meaning

of Section 169. It was contended that the Magistrate had only two options before him – (i) he could either order further investigation. (ii) He could also take cognizance as upon a complaint but for the same the statements of the complainant and witnesses had to be recorded.

16. This Court in the course of its judgment in H.S. Bains (supra), held as follows:

> "6. It is seen from the provisions to which we have referred in the preceding paras that on receipt of a complaint a Magistrate has several courses open to him. He may take cognizance of the offence and proceed to record the statements of the complainant and the witnesses present under Section 200. Thereafter, if in his opinion there is no sufficient ground for proceeding he may dismiss the complaint under Section 203. If in his opinion there is sufficient ground for proceeding he may issue process under Section
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> 204. However, if he thinks fit, he may postpone the issue of process and either enquire into the case himself or direct an investigation to be made by a police officer or such other person as he thinks fit for the 2 (1980) 4 SCC 631 purpose of deciding whether or not there is sufficient ground for proceeding. He may then issue process if in his opinion there is sufficient ground for proceeding or dismiss the complaint if there is no sufficient ground for proceeding. On the other hand, in the first instance, on receipt of a complaint, the Magistrate may, instead of taking cognizance of the offence, order an investigation under Section 156(3). The police will then investigate and submit a report under Section 173(1). On receiving the police report the Magistrate may take cognizance of the offence under Section 190(1)(b) and straight away issue process.

This he may do irrespective of the view expressed by the police in their report whether an offence has been made out or not. The police report under Section 173 will contain the facts discovered or unearthed by the police and the conclusions drawn by the police therefrom. The Magistrate is not bound by the conclusions drawn by the police and he may decide to issue process even if the police recommend that there is no sufficient ground for proceeding further. The Magistrate after receiving the police report, may, without issuing process or dropping the proceeding decide to take cognizance of the offence on the basis of the complaint originally submitted to him and proceed to record the statements upon oath of the complainant and the witnesses present under Section 200 of the Criminal Procedure Code and thereafter decide whether to dismiss the complaint or issue process. The mere fact that he had earlier ordered an investigation under Section 156 (3) and received a report under Section 173 will not have the effect of total effacement of the complaint and therefore the Magistrate will not be barred from proceeding under Sections 200, 203 and 204. Thus, a Magistrate who on receipt of a complaint, orders an investigation under Section 156(3) and receives a police report under Section 173(1), may, thereafter, do one of three things: (1) he may decide that there is no sufficient ground for proceeding further and drop action; (2) he may take cognizance of the offence under Section 190 (1)(b) on the basis of the police report and issue process; this he may do without being bound in any manner by the conclusion arrived at by the police in their report; (3) he may take cognizance of the offence under Section 190(1)(a) on the basis of the original complaint

and proceed to examine upon oath the complainant and his witnesses under Section 200. If he adopts the third alternative, he may hold or direct an inquiry under Section 202 if he thinks fit. Thereafter he may dismiss the complaint or issue process, as the case may be." (Emphasis supplied)

17. Thus, when he proceeds to take action by way of cognizance by disagreeing with the conclusions arrived at in the police report, he would be taking cognizance on the basis of the police report and not on the complaint. And, therefore, the question of examining the complainant or his witnesses under Section 200 of the Code would not arise. This was the view clearly enunciated.

18. In Mahesh Chand v. B. Janardhan Reddy 3 , the appellant/complainant had lodged report alleging commission of offences by the respondent. Subsequently, being dissatisfied with the investigation, he filed a criminal complaint in the court of the Magistrate. In the meantime, the Investigating Officer filed a final report finding that the controversy was of a civil nature. The appellant filed a protest petition. The final report was accepted by the Magistrate. The complaint case filed by the appellant was also closed. It became final. The appellant filed a third complaint, as it were, under Section 200 of the Code. On summons being issued, it was successfully questioned before the High Court. We may notice the following discussion by this Court profitably.

"12. There cannot be any doubt or dispute that only because the Magistrate has accepted a final report, the same by itself would not stand in his way to take cognizance of the offence on a protest/complaint petition; but the question which is required to be posed and answered would be as to under what circumstances the said power can be exercised.

3 (2003) 1 SCC 734

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16. In Munilal Thakur case [1985 Cri LJ 437:1984 Pat LJR 774] the Division Bench of the Patna High Court was concerned with the question as to whether a Magistrate even after accepting final report filed by the police, can take cognizance of offence upon a complaint or the protest petition on same or similar allegations of fact; to which the answer was rendered in the affirmative.

17. The question which has arisen for consideration herein neither arose therein nor was canvassed.

18. In Jayashankar Mund case [1989 Cri LJ 1578 : (1989) 67 Cut LT 426] the Orissa High Court again did not have any occasion to consider the question raised herein. The Court held: (Cri LJ pp. 1582-83, para 6) "Even though a protest petition is in the nature of a complaint, it is referable to the investigation already held by the vigilance police culminating in the final report and because the informant was not examined on solemn affirmation under Section 202 of the Code, thereby no illegality or prejudice was caused to the accused. If such a view is accepted and there is no reason why such a view should not be accepted, the necessary consequence in this particular case shall be that the protest petition which is of the nature of a complaint petition filed by the petitioner shall be

in continuation and in respect of the case instituted and investigated by the vigilance police."

19. Keeping in view the settled legal principles, we are of the opinion that the High Court was not correct in holding that the second complaint was completely barred. It is settled law that there is no statutory bar in filing a second complaint on the same facts. In a case where a previous complaint is dismissed without assigning any reasons, the Magistrate under Section 204 CrPC may take cognizance of an offence and issue process if there is sufficient ground for proceeding. As held in Pramatha Nath Talukdar case [AIR 1962 SC 876 : 1962 Supp (2) SCR 297 : (1962) 1 Cri LJ 770] second complaint could be dismissed after a decision has been given against the complainant in previous matter upon a full consideration of his case.

Further, second complaint on the same facts could be entertained only in exceptional circumstances, namely, where the previous order was passed on an incomplete record or on a misunderstanding of the nature of complaint or it was manifestly absurd, unjust or where new facts which could not, with reasonable diligence, have been brought on record in the previous proceedings, have been adduced. In the facts and circumstances of this case, the matter, therefore, should have been remitted back to the learned Magistrate for the purpose of arriving at a finding as to whether any case for cognizance of the alleged offence had been made out or not." (Emphasis supplied)

19. In Gangadhar Janardan Mhatre v. State of Maharashtra4, this Court reiterated that Magistrate can, faced with a final report, independently apply his mind to the facts emerging from investigation and take cognizance under Section 190 (1)(b), and in this regard, is not bound to follow the procedure under Sections 200 and 202 of the Code for taking cognizance under Section 190(1)(b). It was, however, open to the Magistrate to do so.

20. In regard to the filing of protest petition by the informant who filed the First Information Report, it is important to notice the following discussion by this Court:

> "6. There is no provision in the Code to file a protest petition by the informant who lodged the first information report. But this has been the practice. Absence of a provision in the Code relating to filing of a protest petition has been considered. This Court in Bhagwant Singh v. Commr. of Police [(1985) 2 SCC 537:1985 SCC (Cri) 267 : AIR 1985 SC 1285] stressed on the desirability of intimation being given to the informant when a report made under Section 173(2) is under consideration. The Court held as follows: (SCC p. 542, para 4) 4 (2004) 7 SCC 768 "There can, therefore, be no doubt that when, on a consideration of the report made by the officer in charge of a police station under sub-section (2)(i) of Section 173, the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard so that he can make his submissions to persuade the Magistrate to take cognizance of the offence and issue process. We are accordingly of the view that in a case where the Magistrate to whom a report is forwarded under sub-section (2)(i) of Section 173 decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information

> report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report."
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> 9. When a report forwarded by the police to the Magistrate under Section 173(2)(i) is placed before him several situations arise.

The report may conclude that an offence appears to have been committed by a particular person or persons and in such a case, the Magistrate may either (1) accept the report and take cognizance of the offence and issue process, or (2) may disagree with the report and drop the proceeding, or (3) may direct further investigation under Section 156(3) and require the police to make a further report. The report may on the other hand state that according to the police, no offence appears to have been committed. When such a report is placed before the Magistrate he has again option of adopting one of the three courses open i.e. (1) he may accept the report and drop the proceeding; or (2) he may disagree with the report and take the view that there is sufficient ground for further proceeding, take cognizance of the offence and issue process; or (3) he may direct further investigation to be made by the police under Section 156(3). The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, exercise his powers under Section 190(1)(b) and direct the issue of process to the accused. The Magistrate is not bound in such a situation to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of a case under Section 190(1)(a) though it is open to him to act under Section 200 or Section 202 also. [See India Carat (P) Ltd. v. State of Karnataka [(1989) 2 SCC 132 : 1989 SCC (Cri) 306 : AIR 1989 SC 885] .] The informant is not prejudicially affected when the Magistrate decides to take cognizance and to proceed with the case. But where the Magistrate decides that sufficient ground does not subsist for proceeding further and drops the proceeding or takes the view that there is material for proceeding against some and there are insufficient grounds in respect of others, the informant would certainly be prejudiced as the first information report lodged becomes wholly or partially ineffective. Therefore, this Court indicated in Bhagwant Singh case [(1985) 2 SCC 537 :

> 1985 SCC (Cri) 267 : AIR 1985 SC 1285] that where the Magistrate decides not to take cognizance and to drop the proceeding or takes a view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, notice to the informant and grant of opportunity of being heard in the matter becomes mandatory. As indicated above, there is no provision in the Code for issue of a notice in that regard." (Emphasis supplied)

21. This Court, in Gangadhar Janardan Mhatre (supra), also stressed on the need to issue notice to the informant in the following discussion:

"12. Therefore, the stress is on the issue of notice by the Magistrate at the time of consideration of the report. If the informant is not aware as to when the matter is to be considered, obviously, he cannot be faulted, even if protest petition in reply to the notice issued by the police has been filed belatedly. But as indicated in Bhagwant Singh case [(1985) 2 SCC 537 : 1985 SCC (Cri) 267 : AIR 1985 SC 1285] the right is conferred on the informant and none else." (Emphasis supplied)

22. In Kishore Kumar Gyanchandani v. G.D. Mehrotra 5 , a First Information Report was lodged in respect of certain offences. The Police filed a final report which came to be accepted. Nearly three months thereafter, a protest petition was filed. The Magistrate directed the same to be considered as a complaint. He held an inquiry under Section 202 of the Code and proceeded to take cognizance. Paragraph 4 is relevant and it reads as follows:

"4. There is some controversy between the parties that before accepting the final form by the Magistrate on 27-1-1996 notice had been served on the complainant and the complainant did not file objections, whereas the case of the complainant is that he had not received any notice from the Court. Be that as it may, we are not entering into that 5(2011) 15 SCC 513 controversy for deciding the present case as in our view it is not material either way nor does it oust the jurisdiction of the Magistrate on the basis of a complaint to take cognizance of the offence alleged to have been committed by the accused even if he had already accepted the final form, the same having been filed by the police."

23. In fact, the case itself was decided by a Bench of three learned Judges of this Court in view of the divergence of opinion in the Court. The Court held as follows:

"6. It is too well settled that when police after investigation files a final form under Section 173 of the Code, the Magistrate may disagree with the conclusion arrived at by the police and take cognizance in exercise of power under Section 190 of the Code. The Magistrate may not take cognizance and direct further investigation in the matter under Section 156 of the Code. Where the Magistrate accepts the final form submitted by the police, the right of the complainant to file a regular complaint is not taken away and in fact on such a complaint being filed the Magistrate follows the procedure under Section 201 of the Code and takes cognizance if the materials produced by the complainant make out an offence. This question has been raised and answered by this Court in the case of Gopal Vijay Verma v. Bhuneshwar Prasad Sinha[(1982) 3 SCC 510 : 1983 SCC (Cri) 110] whereunder the view of the Patna High Court to the contrary has been reversed. The Court in no uncertain terms in the aforesaid case has indicated that the acceptance of final form does not debar the Magistrate from taking cognizance on the basis of the materials produced in a

> complaint proceeding." (Emphasis supplied) This Court found that the High Court was in error in interfering with the cognizance taken by the Magistrate.
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> 24. In Rakesh Kumar and another v. State of Uttar Pradesh and another6, on the basis of a First Information Report lodged by the Police after investigation, a final report came to be filed. The Magistrate accepted the final report.

He, simultaneously, directed the case be proceeded with as a complaint case. Statements under Section 200 and 202 of the Code were recorded. The High Court turned down the plea of the accused to whom summons were issued. It was the contention of the accused that having accepted a negative final report, the court could not take action on the basis of the protest petition filed by the complainant. This Court refers to the judgment in H.S. Bains (supra). The principles of law laid down in paragraph 12 of Mahesh Chand (supra), 6 2014 (13) SCC 133 which we have also referred to earlier, came to be approved. The order of the High Court was approved.

25. This is a case where following the First Information Report, the Investigating Officer conducted an investigation. Statements were taken from the complainant, his wife and his son. This is apart from the statements which were taken from the Doctors who treated the daughter of the second respondent/complainant. The Investigation Officer concluded that there is no material which would warrant the accused being sent for trial. When such a report is filed before the court, it is beyond the shade of doubt that the Magistrate may still choose to reject the final report and proceed to take cognizance of the offences, which in his view, are seen committed. He may, on the other hand, after pondering over the materials, which would include the statements of witnesses collected by the Investigating Officer, decide to accept the final report. He may entertain the view that it is a case where further investigation by the Officer is warranted before a decision is taken as to whether cognizance is to be taken or not.

26. It is undoubtedly true that before a Magistrate proceeds to accept a final report under Section 173 and exonerate the accused, it is incumbent upon the Magistrate to apply his mind to the contents of the protest petition and arrive at a conclusion thereafter. While the Investigating Officer may rest content by producing the final report, which, according to him, is the culmination of his efforts, the duty of the Magistrate is not one limited to readily accepting the final report. It is incumbent upon him to go through the materials, and after hearing the complainant and considering the contents of the protest petition, finally decide the future course of action to be, whether to continue with the matter or to bring the curtains down.

27. In this case, the High Court proceeded on the basis, as we have noticed, that the Magistrate has not taken into consideration the protest petition and it was his pious duty to consider the facts mentioned in the petition. We have examined the order passed by the Magistrate. He does refer to the protest petition. The contents therein are undoubtedly noticed. Magistrate says that he has gone through the First Information Report. He finds that the complainant is not an eyewitness in regard to the death of his daughter. He recorded that he has gone through the statements of witnesses given under Section 161. We may notice that the following findings were entered in regard to the case of torture committed against the complainant's daughter:

> "... First of all I have gone through the statement of Sh Shiv Shankar Ojha who is complainant in this case. Although this witness has partly favoured the incident but here it is pertinent to mention that at the time of death of deceased Jaya, this witness was not present. When it was asked from this witness that whether after you received information of torture committed to you daughter, you had made any application anywhere or you had informed this through any relation etc. In reply to this question, he has stated that 'no'. I have also duly gone through the statement of Smt. Shakuntala Devi mother of deceased. Mother of deceased has given statement to the investigating officer that my son in law is working in Haryana in a private job."

28. Thereafter, he referred to the statement of the mother and brother of the deceased. He refers to the statements of the Doctors. The Doctors concluded that the deceased died due to her illness. One of the Doctors have stated that the mother of the patient Smt. Shakuntala had signed the admission form. The patient was examined. The patient had delivered a child two months ago by caesarean operation. She was suffering from fever. She was breathing rapidly. Her body was suffering from jaundice. She was in need of respiratory support machine. The disease of the patient was septic shock and multiple organ failure. She died on 08.10.2017. The death was found to be due to her illness.

29. The Chief Judicial Magistrate, in fact, proceeded to take the view that Magistrate has to take cognizance on the basis of the statements of the witnesses recorded by the Investigating Officer and materials collected. He further finds that if cognizance is taken on the basis of protest petition and documents annexed, that is illegal. It is after that it was found that the deceased died due to her illness and no prima facie case was made out against the accused persons.

30. We may notice that against the order of the Chief Judicial Magistrate and Additional Sessions Judge, the second respondent has invoked jurisdiction under Article 226 of the Constitution of India. The relief sought in the writ petition is one of certiorari to quash the orders. We may indicate that in Radhey Shyam & another v. Chhabi Nath & others7 , this Court, after overruling the judgment of this Court in Surya Dev Rai v. Ram Chander Rai & others8 in this regard, it has been laid down that a Writ of Certiorari will not lie to quash an order of a civil court. The High Court while exercising powers under Article 226 of the Constitution of India, at any rate, must bear in mind the limited nature of its jurisdiction when it deals with orders of subordinate courts.

31. In the facts of this case, the High Court concluded that the Magistrate has not considered the protest petition by the second respondent/complainant. Had it been the case where protest petition had not been considered at all, it may have been open to the court to came to the conclusion 7 (2015) 5 SCC 423 8 (2003)6 SCC 675 that an illegality had been committed in exercise of its jurisdiction to deal with the final report. But it is another matter when the Magistrate has undoubtedly considered the protest petition to direct the court again to consider the matter for action on the same, and for that purpose, to set aside the proceedings.

32. We would think that, as noticed by us, the High Court was in clear error in concluding that the protest petition was not considered. That the High Court may take one of the two views of the

matter may be an unsafe premise for its interference with the orders passed by the Magistrate, as affirmed by the Additional Sessions Judge.

33. On the basis of the materials which include the statements of the Doctors and after adverting to the contentions of the protest petition, the Magistrate has come to the conclusion that it is not a fit case for being continued and the matter should end as the daughter of the second respondent/complainant died due to illness. It is a finding which is arrived at by the court with reference to the statements of the medical practitioners. Equally, in the circumstances which led to the unfortunate death of the daughter of the second respondent/complainant, it is found no case was made out under Section 201 of the IPC. It would appear that before the Sessions Judge, the aspect relating to Section 498A or in fact the provisions relating to Sections 3 and 4 of the Dowry Prohibition Act, 1961, was not pressed by the second respondent. That apart, we also notice that Magistrate has referred to the statement of the complainant that there was no complaint made about the torture apparently based on dowry demand as alleged.

34. We have also gone through the protest petition along with the counter affidavit. No doubt, in paragraph 2, there is a general reference to demands for property from the deceased and father of the deceased and torture. Paragraphs 3 to 15 thereafter relate to the circumstances relating to the death of the daughter of the second respondent. In the said paragraphs, the case is sought to be made out that forged documents were produced before the Investigating Officer. Affidavits of the mother and brother of the deceased, inter alia, were also filed to project the case of forgery. For instance, in the affidavit of the mother of the deceased, she claims that she has not gone to the hospital on the 9th and 10th of October, 2007, whereas, according to the statement under Section 161 of the Code, she is alleged to have stated that on 09.10.2007, the deceased was admitted at Priti Hospital by them which apparently includes the mother. We have noticed that in regard to that no doubt the Chief Judicial Magistrate has relied upon judgment in Mohammed Yusuf and others v. State of Uttar Pradesh and others 9 and taken the view that if cognizance is taken on the basis of the protest petition and the documents annexed with, that is illegal. He also took the view that the Magistrate has to take cognizance on the basis of statements of witnesses recorded by the Investigating Officer, in the case diary and the material collected during investigation.

35. A learned Single Judge of the High Court of Allahabad, in the aforesaid decision, had this to say in paragraph 11:

> 9 2008 CriLJ 493 “11. Where the Magistrate decides to take cognizance under Section 190(1)(b) ignoring the conclusions reached at by the Investigating Officer and applying his mind independently, he can act only upon the statements of the witnesses recorded by the police in the case-diary and material collected during investigation. It is not permissible at that stage to consider any material other than that collected by the investigation Officer. In the instant case the cognizance was taken on the basis of the protest petition and accompanying affidavits. The Magistrate should have adopted the procedure of complaint case under Chapter XV of the Code of Criminal Procedure and recorded the statements of the complainant and the witnesses who had filed affidavits under Sections 200 and 202 Cr.P.C.

The Magistrate could not take cognizance under Section 190(1)(b) Cr.P.C. on the basis of protest petition and affidavits filed in support thereof. The Magistrate having taken into account extraneous material i.e. protest petition and affidavits while taking cognizance under Section 190(1)(b) Cr.P.C. the impugned order is vitiated." (Emphasis supplied)

36. The Chief Judicial Magistrate has adhered to the law laid down by the learned Single Judge. In fact, we may notice that in regard to this aspect, if the learned Single Judge, who has rendered the impugned judgment in this case, had a different view, he ought to have referred the matter to a larger Bench.

37. In H.S. Bains (supra), there was a private complaint within the meaning of Section 190(1)(a) of the Code. The matter was referred to the Police under Section 156(3). The Investigating Officer filed a final report. Therein, the court took the view that apart from the power of the Magistrate to take cognizance notwithstanding the final report, under Section 190(1)(b), he could also fall back upon the private complaint which was initially lodged but after examining the complainant and his witnesses, as contemplated under Sections 200 and 202 of the Code. In regard to taking cognizance under Section 190(1)(b) of the Code of a final report, undoubtedly, it is not necessary to examine the complainant or his witnesses though he may do so.

38. In Mahesh Chand (supra), no doubt the matter was commenced by a First Information Report and followed up by the complainant in the court under Section 190(1)(a) of the Code. On the First Information Report, after investigation, a final report was filed. The final report came to be accepted and it was closed. This is despite the fact that there was the protest petition. A third complaint, as it were, came to be filed by the complainant. This Court went on to hold that acceptance of the final report would not stand in the way of taking cognizance on a protest/complaint petition.

39. In Kishore Kumar Gyanchandani (supra), after the final report was accepted on a protest petition which was treated as a complaint, evidence was taken within the meaning of Section 200 of the Code.

40. In Rakesh Kumar (supra), the final report was filed which was accepted by the Magistrate but he simultaneously directed the case to be proceeded as a complaint case and statements under Sections 200 and 202 of the Code came to be recorded.

41. In the facts of this case, having regard to the nature of the allegations contained in the protest petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the protest petition as a complaint. The fact that he may have jurisdiction in a case to treat the protest petition as a complaint, is a different matter. Undoubtedly, if he treats the protest petition as a complaint, he would have to follow the procedure prescribed under Section 200 and 202 of the Code if the latter Section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the protest

petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived at by the Investigating Officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the protest petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

42. It is true that law mandates notice to the informant/complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the protest petition. In Mahabir Prasad Agarwala v. State10, a learned Judge of the High Court of Orissa, took the view that a protest petition is in the nature of a complaint and should be examined in accordance with provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in Qasim and others v. The State and others11, 10 AIR 1958 Ori. 11 11 1984 CrlLJ 1677 a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows:

> "4. ... In the case of Abhinandan Jha MANU/SC/0054/1967 (supra) also what was observed was 'it is not very clear as to whether the Magistrate has chosen to treat the protest petition as complaint.' This observation would not mean that every protest petition must necessarily be treated as & complaint whether it satisfies the conditions of the complaint or not. A private complaint is to contain a complete list of witnesses to be examined. A further examination of complainant is made under Section 200 Cr.P.C. If the Magistrate did not treat the protest petition as a complaint, the protest petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The protest petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a protest petition the case is to become a complaint case."

> 43. We may also notice that in Veerappa and others v.

Bhimareddappa12, the High Court of Karnataka observed as follows:

> "9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 of the Cr. P.C., but, has approached the police only and where the police after investigation have filed the 'B' report, if the complainant wants to protest, he is thereby inviting the

Magistrate to take cognizance under Section 190(1)(a) of the Cr. P.C. on a complaint. If it were to be so, the protest petition that he files shall have to satisfy the requirements of a complaint as defined in Section 2(d) of the Cr. P.C., and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a) of the Cr. P.C. Instead, if it is to be simply styled as a protest petition without containing all those necessary particulars that a normal complaint has to contain, then, it cannot be construed as a complaint for the purpose of proceeding under Section 200 of the Cr. P.C."

44. Complaint is defined in Section 2(d) of the Code as follows:

"(d) " complaint" means any allegation made orally or in writing to a Magistrate, with a

12 2002 CriLJ 2150 (Karnataka) view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non- cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"

45. If a protest petition fulfills the requirements of a complaint, the Magistrate may treat the protest petition as a complaint and deal with the same as required under Section 200 read with Section 202 of the Code. In this case, in fact, there is no list of witnesses as such in the protest petition. The prayer in the protest petition is to set aside the final report and to allow the application against the final report. While we are not suggesting that the form must entirely be decisive of the question whether it amounts to a complaint or liable to be treated as a complaint, we would think that essentially, the protest petition in this case, is summing up of the objections the second respondent against the final report.

46. This brings us to one aspect of the matter which in fact was not argued at the Bar. The appeal is filed by the husband of the deceased, by special leave and permission. The allegations in the First Information Report are raised against the other relatives of the appellants, viz., his parents and in-laws and his siblings also. They have not challenged the order of the High Court. Allegations are made in respect of offences as committed by them also.

47. In this regard, we may notice, one facet. The Chief Judicial Magistrate accepted the final report and decided not to proceed against any of the accused including the appellant. This stood confirmed by the Additional Sessions Judge. Before the High court, neither the appellant nor any of his relatives were made parties. When the order was passed by the High Court accepting the report and directing reconsideration, was it necessary for the second respondent/complainant to implead the appellant and other relatives? Can we set aside the judgment of the High Court qua only the appellant, or can we in the facts in this case, also interfere with the order of the High Court against all the accused?

48. It may be true that till process is issued, the accused may not have the right to be heard (See the judgment of this court in Iris Computers Limited v. Askari Infotech Private Limited and others13).

49. The High Court, in fact, at paragraph 11 of the impugned order, which we have extracted at paragraph 6 of our judgment, contemplated consideration of the protest petition so that cognizance may be taken under Section 190(1)(b) of the Code. This premise being without any basis even qua the other accused who are the relatives of the appellant, we would think that the impugned order must be set aside. Having regard to the nature of the allegations and in exercise of our powers also under Article 142 of the Constitution of India, we must set aside the Order of the High Court.

50. We would think that in the facts of this case, the High Court erred in intervening and that there was no 13 (2015) 14 SCC 399 justification in the facts for the High Court in setting aside the orders.

51. Resultantly, the appeal will stand allowed, the impugned order of the High Court will stand set aside. We, however, make it clear that this would be without prejudice to the rights of the second respondent to file a complaint as already noticed in the order of the Additional Sessions Judge.

.....J. (SANJAY KISHAN KAUL) .....J. (K.M. JOSEPH) New Delhi, July 09, 2019.