

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 1737/2011**

% **Reserved on: 24th July, 2012**
Date of Decision: 3rd August, 2012

**HINDUSTAN DOMESTIC OIL & GAS CO. (BOMBAY)
LIMITED & ORS.**

....Petitioners

Through Mr. Lokesh Kumar and Harish Nigam
Advocates.

Versus

STATE & ANR.

...Respondents

Through Mr. Pawan Sharma, Standing Counsel.
Mr. H.M. Singh for Respondent No.2

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE S. P. GARG

SANJIV KHANNA, J.

This matter has been listed before us in view of the order dated 19th March, 2012. In the said order, conflicting decisions of two single Judges of this Court, being Crl. M.C. 2626/2009 *Prakash Devi & Ors. vs. State of Delhi & Anr.*, decided on 5th February, 2010 and Crl. Revision Petition No. 523/2009 *Yashpal Kumar vs. Bhola Nath Khanna & Anr.*, decided on 1st March, 2012, have been noticed.

2. At this stage, we record that by order dated 19th March, 2012, Crl.M.C. 1737/2011 has been disposed of and therefore, we need not refer to the factual matrix. We are only required to adjudicate and decide, in view of the conflicting decisions, the following question of law:-

“Whether and in what cases the Sessions Court or the High Court while deciding a revision petition under Section

397/401 of the Code of Criminal Procedure 1973, is required and mandated by law to issue notice to the opposite side who has not been summoned to stand trial?”

3. The said question arises in “private complaints” or when the complainant is required to lead pre-summoning evidence. Orders passed by the Metropolitan Magistrates can be made subject matter of challenge in Revision Petitions before the Sessions Court or the High Court. The Code of Criminal Procedure, 1973 (‘CrPC’, for short) does not mandate or postulate hearing of the opposite party before he is summoned to appear. The contention is that when the opposite party has no right of hearing before the Metropolitan Magistrate, they are not required to be issued notice or heard when a revision petition is decided. The revision petition is nothing but a continuation of the original proceedings. The sequitor is that the opposite party who is yet to be summoned cannot and does not have any right to be heard in the revision. Learned counsel for the respondent in this regard, has referred to proviso to Section 398 of the CrPC. and drawn our attention to the decisions of this Court in *J.K. International vs. State* 96 (2002) DLT 795, *Crl.Rev. Pet. 16/2008* titled *Tata Motors Ltd. vs. State* decided on 12th February, 2009 and *Crl. Rev. Pet. 668/2003* titled *Rajesh Garg vs. Tata Tea Ltd. & Anr.*, decided on 18th February, 2011.

4. To appreciate the contentions, we deem it appropriate to reproduce Sections 190, 200, 202, 203, 204, 397, 398, 399 and 401 as under:-

“190. Cognizance of offences by Magistrates.-

(1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class

especially empowered in this behalf under sub-section (2), may take cognizance of any offence -

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a police report of such facts;

(c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

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

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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 complainant; 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.

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

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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.

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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.

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397. Calling for records to exercise powers of revision.-

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.- All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

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398. Power to order inquiry.—

On examining any record under Section 397 or otherwise, the High Court or the Sessions Judge may direct the Chief Judicial Magistrate by himself or by any of the Magistrates subordinate to him to make, and the Chief Judicial Magistrate may himself make or direct any subordinate Magistrate to make, further inquiry into any complaint which has been dismissed under Section 203 or sub-section (4) of Section 204, or into the case of any person accused of an offence who has been discharged:

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

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399. Sessions Judges powers of revision.-

(1) In the case of any proceeding the record of which has been called for by himself, the Sessions Judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be constructed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

401. High Courts powers of revision.-

(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defense.

(3) Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly.”

5. Section 190 Cr.P.C. states that the Magistrate can take cognizance of an offence upon receiving a complaint, police report or upon information received from any person other than the police officer or upon on his own information. Section 200 Cr.P.C. states that a Magistrate taking cognizance of an offence on a complaint shall examine on oath the complainant and witnesses present. The proviso stipulates when the complainant or witnesses

are not required to be examined. Section 202 empowers the Magistrate to postpone the issue of process to either inquire into the case himself, or direct an investigation to be made by a police officer or by such other person, for deciding whether or not there is sufficient ground for proceeding. A Magistrate can take evidence on oath. Under Section 203 Cr.P.C., a Magistrate can dismiss the complaint if he is of the opinion that there is no sufficient ground for proceeding but he must record his reasons. Section 204 deals with issue of process when the Magistrate finds that there are sufficient grounds for proceeding against the accused. This results in issuance of summons or warrants against the accused. Under sub-section (4), a complaint can be dismissed where the complainant does not pay process fee or the fee is not paid within a reasonable time.

6. Elucidation of the aforesaid provisions shows that between the stage when the Magistrate takes cognizance and before the order under Section 203 or 204 is passed, there can be an interregnum and gap. Proceedings and orders are passed on the judicial side by the Magistrate. As noticed above under Section 204(4) even after summoning order is issued, a complaint can be dismissed for non-prosecution.

7. It is well settled that till process is issued and the accused is summoned by the Magistrate, the opposite party arrayed as an accused does not have any right to be heard and contest as an adversary. An accused, only after he is summoned, can challenge the summoning order

of the Magistrate in appropriate proceedings. [See *Adalat Prasad vs. Roop Lal Jindal & Ors* .(2004) 7 SCC 338]

8. This brings us to Section 397, 399 and 401 of the Code of Criminal Procedure. Section 397 states that the High Court or any Sessions Judge can call for and examine record of any proceeding before any inferior Criminal Court to satisfy himself as to the correctness, legality or propriety of any finding, sentence or order. The powers, which can be exercised by the revisionary authority, are stated. Section 399(2) states that when any proceedings by way of revision are commenced by the Sessions Judge, sub-section (2) to Section 401 and sub-sections (3) to (5) will apply. Sub-section (2) to Section 401 in clear and categorical term states that no order shall be passed or made to the prejudice of the accused or other person unless he has an opportunity of being heard in his own defence. The important words being “no order shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard”. It incorporates the principle of *audi alteram partem*. The language is couched in mandatory form. The word ‘shall’ is a clear pointer that the revisionary authority has no discretion but has to hear the accused or such other person. The only requirement is that the order should be to the prejudice to the said person or accused.

9. Section 398 is ancillary to the power under Section 397. It states that on examining the record under Section 397 or otherwise, the High Court or the Sessions Judge can direct Chief Judicial Magistrate or Magistrate subordinate to him, to make or direct further inquiries into a complaint which has been dismissed under Sections 203, 204(4) or into the case of any person who has been discharged. The said power empowers the High Court or the Sessions Judge to issue directions for conducting an inquiry by the Chief Judicial Magistrate/Magistrates. The proviso states that no direction for further inquiry into the case of the discharged person shall be made unless the person who has been discharged has had an opportunity of showing cause as to why such direction should not be made. The contention raised is that the proviso only applies where accused is discharged and does not apply when further inquiry is directed by the High Court or the Sessions Court after the Magistrate has dismissed the complaint under Section 203 or under Section 204(4). In other words, it is submitted that when a complaint has been dismissed under Section 203 or 204(4), no notice is required to be issued to the opposite party against whom the proceedings have been dropped.

10. The contention while attractive has to be rejected for various reasons. Revisionary power is exercised either by the Sessions Court or by the High Court and therefore, there is already an adjudication or a decision by the Magistrate's court. The order impugned is in favour and confers a benefit or advantage to the other side. The said order may have been passed in the absence of the other side but this does not affect the nature and character of

the said order. The proviso to Section 398 has to be read along with Section 401(2) which is equally applicable to the revision petitions filed before the Sessions Court. Section 398 only deals with the power to direct further inquiry, whereas Section 397 read with Section 399 and Section 401 confers power on the revisionary authority to examine correctness, legality or propriety of any findings, sentence or order. The powers of the revisionary authority under Section 397, 399 and 401 are wide and comprehensive. They are not confined only to inquiry. Section 401(2), states that no order can be passed by the revisionary authority to the prejudice to the accused or other person till he has an opportunity of being heard. Proviso to Section 398 affirms and reiterates that even in cases of further inquiry, notice must be issued. It clears doubt or ambiguity. The term 'discharge', though used in several places in the Cr.P.C, has not been defined specifically. Technically and legally, it is possible to urge and argue that dismissal of a complaint under Section 203 of the Cr.P.C. does not amount to discharge as the accused is not summoned. While under the Code of Criminal Procedure, 1898, the term 'discharge' was used in contradistinction to the term 'dismissal'- both having different connotations and consequences- but under the Cr.P.C. w.e.f 1973, the terms may be used synonymous to each other under certain circumstances. We do not think that it would be appropriate and proper to interpret the term discharge in a restrictive manner when we interpret the said word in the proviso to Section 398. The word 'discharge' need

not necessarily mean absolute discharge where the accused is exonerated from the whole case. A person may be accused of multiple offences but the Magistrate in an order under Section 203 and Section 204 may not issue process for all offences. This order is treated as an order of partial discharge. [See *Thakur Ram v. State of Bihar* AIR 1966 SC 911]. Similarly, in cases where there are several individuals accused of an offence and the Magistrate, while issuing process declines to issue process against some, the refusal, it has been held, amounts to their absolute discharge by implication. [See *Ajab Lal Khirher v. Emperor* I.L.R. (1905) Cal. 783]. Further, inquiry can be directed in a revision petition after the complaint has been dismissed under Section 203 Cr.P.C. Police investigation under Section 156(3) or enquiry under Section 202 Cr.P.C. is before an order of dismissal of dismissal under Section 203 or summoning under Section 204 is passed. Charge or notice is framed/issued after the accused is summoned. Thus it is equally possible to hold that the term 'discharge' in Section 398 can within its scope and ambit include an order under Section 203 or Section 204(4).

11. The term 'other person', preferred and expressly used in Section 401(2), was examined and interpreted by the Supreme Court in *A.K. Subbaiah & Ors. vs. State of Karnataka & Ors.* (1987) 4 SCC 557. In the said case, the persons summoned had filed a revision before the High Court and had impleaded third parties, in addition to the State- the complainant. The High

Court directed deletion of the third parties on the ground that they were not necessary parties in the revision petition. It was accordingly observed as under:-

“11. Apparently this Sub-section contemplates a situation where a person may not be an accused person before the Court below but one who might have been discharged and therefore if the revisional court after exercising jurisdiction under Section 401 wants to pass an order to the prejudice of such a person, it is necessary that that person should be given an opportunity of hearing but it does not contemplate any contingency of hearing of any person who is neither party in the proceedings in the court below nor is expected at any stage even after the revision to be joined as party.”

12. It is clear from the said paragraph that the term “other person” refers to a person who is arrayed as a respondent/accused but has not been summoned.

13. The words ‘prejudice of the accused or other person’, in Section 401(2), are the cornerstone and beacon which indicate when and in what cases notice must be issued to the opposite side. In ***Raghu Raj Singh Rousha vs. Shivam Sundaram Promoters (P) Ltd.*** (2009) 2 SCC 363, the Supreme Court was examining a situation where the Magistrate had passed the following order:

“In the present case all the facts and circumstances of the case are within the knowledge of the complainant. Both the complainant and the accused Company have been dealing with one another by way of contractual agreement and an MoU dated 5-8-2005 was entered into between them as alleged in the complaint. From the complaint and the documents placed on record, it appears that there is some dispute between the parties in respect of immovable property and the payments pertaining to the sale of the same. The complainant submits that the accused had cheated him. In the facts and circumstances of the case there is no requirement of collection of evidence by the

police at this stage as the complainant can lead his evidence. In view of this, present application under Section 156(3) CrPC is dismissed. The complaint can be conveniently dealt with under Section 200 CrPC and subsequent provisions. If there is necessity, however, of police, that shall be taken under Section 202 CrPC.”

On the aforementioned premise, the complainant was asked to lead pre-summoning evidence. It was directed to furnish list of witnesses, if any.”

14. In a revision petition filed by the complainant, the High Court had set aside the said order, on the first hearing, in the following terms:-

“On hearing learned counsel for the parties, it is agreed that the impugned order dated 7-2-2008 be set aside with a direction to the learned Metropolitan Magistrate to examine the matter afresh after calling for a report from the police authorities. The police authorities to hold a preliminary inquiry on the basis of the complaint made by the petitioner complainant and submit a report to the learned Magistrate within three weeks from today. The petitioner to appear before the trial court on 24-3-2008. The petition stands disposed of.”

Only State was made a party before the High Court.

15. It is clear from the aforesaid direction that the High Court had not summoned the opposite party or accused of the offence but had directed further inquiry. Examining the said factual position, the Supreme Court observed and held that the impugned order passed by the High Court could not be sustained as notice had not been issued to the opposite side. It was held as under:-

“22. Here, however, the learned Magistrate had taken cognizance. He had applied his mind. He refused to exercise his jurisdiction under Section 156(3) of the Code.

He arrived at a conclusion that the dispute is a private dispute in relation to an immovable property and, thus, police investigation is not necessary. It was only with that intent in view, he directed examination of the complainant and his witnesses so as to initiate and complete the procedure laid down under Chapter XV of the Code”.

16. In the said decision, the Supreme Court referred to several earlier decisions and examined the scope and ambit of Section 401(2). The findings and the observations of the Supreme Court with reference to the earlier decisions read as under:-

“15. In *Makkapati Nagaswara Sastri v. S.S. Satyanarayan* [(1981) 1 SCC 62 : 1981 SCC (Cri) 111] this Court opined that the principle of audi alteram partem is applicable in a proceeding before the High Court.

16. Yet again, in *P. Sundarrajan v. R. Vidhya Sekar* [(2004) 13 SCC 472 : (2006) 1 SCC (Cri) 345] this Court held: (SCC pp. 472-73, paras 4-5)

“4. On the above basis, it proceeded to consider the material produced by the petitioner before it and without taking into consideration the defence that was available to the respondent proceeded to set aside the order of the Magistrate, and directed the said court to take the complaint on file and proceed with the same in accordance with law.

5. In our opinion, this order of the High Court is ex facie unsustainable in law by not giving an opportunity to the appellant herein to defend his case that the learned Judge violated all principles of natural justice as also the requirement of law of hearing a party before passing an adverse order.”

17. We may also notice that this Court in *Vadilal Panchal v. Dattatraya Dulaji Ghadigaonkar* [AIR 1960 SC 1113] opined: (AIR pp. 1116-17, para 9)

“9. The general scheme of the aforesaid sections is quite clear. Section 200 says inter alia what a Magistrate taking cognizance of an offence on complaint shall do on receipt of such a complaint. Section 202 says that the Magistrate may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry for the purpose of ascertaining the truth or falsehood of the complaint; in other words, the scope of an inquiry under the section is limited to finding out the truth or falsehood of the complaint in order to determine the question of the issue of process. The inquiry is for the purpose of ascertaining the truth or falsehood of the complaint; that is, for ascertaining whether there is evidence in support of the complaint so as to justify the issue of process and commencement of proceedings against the person concerned. The section does not say that a regular trial for adjudging the guilt or otherwise of the person complained against should take place at that stage; for the person complained against can be legally called upon to answer the accusation made against him only when a process has issued and he is put on trial. Section 203, be it noted, consists of two parts: the first part indicates what are the materials which the Magistrate must consider, and the second part says that if after considering those materials there is in his judgment no sufficient ground for proceeding, he may dismiss the complaint. Section 204 says that if in the opinion of the Magistrate there is sufficient ground for proceeding, he shall take steps for the issue of necessary process.”

18. The question again came up for consideration before this Court recently in *Divine Retreat Centre v. State of Kerala* [(2008) 3 SCC 542 : (2008) 2 SCC (Cri) 9 : AIR 2008 SC 1614] wherein this Court opined that the jurisdiction of the High Court even in terms of Section 482 of the Code is not unlimited. It was held that even in a case where no action is taken by the police, the informant's remedy lies under Sections 190 and 200 of the Code. Similar view has been expressed by this Court in *Sakiri*

Vasu v. State of U.P. [(2008) 2 SCC 409 : (2008) 1 SCC (Cri) 440]

19. It is in the aforementioned backdrop the decision of this Court in *Chandra Deo Singh* [AIR 1963 SC 1430] may be considered. Therein this Court opined that although an accused has no right to participate unless the process is issued, he may remain present either in person or through a counsel or agent with a view to be informed of what is going on. It was held that one of the objects behind the provisions of Section 202 of the Code is to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an obviously frivolous complaint but that is not the stage where defence of an accused can be gone into, stating: (AIR p. 1433, para 7)

“7. ... An enquiry under Section 202 can in no sense be characterised as a trial for the simple reason that in law there can be but one trial for an offence. Permitting an accused person to intervene during the enquiry would frustrate its very object and that is why the legislature has made no specific provision permitting an accused person to take part in an enquiry. It is true that there is no direct evidence in the case before us that the two persons who were examined as court witnesses were so examined at the instance of Respondent 1 but from the fact that they were persons who were alleged to have been the associates of Respondent 1 in the first information report lodged by Panchanan Roy and who were alleged to have been arrested on the spot by some of the local people, they would not have been summoned by the Magistrate unless suggestion to that effect had been made by counsel appearing for Respondent 1. This inference is irresistible and we hold that on this ground, the enquiry made by the enquiring Magistrate is vitiated.”

20. It was emphasised that the question as to whether a process has to be issued or not lies within the exclusive domain of the Magistrate so as to enable him to arrive at a satisfaction that there is sufficient ground for proceeding but not with a view to see as to whether there is sufficient

ground for conviction, stating: (*Chandra Deo Singh case* [AIR 1963 SC 1430] , AIR p. 1433, para 8)

“8. ... No doubt, as stated in sub-section (1) of Section 202 itself, the object of the enquiry is to ascertain the truth or falsehood of the complaint, but the Magistrate making the enquiry has to do this only with reference to the intrinsic quality of the statements made before him at the enquiry which would naturally mean the complaint itself, the statement on oath made by the complainant and the statements made before him by persons examined at the instance of the complainant.”

17. In paragraph 21 of the decision, the Supreme Court noticed the difference between pre-cognizance stage and post-cognizance stage and thereafter had made observations in paragraph 22. Magistrate takes cognizance under Section 190. The term cognizance refers to the first application of mind by the Magistrate's court. It takes place when the Magistrate applies his mind for proceeding under Section 200. It does not involve any formal action but occurs as soon as the Magistrate applies his mind to the suspected commission of offence. No elaborate inquiry is required at that time. Cognizance is taken when the Magistrate proceeds to examine the complainant under Section 200 or directs inquiry under Section 202. Before taking cognizance, the Magistrate has the power to send the matter for police investigation under Section 156(3). [See *Mona Panwar versus High Court of Judicature of Allahabad* (2011) 3 SCC 496 and *Chief Enforcement Officer v. Videocon International Ltd.* (2008) 2 SCC 492]

18. Reference to a recent decision of the Supreme Court in *A.N. Santhanam vs. K. Elangovan* 2011(2) JCC 720 is more appropriate. In the said case, the complaint filed was dismissed under Section 203 Cr.P.C. The said order was set aside in the revision petition without notice to the adverse party. The opposite party on appeal succeeded before the Supreme Court and the order of the High Court was set aside with a direction that the revision petition shall stand restored for fresh hearing and disposal on merits after issuing notice/hearing the opposite party. The reasoning given by the Supreme Court reads as under:-

“8. A plain reading of Clause (2) of the said provision makes it abundantly clear that the High Court in exercise of its revisional power cannot pass any order which may cause prejudice to the accused or other persons unless he has an opportunity of being heard either personally or by pleader in his own defence.

9. In the instant case it cannot be said that the rights of the Appellant have not been affected by the order of revision. The complaint filed by the Respondent which was rejected for whatsoever reasons has been resurrected with a direction to the Magistrate to proceed with the complaint. Undoubtedly, whether the Appellant herein was an accused or not but his right has been affected and the impugned order has resulted in causing prejudice to him.”

Clause (2) referred to in paragraph 8 above is clause (2) to Section 401.

19. We may also note here the decision of the Supreme Court in *Rameshan P.O. & Ors. vs. Rakesh Kumar Yadav & Anr.* (2009) 13 SCC 546. The decision is brief but indicates that the revision petition was allowed and disposed of without notice to the appellant. Before the Supreme Court the contention raised was that prejudice was caused to the appellant. The appeal

was allowed with an order of remit. In *Uma Nath Pandey vs. State of U.P.* (2009) 12 SCC 40, several decisions have been referred to observing that natural justice is essence for fair adjudication. We only note that if Section 401(2) applies, the ‘useless formality theory’ cannot be applied in view of the express mandatory stipulation.

20. The decision of the single Judge of this Court in *Tata Motors Ltd.* (supra) is often cited and relied upon. However, the said decision was set aside in appeal before the Supreme Court vide order dated 22nd February, 2010 passed in Special Leave to Appeal (Crl.) No. 1811/2009 titled *Arindam Chaudhari vs. M/s Tata Motors Ltd. & Anr.* The order reads as under:-

“Heard both sides.

Learned senior counsel appearing for the parties agree that the petitioner would be given an opportunity to hear before the High Court. In view of this consent of the parties, we set aside the order passed by the High Court and request the High Court to hear the petitioners herein and pass appropriate orders at the earliest, at least within a period of two months.”

The reasoning and the view expressed in *Tata Motors Ltd.* (supra) was followed in *Rajesh Garg* (supra) and *Prakash Devi* (supra).

21. The decision of Delhi High Court in *J.K. International* (supra) is clearly distinguishable. In the said case, the complaint was dismissed in default and for non-prosecution as the complainant was not present and the process fee had not been paid. In said circumstances, it was held that Section 401(2) would not be applicable and no notice was required to be issued. An

order dismissing the complaint for non-prosecution or in default, which is made the subject matter of the revision, cannot be equated with “revision petitions” that are filed on substantive grounds or touch on the merits. Courts have recognized difference between orders of this nature which are procedural and substantive orders. [See *Grindlays Bank Ltd. vs. Central Government Industrial Tribunal and Ors.* 1980 (Supp) SCC 420, which draws distinction between procedural and substantive review. Power of procedural review need not be specifically conferred but power of substantive review has to be conferred by the statute before it can be exercised by a judicial forum/court. Power of procedural review is inherent and therefore does not require any statutory provision or conferment.] A reading of Section 401(2) illuminates that power of revision should not be exercised without notice when an order prejudicial to the accused or other person is being passed. The order dismissing the complaint for default or non-prosecution does not touch upon the factual or legal merits of the complaint. The said order is a reflection on or about the conduct of the complainant in the proceedings before the court and the opinion formed by the court about the said conduct. Such orders if they do not reflect and take into consideration the merits of the case or the complaint will not require notice to the opposite side when examined in a revision petition. Such orders are not prejudicial to the other side as they do not reflect and take into consideration merits and demerits of the allegations. When a revision petition is filed against an order dismissing a complaint for non-prosecution or in default, and the same is allowed, it is not an order that causes

prejudice to the opposite side, if there is no application of mind or reflection on merits whatsoever. This distinction and aspect has to be kept in mind.

21. The question of law mentioned above is accordingly answered.

-sd-
(SANJIV KHANNA)
JUDGE

-sd-
(S. P. GARG)
JUDGE

August 3rd, 2012
Kkb