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24/3/07

HIGH COURT OF SIKKIM
GANGTOK

Criminal Misc. Case No. 2 of 2006

1. Santosh Kumar Himatsingka,
Director, Lexicon Auto Ltd.,
C/O Himatsingka Auto Enterprise,
Parmeshwari Building,
Chatribari Road,
Guwahati.

2. Harish Himatsingka,
Director, Lexicon Auto Ltd.,
Residing at
40B, Princep Street,
Kolkata.

3. Mr. Manoj Dutta,
Sales Executive of Lexicon Auto Ltd.,
Matigara, Siliguri. ..... ***Petitioners.***

Versus

1. Snowlion Automobiles Ltd.,
5th Mile Tadong, East Sikkim
through Mahabir Pd. Agarwal,
Director

2. State of Sikkim ..... ***Respondents.***

Counsel for the Petitioners : Mr. R. K. Agarwal assisted by Mrs. Laxmi Chakraborty.

Counsel for the Respondent No.1 : Mr. N. K. P. Sarraf assisted by Ms. Ranjita Kumari, Ms.Saroj Singh and Ms. Sabita Chettri.

Counsel for the Respondent No.2 : Mr. J. B. Pradhan, Public Prosecutor.

Present : The Hon'ble Mr. Justice A. P. Subba, Judge.

Date of Order : 26th March, 2007

ORDER

This Criminal Misc. Case filed under Section 482 of the Code of Criminal Procedure, 1973 is directed against the order dated 21.04.2006 passed by the learned Chief Judicial Magistrate (East & North) at Gangtok in PC Case No.1 of 2006 taking cognizance of offences u/Ss. 447/420/506/352/34 of the Indian Penal Code and directing issue of process against the present Petitioners.

2. As per the facts set out in the Crl. Misc. Case, the Snowlion Automobiles Ltd. (Respondent No.1) through its Director, Mahabir Agarwal, filed a petition of complaint in the Court of the learned Chief Judicial Magistrate (East & North) at Gangtok (for short CJM) on 24.5.2005 against the Petitioners alleging, inter alia, that the Petitioner No.2 as Agent of Lexicon Auto Limited had entered into an agreement with the Snowlion Automobiles Ltd. (Respondent No.1), (a company registered under Sikkim Companies Act) through its Director, Mahabir Prasad Agarwal. Under this agreement, the Respondent No.1 which owned a Tata vehicles repairing center with parking space at 5th Mile, Tadong, agreed to provide space at their repairing center for parking the new Tata vehicles of the Petitioners. The safety and security of the vehicles so parked in the said premises was to be the responsibility of the Respondent No.1. In addition, the Respondent No.1 had also undertaken the job of conducting regular check-up and cleaning of the vehicles parked in the premises. For the services so rendered and the parking facility so provided

under the agreement, a consideration amount of Rs.50, 000.00 per month was fixed. Pursuant to the agreement, the Petitioners started parking their new Tata vehicles in the space provided by the Respondent No.1 from the month of August, 2003 and the Respondent No. 1 started rendering necessary services in terms of the agreement for which he had to provide four security staff in addition to service staff for ensuring security besides cleaning of the vehicles regularly. However, on 24.5.2004, at about 3.00 p.m. one Manoj Dutta, (Petitioner No.3) Sales Executive of Lexicon Auto Ltd. accompanied by two other persons whom he introduced as officials of the Motor Vehicles Department, came to the premises and told the staff of the Respondent No.1 that they had come there to remove the new Tata vehicles parked in the Respondent No.1's premises. Since Mr. Mahabir Agarwal, the Director of the Company was out of station on the relevant day, Mr. Biswanath Das, Manager of the Snowlion Automobiles Ltd., contacted him over phone and when he informed him of the purpose and visit of the Petitioners to the premises, the said Mahabir Agarwal instructed the Manager not to permit the Petitioners to take away the vehicles unless the dues amounting to Rs.4 lakhs being the rent payable up to the month of May, 2004 had been cleared. However, in the meantime, several anti social elements were called to the premises by the said Manoj Dutta and with their help they forcibly removed all the vehicles from the premises under threats that any one who dared to resist them will meet with dire consequences and in the process some of these anti social elements also manhandled, pushed and slapped Mr. Biswanath Das.

It was also stated in the complaint, that an FIR was lodged at Sadar Police Station regarding the incident on 9.6.2004 but no action was taken in the matter, and as such, the complaint was being filed.

3. When the above petition of complaint was filed by the Respondent No.1 on 24.05.2005, the Chief Judicial Magistrate (East and North) at Gangtok endorsed the same to O/C Sadar Police Station, Gangtok for enquiry and report. On 21.1.2006, S.I. Kalpana Dong, Sadar Police Station to whom the complaint was endorsed for investigation, submitted the report to the learned Chief Judicial Magistrate (East and North) at Gangtok. The report was placed before the learned Chief Judicial Magistrate (E&N) on 3.2.2006. Since the matter was adjourned on the request of the complainant on that day, no order either accepting or rejecting the report was passed. On the adjourned date, i.e., on 21.4.2006, the learned Chief Judicial Magistrate examined the complainant (Respondent No.1) on oath and on such examination and after perusal of the documents along with the complaint found sufficient material to proceed further and accordingly took cognizance of the offence and ordered issue of summons against the Petitioners fixing 29.5.2006 for appearance of the Petitioners. It is against this order taking cognizance of the offence and directing issue of process against the Petitioners in the manner stated above that the present Revision Petition has been directed.

5. ***4.*** Mr. R. K. Agarwal, learned Counsel assisted by Mrs. Laxmi Chakraborty, learned Counsel appearing on behalf of the Petitioners, Mr. N. K. P. Sarraf, learned Counsel assisted by Ms. Saroj Singh, learned Counsel appearing on behalf of Respondent No.1 and Mr. J. B. Pradhan,

learned Public Prosecutor appearing on behalf of the State – Respondent No.2 were heard.

5. Mr. R. K. Agarwal, the learned Counsel for the Petitioners submitted that the learned Chief Judicial Magistrate failed to follow the relevant procedure laid down in the Cr.P.C. for taking cognizance of an offence, and such irregularity committed by the learned Court vitiated the proceedings. Additionally it was also submitted by him that the dispute between the parties was civil in nature in so far as there was no mens rea on the part of the Petitioners in the commission of the alleged wrong, that the evidence relied on by the learned CJM for coming to the conclusion that there was prima facie case was purely hearsay in nature, that there was undue delay in lodging the FIR and that there was delay also in filing the petition of complaint. Mr. N. K. P. Sarraf, learned Counsel for the Respondent No.1 submitted that no irregularity was committed by the learned CJM in so far as it was permissible to examine the complainant and proceed further on receipt of the police report submitted by the police. Supporting the submission made by Mr. N. K. P. Sarraf, Mr. J. B. Pradhan, learned Public Prosecutor appearing on behalf of the State – Respondent No.2 submitted that even if any irregularity was committed in sending the complaint to the police without examining the complainant at the first instance, the irregularity must be taken to have been rectified on examination of the complainant after the receipt of the police report.

6. As it can be noticed from the submissions noted above, the first and the main ground urged by the learned Counsel for the Petitioners relates to the procedural irregularity allegedly committed by the learned

Chief Judicial Magistrate while taking cognizance of the offence u/S. 200 r/w Sec. 190 Cr.P.C. and other related provisions. In order to appreciate this contention raised by the learned Counsel, it would be necessary to notice the different steps taken by the learned Magistrate on and after receiving the petition of complaint and till the passing of the impugned order directing issue of process.

7. As already narrated above, the petition of complaint was filed by the complainant before the learned Chief Judicial Magistrate (E&N) at Gangtok on 24.05.2005. The endorsement made by the learned CJM on the body of the petition on that date shows that the petition of complaint was referred to O.C. Sadar P.S. for enquiry and report. The endorsement reads as follows :-

> **"To**
> **O/C Sadar P.S. for enquiry and report".**

The report in respect of the investigation carried out by the police pursuant to the above order was filed before the Ld. CJM on 3.2.2006. The order passed by the learned Court on the file on that date, reads as follows: -

> **"1. 3/2/06 Case file put up before me today.**
>
> **Complainant Mahabir Prasad Agarwal present in person.**
>
> **Also seen the report submitted by S.I. Kalpana Dong of Sadar P.S.**
>
> **Complainant verbally submitted that his Counsel Shri A. K. Upadhaya is busy in connection with other cases**
> **and prays time till 21.04.06.**
> **Considered, time allowed.**
> **To : 21.04.06.**
> **For : Exm. Of Complainant.**
>
> **Sd/-**
> **(Mrs. Lakchung Sherpa)**
> **Chief Judicial Magistrate**
> **East & North."**

The next order passed on the adjourned date, i.e., 21.04.2006 which has been impugned herein is as follows: -

> **"2. 21/4/06 Complainant present with Ld. Counsel Shri Sudesh Joshi.**
>
> **Register the same as Private Complaint.**
>
> **Complainant Shri Mahabir Prasad Agarwal examined.**
>
> **On examination of complainant on Oath and on perusal of the documents alongwith the complaint I find there are sufficient prima facie materials to proceed against the Opposite party Mr. Santosh Mr. Himmatsinghka, Mr. Harish Himmatsinghka and Mr. Manoj Dutta, U/S 447/420/506/352/34 of IPC.**
>
> **Cognizance taken.**
>
> **Issue summons to the Opposite party for appearance on**
> **To : - 29/5/06**
>
> **Sd/-**
> **(Mrs. Lakchung Sherpa)**
> **Chief Judicial Magistrate, East & North, Gangtok."**

8. A reading of the above orders passed by the learned Chief Judicial Magistrate (E&N) at Gangtok after the petition of complaint was filed before her, makes it amply clear that when the petition of complaint was filed before her, she forwarded the same to the police for investigation without examining the complaint u/S. 200 Cr.P.C. The report submitted by the police after conducting investigation pursuant to the direction given by her was perused by her when it was placed before her on 03.02.2006. On that date the complainant was not examined, as the matter was adjourned to another date on the request of the learned Counsel for the complainant. On the adjourned date, i.e., on 21.04.2006 the learned Court examined the complainant on oath and on perusal of the documents along with the petition of complaint, came to find sufficient

prima facie material to proceed further against the opposite party and accordingly took cognizance of the offence and directed issue of summons to the opposite parties for appearance.

9. The relevant fact to be noted from the above is that the learned CJM initially adopted the procedure prescribed under Chapter XII of the code by referring the petition of complaint to the police for enquiry and report U/S.156 (3) Cr.P.C. without examining the complainant when it was filed on 24.05.2005, but subsequently switched back to the procedure prescribed for an enquiry by Magistrate under Sections 200 to 203 Cr.P.C. under Chapter XV of the Code. Based on these facts, the specific submission of Mr. Agarwal, the learned Counsel is that in the circumstances the learned CJM must be taken to have sent the petition of complaint to the police for investigation in exercise of powers vested in the Court u/S. 156(3) of the Cr.P.C. without taking cognizance and the investigation so conducted by the police, must have resulted in a charge sheet or final report, to be submitted under Sec. 173 unlike in an enquiry conducted under the orders of Magistrate u/S. 202 of the Cr.P.C. Consequently, the examination of the complainant done by the Court u/S. 200 Cr.P.C. after the receipt of the police report submitted pursuant to the order of the Court passed by it under Sec. 156(3) is contrary to the procedure contemplated under the Code, and, as such, the impugned order passed without complying with the relevant provisions of law suffers from a serious illegality and thus the same is liable to be quashed.

10. It may be observed at the outset, that the above submission of the learned Counsel for the Petitioners is not without substance and cannot be lightly brushed aside. In order to ascertain the correct position

in the matter, a reference to the relevant provisions of law referred to by the learned Counsel is unavoidable. The Sections of law cited by the learned Counsel in support of his submission are, Sections 156, 200, 202 and 203. While Sec. 156 falls under Chapter XII relating to 'information to the police and their powers to investigate' Sections 200, 202 and 203 fall under Chapter XV relating to 'complaint to Magistrates'.

In order to facilitate convenience of reference the above Sections of law are reproduced below :-

> **"*156. Police officer's 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 the section to investigate**
>
> **(3) Any Magistrate empowered under Section 190 may order such an investigation as above-mentioned.**
>
> ***200. Examination of complainant.* – A Magistrate taking cognizance of an offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate :**
>
> **Provided that, when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses –**
>
> **(a) if a public servant acting or purporting to Act in the discharge of his official duties or a Court has made the complaint ; or**
>
> **(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under Section 192 :**
>
> **Provided further that if the Magistrate makes over the case to another Magistrate under Section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them.**
>
> ***202. Postponement of issue of process.* – (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized 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 other 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 Sessions; 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 under Section 200.

(2) In an inquiry 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 Sessions, he shall call upon the complainant to produce all his witnesses and examine them on oath.

(4) 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 this Code on an officer in-charge of a police station except the power to arrest without warrant.

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) under Section 202, the Magistrate is of 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".

11. The above provisions have come up for consideration of different High Courts and the Apex Court in a number of decisions. To mention only a few, we may refer to the following decisions.

In ***Jamuna Singh & Others versus Bhadai Shah*** reported in ***AIR (1964) SC 1541 (V 51 C 200)*** the Apex Court referring to the two earlier decisions rendered in ***R. R. Chari v. State of U.P., 1951 SCR 312: (AIR 1951 SC 207)*** and again in ***Gopal Das v. State of Assam, AIR 1961 SC 986*** observed as follows :-

"(8). .....It is well settled now that when on a petition of complaint being filed before him a Magistrate applies his mind for proceeding under the various provisions of Chapter XVI of the Code of Criminal Procedure, he

> **must be held to have taken cognizance of the offences mentioned in the complaint. When however he applies his mind not for such purpose but for purposes of ordering investigation u/S 156 (3) or issues a search warrant for the purpose of investigation he cannot be said to have taken cognizance of any offence."**

Relying on the above decision of the Hon'ble Supreme Court, the then Mysore High Court in ***K. V. Subbaiah vs. State of Mysore & Another*** reported in ***AIR (1969) Mysore 184 (V 56 C 37)*** at paragraph 6 held as follows :-

> **"6. .....The examination of the complainant contemplated by Section 200, is by a Magistrate taking cognizance of an offence on complaint. The effect of these provisions is, that if there is an examination of the complainant by the Magistrate taking cognizance and thereafter an enquiry or investigation is directed to be made by a police officer, then, the report submitted by the Police Officer consequent on such enquiry or investigation, will be a report which will fall under Section 202 and Section 203 of the Cr. P. C. But, if the report is called for by the Magistrate without his having cognizance of the offence complained of on examining the complainant on oath, then, the report submitted by the police consequent upon an enquiry directed by the Magistrate will be one which will fall within Section 156(3) of the Cr.P.C.". *(emphasis added).***

The Apex Court in ***Devarapalli Lakshminarayana Reddy and others v. V. Narayana Reddy and others*** reported in ***AIR (1976) SC 1672*** duly noticing the decision rendered in ***Jamuna Singh's*** case (supra) held as follows :-

> **"2. .....The power to order police investigation under Section 156 (3) is different from the power to direct investigation conferred by Sec. 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 Section 156 (3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 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 Section 156 (3) .....". *(emphasis added).***

Elaborating the point further, the Apex Court observed as follows :-

> **".....Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with a report or charge sheet under Section 173. On the other hand, Section 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 Section 202 to direct, within the limits circumscribed by that section, an investigation "for the purpose of deciding whether or not there is sufficient ground for proceeding." Thus the object of an investigation under Section 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." *(emphasis added).***

12. It is thus evident that when a petition of complaint is filed before a Magistrate, such Magistrate can either order an investigation by the police under Section 156(3) or conduct the enquiry himself by examining the complainant. If he makes up his mind to refer the petition of complaint to the police for investigation he will not be required to examine the complainant and if he desires to conduct the enquiry himself, he will be required to examine the complainant and the witnesses present, if any. It is obvious that the difference in the two courses open to the Magistrate under the Code, lies in the fact that if a complaint is forwarded to the police u/S. 156 (3), no cognizance is taken and if the Magistrate conducts the enquiry himself, and proceeds with the examination of the complainant and his witnesses, if any, he takes due cognizance of the offence. Of course in cases where cognizance is taken by the Court by examining the complainant, it remains open to such Court, if it is unable to come to any conclusion as to the sufficiency of ground for proceeding further, to direct an investigation to be made by a police officer or by such other person as the Court thinks fit. It must however be borne in mind, that the enquiry or the investigation to be conducted by the police on the orders of the Magistrate in such a case is totally different in its ambit and

scope from the investigation conducted under Chapter XII after the complaint is endorsed to the police u/S. 156(3), i.e., without examining the complainant. An investigation conducted by the police on a complaint on the orders of Magistrate under Chapter XII invariably results either on a charge sheet or final report as contemplated u/S 173 Cr.P.C. on receipt of which the Court can take cognizance, whereas the complainant having already been examined and cognizance having already been taken, the report to be submitted by the police under Chapter XV can be used only for the limited purpose of coming to the conclusion, as to whether there are sufficient materials to proceed further or not. It is this distinction which determines the procedure to be followed at the trial. While the procedure laid down in Chapter XIX-A applies to cases instituted on a police report, the procedure laid down in Chapter XIX-B applies to cases instituted otherwise than on police report.

13. It thus becomes clear that when the Magistrate applies his mind to the complaint filed before him with a view to proceeding under Section 200 and the succeeding sections under Chapter XV by duly examining the complainant, he should be held to have taken cognizance of the offence within the meaning of Section 200 r/w Sec. 190(1)(a) and the enquiry so conducted by him falls under the provisions of Chapter XV. On the other hand, if the Magistrate takes action of some other kind, such as ordering investigation by the police under Section 156 (3) without examining the complainant, he cannot be held to have taken cognizance of the offence. Further, while the investigation conducted under Chapter XV after the examination of the complainant is of limited scope, the

investigation to be conducted by the police u/S. 156 (3) embraces the entire continuous process beginning from the collection of evidence to submission of report or charge sheet u/S. 173.

14. Thus, keeping in view the difference in the ambit and scope of investigation conducted by the police on the orders of the Court u/S.156 (3) and the enquiry/investigation falling under Chapter XV, we may now proceed to consider as to whether the course adopted by the learned Chief Judicial Magistrate in the case on hand while dealing with the matter and passing the impugned order is in consonance with the relevant provisions under the Code. On the basis of the foregoing discussion, it can safely be said that the different steps taken by the learned Chief Judicial Magistrate do not, strictly speaking, conform to relevant procedure laid down under the provisions contained in the Code. It is clear that the option exercised by the learned Chief Judicial Magistrate on receipt of the petition of complaint, namely, to refer the matter to the police for enquiry and report, shows that the Court required the police to investigate the matter in exercise of the statutory duty vested on them u/S. 154 and 156 of the Code of Criminal Procedure. As observed by the Apex Court in the case cited above, such investigation to be conducted by the police embraces the entire continuous process of collection of evidence u/S. 156 and ends with a report or charge sheet u/S. 173. The order dated 03.02.2006 passed by the learned Magistrate, shows that a report was submitted by the police on that date. However, whether that report was considered for any purpose is not clear from the impugned order passed on 21.04.2006. Even though the police report was placed on record, it finds no mention in

it. A reading of this order would make it clear that the materials that were taken for consideration were only the complaint and documents filed along with it and it is only on the basis of these materials that the Court found prima facie material and took cognizance.

15. We have already noted above, that when the Court refers the petition of complaint to the police for investigation u/S. 156 (3) Cr.P.C., without taking cognizance, the police would be under a statutory duty to carry on the investigation and complete the same as per the provisions contained in Chapter XII. It however appears that the learned Chief Judicial Magistrate instead of allowing the investigation being conducted by the police to come to any logical end, treated the same as a report submitted under Chapter XV, even though the report submitted under Chapter XV stands on a different footing from the report submitted under Chapter XII. Such an approach of adopting one procedure initially and then switching over to the next one and passing a hybrid composite order is contrary to the procedure laid down in the Code. This view finds support from the observation made by the Hon'ble Supreme Court in paragraph 18 of ***Devarapalli Lakshminarayana Reddy's*** case ***(supra)***, wherein it has been laid down that where the Magistrate does not examine the witness or his witnesses u/S. 200 Cr. P. C. so as to bring into motion the machinery of Chapter XV, which is the first step in the procedure prescribed under that Chapter, the question of taking the next step of that procedure envisaged in Section 202 does not arise.

16. Having thus noticed the illegality that crept into the proceedings on account of the failure on the part of the learned Chief

Judicial Magistrate to keep in mind the difference between police enquiry report envisaged u/S. 202 and the police investigation envisaged u/S.156 (3), and to follow the prescribed procedure, we may now proceed to see what course the learned Court ought to have adopted in the circumstances of the case. It has been clearly mentioned in the petition of complaint in paragraph 8 that the complainant had lodged an FIR at the Sadar Police Station on 9.6.2004, but no action had been taken on the said FIR till the time of its filing. Even in the evidence of the complainant recorded by the learned Magistrate, the complainant has clearly stated that a complaint had been lodged by him with the Sadar P.S. on 9.6.2004, but since no action was taken, he was obliged to file the complaint. Apart from this, even the investigation report submitted by the police related to an ongoing investigation under Chapter XII. All these materials on record go to show that a police investigation was in progress in respect of the same offence and in respect of the same accused when the enquiry u/S. 202 was being conducted, but unfortunately, the learned Chief Judicial Magistrate failed to take note of the ongoing investigation and proceeded to pass the impugned order in the manner already indicated hereinabove.

17. Section 210 Cr.P.C. introduced for the first time in the Code of 1973 which lays down a procedure to meet a situation where police is still investigating the offence when a complaint is filed in the Court relating to the same facts provides as follows :-

> **"*210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence*. – (1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject matter of the inquiry or trial held by him, the Magistrate shall stay the proceedings of**

> **such inquiry or trial and call for a report on the matter from the Police Officer conducting the investigation.**
>
> **(2) If a report is made by the investigating Police Officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.**
>
> **(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."**

18. The above Section clearly lays down the procedure to be followed by Court when a complaint case and a police case are proceeding side by side. While laying down guidelines for dealing with such a situation, the Orissa High Court in ***Jagannath Das and others v. State and another*** reported in (***1992) Crl.L.J. 2204*** observed as follows :-

> **"5. When a complaint case is registered on the basis of a complaint made by the complainant and the magistrate in course of enquiry or trial into the said complaint comes to know that an investigation by the police is in progress in relation to the self-same offence, then he shall stay the proceeding before him on the basis of the complaint and shall call for a report on the matter from the police officer conducting investigation. ....." (*emphasis added*).**

Indicating the correct procedure to be followed by a Court of Magistrate, the learned Single Bench of the Gujarat High Court in ***Shantibhai Somabhai Raval v. Madhukani T. Shukla and another*** reported in ***(1983) Crl.L.J. 62*** made similar observation as follows :-

> **"3. Where the Contents of the complaint showed that complainant had already given the complaint to the police and it was under investigation, issue of process on the strength of complaint was illegal. In such a case, the Magistrate should have followed the procedure prescribed under S. 210."**
>
> **4. .....if it is made to appear to the Magistrate during the course of inquiry or trial held by him, that an investigation by police is in progress, then he has to stay the matter and call for the report of the police and if the report is made by the investigation officer, then the Magistrate has to inquire into and try together the complaint case and case**

> **arising out of the police report as if both the cases were instituted on a police report.** ***(emphasis added).***

The above provisions also came up for consideration before the Hon'ble Supreme Court in the recent case of ***Sankaran Moitra v. Sadhna Das,*** reported in ***(2006) 4 SCC 584.*** Interpreting the above provision, it was observed by the Apex Court as follows :-

> **"76 A bare reading of the above provision makes it clear that during an inquiry or trial relating to a complaint case, if it is brought to the notice of the Magistrate that an investigation by the police is in progress in respect of the same offence, he shall stay the proceedings of the complaint case and call for the record of the police officer conducting the investigation."**
> ***(emphasis added).***

Highlighting the object of enacting Sec. 210 of the Code, the Court further observed as follows :-

> **"77. The object of enacting Section 210 of the Code is threefold:**
>
> **(i) it is intended to ensure that private complaints do not interfere with the course of justice;**
>
> **(ii) it prevents harassment to the accused twice; and**
>
> **(iii) it obviates anomalies which might arise from taking cognizance of the same offence more than once."**

Further, highlighting the conditions required for invoking Sec. 210, it was observed in paragraph 79 as follows :-

> **"79. It is thus clear that before Section 210 can be invoked, the following conditions must be satisfied.**
>
> ***(i)*** **there must be a complaint pending for inquiry or trial;**
> ***(ii)*** **investigation by the police must be in progress in relation to the same offence;**
> ***(iii)*** **a report must have been made by the police officer under Section 173; and**
> ***(iv)*** **the Magistrate must have taken cognizance of an offence against a person who is accused in the complaint case."**

19. When the case on hand is viewed in the light of the above guidelines, it becomes obvious that all the conditions mentioned above exist in the case. It thus follows that the learned Court ought to have

followed the procedure laid down in the above Section, i.e., Section 210, which has been held to be mandatory. Since a mandatory provision of law has been overlooked while passing the impugned order, there is no option, but to set aside the same and remand the matter back with direction to follow the procedure laid down in the above Section of law. Thus, in view of the order, I propose to pass, I do not consider it necessary to deal with the rest of the submissions made by the parties. It is needless to observe that it shall be open to the Petitioners to raise these points in the proceedings to be held in pursuance of the remand order, if so advised.

In the result, the impugned order is hereby set aside. The learned trial Court shall stay the proceedings of the complaint case and call for further report from the police officer conducting the investigation. When such report is received and cognizance is taken, the Court shall enquire into and try together the complaint case and the case arising out of the police report, as if both the cases were instituted on a police report in accordance with the provisions of Section 210 of the Code.

Records of the trial Court be returned forthwith.

(A. P. Subba)
Judge