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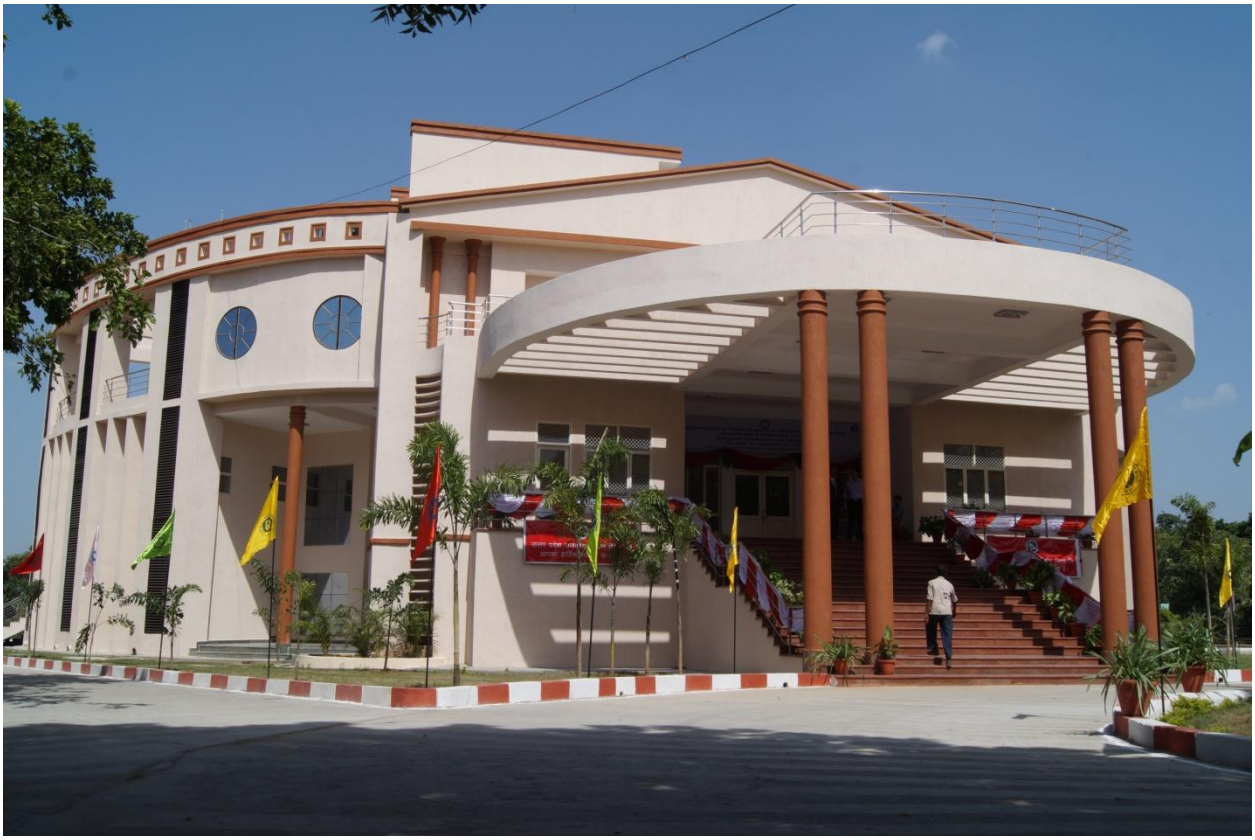
## COMPLAINT UNDER CODE OF CRIMINAL PROCEDURE, 1973



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# Procedure of Complaint under Chapter XV of the Code of Criminal Procedure, 1973 and General Practice in the Courts.

**By--**

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## GENERAL PRACTICE IN THE COURTS-

When the complaint in writing is filed in the Court, the magistrate after perusal of the complaint, registers it, and after registering it, the statement of complainant u/s. 200 Cr.P.C. 1973 is recorded on the same day and the case is fixed for recording evidence of the witnesses under section 202 of the Code of Criminal Procedure, 1973 for any other day. After recording evidence u/s 202 Cr.P.C of the witness or witnesses, as the case may be, the case is fixed for arguments on summoning. Having heard the arguments on summoning, the case is fixed for order on summoning. If the Magistrate finds or satisfies that prima facie offence is made out against the accused and all essential ingredients of alleged offence are available in complaint as per evidence u/ss. 200 and 202 of the Code of Criminal Procedure, 1973, the Magistrate issues process u/s 204 of the Cr.P.C. 1973 against the accused. On the other hand, if the Magistrate satisfied after perusal of evidence u/ss. 200 and 202 Cr.P.C, 1973 that no prima facie offence is made out and there is no sufficient ground for proceeding, he dismisses the complaint u/s 203 Cr.P.C. 1973.

But, as per provisions of chapter XV of the Code of Criminal Procedure,1973, the procedure of the complaint is quite different from the above general practice in the Courts. Now, we take up the provisions of chapter XV of the Cr.P.C. 1973(hereinafter referred to as Code).At first, it will be appropriate to discuss the statutory provisions of the Code.

**S. 200- Examination of complainant -** A magistrate taking cognizance of an offence on complaint shall, examine upon oath the complainant and witnesses present, if any and the substance of such examination shall be reduced into writing and shall be signed by the complainant and witnesses and also by the magistrate.

Provided that, when the complainant 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 discharged of his official duties of court has made the complaint, or

(b) If the Magistrate makes over the case for enquiry or trial to another Magistrate under section 192 after examining the complainant and the witnesses, the Magistrate need not re examine them.

The procedure to be adopted when complaint is filed is as follows-

U/s. 200 of the Code, it is incumbent on the Magistrate taking cognizance on a complaint to examine upon oath the complainant and his witnesses present if any, at sufficient length to satisfy himself. The object is to test whether allegations make out a prima facie case to assure the Magistrate to issue process u/s. 204 Cr.P.C, 1973. If the witnesses are present on the date of filing complaint, their statement should also be recorded u/s. 200 Cr.P.C, 1973.

After recording statements and evidence of complainant and witnesses respectively u/s 200 Cr.P.C, 1973, the Magistrate has three options -

1. He may issue process u/s 204 Cr.P.C, 1973, if prima facie offence is made out, if the proposed accused is residing within the area to which the local jurisdiction of the Magistrate extends.

2. He may dismiss the complaint u/s. 203 of Cr.P.C., 1973, if no prima facie offence is made out and there is no sufficient ground for proceedings, or

3. He may postpone issue of process pending further inquiry by himself, or investigation by police or any other person as he deems fit u/s 202 Cr.P.C, 1973.

Hence, section 200 of the Cr.P.C., 1973 requires not only the complainant, but also his witnesses present if any, should be examined. This section casts an imperative duty on the Magistrate to examine the witnesses as well.

**S. 201- Procedure by Magistrate not competent to take the cognizance of the case-** if the complaint is made to a magistrate who is not competent to the cognizance of the offence, he shall-

(a) If the complaint is in writing, return it for presentation to the proper court with an endorsement to that effect;

(b) If the complaint is not in writing, direct the complainant to the proper Court.

This section does not require any comment.

Now, we take up section 202 of the Code of Criminal Procedure, 1973 which provides as under-

**S. 202- Postponement of issue of processes-**

1. Any magistrate on the receipt of the complaint of a offence of which he is authorised to take cognizance or which has been made over to him under section 192, may if he thinks fit and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction 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 or by such person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

   Provided that no such direction for investigation shall be made-

   (a) Where it appears to the magistrate that the offence complained of is triable exclusively by the court of Session, or

   (b) Where the complaint has not been made by a court, unless the complainant and the witnesses present (if any) have been examined on oath u/s. 200.

2. In an enquiry under sub-section (1), the magistrate may, if he thinks fit take evidence of witnesses on oath.

   Provided that if it appears to the magistrate that the offence complained of is triable exclusively by the court of session, he shall call upon the complainant to produce all his witnesses and examine them on oath.

3. If an investigation under sub-section (1) is made by a person not being a police officer, he shall have for that investigation all the powers conferred by

the Code on an officer in charge of a police station except the power to arrest without warrant.

**S. 203- Dismissal of complaint-**

If after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s. 202, the magistrate is opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

Now ,we frame points of determination(topics) for convenience as under-

**1. Whether the accused can be summoned on the sole basis of evidence/ statement recorded u/s 200 of the Code?**

**2. Whether the statement of complainant u/s 200 of the Code should be recorded on the same day?**

**3. Whether the Court can summon any document at the stage of inquiry u/s 202 of the Code?**

**4. Whether the Court has power to summon any witness or person as witness at the stage of inquiry u/s 202 of the Code?**

**5. What options are available to a Magistrate at the stage of section 202 of the Code?**

**6. Whether the complainant can be called upon to produce all his witnesses and examine them on oath in the offence complained of exclusively triable by the Court of Session?**

**7. What is prima facie case or sufficient ground for proceeding?**

**8. Whether the second complaint is maintainable, if first complaint has been dismissed in default of appearance of the complainant or otherwise u/s 203 of the Code?**

**9. Whether the Court has to give reasons in summoning order u/s.204 and dismissal order u/s 203 Code,1973?**

**10. Whether the complaint can be treated as an application under section 156(3) of the Code?**

**11-Whether the revision against summoning order is maintainable?**

**12-In which complaint case process fee is chargeable?**

**13-Whether the application to discharge the accused can be moved under section 245(2) of the Code through counsel?**

**14-When the Magistrate or Court, as the case may be, is deemed to have taken cognizance in the cases instituted on complaint?**

Now, we discuss these above mentioned topics in accordance with serial in some detail-

**(1) Whether the accused can be summoned on the sole basis of statements and evidence u/s. 200 Cr.P.C., 1973?**

As per, language of 200 Cr.P.C. 1973, it is clear that the statement of complaint u/s 200 Cr.P.C. and the evidence of witnesses present, if any, should be recorded on the date of institution of complaint. The process can be issued directly against the accused person on the sole basis of statements and evidence recorded under section 200 Cr. P.C.1973, if prima facie offence is made out as per statements/evidence available under section 200 of the Code except the cases where the proposed accused person resides out of the local limits of the jurisdiction of the Magistrate as per new amendment in section 202 of the Code in the year 2005. If the proposed accused person resides out of the local limits of the Court, it is mandatory for the Magistrate or the Court, as the case may be, to make an inquiry as required under section 202 of the Code. Hence, it will not be out of place to mention section 202 of the Code (as amended in the year 2005). Amended section 202 of the Code states as under-

**S. 202- Postponement of issue of processes-**

1. Any magistrate on the receipt of the complaint of a offence of which he is authorised to take cognizance or which has been made over to him under section 192, may if he thinks fit and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction 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 or by such person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

The Hon'ble Supreme Court has held in case law **A R Antulay v. Ram Dass Sri Nivas Nayak, (1984) 2 SCC 500**, that Magistrate's power to take cognizance without holding inquiry or directing investigation is implicit in section 200 Cr.P.C., 1973. Hon'ble Karnataka High Court has expressed its view in case law **V.N.Talwar vs. Lakasha Maiya, 1989Cr.L.J. (NOC) 96** that process can be issued against the accused on the statement of the complainant without the evidence under section 202 of the Code. Hence, as per above discussed facts and case laws cited above, process can be issued against the accused persons on the sole basis of statement and evidence recordedunder section 200 of the Code.

But, as per new amendment under section 202 of the Code, (Amendment ActNo.25 0f 2005), it is mandatory for the Magistrate or the Court, as the case may be, to hold the inquiry by himself or itself for the purpose of deciding whether or not,there is sufficient ground for proceeding in case the accused is residing at place beyond the area in which he or it exercises his or its jurisdiction.

The Hon'ble AllahabadHigh Court **(His Lordship Hon'ble Mr. Justice Sudhir Kumar Saxena ) has held in case law Salma Syed Abdul Qadir and another vs. State of UP and another ,2012(76) ACC 97 (Allahabad – Lucknow Bench )** that Indian Penal Code, 1860- Section 379- proceedings under- Challenged-Magistrate has not considered the impact of amended section 202, Cr.P.C. which makes it incumbent upon him to make inquiry-if the proposed accused persons are not residing within the jurisdiction vested with him-Magistrate has failed to apply his mind- entire prosecution case appears to be improbable- order suffers from vice of non application of mind- summoning order is blatant abuse of the processes of Court- complaint and proceedings are liable to be quashed- petition allowed- proceeding and summoning order are quashed.

**(2)-Whether the statement of complainant u/s. 200 Cr.P.C., 1973 should be recorded on the same day?**

The important Circular Letters of the Hon'ble Allahabad High Court in this regard are as under-

C.L. No.6/Admin. (B)Dated 1, May, 1971 provides as under- In every case the statement of the complainant u/s.200 Cr.P.C.1973 be recorded on the same day, on which the complaint is made. Where for some good reasons the statement cannot be recorded on the same day, it should be recorded on the following day. It should be ensured that the complainants do not have to come to the Court for this purpose and minimum inconvenience be caused to them.

The recording of statements of witnesses u/s.202 Cr.P.C. should not become a matter of routine. If the case is one in which notice shall be issued to the accused, no detailed enquiry u/s.202 Cr.P.C. need to be conducted and soon after recording the statement of the complainant, notice can be issued to the accused. Where an inquiry u/s.202 Cr. P.C. is considered necessary, the Magistrates should take personal interest while recording the statements of witnesses. They can, on their own, put a few questions and find out the status of the witnesses and also whether they had an opportunity to see the occurrence. By so doing, large number of complaints can be dismissed u/s.203 Cr.P.C.

Further, the complaint cases should be kept pending without date only after the accused persons have been served so that such cases can be taken at short notice whenever necessary.

**Recording of statements u/s. 200 Cr.P.C.**

**C.L. No.53/2007 Admin (G) : Dated: 13.12.2007**

The Hon'ble Court has been pleased to observe that section 200 Cr.P.C. mandates that the substance of the information/statement only is required to be recorded by the magistrate which should be done by him in his handwriting as that would facilitate in pinpointing the controversy and check frivolous complaints.

Therefore, in continuation of earlier Circular letter no. 6 Admin. (B) dated 1st May 1971, I have been directed to say that all the magistrates working under your administrative control may please be directed to record statements under section 200 Cr.P.C. in their own handwriting.

I am, further, to request you kindly to bring the contents of this Circular Letter to all the Judicial Officers working under your administrative control for strict compliance.

Hence, as per these abovementioned circular letters of the Hon'ble Court, the statement of the complainant should be recorded on the same day by the Magistrate in his own handwriting except the situation mentioned in aforesaid C.Ls.

**(3)- Whether the Court can summon any document at the stage of inquiry under section 202 Cr.P.C. 1973?**

As per statutory provisions of section 202 Cr.P.C, the court has no jurisdiction to summon any document. But section 91 Cr.P.C. provides as under--

**S.91- Summon to produce document or other thing-**

(1). Whether any court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for purpose of any investigation, inquiry, trial or other proceedings under this code by or before such court or officer, such court may issue a summon, or such officer a written order, to the person whose possession or power such document or thing is believed to be requiring him to attend or to produce it at the time and place stated in the summons or order.

The procedure provided, u/s 202 Cr.P.C. 1973 is an inquiry. Hence, the Court can summon any document at the stage of inquiry u/s 202 Cr.P.C. 1973 as per power conferred by S.91 of the Code of Criminal Procedure, 1973.

**(4)- Whether the Court has power to summon any witness or person as witness at the stage of inquiry u/s 202 Cr.P.C.,1973?**

Section- 202 (2) of the Code of Criminal Procedure, 1973 provides as follows-

**S.202 (2) -** In and inquiry under subsection (1) the magistrate may, if he thinks fit, take evidence of witnesses on oath.

As per above provisions there is no power to summon, any witness for examination u/s 202 Cr.P.C 1973.

But, section 311 of Cr.P.C, 1973 provides as under-

**S. 311- Power to summon material witness, or examine the person present-**

Any Court may, at any stage of inquiry, trial or other proceeding under this code, summon any person as a witness or examine any person in attendance, though not summoned as a witness, or recall and re examine any person already examined, and the court shall summon and examine and recall and re examine any such person if his evidence appears to it essential for the just decision of the case.

The stage of section 202 Cr.P.C.1973 is an inquiry.

The Hon'ble Kerela High Court has held in case law **Thirkan vs. Sukimaran, 1981 Cr.L.J. 1162 (Kerala**) that the Magistrate may summon the witness u/s 202 Cr.P.C 1973. As per case law **Rosy and Another vs. State of Kerela, ACC 2000 (40)page444 (S.C)** the Magistrate can issue summons at the stage of S. 202 Cr.P.C 1973.

**(5)- What options are available to a Magistrate at the stage of section 202 of the Code?**

Prior to discussion this topic, it will be appropriate to mention section 202 of the Code. Section 202 of the Code provides as under-

. **S. 202- Postponement of issue of processes-**

1. Any magistrate on the receipt of the complaint of a offence of which he is authorised to take cognizance or which has been made over to him under section 192, may if he thinks fit and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction 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 or by such person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

As per above provision, it is crystal clear that the Magistrate has the following options-

1-The Magistrate may inquire the matter himself and if he inquires the matter himself, he may record the statements of the witnesses on oath, or

2- He may direct an investigation to be made by a police officer, or

3- He may direct an investigation to be made by such person otherthan police officer.

But, the Magistrate has to opt one of the options (out of three options). He cannot follow all the options. But, when a complaint is filed against the accused where the accused is residing at a place beyond the area in which he exercises his jurisdiction, inquiry under section 202 of the Code is mandatory.

The Hon'ble Allahabad High Court has held in case law **Irshad Khan and Others vs. State of U.P. and another, 2014 (84) A.C.C. 95 (All.)** that

Cr.P.C. – S.202 inquiry- object-of- for ascertainment of fact whether complaint has valid foundation calling for issue of process to person complained against- or whether this is baseless one and no action need be taken.

Cr.P.C. – S.202- Simultaneous inquiry- power of- Magistrate- He cannot resort to inquire into case himself and also direct investigation by a police officer.

Cr.P.C. – S.202- investigation by police officer-Scope of-for a limited purpose and only for helping the Magistrate to decide sufficiency of the ground to proceed further on complaint or not.

Cr.P.C, S.202-Report of police officer under section 202 of the Code cannot be challenged by filing a protest petition.

The Hon'ble Allahabad High Court has expressed its view in case law **Gauri Shanker Sawhany vs. State of U.P., 2012 (77) A.C.C.141All.** that the summoning order passed under sections 364,302 and 201 of I.P.C.,1860 was challenged - An illegality has been committed on the part of the police- Matter was sent to police for investigation under section 202(1), Cr.P.C. – Police registered an F.I.R. and after investigation a final report was submitted. Magistrate committed another illegality and issued notice to O.P. no. 2, the last illegality committed by magistrate is after hearing protest petition he passed the summoning order- Revision is allowed. Order impugned is set aside. Matter is remanded back to CJM, who will proceed further in accordance with law.

Hon'ble Supreme Court in case law **Bhagat Ram v. Surinder Kumar and others, 2005 (2) SCC 95**, held in paragraph 4

"It is clear from the perusal of the order made by the learned Magistrate that he has not done anything other than to comply with the provisions of section 202(1) of the Code of Criminal Procedure ,that after examining complainant and his witnesses(u/s 200), he found that it was necessary to further probe into the matter and, therefore, directed investigation to be done by the police and after investigation was done by the police and on report being filed by them, he heard the matter afresh and directed issue of summon. We find that the procedure adopted by the learned Magistrate is perfectly in order. The Hon'ble Apex Court has further held in this paragraph that **the Magistrate has power under section 202(1) of the Code of Criminal Procedure to direct investigation and in the meanwhile he may postpone issue of process against the accused by adopting <u>one of the courses</u> mentioned in section 202(1)".**

Hence, it is clear that the Magistrate has to opt one of the options mentioned under section 202(1) of the Code. **<u>6-. Whether the complainant can be called upon to produce all his witnesses and</u>**

**examine them on oath in the complaint exclusively triable by the Court of Session?**

Proviso to section 202 (2) of Cr.P.C,1973 provides as under -

"Provided that if it appears to the magistrate that the offence complained of is triable exclusively by the Court of Session, he shall call upon the complaint to produce all his witnesses and examine them on oath."

As per above proviso to S. 202 (2) Cr.P.C. 1973, it is mandatory for the Court to call upon the complainant to produce all his witnesses and examine them on oath, because the word "shall" has been used in proviso to subsection (2) of section 202 Cr.P.C.,1973.

The Hon'ble Kerala High Court has held in case law- **Manuddin Kutti Hazi vs. Kunhi Koy and other, 1987 Cr.L.J 1106 (Kerala**) that in the complaint which is triable exclusively by the court of session, the Magistrate is required to call upon the complainant to produce all his witnesses and examine them on oath.

The Hon'ble Allahabad high Court has expressed its veiw in case law- **Jai Nath and others vs. State of U.P, A.C.C (C.R) 1978All. 317** that in the offence complainedof is triable exclusively by Court of Session, the Magistrate is not required to examine all the witnesses. Witnesses of complainant's choice should be examined under proviso to s. 202 (2) of Cr.P.C. 1973.

The Hon'ble Allahabad High Court has expressed same view in case law- **Satya Deo Pandey vs. State of U.P and others, All Cr. R. 1987 P. 165.**

The Hon'ble Allahabad High Court has expressed contrary view in case law **D.B Dixit vs. State of U.P A.C.C 1997 (30) 500 (All.)** that u/s 202 (2) proviso of Cr.P.C, 1973, if the Magistrate has not followed the mandatory provision and he has failed to call upon the complainant to produce all the witnesses, summoning order is illegal.

The Hon'ble Allahabad High Court has held in case law- **Satpal and others vs. State of U.P and another, 2005(53) ACC 218** that if the case is exclusively triable by Court of Session and there are more than one witnesses and they have not been examined during the enquiry, noncompliance of the proviso to subsection(2) of the section 202 Cr.P.C. 1973, order passed by Magistrate is unsustainable. Matter remitted back with the direction to proceed further with the inquiry as contemplated under the proviso to sub section (2) of section 202 Cr.P.C 1973.

But the Hon'ble Supreme Court has held in case law –**Rosy and another vs. State of Kerela and others, ACC 2000 (40) 444 (SC)** that compliance of proviso to subsection(2) of section 202 Cr.P.C 1973, in all session triable cases is not necessary (must). It would not vitiate further trial unless prejudice is caused to accused. Inquiry u/s 202of Cr.P.C.,1973 is itself discretionary. Mandate of proviso is not absolute.

The Hon'ble Apex Court has held in case law **Shivjee Singh vs. Nagendra Tiwary and others, A.I.R. 2010 SC 2261(2010Cr.L.J. 3227 SC)** that the provisions of the Code of Criminal Procedure,1973, are procedural, violation of any provision, if it does not cause prejudice to the accused, it has to be treated as directory despite use of word "shall". In complaint case triable by the Court of Session, examination of all the witnesses cited by the complainant is not mandatory under proviso to section 202 (2) of the Code of Criminal Procedure, 1973. Hon'ble Allahabad High Court has also held in case law **Pradeep vs. State of U.P., 2012(1) J.I.C.104 (ALL.)** that under section 202(2) of the Code, examination of all witnesses is not necessary, if prima facie offence is made out for summoning the petitioner. Petition dismissed.

As per Article 141 of the Constitution of India all laws declared by the Supreme Court shall be binding on all Courts within the territory of India.

Hence, as per case laws of Hon'ble Apex Court, the complainant cannot be called upon to produce all his witnesses and examine them on oath.

**7. What is prima facie case or sufficient ground for proceedings?**

Prima facie case means all essential ingredients of the offence are present as per statements/evidence recorded u/ss. 200 or 202 Cr.P.C.1973 or as per investigation report (if any) made by an investigation agency u/s 202 Cr.P.C. 1973. For example –

A complaint of the offence punishable u/s 379 of the Indian Penal Code, 1860 is filed u/s 190(1)(a) read with section 200 of the Code before a competent Magistrate or Court empowered to take cognizance. After taking cognizance upon a complaint, the Magistrate or Court, as the case may be, proceeds to record the statements of complainant and his witnesses present, if any u/s 200 of the Code or the statement/evidence or to make an order for investigation by a police officer or by any person other than police officer, as the Magistrate or the Court thinks fit. As per statement, evidence or the result of the inquiry or investigation report u/ss. 200 or

202of the Code, if all essential ingredients of the alleged offence in the complaint are available, it shall be deemed that prima facie offence is made out.

The Magistrate or the Court has to see the definition of theft as defined u/s 378 of the Indian Penal Code which states as under--

**" Section-378. Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."**

As per the definition of theft there are five essential ingredients of this offence which are as under-

1. The intention should be dishonest,

2. The property should be movable

3. That property should be taken out of the possession of any person

4. The property should be taken without that person's consent, and

5. In order to take that property there should be a movement from one place to another.

If all five essential ingredients mentioned above as per statement/evidence etc recorded u/ss. 200 or 202 of the Code, it shall be deemed that prima facie offence punishable u/s. 379 of the Indian Penal Code, 1860 is made out. Sufficient ground for proceeding means a prima facie offence is made out. The Hon'ble Supreme Court has held in the case law **S.W. Palanitkar and others vs. State of Bihar and another, AIR 2001 SC 2960 that Cr.P.C- S. 203 -** Dismissal of complaint. Term "sufficient grounds" means satisfaction that a prima facie case is made out against the accused person and not sufficient ground for the purpose of conviction. When the act alleged against the accused doesn't constitute the offence satisfying the ingredients even prima facie, the process should not be issued. The words 'sufficient ground' used under section 203 have to be construed to mean the satisfaction that a prima facie case is made out against the accused and not sufficient ground for the purpose of conviction.

The Hon'ble Supreme Court has recently held in case law **Sunil Bharti Mittal vs. Central bureau of investigation, AIR 2015 SC 923** that issuing of process words " sufficient grounds for proceeding in section 204 suggests formation of opinion only after application of mind and on the basis of sufficient material. Such

formation of opinion to be stated in order itself. Summoning appellant as accused without recording proper satisfaction by special judge is liable to be set aside.

**8. Whether the second complaint is maintainable, if the first complaint has been dismissed in the absence of the complainant or otherwise under section 203 of the Code?**

Section 203 of the Code provides as under-

If after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the magistrate is of the opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.

As per provisions of section 203 of the Code complaint cannot be dismissed in the absence of the complainant. In other words, we can say that there is no provision to dismiss the complaint in his absence at this stage. If the complaint has been dismissed due to mistake by the court or a Magistrate, the second complaint is maintainable on the same facts.

Explanation to section 300 of the Code provides as under-

Explanation- The dismissal of a complaint or the discharge of the accused is not the acquittal for the purpose of this section.

The Hon'ble Apex Court has held in case **law Pramoth Nath Talukdar vs. Saroj Ranjan Sonkar, AIR, 1962 SC 876** that an order of dismissal under section 203 of the Code of Criminal Procedure, 1973 in absence of the complainant is no bar to the entertainment of the second complaint on the same facts, but it will be entertained only in exceptional circumstances.

The Hon'ble Supreme Court has held in case law **Jitendra Singh and other vs. Rajneet Kaur, 2001 (42) ACC, Page 521 (SC)** that if a criminal complaint is dismissed in default of appearance of the complainant, but not on merits, second complaint for same offence is maintainable.

It has been held in case law **Jai Ram and others v. State of UP & another; 2013 (82) ACC277that** there is no dispute regarding maintainability of second complaint as laid down in various pronouncements. Hon'ble Supreme Court in the case **of**

**Pramoth Nath Talukdar and another vs. Saroj Ranjan Sonkar; AIR 1962 SC 876** has laid down that:

"There is nothing in law which prohibits the entertainment of a second complaint on the same allegations when a previous complaint had been dismissed under section 203 of the Code of Criminal Procedure, 1973. As however, a rule of necessary caution and of proper exercise of the discretion given to a Magistrate under section 204(1) of the Code of Criminal Procedure,1973,exceptional circumstances must exist for the entertainment of the second complaint on the same allegations; in other words there must be good reasons, why the Magistrate thinks that there is no "sufficient ground for the proceeding" with the second complaint, when a previous complaint on the same allegations was dismissed under section 203 of the Code of Criminal Procedure,1973.

The question now is what should be those exceptional circumstances? In **Queen Empress vs. Dalgobind Das(1**)Maclean C.J. said "I only desire to add that No Presidency Magistrate ought, in my opinion to rehear a case previously dealt with a Magistrate of coordinate jurisdiction upon the same evidence only unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice". In the same decision the Apex Court has also laid down the test to determine the exceptional circumstances which are-(1)-manifest error(2)-manifest miscarriage of justice, and (3)- new facts which the complainant had no knowledge of or could not with reasonable diligence have brought forward in the previous proceedings.

The Hon'ble Apex Court has expressed its view in case of **Poonam Chand Jain and another vs.Farzru,2010(68)A.C.C.1004 S.C.** that if the second complaint is filed on the almost identical facts as raised in the first complaint. First complaint was dismissed on merits. Core of both the complaints was same .No case made out that despite due diligence, facts alleged in second complaint were not within application of first complaint .No exceptional circumstances explained in the terms of Pramath Nath's case. Second complaint can not be entertained.

**9. Whether the Court has to assign reasons in summoning order passed under section 204 of the Code or dismissal order passed under section 203 of the Code?**

It will be appropriate to mention s. 203 of the Code prior to proceed further-

Section 203 of the Code provides as under-

If after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) u/s 202, the magistrate is of the opinion that there is no sufficient ground for proceeding, **he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing.**

As per the provisions of s.203 of the Code if the Magistrate dismisses the complaint under this section, it is mandatory for the Magistrate to record his reasons for such dismissal of complaint u/s. 203 of the Code. The underlined part of the above mentioned section indicates this thing.

It will be appropriate to quote s. 204 of the Code also-

**204. Issue of process.-**

**(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be -**

**(a) a summons-case, he shall issue his summons for the attendance of the accused, or**

**(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.**

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

As per underlined part of above section it is not mandatory for the Magistrate to record reasons in detail at the time of issuing process against the accused persons. The Magistrate has to see whether there is sufficient ground for proceeding against the accused. If in the opinion of the Magistrate taking cognizance of an offence,there is sufficient ground for proceeding against the accused he shall issue the process. The relevant case laws on this topic are as under-

The Hon'ble Apex Court has held in case law **Bhushan Kumar vs. State (N.C.T. of Delhi), (2012)2 SCC(Cri.)872** that the expression "cognizance" in sections190 and 204 Cr.P.C. is entirely different thing from initiation of

Proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge .Cognizance is taken of the cases/offences and not of persons. Under section190 of the Code, it is the application of judicial mind to the averments in the complaint that constitute cognizance. At this stage, the Magistrate has to be satisfied whether there is sufficient ground for proceeding and not whether there is sufficient ground for conviction. Whether the evidence is adequate for supporting the conviction can be determined only at the trial not at the stage of inquiry. If there is sufficient ground for proceeding, the Magistrate is empowered for issuance of under section 204 of the Code.

Section 204 Cr.P.C. does not mandate the Magistrate to explicitly state the reasons for issuance of summons. Section 204 Cr.P.C. mandates the Magistrate to form an opinion as to whether there exists a sufficient ground for summons to be issued but it is nowhere mentioned in Section 204 that the explicit narration of the same is mandatory, meaning thereby that it is not a prerequisite for deciding the validity of the summons issued. Therefore, the order passed by the Magistrate cannot be faulted with only on the ground that the summoning order was not reasoned order.

The Hon'ble Allahabad High Court has expressed its view in judicial pronouncement **Uday Pal Singh vs. State of U.P. and another, ACC 2000(40) page 711** that under section 204 of the Code of Criminal Procedure, 1973 to issue process, recording of reasons is not necessary, but recording of reasons is necessary for dismissing the complaint under section 203 of the Code. The Hon'ble Allahabad High Court has held in case law **Anand Kumar Porwal vs. State of UP and another, 2011(1) ALJ (NOC) 117 Allahabad** that under section 204 of the Code of Criminal Procedure,1973 for summoning of accused reasoned order is not necessary.

- The Hon'ble Supreme Court has held in case of **Nupur Talwar vs. C.B.I. and another ,A.I.R., 2012 S.C.192**1 that if revision is filed against the order of issuing process against the accused, the Revisional Court can not go into the question ,whether reasons given by Magistrate were good or bad, sufficient or insufficient. It can only see whether there was material before Magistrate to take a view that there was sufficient ground for issuing process. Order issuing process under section 204 of the code need not be reasoned .Absence of reasons, therefore, does not vitiate order.

See the following case laws also-

1- **Ratan Singh vs. Kusum Singh, 1984 All Cr page 108**

2- **Shiv Shanker vs. State of UP, ACC1991 page33**

3- **AIR2000 SC pag1456**

4- **AIR, 2000 SCpage522**

**5- Raj Kumar Agrawal vs. State of U.P. and another, A.C.C.(38)1999 page 793 All.**

**10. Whether the complaint can be treated as a application u/s 156(3) Cr.P.C 1973?+**

The complaint regarding commission of a cognizable offence can be treated as an application moved u/s 156(3) of the Code. If the complaint about commission of a cognizable offence is instituted before a Magistrate or Court, as the case may be, the Magistrate or Court may send that complaint treating as an application u/s 156(3) of the Code to the concerned Police Station with the direction to lodge an F.I.R and investigate the case. But, the Magistrate or Court has this option before taking cognizance on complaint i.e. before registering the complaint under section 200 of the Code. But, where the Magistrate has taken cognizance and recorded the statement of thecomplainant under section 200 of the Code, he cannot direct the police to register the case upon such complaint.

The relevant case laws on this topic are as under-

The Hon'ble Supreme Court has held in the case law **Devarapalli Lakshminarayana Reddy v. Narayana Reddy, 1976 (13) ACC 230 (SC)** that "Section 156(3) occurs in Chapter XII, under the caption: "Information to the Police and their powers to investigate"; while s. 202 is in Chapter XV which bears the heading "Of complaints to Magistrates". The power to order police investigation under s. 156(3) is different from the power to direct investigation conferred by s. 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre cognizance stage, the second at the post-cognizance stage when the Magistrate is in seisin of the case. 'That is to say in the case of a complaint regarding the commission of a cognizable offence, the power under s. 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under s. 190(1)(a). But if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognizance stage and avail of s. 156(3). It may be noted further that an order made

under sub-section (3) of s. 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under s. 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under s. 156 and ends with a report or charge sheet under s. 173. On the other hand s.202 comes in at a stage when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under s. 202 to direct within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not here is sufficient ground for proceeding ". Thus the object of an investigation under s. 202 is not to initiate a fresh case on police report but to assist the Magistrate in completing proceedings already instituted upon a complaint before him."

The Hon'ble Supreme Court has held in case law **Madhu Bala vs. Suresh Kumar and others, 1997 Cr. L.J. page 3757 (S.C.)** that if a written complaint regarding commission of a cognizable offence is filed before a Magistrate, the Magistrate has power to direct the police to register the case. On the other hand, he may take cognizance upon the same under section 190(1) (a) of the Code of Criminal Procedure, 1973 and proceed with the same in accordance with the provisions of chapter xv of the Code. The Hon'ble Apex Court has, after discussing the provisions of sections 2(d),154,156(1) and(3),190(1) (a),190(1)(b) and 173(2) etc of the Code has also held that-

"From a combined reading of the above provisions it is abundantly clear that when a written complaint disclosing a cognizable offence is made before a Magistrate, he may take cognizance upon the same under Section 190(1)(a) of the Code and proceed with the same in accordance with the provisions of Chapter XV. The other option available to the Magistrate in such a case is to send the complaint to the appropriate Police Station under Section 156(3) for investigation. Once such a direction is given under sub section (3) of Section 156 the police is required to investigate into that complaint under sub-section (1) thereof and on completion of investigation to submit a police report in accordance with Section 173(2) on which a Magistrate may take cognizance under Section 190(1)(b) but not under 190(1)(a). Since a complaint filed before a Magistrate cannot be police report in view of the definition of complaint referred to earlier and since Section 156(1) has to culminate in a police report. The complaint - as soon as an order under Section 156 (3) is passed thereon - transforms itself to a report given in writing within the meaning of

Section 154 of the Code, which is known as the First information Report (F I R). As under Section 156 (1) the police can only investigate a cognizable case it has to formally register a case on that report."

The same view has been expressed by the Hon'ble Supreme Court in case law**(2) Suresh Chandra Jain vs. State of MP,2001(42) A.C.C.,459 S.C**.

To understand the legal position on this point, it will be appropriate quote the main part of the judgment with facts and finding here-

"A complaint was forwarded by a magistrate to the police for registering an FIR and for conducting investigation. One of the persons arrayed in the complaint as accused questioned the legality of the above order first in revision before the Sessions Court and then by invoking the inherent powers of the High Court. Both did not succeed. This appeal is by the same person contending that the order of the magistrate should have been upset in the interest of justice."

"The complaint was filed by the second respondent (Mahesh Patidar) before the Chief Judicial Magistrate, Neemuch (M.P.) on 12.8.1999 alleging that the appellant and his wife Geeta Devi have committed offence under Section 3 of the Prized Chits and Money Circulation Scheme (Prohibition) Act and under Section 420 of the Indian Penal Code. The Chief Judicial Magistrate passed an order on 18.8.1999 which is extracted below: The complaint submitted by the complainant has been perused. This complaint has been submitted by the complainant for initiating action against the accused under Section 3 of the Prizes, Chits and Money Circulation Scheme (Prohibition) Act and Section 420 of the IPC. Both the offences are serious, therefore, the case is required to be investigated by the police station Neemuch Cantt. under Section 156(3) Cr.P.C., therefore, the complaint submitted by the complainant be sent to the In-charge, Police Station Neemuch Cantt. with the direction to register F.I.R. and initiate investigation. The copy of the F.I.R. and initiate investigation. The copy of the F.I.R. be sent to this court immediately".

Appellant challenged the said order in a revision before the Sessions Court and when the revision was dismissed,he moved the High Court under Section 482 of the Code of Criminal Procedure (for short the Code). Learned Single Judge of the High Court of Madhya Pradesh took the view that in a private complaint case under Section 156(3) of the Code the magistrate is empowered to order investigation; the allegation made in the complaint needs to be investigated in public interest.

Shri R.K Jain, learned senior counsel contended first that a magistrate on receipt of a complaint should have examined the complainant on oath before proceeding to any other step. Learned senior counsel adopted the alternative contention that the

magistrate has no power to direct the police to register an FIR. In support of the said contention learned counsel cited two decisions. One is Ram Narain vs. Lokuram {1986(37) Rajasthan Law Weekly 143} and the other was rendered by the Punjab and Haryana High Court in Suresh Kumar vs. State of Haryana {1996 (3) Recent Criminal Reports 137}.

The former decision of the Rajasthan High Court need not vex our mind as the consideration focussed therein was on the scope of Section 202(1) of the Code and the learned Single Judge observed therein that a magistrate cannot make any order regarding police investigation without examining the complainant on oath. If the facts in that case remained one under Section 202(1) of the Code then the observation cannot be faulted with. That apart, as the point involved in this case is different we do not think it necessary to examine the said decision. But the other decision rendered by a Single Judge of the Punjab and Haryana High Court (Suresh Kumar vs. State of Haryana) has gone a step further as he held that the magistrate has no power within the contemplation of Section 156(3) of the Code to ask for registration of the case, but could only refer the complaint to the police for investigation at the pre-cognizance stage to make the enquiry in the matter enabling the magistrate to apply his mind with regard to the correctness of the complaint. In that decision learned Single Judge, at the end of the judgment, made a direction as follows: Before parting with the judgment, it is observed that often it is found that the Judicial Magistrates working under the control of this Court many a time upon the complaints preferred before them, allegedly showing that a cognizable offence has been committed by the accused, direct the police to register and conduct the investigation in such cases under Section 156(3) of the Cr.P.C. After the reports are received from the police the Magistrates deal with those cases as police challans and conduct the proceedings in the matters against the provisions of law as discussed above. Hence the Registry is directed to send a copy of this judgment to all the Judicial Magistrates in the States of Punjab, Haryana and Union Territory, Chandigarh, for information and guidance.

In our opinion, the aforesaid direction given by the learned Single Judge of the Punjab and Haryana High Court in Suresh Kumar vs. State of Haryana (supra) is contrary to law and cannot be approved. Chapter XII of the Code contains provisions relating to information to the police and their powers to investigate, whereas Chapter XV, which contains Section 202, deals with provisions relating to the steps which a magistrate has to adopt while and after taking cognizance of any offence on a complaint. Provisions of the above two chapters deal with two different facets altogether though there could be a common factor i.e. complaint

filed by a person. Section 156, falling within Chapter XII, deals with powers of the police officers to investigate cognizable offences. True, Section 202 which falls under Chapter XV, also refers to the power of a Magistrate to direct an investigation by a police officer. But the investigation envisaged in Section 202 is different from the investigation contemplated in Section 156 of the Code. Section 156 of the Code reads thus: 156. Police officers power to investigate cognizable cases.- (1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. (2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

The investigation referred to therein is the same investigation the various steps to be adopted for it have been elaborated in Chapter XII of the Code. Such investigation would start with making the entry in a book to be kept by the officer-in-charge of a police station, of the substance of the information relating to the commission of a cognizable offence. The investigation started thereafter can end up only with the report filed by the police as indicated in Section 173 of the Code. The investigation contemplated in that Chapter can be commenced by the police even without the order of a magistrate. But that does not mean that when a magistrate orders an investigation under Section 156(3) it would be a different kind of investigation. Such investigation must also end up only with the report contemplated in Section 173 of the Code. But the significant point to be noticed is, when a magistrate orders investigation under Chapter XII he does so before he takes cognizance of the offence.

But a magistrate need not order any such investigation if he proposes to take cognizance of the offence. Once he takes cognizance of the offence,he has to follow the procedure envisaged in Chapter XV of the Code. A reading of Section 202(1) of the Code would convince that the investigation referred to therein is of a limited nature. The magistrate can direct such an investigation to be made either by a police officer or by any other person. Such investigation is only for helping the magistrate to decide whether or not there is sufficient ground for him to proceed further. This can be discerned from the culminating words in Section 202(1) i.e. or direct an investigation to be made by a police officer or by such other persons as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding.

This is because he has already taken cognizance of the offence disclosed in the complaint, and the domain of the case would thereafter vest with him.

The position is thus clear. 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. For the purpose of enabling the police to start investigation it is open to the magistrate to direct the police to register an FIR. There is nothing illegal in doing so. After all registration of an FIR involves only the process of entering the substance of the information relating to the commission of the cognizable offence in a book kept by the officer-in- charge of the police station as indicated in Section 154 of the Code. Even if a magistrate does not say in so many words while directing investigation under Section 156(3) of the Code that an FIR should be registered, it is the duty of the officer-in-charge of the police station to register the FIR regarding the cognizable offence disclosed by the complaint because that police officer could take further steps contemplated in Chapter XII of the Code only thereafter.

Though the learned Single Judge of the Punjab and Haryana High Court **in Suresh Kumar vs. State of Haryana (supra) made reference to two decisions rendered by this Court [Gopal Das Sindhi and ors. vs. State of Assam and anr. (AIR 1961 SC 986) and Tula Ram and ors. vs. Kishore Singh (AIR 1977 SC 2401)]** learned Single Judge fell into error in formulating a legal position which is quite contrary to the dictum laid down by this Court in the afore-cited decisions. In Gopal Das Sindhi vs. State of Assam (supra) a three Judge Bench of this Court considered the validity of the course adopted by a judicial magistrate of the 1st class in ordering the police to register a case, investigate and if warranted, submit charge-sheet. Learned Judges repelled the contention that the magistrate ought to have examined the complainant on oath under Section 200 of the Code. Dealing with the said contention their Lordships stated thus: 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 S.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 S.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 offences 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.

In Tula Ram vs. Kishore Singh (supra) a two Judge Bench of this Court, after referring to the earlier decision, reiterated the same legal position. It is unfortunate that when this Court laid down the legal position so explicitly in the above two decisions which reached the notice of the learned Judge of the Punjab and Haryana High Court he had formulated a position contrary to it by stating that the Magistrate has no power within the contemplation of Section 156(3) of the Code, to ask for registration of the case. It appears that the judicial officers under Punjab and Haryana High Court who were, till then, following the correct position, were asked by the learned Judge to follow the erroneous position formulated by him in the aforesaid judgment.

In the present case the High Court of Madhya Pradesh had rightly upheld the course adopted by the magistrate. Hence we dismiss this appeal.

The Hon'ble Apex Court has expressed its view in the case of **Sriniwas Gundluri and others vs. M/S. SEPCO Electric power Construction Corporation and others,2010(70) A.C.C.825 S.C. that Cr.P.C- S.156 (3)-** Direction by magistrate to register F.I.R and investigate the case- validity-respondent S.E.P.C.O. filed criminal complaint against the appellants before C.J.M, Kobra- Magistrate allowed the application and forwarded original complaint along with annexures to concerned S.H.O directing him to register F.I.R, after due inquiry and to submit charge sheet after investigation- Magistrate perused the complaint without examining on merits and directed investigation u/s. 156 (3) Cr.P.C- he didn't examine the witness-Question of taking next step under section 202 did not arise- Bare reading of the complaint discloses cognizable offence- Magistrate instead of applying his mind may direct the police for investigation- cannot be construed that the magistrate has exceeded his power.

Cr.P.C- S.156 (3) 200 and 202- two chapters deal with different facts altogether.

The Hon'ble Supreme Court has recently held in para11 of the case **Anil Kumar and others vs. M.K. Aiyappa and another, Cr.L.J., 2014(Supreme Court) page 01** that a Special Judge is deemed to be a Magistrate under Section 5(4) of Prevention of the Corruption Act, 1988, therefore clothed with all the Magisterial powers provided under the Code of Criminal Procedure Code,1973. When a private complaint is filed before the Magistrate, he has two options. He may take cognizance of the offence under section 190 of the Code of Criminal Procedure, 1973 or proceed further in enquiry or trial. A Magistrate, who is otherwise

competent to take cognizance, without taking cognizance under Section 190, may direct an investigation under Section 156(3) Cr.P.C.1973.

The Magistrate, who is empowered under section 190 to take cognizance ,alone has power to refer a private complaint for police investigation under section 156(3) Cr.P.C.1973.But.if complaint of corruption is filed against public servant, direction to investigate under Section 156(3) of the Code cannot be issued in absence of sanction to prosecute as required under section197.

The Hon'ble Supreme Court has held in the case of **Madhao v. State of Maharashtra, 2013 (82) ACC 378 (SC**) that "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 Section 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)."

The Hon'ble Allahabad High Court has recently held in case law **Jagannath Verma vs. State of U.P.,2015 (88)A.C.C.1(Full Bench)ALL.** that when a written complaint disclosing commission of a cognizable offence is made before a Magistrate, Magistrate may take cognizance and proceed in accordance with the provisions of chapter xv, Cr.P.C.-Other option available to him to transmit the complaint to the police station concerned for investigation. Once the Magistrate has taken cognizance and adopted procedure under chapter xv, Cr.P.C.-Not open to him to go back to the pre -cognizance stage and avail section 156(3) Cr.P.C., 1973.

Hence, as per discussed facts and case Laws, it is clear that complaint of cognizable offence can be treated as an application under section 156(3) of the Code and direction can be given by the magistrate to register and investigate the case.

**(11)-Whether the revision against summoning order is maintainable?**

As per case **law Adalat Prasad vs. Roop lal Jindal and others, A.I.R.2004Supreme Court 4674** the accused has only remedy to move the High Court under section 482 of the Code against summoning order. Recalling of summoning order by the Magistrate is without jurisdiction. The Hon'ble Apex Court has overruled the case law K.M .Mathew vs. State of Kerala ,A.I.R.1992 S.C.2206 .

The Hon'ble Apex Court has held in case law **Subramaniam Sethuraman vs. State of Maharashtra, A.I.R.2004 S.C.4711** that it is not permissible for Magistrate to review or to reconsider his decision to issue process under section 204 of the Code of Criminal Procedure,1973 in absence of any specific provision. Once plea of accused is recorded under section 252 of the Code, it is not open to accused to seek recall of summons or to seek discharge. Only remedy available to aggrieved accused is by way of petition under section 482 of the Code.

In case law **Bholu Ram vs. State of Punjab and another,2009 (1)S.C.Cr.R.228 it has been held that** revision against summoning order is not maintainable .The accused has only remedy to move the High Court under section 482 of the Code against summoning order.

But, later on the Hon'ble Apex Court has held in case law **Dhariwal Tobacco Products Limited and others vs. State of Maharashtra, 2009(64) A.C.C.62 (S.C.)/A.I.R.2009S.C.1032** that issuance of summons is not an interlocutory order within the meaning of section 397 of the Code of Criminal Procedure,1973. Hence, revision against summoning order is maintainable . Application under section 482 and 377 of the Code, only because revision petition is maintainable, the same by itself is no bar for entertaining application under section 482 of the code. Under section 397(2) of the code-If, the first revision is dismissed by the Sessions Court, the second revision before the High Court is not maintainable. Inherent power of High Court under section 482 of the Code is available.

The Hon'ble Allahabad High Court has held in the case **of Shiv Prasad Shakyawar vs. State of U.P. and an other,2009(670 A.C.C.154 (All)**that summoning order is not an interlocutory order under section 397(2) of the Code .Hence, revision against summoning order is maintainable. The Hon'ble High Court has followed the decision of the Hon'ble Supreme Court ( Dhariwal Tobacco Products Limited case,2009(64)ACC962 SC (supra).

The Hon'ble Allahabad High Court has expressed its view in case law **Jai Narain and others vs. State of U.P. and another,2009(5)A.L.J.84 (All)** that issuing process for summoning of accused in complaint case is not an interlocutory order under section397(2) of the Code. Hence, revision against summoning order is maintainable.

The Hon'ble Allahabad High Court has held in case law **Ashok Kumar Bhadauriya vs. State of U.P. and another,2011(75)A.C.C.815 All** that the summoning order is not an interlocutory order within the meaning of sub-section(2)of section397 of the Code of Criminal Procedure,1973.Hence ,revision against summoning order is maintainable. The brief facts of this case are as under-

" Final report was submitted after investigation under sections 324and 504 of the Indian Penal Code,1860.Protest petition was filed against that Final Report by the informant. The learned Magistrate treated that protest petition as complaint and followed the procedure of complaint under chapter xv of the Code and summoned the appellant for the offence punishable under sections 324and 504 of the Indian Penal Code,1860.Appellant/accused filed revision against the summoning order in the Court of Session. The learned Sessions Judge dismissed the revision on the ground that the revision is not maintainable. The Hon'ble High Court set aside the order passed by the revisional Court and directed to decide the revision on merits."

The Apex Court has held again in the case of **Om Kumar Dhankar vs. State of Haryana ,2013 (77)A.C.C.243 (S.C**) that it would not be appropriate to hold that an order directing issuance of process is purely interlocutory order and ,therefore, the bar under sub section(2) of section 397 would apply ,on the other hand, it must be held to be intermediate or quasi- final and, therefore, the revisional jurisdiction under section 397 could be exercised against the same.

**In this case law the Hon'ble Apex Court has considered the following case laws-**

**1-Raj Kumar Sita Ram Pande and others vs Uttam and others, A.I.R.1999S.C.1028**

**2-MadhuLimaye vs, State of Maharashtra, A.I.R.1978 SC47**

**3-.V. C .Shukla vs . State, A.I.R.,1980 S.C. 962**

**4-Amar Nath vs. State of Haryana, A.I.R.1977 S.C.2185**

**5-K.M.Mathew vs .State of Kerala, A.I.R.1992 S.C.2206.**

As per above discussed facts and case laws, it is the established position of the law that the revision against summoning order is maintainable. On the other hand, the accused has also other remedy to move a petition under section 482 of the Code before the Hon'ble High Court.

**12-In which complaint cases process fee is payable?**

Section 204 (4) of the Code provides as under-

"When any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint."

At first we should know this thing that in which cases process fees or any other fees are payable.

**Rule 17 of the General Rules (Criminal), 1977** is relevant in this regard. Rule 17 states as under-

"Rule-17-Process Fee-The fees hereinafter mentioned shall be chargeable for serving and executing processes issued by criminal Courts in the case of offences other than offences for which police officers may arrest without a warrant."

(1)-Warrant of arrest Rs.10/=

(2)-Summons Rs.5/=

(3)-Proclamation for absconding person under section 82 of the Code

Rs.10/=

(4)-Warrant of attachment—

(a)-in respect of the warrant Rs.20/=

(b)-where it is necessary to place officer in charge of the property

Attached, in respect of each officer so employed, per diem Rs.10/=

(5)- In case where an application is made by a complainant for the recovery of compensation granted under section357 of the Code, or where a person applies for the recovery of compensation awarded to him under section 250 of the Code.

In respect of the warrant for the levy of the fees, fine or compensation.

Rs.10/=

Provided that no fee shall be chargeable for any process issued upon the complaint or application of any public officer as defined in Section 2 of the Code of Criminal Procedure, 1908 when acting as such public officer, or of any railway servant as defined in Section 3 of the Indian Railways Act,1890 ,when acting as such railway servant or an officer or servant of a local authority acting in that capacity.

Provided also that the Presiding Officer of the Court may remit in whole or in part a fee chargeable under this rule, whenever he is satisfied that the person applying for the issue of process has not the means of paying it."

As per this above mentioned rule process fees are chargeable for serving and executing processes id est (i.e.) summons or warrants etc .issued by the Criminal Courts in non cognizable offences. The police officer has no power to arrest in non cognizable offences. The police officer has power to arrest without warrant in cognizable offences or offences mentioned in section 41 of the Code or any other offences under other enactments which have been made cognizable by any other law for the time being in force.

**Hence , it is clear that process fees are payable in non cognizable offences for issuing summons or warrant as the case may may be. .Process fees are not chargeable for issuing process in cognizable offences.The court has to issue the process in the complaint case regarding cognizable offence.**

Sub-Section (5) of section 204 of the Code provides as under-

Nothing in this section shall be deemed to effect the provisions of section 87.

Section 87 of the Code deals with the powers of the Court to issue warrant in lieu of summons. When the Court issues warrant under section 87 of the Code, then no process fee is required.

Example-

If, the Magistrate passes an order to issue process under section 204 of the Code i.e. summoning order against the accuse persons to face the trial for the offence punishable under sections 452,325, 506 I.P.C.1860. In this complaint, the

complainant is not required to pay the process fees for issuing processes i.e. summons or warrant against the accused person. The complainant remains absent on every date and he has not paid any process fee, even then the complaint cannot be dismissed under sub-section (4) of Section 204 of the Code.

The Hon'ble Supreme Court has also held in the case law **Ranvir Singh vs. State of Haryana, (2009) 9 SCC 642** that if the complaint had been dismissed for failure of complainant to put in the process fees for effecting service and held that in such a fact and situation second complaint is maintainable.

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**(13)-Whether the application to discharge the accused can be moved under section 245(2) of the Code through counsel?**

When the case law of Hon'ble Apex Court **K.M. Mathew vs. State of Kerala,A.I.R.1992 S.C.** was in existence up to the year 2004,the Magistrate had a power to review, modify and set aside his own summoning order, if no prima facie offence was made out, then the application for discharge could be moved through counsel.

In the following case laws it has been held that an application to set aside summoning order or discharge the accused can be moved through counsel-

**(1)-Kailash Choudhary& others vs. State of U.P.,1993(30)ACC665 All** (Later on the first proposition of this case law was overruled by the decision **of Ranjit Singh vs. State of U.P., 2000 A.L.J.898 All(F.B.),**

**(2)-Smt.Amna vs. Smt.Tasleema, 1994(18)ALL.Cr,R.579(all).**

**(3)- Jaipal Singh vs. State of U.P.,2002(44)ACC597All.**

These three case laws cited above have now become infructuous in the changed legal scenario after promulgation of the case laws( **1)-Adalat Prasad vs. Roop Lal Jindal and another,AIR2004,and(2)-Subramaniam Sethuraman vs, State of Karnataka,AIR,2004SC4711(Three JudgeBench).**

The Hon'ble Apex Court has overruled this case law( K.M .Mathew vs. State of Kerala, A.I.R.1992) by Full Bench decision in the case of **Adalat Prasad vs. RoopLal Jindal and another,A.I.R.2004 S.C.4674 affirmed by later decision of Subramaniam Sethuraman vs. State of Karnatak,A.I.R.2004 S.C 4711(F.B**.) holding that that the there is no provision in the Code of Criminal

Procedure,1973 to review the summoning order by the Magistrate .Hence, the Magistrate has no power to set aside, review, or modify his own order

At present, application for discharge can not be moved through counsel. The Hon'ble Allahabad High Court has held in case law **Rajesh Chowdhary and others vs. State of U.P.,2012(77) A.C.C.37(All.)** that non bailable warrant was issued against the accused person. Accused did not appear before the trial court and he has filed a petition to quash the proceedings. The accused moved an application for discharge through counsel. Since, accused did not appear and non bailable warrant was issued. The magistrate rightly rejected that application. No good ground is made out to interfere in impugned order .Petition accordingly dismissed.

The Hon'ble Allahabad High Court has also held in case law **Dr. Gulazar vs. State of U.P. and others,2013(81) A.C.C.99 (All) that** Cr PC- S.245(2) and 482- IPC- SS.34, 379, 411, 417, 418, 420, 467, 468, 471 and 477- complaint- cognizance – summoning order. Stay order dismissed. Discharge application u/s. 245(2)- Informant filed objection on the ground that application entertained without surrendering of accused persons . Provisions discussed, presence of accused before the trial Court is mandatory. On their failure to appear, non bailable warrant issued. Interim bail to respondent No.2 under S.437 can be granted in exceptional circumstances – Application allowed.

The Hon'ble Allahabad High Court has expressed its view in case law **Bundu Khan and another vs. State of U.P., 2010 Cr.L.J.(N.O.C.)343 All**. that if the application for discharge is moved by the accused persons under section 245(2) of the Code through their counsel without putting in their appearance in Court. No plea that personal attendance of accused person was dispensed with. In absence of the personal appearance of accused, rejection of their application was proper.

As per above discussed facts and case laws ,at present, application for discharge the accused cannot be moved through counsel.

**(14)-When the Magistrate or Court, as the case may be, is deemed to have taken cognizance in the cases instituted on complaint?**

The word cognizance has nowhere been defined in the Code. The definition of cognizance has been derived from the case laws. According to the legal dictionary the meaning of cognizance is as under-

"The power, authority, and ability of a judge to determine a particular legal matter. A judge's decision to take note of or deal with a cause." In simple words, the

word cognizance can be defined as "cognizance means exercise of a judicial discretion to proceed with the case."

See the following case on this topic-

**(1)- Superintendent & Remembrancer of Legal Affairs vs. Abani Kumar Banerjee, AIR 1950 Calcutta 437**

**(2)- Narayandas Bhagwandas Madhavdas v. State of West Bengal, (1960) 1 SCR 93**

**(3)- Ajit Kumar Palit v. State of W.B. & Anr., (1963) Supp (1) SCR 953;**

**(4)-Hareram Satpathy v. Tikaram Agarwala & Anr., (1978) 4 SCC 58**

**(5)- Bhushan Kumar vs. State (N.C.T. of Delhi), (2012)2 SCC(Cri.)872**

Here, it will be appropriate to mention section 190 of the Code. Section 190 of the Code states as under-

**Section190. 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 constitutes 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

As per the language of section190(1)(a) of the Code quoted above, the cognizance maybe taken upon receiving a complaint of such facts which constitutes an offence .In other words, we can say that when a written complaint disclosing an offence is filed before a Magistrate or Court, as the case may be, under chapter XV of the code, as soon as the Magistrate registers that complaint for recording the statements of the complainant and the witnesses present, if any, under section 200 of the Code, the Magistrate is deemed to have taken cognizance.

The Hon'ble Supreme Court ha s held in case law **CREF Finance Ltd vs Shree Shanthi Homes Pvt. Ltd. & Anr, 2005 Cr.L.J.4525 SC** as under-

"In the instant case, the appellant had filed a detailed complaint before the Magistrate. The record shows that the Magistrate took cognizance and fixed the matter for recording of statement of the complainant on 01.06.2000. Even if we assume, though that is not the case, that the words "cognizance taken" were not to be found in the order recorded by him on that date, in our view that would make no difference. The cognizance is taken of the offence and not of the offender and, therefore, once the Court on perusal of the complaint is satisfied that the complaint discloses the commission of an offence and there is no reason to reject the complaint at that stage, and proceeds further in the matter, it must be held to have taken cognizance of the offence. One should not confuse taking of cognizance with issuance of process. 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 police for investigation under Section 156(3) of the Code of Criminal Procedure. We can conceive of many other situations in which a Magistrate may not take cognizance at all, for instance, a case where he finds that the complaint is not made by the person who in law can lodge the complaint, or that the complaint is not entertainable by that Court, or that cognizance of the offence alleged to have been committed cannot be taken without the sanction of the competent authority etc. etc. These are cases where the Magistrate will refuse to take cognizance and return the complaint to the complainant. But if he does not do so and proceeds to examine the complainant and such other evidence as the complainant may produce before him then, it should be held to have taken cognizance of the offence and proceeded with the inquiry. We are, therefore, of the opinion that in the facts and circumstances of this case, the High Court erred in holding that the Magistrate had not taken cognizance, and that being a condition precedent, issuance of process was illegal. Counsel for the respondents submitted that the cognizance even if taken was improperly taken

because the Magistrate had not applied his mind to the facts of the case. According to him, there was no case made out for issuance of process. He submitted that the debtor was the company itself and the respondent No.2 had issued the cheques on behalf of the Company. He had subsequently stopped payment of those cheques. He, therefore, submitted that the liability not being the personal liability of respondent No.2, he could not be prosecuted, and the Magistrate had erroneously issued process against him. We find no merit in the submission. At this stage, we do not wish to express any considered opinion on the argument advanced by him, but we are satisfied that so far as taking of cognizance is concerned, in the facts and circumstances of this case, it has been taken properly after application of mind. The Magistrate issued process only after considering the material placed before him. We, therefore, find that the judgment and order of the High Court is unsustainable and must be set aside. This appeal is accordingly allowed and the impugned judgment and order of the High Court is set aside. The trial court will now proceed with the complaint in accordance with law from the stage at which the respondents took the matter to the High Court. Since the matter is already considerably delayed, it must be disposed of with promptitude. Counsel for the parties are present in Court and in their presence, we direct the parties to appear before the trial court on 19.9.2005 on which date the Court will give further directions."

The important judgment of Hon'ble Supreme Court on this topic is

**S.K. Sinha, Chief Enforcement officer vs Videocon International Ltd. & Ors, 2008(61)ACC371SC**

**Since the Hon'ble Apex Court has discussed various case laws in this judgment, hence, it will be appropriate to reproduce the main part of the judgment here-**

"...12. 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. 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. Chapter XIV (Sections 190-199) of the Code deals with Conditions requisite for initiation of proceedings. Section 190 empowers a Magistrate to take cognizance of an offence in certain circumstances. Sub-section (1) thereof is material and may be quoted in extenso.

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.

13. Chapter XV (Sections 200-203) relates to Complaints to Magistrates and covers cases before actual commencement of proceedings in a Court or before a Magistrate. Section 200 of the Code requires a Magistrate taking cognizance of an offence to examine the complainant and his witnesses on oath. Section 202, however, enacts that a Magistrate is not bound to issue process against the accused as a matter of course. It enables him before the issue of process either to 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 for the purpose of deciding whether there is sufficient ground for proceeding further. The underlying object of the inquiry under Section 202 is to ascertain whether there is prima facie case against the accused. It thus allows a Magistrate to form an opinion whether the process should or should not be issued. The scope of inquiry under Section 202 is, no doubt, extremely limited. At that stage, what a Magistrate is called upon to see is whether there is sufficient ground for proceeding with the matter and not whether there is sufficient ground for conviction of the accused.

14. Then comes Chapter XVI (Commencement of proceedings before Magistrates). This Chapter will apply only after cognizance of an offence has been taken by a Magistrate under Chapter XIV. Section 204, where under process can be issued, is another material provision which reads as under:

204. Issue of process.- (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be

(a) a summons-case, he shall issue his summons for the attendance of the accused, or

(b) a warrant-case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub- section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub- section (1) shall be accompanied by a copy of such complaint.

(4) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of section 87.

15. From the above scheme of the Code, in our judgment, it is clear that Initiation of Proceedings, dealt with in Chapter XIV, is different from Commencement of Proceedings covered by Chapter XVI. For commencement of proceedings, there must be initiation of proceedings. In other words, initiation of proceedings must precede commencement of proceedings. Without initiation of proceedings under Chapter XIV, there cannot be commencement of proceedings before a Magistrate under Chapter XVI. The High Court, in our considered view, was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

16. Let us now consider the question in the light of judicial pronouncements on the point.

17. **In Superintendent & Remembrancer of Legal Affairs vs. Abani Kumar Banerjee, AIR 1950 Calcutta 437**, the High Court of Calcutta had an occasion to consider the ambit and scope of the phrase taking cognizance under Section 190 of the Code of Criminal Procedure, 1898 which was in pari materia to Section 190 of the present Code of 1973. Referring to various decisions, Das Gupta, J. (as His Lordship then was) stated:

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 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 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.

18**. R.R. Chari v. State of Uttar Pradesh, 1951 SCR 312** was probably the first leading decision of this Court on the point. There, the police, having suspected the appellant-accused to be guilty of offences punishable under Sections 161 and 165 of the Indian Penal Code (IPC) as also under the Prevention of Corruption Act, 1947, applied to the District Magistrate, Kanpur to issue warrant of arrest on October 22, 1947. Warrant was issued on the next day and the accused was arrested on October 27, 1947. On March 25, 1949, the accused was produced before the Magistrate to answer the charge-sheet submitted by the prosecution. According to the accused, on October 22, 1947, when warrant for his arrest was issued by the Magistrate, the Magistrate was said to have taken cognizance of offence and since no sanction of the Government had been obtained before that date, initiation of proceedings against him was unlawful. The question before the Court was as to when cognizance of the offence could be said to have been taken by the Magistrate under Section 190 of the Code. Considering the circumstances under which cognizance of offence under sub- section (1) of Section 190 of the Code can be taken by a Magistrate and referring to Abani Kumar Banerjee, the Court, speaking through Kania, C.J. stated:

It is clear from the wording of the section that the initiation of the proceedings against a person commences on the cognizance of the offence by the Magistrate under one of the three contingencies mentioned in the section. The first contingency evidently is in respect of non-cognizable offences as defined in the Criminal Procedure Code on the complaint of an aggrieved person. The second is on a police report, which evidently is the case of a cognizable offence when the police have completed their investigation and come to the Magistrate for the issue of a process. The third is when the Magistrate himself takes notice of an offence and issues the process. It is important to remember that in respect of any cognizable offence, the police, at the initial stage when they are investigating the matter, can arrest a person without obtaining an order from the Magistrate. Under section 167(b) of the Criminal Procedure Code the police have of course to put up the person so arrested before a Magistrate within 24 hours and obtain an order of remand to police custody

for the purpose of further investigation, if they so desire. But they have the power to arrest a person for the purpose of investigation without approaching the Magistrate first. Therefore in cases of cognizable offence before proceedings are initiated and while the matter is under investigation by the police the suspected person is liable to be arrested by the police without an order by the Magistrate.

19. Approving the observations of Das Gupta, J. in Abani Kumar Banerjee, this Court held that it was on March 25, 1949 when the Magistrate issued a notice under Section 190 of the Code against the accused that he took cognizance of the offence. Since before that day, sanction had been granted by the Government, the proceedings could not be said to have been initiated without authority of law.

20. Again **in Narayandas Bhagwandas Madhavdas v. State of West Bengal, (1960) 1 SCR 93**, this Court observed that when cognizance is taken of an offence depends upon the facts and circumstances of each case and it is impossible to attempt to define what is meant by taking cognizance. Issuance of a search warrant for the purpose of an investigation or a warrant of arrest of accused cannot by itself be regarded as an act of taking cognizance of an offence. It is only when a Magistrate applies his mind for proceeding under Section 200 and subsequent sections of Chapter XV or under Section 204 of Chapter XVI of the Code that it can be positively stated that he had applied his mind and thereby had taken cognizance of an offence [see **also Ajit Kumar Palit v. State of W.B. & Anr., (1963) Supp (1) SCR 953; Hareram Satpathy v. Tikaram Agarwala & Anr., (1978) 4 SCC 58].**

21. In Gopal Das Sindhi & Ors. v. State of Assam & Anr., AIR 1961 SC 986, referring to earlier judgments, this Court said: 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 offences 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.

22. In **Nirmaljit Singh Hoon v. State of West Bengal & Anr., (1973) 3 SCC 753,** the Court stated that it is well settled that before a Magistrate can be said to have

taken cognizance of an offence under Section 190(1) (a) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that section. Where, however, he applies his mind only for ordering an investigation under Section 156(3) or issues a warrant for arrest of accused, he cannot be said to have taken cognizance of the offence.

23. **In Darshan Singh Ram Kishan v. State of Maharashtra, (1972) 1 SCR 571,** speaking for the Court, Shelat, J. stated that under Section 190 of the Code, a Magistrate may take cognizance of an offence either (a) upon receiving a complaint, or (b) upon a police report, or (c) upon information received from a person other than a police officer or even upon his own information or suspicion that such an offence has been committed. As has often been said, taking cognizance does not involve any formal action or indeed action of any kind. It occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, thus, takes place at a point when a Magistrate first takes judicial notice of an offence.

24**. In Devarapalli Lakshminarayana Reddy & Ors. v. V. Narayana Reddy & Ors., (1976) 3 SCC 252**, this Court said:

It is well settled that 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. This is clear from the use of the words "may take cognizance" which in the context in which they occur cannot be equated with must take cognizance". The word "may" gives discretion to the Magistrate 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 Section 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, himself.

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 of the Code of 1973, he is said to have taken cognizance of the offence within the meaning of Section 190(1)(a). If, 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. [see also M.L. Sethi v. R.P. Kapur & Anr., (1967) 1 SCR 520].

25. In the case on hand, it is amply clear that cognizance of the offence was taken by the Chief Metropolitan Magistrate, Mumbai on May 24, 2002, i.e., the day on which the complaint was filed, the Magistrate, after hearing the counsel for the department, took cognizance of the offence and passed the following order: Mr. S.A.A. Naqvi, counsel for the department is present. Complainant is public servant. Cognizance is taken. Issue summons to accused under Section 18(2)(3) of FERA, 73 read with Central Notification and r/w Section 68(1) of the said Act and r/w 56 (1)(i) and r/w Section 49(3) (4) of FEMA, 1999. Summons returnable on 7.2.2003 at 3 p.m. (emphasis supplied)

26. Undoubtedly, the process was issued on February 3, 2003. In our judgment, however, it was in pursuance of the cognizance taken by the Court on May 24, 2002 that a subsequent action was taken under Section 204 under Chapter XVI. Taking cognizance of offence was entirely different from initiating proceedings; rather it was the condition precedent to the initiation of the proceedings. Order of issuance of process on February 3, 2003 by the Court was in pursuance of and consequent to taking cognizance of an offence on May 24, 2002. The High Court, in our view, therefore, was not right in equating taking cognizance with issuance of process and in holding that the complaint was barred by law and criminal proceedings were liable to be quashed. The order passed by the High Court, thus, deserves to be quashed and set aside.

27. It was also contended by the learned counsel for the appellant that the relevant date for considering the question of limitation is the date of filing of complaint and not taking cognizance or issuance of process by a Court of law. In this connection, our attention was invited by the counsel **to Bharat Damodar Kale & Anr. v. State of A.P., (2003) 8 SCC 559 and a recent decision of this Court in Japani Sahoo v. Chandra Sekhar Mohanty, (2007) 7 SCC**

394. In Japani Sahoo, one of us (C.K. Thakker, J.), after considering decisions of various High Courts as also Bharat Damodar Kale, stated:

52. The matter can be looked at from different angle also. Once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of litera legis. Connecting the provision of limitation in Section 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution.

28. The learned counsel for the respondent, on the other hand, tried to distinguish Bharat Damodar Kale and Japani Sahoo submitting that in both the decisions, this Court was called upon to consider, inter alia, Section 468 of the Code providing for limitation for taking cognizance of certain offences. According to the counsel, Section 468 of the Code starts with the expression Except as provided elsewhere in this Code. Section 49(3) of FEMA, on the other hand, starts with a non-obstante clause (Notwithstanding anything contained in any other law for the time being in force). It was, therefore, submitted that the ratio laid down in the above two cases would not be applicable to the instant case.

29. In our opinion, it would not be necessary for us to express any opinion one way or the other on the larger question. We have already held in the earlier part of the judgment that in the case on hand, cognizance of an offence had already been taken by the Chief Metropolitan Magistrate, Mumbai on May 24, 2002, well within the period prescribed by sub-section (3) of Section 49 of FEMA within two years of coming into force of the Act from June 1, 2000. We, therefore, express no opinion on the question raised by the learned counsel for the respondent.

30. As regards quashing of proceedings on merits, the learned counsel for the appellant is right in submitting that the High Court has not at all touched the merits

of the case and proceedings were not quashed on the ground that the provisions of FERA do not apply to the case before the Court. The High Court dealt with only one point as to whether the proceedings were liable to be quashed on the ground that they were time-barred and upholding the contention of the accused, passed the impugned order. As we are of the view that the High Court was not right in quashing the proceedings on the ground of limitation, the order deserves to be set aside by remitting the matter to the Chief Metropolitan Magistrate, Mumbai to be decided in accordance with law. We may, however, clarify that it is open to the respondents to take all contentions including the contention as to applicability or otherwise of FERA to the facts of the case. As and when such question will be raised, the Court will pass an appropriate order in accordance with law.

31. For the foregoing reasons, the appeal is allowed. The order passed by the High Court is set aside and it is held that cognizance of the offence had already been taken by the competent Criminal Court i.e. Chief Metropolitan Magistrate, Mumbai on May 24, 2002 and it could not be said that the proceedings were barred by Section 49(3) of FEMA. The Chief Metropolitan Magistrate will now proceed to consider the matter in accordance with law. All contentions of all parties are kept open except the one decided by us in this appeal. Since the matter is very old, the Court will give priority and will decide it as expeditiously as possible, preferably before June 30, 2008."

See the following cases also on this topic:-

1. **Mohd. Yousuf vs Smt. Afaq Jahan & Anr on 2 January, 2006( AIR,2006 SC)**
2. **Bhagat Ram vs.Surindar Kumar and others 2005(2)CCSC951(SC)**

Hence, as per provisions of section 190 (1) (a), (b) and (c) of the Code and the case laws discussed above it is abundantly clear that if a Magistrate after perusal of the facts/allegations mentioned in the complaint exercises his judicial discretion to proceed the complaint further and registers it under section 200 of the code for recording the statement of complainant, it shall be deemed that magistrate has taken cognizance. Taking cognizance is different from issuing process under section 204 of the Code.

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