HIGH COURT OF TRIPURA
AGARTALA

Crl. Petn. No.14/2021

Shri Sentu Dey,
Son of Chandradhar Dey, resident of Bairagi Bazar, Jumerdhepa,
PS-Melaghar, Sub-Division-Sonamura, District-Sepahijala.

.....Petitioner(s)

Versus

1. The State of Tripura.

2. The Superintendent of Police,
Sepahijala District, Bishramganj, District-Sepahijala.

3. The Officer-in-Charge,
Bishalgarh Police Station, PO & Sub-Division - Bishalgarh,
District-Sepahijala.

4. Shri Niranjan Ch. Das,
Superintendent of State Tax, Bishalgarh Charge, Posted at Bishalgarh Office, having its jurisdiction of Sepahijala District.

.....Respondent(s)

For Petitioner(s) : Mr. Sankar Lodh, Advocate.

For Respondent(s) : Mr. Ratan Datta, P.P.

HON'BLE THE CHIEF JUSTICE MR. AKIL KURESHI

Date of hearing : 30.04.2021.

Date of delivery of Judgment & order : 28.05.2021.

Whether fit for reporting : Yes.

JUDGMENT & ORDER

The petitioner has challenged an order dated 02.01.2021 passed by the learned Judicial Magistrate, 1st Class, Bishalgarh under which he has sent a criminal case CR 03 of 2020 for investigation under Section 156(3) of Criminal Procedure Code to the concerned Police Station.

2. This challenge of the petitioner arises in following factual background:

The petitioner is a sole proprietor of one M/S. Sentu Dey, which is registered under Tripura State Goods and Service Tax Act, 2017 (Tripura State GST Act) (hereinafter to be referred to as the 'SGST Act') and related statutes. On 27.11.2020, Superintendent of State Taxes, Bishalgarh, filed a complaint before the Sub-Divisional Magistrate, Bishalgarh under Section 190 read with Section 200 of Cr.P.C. In the said complaint, the complainant alleged that the petitioner has under declared the outward taxable turnover and accordingly, paid less tax than he was liable to pay for the period starting from August, 2017 onwards. It is further stated that sizable demand of Rs.19.74 Crores (rounded off) inclusive of tax, interest and penalty has been raised against the petitioner out of which only an amount of Rs.1.18 Crores (rounded off) could be recovered. Remaining amount of Rs.18.55 Crores (rounded off) still remains unpaid. Notices were issued to the purchasing dealers of the petitioner, who conveyed to

the department that they had already paid their taxes to the petitioner for the purchases made by them from the petitioner. The complainant therefore alleged that the petitioner though had collected the taxes from the purchasing dealers, had not deposited the same in the Government revenue. The petitioner had thus committed offences punishable under Sections 132 of the SGST Act and 406 and 409 of IPC. The request, therefore, was made to the Magistrate to take cognizance of the said offences.

3. On 24.11.2020, the Sub-Divisional Magistrate, Bishalgarh ordered that the complaint may be registered as a CR Case and be transferred to the Court of JMFC, Bishalgarh. Accordingly, on 27.11.2020, the said complaint was registered as CR 03 of 2020 and was placed before the Judicial Magistrate, 1st Class, Bishalgarh, who passed the following order:

> "Received the case record from the Court of Ld. SDJM Bishalgarh.
>
> Make necessary entry in my T.R.
>
> The instant case is put up today on a petition filed by Ld. Counsel Mr. J.P. Saha.
>
> Ld. APP is present.
>
> Perused the case record.
>
> Received some copies of documents by firisti.
>
> Keep these along with the case record.
>
> Let the case be fixed for examination U/S 200 Cr.P.C.
>
> Fix 02.01.2021 examination U/S 200 Cr.P.C."

4. On 02.01.2021, the learned Magistrate passed the impugned order, which reads as under:

> "Ld. Spl P.P J.P. Saha is present on behalf of the complainant.
>
> Perused the case record.
>
> Today the case is fixed for order.
>
> This is a complain filed by Mr. N.C. Das, Supdt. of State Taxes, Bishalgarh, Sephaijala, Tripura U/s 132(1) of the Tripura State Goods and Service Tax 2017 read with sections 406/409 of IPC against the accused person namely M/S Sentu Dey having GST-16AJITD6343A2ZT of Bairagi Bazar, Jumedpa, Sephaijala, Tripura.
>
> Along with the petition, complainant submitted some documents with firisti.
>
> Perused the same along with the petition.
>
> After having being heard ld. Spl P.P. Mr. J.P. Saha on behalf of the complainant and after having perused the complainant petition, this court is consider opinion that before taking cognizance the matter be investigated by Police. So, send the original petition along with copy of this order to the OC Bishalgarh P.s for investigation u/s 156(3) of Crpc treating the complaint petition as an FIR and to submit report on the next date.
>
> Office is directed to comply the same immediately.
>
> Fix. 2-03-2021 for Report."

5. By the said order thus the learned Magistrate sent the case for investigation after registering the complaint as an FIR and called for a report. It this order the petitioner-original accused has challenged in this petition.

6. Appearing for the petitioner, learned counsel Mr. Sankar Lodh raised following contentions:

(i) On 27.11.2020, when the complaint was placed before the learned Magistrate, he had taken cognizance thereon. It was thereafter not open for him to call for investigation.

(ii) The complainant had not previously approached the police by filing a complaint and that therefore, the Magistrate could not have directly sent the complaint for investigation.

(iii) The order was passed mechanically and without application of mind.

(iv) Counsel submitted that the offence alleged against the petitioner is one punishable under Section 132 of the SGST Act, which is the special statute. The general provisions of IPC in such a case cannot be invoked.

7. In support of his contentions, counsel for the petitioner has relied on following decisions:

In case of ***Mohd. Yousuf vs. Smt. Afaq Jahan & anr***., reported in ***2006 AIR SCW 95***, in order to highlight the difference between investigation that a Magistrate can order under Section 156(3) of Cr.P.C. as compared to one before to under Section 202(1) of Cr.P.C. On the basis of this decision, the counsel argued that once the Magistrate has taken cognizance of the offence alleged in the complaint, he thereafter cannot

send the complaint for investigation by the police under Section 156(3) of the Code.

Reliance was placed on the decision in case of ***State of Karnataka & anr. Vs. Pastor P. Raju***, reported in ***2006 AIR SCW 3916***, in which in the context of the question as to when the Magistrate can be said to have taken cognizance, it was observed as under:

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

Reliance was placed on the decision in case of ***Mrs. Priyanka Srivastava and another vs. State of U.P. and others***, reported in ***2015 AIR SCW 2075***, in support of the contention that in order to call for investigation under Section 156(3) of Cr.P.C., the Magistrate must apply his judicial mind and such investigation cannot be ordered mechanically.

Reliance was placed on the decision in case of ***Sharat Babu Digumarti vs. Govt. Of NCT of Delhi***, ***AIR 2017 SC 150,*** in which referring to Sections 67, 67A and 67B of Information & Technology Act, it

was observed that the said provisions are complete code relating to the offences under the IT Act. Section 292 of IPC makes punishable sale of obscene books etc. The IT Act in various provisions deals with obscenity in electronic form and covers the offence under Section 292 of IPC. IT Act is a special enactment and therefore, the provisions made in the IT Act have to be given effect to.

8. On the other hand, learned Public Prosecutor, Mr. Ratan Datta opposed the petition contending that the petitioner is alleged to have committed cognizable offences. The Magistrate had the power to call for police investigation. He had previously not taken cognizance of the offences. He submitted that this petition is not maintainable. In this respect he relied on the decision of Supreme Court in case of ***HDFC Securities Limited vs. State of Maharashtra***, reported in ***(2017) 1 SCC 640***.

9. At the outset, I may dispose of the preliminary objection of the learned Public Prosecutor to the maintainability of this petition. His contention was that the order passed by the Magistrate was not revisable. Under such circumstances, the petition for quashing such an order under Section 482 of Cr.P.C. also cannot be entertained. In my opinion, this objection is not valid. Powers of the High Court under Section 482 of Cr.P.C. read with Articles 226 and 227 of the Constitution are sufficiently wide so as to examine the legality and correctness of an order passed by

the Magistrate which adversely affects the petitioner. Even assuming that a revision petition against the impugned order of the Magistrate is not maintainable, that would not preclude the High Court from examining the legality of the order under Section 482 of Cr.P.C. The reliance on the decision in case of HDFC Securities case (supra) is misplaced. In the said case of the facts were entirely different. It was the case in which the Magistrate had straightway called for investigation under Section 156(3) of Cr.P.C. upon receipt of the complaint upon which an FIR was registered against the accused. The accused approached the High Court even before the stage of issuance of process and challenged the order passed by the Magistrate under Section 156(3) of Cr.P.C. It was in this context observed that the stage of taking cognizance by the Magistrate would arise only after investigation report is filed before the Magistrate concerned. In the present case, the prime contention of the petitioner is that the Magistrate having previously taken cognizance of the offences, cannot revert to calling for police investigation.

10. I may now examine the contentions raised by the counsel for the petitioner in support of the challenge to the impugned order. With respect to the contention of the complainant not having previously approached the police authorities before filing a written complaint before the Magistrate, I do not find this to be a valid argument in any manner. Section 190 of

Cr.P.C. pertains to cognizance of offences by Magistrates and reads as under:

> "190. Cognizance of offences by Magistrates.
>
> (1) 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.
>
> (2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub- section (1) of such offences as are within his competence to inquire into or try.

11. Under sub-Section(1) of Section 190 thus, a Magistrate is authorized to take cognizance of an offence upon receiving a complaint of facts which constitute such offence, or upon a police report of such facts or upon information received from any other person or upon his own knowledge, that such offence has been committed. This provision thus nowhere requires that before a complaint as referred to in clause (a) of sub-Section (1) is lodged before the concerned Magistrate, attempt must be first made to file a First Information Report before the police and only when the

police authorities fail to register the same as an FIR, the complainant can approach the Magistrate.

12. The contention of the counsel that since the allegations involved commission of offence under Section 132 of CGST Act, the provisions of IPC cannot be invoked requires a closure examination. Section 132 of CGST Act is a penal provision providing punishment for certain offences. Sub-Section (1) of Section 132 prescribes several acts and omissions which are made punishable with different sentences depending on the nature of the offence. Sub-Section (4) of Section 132 provides that notwithstanding anything contained in the Code of Criminal Procedure, all offences under the said Act, except those referred to in sub-Section (5) shall be non-cognizable and bailable. However, sub-Section (5) of Section 132 makes certain offences cognizable and non-bailable. Sub-Section (6) of Section 132 provides that a person shall not be prosecuted for any offence under the said Section except with the previous sanction of the Commissioner.

13. As noted, Section 132 of CGST Act provides punishment for certain offences related to the Goods and Service Tax related acts and omissions. However, it is not unknown that a certain act may fall within the said special penal statute at the same time may also have an element of an offence under IPC. The question whether the accused in such a situation

can be made answerable only for the special statue offence or general offence also, has been examined by the Supreme Court earlier.

14. In case of ***Jayant and others vs. State of Madhya Pradesh***, reported in ***(2021) 2 SCC 670***, facts were that on a surprise inspection, the Mining Inspector found that the accused was indulging in illegal mining and transportation of minor minerals. He made a report suggesting that the offences can be compounded. This was accepted by the authorities and the accused also. Subsequently, it was reported that there was large scale illegal excavation and transportation of minerals without payment of royalty. The Magistrate passed and order taking note of such information. He was of the view that offences under the IPC were distinct from those punishable under Mines and Minerals (Development and Regulation) Act. He, therefore, directed registration of a criminal case against the accused and for investigation under Section 156(3) of Cr.P.C. The accused challenged the FIR under Section 482 of Cr.P.C. contending that in view of the bar under Section 22 of MMRD Act, the order passed by the Magistrate was unsustainable. The issue ultimately reached the Supreme Court. One of the questions considered by the Supreme Court was whether in case of illegal mining and transportation of minor minerals action by police for offence of theft under Section 378 of IPC was permissible in

view of the provisions contained in MMRD Act. In this respect, it was held that -

> "17.3. Therefore, as in the present case, the Mining Inspectors prepared the cases under Rule 53 of the 1996 Rules and submitted them before the Mining Officers with the proposals of compounding the same for the amount calculated according to the Rules concerned and the Collector approved the said proposal and thereafter the private appellant violators accepted the decision and deposited the amount of penalty determined by the Collector for compounding the cases in view of sub-section (2) of Section 23-A of the MMDR Act and the 1996 Rules and even the 2006 Rules are framed in exercise of the powers under Section 15 of the MMDR Act, criminal complaints/proceedings for the offences under Sections 4/21 of the MMDR Act are not permissible and are not required to be proceeded further in view of the bar contained in sub-section (2) of Section 23-A of the MMDR Act. At the same time, as observed hereinabove, the criminal complaints/proceedings for the offences under IPC — Sections 379/414 IPC which are held to be distinct and different can be proceeded further, subject to the observations made hereinabove."

15. In case of ***State (NCT of Delhi) vs. Sanjay***, reported in ***(2014) 9 SCC 772***, also similar question came up for consideration. It was held:

> "72. From a close reading of the provisions of the MMDR Act and the offence defined under Section 378 IPC, it is manifest that the ingredients constituting the offence are different. The contravention of terms and conditions of mining lease or doing mining activity in violation of Section 4 of the Act is an offence punishable under Section 21 of the MMDR Act, whereas dishonestly removing sand, gravel and other

minerals from the river, which is the property of the State, out of the State's possession without the consent, constitute an offence of theft. Hence, merely because initiation of proceeding for commission of an offence under the MMDR Act on the basis of complaint cannot and shall not debar the police from taking action against persons for committing theft of sand and minerals in the manner mentioned above by exercising power under the Code of Criminal Procedure and submit a report before the Magistrate for taking cognizance against such persons. In other words, in a case where there is a theft of sand and gravel from the government land, the police can register a case, investigate the same and submit a final report under Section 173 CrPC before a Magistrate having jurisdiction for the purpose of taking cognizance as provided in Section 190(1)(*d*) of the Code of Criminal Procedure.

73. **After giving our thoughtful consideration in the matter, in the light of the relevant provisions of the Act vis-à-vis the Code of Criminal Procedure and the Penal Code, we are of the definite opinion that the ingredients constituting the offence under the MMDR Act and the ingredients of dishonestly removing sand and gravel from the riverbeds without consent, which is the property of the State, is a distinct offence under IPC. Hence, for the commission of offence under Section 378 IPC, on receipt of the police report, the Magistrate having jurisdiction can take cognizance of the said offence without awaiting the receipt of complaint that may be filed by the authorised officer for taking cognizance in respect of violation of various provisions of the MMDR Act. Consequently, the contrary view taken by the different High Courts cannot be sustained in law and, therefore, overruled. Consequently, these criminal appeals are disposed of with a direction to the Magistrates concerned to proceed accordingly." (emphasis supplied)**

16. These decisions completely answer the contention of the counsel for the petitioner. In case of ***Sharat Babu Digumarti vs. Govt. Of NCT of Delhi*** (supra), the facts were different. It is the case in which the Magistrate had taken cognizance against the Director of a company for offences punishable under Sections 292 and 294 of IPC and Section 67 of IT Act. It was in such background, the Supreme Court was of the view that Section 67 read with Section 67A and 67B of the IT Act were a complete code and for the same set of allegations, the provisions of Section 292 of IPC cannot be invoked.

17. As noted, Section 132 of SGST Act prescribes punishment for various acts and omissions under the said act such as non-deposit of tax in government revenue after collection from the purchasing dealers. On the other hand, Sections 406 and 409 of IPC deal with offence of criminal breach of trust. Section 405 of IPC defines the offence of criminal breach of trust by providing that " whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of

trust". It can thus be seen that the offences punishable under Section 132 of CGST Act and those under Sections 406 and 409 of IPC operate in different fields. In a given case an act or omission on part of the dealer may form offence only under Section 132 of CGST Act. But in a given case where the ingredients of Section 405 of IPC are satisfied, the action can as well amount to offences punishable under Sections 406 and 409 of IPC. However, a word of caution would not be misplaced. The tax administration of the State should not invoke IPC provisions without application of mind in every case. In the present case, however, no arguments are made on the basis that even if the allegations in the complaint are taken on the face value, offence of criminal breach of trust is not made out.

18. I also do not find that the Magistrate can be said to have passed the order mechanically or without application of mind. He has perused the record, formed an opinion that before issuing process, police investigation is necessary and thereupon passed the order.

19. Coming to the contention regarding the stage at which the Magistrate can call for police report, we may recall, Section 190 of Cr.P.C. pertains to cognizance of offences by Magistrates and authorizes the concerned Magistrate to take cognizance of an offence under certain circumstances referred to in clauses (a) to (c) of sub-Section (1) of Section

190 of Cr.P.C. Section 190 Cr.P.C. falls under Chapter XIV, which pertains to conditions requisite for initiation of proceedings. Section 200, which pertains to examination of complainant falls in Chapter XV pertaining to complaints to Magistrates. Section 200 provides that a Magistrate taking cognizance of an offence on complaint shall examine the complainant on oath and the witnesses present, if any, and the substance of such examination shall be reduced to writing. Under Section 202, the Magistrate may postpone issuance of process to the accused and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit.

20. It is clear through series of judgments of the Supreme Court, reference to some of which would be made shortly, that upon receipt of a complaint under Section 190, the Magistrate may take cognizance thereof himself and thereafter proceed to examine the complainant and other witnesses, if any, as provided under Section 200. In the alternative, the Magistrate may call for an investigation by the police under Section 156(3) of Cr.P.C. before deciding to take cognizance upon receiving the complaint. However, once the Magistrate takes cognizance of the offence, it is not thereafter open for him to call for investigation under Section 156(3) of Cr.P.C.

21. One of the earliest cases of the Supreme Court on this issue is of ***R.R. Chari vs. The State of Uttar Pradesh***, reported in ***1951 SCR 312*** in which the observations of the Calcutta High Court in case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal v. Abani Kumar Banerjee, AIR 1950 Cal. 437*** were noted with approval as under:

> "9. In *Gopal Marwari* v. *Emperor* it was observed that the word "cognizance" is used in the Code to indicate the point when the Magistrate or a Judge first takes judicial notice of an offence. It is a different thing from the initiation of proceedings. It is the condition precedent to the initiation of proceedings by the Magistrate. The court noticed that the word "cognizance" is a word of somewhat indefinite import and it is perhaps not always used in exactly the same sense.
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> 10. After referring to the observations in *Emperor* v. *Sourindra Mohan Chuckerbutty* it was stated by Das Gupta, J. in *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee*[3] as follows: "What is taking cognizance has not been defined in the Criminal Procedure Code and I have no desire to attempt to define it. It seems to me clear however that before it can be said that any Magistrate has taken cognizance of any offence under Section 190(1)(*a*) of the Criminal Procedure Code, he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter—proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. When the Magistrate applies his mind not for the purpose of proceeding under the subsequent sections of this Chapter, but for taking action of some other kind e.g. ordering

investigation under Section 156(3), or issuing a search warrant for the purpose of the investigation, he cannot be said to have taken cognizance of the offence". In our opinion that is the correct approach to the question before the court."

22. In case of ***Gopal Das Sindhi and others vs. State of Assam and another***, reported in ***AIR 1961 SC 986***, it was observed as under:

"8. The real question for determination is whether the Additional District Magistrate took cognizance on August 3, 1957, of the offences mentioned in the complaint filed before him. The transfer of a case contemplated under Section 192 is only of cases in which cognizance of an offence has been taken. If the Additional District Magistrate had not taken cognizance of any offence on August 3, 1957, when the complaint was presented to him, his sending the complaint to Mr Thomas for disposal would not be a transfer of a case under Section 192. We have already quoted the order passed by the Additional District Magistrate on August 3, 1957, on the complaint presented to him. That order, on the face of it, does not show that the Additional District Magistrate had taken cognizance of any offence stated in the complaint. He sent the complaint to Mr Thomas by way of an administrative action presumably because Mr Thomas was the Magistrate before whom ordinarily complaints should be filed.

9. When the complaint was received by Mr Thomas on August 3, 1957, his order, which we have already quoted, clearly indicates that he did not take cognizance of the offences mentioned in the complaint but had sent the complaint under Section 156(3) of the Code to the Officer Incharge of Police Station Gauhati for

investigation. Section 156(3) states "Any Magistrate empowered under Section 190 may order such investigation as above-mentioned". Mr Thomas was certainly a Magistrate empowered to take cognizance under Section 190 and he was empowered to take cognizance of an offence upon receiving a complaint. He, however, decided not to take cognizance but to send the complaint to the police for investigation as Sections 147, 342 and 448 were cognizable offences. It was, however, urged that once a complaint was filed the Magistrate was bound to take cognizance and proceed under Chapter XVI of the Code. It is clear, however, that Chapter XVI would come into play only if the Magistrate had taken cognizance of an offence on the complaint filed before him, because Section 200 states that a Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate. If the Magistrate had not taken cognizance of the offence on the complaint filed before him, he was not obliged to examine the complainant on oath and the witnesses present at the time of the filing of the complaint. We cannot read the provisions of Section 190 to mean that once a complaint is filed, a Magistrate is bound to take cognizance if the facts stated in the complaint disclose the commission of any offence. We are unable to construe the word 'may' in Section 190 to mean 'must'. The reason is obvious. A complaint disclosing cognizable offences may well justify a Magistrate in sending the complaint, under Section 156(3) to the police for investigation. There is no reason why the time of the Magistrate should be wasted when primarily the duty to investigate in cases involving cognizable offence is with the police. On the other hand, there may be occasions when the Magistrate may

exercise his discretion and take cognizance of a cognizable offence. If he does so, then he would have to proceed in the manner provided by Chapter XVI of the Code. Numerous cases were cited before us in support of the submissions made on behalf of the appellants. Certain submissions were also made as to what is meant by "taking cognizance". It is unnecessary to refer to the cases cited. The following observations of Mr Justice Das Gupta in the case of *Superintendent and Remembrancer of Legal Affairs, West Bengal* v. *Abani Kumar Banerjee AIR 1950 Cal 437*

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

were approved by this Court in *R.R. Chari* v. *State of Uttar Pradesh*[2]. It would be clear from the observations of Mr Justice Das Gupta that when a Magistrate applies his mind not for the purpose of proceeding under the various sections of Chapter XVI but for taking action of some other kind, e.g. ordering investigation under Section 156(3) or issuing a search warrant for the purpose of

investigation, he cannot be said to have taken cognizance of any offence. The observations of Mr Justice Das Gupta above-referred to were also approved by this Court in the case of *Narayandas Bhagwandas Madhavdas* v. *State of West Bengal*[3]. It will be clear, therefore, that in the present case neither the Additional District Magistrate nor Mr Thomas applied his mind to the complaint filed on August 3, 1957, with a view to taking cognizance of an offence. The Additional District Magistrate passed on the complaint to Mr Thomas to deal with it. Mr Thomas seeing that cognizable offences were mentioned in the complaint did not apply his mind to it with a view to taking cognizance of any offence; on the contrary in his opinion it was a matter to be investigated by the police under Section 156(3) of the Code. The action of Mr Thomas comes within the observations of Mr Justice Das Gupta. In the circumstances, we do not think that the first contention on behalf of the appellants has any substance.

23. In case of ***Jamuna Singh and others vs. Bhadai Shah***, reported in ***AIR 1964 SC 1541***, it was observed as under:

"12. Relying on the provisions in Section 190 of the Code that cognizance could be taken by the Magistrate on the report of the police officer the learned counsel for the appellants argued that when the Magistrate made the order on November 22, 1956 his intention was that he would take cognizance only after receipt of the report of the police officer and that cognizance should be held to have been taken only after that report was actually received in the shape of a charge-sheet under Section 173 of the Code, after December 13, 1956. The insuperable difficulty in the way of this argument, however, is the fact that the Magistrate had already examined the complainant under Section 200 of the Code of

> Criminal Procedure. That examination proceeded on the basis that he had taken cognizance and in the face of this action it is not possible to say that cognizance had not already been taken when he made the order "to Sub-Inspector, Baikunthpur, for instituting a case and report by 12.12.56."

24. This position has been maintained in subsequent decisions of the Supreme Court also. In case of ***Madhao and another vs. State of Maharashtra and another***, reported in ***(2013) 5 SCC 615***, it was observed as under:

> "17. In *CREF Finance Ltd.* v. *Shree Shanthi Homes (P) Ltd.*[5] while considering the power of a Magistrate taking cognizance of the offence, this Court held: (SCC p. 471, para 10)
>
> > "*10.* … Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure."
>
> It is clear that any Judicial Magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. If he

does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

18. When a Magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The Magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under 621Section 156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(*a*). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3).”

25. The question, however, is what amounts to the Magistrate taking cognizance of an offence for the purpose of Section 190 of Cr.P.C. This expression has not been defined under the Code of Criminal Procedure and the question whether in a given case the Magistrate can be said to have taken cognizance or not must be judged based on facts of the case. In case of ***Devarapalli Lakshminarayana Reddy and others vs. V. Narayana Reddy and others***, reported in ***(1976) 3 SCC 252***, the Supreme Court has made following observations:

> "14. This raises the incidental question: What is meant by "taking cognizance of an offence" by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (*a*), (*b*) and (*c*) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate**. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV to the Code of 1973, he is said to have taken cognizance of the offence within the meaning to Section 190(1)(*a*). It, instead of proceeding under Chapter XV, he has, in the judicial exercise of his discretion, taken action of some other kind, such as issuing a search warrant for the purpose of investigation, or ordering investigation by the police under Section 156(3), he cannot be said to have taken cognizance of any offence." (emphasis supplied)**

26. In case of ***Nirmaljit Singh Hoon vs. The State of West Bengal and another***, reported in ***(1973) 3 SCC 753***, it was held that when the Magistrate had applied his mind only for ordering investigation under Section 156(3) or issuing warrant for the purpose of investigation, it cannot be stated that the Magistrate had taken cognizance of the offence. It was further observed that the purpose of examination of the complainant is to

find out whether there is the prima facie case against the person accused of the offence in the complaint.

27. As noted, the Calcutta High Court in case of ***Superintendent and Remembrancer of Legal Affairs, West Bengal vs. Abani Kumar Banerjee*** (supra) had observed that before it can be said that any Magistrate has taken cognizance of an offence under Section 190(1)(a) of Cr.P.C., he must not only have applied his mind to the contents of the petition but he must have done so for the purpose of proceeding in a particular way as indicated in the subsequent provisions of this Chapter, proceeding under Section 200 and thereafter sending it for inquiry and report under Section 202. These observations of Calcutta High Court were noted with approval by the Supreme Court in case of ***R.R. Chari vs. State of Uttar Pradesh*** (supra).

28. With this legal background, we may revert to the facts of the present case. We may recall that on the first instance when the complaint was placed before the learned Magistrate, on 27.11.2020, he recorded that he had perused the case record, received some of the documents which were ordered to be kept along with the case record. He thereupon stated -

> **"Let the case be fixed for examination U/S 200 Cr.P.C.**
>
> **Fix 02.01.2021 examination U/S 200 Cr.P.C."**

29. A perusal of this order dated 27.11.2020 would immediately show that the learned Magistrate had decided to examine the complainant or possibly the witnesses, if any, under Section 200 of Cr.P.C. on 02.01.2021. This he had decided after perusal of the case record and receipt of some of the documents, which were kept along with the rest of the record of the case. It is thus clear that the Magistrate had taken cognizance of the offences disclosed in the complaint. His action of perusal of the case record which led to his decision to examine the witnesses under Section 200 of Cr.P.C. at a later date clearly establishes application of mind on his part onthe allegations made in the complaint and which led to his making up his mind about the requirement of carrying out examination under Section 200 of Cr.P.C. Had the Magistrate perused the case records and was of the opinion that before deciding to take cognizance of the offence it was necessary to call for the police investigation, it was open for him to do so. However, in such a case, his decision would have been entirely different. The very fact that after perusal of the case record he was persuaded that there is a requirement of examination under Section 200 of Cr.P.C, would establish that he had already taken cognizance of the offence. It is well settled that the stage of examination of witness under Section 200 of Cr.P.C. would not arise before taking cognizance by the Magistrate. Thus, these two twin facts namely, the perusal of the case record by the Magistrate and the decision that he arrived on upon perusal

of the case records of examining the witnesses under Section 200 of Cr.P.C. would leave no manner of doubt that on 27.11.2020 itself he had taken cognizance of the offences. It was thereafter not open for him to change the course and revert back to the initial option of requiring police investigation and calling for police report. Unfortunately, on 02.01.2021 this is precisely what he did. In the said order, he has recorded that after hearing the learned P.P. and after perusal of the complaint, he was of the opinion that before taking cognizance, the matter may be investigated by the police. In the process, the learned Magistrate lost sight of the fact that the stage of taking cognizance had already been crossed on 27.11.2020 itself.

30. In the result, the impugned order dated 02.01.2021 is quashed. However, this does not put an end to the complaint lodged before the concerned Magistrate, who shall proceed further in accordance with the law from the stage of taking cognizance of the offences disclosed.

31. Petition allowed in above terms and disposed of accordingly. Pending application(s), if any, also stands disposed of.

(AKIL KURESHI), CJ

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