

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 3462 of 2022

Neelam Agarwal & Anr.

-Vs-

The State of West Bengal & Anr.

For the petitioners:

Mr. Sandipan Ganguly, Sr. Adv.,
Mr. Ayan Bhattacharjee, Adv.,
Mr. Nilay Sengupta, Adv.,
Mr. Ankit Agarwal, Adv.,
Ms. Alotriya Mukherjee, Adv.

For the opposite party No.2 :-

Mr. Kalyan Bandyopadhyay, Sr. Adv.,
Mr. Somopriyo Chowdhury, Adv.,
Mr. Ajay Agarwal, Adv.,
Mr. Sanket Sarawgi, Adv.,
Mr. Arka Banerjee, Adv.,

Heard on: 28 September, 2022.

Judgment on: 10 November, 2022.

BIBEK CHAUDHURI, J. : –

1. In connection with Alipore Police Station Case No.15 of 2021 under Sections 304B/498A/406/34 of the IPC, the Investigating Officer submitted charge-sheet against one Kushal Agarwal, Naresh Agarwal and Smt. Neelam Agarwal. Smt. Neelam Agarwal and Naresh Agarwal are the petitioners before this Court. They have filed the instant criminal revision

challenging the order dated 11th August, 2022 passed by the learned Chief Judicial Magistrate at Alipore taking cognizance of offence punishable under Sections 304B/498A/406/34 of the IPC against the petitioners and their son Kushal Agarwal. The petitioners have also challenged the legality and propriety of the aforesaid order passed by the learned Chief Judicial Magistrate at Alipore issuing warrant of arrest against the petitioners after taking cognizance of offence on the basis of the police report/charge-sheet filed by the Investigating Officer.

2. It is pertinent to mention at the outset that marriage of one Rashika Jain was solemnized with the above named Kushal Agarwal on 9th February, 2020. It is alleged that Rashika Jain was subjected to physical and mental cruelty and harassment by her husband and parents-in-law on demand of dowry since her marriage. She was not even provided with necessary medical treatment by her husband and matrimonial relations as advised by the doctor. Failing to bear such physical and mental torture, Rashika Jain had met with an unnatural death within one year of her marriage on 16th February, 2021. After the death of Rashika, her father lodged a written complaint in the jurisdictional Police Station that gave rise to registration of FIR Case No.15 of 2021 dated 17th February, 2021 against the petitioners and their son Kushal Agarwal.

3. Indisputably, initial investigation was being conducted by a Police Officer attached to Alipore police station in different and lackadaisical manner. The defacto complainant being the unfortunate father of the deceased lady finally approached this court under Article 226 of the

Constitution of India for a direction upon the police authority so that the investigation might be concluded to its logical end.

4. This court on perusal of the case diary and other connected materials directed formation of a Special Investigation Team (SIT) under the supervision of the Special Commissioner of Police (II), Kolkata. Within 11 days of formation of SIT, charge-sheet was submitted by the police against the accused persons.

5. It is also important to mention that while challenging the very basis of the case, i.e., order of cognizance taken by the learned Chief Judicial Magistrate vide order dated 11th August, 2022, the petitioners filed another application before the learned Sessions Judge at Alipore praying for anticipatory bail. Prayer for anticipatory bail of the petitioners were rejected by the learned Sessions Judge, Alipore on 21st September, 2022.

6. Mr. Sandipan Ganguly, learned Senior Counsel on behalf of the petitioners at the outset draws my attention to Sub-Section (5) of Section 173 of the Code of Criminal Procedure. The provision runs thus:-

“Sub-Section 173. Report of police officer on completion of investigation.- (1)...

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report-

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.”

7. It is submitted by the learned Senior Counsel on behalf of the petitioner that Section 173 of the Cr.P.C makes imperative for the Police Officer investigating into a cognizable offence to submit along with his report under Section 173(2), documents purporting to furnish evidence collected in course of the investigation and the statements of the witnesses and the Court, before proceeding into the case is under a duty to inquire whether the accuse has been furnished with copies of all relevant documents received under Section 173 of the Cr.P.C. It is also the duty of the court to look at the report in the prescribed form along with its accompaniments for taking cognizance of the offence. Mr. Ganguly submits in reference to the impugned order dated 11th August, 2022 passed by the learned Chief Judicial Magistrate at Alipore that the Investigating Officer did not forward to the learned Magistrate all documents or relevant extracts thereof on which the prosecution proposes to rely and the statements recorded under Section 161 of the Cr.P.C of all the persons whom the prosecution proposes to examine as its witnesses. In support of his contention, he refers to the information slip issued by the office of the learned Chief Judicial Magistrate wherein it is reported that the documents and statements that are required to be filed by the investigating officer along with the police report were not filed and learned Magistrate had no occasion to go through the said documents and

statements before taking cognizance. He took cognizance of offence mechanically only on perusal of the charge-sheet. Thus, cognizance taken by the learned Magistrate is bad in law and the same is liable to be quashed. In support of his contention Mr. Ganguly refers to a decision of the Hon'ble Supreme Court in the case of **Satya Narain Musadi and Ors. vs. State of Bihar** reported in **(1980) 3 SCC 152**.

8. Referring to a decision of this court by a Coordinate Bench in the case of **Raghubirsaran Jain & Anr. vs. State and Ors** reported in **(1995) 2 CHN 410**, it is further submitted by Mr. Ganguly that police report under Section 173(2) comprises of the report and its accompaniment under Section 173(5) of the Cr.P.C as a whole and the part of it, i.e., a report under Section 173(2) minus the accompaniments under Section 173(5) could not clearly be held to be a police report. While holding as such, it was finally decided by the learned judge in the above mentioned report that in order to enable a Magistrate to take cognizance on a police report under Section 173(2) of the Code, the same has to be a complete report thereunder, accompanied by all documents or relevant extracts thereof on which the prosecution proposes to rely and copies of statements recorded by the Police Officer under Section 161 of the Cr.P.C of all the persons whom the prosecution proposes to examine as its witnesses. It is obligatory for the learned Magistrate while taking cognizance of an offence to see all documents mentioned in Section 173(5) because while taking cognizance, the learned Magistrate is required to apply his judicial mind only upon perusal of the police report and all the

documents mentioned above, the learned Magistrate shall decide as to whether there is sufficient material to take cognizance under Section 190(1)(b) of the Cr.P.C. In the instant case the impugned order clearly shows that the learned Magistrate had no occasion to peruse the documents mentioned in Section 173(5) at the time of taking cognizance as the said documents were not produced before him. Therefore, the impugned order is liable to be set aside.

9. Mr. Ganguly also refers to a Supreme Court decision in the case of **State of Gujarat vs. Afroz Mohammed Hasanfatta** reported in **(2019) 20 SCC 539**, he specifically takes me to paragraph 23 of the aforesaid report wherein the duty of the learned Magistrate at the time of taking cognizance to take judicial notice of the charge-sheet along with statement of witnesses and other evidence collected by the police during the investigation has been elaborated. It is observed by the Hon'ble Supreme Court in paragraph 23 of the aforesaid decision that "in a case based upon the police report, at the stage of issuing summons to the accused, the Magistrate is not required to record any reason." But an order of issuing process to the accused after taking cognizance is based upon subject to the satisfaction of the Magistrate considering the police report and other documents and satisfying himself that there is sufficient ground for proceeding against the accused.

10. Mr. Ganguly further submits that after taking cognizance of offence against the accused persons solely on the basis of charge-sheet/police report the learned Magistrate issued warrant of arrest against the

petitioners. The said part of the order is also bad in law and liable to be set aside. To buttress his argument Mr. Ganguly refers to annexure P3 being a letter written by the Advocate of the petitioner No.2 to the Commissioner of Police and other Police Officers narrating certain facts and disclosing it to the Police Officers that the petitioners were all along ready and willing to cooperate with the Investigating Team to unearth the truth. In spite of their declaration that they were ready and willing to cooperate with the investigation of the case, the petitioners were not served with any notice by the SIT requiring them to attend before the Investigating Officer for interrogation or any other purpose. The petitioners never evaded arrest during the entire process of investigation. They were not asked to visit the Investigating Officer for the purpose of investigation. Therefore, the Investigating Officer only recorded in column 11 of the charge-sheet that the petitioners were not arrested. "Not arrested" does not mean that the petitioners evaded arrest or evaded the process of law during investigation. Therefore, the learned Magistrate acted illegally and with material irregularity by issuing warrant of arrest against the petitioners. It is also submitted on behalf of the petitioners that the learned Magistrate misplaced the ratio laid down in **Satender Kumar Antil vs. Central Bureau of Investigation & Anr** decided by the Hon'ble Supreme Court on 11th July, 2022.

11. It is submitted by him referring to paragraph 1 of the said decision that on 7th October, 2021 the Hon'ble Supreme Court was pleased to pass certain guidelines for grant of bail under certain circumstances, viz- (i) not

arrested during investigation. (ii) Cooperate throughout in the investigation including appearing before Investigating Officer whenever called. It is contended by Mr. Ganguly that the petitioners openly declared that they would cooperate though out the investigation but they were not called by the Investigating Officer. Therefore, the learned Magistrate wrongly held that the petitioners failed to comply with the requisite conditions. When the petitioners were inclined to cooperate with the process of investigation, the learned Magistrate was wrong in issuing warrant of arrest against the petitioners. It is submitted by Mr. Ganguly that in *Satender Kumar Antil* the Hon'ble Supreme Court reminded the well recognized principle that bail is the rule and jail is the exception. He also submits that object of bail is to secure attendance of the person during trial, the object of bail is neither punitive nor preventative. Deprivation of liberty must be considered as a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. According to Mr. Ganguly investigation of the case ends with filing of charge sheet. At this stage it is required for the court to consider as to whether attendance of the accused persons/petitioners can be ensured by issuing summons against them or by arresting them on the strength of warrant of arrest. Custodial detention of the petitioners is not necessary at this stage. It is also not urged by the Investigating Officer that custodial trial of this case is

absolutely necessary. It is for the prosecution to satisfy that the arrest of the petitioners is warranted and they are not entitled to bail.

12. Mr. Ganguly further submits that while hearing of the instant revision was continuing, petitioners' prayer for anticipatory bail was rejected by the learned Sessions Judge in Criminal Misc Case No.4142 of 2022 vide order dated 21st September, 2022. However, the said order does not restrict the petitioners to pray for recalling of the warrant of arrest issued by the learned Magistrate against them after taking cognizance of offence. In support of his contention learned Senior Counsel on behalf of the petitioners refers to the decision of the Hon'ble Supreme Court in **Siddharth vs. State of UP & Anr.** reported in **(2022) 1 SCC 676**.

Learned Counsel submits that Section 170 of the Cr.P.C does not impose an obligation on the Officer-in-Charge to arrest each and every accused at the time of filing of the charge. There are instances of cases where the accused has cooperated with the investigation throughout and yet on the charge-sheet being filed non-bailable warrants have been issued for his production premised on the requirement that there is an obligation to arrest the accused and produce him before the court. If the Investigating Officer does not believe that the accused will abscond or disobey summons, he/she is not required to be produced in custody. Word "custody" appearing in Section 170 of Cr.P.C does not contemplate either police or judicial custody but it merely connotes the presentation of the accused by the Investigating Officer before the court while filing the charge-sheet. The Investigating Officer did not make out a case against

the petitioners in the charge-sheet that the petitioners were absconding or they did not obey the notice served upon them or refuse to appear before the Investigating Officer despite proof of due service of summons upon them. In the absence of such prerequisites, learned Magistrate acted illegally and with material irregularity in issuing warrant of arrest against the petitioners. In support of his contention he refers to an unreported decision of the Hon'ble Supreme Court in the case of **Aman Preet Singh vs. C.B.I Through Director (Criminal Appeal No.929 of 2021, decided on 2nd September, 2021)**.

13. Mr. Kalyan Bandyopadhyay, learned Senior Counsel on behalf of the opposite party No.2/the defacto complainant, on the other hand, submits that each case has its peculiar facts and circumstances which are required to be borne in mind at the time of adjudication. It is submitted by Mr. Bandyopadhyay that the marriage of the victim girl was solemnised with the principal accused, being the son of the petitioners with pomp and grandeur. Both the families are immensely rich which would be evident from the nature of the bridal gifts that were presented to the deceased at the time of her marriage and seized by the Investigating Officer during investigation. The victim girl was highly educated. Her marriage was solemnized with the son of the petitioners on a cherished hope that she would lead a very happy conjugal life with her husband in her matrimonial home. However, greed of the accused persons prevailed over matrimony. The victim was so tortured that she had to meet with an unnatural death.

14. On the basis of a written complaint submitted by the opposite party No.2, Alipore Police Station Case No.15 of 2021 under Sections 304B/498A/406/34 of the IPC was registered against the husband of the deceased and the petitioners being her parents-in-law.

15. The petitioners were so influential that they initially were able to exert undue influence over the Investigating Officer. This led the defacto complainant to file a writ petition being No.WPA No.17293 of 2021. The said writ petition was disposed of by a Coordinate Bench of this Court vide order dated 14th June, 2022. In the said order it was observed by this Court “that the investigation ought to have been conducted in a more speedy and systematic manner. It has been rather slow and directionless.” Recording such observation the writ court directed formation of SIT under the leadership and supervision of the Special Commissioner of Police (II), Kolkata Police for conducting the investigation.

16. Only after formation of SIT, and investigation having been taken over by the Detective Department, Kolkata Police under the supervision of Special Commissioner of Police (II), the petitioners sent an advocate’s letter stating that they are ready to cooperate with the investigation. In the said Advocate’s letter, the address of the petitioners was stated as 1B, D.L Khan Road, P.S Alipore. But in the instant revision the petitioners stated that they are the residents of Ward No.6, P.O and P.S- Jhalda, Purulia. It is submitted by the learned Senior Counsel on behalf of the opposite party No.2 that the petitioners used to give different address at

different points of time only to confuse the Investigating Team and during investigation, their attendance could not be procured. On one hand, they declared that they were ready and willing to cooperate with the investigation, on the other hand they confused the Investigating Team producing different residential addresses at different points of time and thereby evaded process. It is also submitted by Mr. Bandyopadhyay that the case diary may be looked into to consider as to whether the petitioners really cooperated with the Investigating Officer. As the petitioners never cooperated with the Investigating Officer during investigation and the case falls within Category-B offences as laid down in Satender Kumar Antil petitioner's prayer for recalling warrant of arrest is misconceived.

17. Mr. Bandyopadhyay next submits before me that the principal accused, namely Kushal Agarwal approached this Court by filing an application for anticipatory bail being CRM 7164 of 2021. The said application was rejected and anticipatory bail was refused by the Division Bench of this Court on 23rd February, 2022 holding, as hereunder:-

“25. In a case like this effective interrogation of suspected person is of tremendous advantage in disinterring useful information. Success in such interrogation would elude if the suspected person know that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would be a mere ritual.”

18. Mr. Bandyopadhyay further submits that the Investigating Officer reserves to file his supplementary charge-sheet against the petitioners. In spite of the best effort by the SIT the petitioners could not be interrogated. Till date the Investigating Officer was not able to seize all the bridal gifts and ornaments of the victim from the possession of the petitioners. It is specifically alleged that the victim girl was coerced and harassed for dowry. Therefore, it was absolutely necessary for the Investigating Team to take the petitioners under their custody. But the petitioner managed to abscond throughout the period of investigation. On the contrary, it is urged on behalf of the petitioner with utmost futility that the petitioners were all through ready and willing to cooperate with the investigation.

19. Mr. Bandyopadhyay next submits referring to a decision of the Hon'ble Supreme Court in the case of **Jayant & Ors. vs. State of MP** reported in **(2021) 2 SCC 670** that no injustice was caused to the petitioners by taking cognizance of offence on the basis of the charge-sheet by the learned Chief Judicial Magistrate, Alipore. The petitioners failed to show any miscarriage of justice in the process of taking cognizance. No prejudice was caused to the petitioners. In support of his contention, Mr. Bandyopadhyay relies on paragraph 11.3 of the decision in **Jayant & Ors** (Supra) which runs thus:

11.3. In Chief Enforcement Officer v.Videocon International Limited, (2008) 2 SCC 492, in paragraphs 19 to 34, it is observed and held as under: (SCC pp. 499-504)

“19. 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.

20. “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.

21. 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:—

‘190. Cognizance of offences by Magistrates.—

(1) Subject to the provisions of this Chapter, any Magistrate of the First Class, and any Magistrate of the Second Class specially empowered in this behalf under sub-section (2), may take cognizance of any offence—

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

(b) upon a police report of such facts;

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

22. 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*.

23. 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, whereunder 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.’

24. 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 [*Videocon International Ltd. v. S.K. Sinha*, 2006 SCC OnLine Bom 1555] , in our considered view,

was not right in equating initiation of proceedings under Chapter XIV with commencement of proceedings under Chapter XVI.

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

26. In *Legal Remembrancer v. Abani Kumar Banerji* [*Legal Remembrancer v. Abani Kumar Banerji*, 1950 SCC OnLine Cal 49 : AIR 1950 Cal 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 with Section 190 of the present Code of 1973. Referring to various decisions, Das Gupta, J. (as his Lordship then was) stated: (AIR p. 438, para 7)

‘7. ... 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) CrPC, 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.’

27. *R.R. Chari v. State of U.P.* [*R.R. Chari v. State of U.P.*, 1951 SCC 250 : AIR 1951 SC 207] 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 Penal Code (IPC) as also under the Prevention of Corruption Act, 1947, applied to the District Magistrate, Kanpur to issue warrant of arrest on 22-10-1947. Warrant was issued on the next day and the accused was arrested on 27-10-1947.

28. On 25-3-1949, the accused was produced before the Magistrate to answer the charge-sheet submitted by the prosecution. According to the accused, on 22-10-1947, 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 Banerji* [*Legal Remembrancer v. Abani Kumar Banerji*, 1950 SCC OnLine Cal 49 : AIR 1950 Cal 437] , the Court, speaking through Kania, C.J. stated: (*Chari case* [*R.R. Chari v. State of U.P.*, 1951 SCC 250 : AIR 1951 SC 207] , AIR p. 208, para 3)

‘3. 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 CrPC 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) CrPC 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.’

29. Approving the observations of Das Gupta, J. in *Abani Kumar Banerji* [*Legal Remembrancer v. Abani Kumar Banerji*, 1950 SCC OnLine Cal 49 : AIR 1950 Cal 437] , this Court held that it was on 25-3-1949 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.

30. Again in *Narayandas Bhagwandas Madhavdas v. State of W.B.* [*Narayandas Bhagwandas Madhavdas v. State of W.B.*, AIR 1959 SC 1118 : 1959 Cri LJ 1368] , 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 the 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.* [*Ajit Kumar Palit v. State of W.B.*, AIR 1963 SC 765 : (1963) 1 Cri LJ 797] and *Hareram Satpathy v. Tikaram Agarwala* [*Hareram Satpathy v. Tikaram Agarwala*, (1978) 4 SCC 58 : 1978 SCC (Cri) 496]).

31. In *Gopal Das Sindhi v. State of Assam* [*Gopal Das Sindhi v. State of Assam*, AIR 1961 SC 986 : (1961) 2 Cri LJ 39] , referring to earlier judgments, this Court said: (AIR p. 989, para 7)

‘7. ... 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.’

32. In *Nirmaljit Singh Hoon v. State of W.B.* [*Nirmaljit Singh Hoon v. State of W.B.*, (1973) 3 SCC 753 : 1973 SCC (Cri) 521] , 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 the accused, he cannot be said to have taken cognizance of the offence.

33. In *Darshan Singh Ram Kishan v. State of Maharashtra* [*Darshan Singh Ram Kishan v. State of Maharashtra*, (1971) 2 SCC 654 : 1971 SCC (Cri) 628] , 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.

34. In *Devarapally Lakshminarayana Reddy v. V. Narayana Reddy* [*Devarapally Lakshminarayana Reddy v. V. Narayana Reddy*, (1976) 3 SCC 252 : 1976 SCC (Cri) 380] , this Court said: (SCC p. 257, paras 13-14)

‘13. 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 a 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.

14. This raises the incidental question: What is meant by “taking cognizance of an offence” by a Magistrate within the contemplation of Section 190? This expression has not been defined in the Code. But from the scheme of the Code, the content and marginal heading of Section 190 and the caption of Chapter XIV under which Sections 190 to 199 occur, it is clear that a case can be said to be instituted in a court only when the court takes cognizance of the offence alleged therein. The ways in which such cognizance can be taken are set out in clauses (a), (b) and (c) of Section 190(1). Whether the Magistrate has or has not taken cognizance of the offence will depend on the circumstances of the particular case including the mode in which the case is sought to be instituted, and the nature of the preliminary action, if any, taken by the Magistrate. Broadly speaking, when on receiving a complaint, the Magistrate applies his mind for the purposes of proceeding under Section 200 and the succeeding sections in Chapter XV 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.' (emphasis supplied)

20. Mr. Bandyopadhyay next refers to a decision of the Hon'ble Supreme Court in **Bandekar Borthers Private Limited & Anr. vs. Prasad Vassudev Keni & Ors.** reported in **(2020) 20 SCC 1**. It is submitted by him that taking cognizance of offence is not the same thing as issuance of process. Cognizance is taken at the initial stage when the Magistrate applies his judicial mind to the facts mentioned in a complaint or to a police report or upon information received from any other person that an offence has been committed. The issuance of process is at a subsequent stage when after considering the material placed before it the court decides to proceed against the offender on his finding that prima facie case is made out. The learned Magistrate took cognizance of offence on the basis of the police report. Section 190(1)(b) of the Cr.P.C states that cognizance can be taken on police report. Since the relevant procedure of taking cognizance is by way of application of mind it is observed by the Hon'ble Supreme Court that the Magistrate should also look into the accompaniments which are filed by the Police Officer along with the police report. If the learned Magistrate does not write in his order that he had gone through the documents filed with the police report under Section 173(5) of the Cr.P.C, the said order cannot be held to be bad in law because the learned Magistrate does not require to pass detailed order of

taking cognizance. If the impugned order reveals that he had applied his judicial mind, the order of cognizance cannot be held to be bad in law and accordingly liable to be set aside. In support of his contention Mr. Bandyopadhyay refers to a Division Bench Judgment of this Court in the case of **Anwar @ Anwar Rahaman vs. State of West Bengal** reported in **(2000) 1 CHN 351**.

21. In reply it is submitted by Mr. Ganguly on behalf of the petitioners that they never suppressed their residential address at the time of investigation. He has placed Aadhar Card of petitioners in order to prove that petitioners are permanent residents of Jhalda in the district of Purulia. They have also a residence in Kolkata at Premises No.1B, D.L. Khan Road within P.S- Alipore. It is also submitted by Mr. Ganguly that ratio laid down by the Hon'ble Supreme Court in **Satya Narain Musadi** (Supra) is consistently followed in all subsequent judgments and it is no longer res integra that a police report under Section 173(2) of the Cr.P.C without the documents required to be forwarded to the Magistrate under Sub-section (5) of Section 173 is an incomplete charge-sheet. Cognizance taken on the basis of such incomplete charge-sheet is bad in law and liable to be set aside. It is also submitted by Mr. Ganguly that the decision of the Hon'ble Supreme Court relied on by Mr. Bandyopadhyay, learned Senior Counsel on behalf of the opposite party No.2 also followed the ratio of **Satya Narain Musadi** (Supra). "the word shall" used in 173(5) of the Code makes the said provision mandatory and not merely directory.

22. It is also submitted by Mr. Ganguly that proviso to Section 438(1) does not restrict this Court from passing an interim order prohibiting the Police Authority from executing the warrant of arrest against the petitioners.

23. Impugned order dated 11th August, 2022 contains two distinct part. In the first part the learned Magistrate took cognizance of offence punishable under Section 304B/498A/406/34 of the IPC against the accused persons named in the charge-sheet. Second part of the order relates to issuance of warrant of arrest against the petitioners passed by the learned Magistrate.

24. I propose to adjudicate the above mentioned two distinct parts of order separately as herein below.

25. Chapter (XII) of the Code of Criminal Procedure contains the provisions relating to “**Information to the Police And Their Powers to Investigate.**” This chapter contains Sections 154-176. Section 170(1) of the Code of Criminal Procedure states:-

“170. Cases to be sent to Magistrate when evidence is sufficient.- (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or, if the offence is bailable and the accused is able to give security, shall take security from him for his

appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.”

26. Section 172 obligates every Police Officer making an investigation under chapter-XII to enter his proceeding day by day in the investigation in a diary with time of receiving information, commencement of investigation, commencement and closure of investigation, place or places visited by him and a statement of the circumstances ascertained through his investigation. The case diary shall also contain the statements of witnesses recorded during the course of investigation under Section 161. Any Criminal Court is empowered to call for such diaries to aid it any inquiry or trial subject to the rider that it cannot be used as evidence their act.

27. Section 173(2) of the Cr.P.C states as hereunder:-

“(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating-

- (a) the names of the parties;***
- (b) the nature of the information;***
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;***
- (d) whether any offence appears to have been committed and, if so, by whom;***
- (e) whether the accused has been arrested;***
- (f) whether he has been released on his bond and, if so, whether with or without sureties;***

(g) whether he has been forwarded in custody under section 170.

(ii) The officer shall also communicate, In such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.”

28. It is already narrated hereinabove the provision of Sub-Section (5) of Section 173 which is applicable only when it appears to the Investigating Officer that there is sufficient evidence or reasonable ground to proceed further against the accused. Only in such cases the Police Officer shall forward to the Magistrate along with police report/charge-sheet (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation as (b) the statements recorded under Section 161 of all the persons whom the prosecution proposes to examine as its witnesses. The Hon'ble Supreme Court in **Satya Narain Musadi** (Supra) was pleased to state the object and reason behind introduction of Section 173 (5) of the Cr.P.C in the following words:-

“In fact, on the introduction of Section 173 in its form in the Cr.P.C, 1973, the police officer investigating into a cognizable offence is under a statutory obligation to submit along with his report under Section 173(2) documents purporting to furnish evidence collected in the course of the investigation and the statements of the witnesses and the Court before proceeding into the case is under a duty to

inquire whether the accused has been furnished with copies of all relevant documents received under Section 173 by the Court, and the entire complexion of what should normally be styled as report submitted under Section 173(2) of the Code has undergone a change. Court can look at the report in prescribed form along with its accompaniments for taking cognizance of the offence.”

29. Close reading of the above quoted observation of the Hon’ble Supreme Court suggests that at the time of filing of the charge-sheet the Police Officer shall file all documents which the prosecution proposes to rely during trial and the statement of witnesses to ensure fair trial so that the accused may not be taken aback during trial. In other words, Section 173(5) of the Code postulates a provision on the principle of fair trial. Thus it casts a duty upon the Police Officer to produce all documents and statements recorded under Sections 161 of all the persons which and whom the prosecution proposes to rely. The “police report” being the final result of investigation under chapter XII of the Code is a report that an Investigating Officer draws on the basis of the materials collected during investigation and such conclusion can only form the basis of a competent court to take cognizance there upon under Section 190(1)(b) of the Code and to proceed with the for trial. For taking cognizance of the offence, the Court must analyze the report filed by the Investigating Officer and all the materials appended thereto and then form an independent prima facie opinion as to whether there is ground for presuming that the accused has

committed an offence, as alleged. The Court/Magistrate will apply the same standard to form an opinion about the materials collected during investigation and articulated in the report submitted under Section 173 of the Code.

30. Since Police report under Section 173(2) shall contain documents and statements prescribed in Section 173(5) of the Code, the Magistrate is under obligation to consider the accompaniments to satisfy his judicial conscience before taking cognizance. Now, the question that falls for consideration in the instant revision is what would happen if the learned Magistrate fails to consider the accompaniments or if the documents and statements as contemplated under Section 173(5) are not sent by the Investigation Officer along with the charge-sheet. Contention of Mr. Ganguly in this regard that the cognizance is liable to be set aside under such circumstances, in my opinion, is absolutely narrow and hypertechnical approach. It is obvious that rules of procedure are in the aid of rendering and dispensing substantial justice. If the impugned order of taking cognizance contains an observation that the learned Magistrate consulted with the case diary maintained by the Investigation Officer at time of taking cognizance, the court cannot raise any doubt over the issue of taking cognizance, because all the documents and statements required to be filed along with the police report are placed in the case diary. Only because the Investigating Officer failed to file those documents under Section 173(5) with the police report, cognizance taken by the learned Magistrate on the basis of police report and materials in case

diary cannot be said to be bad. Therefore, the decision of a Co-ordinate Bench of this Court in **Raghubirsaran Jain** (Supra) is not applicable under the facts and circumstances of this case.

31. The word “cognizance” which appears in Section 197 of the Cr.P.C has not been defined in the Code. “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 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 is 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. **S.K Sinha, Chief Enforcement Officer vs. Videocon International Limited : (2008) 2 SCC 492, Legal Remembrancer vs. Abani Kr. Banerjee : AIR 1950 Cal 437, Gopal Das Sindhi & Ors vs. State of Assam & Anr. : AIR 1961 SC 986, State of U.P vs. Paras Nath Singh : (2009) 6 SCC 372.** The question as to whether requirement of Section 173(5) of the Code is mandatory or directory came up for consideration before the Hon’ble Supreme Court in **Narendra Kumar Amin vs. Central Bureau of Investigation & Ors** reported in **(2015) 3 SCC 417**. In the said report observation made at paragraph 76 in **K. Veeraswamy vs. Union of India : (1991) 3 SCC 655** came up for consideration before the Hon’ble Supreme Court. The Hon’ble Supreme Court held as hereunder:-

“15. The observation made at para 76 of the constitution Bench judgment of this Court in the case of K. Veeraswamy (supra) that the report is complete if it is accompanied by all documents and statement of witnesses as required under Section 173 (5) of Cr.P.C. cannot be construed as the statement of law, since it was not made in the context of the police report under Section 2 (r) read with Section 173 (2), (5) and (8) Cr.P.C. On the contrary, the three Judge Bench of this Court in the decision in Central Bureau of Investigation v. R.S. Pai case: (2002) 5 SCC 82 (supra), after referring to the earlier judgment of the coordinate Bench in Narayan Rao case (supra) categorically held that the word "shall" used in sub-Section (5) cannot be interpreted as mandatory, but directory. The said statement of law is made after considering the provisions of Section 2(r) read with Section 173 (5) and (8) of Cr.P.C. Therefore, filing of police report containing the particulars as mentioned under Section 173 (2) amounted to completion of filing of the report before the learned ACJM, cognizance is taken and registered the same. The contention of the appellant that the police report filed in this case is not as per the legal requirement under Section 173 (2) & (5) of Cr.P.C. which entitled him for default bail is rightly rejected by the High Court and does not call for any interference by this Court.”

32. Under the above backdrop and the judicial precedent let me now examine the impugned order.

33. Impugned order dated 11th August, 2022 runs thus:-

“Today the I.O has filed her report following the modalities of Section 173 of the Code of Criminal Procedure, 1973. The charge-sheet being No.67 of 2022 dated 10.08.2022 is accepted as the investigating officer is also member of the SIT. The charge-sheet i.e. report as per section 173 of the Code of Criminal Procedure, 1973 which has been filed today be made part of the record and on perusal of the charge-sheet it has transpired that after investigation the investigating agency has found prima facie materials against the accused persons namely 1. Kushal Agarwal, 2. Naresh Agarwal and 3. Neelam Agarwal and has indicted them for allegedly committing offense punishable under section 304B/498A/406/34 of the Indian Penal Code, 1860. Form A has also been filed with the charge-sheet i.e. report as per section 173 of the Code of Criminal Procedure, 1973. The investigating officer has also kept open the provisions for further investigation in terms of section 173 sub-section (8) of the Code of Criminal Procedure, 1973.

I have meticulously introspected the charge-sheet and the CD. After such exercise I find that there are prima facie materials against the accused persons named in the J/C and a case for taking of cognizance has been made out. Hence cognizance is taken for committing offence punishable under section 304B/498A/406/34 of the Indian Penal Code, 1860 against the accused persons named in the charge-sheet.

On prayer of the investigating officer the CD be returned to the investigating officer for the purpose of her further investigation.”

34. On perusal of the impugned order it is ascertained that the learned Magistrate carefully perused the charge-sheet/police report under Section 173(2) of the Cr.P.C and the case diary and found that there are prima facie materials against the accused persons for further proceeding and accordingly he took cognizance of offence punishable under Section 304B/498A/406/34 of the IPC against the accused persons named in the charge-sheet. It is needless to say that as per Section 172 of the Code the case diary contains the statements of witnesses recorded during the course of investigation under Section 161 and all materials in original which the prosecution proposes to rely during trial. Thus, the documents and statements that might be forwarded to Investigating Officer along with the police report were lying in the case diary and the learned Magistrate is empowered to use the materials in the case diary in course of inquiry and trial. Therefore, when the learned Magistrate took cognizance of offence on the basis of the police report and the materials in case diary which he is entitled to consider under Section 172(2) of the Code, this Court is not in a position to set aside the order of taking cognizance against the accused persons.

35. On the question as to whether the learned Magistrate acted illegally and with material irregularity in issuing non-bailable warrant of arrest against the petitioners, this Court is inclined to record that the learned

Magistrate duly considered the guidelines of the Hon'ble Supreme Court in the case of Satender Kumar Antil. On perusal of the case diary he found that the petitioners never joined the investigation. The petitioners cannot claim protection against arrest on the basis of the advocate's letter written to the Investigating Officer on behalf of the petitioners that they were willing to extend cooperation to unearth the truth in course of investigation. On the contrary, the fact remains that the Investigating Officer failed to ensure attendance of the petitioners during investigation. Moreover, prayer for anticipatory bail of the petitioners was rejected by the learned Sessions Judge on 21st September, 2022.

36. Under such circumstances, I do not find any merit in the instant revision and the same is dismissed on contest, however without cost.

(Bibek Chaudhuri, J.)

Later

After delivery of judgment, Mr. Ayan Bhattacharjee, learned Advocate for the petitioners has prayed for stay of operation of the judgment/order passed by this Court in the instant revision for a fortnight placing an order dated 12th October, 2022 passed in C.R.M (A) 4870 of 2022.

Mr. Somopriyo Chowdhury, learned Advocate for the private opposite party has opposed such prayer.

This Court is not inclined to stay operation of the judgment and order passed by this Court. Accordingly, prayer for stay is rejected.

(Bibek Chaudhuri, J.)