2025:KER:6236

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

WEDNESDAY, THE 22ND DAY OF JANUARY 2025 / 2ND MAGHA, 1946

CRL.MC NO. 508 OF 2025

AGAINST THE ORDER/JUDGMENT DATED 26.10.2024 IN CMP NO.3910 OF 2024 OF JUDICIAL MAGISTRATE OF FIRST CLASS - III,THRISSUR.

PETITIONER:

SUBY ANTONY,
AGED 50 YEARS
50/24, S/O. LATE P.D. ANTONY, 48 B, UNRA, UMA NAGAR, KALTHODU, THRISSUR, PIN - 680655

BY ADV SHAJU FRANCIS

RESPONDENTS:

1 R1(DELETED),
1ST RESPONDENT IS DELETED FROM THE PARTY ARRAY VIDE ORDER DATED 16/01/2025 IN CRL.M.C 508/2025),
PIN - 680003

2 SUSHA,
W/O. SIMJI JOSEPH, TC 11/488(3) DBRA-6.
NANTHANCODE, TRIVANDRUM, PIN - 695003

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3 SIMJI JOSEPH,
TC 11/488(3) DBRA-6,
NANTHANCODE, TRIVANDRUM, PIN - 695003

4 SACHIN JOSEPH,
S/O. SIMJI JOSEPH, TC 11/488(3) DBRA-6,
NANTHANCODE, TRIVANDRUM, PIN - 695003

5 RIYA JOSEPH,
D/O. SIMJI JOSEPH, TC 11/488(3) DBRA 6,
NANTHANCODE, TRIVANDRUM, PIN - 695003

6 BIJU ANTONY,
S/O. P.D. ANTONY, 10/1, AL QURUM, MUSCAT,
SULTANATE OF OMAN, GENERAL MANAGER, BTA-SUHAIL
BAHWAN GROUP HOLDING LLC, PO BOX 282, PC 100, AL
QURUM, MUSCAT, SULTANATE OF OMAN

7 JOHNICHAN GEORGE,
S/O. GEORGE, NELPURACKAL HOUSE, PARATHODU,
PODIMATTOM, KOTTAYAM, PIN - 686512

8 MOLLYKUTTY GEORGE,
W/O. JOHNICHAN GEORGE, NELPURACKAL HOUSE,
PARATHODU, PODIMATTOM,
KOTTAYAM, PIN - 686512

9 P.D. PRATAP KUMAR,
THEN SUB REGISTRAR, KANJIRAPPALLY,
KOTTAYAM, PIN - 686506

10 ABHILASH & OTHER EMPLOYEES,
INDIAN OVERSEAS BANK, KANJIRAPPALLY BRANCH
KOTTAYAM/IOB,
FATHIMA NAGAR, THRISSUR, PIN - 686555

OTHER PRESENT:

SMT. PUSHPALATHA. M.K, SR.PP.

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 17.01.2025, THE COURT ON 22.01.2025 PASSED THE FOLLOWING:

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V.G.ARUN, J

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ORDER

The introduction of three new criminal laws; the Bharatiya Nyaya Sanhita (BNS for short), Bharatiya Nagarik Suraksha Sanhita (BNSS for short) and Bharatiya Sakshya Adhiniyam (BSA for short), has given rise to many interesting and intriguing legal issues. One such conundrum, coming up for consideration in this case, is whether Section 223(1) of the BNSS envisages issuance of notice to the accused named in the complaint before taking cognisance of the offence.

2. Adv.Shaju Francis appearing for the petitioner submitted that the court below grossly erred in issuing notice to the accused in the complaint filed by the petitioner, even before examining the petitioner and his witnesses on oath. It is

the submission of the learned counsel that the illegality is perpetuated by the learned Magistrate issuing notice to the accused, in spite of the oral objection raised initially and the written objection filed thereafter. According to the counsel, even on plain reading of Section 223(1), it is apparent that the accused need be issued with notice only at the stage of taking cognisance. It is submitted that the legal position as to when notice under Section 223(1) is to be issued, laid down by the High Court of Karnataka in **Basanagouda R Patil v. Shivananda S Patil** [2024 SCC OnLine Kar 96], though brought to the notice of the learned Magistrate, was not adverted to.

3. The contentions call for close scrutiny of Section 223(1) of BNSS, since in Section 200 of Cr.P.C, which is the corresponding provision in the Code, the proviso to Section 223(1) was absent. Presumably, the purpose behind the proviso is to provide an opportunity to the Magistrate to assimilate the correct facts, for deciding whether or not to take cognizance of

the offence. For ease of reference, Section 223 is extracted hereunder;

> **"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. "

4. As the term cognizance is not defined in BNSS, it will be profitable to refer the following erudite exposition of the Supreme Court in **S.K.Sinha, Chief Enforcement Officer v. Videocon International Ltd. and Others.** [(2008) 2 SCC 492].

"19. The expression "cognizance" has not been defined in the Code. But the word (cognizance) is of indefinite import. It has no esoteric or mystic significance in criminal law. It merely means "become aware of" and when used with reference to a court or a Judge, it connotes "to take notice of judicially". It indicates the point when a court or a Magistrate takes judicial notice of an offence with a view to initiating proceedings in respect of such offence said to have been committed by someone.

20. "Taking cognizance" does not involve any formal action of any kind. It occurs as soon as a Magistrate applies his mind to the

> suspected commission of an offence. Cognizance is taken prior to commencement of criminal proceedings. Taking of cognizance is thus a sine qua non or condition precedent for holding a valid trial. Cognizance is taken of an offence and not of an offender. Whether or not a Magistrate has taken cognizance of an offence depends on the facts and circumstances of each case and no rule of universal application can be laid down as to when a Magistrate can be said to have taken cognizance.

5. Thus, the taking of cognisance of an offence occurs when the Magistrate takes judicial notice of an offence with a view to initiate proceedings in respect of such offence alleged to have been committed by the accused. Once cognisance is taken, then the Magistrate has to decide whether to issue process to the accused or not. Section 225 confers power on the Magistrate to postpone the issue of process to the accused even after taking cognisance of the offence. At that stage the Magistrate can either inquire into the case himself, or direct investigation to be made by a police officer or such other person for the purpose of deciding whether there is sufficient ground for proceeding. The Apex Court in **Smt.Nagawwa v. Veeranna Shivalingappa Konjalgi and Others** [(1976) 3

SCC 736], dilating on the limited scope of inquiry under Section 202 Cr.P.C, corresponding to Section 225 of BNSS, held as under;

> "4. It would thus be clear from the two decisions of this Court that the scope of the inquiry under Section 202 of the Code of Criminal Procedure is extremely limited — limited only to the ascertainment of the truth or falsehood of the allegations made in the complaint— (i) on the materials placed by the complainant before the court: (ii) for the limited purpose of finding out whether a prima facie csse for issue of process has been made out; and (iii) for deciding the question purely from the point of view of the complainant without at all adverting to any defence that the accused may have. In fact it is well settled that in proceedings under Section 202 the accused has got absolutely no locus standi and is not entitled to be heard on the question whether the process should be issued against him or not."

The above decision leaves no room for doubt that under the Code the accused had no *locus standi* even at the stage where the Magistrate decides whether or not to issue process to the accused.

6. While on this question, it will also be profitable to refer the decision of the Apex Court in **A.R. Antulay v. Ramdas**

Sriniwas Nayak and Another [(1984) 2 SCC 500], wherein the procedure to be followed by the Magistrate upon filing of a complaint is detailed as under ;

> "When a private complaint is filed, the court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 CrPC. After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the court to judicially determine whether a case is made out for issuing process. When it is said that court issues process, it means the court has taken cognizance of the offence and has decided to initiate the proceeding and as a visible manifestation of taking cognizance, process is issued which means that the accused is called upon to appear before the court. This may either take the form of a summons or a warrant, as the case may be. It may be that after examining the complainant and his witnesses, the court in order to doubly assure itself may postpone the issue of process, and call upon the complainant to keep his witnesses present. The other option open to the court is to direct investigation to be made by a police officer.
>
> Upon a complaint being received and the court records the verification, it is open to the court to apply its mind to the facts disclosed and to judicially determine whether process should or should not be issued. It is not a condition precedent to the issue

> of process that the Court of necessity must hold the inquiry as envisaged by Section 202 or direct investigation as therein contemplated. The power to take cognizance without holding inquiry or directing investigation is implicit in Section 202 when it says that the Magistrate may "if he thinks fit, postpone the issue of process against the accused and either inquire into the case himself or direct an investigation to be made by a police officer…, for the purpose of deciding whether or not there is sufficient ground for proceeding". Therefore, the matter is left to the judicial discretion of the court whether on examining the complainant and the witnesses if any as contemplated by Section 200 to issue process or to postpone the issue of process. This discretion which the court enjoys cannot be circumscribed or denied by making it mandatory upon the court either to hold the inquiry or direct investigation. Such an approach would be contrary to the statutory provision. Therefore, there is no merit in the contention that by entertaining a private complaint, the purpose of speedy trial would be thwarted or that a pre-process safeguard would be denied."

7. Indeed, a radical change in procedure is brought about by the proviso to Section 223(1) of BNSS. Pertinently, in spite of the proviso to Section 223(1) making it mandatory to provide opportunity of hearing to the accused before taking cognisance,

Section 226 does not reckon the accused's objection at the stage of taking cognisance as a relevant factor for dismissing the complaint. Being guided by the precedents on Sections 200 and 202 of the Code and the plain language of the proviso to Section 223(1) of the BNSS, this Court is of the opinion that , after the complaint is filed, the Magistrate should first examine the complainant and witnesses on oath and thereafter, if the Magistrate proceeds to take cognisance of the offence/s, opportunity of hearing should be afforded to the accused. I am also in complete agreement with the following procedural drill delineated by the High Court of Karnataka in **Basanagouda's** case (supra);

> "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."

8. In the result, the Crl.M.C is allowed and the impugned order dated 26.10.2024 is quashed. The court below is directed to examine the complainant and his witnesses, if any, upon oath. The accused, though issued with notice from the court below, shall be afforded opportunity of hearing if the Magistrate decides to take cognisance of the offences mentioned in the complaint after such examination.

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Having found that notice could not have been issued to the prospective accused before taking cognisance, notice to respondents 2 to 10 in this Crl.MC is dispensed with.

sd/-

V.G.ARUN, JUDGE

sj