IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(CRIMINAL REVISIONAL JURISDICTION)

PRESENT:

THE HON'BLE DR. JUSTICE AJOY KUMAR MUKHERJEE

CRR 119 of 2025

Kaberi Dey & Ors.
Vs.
Sourav Bhattacharjee

For the Petitioners	:	Mr. Ayan Bhattacharjee, Sr. Adv. Mr. Shounak Mondal Mr. Suman Majumder
For the Opposite party	:	Mr. Sabyasachi Roy Chowdhury Ms. Priya Chakraborty Mr. Subhajyoti Sain
Heard On	:	24.06.2025
Judgment on	:	18.07.2025

Dr. Ajoy Kumar Mukherjee, J.

1. Shorn of unnecessary details the case of the petitioners herein is that on 12th September, 2024 a complaint was filed by the opposite party herein before the court of learned Chief Judicial Magistrate (in short CJM), At Jalpaiguri against the petitioners herein, alleging commission of offence punishable under sections 115(1) /115(2) /118(1) /117(2) /126(1) /329(3)

/351(2)/351(3) of the Bharatiya Nyaya Sanhita, 2023 (in short BNS, 2023). On September 13th 2024 said CJM was pleased to take cognizance straightway on perusal of complaint and transferred the case to the court of learned judicial Magistrate 1st Court, for disposal in contravention of section 223(1) of the Bharatiya Nagarik Suraksha Sanhita, 2023 (in short BNSS) without affording an opportunity to the petitioners of being heard before taking such cognizance. On 13th November, 2024 the opposite party herein was examined and his statement on solemn affirmation was recorded and the trial Magistrate fixed 16th December, 2024 for filing of requisites. On filing of requisites by the opposite party, learned trial Magistrate issued process to the petitioners.

2. Being aggrieved by and dissatisfied with the orders dated 13.09.2024 relating to taking cognizance and order dated 13.11.2024., Mr. Ayan Bhattacharya, learned senior Counsel, appearing on behalf of the petitioners submits that the impugned order whereby purported cognizance was taken by the CJM is de hors the edict of law as promulgated in terms of section 223 of the BNSS, in as much as the instant petitioners being the alleged accused were not afforded an opportunity of being heard before such cognizance was taken and therefore, the impugned orders by which the cognizance was taken and the process was issued ought to be set aside, since the same suffers from gross illegality and the same are non-est in the eye of law.

3. Mr. Sabyasachi Roy Chowdhury learned Counsel appearing on behalf of the opposite parties submits that 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. Though it has been argued that section 223 (1) of BNSS is in *pari materia* to section 200 Cr.P.C., however the distinction is that 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 having jurisdiction while taking cognizance of an offence*'. Thus under the BNSS 2023 the legislature has specifically stated in section 223 (1) 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 complainant and his 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.

4. Accordingly under section 223 of the BNSS a Magistrate on receiving a complaint shall examine the complainant and the witness as produced by the complainant and may take further steps under section 224 or 225 of BNSS. Thereafter, the magistrate would give an opportunity to the accused against whom allegation and evidence have come on record, under section 223 or 225 of BNSS to make submissions before the court, before the cognizance of the offence is finally taken. In this context he relied upon the judgment of Shri ***Basanagouda R. Patil Vs. Shir Shivananda S. Patil*** reported in **2024 SCC Online Kar 96.**

5. He further argued that 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. Therefore, to clear the obfuscation it is necessary to look into the language deployed therein. The magistrate while taking cognizance of the offence should have with him the statement on oath of the complainant and if any witness is present his statement. The taking of cognizance under section 223 of 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.

6. He further submits that as pointed out in the judgement of ***Basanagouda*** (supra), it is only after the examination of the complainant and witnesses under section 223(1) of BNSS and investigation or an enquiry under section 225 of BNSS, that the complete material on the basis of which cognizance of an offence is taken would be available before the court and only by providing that materials to the accused an effective hearing will be given to the accused to make submissions against taking cognizance of the offence alleged to have committed by the accused.

7. He further submits that it would be time taking and futile excise 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 proceeding and then again bringing the process serving agency into action at the stage of section 227 of 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 under section 223 (1) of BNSS and may again do so at the stage of section 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.

8. Contradicting petitioners counsel's argument, Mr. Roy Chowdhury submits that non-compliance with any procedural requirement relating to complaint should not entail automatic dismissal or rejection, unless the relevant statute or rule so mandates. Procedural defects or irregularities which are curable, should not be allowed to defeat the substantive rights or to cause injustice. In this context he further submits that procedure a hand maiden to justice, should never be made a tool to deny justice or perpetrate injustice by any oppressive or punitive use.

9. In this context he further submits that action taken by the court below within its jurisdiction cannot be held to be invalid for mentioning a wrong section or other provision of law in its order. It is well settled that if an authority has jurisdiction to take particular action, mere mention of incorrect provision or non-mention of correct provision does not make the action without jurisdiction, unless it is shown that the authority has no jurisdiction in the matter and in this context he relied upon judgment *of* ***Kaushalya Kanya Inter college Moradabad Vs. State of UP*** reported in **2005 (2) AWC 1983(ALL).** In the above backdrop considering the materials collected therein, the instant proceeding is not liable to be quashed but if

quashed liberty may be given to the opposite party to file fresh complaint upon the self same cause of action.

10. Therefore, the short questions that falls for consideration before this Court is whether under the proviso to section 223 (1), the examination of complainant and/or his witnesses, if any, is to be made prior to giving the accused an opportunity of being heard and for that matter before taking cognizance.

11. Before going to further details let me reproduce section 223 of BNSS which 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 added)*

12. It is apparent from the order impugned dated 13th September, 2024 that the concerned magistrate was pleased to take cognizance without hearing the proposed accused persons/petitioners in terms of proviso to

section 223 (1) of the BNSS. The supreme Court in ***Kushal Kumar Agarwal Vs. Directorate of Enforcement*** reported in **2025 SCC Online SC 1221** was pleased to set aside order only on the ground of non compliance with the proviso to sub section (1) of section 223 of the BNSS, though the Apex Court have not expressed any opinion on the merits of the contentions raised in the said proceeding.

13. From the order dated November, 13 2024 it is evident that the court below has proceeded to examine the opposite party under section 223 (1) of the BNSS and thereafter vide order dated December 16, 2024 issued process to the accused persons.

14. This particular issue relating to mode of giving the accused an opportunity of being heard under said proviso to sub section (1) of section 223 had fallen for consideration before different High Courts across India, when the Hon'ble High Court of Karnataka, Hon'ble High Court of Allahabad, Hon'ble High Court of Chhattisgarh, Hon'ble High Court of Kerala and Hon'ble High Court of Delhi in ***Basanagouda R Patil Vs. Shivananda S. Patil*** reported in **2024 SCC Online Kar 96**, ***Prateek Agarwal Vs. State of U.P.,*** reported in **2024 SCC Online ALL 8212**, ***Sanjay Bandhe and others Vs. Ashwani Bandhe and others*** reported in **2024 SCC Online Chh 13745**, ***Suby Antony Vs. Judicial 1st Class Magistrate III*** reported in **2025 SCC Online Ker 532** and ***Neeti Sharma Vs. Saranjit Singh*** reported in **2025 SCC Online Del 2329** respectively, have unanimously taken a view that the proviso to section 223(1) is compulsory in nature and any order taking cognizance in complete disregard to the provisions of BNSS has been held to be illegal. However

Hon'ble High Court Karnataka, Hon'ble High Court of Allahabad and Hon'ble High Court of Kerala have held that before issuance of notice for pre cognizance hearing, the Magistrate has to exhaust the provision under section 223 of BNSS by examining the complainant and his witnesses, if any.

15. In the BNSS the term 'cognizance' has not been defined but it means application of mind for proceeding further in a broad way as indicated in various judgments earlier. In ***RR Chari Vs. the state of UP*** reported in **AIR 1951 SC 207,** the Supreme Court in paragraph 16 dealt with the issue of taking cognizance and held as follows:-

> ***16.*** *After referring to the observations in Emperor v. Sourindra Mohan Chuckerbutty [Emperor v. Sourindra Mohan Chuckerbutty, ILR (1910) 37 Cal 412 : 1910 SCC OnLine Cal 41] , it was stated by Das Gupta, J. in Supt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee [Supt. and Remembrancer of Legal Affairs v. Abani Kumar Banerjee, AIR 1950 Cal 437 : 1950 SCC OnLine Cal 49] as follows : (AIR p. 488, para 7)*
>
> *"7. … What is 'taking cognizance' has not been defined in the Criminal Procedure Code, and I have no desire now 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 enquiry 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."*
>
> *In our opinion that is the correct approach to the question before the court.*

16. In ***Tula Ram and others Vs. Kishore Singh*** reported in **1977 (4) SCC 469** supreme Court again dealt with the words 'taking cognizance' and it held in para 8 as follows:-

> ***8.*** *Section 190 of the Code runs thus:*

"Subject to the provisions of this Chapter, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf under sub-section (2) may take cognizance of any offence—

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed."

It seems to us that there is no special charm or any magical formula in the expression "taking cognizance" which merely means judicial application of the mind of the Magistrate to the facts mentioned in the complaint with a view to taking further action. Thus what Section 190 contemplates is that the Magistrate takes cognizance once he makes himself fully conscious and aware of the allegations made in the complaint and decides to examine or test the validity of the said allegations. The Court prescribes several modes in which a complaint can be disposed of after taking cognizance. In the first place, cognizance can be taken, on the basis of three circumstances: (1) upon receiving a complaint of facts which constitute such offence; (2) upon a police report of such facts; and (c) upon information received from any person other than the police officer or unon his own knowledge, that an offence has been committed. These are the three grounds on the basis of which a Magistrate can take cognizance and decide to act accordingly. It would further appear that this Court in the case of Narayandas Bhagwandas Madhavdas v. State of West Bengal [AIR 1959 SC 1118 : (1960) 1 SCR 93, 106 : 1959 Cri LJ 1368] observed the mode in which a Magistrate could take cognizance of an offence and observed as follows:

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

17. In ***Manharibhai Mulji bhai Kakadia Vs. Shaileshbhai Mohan bhai patel & ors.*** reported in **(2012) 10 SCC 517,** it was decided as follows:-

24. *The procedural scheme in respect of the complaints made to Magistrates is provided in Chapter XV of the Code. On a complaint being made to a Magistrate taking cognizance of an offence, he is required to examine the complainant on oath and the witnesses, if any, and then on considering the complaint and the statements on oath, if he is of the opinion that there is no sufficient ground for proceeding, the complaint shall be dismissed after recording brief reasons. The Magistrate may also on receipt of a complaint of which he is authorised to take cognizance proceed with further inquiry into the allegations made in the complaint either himself or direct an investigation into the allegations in the complaint to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. In that event, the Magistrate in fact postpones the issue of process. On conclusion of the inquiry by himself or on*

> *receipt of report from the police officer or from such other person who has been directed to investigate into the allegations, if, in the opinion of the Magistrate taking cognizance of an offence there is no sufficient ground for proceeding, the complaint is dismissed under Section 203 or where the Magistrate is of the opinion that there is sufficient ground for proceeding, then a process is issued. In a summons case, summons for the attendance of the accused is issued and in a warrant case the Magistrate may either issue a warrant or a summons for causing the accused to be brought or to appear before him.*

18. From a comparative study of the relevant provisions of the Cr.P.C. and the BNSS it would be evident that the provisions of pre cognizance hearing has been introduced by the legislature by insertion of the proviso to section 223 (1) of BNSS. However, the other portions of the relevant provisions have been kept intact. Since the other provisions remains unaltered therefore, there can hardly any scope of departure from the interpretation as made by the Apex Court in various judgments including the judgments quoted above in ***R.R. Chari*** (supra) ***Tula Ram*** (Supra) ***Manoharbhai Muljibhai*** (supra) as the cognizance is known to be the initial stage of taking judicial notice of the allegations in the complaint for proceeding further interms of the other provisions of the Cr.P.C. Therefore, there can be no occasion for a magistrate to examine the complainant prior to taking cognizance.

19. Needless to reiterate that the cognizance is taken of an offence whereas order of process is issued against the offender and at the time of taking cognizance the court has to see only existence of a prima facie offence and the issue of offender's individual role, liability, responsibilities etc. does not fall for consideration before the court at the time of taking cognizance. Once cognizance is taken, then the question of determination of the role of the persons arraigned as proposed accused will come and therefore in order to determine their role, court has to examine the complainant and his

witnesses if any, on oath under section 223 of the BNSS. At this stage if any suspicion comes in the mind of magistrate regarding the role of the offender, he can conduct an additional inquiry or direct the authority to investigate under section 225 of the BNSS in order to find out whether there is sufficient ground to proceed against an accused and such additional inquiry /investigation under section 225 of the BNSS is compulsory in case the accused resides beyond the jurisdiction of the Court. Thereafter depending on such report of inquiry/investigation, the court can dismiss a complain where he finds no ground to proceed further as a whole or against a particular accused under section 226 of the BNSS. But on the contrary if the court is of the view that there are sufficient grounds for proceeding, he may issue process in accordance with the gravity of the offence in terms of section 227 of the BNSS. Therefore, under the scheme of BNSS it has to be grasped in mind that it does not say that section 223 (1) of BNSS can be put before section 210 of the BNSS.

20. Moreover, the preamble of the BNSS which replaces the Code of Criminal Procedure 1973 aims to consolidate and amend the law relating to Criminal Procedure. Therefore, while interpreting BNSS as a consolidating statute judicial decisions on previous statute are to be taken into consideration, as the parliament must be aware of the decisions of the courts in the meantime.

21. In Shri ***M/S Bharat Steel Rolling Mills Vs. Commissioner of Central Excise and another*** reported in **(2016) 3 SCC 643** Supreme Court held in para 20 as follow:-

> *20..It is settled law that Parliament is presumed to know the law when it enacts a particular piece of legislation. The Prevention of Corruption Act was passed in the year 1988, that is long after 1969 when the Constitution Bench decision in Rayala Corpn. [Rayala Corpn. (P) Ltd. v. Director of Enforcement, (1969) 2 SCC 412] had been delivered. It is, therefore, presumed that Parliament enacted Section 31 knowing that the decision in Rayala Corpn. [Rayala Corpn. (P) Ltd. v. Director of Enforcement, (1969) 2 SCC 412] had stated that an omission would not amount to a repeal and it is for this reason that Section 31 was enacted. This again does not take us further as this statement of the law in Rayala Corpn. [Rayala Corpn. (P) Ltd. v. Director of Enforcement, (1969) 2 SCC 412] is no longer the law declared by the Supreme Court after the decision in Fibre Board case [Fibre Boards (P) Ltd. v. CIT, (2015) 10 SCC 333 : (2015) 376 ITR 596] . This reason therefore again cannot avail the appellant.*

22. Accordingly it can be said that had it been the intention of the legislature to bring in any change sequentially in connection with the taking of cognizance and examination of witnesses to put section 223(1) before section 210 of the BNSS, necessary changes would have been brought by the legislature in BNSS and in that case legislature would not have kept the other relevant provisions from 223 to 227 of the BNSS as unaltered in comparison to section 200 to 204 of the erstwhile Cr.P.C.

23. Therefore taking into consideration legislative intent, I am constrained to say that the court has hardly any scope for any departure in interpreting the term ‘ taking cognizance’ as held in ***RR Chari*** (supra) **Tula Ram** (Supra) ***Manoharbhai Muljibhai*** (supra).

24. There is another aspect of the matter as is evident from the fact that from a bare reading of provisions under section 210/223/225/226 and 227 of the BNSS it is evident that once a complaint is filed, the court will take cognizance after hearing the proposed accused. After such cognizance is taken, the court has to examine the complainant and his witnesses, if any. Subsequently order can be passed under section 226 or 227 of the BNSS directly or through section 225 of the BNSS in accordance with the situation

and there is no ambiguity in reading the said provision which are *pari materia* with the provisions under the Cr.P.C. Since there is no vagueness or ambiguity or absurdity in the aforesaid provisions of BNSS which are *pari materia* with the relevant provisions of Cr.P.C., there is no requirement for the court to take the role of interpreter for the purpose of interpretation of proviso to section 223(1) to alter or amend the law. The purpose of interpretation is also not to make provisions what the judge think it should be but to make it what the legislature intended it to be. In ***A.G. Syed Mohideen*** *Vs.* ***Shri Jayaram Educational Trust*** reported in **(2010) 2 SCC 513** it was held by the Apex Court

> ***11.*** *It is now well settled that a provision of a statute should have to be read as it is, in a natural manner, plain and straight, without adding, substituting or omitting any words. While doing so, the words used in the provision should be assigned and ascribed their natural, ordinary or popular meaning. Only when such plain and straight reading, or ascribing the natural and normal meaning to the words on such reading, leads to ambiguity, vagueness, uncertainty, or absurdity which were not obviously intended by the legislature or the lawmaker, a court should open its interpretation toolkit containing the settled rules of construction and interpretation, to arrive at the true meaning of the provision. While using the tools of interpretation, the court should remember that it is not the author of the statute who is empowered to amend, substitute or delete, so as to change the structure and contents. A court as an interpreter cannot alter or amend the law. It can only interpret the provision, to make it meaningful and workable so as to achieve the legislative object, when there is vagueness, ambiguity or absurdity. The purpose of interpretation is not to make a provision what the Judge thinks it should be, but to make it what the legislature intended it to be.*

25. In ***Martin Burn Ltd. Vs. The Corporation of Calcutta*** reported in **AIR 1966 SC 529** Hon'ble Court came to a finding as follows:-

> *"..... A court has no power to ignore that provision to relieve what it considers a distress resulting from its operation. A statute must of course be given effect to whether a court likes the result or not."*

26. At the cost of repetition it can be said that at the stage of taking cognizance, the role of an individual accused is not germane for consideration. Therefore, the scope and ambit of hearing proposed accused

at the pre cognizance stage is extremely limited. No defence of an accused can be taken into consideration at this stage. The words *'giving the accused an opportunity of being heard'* is confined only to take an exception by the proposed accused to the taking of cognizance to the extent of jurisdictional error, taking of cognizance on a time barred complaint without condoning delay, taking of cognizance without obtaining sanction in a given case and/or taking of cognizance by a court not competent to take cognizance on account of existence of special court or on the issue of locus and/or inherent or technical defect in the complaint etc. A proposed accused can also demonstrate that the allegations in the complaint are so pre-posteriors obnoxious and outrageous that no semblance of offence is made out for taking cognizance. However in order to demonstrate that no offence has been disclosed, the proposed accused would not be entitled to produce any document or lay his defence beyond the complaint because the pre cognizance enquiry is offence centric and not offender centric. Naturally at this stage accused is not supposed to argue that no process should be issued against him as the inquiry of this stage is offence- centric inquiry and not the offender-centric inquiry and since the scope of examination at the stage of cognizance is extremely narrow and therefore no detailed hearing can be afforded to a proposed accused. The scope of such inquiry was held to be extremely limited in the case of ***Vadilal Panchal Vs. Dattatraya Dulaji Ghadigaonker*** reported in **AIR 1960 SC 1113,** which states:-

> ***9.*** *The general scheme of the aforesaid sections is quite clear. Section 200 says inter alia what a Magistrate taking cognisance of an offence on complaint shall do on receipt of such a complaint. Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining*

the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial. Section 203, be it noted, consists of two parts : the first part indicates what are the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint. Section 204 says that if in the opinion of the Magistrate there is sufficient ground for proceeding, he shall take steps for the issue of necessary process."

27. In ***Chandra Deo Singh Vs. Prakash Chandra Bose & anr***. reported in **AIR 1963 SC 1430,** the court has also taken the same view, which may be re produced below:-

Taking the first ground, it seems to us clear from the entire scheme of Ch. XVI of the Code of Criminal Procedure that an accused person does not come into the picture at all till process is issued. This does not mean that he is precluded from being present when an enquiry is held by a Magistrate. He may remain present either in person or through a counsel or agent with a view to be informed of what is going on But since the very question for consideration being whether he should be called upon to face an accusation, he has no right to take part in the proceedings nor has the Magistrate any jurisdiction to permit him to do so. It would follow from this, therefore, that it would not be open to the Magistrate to put any question to witnesses at the instance of the person named as accused but against whom process has not been issued ; nor can he examine any witnesses at the instance of such a person. of course, the Magistrate himself is free to put such questions to the witnesses produced before him by the complainant as he may think proper in the interests of justice. But beyond that, he cannot go. It was, however, contended by Mr. Sethi for respondent No. 1 that the very object of the provisions of Ch. XVI of the' Code of Criminal Procedure is to prevent an
accused person from being harassed by a frivolous complaint and, therefore, power is given to a Magistrate before whom complaint is made to postpone the issue of summons to the accused person pending the result of an enquiry made either by himself or by a Magistrate subordinate to him. A privilege conferred by these provisions can, according to Mr. Sethi, be waived by the accused person and he can take part in the proceedings. No doubt, one of the objects, behind the provisions of s. 202, Cr.P.C. is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint. But there is also another object behind this provision and it is to find out what material there is to support the allegations made in the complaint. It is the bounden duty of the Magistrate while making an enquiry to elicit all facts not merely with a view to protect the interests of an absent accused person, but also with a view to bring to book a person or persons against whom grave allegations are made. Whether the complaint is frivolous or not has, at that

> *stage, necessarily to be determined on the basis of the material placed before him by the complainant. Whatever defence the accused may have can only be enquired into at the trial. An enquiry under s. 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in the case before us that the two persons who were examined as court witnesses were so examined at the instance of respondent No. 1 but from the fact that they were persons who were alleged to have been the - associates of respondent No. 1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for respondent No. 1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated. In this connection; the' observations of this court in Vadilal Panchal v. Dattatraya Dulaji Ghadigsonkar (1), may usefully be quoted "The enquiry is for the purpose of ascertain- ing the truth or falsehood of the complaint that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage for the person complained against can be legally called upon to answer the 'accusation made against him only when a process has issued and he is put on trial."*

28. The law commission of India in its 41st report recommended for curtailing the scope of such enquiry and thereby it has recommended for the substitution of the purposive parameter being *"ascertaining the truth or falsehood of the complaint"* with the purposive parameter being "deciding whether or not there is sufficient ground for proceeding". Accordingly in terms of recommendation, the legislature while framed section 202 of Cr.P.C. had substituted the words, *"deciding whether or not there is sufficient ground for proceeding"* in place of "ascertaining the truth or falsehood of the complainant". However the scope of a pre-cognizance inquiry, juxtaposition to a post cognizance but pre summoning inquiry is much more confined and narrower as the same is offence-centric inquiry and not the offender-centric inquiry.

29. Therefore, the procedure that needs to be followed on receipt of a complaint, in view of section 223 and concerned relevant provisions under the BNSS, would be as follows:-

(a) Once, a complaint is filed, after registering the same, the court has to issue a notice to the proposed accused person/persons;

(b) Such notice may be served by way of registered post with acknowledgement due and/ or through electronic mode under the scheme of BNSS as envisaged in chapter VI-A.

(c) In such notice, it has to be mandatorily mentioned that the purpose of such notice is to provide a right of hearing at a pre-cognizance stage. The notice must also incorporate that the proposed accused may either appear by person or through his lawyer. The notice must also indicate that the proposed accused may avail of the facilities of legal aid in terms of the provisions under the Legal Services Authorities Act, 1987, if he so qualifies;

(d) Once in terms of such notice, an accused appears in person or through his lawyer, pre-cognizance hearing has to be conducted. The result of such hearing has to be communicated to both the parties.

(e) In case despite hearing, the learned Magistrate proposes to take cognizance, the accused will have no further participation in the proceeding till issuance of process under section 227 of the BNSS.

30. Since in the present case the order of taking cognizance is passed without adhering to proviso to section 223 of the BNSS, the impugned orders are hereby set aside. The case is remanded to the court below to

follow the steps mentioned in the preceding paragraph in respect of the complaint lodged by the opposite party herein at the earliest.

31. **CRR 119 of 2025** thus stands disposed of.

32. Registrar General shall circulate one copy of this order to all the District Judges, who in turn shall circulate the order to concerned Magistrates of the district.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(DR. AJOY KUMAR MUKHERJEE, J.)