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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On: 12th October, 2023

Pronounced On: 19th December, 2023

+ CRL.M.C. 3566/2014, CRL.M.A. 351/2016 (Additional Documents) & CRL.M.A. 33225/2018 (Extension of Stay)

URAVASHI FAKAY

..... Petitioner

Through: Mr. Pramod Kumar Dubey, Senior Advocate with Mr. Shiv Chopra, Mr. Kaustubh Chauhan, Ms. Aadhya Khanna, Mr. Akshat Sharma, Mr. Prince Tiwari, Ms. Pallavi Garg and Mr. Siddharth Arora, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Aman Usman, APP for State.
SI Amit Rathee, P.S. Ashok Vihar.
Mr. Tarun Khanna, Advocate for R-2.

+ CRL.M.C. 3567/2014, CRL.M.A. 33221/2018 (Extension of Stay) & CRL.M.A. 11077/2019 (Extension of Stay)

SUNIL FAKAY

..... Petitioner

Through: Mr. Pramod Kumar Dubey, Senior Advocate with Mr. Shiv Chopra, Mr. Kaustubh Chauhan, Ms. Aadhya Khanna, Mr. Akshat Sharma, Mr. Prince Tiwari, Ms. Pallavi Garg and Mr. Siddharth Arora, Advocates.



versus

STATE OF NCT OF DELHI

..... Respondent

Through: Mr. Aman Usman, APP for State.
SI Amit Rathee, P.S. Ashok Vihar.
Mr. Tarun Khanna, Advocate for R-2.

CORAM:
HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present petitions under Section 482 of the Code of Criminal Procedure, 1973 ('CrPC') read with Article 227 of the Constitution of India seek the following prayers:

CRL.M.C. 3566/2014

"It is most respectfully submitted in the light of the above mentioned facts and circumstances that this hon'ble court may be pleased to pass an order:

a) To call the records of the matter entitled as "Urvashi Fakay versus State and Anr." bearing CR. No.4/14, from the court of Dr. Kamini Lau, Learned. Additional Sessions Judge, Rohini Courts, New Delhi and the records of case titled as "State vs. Dr. Sunil Fakay Etc." FIR No.228/10 & CC No. 725/1/10 titled as "Beti Bachao Samiti vs. Dr. Sunil Fakay Etc." both U/s. 23 of PC & PNDDT Act of P.S. Ashok Vihar, Delhi, pending in the Court of Ms. Rekha, Chief Metropolitan Magistrate, Distt. N/W, Rohini Courts, Delhi and is now fixed for 22.08.2014;

b) Quashing the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Learned. Additional Sessions Judge, Rohini Courts in the matter entitled as "Dr. Sunil Fakay versus State and Anr." CR. No.5/14 and the impugned order dated 25.11.2013 passed by Ld. Chief Metropolitan



Magistrate (Distt North-West) Rohini Courts and discharge the petitioner in FIR No. 228/2010 and Complaint Case No. 725/1/10;

c) Expunge the remarks made against the Petitioner in para 19, 21, 22 of the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts in the matter entitled as “Dr. Sunil Fakay versus State and Anr.” CR. No.5/14;

d) Expunge the wrong fact recorded in para 2 of the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts, wherein, the complaint dated 07.07.10 addressed to DC-North West has been filed by the Respondent No.2 against the petitioner also under Medical Termination of Pregnancy Act;

e) Expunge the wrong fact recorded in para 3 of the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts, wherein, the petitioner has been referred as a doctor;

f) Pass such and such order as this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.”

CRL.M.C. 3567/2014

“It is most respectfully submitted in the light of the above mentioned facts and circumstances that this hon’ble court may be pleased to pass an order:

a) To call the records of the matter entitled as “ Dr.Sunil Fakay versus State and Anr.” bearing CR. No.5/14, from the court of Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts, New Delhi and the records of case titled as “State vs. Dr. Sunil Fakay Etc.” FIR No.228/10 & CC No. 725/1/10 titled as “Bet! Bachao SamitI vs. Dr. Sunil Fakay Etc.” both U/s. 23 of PC & PNDT Act of P.S. Ashok Vihar, Delhi, pending in the Court of Ms. Rekha, Chief Metropolitan Magistrate, Distt. N/W, Rohini Courts, Delhi and is now fixed for 22.08.2014;

b) Quashing the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts in the matter entitled as “Dr. Sunil Fakay versus State and Anr.” CR. No.5/14 and the Impugned order dated 25.11.2013 passed by Ld. Chief Metropolitan Magistrate (Distt



North west) Rohini Courts and discharge the Petitioner in FIR No. 228/2010 and Complaint Case No. 725/1/10;

c) Expunge the remarks made against the Petitioner in para 19, 21, 22 of the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts in the matter entitled as “Dr. Sunil Fakay versus State and Anr.” CR. No.5/14;

d) Expunge the wrong fact recorded in para 2 of the impugned order dated 02.07.2014 passed by Dr. Kamini Lau, Ld. Additional Sessions Judge, Rohini Courts, wherein, the complaint dated 07.07.10 addressed to DC-North West has been filed by the Respondent No.2 against the petitioner also under Medical Termination of Pregnancy Act;

e) Pass such and such order as this Hon’ble Court may deem fit and proper in the facts and circumstances of the case.”

Both the petitions challenge the aforesaid common order dated 02.07.2014 and seek similar prayers and therefore, are being disposed of *vide* the present common judgment.

Background

2. Briefly stated, facts of the case necessary for the purpose of disposal of the present petitions are as under:-

- i. A non-government organization, i.e., respondent no.2/Beti Bachao Samiti filed a complaint dated 07.07.2010 before the Deputy Commissioner, North-West District, being the appropriate authority under the provisions of Pre-Conception and Pre-Natal Diagnostic Techniques Act, 1994, (hereinafter referred as ‘the Act’) and Medical Termination of Pregnancy Act, 1971 against the present petitioners.
- ii. The aforesaid complaint was forwarded by the Deputy Commissioner to the SHO, P.S. Ashok Vihar with a direction to lodge an FIR against



the Diagnostic Centre and its Proprietor immediately, pursuant to which FIR No. 228/2010 was registered at P.S. Ashok Vihar on 17.08.2010, under Section 23 of the Act.

- iii. Respondent no. 2 also filed a separate complaint before the learned Chief Metropolitan Magistrate ('CMM') based on the same set of facts on 30.07.2010, which was registered as CC No. 725/1/10.
- iv. While the aforesaid complaint was pending, respondent no. 1/State, filed a chargesheet under Section 23 of the Act on 16.10.2012 in case FIR No. 228/2010, registered at P.S. Ashok Vihar.
- v. The learned CMM, *vide* order dated 11.01.2013, took cognizance of the aforesaid chargesheet and summoned the present petitioners.
- vi. The complaint case i.e., CC No. 725/1/10 was pending at the stage of pre-summoning evidence and since the chargesheet was also pending in the same Court, the learned CMM took up the aforesaid chargesheet and the said complaint case simultaneously.
- vii. An application on behalf of the petitioners seeking discharge in the chargesheet was filed before the concerned Court on the ground that Section 28 of the Act was not complied with and therefore, cognizance taken by the learned CMM on the said chargesheet was bad in law.
- viii. An application under Section 210 of the CrPC was also filed on behalf of respondent no. 2 for clubbing the chargesheet and the complaint. Learned CMM, while disposing of the said application passed an order clubbing the aforesaid chargesheet arising out of FIR No. 228/2010 with the complaint case No. 725/1/10 *vide* order dated 25.11.2013. Learned CMM while passing the aforesaid order also held that since the



cognizance in the aforesaid complaint case was taken on 17.08.2010, petitioners would be treated as summoned *vide* order dated 11.01.2013 in the complaint case as well and that henceforth, the said complaint case would proceed as a 'Warrant Trial' under the Act.

- ix. The aforesaid order was challenged by the present petitioners by way of revision petitions which were dismissed by learned Additional Sessions Judge ('ASJ') *vide* the impugned order dated 02.07.2014.

Submissions on behalf of the Petitioners

3. Learned Senior Counsel appearing on behalf of the petitioners raised the following legal issues:

Notice Mandatory under section 28(1)(b) of the Act and intention to file complaint in absence of any action taken by the appropriate authority:

3.1. Learned Senior Counsel appearing on behalf of the petitioners submitted that in the present case, the complaint was filed with the appropriate authority but nowhere in the said complaint was it mentioned that upon failure on the part of the appropriate authority to take any action, the complainant would institute the complaint for the prosecution of the petitioners within the statutory period of 15 days. It was further pointed out that on the complaint of respondent no. 2, action was taken by the appropriate authority against the petitioners by cancelling the registration of the petitioners' centre *vide* order dated 16.07.2010 and also forwarding the complaint through the SDM to the local police for legal action, consequent to which the aforesaid FIR was registered. Learned Senior Counsel further submitted that the mandatory notice under Section 28(1)(b) of the Act was not given and therefore, the entire proceedings is vitiated.



Cognizance can be taken only on the basis of the complaint as mandatory under Section 28(l)(b) of the Act

3.2. Learned Senior Counsel appearing on behalf of the petitioners submitted that no cognizance of the offence could have been taken on the basis of chargesheet as there was no complaint made by the appropriate authority, mandated by Section 28(1)(a) of the Act. It was submitted that the aforesaid illegality is not a curable defect and therefore, the entire proceedings stand vitiated. In support of the said contention, learned Senior Counsel placed reliance on the following judgments:

- i. Jeewan Kumar Raut v. CBI, AIR 2009 SC 2763.
- ii. Aniruddha Bahal v. CBI, (2014) 2 JCC 1403.

Legal import of complaint defined under Section 2(d) of the CrPC as distinguished from police report defined under Section 173(2) of the CrPC

3.3. ‘Complaint’ is defined under Section 2(d) of the CrPC as under:

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

3.4. The term ‘Police report’ is defined under Section 2(r) of the CrPC, which reads as under:

“Police report means a report forwarded by the Police Officer to the Magistrate under sub-section (2) of Section 173 “

3.5. It was submitted that a combined reading of the above two provisions makes it amply clear that a police report is excluded from the definition of a complaint. It was argued that the Act is a special act, which completely prohibits the Court from taking cognizance on any report, including a police



report and cognizance can only be taken on a complaint. As per Section 4 and 5 of the CrPC, the special act will override the general act. The procedure for prosecution of a complaint case and a police case is distinct and falls under distinct Chapters of the CrPC.

3.6. Further it was submitted that in any event, as per the judgment in **Privy Council in King Emperor and Nazir Ahmed, AIR 1936 PC 253**, no other procedure is permitted to be adopted other than that which has been laid down in the provision itself.

3.7. Further, the complaint as per the mandate of Section 28(1)(a) of the Act is to be filed in the prescribed manner. The legislature has set out a prescribed manner or mode for taking cognizance as envisaged in section 28(1)(a) of the Act, wherein no Court shall take cognizance of the offence except on a complaint by the competent authority.

3.8. In the present case, the Courts below have failed to appreciate that the effect and the purport of the police report is of no consequence, in view of the mandatory procedure of taking cognizance only on a basis of the complaint by the appropriate authority or any person who has given a fifteen days notice to the appropriate authority to make a complaint to the Court in absence of any action on part of the appropriate authority.

3.9. Reliance was placed on **Daulat Ram v. State of Punjab, AIR 1962 SC 1206**, wherein the Hon'ble Supreme Court considered the nature of Section 195 of the CrPC. In the said case, cognizance had been taken on the police report by the learned Magistrate and the appellant therein had been tried and convicted, though the concerned public servant, the *Tahsildar* had not filed any complaint.



Complaint of respondent no. 2 is not maintainable as the appropriate authority had already initiated action

3.10. It was submitted that in the present case, the appropriate authority has already initiated action which is apparent from the letter dated 07.07.2010 which reflects that the SDM, Model Town, on the direction of the appropriate authority, sent a letter to the SHO, P.S. Ashok Vihar to register an FIR with regard to the present case. Further, the Show cause notice dated 13.07.2010 and order dated 16.07.2010 cancelling registration of 'Dr. Sunil Fakay - Imaging Centre' and sealing order dated 16.07.2010 passed by the SDM shows that the appropriate authority acted within nine days of letter dated 07.07.2010 addressed to appropriate authority. It was submitted that respondent no.2, knowing that all these actions were being taken against the petitioners and their Ultrasound Imaging Centre, deliberately filed the complaint with an ulterior motive of somehow coercing the petitioners to accept the illegal demands of money of respondent no. 2 and the same is also evident from FIR No. 152/2010, under Sections 384/34 of the IPC, registered against respondent no. 2 and other accomplices.

Pre-summoning evidence was not complete and never reached its logical conclusion as it was not formally closed by the then learned Metropolitan Magistrate

3.11. It was submitted that pre-summoning evidence was being recorded and before the conclusion of the same, the learned Magistrate, without passing the necessary order for closure of pre-summoning evidence and appreciating the pre-summoning evidence, passed the impugned order holding that the summoning order dated 11.01.2013 passed in the police case would be



deemed to be treated as a summoning order in the complaint case as well, thereby giving a retrospective effect to the said order. Learned Senior Counsel submitted that the procedure adopted by the learned Metropolitan Magistrate is unknown and contrary to law. Hence, the deemed summoning order in the complaint case is not only bad in law but also void *ab initio*.

3.12. Further, it was submitted that the judicial record of the present case and order dated 30.03.2013, reflects that in the complaint case, pre-summoning evidence was last listed for 30.03.2013, after which on further dates no pre-summoning evidence was recorded or formally closed by the then learned Magistrate. Learned Senior Counsel submitted that this shows that pre-summoning evidence in the present case never reached its logical conclusion to enable the summoning of petitioners. Thus, the summoning of the petitioners is illegal on account of this defect.

3.13. It was submitted that the learned ASJ failed to appreciate that the learned CMM adopted improper procedure of 'deemed summoning' of the petitioners in complaint case by giving retrospective effect to the summoning order passed in the police case on a date prior to the conclusion of pre-summoning evidence. As issuance of deemed process in complaint case on 11.01.2013 was prior in time to closing of pre-summoning evidence on 30.03.2013, the former is illegal and is beyond the scheme of the CrPC. Further, none of the allegations and statements given on oath were considered at the time of issuance of deemed process in the complaint case.



Illegal procedure adopted in clubbing of complaint case and the state case under Sections 202 and 210 of the CrPC

3.14. It was submitted that the learned ASJ failed to appreciate that the learned CMM adopted an illegal procedure of clubbing the complaint case and the Police case under Section 202 of the CrPC. The learned ASJ had erred in treating the chargesheet defined in Section 2(r) of the CrPC as an inquiry report defined under Section 202 of the CrPC, without appreciating the importance and the effect of a chargesheet and an inquiry report.

3.15. Learned Senior Counsel submitted that the Court cannot treat the report under Section 173(2) of the CrPC report as a report filed by the police under Section 202 of the CrPC. A report under Section 202 of the CrPC is mandatory in nature, so as to direct the local police to conduct an investigation on a specific aspect. An order of the learned Magistrate is *sine qua non* for an inquiry report under Section 202 of the CrPC. Reports under Sections 173(2) and 202 of the CrPC are distinct from each other.

3.16. It was submitted that clubbing under Section 202 of the CrPC can neither be expressly or impliedly interpreted from a plain reading of the said provision which leads to an irresistible conclusion that the aforesaid procedure of clubbing of the complaint case with the police case is illegal.

3.17. Reliance was placed on **State of Bihar v. Murad Ali Khan, (1988) 4 SCC 655**, wherein it was held that the cognizance can be taken only in one way, i.e., on the complaint of a particular statutory functionary, then Section 210 of the CrPC has no role to play.



Triple test of illegality, impropriety and irregularity not adhered to in the revision of the impugned order under challenge in exercise of revisional power under Section 397 of the CrPC

3.18. Learned Senior Counsel for the petitioners submitted that the learned ASJ failed to appreciate that order dated 25.11.2013, passed by the learned CMM does not qualify the triple test of illegality, impropriety and irregularity in view of the following illegalities: (i) illegal cognizance; (ii) deemed summoning of the petitioners on the date prior to the conclusion of pre-summoning evidence i.e. 30.03.2013, (iii) clubbing of police case and the complaint case under Section 202 of the CrPC and (iv) treating the chargesheet as an interim report under Section 202 of the Cr.P.C.

Illegal procedure adopted by the Revisional court by relying upon material which was not the part of the judicial record and the pleadings.

3.19. It was submitted that the learned ASJ went outside the scope of revision by discussing the statistics regarding the sex ratio in India and making an observation regarding doctors who are on the wrong side of the law. This observation made by the learned ASJ was not a part of the judicial record and the pleadings.

Erroneous observation of predetermining the guilt of the petitioner, going outside the scope of a revision

3.20. Learned Senior Counsel submitted that the learned ASJ went completely outside the scope of revision by discussing that as part of the National Policy, it was required to come down heavily on those who were involved in illegal actions of female foeticide. It was argued that this observation leads to an irresistible conclusion that the learned ASJ



predetermined the guilt of the petitioners, while going completely outside the scope of revision.

Revisional court failed to deal with all the grounds raised in the revision petition

3.21. It was argued that the learned ASJ has only dealt with the issues viz. cognizance; whether the complaint filed by the respondent no.2 fulfills the criteria of depicting the intention to file a complaint before the Magistrate for failure on part of the appropriate authority to file a complaint before the Magistrate within 15 days of receiving the said complaint; whether the police case and the complaint case can be clubbed under Section 202 of the CrPC; and finally, whether the chargesheet can be treated as inquiry report under Section 202 of the CrPC. It was submitted that whereas, the petitioners raised as many as 41 grounds and grounds C,D,G,H,I,K,L,M,S and T taken in the revision petition by the learned ASJ, were not considered while passing the impugned order dated 02.07.2014.

Absence of DVR on which the alleged sting operation conducted on the petitioners was recorded.

3.22. It was submitted that the learned ASJ did not appreciate that respondent no.2 failed to furnish the DVR on which the alleged sting operation was recorded. Reliance was placed upon **Ram Singh v. Col. Ram Singh, AIR 1986 SC 3.**

Admissibility of CD and transcript in the absence of certificate under section 65-B of the Indian Evidence Act

3.23. Learned Senior Counsel submitted that the learned CMM and the learned ASJ failed to appreciate that respondent no.2 failed to furnish a



certificate under section 65-B of the Indian Evidence Act with regard to the CD of the alleged sting operation and the transcript of the alleged conversation which renders both inadmissible as evidence. Reliance was placed on **Anwar P.V v. P.K.Basheer and Ors.**, judgment dated 18.09.2014, passed by the Hon'ble Supreme Court in **Civil Appeal No. 4226 OF 2012**.

3.24. Reliance was also placed on the judgment of the Hon'ble Supreme Court in **Sanjaysinh Ramrao Chavan v. Dattatmy Gulabrao Phaike, (2015) 1 SCALE 457**; a judgment passed by a co-ordinate bench of this Court in **Jagdeo Singh State, 2015:DHC:1362** and a judgment passed by a learned Division Bench of this Court in **Abhilash Kaur v. CBI, 2015:DHC:2149-DB**.

No material furnished by the respondent no.2 to show that as per the handbook of PC&PNDT rules the alleged sting operation was volunteered and it was not under entrapment:

3.25. As per the handbook of the Rules, the act of the wrongdoer must be a volunteered act. For the sake of argument, it was submitted that an Act done under an entrapment and for the purpose of conducting a sting operation is not a volunteered act and will not be an offence under the Act. In this regard, the reliance was placed on **R.K. Anand v. Registrar, Delhi High Court, (2009) 8 SCC 106**.

3.26. It was submitted that respondent no.2 failed to furnish any material to show that as per the handbook of the Rules the alleged sting operation was volunteered and it was not under an entrapment.



Submissions on behalf of the Respondents

4. *Per contra*, learned APP for the State assisted by learned counsel appearing on behalf of respondent no. 2 submitted as under:

4.1. The petition is not maintainable in the present form as the same is premature *qua* the relief of discharge of the petitioners, as the learned Trial Court is yet to record pre-charge evidence in the present matter and decide whether to proceed with framing of charge or not.

4.2. It was submitted that the petitioners have assailed the orders dated 25.11.2013 & 02.07.2014, whereby the Courts have, treated the police report (chargesheet) as per the provision of 202(1) of the CrPC and merged the police report with the pre summoning evidence led by respondent No.2 to proceed with the matter from the stage of pre charge evidence. However, the petitioners herein were summoned *vide* order dated 11.01.2013 and the summoning order dated 11.01.2013 was never challenged by the petitioners, either before the Court of learned ASJ or before this Court and thus same has attained finality. Similarly, the order of the cognizance was never been assailed either before the Court of learned ASJ, or before this Court, thus same attained finality. Thus, on this ground alone, in absence to the challenge to cognizance and summoning (which attained finality), present petition is liable to be dismissed.

4.3. The petitioners herein, *vide* order dated 25.05.2013, submitted to the jurisdiction of the learned CMM and submitted to club the proceedings, therefore, now they are *estopped* in law to challenge the clubbing of the cases.

4.4. Brief facts of the present case were laid out as under:



07.07.2010	Respondent no.2 approached the Deputy Commissioner North-West, Delhi, who was the District Appropriate Authority (DAA) established under the provisions of the PNDDT Act with the clear intention to file complaint under Section 28 of the Act against the petitioners for the incident dated 26.05.2010
30.07.2010	Respondent no.2 filed a complaint before the concerned learned Magistrate in terms of their complaint dated 07.07.2010 before the Appropriate Authority, which was registered as CC No. 725/1/10.
17.08.2010	Though there was no formal order, however, since the matter was placed for the purpose of recording pre-summoning evidence, therefore, under the law it is deemed that cognizance of the complaint filed before the concerned court was taken and respondent no.2 was directed to complete pre-summoning evidence.
17.08.2010	On same day, FIR No. 228/10 was registered against the petitioners at P.S. Ashok Vihar.
26.10.2012	Chargesheet was filed in FIR No. 228/2010 before the concerned Court.
09.01.2013	A supplementary chargesheet was filed in FIR No.228/210
11.01.2013	The learned CMM in its order took the cognizance of the chargesheet filed in FIR No.228/10 registered at PS



	Ashok Vihar and summoned the present petitioners.
30.03.2013	Pre-summoning evidence was formally closed in the complaint case, i.e., CC No. 725/1/10 filed by respondent no.2, though no witness was examined in between 09.01.2013 to 30.03.2013.
20.05.2013	The petitioners submitted, during the course of hearing in CC No. 725/1 that the same be clubbed with the FIR No. 228/10, registered at P.S. PS Ashok Vihar pending before the Court of the learned CMM.
May-June 2013	The petitioners moved applications, seeking their discharge under Section 239 of the CrPC. Respondent no.2 herein moved an application under Section 210 Cr.P.C
25.11.2013	The learned CMM, proceeded to dispose of the two applications, i.e. an application seeking discharge under Section 239 of the Cr.PC filed by the petitioners and another application under Section 210(1) of the Cr.PC preferred by the respondent no. 2, and both the matters i.e. FIR No.228/2010 & CC No. 725/1/10 <u>were directed to be proceeded further as a warrant trial case instituted otherwise than on a police report i.e. like a complaint case u/s 23 of the PC & PNDT Act.</u>
02.07.2014	A Revision petition preferred by the petitioners challenging the order dated 25.11.2013, was dismissed by



	the learned ASJ, (NW), Rohini Courts, Delhi.
26.07.2014	The petitioner filed the present petition challenging both the order dated 25.11.2013 passed by the CMM and order dated 02.07.2014 passed by the learned ASJ.

4.5. It was submitted that both the Courts below made categorical observations and treated the chargesheet as investigation within the meaning of Section 202 of the Cr.P.C, and clubbed the police report with the complaint case and decided to treat the present case as warrant trial case.

4.6. It was further submitted that in the present matter, respondent no.2 filed different complaints with different authorities including a complaint dated 07.07.2010 addressed to the Deputy Commissioner North-West District being the appropriate authority. In the said complaint, a request was made to file a complaint before the Magistrate in terms of section 28 of the Act. In the said the complaint, respondent no.2 made it clear that the same be treated as their intention to take appropriate action against the petitioners in accordance with provisions of law. It is also clear from the endorsement on the said complaint that it was received in the office of the appropriate authority on 07.07.2010 itself.

4.7. The present FIR was registered on 17.08.2010, which was after lapse of 15 days, as per the requirement of the law. In terms of section 28(1)(b) of the Act, the complainant was competent to file a complaint after expiry of 15 days after 07.07.2010. Thus, respondent no.2 filed a complaint, i.e., CC No. 725/1/10 before learned CMM on 30.07.2010 on the same set of facts as



described in the complaint dated 07.07.2010. Thus, the said complaint was filed by a competent person in terms of Section 28 of the Act.

4.8. In the meantime, the learned CMM directed respondent no.2 to lead the pre-summoning evidence in complaint case on 17.08.2010. Thus, impliedly by taking the cognizance, the learned CMM issued directions to lead the pre summoning evidence to the respondent no.2. The complaint case remained fixed for pre-summoning evidence from 17.08.2010 to 30.03.2013 when complainant evidence was formally closed.

4.9. Further, learned APP submitted that in the meantime, on 17.08.2010, the police registered an FIR against the petitioners herein and investigated the matter. On 26.10.2012, police filed the chargesheet. Both the cases, i.e., the complaint case and the FIR were pending before the same Court, however, were listed on different dates and proceedings were going on simultaneously. On 09.01.2013, a supplementary chargesheet was filed by the police. The learned CMM, took cognizance of the offence mentioned in the chargesheet *vide* order dated 11.01.2013 and summoned the accused in the police case. In the meantime, pre-summoning evidence was also formally closed on 30.03.2013. It was submitted that in the complaint case, between 09.01.2013 and 30.03.2013, the complainant did not examine any of the witness, meaning thereby all the witnesses were examined in pre summoning evidence before cognizance was taken by the learned CMM in the chargesheet on 11.01.2013.

4.10. On 20.05.2013, when both the matters were taken up simultaneously by the learned CMM, the petitioners expressed their desire to club both the matters.



4.11. In the meantime, the petitioners herein filed applications under Section 239 of the CrPC seeking discharge and respondent no.2 also filed an application under Section 210 of the CrPC to club the cases.

4.12. It was submitted that *vide* order dated 25.11.2013, the learned Metropolitan Magistrate disposed of the applications but treated the chargesheet as a police report under Section 202 of the CrPC and decided to proceed with the matter as a warrant trial case from the stage of pre-charge evidence.

4.13. Learned APP for the State submitted that the complaint case was not placed before the learned CMM on 11.01.2013, when the cognizance in the police case was taken, but a complaint filed by the competent person was very much pending before the same Court, where the pre-summoning evidence was being recorded, implying that the said Court had already taken cognizance of the offence in the complaint case *vide* order dated 17.08.2010 and proceeded to record pre-summoning evidence. It is also not disputed when pre-summoning was completed, though not formally closed, the police filed the chargesheet, and cognizance was taken on the same *vide* order dated 11.01.2013, by the same Court. Now, as far as second cognizance is concerned, though it is a specific order, however, same cannot vitiate the proceedings by treating it as an illegality. The court was competent to proceed with the matter on the basis of deemed cognizance *vide* order dated 17.08.2010 in the complaint case. Further, the chargesheet filed in the present case is actually an aid to the enquiry conducted by the learned Metropolitan Magistrate, during the pre-summoning stage.



4.14. It was submitted that it is also an admitted position that *vide* order dated 11.01.2013, the learned Trial Court issued summons to the petitioners, the same can be treated as being issued in complaint case, as the said complaint case was also pending at the same time before the same court and there was sufficient material on record to proceed with the matter in the complaint case, besides, the police report was treated to be filed under Section 202 Cr.P.C.

4.15. It was submitted that, it is well settled law that technicalities of law must not come in the way of substantive justice, as laid down by different Courts from time to time. It is not the case that there was no complaint before the Court at the time of taking cognizance in the police case, rather there was a duly filed complaint case pending before the said Court on same set of facts and if the said complaint case was brought to the notice of Court at that time, appropriate order could have been passed after taking into consideration both the matters.

4.16. Without prejudice to the aforesaid, it was submitted that the irregularity, if any, order dated 11.01.2013 due to absence of a complaint before the Court for the purpose of taking cognizance, is a curable defect. The cognizance on the allegation leveled by the complainant, both in the complaint dated 07.07.2010 sent to the appropriate authority and the complaint filed before the learned CMM shall relate back to order dated 17.08.2010 when the complaint case was fixed for pre-summoning evidence. Similarly, the summoning order dated 11.01.2013 which had in fact, been passed in the Police case would also be treated as a summoning order in the complaint case and no separate or fresh summoning order is required.



4.17. It was submitted that the order taking cognizance, at best is a curable defect, which is remediable under Section 460(e) of the Cr.PC and what is a curable defect cannot be made a ground for quashing proceedings. In support of the said contention, reliance was placed on **Purshottam Jethanand v. State of Kutch, AIR 1954 SC 700**. It is a settled principle of law that be a defect which can be cured cannot a ground for quashing proceedings under Section 482 of the CrPC.

4.18. Reliance was also placed on a judgment dated 18.04.2022 passed by the Hon'ble High Court of Punjab and Haryana in **CRM-M-14160-2016(O&M)** titled '**Ila Sood v. State of Punjab**', wherein while dealing with a quashing plea in a case pertaining to the Act, it was held as under:

“9. As has been noticed hereinabove, the primary contention of the petitioner is that an FIR was not maintainable as the Court could take cognizance under the Act only on a complaint of the Appropriate Authority. During the course of arguments however, another alternative plea was raised that if the State case (FIR case) and the complaint case was to be clubbed, then the trial should proceed following the procedure of a complaint case.

12. That there were conflicting judgments of this Court as to the apparent dichotomy between Sections 27 and 28 of the PC & PNDT Act, 1994 inasmuch as, Section 27 PC & PNDT Act envisaged the offence to be cognizable i.e. that the registration of the FIR was permissible, whereas, the Section 28 gives an impression that the mode of taking cognizance was only on the basis of a complaint by an Appropriate Authority. Ultimately, the matter came up on a reference to a Division Bench of this Court in the case of 'Hardeep Singh & Another Vs. State of Haryana & others' in CRM-M-4211-2014 decided on 04.12.2014..

14. In the present case undoubtedly, the petitioners have also been summoned in a private complaint preferred by the Appropriate Authority and in fact a quashing petition bearing CRM-M-2608-2016 is pending adjudication before this Court. Thus, in the present situation where an accused has been summoned in a criminal complaint and is also facing



proceedings initiated on the basis of an FIR, resort can be had to the provisions of Section 210 Cr.P.C..

15. A perusal of the aforementioned provision would reveal that where there is a complaint case and a police investigation in respect of the same offence then the Magistrate concerned shall inquire into or try together the complaint case and the case arising out of a police report as if both the cases have instituted on a Police report. Therefore, the alternative argument of the learned counsel for the petitioner that on clubbing of both cases, the trial should proceed like in a complaint case cannot be accepted.

16. In view of the aforementioned discussion, an FIR is clearly maintainable under the provisions of the PC & PNDT Act, 1994 and even otherwise, the petitioner has the remedy of seeking clubbing of both the cases in terms of Section 210 Cr.P.C, in which case the trial shall proceed like in a State case.

17. Thus, the present petition for quashing of the FIR No.05 dated 03.01.2016 registered under Sections 3-A, 5, 6 and 23 of PNDT Act, 1994 and Rule 9(4) & 9(1) of PC PNDT Rules, 1996 and Sections 120-B IPC at Police Station City Khanna, District Ludhiana (Annexure P-1) and all subsequent proceedings arising therefrom is hereby dismissed.”

4.19. It was stated by learned APP that the Act has been enacted with an object to prohibit the pre-natal diagnostic techniques for sex determination of foetus so that the menace of female foeticide can be curbed. To meet the objective behind the enactment of said law, the technicalities must not come in the way of its implementation and its objectives must not be defeated on technical grounds. Further, no prejudice has been caused to the petitioners by clubbing the proceedings together.

4.20. Attention of this court was drawn to a recent judgment passed by a coordinate bench of this Court in **Manoj Krishan Ahuja v. State (NCT of Delhi) & Anr., 2023:DHC:2718;** wherein it was held as under:

“45. As per Section 27, the offences under the PC&PNDT Act have been classified as ‘cognizable’ offences without an exclusion clause barring the role of police. Similarly, the phrase “as far as possible” included in Rule 18A(3) would indicate that the role or assistance of police is not barred



under the Act. Though the offences under the Act have been made cognizable, definition of which has as per Cr.P.C. has been reproduced in preceding para no. 43, it is not clear from the Act that since the police is duty bound to register an FIR when it comes to their knowledge that a cognizable offence has been committed and is empowered to arrest a person without a warrant, though Section 27 makes all the offences under the Act to be 'cognizable', what will police do in such eventuality.

46. However, this Court notes that Section 28 of PC&PNDT Act only bars taking of cognizance by Court of law and does not bar registration of FIR or investigation by police on the basis of a complaint lodged with the police.

50. Thus, tested from the facts and material on record of the present case, the proceedings in this case were initiated by Appropriate Authority. The initial investigation as per the Act was carried out by them and they had sought assistance of the police for further investigation. Since the Act does not bar the involvement of the police entirely and the Appropriate Authority could have taken assistance of the police, the assistance of the police in this case was thereby taken. The reason as to why the Appropriate Authority felt a need for taking assistance of the police will become clear only during trial and, therefore, it cannot be a ground for quashing of FIR.

51. A report under Section 173 Cr.P.C., in the present case, was only a part of investigation or an 'assisted investigation' under the PC&PNDT Act as the initial investigation including search, seizures, etc. was carried out by the Appropriate Authority. Since the offences under the PC&PNDT Act are cognizable in nature as per Section 27, as and when commission of a cognizable offence comes to the knowledge of police, the police is bound to register an FIR and conduct investigation. Thereafter, a report under Section 173 Cr.P.C. will also follow which can only be filed before a Court of law.

52. However, as observed in preceding discussion, the bar under Section 28 of the Act that cognizance can be taken only if a complaint of the Appropriate Authority is before the Trial Court is an absolute bar. Therefore, though registration of the FIR is not expressly barred under the Act on the complaint made by Appropriate Authority, taking of cognizance only on the basis of chargesheet filed by the police on the basis of such a complaint is barred. A similar view was also taken by the Division Bench of Hon'ble High Court of Punjab and Haryana in case of Hardeep Singh v. State of Haryana CRM No.M-4211/2014.



59. The power under Section 482 Cr.P.C. has to be exercised sparingly and that too in the rarest of rare cases. Tested on the touchstone of aforesaid judicial precedents, the plea of present petitioner for quashing of FIR is not covered under the said principles as material regarding commission of the offence has been collected and filed in the form of chargesheet before the Trial Court and is also before this Court. As observed in preceding discussion, the object of the Act cannot be allowed to get defeated by quashing the FIR solely on the ground that police could not have investigated and filed chargesheet in this case, since the police assistance sought by Appropriate Authority is not barred completely by the Act.

60. In the present case, the complaint was received by the Appropriate Authority, and was dealt with by them under the Act and thereafter a complaint was lodged with the police as their assistance was sought for investigating the matter. Further, keeping in view that there is no complete bar in involvement of police under the words used in Rule 18A(3) are “as far as possible”, neither the filing of chargesheet was vitiated nor the registration of FIR was bad in law. In case this view is adopted, FIRs registered under the Act and investigations carried out by the police pursuant to complaint by Appropriate Authorities culminating into filing of chargesheet against the offenders would have to be quashed on technical ground of no clarity or specific provision in the Act regarding the same.

61. The Act is silent as to what course is to be adopted and what is the repercussion of such chargesheet being filed in the court. As held by the Hon’ble Apex Court in the case of Rasila S. Mehta (supra), the purpose of law is not to allow the offender to sneak out of the meshes of law and that “the statutes must be construed in a manner which will suppress the mischief and advance the object the legislature had in view. A narrow construction which tends to stultify the law must not be taken.”

62. Thus, hyper technical grounds cannot become the basis of quashing of chargesheets or FIRs, especially when offences under the Act are cognizable in nature.”

4.21. Learned APP for the State further contended that the petitioners are estopped from challenging the order of clubbing as they had also made a request for the same before the learned CMM.



4.22. Thus, in facts and circumstances stated herein above, it was prayed that present petitions may be dismissed and the learned Trial Court be allowed to proceed with the matter treating the same as a warrant trial case.

Analysis and Findings

5. Both the petitioners have been accused of committing offence under Section 23 of the Act. The primary issue raised in the present petitions is with respect to Section 28 of the Act which provides as under:

“28. Cognizance of offences.—(1) No court shall take cognizance of an offence under this Act except on a complaint made by—

(a) the Appropriate Authority concerned, or any officer authorised in this behalf by the Central Government or the State Government, as the case may be, or the Appropriate Authority; or

(b) a person who has given notice of not less than fifteen days in the manner prescribed, to the Appropriate Authority, of the alleged offence and of his intention to make a complaint to the court.

Explanation.—For the purpose of this clause, “person” includes a social organisation.

(2) No court other than that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under this Act.

(3) Where a complaint has been made under clause (b) of sub-section (1), the court may, on demand by such person, direct the Appropriate Authority to make available copies of the relevant records in its possession to such person.”

6. A bare reading of the aforesaid provision reflects that a complaint with respect to the Act can be filed in the following manner:

- i. By a competent authority concerned or any officer authorized in this behalf by the Central or the State Government or as the case may be by the appropriate authority.
- ii. A complaint can be filed by a person which would include a social organization by giving notice of no less than 15 days in the manner



‘prescribed’ to the appropriate authority of the alleged offence, his intention to make a complaint to the Court.

7. ‘Prescribed’ has been defined under Section 2(1) of the Act as being ‘*prescribed by rules made under this Act*’ It is pertinent to note that no rules under the present Act have been framed regarding the mode and manner of a complaint under Section 28(1)(b) of the Act.

8. In the present case, respondent no. 2 which is an NGO, made the complaint dated 07.07.2010 to the Deputy Commissioner North-West Delhi who was the district appropriate authority against the petitioners for violation of provisions of the Act. In the said complaint, it is recorded as under:

“In view of the above said facts and circumstances your good-self is earnestly requested to take immediate action and investigate in the matter without any delay. Kindly treat this application as complaint and take appropriate action including filling of criminal complaint before the concerned Metropolitan Magistrate or Judicial Magistrate as per provisions of Section 28(1) of PNDT Act.

Without prejudice, needless to say that they complaint be also treated as out intention to take appropriate action against the above culprits, in accordance with the provision of law.

Your kind cooperation in achievement of our goal shall be highly appreciated as well need your hands to eradicate the evil from the society. Please support us in achieving our goal of a dignified society and uplifting of sex ratio and uplifting of status of female in society.”

9. Thereafter, the aforesaid complaint was forwarded by the competent authority to the concerned police station, i.e., P.S. Ashok Vihar and FIR No. 228/2010 was registered on 17.08.2010 against the present petitioners under Section 23 of the Act. However, no complaint under Section 28(1)(a) of the Act was filed by the competent authority. It is pertinent to note that on the



same date, i.e., 17.08.2010, respondent no. 2 also filed a complaint case, i.e., CC No. 725/1/10 before the learned Metropolitan Magistrate and the same was fixed for pre-summoning evidence.

10. On conclusion of investigation in the aforesaid FIR a chargesheet and supplementary chargesheet were filed before the Court of competent jurisdiction dated 26.10.2012 and 09.01.2013 respectively. Learned CMM took cognizance on the said chargesheet and summoned the present petitioners *vide* order dated 11.01.2013.

11. Grievance of the present petitioners is that the aforesaid order of cognizance is bad in law on account of the fact that same could not have been taken in absence of a complaint under Section 28 (1)(a) of the Act.

12. A co-ordinate bench of this Court in **Manoj Krishan Ahuja (*supra*)** has observed and held as under:

“32. Having discussed the procedure contemplated under Section 28 of the Act in the preceding discussion, this Court notes that the manner in which the cognizance was taken by the learned Trial Court upon a chargesheet is not the procedure envisaged under the PC&PNDT Act. In the present case, the complaint had to be filed by the concerned Appropriate Authority before the learned Trial Court as a complaint under Section 200 Cr.P.C. Since the cognizance has been taken on the chargesheet filed under Section 173 of Cr.P.C., it is clearly in the teeth of the bar under Section 28 of this Act which bars cognizance except upon receipt of complaint in the manner provided therein. It is also the sine qua non for taking cognizance that the said Appropriate Authority or the person so authorised should be validly appointed.

33. During the course of arguments, learned APP for the State had also produced a copy of complaint filed by the District Appropriate Authority before the learned Trial Court, almost a year after the cognizance had been taken in the present case, to contend that the irregularity, if any, stood cured.

34. On the contrary, it has been brought to the notice of this Court that the complaint filed by the Appropriate Authority on 02.09.2020 was filed as



a separate complaint case, which has been registered separately vide CT Case No. 3778/2020, pending before the same Trial Court.

35. **In the considered opinion of this Court, since Section 28 of the Act expressly prohibits taking of cognizance by the Courts in absence of a complaint made by Appropriate Authority or any other person authorised on its behalf, the complaint filed subsequently and registered and pending adjudication as per law under the Act cannot come to the rescue of the prosecution, more so since it will amount to prosecuting the same persons for same offences by two procedures prescribed under law i.e. by way of filing of a complaint case which was mandatory under this Act and on the basis of cognizance taken of a chargesheet which is prohibited under the Act.”**

(emphasis supplied)

13. In view of the above and the express provisions of law, the observation made by the learned ASJ in the impugned order dated 02.07.2014 that the aforesaid order dated 11.01.2013 was a curable defect which has been rectified by the complaint filed by respondent no. 2 which was pending in the same Court, is not sustainable in law. The order dated 11.01.2013 taking cognizance is set aside and the petitioners are discharged in the said chargesheet. At the same time, it is observed that registration of an FIR and subsequent investigation was not barred under the provisions of the Act. In **Manoj Krishan Ahuja (supra)**, it was further held as under:

“46. However, this Court notes that Section 28 of PC&PNDT Act only bars taking of cognizance by Court of law and does not bar registration of FIR or investigation by police on the basis of a complaint lodged with the police.

47. In this regard, a reference can also be made to Section 4 of Cr.P.C. which provides as under:

“4. Trial of offences under the Indian Penal Code and other laws.



(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.

(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.”

48. A bare perusal of the aforesaid provision would reveal that all offences under the Indian Penal Code, 1860, and also the offences under ‘any other law’, are to be investigated, inquired into, tried or otherwise to be dealt with as per provisions of Cr.P.C., unless an exception to the same is expressly provided in ‘any other law’. As observed in preceding paragraphs, the offences under the PC&PNDT Act are cognizable in nature, and thus, registration of FIR or investigation by police as per law is not barred.”

Thus, in the present case, the investigation and the material collected during the same cannot be faulted with.

14. The next issue before this Court is that if the cognizance in the chargesheet/police report is bad in law, then could the said chargesheet/police report be clubbed with the complaint filed on behalf of respondent no. 2 under Section 210 or Section 202 of the CrPC? Although the application under Section 210 of the CrPC filed on behalf of respondent no. 2 was not allowed by the learned CMM and the learned ASJ, this aspect has to be considered before dealing with the provision of Section 202 of the CrPC under which the chargesheet/police report has been clubbed with the complaint case filed by respondent no. 2, by the learned CMM and subsequently upheld by the learned ASJ.

15. Section 210 of the CrPC provides as under:



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

(2) If a report is made by the investigating police officer under Section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code”

(emphasis supplied)

16. The Hon’ble Supreme Court in the **Murad Ali Khan (*supra*)**, while dealing with similar provisions of the Wild Life (Protection) Act, 1972 has observed and held as under:

“12. Section 51 of the Act provides for penalties. Violation of Section 9(1) is an offence under Section 51(1). Section 55 deals with cognizance of offences:

“55. No court shall take cognizance of any offence against this Act except on the complaint of the Chief Wild Life Warden or such other officer as the State Government may authorise in this behalf.”

13. What emerges from a perusal of these provisions is that cognizance of an offence under the “Act” can be taken by a court only on the complaint of the officer mentioned in Section 55. The person who lodged complaint dated 23-6-1986 claimed to be such an officer. In these circumstances even if the jurisdictional police purported to register a case for an alleged offence against the Act, Section 210(1) would not be attracted having regard to the position that cognizance of such an offence can only be taken on the complaint of the officer mentioned in that section. Even where a Magistrate



takes cognizance of an offence instituted otherwise than on a police report and an investigation by the police is in progress in relation to same offence, the two cases do not lose their separate identity. The section seeks to obviate the anomalies that might arise from taking cognizance of the same offence more than once. But, where, as here, cognizance can be taken only in one way and that on the complaint of a particular statutory functionary, there is no scope or occasion for taking cognizance more than once and, accordingly, Section 210 has no role to play. The view taken by the High Court on the footing of Section 210 is unsupportable.”

17. Similarly, in **Aniruddha Bahal v. Central Bureau of Investigation, 2014 SCC OnLine Del 3263**, a learned Single Judge of this Court, was dealing with a complaint filed by the CBI through its Deputy Commissioner of Police under Section 13 of the Official Secrets Act, 1923 for offences under Sections 3(1)(c), 5(1)(2)(4) of the Act read with section 120-B IPC before the learned C.M.M., Delhi. Subsequently, on the basis of the same allegations a chargesheet was also filed before the learned CMM. Learned Single Judge in the said case observed and held as under:

“33. I find that there is substantial force in the submissions made on behalf of accused persons that respondent-CBI could not have proceeded to file charge sheet in the present case.

34. The Official Secrets Act is a special Act and by virtue of section 4 and 5 of the Cr.P.C., any trial under the Official Secrets Act would be governed by the procedure as laid down by the Official Secrets Act.

Section 13(3) of the Official Secrets Act is as follows : -

“13. Restriction on trial of offences

.....

(3) No Court shall take cognizance of any offence under this Act, unless upon complaint made by order of, or under authority from, the appropriate Government or some officer empowered by the appropriate Government in this behalf.”



35. The term ‘complaint’ vide Section 2 (d) of Cr.P.C. means any allegation, made orally or in writing, to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

36. The term ‘police report’ is defined in Section 2 (r) of Cr.P.C. as follows : -

“2(r) “police report” means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173”

37. Thus, the term ‘complaint’ and ‘police report’ have different meaning and connotation. In this case, the CBI initially filed the complaint under Section 13(3) of the Act, thereafter, proceeded to file a charge sheet under Section 173 Cr.P.C. In the order dated 15.6.2005 the learned CMM has referred to challan and the complaint under Section 13(3) of the Act. Thus, it would appear that the learned CMM took cognizance of the offence based on the police complaint and the charge sheet. Moreover, the learned CMM vide order dated 7.7.2005 also ordered that the complaint filed under Section 13(3) of Act and the charge sheet be clubbed together as per law.

38. Learned CMM has not referred to the law by which complaint under Section 13(3) of Act and Section 173 of Cr.P.C. were liable to be clubbed together. However, it may be that the learned CMM had the provisions of Section 210 Cr.P.C. in her mind.

40. Provisions of Section 210 Cr.P.C. would have no applicability to the trial of offences under the Act. Under Section 13(3) of the Act reproduced above, no court can take cognizance of an offence under the Act unless upon complaint made by order of, or under authority from appropriate Government or some officer empowered by the appropriate Government in this behalf.”

18. In view of the above, for the purposes of proceedings under Section 210 of the CrPC, so far as clubbing of police report and complaint is concerned, cognizance of an offence of a report under Section 173 of the CrPC is mandatory. Section 210(2) of the CrPC clearly stipulates that the Magistrate shall try together the complaint case and the case arising out of the



police report only if the cognizance had been taken by the learned Magistrate on such report. In the present case as pointed out hereinabove, the cognizance could not have been taken in view of the Section 28(1)(a) of the PCPNDT Act and, in absence of any cognizance the clubbing of the police report and the complaint is not permissible under Section 210 of the CrPC.

19. The next issue is whether the police report can be considered as an inquiry report under Section 202 of the CrPC and whether the police report and the complaint case can be clubbed under the said provision. Section 202 of the CrPC provides as under:-

“202. Postponement of issue of process.—(1) Any Magistrate, on receipt of a complaint of an offence of which he is authorised to take cognizance or which has been made over to him under Section 192, may, if he thinks fit, 132[and shall, in a case where the accused is residing at a place beyond the area in which he exercises his jurisdiction,] postpone the issue of process against the accused, and either inquire into the case himself or direct an investigation to be made by a police officer or by such other person as he thinks fit, for the purpose of deciding whether or not there is sufficient ground for proceeding:

Provided that no such direction for investigation shall be made,—

(a) where it appears to the Magistrate that the offence complained of is triable exclusively by the Court of 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”



20. The aforesaid provision relate to Chapter XV of the CrPC (Complaints to Magistrate). The code has clearly drawn a distinction between a complaint which is defined under Section 2(d) and police report in Section 2(r) of the Code as under :

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

(r) “police report” means a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173;”

21. The said distinction was noted by Hon’ble Supreme Court in **Jeewan Kumar Raut v. CBI, (2009) 7 SCC 526**, wherein while dealing with the provisions of Transplant of Human Organs Act, 1994, it has observed and held as under:

“**25.** Section 22 of TOHO prohibits taking of cognizance except on a complaint made by an appropriate authority or the person who had made a complaint earlier to it as laid down therein. The respondent, although, has all the powers of an investigating agency, it expressly has been statutorily prohibited from filing a police report. It could file a complaint petition only as an appropriate authority so as to comply with the requirements contained in Section 22 of TOHO. If by reason of the provisions of TOHO, filing of a police report by necessary implication is necessarily forbidden, the question of its submitting a report in terms of sub-section (2) of Section 173 of the Code did not and could not arise. In other words, if no police report could be filed, sub-section (2) of Section 167 of the Code was not attracted.

26. It is a well-settled principle of law that if a special statute lays down procedures, the ones laid down under the general statutes shall not be followed. In a situation of this nature, the respondent could carry out investigations in exercise of its authorisation under Section 13(3)(iv) of TOHO. While doing so, it could exercise such powers which are otherwise vested in it. But, as it could not file a police report but a



complaint petition only; sub-section (2) of Section 167 of the Code may not be applicable.

27. The provisions of the Code, thus, for all intent and purport, would apply only to an extent till conflict arises between the provisions of the Code and TOHO and as soon as the area of conflict reaches, TOHO shall prevail over the Code. Ordinarily, thus, although in terms of the Code, the respondent upon completion of investigation and upon obtaining remand of the accused from time to time, was required to file a police report, it was precluded from doing so by reason of the provisions contained in Section 22 of TOHO.

28. To put it differently, upon completion of the investigation, an authorised officer could only file a complaint and not a police report, as a specific bar has been created by Parliament. In that view of the matter, the police report being not a complaint and vice versa, it was obligatory on the part of the respondent to choose the said method invoking the jurisdiction of the Magistrate concerned for taking cognizance of the offence only in the manner laid down therein and not by any other mode. The procedure laid down in TOHO, thus, would permit the respondent to file a complaint and not a report which course of action could have been taken recourse to but for the special provisions contained in Section 22 of TOHO.

29. It is one thing to say that the court could take recourse to the procedure laid down in Section 202 of the Code or even reject the complaint but then only because such a course of action could be resorted to by the learned Magistrate, the same, by itself, would not lead us to a conclusion that the complaint petition should have been treated to be a police report; the logical corollary whereof would be to invoke the provisions of sub-section (2) of Section 167 of the Code.”

(emphasis supplied)

22. The provisions of Section 202 of the CrPC as stated hereinabove clearly applies to a complaint case and the police report filed in the present case was not in pursuance to an order passed under Section 202 of the CrPC in the complaint case filed on behalf of respondent no. 2. It is also pertinent to observe that provision of clubbing a police report and complaint has been



provided for under Section 210 of CrPC and not under Section 202 of the CrPC. The learned ASJ and the learned CMM erred in law by clubbing the police report and complaint case under the provision of Section 202 of the CrPC. At this juncture, reference is made to **Nazir Ahmad and The King-Emperor, 1936 SCC OnLine PC 41**, wherein the Privy Council was dealing with a case where the appellant was convicted on the strength of a confession said to have been made by him to a Magistrate under the provisions of Section 164 of the CrPC. Oral evidence of the said alleged confession was given by the learned Magistrate but the same was not recorded by him, as required under Section 164 of the CrPC. While dealing with the aforesaid situation, the Privy Council observed and held as under:

“The rule which applies is a different and not less well recognised rule, namely, that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.”

It is noted that there is no estoppel in law and a consent given cannot legitimize an otherwise illegal procedure.

23. In view of the above, the findings of the learned ASJ that the police report filed under Section 173 of the CrPC could be treated as inquiry report under Section 202 of the CrPC and also that the police report and the complaint could be clubbed together under the said Section are not sustainable in law and set aside.

24. So far as the complaint filed on behalf of respondent no. 2 is concerned, the same can be treated as one under Section 28(1)(b) of the Act. As pointed out hereinabove that the complaint of respondent no. 2 apart from making a



complaint with regard to the incident dated 26.05.2010 also state that the said complaint should be taken as their intent to take appropriate action in accordance with provisions of law. The same would come within the meaning of Section 28(1)(b) of the Act inasmuch as after making a complaint and expressing the intention, the complaint under Section 200 of the CrPC was filed after 15 days of the complaint dated 07.07.2010 before the competent authority. It is noted that the competent authority sent the complaint dated 07.07.2010 for registration of an FIR but no complaint under Section 28(1)(a) of the Act was filed. Aforesaid registration of FIR cannot be treated as action taken within the meaning of Section 28 of the Act.

25. Reliance was placed by learned Senior Counsel on the Handbook on Pre-Conception and Pre-Natal Diagnostic Techniques, 1994 to show the complaint by respondent no. 2 should have been filed in the format provided for in Annexure – V of the said handbook. It is noted that the said handbook has been issued by the Ministry of Health and Family Welfare, Government of India, but the said format contained in the said annexure is not ‘prescribed’ under any rules framed under the Act. At best, it can be a guide to a file a complaint but it does not ‘prescribe’ the manner as per Section 28(1)(b) of the Act.

26. A perusal of the record would reflect that the learned CMM vide order dated 25.11.2013 held that the summoning order dated 11.01.2013 in the chargesheet should be treated as a summoning order in the present complaint. As already observed hereinabove, the order taking cognizance and summoning by the learned CMM in the chargesheet was not in accordance with Section 28(1)(a) of the Act and therefore, the applicability of the same to



the complaint case filed on behalf of respondent no. 2 cannot be sustainable. Even otherwise such a procedure adopted by the learned CMM is beyond the scope of CrPC. The Code clearly provides for procedure to be followed in the complaint cases and cases instituted upon the police report and the same have to be followed as per the provisions contained therein.

27. Learned APP for the State relied upon paragraphs 108 and 109 in **Manoj Krishan Ahuja (*supra*)** wherein it was held as under:-

“108. In this case, the complaint was filed by the Appropriate Authority under Section 23 of the Act on 02.09.2020 which is now listed for evidence of the complainant before the learned Trial Court before which the present FIR is also pending wherein cognizance has been taken vide order dated 11.10.2019 which is impugned before this Court. In view thereof, this Court is of the view that in order to bring the complaint to its logical end, negating the investigation carried out in this case, which was initiated on the original complaint lodged on behalf of the Appropriate Authority to the police, will be travesty of justice.

109. Therefore, this Court holds that the investigation carried out in this case was ‘assisted investigation’ at the request of Appropriate Authority, and since the complaint filed by Appropriate Authority is already pending before the learned Trial Court in a separate complaint case, the police investigation in the present case be merged with the said complaint case. Petitioner will be at liberty to move an appropriate application before the learned Trial Court for clubbing of cases, as per law”

28. The aforesaid observations would not be applicable in the present case as the complaint herein has been filed by respondent no. 2 and not the Competent Authority. In the facts of the aforesaid case, apart from the FIR, the Appropriate Authority had also filed a complaint in the Court which was pending. In any case, this Court is of the opinion that since the police report and the complaint could not be clubbed under Section 210 or Section 202 of the CrPC, the aforesaid observations will not be applicable to the facts of the



present case. Be that as it may, it will also be permissible in law for the complainant/respondent no. 2 or the learned Metropolitan Magistrate, under the relevant provision of the Code as well as the Indian Evidence Act, to summon the record of the police report alongwith relevant witnesses in support of the complaint filed under Section 28(1)(b) of the Act. It is noted that *vide* order dated 30.03.2013, learned CMM had fixed the complaint case for arguments on summoning. Respondent no. 2 shall be at liberty to proceed with the said complaint case in accordance with the law. The grounds with respect to the merits of the complaint are not being addressed as, till date, there is no order summoning the petitioners in the complaint case.

29. In view of the above discussion, the present petitions are being disposed of with the following directions:

- i. Order dated 11.01.2013 passed by the learned CMM taking cognizance in FIR No. 228/2010 under Section 23 of the Pre-Conception and Pre-Natal Diagnostic Techniques Act registered at PS Ashok Vihar is set aside and the petitioners are discharged in the said case.
- ii. Complaint case bearing CC No. 725/1/10 instituted at the instance of respondent no. 2 has been filed under Section 28(1)(b) of the Act and shall proceed in accordance with law.
- iii. Findings/directions contained in the impugned order dated 25.11.2013 passed by the learned CMM in CC No. 725/1/10 and order dated 02.07.2014 passed by the learned ASJ in CR No. 4/14 and CR No. 5/14 with respect to clubbing of the police case and the complaint case as well as treating the police report as an inquiry report under Section 202 of the CrPC, are set aside.



- iv. Remarks made by the learned ASJ in order dated 02.07.2014 passed in CR No. 4/14 and CR No. 5/14 relating to the petitioners in their personal capacity are expunged.
30. Petitions are partly allowed and disposed of in the aforesaid terms.
31. Pending applications, if any, also stand disposed of.
32. Needless to state, nothing stated hereinabove is an opinion on the merits of the case.
33. Copy of the judgment be sent to the concerned learned Trial Court as well as the learned Sessions Court for necessary information and compliance.
34. Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

DECEMBER 19, 2023/sn