



record the statement of the complainant as well as witnesses and thereafter, copy of the complaint as well as statement of complainant and other witnesses taken on oath were to be provided to the accused annexing the notice, but in the present case, statement was not recorded, and therefore, impugned order is bad in the eyes of law. Relying on the decision of Karnataka High Court passed in ***Criminal Petition No. 7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil)*** learned counsel for the applicant requests for kind indulgence of this Court.

5. Learned A.G.A. opposes the prayer of the applicant and submits that statement can be recorded after appearance of the accused/applicant however, he does not dispute the intentions of the Section 223 of B.N.S.S. as well as the legal pronouncement of the High Court of Karnataka in the aforesaid case.

6. Considering the arguments of learned counsel for the parties, going through the record of the application as well as other relevant documents, it is evident that a protest petition was filed by the complainant of the present case, which was treated as a complaint case by the trial court on 15.10.2024 under Section 210 of B.N.S.S., 2023. It is also evident that at the moment, the complaint was registered, the trial court, before recording the statement of complainant as well as witnesses, issued notice to the accused/applicant, which is erroneous.

7. Section 223 of B.N.S.S. reads as under :-

*"223. Examination of complainant. - (1) A Magistrate having jurisdiction while taking cognizance of an*

*offence on complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and shall be signed by the complainant and the witnesses, and also by the Magistrate:*

*Provided that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard:*

*Provided further that when the complaint is made in writing, the Magistrate need not examine the complainant and the witnesses –*

*(a) if a public servant acting or purporting to act in the discharge of his official duties or a Court has made the complaint; or*

*(b) if the Magistrate makes over the case for inquiry or trial to another Magistrate under section 212:*

*Provided also that if the Magistrate makes over the case to another Magistrate under section 212 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them:*

*(2) A Magistrate shall not take cognizance on a complaint against a public servant for any offence alleged to have been committed in course of the discharge of his official functions or duties unless –*

*(a) such public servant is given an opportunity to make assertions as to the situation that led to the incident so alleged; and*

*(b) a report containing facts and circumstances of the incident from the officer superior to such public servant is received."*

8. Proviso of Sub Section (1) of Section 223 of the B.N.S.S. mandates that a Magistrate while taking cognizance of an offence, on a complaint, shall examine

upon oath, the complainant and the witnesses present, if any, and reduce it into writing. The Proviso further mandates that no cognizance of an offence shall be taken by the Magistrate without giving an opportunity to the accused of being heard. Section 227 of the B.N.S.S. deals with the issuance of process which is akin to Section 204 of the Cr.P.C.

9. Relevant part of the order dated 27.9.2024 passed in **Criminal Petition No.7526 of 2024 (Sri Basanagouda R. Patil Vs. Sri Shivananda S. Patil)** passed by High Court of Karnataka is as under:-

*"8. The obfuscation generated in the case at hand is with regard to interpretation of Section 223 of the BNSS, as to whether on presentation of the complaint, notice should be issued to the accused, without recording sworn statement of the complainant, or notice should be issued to the accused after recording the sworn statement, as the mandate of the statute is, while taking cognizance of an offence the complainant shall be examined on oath. The proviso mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.*

*9. To steer clear the obfuscation, it is necessary to notice the language deployed therein. The Magistrate while taking cognizance of an offence should have with him the statement on oath of the complainant and if any witnesses are present, their statements. The taking of cognizance under Section 223 of the BNSS would come after the recording of the sworn statement, at that juncture a notice is required to be sent to the accused, as the proviso mandates grant of an opportunity of being heard.*

*10. Therefore, the procedural drill would be this way:*

*A complaint is presented before the Magistrate under Section 223 of the BNSS; on presentation of the complaint, it would be the duty of the Magistrate / concerned Court to examine the complainant on oath, which would be his sworn statement and examine the witnesses present if any, and the substance of such examination should be reduced into writing. The question of taking of cognizance would not arise at this juncture. The magistrate has to, in terms of the proviso, issue a notice to the accused who is given an opportunity of being heard. Therefore, notice shall be issued to the accused at that stage and after hearing the accused, take cognizance and regulate its procedure thereafter.*

*11. The proviso indicates that an accused should have an opportunity of being heard. Opportunity of being heard would not mean an empty formality. Therefore, the notice that is sent to the accused in terms of proviso to sub-section (1) of Section 223 of the BNSS shall append to it the complaint; the sworn statement; statement of witnesses if any, for the accused to appear and submit his case before taking of cognizance. In the considered view of this Court, it is the clear purport of Section 223 of BNSS 2023.*

*12. Swinging back to the facts of the case the concerned Court has passed the following order:*

*"This complaint is filed against the Accused alleging the offence P/U/Sec.356(2) of BNS, 2023.*

*Issue notice to the Accused as per proviso to section 223 of BNSS, 2023.*

*For hearing.*

*Call on 13.08.2024."*

*The moment complaint is filed, notice is issued to the accused. This*

*procedure is erroneous. Therefore, the petition deserves to succeed on this short ground of procedural aberration and the matter is to be remitted back to the hands of the concerned Court to redo the exercise from the beginning, bearing in mind the observations made in the course of the order.*

13. For the aforesaid reasons the following:

**ORDER**

(i) Criminal Petition is allowed.

(ii) Impugned order dated 16-07-2024 passed by the XLII Additional Chief Judicial Magistrate, Bengaluru in PCR No.9136 of 2024 stands quashed.

(iii) Matter is remitted back to the learned Magistrate to redo the exercise afresh, from the stage of entertainment of the complaint, bearing in mind the observations made in the course of the order.

(iv) The said exercise shall be undertaken within 4 weeks from the date of receipt of the copy of this order.

Consequently, I.A.No.2 of 2024 stands disposed."

10. In view of the above facts and discussions, present application is **allowed**. The impugned order dated 15.10.2024 is in violation of the provision of Section 223 of B.N.S.S., and therefore, the same is hereby set aside.

11. The Chief Judicial Magistrate, Sitapur is directed to pass fresh order after recording the statement of the complainant as well as witnesses of the present case.

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**(2024) 11 ILRA 530**  
**ORIGINAL JURISDICTION**  
**CIVIL SIDE**  
**DATED: ALLAHABAD 12.11.2024**

**BEFORE**

**THE HON'BLE MS. NAND PRABHA SHUKLA, J.**

Matters Under Article 227 No. 9750 of 2023  
(Criminal)

**Babbar @ Pabbar & Ors.      ...Petitioners**  
**Versus**  
**State of U.P. & Ors.      ...Respondents**

**Counsel for the Petitioners:**

Sri Romeshwari Prasad

**Counsel for the Respondents:**

G.A., Sri Vinay Kumar Pandey, Sri Himanshu Srivastava

**Civil Law – Constitution of India,1950 – Article 227 – Criminal Procedure Code,1973 - Sections – 145 & 146:**

Misc. Petition – challenge to the impugned order – petitioner in peaceful possession over the land in question for 40-50 years – respondent no. 4 initiates proceedings u/s 145/146 Cr.P.C. for forcible possession – objection raised, citing pending civil suit – no likelihood of breach of peace – impugned proceedings alleged as an attempt to harass the petitioner – SDM directs attachment and custody takeover – Criminal Revision – dismissed – Misc. Petition – court observes – respondent no. 4 not impleaded as a defendant in civil suit – no ad-interim injunction in petitioner's favour – held, relying on case law of Hon'ble Supreme Court in Amresh Tiwari's case, no illegality in impugned order – petition dismissed. (Para – 7, 8, 9)

**Misc. Petition Dismissed.** (E-11)

**List of Cases cited:**

Amresh Tiwari Vs Lalta Prasad Dubey & anr. (2000 vol. 4 SCC 440).

(Delivered by Hon'ble Ms. Nand Prabha Shukla, J.)

1. Heard Sri Romeshwari Prasad, learned counsel for the petitioners, Sri