

Aligarh in Case No.129/2020 under Sections 147, 342, 323, 307, 506 of the Indian Penal Code, 1860³ Police Station, Civil Lines, District Aligarh. There is an order dated 01.11.2021 passed by the High Court wherein the Case Number mentioned in the order dated 24.08.2021 was corrected as Case No.5727/2021.

3. Respondent no.2 lodged a First Information Report⁴ bearing the aforesaid details whereupon the same was investigated and after investigation the police report under Section 173(2) Cr.P.C. was submitted according to which the Investigating Officer found that no evidence could be collected which could substantiate the allegations made in the FIR. The said report was submitted to the Court concerned whereupon notices were issued to the informant. The informant filed a Protest Petition along with affidavits to show that the investigation carried out by the Investigating

³ IPC

⁴ FIR

Officer was not a fair investigation. He had completed the case diary sitting at the Police Station without actually recording the statements of the witnesses.

4. The CJM, by order dated 08.03.2021 rejected the police report under Section 173(2) Cr.P.C. and further proceeded to take cognizance for offences under Sections 147, 342, 323, 307, 506 of the IPC and under Section 190 (1) (b) of the Cr.P.C. and also directed that the matter would continue as a State case. Accordingly, it summoned the accused, fixed 30th April, 2021. This order of cognizance and summoning the present appellant was assailed before the High Court by way of a petition under Section 482 Cr.P.C. registered as Application u/s.482 No.15273 of 2021. The said application has sine been dismissed by the High Court giving rise to the present appeal.
5. Shri Vinod Prasad, learned senior counsel appearing for the appellant submitted that the CJM as also the High Court fell in error in taking

cognizance under Section 190(1)(b) Cr.P.C. inasmuch as the CJM had relied upon not only the Protest Petition which was supported by affidavit of the complainant but also on the affidavits of witnesses which were filed along with the Protest Petition to support the contents of the complaint. The submission was that once the CJM was relying upon additional material in the form of evidence produced by the complainant along with the Protest Petition then the only option for the CJM was to treat it as a complaint under Section 200 Cr.P.C. and proceed accordingly. The said case could not have been continued as a State case and should have been treated as a private complaint. It was also submitted that it was open for the CJM to have rejected the police report submitted under Section 173(2) Cr.P.C. for closure and relying upon the material in the case diary, (in effect, the material collected during investigation) could have taken cognizance but once additional evidence was being relied upon which had been filed along with the Protest Petition then the only option open was to treat it as a

private complaint and after following the due procedure in Chapter XV of the Cr.P.C. proceeded to take cognizance under Section 190(1)(a) Cr.P.C.

6. On the other hand, the submission advanced by the learned counsel for the State as also the Complainant – respondent no.2 was that the CJM did not take into consideration any additional evidence filed in the form of affidavits along with the Protest Petition and had only relied upon the material collected during the investigation as contained in the case diary and based upon the same the satisfaction recorded by the CJM to reject the police report and take cognizance was well within his domain and such cognizance would fall within Section 190(1)(b) Cr.P.C. It was thus submitted that the impugned order does not suffer from any infirmity.
7. We have carefully examined the order dated 24.08.2021 passed by the CJM taking cognizance and summoning the police and we

find that the CJM had actually taken into consideration not only the Protest Petition but also the affidavit filed in support of the Protest Petition as well as the four affidavits of witnesses filed along with the Protest Petition. It was based on consideration of such affidavits that the CJM was of the view that the investigation was not a fair investigation and these affidavits made out a prima facie case for taking cognizance and summoning the accused.

8. Once we have held as above without going into many judgments of this Court on the point as to how the Magistrate would proceed under Section 190 Cr.P.C. once the Investigating Officer had submitted a closure report under Section 173(2) Cr.P.C., we may briefly deal with the legal issue and refer to relevant paragraphs of a recent decision. In this connection, Section 190(1) (a) and (b) of Cr.P.C. is extracted hereunder:

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;....”

9. In the case of **Vishnu Kumar Tiwari vs. State of Uttar Pradesh, through Secretary Home, Civil Secretariat, Lucknow & Anr.**,⁵ Justice K.M. Joseph, speaking for the Bench laid down the legal position relying upon previous judgments of this Court. In the said case the facts were quite similar to that of the present case where affidavits were filed along with the Protest Petition. The net result is that the Magistrate in the present case ought to have treated the Protest Petition as a complaint and proceeded according to Chapter XV of the Cr.P.C.. The relevant paragraphs dealing with

⁵ (2019) 8 SCC 27

the above aspect in the case of **Vishnu Kumar Tiwari** (supra), being paragraphs 42 to 46 are reproduced hereunder:

“42. In the facts of this case, having regard to the nature of the allegations contained in the Protest Petition and the annexures which essentially consisted of affidavits, if the Magistrate was convinced on the basis of the consideration of the final report, the statements under Section 161 of the Code that no prima facie case is made out, certainly the Magistrate could not be compelled to take cognizance by treating the Protest Petition as a complaint. The fact that he may have jurisdiction in a case to treat the Protest Petition as a complaint, is a different matter. Undoubtedly, if he treats the Protest Petition as a complaint, he would have to follow the procedure prescribed under Sections 200 and 202 of the Code if the latter section also commends itself to the Magistrate. In other words, necessarily, the complainant and his witnesses would have to be examined. No doubt, depending upon the material which is made available to a Magistrate by the complainant in the Protest Petition, it may be capable of being relied on in a particular case having regard to its inherent nature and impact on the conclusions in the final report. That is, if the material is such that it persuades the court to disagree with the conclusions arrived

at by the investigating officer, cognizance could be taken under Section 190(1)(b) of the Code for which there is no necessity to examine the witnesses under Section 200 of the Code. But as the Magistrate could not be compelled to treat the Protest Petition as a complaint, the remedy of the complainant would be to file a fresh complaint and invite the Magistrate to follow the procedure under Section 200 of the Code or Section 200 read with Section 202 of the Code. Therefore, we are of the view that in the facts of this case, we cannot support the decision of the High Court.

43. It is true that law mandates notice to the informant/complainant where the Magistrate contemplates accepting the final report. On receipt of notice, the informant may address the court ventilating his objections to the final report. This he usually does in the form of the Protest Petition. In *Mahabir Prasad Agarwala v. State* [*Mahabir Prasad Agarwala v. State*, 1957 SCC OnLine Ori 5 : AIR 1958 Ori 11] , a learned Judge of the High Court of Orissa, took the view that a Protest Petition is in the nature of a complaint and should be examined in accordance with the provisions of Chapter XVI of the Criminal Procedure Code. We, however, also noticed that in *Qasim v. State* [*Qasim v. State*, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , a learned Single Judge of the High Court of Judicature at Allahabad, inter alia, held as follows: (*Qasim*

case [Qasim v. State, 1984 SCC OnLine All 260 : 1984 Cri LJ 1677] , SCC OnLine All para 6)

“6. ... In *Abhinandan Jha* [*Abhinandan Jha v. Dinesh Mishra*, AIR 1968 SC 117 : 1968 Cri LJ 97 : (1967) 3 SCR 668] also what was observed was “it is not very clear as to whether the Magistrate has chosen to treat the Protest Petition as complaint”. This observation would not mean that every Protest Petition must necessarily be treated as a complaint whether it satisfies the conditions of the complaint or not. *A private complaint is to contain a complete list of witnesses to be examined.* A further examination of complainant is made under Section 200 CrPC. If the Magistrate did not treat the Protest Petition as a complaint, the Protest Petition not satisfying all the conditions of the complaint to his mind, it would not mean that the case has become a complaint case. *In fact, in majority of cases when a final report is submitted, the Magistrate has to simply consider whether on the materials in the case diary no case is made out as to accept the final report or whether case diary discloses a prima facie case as to take cognizance. The Protest Petition in such situation simply serves the purpose of drawing Magistrate's attention to the materials in the case diary and invite a careful scrutiny and exercise of the mind by the Magistrate so it cannot be held that simply because there is a Protest Petition the case is to become a complaint case.”*

(emphasis supplied)

44. We may also notice that in *Veerappa v. Bhimareddappa* [*Veerappa v. Bhimareddappa*, 2001 SCC OnLine Kar 447 : 2002 Cri LJ 2150] , the High Court of Karnataka observed as follows: (SCC OnLine Kar para 9)

“9. From the above, the position that emerges is this: Where initially the complainant has not filed any complaint before the Magistrate under Section 200 CrPC, but, has approached the police only and where the police after investigation have filed the ‘B’ report, if the complainant wants to protest, he is thereby inviting the Magistrate to take cognizance under Section 190(1)(a) CrPC on a complaint. If it were to be so, the Protest Petition that he files shall have to satisfy the requirements of a complaint as defined in Section 2(d) CrPC, and that should contain facts that constitute offence, for which, the learned Magistrate is taking cognizance under Section 190(1)(a) CrPC. Instead, if it is to be simply styled as a Protest Petition without containing all those necessary particulars that a normal complaint has to contain, then, it cannot be construed as a complaint for the purpose of proceeding under Section 200 CrPC.”

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

“2. (d) “complaint” means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation.—A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;”

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

10. From a perusal of the above opinion of this Court, it is also reflected that the Magistrate also had the liberty to reject the Protest Petition along with all other material which may have been filed in support of the same. In that event the Complainant would be at liberty to file a fresh complaint. The right of the Complainant to file a petition under Section 200 Cr.P.C. is not taken away even if the Magistrate concerned does not direct that such a Protest Petition be treated as a complaint.

11. In the present case as the Magistrate had already recorded his satisfaction that it was a case worth taking cognizance and fit for summoning the accused, we are of the view that the Magistrate ought to have followed the provisions and the procedure prescribed under Chapter XV of the Cr.P.C. Accordingly, we allow this appeal, set aside the impugned orders passed by the High Court as also the CJM, Aligarh.

12. However, we leave it open for the Magistrate to treat the Protest Petition as a complaint and proceed in accordance to law as laid down under Chapter XV of the Cr.P.C. We make it clear that we have not made any comments on the merits of the matter and any observations made would not influence the CJM in taking an appropriate decision as required above.

.....**J**
(VIKRAM NATH)

.....**J**
(SATISH CHANDRA SHARMA)

NEW DELHI
APRIL 18, 2024