HIGH COURT OF JAMMU AND KASHMIR
(Office of the Registrar General at Srinagar)
*****

To

All Principal District & Sessions Judges,
J&K State.

No: 5145 - 70/GS Dated: 29-05-2019

Sub: OWP No.526/2019 titled Nasreena Bano Vs. State and others.

Sir,

In reference to the subject cited above, I am directed to forward herewith a copy of Judgment passed by Hon'ble Mr.Justice Sanjeev Kumar in the aforementioned Wirt Petition for information and with the request to circulate the same amongst all the Judicial Magistrates of the District for strict compliance.

Enclosures:As per letter

Yours faithfully,

(Sanjay Dhar)
Registrar General
29/5/19

No: 5145-70 /GS Dated: 29/05/2019

Copy to the:-

1. Principal Secretary to Hon'ble The Chief Justice, High Court of J&K, Srinagar for information of Her Lordship.
2. Secretary to Hon'ble Mr. Justice Sanjeev Kumar for information of His Lordship.
3. CPC, e-Courts, High Court of J&K, Srinagar for information and with the request to get the same uploaded on the official website of J&K, High Court for information of all concerned.

Registrar General
29/5/19

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

OWP No. 526/2019
IA No. 01/2019

Reserved on: 16.04.2019
Date of order: 10.05.2019

Narseena Bano

Vs.

State and others

Coram:
Hon'ble Mr Justice Sanjeev Kumar, Judge

Appearance:

For the petitioner/appellant(s) : Mr.K.S.Johal, Sr. Advocate with Mr. Karman Singh Johal, Advocate

For the respondent(s) : Mr.Raman Sharma, Deputy Advocate General

i/ Whether to be reported in Press/Media? Yes/No

ii/ Whether to be reported in Digest/Journal? Yes/No

1. Instant petition filed under Section 561-A of the Code of Criminal Procedure is directed against the order dated 06.03.2019 passed by the learned Chief Judicial Magistrate, Jammu in File No. 407/Misc. titled *Nasreena Bano Vs. Rafiq Ahmed Jaral* whereby learned Chief Judicial Magistrate, Jammu after recording the statement of the petitioner in compliance to the directions passed by the Hon'ble Supreme Court of India in SLP (Crl.) No. (S) 864/2019 has taken the cognizance of the complaint and has directed the Inspector General of Police, Jammu to

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conduct the inquiry himself or by any other Police Officer not below the rank of Senior Superintendent of Police. The petitioner also seeks a direction for registration of FIR against the respondents 5 to 7 for commission of the offence punishable under Sections 376 and 376-C read with Section 34 of the Ranbir Penal Code.

2. An advertence, though brief, to the factual antecedents leading up to the filing of the instant petition, may be advantageous to appreciate the controversy raised in this petition in proper prospective. As per the allegations contained in the complaint filed by the petitioner, a Demolition Squad lead by the SDM, North, Jammu along with respondents 5 to 7 demolished the house of the petitioner on 03.08.2018 with the use of JCB, Tipper and Cranes. The petitioner claims that not only her house was demolished without any notice or warning, but, she was also manhandled on spot by the Senior Police Officer, who forcibly put her into the Van and took her to the Police Post, Chinore. She alleges that she was kept in the Police Post for two nights from 03.08.2018 to 05.08.2018. She was also involved in a false and frivolous case registered against her under Sections 107/151 Cr.PC. Her further allegations is that on the evening of 03.08.2018, she was shifted to a secluded room behind the main building of the Police Post and was slapped and molested by respondent

No. 6 who then forcibly committed intercourse with her without her consent. He was followed by the respondents Nos. 5 and 7, who also repeated the same act with the petitioner. There is further allegation that on the intervening night of 04.08.2018 and 05.08.2018, the respondents 5 to 7 ravished her again. The petitioner wanted to get herself medically examined on 05.08.2018, but, was also not permitted to do so. She claims to have gone to SMGS Hospital, Jammu for getting herself examined, but, the respondents managed that no such examination takes place in the Hospital. There is long tale of woe narrated by the petitioner in her complaint. The petitioner claims to have appeared before the Inspector General of Police, Jammu on 13.08.2018 during a public hearing and narrated him the whole episode and even showed him proof of the respondents 5 to 7 having committed the offence.

3. The petitioner further alleges that though her grievance was heard by the Inspector General of Police, Jammu,who forwarded her complaint to the SSP, Jammu but,strangely no FIR was registered against the respondents 5 to 7. The petitioner claims that she made complaint thereafter to all higher authorities including Governor of the State, Hon'ble Home Minister of India, Director General of Police, Border Security Force and Director General of

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Police, Jammu and Kashmir Police etc.etc. The petitioner states in her complaint that having failed to get an FIR registered against the respondents 5 to 7, she filed a complaint before the learned Chief Judicial Magistrate, Jammu narrating all that had happened to her in paragraphs 13 to 24 of the complaint. The petitioner sought a direction from the learned Chief Judicial Magistrate, Jammu for registration of FIR against the respondents 5 to 7 for commission of offences under Sections 376/376-C read with Section 34 RPC. Learned Chief Judicial, Jammu after going through the complaint and being satisfied that the commission of cognizable offence was disclosed against the respondents 5 to 7, directed Senior Superintendent of Police, Jammu to register an FIR under the relevant provisions of law and investigate the matter. This was done by the learned Chief Judicial Magistrate, Jammu purportedly in exercise of powers conferred on him under Section 156(3) of the Cr.PC. This order was challenged by the respondent No.6 before this Court by way of petition under Section 561-A Cr.PC, which came to be allowed by this Court vide judgment dated 03.11.2018. The order dated 15.10.2018 directing registration of an FIR was quashed and the matter remanded back to the learned Chief Judicial Magistrate, Jammu to decide the application of the

petitioner under Section 156(3) of the Cr.PC afresh in the light of the judgement rendered by the Hon'ble Supreme Court of India in the case of **Priyanka Srivastava and others Vs. State of U.P. and others**, reported in **AIR 2015 SC 1758**. Aggrieved, the petitioner took the matter to the Hon'ble Supreme Court of India by way of Special Leave Petition SLP (Crl.) No.(S) 864 of 2019, which came to be disposed of by the Hon'ble Supreme Court vide its order dated 01.02.2019 with a direction to the concerned Magistrate to have a fresh look into the matter after recording the statement of the victim. This is how the matter landed before the learned Chief Judicial Magistrate, Jammu once again. Learned Chief Judicial Magistrate, Jammu recorded the statement of the complainant and being satisfied that the averments made in the complaint coupled with the statement of the petitioner recorded pursuant to the directions of the Hon'ble Supreme Court of India, prima-facie discloses the commission of offences alleged, instead of directing the police to register FIR itself, took the cognizance of the complaint and deferred the issuance of the process. Learned Chief Judicial Magistrate, Jammu thought it necessary to have the inquiry conducted under Section 202 of the Cr.PC. The Magistrate, however, restricted the inquiry to seven points formulated in the order impugned. It is this order, the

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petitioner is aggrieved of. The sole grievance projected by her in this petition is that the Magistrate after recording the statement of the petitioner and being satisfied with respect to the commission of the cognizable offence was under statutory obligation to mandatorily direct the registration of FIR. Learned CJM, Jammu by taking cognizance of the complaint and referring the matter under Section 202 Cr.PC for inquiry has violated not only the mandate of law, but, has acted against the spirit of the directions issued by the Hon'ble Supreme Court. Placing strong reliance upon the judgment of the Hon'ble Supreme Court in the case of **Lalita Kumari Vs. Govt. of UP and others, (2014) 2 SCC 1**, learned Senior counsel appearing for the petitioner submits that once the Magistrate finds that information contained in the application discloses the commission of a cognizable offence, it has no option but to direct registration of FIR as a matter of routine. The Magistrate can, however, refuse to direct registration of FIR if the information does not disclose the commission of cognizable offence or pertains to the disputes falling in the categories enumerated in the aforesaid judgment viz:

(i) Matrimonial disputes/family disputes;

(ii) Commercial offences;

(iii) Medical negligence cases;

(iv) Corruption cases;

(v) Cases where there is abnormal delay/latches in initiating the criminal prosecution.

4. It is, thus, submitted that in the given facts and circumstances of the case in hand, the Magistrate after finding that the allegations contained in the complaint disclosed the commission of cognizable offence had no option, but, to direct the registration of FIR. It is also urged that the learned Magistrate went completely wrong in directing the inquiry to be conducted on the peripheral issues and the circumstances rather than restricting its scope to the commission of the offence.

5. It is next contended by the learned Senior Counsel appearing for the petitioner that the facts and circumstances of the case and also in view of the directions passed by the Supreme Court while disposing of the SLP, the Magistrate was obliged to exercise powers under Section 156(3) of the Cr.PC and direct registration of the FIR. He could not have embarked upon an inquiry to be conducted in terms of the Section 202 Cr.PC. The order impugned has also been found fault with by the learned Senior counsel on the ground that the Magistrate has clearly gone beyond the scope of its power and has even hinted in the order impugned that in absence of sanction from the Government for prosecuting the respondents 5 to 7, no order regarding registration of FIR could be issued.

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6. Having heard learned counsel for the petitioner and perused the record, I am of the view that following questions of seminal importance arise for consideration in this case.

(i) What is the meaning of the expression 'taking cognizance' as contained in Section 190 of the Cr.PC ?

(ii) What are the broader parameters which governs exercise of discretion by the Magistrate to proceed under Section 156(3) or under Section 202 of the Code of Criminal Procedure when a complaint of facts disclosing commission of cognizable offence is received by it?

7. Both these issues have remained subject matter of debate for long, despite there being several authoritative pronouncements of the Hon'ble Supreme Court on the issues. Most of the Magistrates have often failed to appreciate the distinction between the two powers; one conferred under Section 156(3) and other under Section 202 Cr.PC. They often commit mistake in issuing directions for registration of FIR after they have taken cognizance and similarly it has also come to the notice of this Court that many Magistrates after receiving report of inquiry under Section 202 Cr.PC direct the registration of

FIR. There is lot of confusion amongst the Magistrates to understand the true meaning and import of the term '**taking cognizance**' as contained in Section 190 of the Code of Civil Procedure. This judgment besides taking note of the grievance of the petitioner as projected in this petition would also make an effort to clear the haze created around the issues framed hereinabove.

8. Before embarking upon the discussion on the issues formulated, it would be first necessary to take note of the scheme of Code of Criminal Procedure in this regard and set out the relevant provisions. Chapter XIV deals with the information to the Police and their powers to investigate. Section 154 essentially pertains to registration of FIR and provides that every information relating to commission of cognizable offence whether given in writing or reduced to writing by the officer Incharge of the Police Station or under his directions shall be signed by the person giving it and the substance thereof shall be entered in a book to be kept in the office in such form as the Government may prescribe in this behalf. Section 154 of the Act, which has some relevance to the controversy in hand is set out below:-

> "154. Information in cognizable cases- (1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such

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information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

(2) A copy of the information as recorded under Sub-Section (1) shall be given forthwith, free of cost, to the informant.

(3) Any person, aggrieved by a refusal on the part of an officer in charge of a police station to record the information referred to in Sub-Section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code, and such officer shall have all the powers of an officer in charge of the police station in relation to that offence.

9. As is apparent from the plain reading of Section 154, the information disclosing the commission of cognizable offence is sine-qua-non for registration of FIR by the Police and any person, who is aggrieved by refusal on the part of Officer Incharge of Police Station to register FIR pertaining to the information disclosing commission of cognizable offence, may approach the Superintendent of the Police concerned who if satisfied that such information discloses the commission of cognizable offence shall either investigate the case himself or direct the investigation to be made by any Police Officer subordinate to him. Undoubtedly, if the Police refuse to register an FIR

the remedy of the aggrieved person is to approach the concerned SSP, who has been given similar power to register the FIR to set the investigation in motion. The scope of Section 154 became subject matter of discussion in the case of **Lalita Kumari Vs. Govt. of UP,** (2014) 2 SCC 1. The Constitution Bench of the Supreme Court after threadbare discussion of the issue and surveying the case law on the point summed up its conclusion in paragraph No.120, which for facility of reference is reproduced here under:-

> "120. In view of the aforesaid discussion, we hold:
>
> i) Registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.
>
> ii) If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may be conducted only to ascertain whether cognizable offence is disclosed or not.
>
> iii) If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.
>
> iv) The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

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v) The scope of preliminary inquiry is not to verify the veracity or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence.

vi) As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:

a) Matrimonial disputes/ family disputes

b) Commercial offences

c) Medical negligence cases

d) Corruption cases

e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months delay in reporting the matter without satisfactorily explaining the reasons for delay.

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

vii) While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry.

viii) Since the General Diary/Station Diary/Daily Diary is the record of all information received in a police station, we direct that all information relating to cognizable offences, whether resulting in registration of FIR or leading to an inquiry, must be mandatorily and meticulously reflected in the said Diary and the decision to conduct a preliminary inquiry must also be reflected, as mentioned above.

10. The judgment aforesaid only deals with the duties of the Incharge Police Station on receiving the information disclosing commission of cognizable offence. The

Constitution Bench has authoritatively concluded that if the information given to the Incharge Police Station discloses commission of cognizable offence, it is mandatory duty of the Incharge Police Station to register an FIR and commence the investigation. There, however, may be the cases where before registration of FIR, a preliminary inquiry may be desirable, but, this will dependent on the facts and circumstances of each case. The Court gave few instances where such preliminary inquiry to ascertain whether the information reveals any cognizable offence may be required. The instances have been given in paragraph 120(vi) reproduced above. But as rightly said that these instances are only illustrative and not exhaustive of all the circumstances, which may warrant preliminary inquiry. Obviously, the power of the Magistrate to direct registration of FIR or to take cognizance of the offence and proceed under Section 202 of Cr. PC was not the subject matter of discussion in the aforesaid petition. Much emphasis was laid down by Mr.Johal, learned Senior counsel appearing for the petitioner on the judgment rendered in the case of **Lalita Kumari** (supra). So far as the power of the Magistrate to direct registration of FIR is concerned, the same is provided under Section 156(3) Cr.PC which for facility of reference is reproduced here under:-

156. Investigation into cognizable case.

(1) Any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

(2) No proceeding of a police officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above- mentioned.

11. A plain reading of Section 156(3) Cr.PC would indicate that any Magistrate, who is empowered under Section 190 of the Cr.PC to take cognizance may order an investigation by the Police, which in other words would be a direction to register the FIR. Needless to say that no investigation in the cognizable offence can be taken up by the Police without first registering the formal FIR in terms of Section 154 of the Cr.PC. The scope and true import of the power of the Magistrate under Section 156(3) Cr.PC and parameters for exercise of such power by the Magistrate have been explained elaborately in the judgment rendered in the case of **Priyanka Srivastava V. State UP AIR 2015 SC 1758**. The Hon'ble Supreme Court in the aforesaid judgment in paragraph No.27 held as follows:

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"27. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."

12. From the careful perusal of the judgment passed in **Priyanka Srivastava** (supra), it is nowhere to be found

that the Hon'ble Supreme Court has mandated it for the Magistrate to necessarily exercise the powers under Section 156(3) Cr.PC and direct registration of FIR if he receives the information with regard to the commission of cognizable offence. The Magistrate, however, instead of proceeding to take cognizance under Section 190 Cr.PC may direct the registration of FIR by the Incharge Police Station concerned if the information placed before it discloses the commission of cognizable offence and the application meets the requirements as enumerated in the case of **Priyanaka Srivastava** (supra). There is, however, no dispute on the aspect that petitioner before approaching the Magistrate by way of an application seeking indulgence of the Magistrate under Section 156(3) Cr.PC had fulfilled the requirements of law as adumbrated in the judgment of Supreme Court in the case of **Priyanka Srivastava** (supra), but, the larger question that begs determination in this case is whether the Magistrate, who receive the information in writing or otherwise with regard to the commission of cognizable offence and the application moved also confirms to the requirements laid down in **Priyanaka Srivastava** (supra), must necessarily direct the registration of FIR or it can, in its discretion, take cognizance of the complaint of facts constituting the cognizable offence and proceed under Chapter XVI. At

this juncture, it would be appropriate to take note of the Section 190 of the Cr.PC which for expedience is reproduced here under:-

> "**190. Cognizance of offence by Magistrates**. –
>
> (1) Except as hereinafter provided, [any Chief Judicial Magistrate and, any other Judicial Magistrate] specially empowered in this behalf, may take cognizance of any offence-
>
> (a) upon receiving a complaint of facts which constitute such offence ;
>
> (b) upon a report in writing of such facts made by any police officer ;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed.
>
> (2) The [High Court may empower any Judicial Magistrate] to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trail.(3) The [High Court may empower any Judicial Magistrate] of the first or second class to take cognizance under sub-section (1), clause (c), of offences for which he may try or commit for trial."

13. From the plain reading of Section aforesaid, it is clear that any Chief Judicial Magistrate or any other judicial Magistrate specially empowered may take cognizance of any offence upon receiving a complaint of facts constituting the offence whether cognizable or non-cognizable. This cognizance can be taken by the CJM/Magistrate specially empowered upon a report in

writing of such facts made by any police officer or upon the information received from any person other than the police officer or upon his own knowledge or suspicion that such offence has been committed. The power of the Magistrate under Section 190 of Cr.PC is too wide to comprehend within its scope the power to take cognizance once it receives the information with regard to commission of an offence. Taking of cognizance of the offence is sine-quo-non for commencement of the trial before the Magistrate. Once the Magistrate takes cognizance of an offence on a complaint other than the police report, it is mandatory for him to follow the procedure prescribed in Chapter XVI. Three Sections contained in Chapter XVI relating to the complaint to the Magistrate are very relevant to the context and are, therefore, noted below:-

> "200. **Examination of complainant**.- A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant and the witnesses present, if any, upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant and the witnesses and also by the Magistrate:
> Provided as follows-
> (a) When the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under Section 192;
> (b) When the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties;
> (c) When the case has been transferred under Section 192 and the Magistrate so transferring it has already examined

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the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

202. **Postponement for 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 transferred to him under Section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself, or, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or, by a police officer, or by such other person as he thinks fit for the purpose of ascertaining the truth of falsehood of the complaint:

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of Section 200.

(2) If any inquiry or investigation under this section is made by a person not being a Magistrate or a police officer, such person shall exercise all the powers conferred by this Code on an officer-in-charge of a police station, except that he shall not have power to arrest without warrant.

(3) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath."

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 one in which, according to the fourth column of the Second Schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column, a warrant should issue in the first instance, 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.

(1-a) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(1-b) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section 91) shall be accompanied by a copy of such complaint.

(2) Nothing in this section shall be deemed to affect the provisions of Section 90.

(3) 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."

14. From reading of Section 202 Cr.PC in continuation with Section 200 Cr.PC, it is abundantly clear that the moment, the Magistrate takes cognizance of the offence under Section 190 Cr.PC on the basis of a private complaint, it is obligated to at once examine the complaint and the witness present, if any, upon oath and reduce the substance of examination in writing. This is obviously, a post-cognizance stage of the proceedings. As per Section 202 Cr.PC, the Magistrate on taking cognizance may either issue the process for compelling the attendance of the person accused in the complaint or postpone the same and inquire into the case either himself or direct an inquiry or investigation to be made by any Magistrate subordinate to him or by a police officer or by such other person as he may think fit for the purposes of ascertaining the truth or

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falsehood of the complaint.The issuance of process for compelling the attendance of the accused person/persons or its postponement till the receipt of report of inquiry directed in terms of Sub Section (1) of Section 202Cr.PC is subject to the conditions that the complainant is first examined by the Court under the provisions of Section 200Cr.PC.

15. From conjoint reading of Section 190 of Cr.PC, Sections 156(3), Section 200 and Section 202 Cr.PC, it becomes abundantly clear that if the Magistrate receives information of facts constituting a cognizable offence, it has three options to proceed in the matter.

(i) It can refuse to entertain the application and take cognizance, if the facts do not disclose the commission of any offence;

(ii) It may take cognizance and proceed under Chapter XVI to examine the complaint on oath, reduce the substance of his examination in writing and then decide either to issue process for compelling the attendance of the accused persons or for reasons to be recorded postpone the same and hold an inquiry into the case either himself or direct the inquiry or investigation to be made by the Magistrate subordinate to him or by a police officer or any other person, he thinks fit. The

scope of inquiry would be limited to the ascertaining of the truth or falsehood of the complaint.

Or

(iii) Instead of taking cognizance of the complaint and proceedings under Chapter XVI, the Magistrate may if the application contains the information disclosing cognizable offence and complies with pre-requisite as laid in the case of **Priyanka Srivastava** direct the registration of the FIR.

16. Which mode is to be adopted by the Magistrate is best left to the discretion of such Court and the complainant has no right, fundamental or statutory to claim that once he has moved an application under Section 156(3) Cr.PC and the averments made therein disclose the commission of cognizable offence, the Magistrate must adopt the third mode and direct the registration of FIR by the Officer Incharge, Police Station concerned. It may be significant to note that even when the Magistrate directs registration of FIR by exercising the powers under Section 156(3)Cr.PC, the Police after investigation is to submit the challan/final report before the competent Magistrate for taking cognizance in the matter. The stage, which would come after the investigation is completed by the Police and the challan is presented, if resorted to by the Magistrate in

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the first instance, cannot be said to have prejudiced any of the rights of the complainant. The only right conferred by the Code of Criminal Procedure on the complainant alleging commission of cognizable offence is to have the matter tried by the competent Court of law so that the person accused if found guilty is brought to the clutches of law. The mode and manner of the investigation or exercise of power of the Magistrate cannot be left to the choosing of the complainant. In the instant case, the complainant had made a complaint of facts disclosing commission of cognizable offence. Undoubtedly, the application was filed by the complainant under Section 156(3) Cr.PC to seek a direction to the police for registration of FIR. In the first instance, the Magistrate instead of taking cognizance directed the Police to register FIR, but, that order was set aside by the High Court. The matter went to the Supreme Court, the order of the High Court was not interfered with, but, the trial Court was directed to record the statement of the complainant and re-look the matter in the light of such statement. Accordingly, the statement of the complainant was recorded and the Magistrate in its discretion found it a fit case to take cognizance. In the order impugned, he has specifically indicated that he has taken the cognizance of the facts, but, is postponing the issuance of process for compelling attendance of the accused persons till an

inquiry is conducted by the IGP, Jammu either himself or through any other Police Officer not below the rank of Senior Superintendent of Police. This course is clearly permissible under Sections 190, 200 and 202 Cr.PC.

17. From the aforesaid discussion, one thing is abundantly clear that the power under Section 156(3) of Cr.PC can be exercised by the Magistrate at a pre-cognizance stage, i.e., before it has taken cognizance under Section 190 of the Cr.PC. But if the Magistrate takes cognizance under Section 190 Cr.PC on a private complaint, it must necessarily follow the provisions contained in the Chapter XVI, record the statement of the complainant and the witness, if any, present on oath, record the substance of their examination in writing and decide to proceed for compelling the attendance of the accused person, or, postpone the process and direct holding of inquiry or investigation in the case. This obviously is a post cognizance stage. It is now fairly settled that once the Magistrate has taken the cognizance under Section 190 Cr.PC on a private complaint constituting an offence, it cannot revert back and direct the registration of FIR by exercising powers under Section 156(3) Cr.PC. The issue as to whether in a particular case, the Magistrate can be said to have taken the cognizance, has been subject matter of debate in many cases coming

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before this Court as well as many which landed before the Supreme Court. The expression "taking cognizance" used under Section 190 of the Cr.PC fell for consideration in the case of the **State West Bengal Vs. Mohd Khalid (1995) 1 SCC 684**. The Supreme Court in paragraph 43 observed as under:-

> "43. Similarly, when Section 20-A(2) of TADA makes sanction necessary for taking cognizance - it is only to prevent abuse of power by authorities concerned. It requires to be noted that this provision of Section 20-A came to be inserted by Act 43 of 1993. Then, the question is as to the meaning of taking cognizance. Section 190 of the Code talks of cognizance of offences by Magistrates. This expression has not been defined in the Code. In its broad and literal sense, it means taking notice of an offence. This would include the intention of initiating judicial proceedings against the offender in respect of that offence or taking steps to see whether there is any basis for initiating judicial proceedings or for other purposes. The word 'cognizance' indicates the point when a Magistrate or a Judge first takes judicial notice of an offence. It is entirely a different thing from initiation of proceedings; rather it is the condition precedent to the initiation of proceedings by the Magistrate or the Judge. Cognizance is taken of cases and not of persons.

18. In the latter case of **S.K.Sinha, Chief Enforcement Officer Vs. Videocon International Ltd. and others**, (2008) 2 SCC 492, it is observed that the expression 'cognizance' has not been defined in the Code. But, the word '**cognizance**' is of indefinite import. It has esoteric or mystic significance in the 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'.

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The relevant para of the judgment, however, is reproduced as under:-

> "12. 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 meansbecome aware of and when used with reference to a Court or a Judge, it connotes to take notice ofjudicially. 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. 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. 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.
>
> 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."

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19. There are several other judgments of the Supreme Court where an attempt has been made to define the expression 'taking cognizance' as contained in the Section 190 of the Code of Criminal Procedure.

20. On conspectus of the judicial opinion on the issue, it can be safely held that when a Magistrate applies his mind to the suspected commission of offence and applies his mind for the purposes of the proceeding under the subsequent Section of the chapter, the Magistrate can be said to have taken the cognizance. The broadly speaking, when on receiving a complaint the Magistrate applies his mind for the purposes of proceeding under Section 200 Cr.PC and the succeeding Section in Chapter XVI of Cr.PC, he said to have taken cognizance of the offence within the meaning of Section 190(1)(A), but, if instead of proceeding under Chapter XVI, the Magistrate decides, in its judicial exercise of discretion, to take action of some other kind like directing investigation under Section 156(3) Cr.PC or issuing a search warrants for the purposes of investigation, he cannot be said to have taken the cognizance of offence. (See. **RR Chari. AIR 1951 SC 207**). It is, thus, clear that if the Magistrate receives the complaint of facts constituting a cognizable offence, it may examine the complaint and apply its mind only with a view to find out as to whether the averments made in the

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complaint if taken to be true at their face value, constitute cognizable offence and then decide as to whether he thinks it fit to proceed further under Chapter XVI or direct investigation under Section 156(3). If he decides to proceed under Chapter XVI, he would record the statement of the complainant and witness, if any, present, reduce the substance of the examination in writing and then proceed either to summon the accused or postpone the process and direct an inquiry and investigation to be made in the case as provided under Section 202 Cr.PC. However, if the Magistrate applies his mind not for the purposes of proceeding under Chapter XVI but for taking action of some other kind like directing investigation under Section 156(3) or for issuing a search warrant for the purposes of investigation, he cannot be said to have taken the cognizance of the offence. It may be noted that the moment, the Magistrate receives a complaint whether it is purportedly filed under Section 156(3) or Section 200 Cr.PC (nomenclature would not matter), the Magistrate is always at crossroads when he finds that the averments contained in the complaint disclose commission of cognizable offence. It is well settled that when the Magistrate receives a complaint, he is not bound to take the cognizance even if the facts alleged in the complaint disclose the commission of offence. This is clear from the

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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 discretion to the Magistrate in the matter. It is equally well settled that if the Magistrate exercises the discretion and takes cognizance, the complainant has no cause to assail the order of taking such cognizance. Taking of cognizance by the Magistrate on the complaint of the complainant is a step towards initiating trial against the person complained against. Such discretionary order passed by the Magistrate cannot be made subject matter of challenge in the inherent jurisdiction of this Court vested under Section 561-A Cr.PC. The broad parameters for exercise of power by the Magistrate under Section 156(3) and proceeding under Section 202 (1) Cr.PC were also elaborately discussed by the three-judge Bench of the Supreme Court in the case of **Ramdev Food Products Pvt. Ltd. Vs. State of Gujarat and others** reported in (2015) 6 SCC 439, what was observed by the Supreme Court in paragraph No.22 is noteworthy and deserves needs to be reproduced as under:-

> " **22**.Thus, we answer the first question by holding that:
> **22.1** The direction under Section 156(3) is to be issued, only after application of mind by the Magistrate. When the Magistrate does not take cognizance and does not find it necessary to postpone the issuance of process and finds a case made out to proceed forthwith, direction under the said provision is issued. In other words, where on account of credibility of information available, or weighing

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the interest of justice it is considered appropriate to straightaway direct investigation, such a direction is issued.

22.2 The cases where Magistrate takes cognizance and postpone issuance of process are cases where the Magistrate has yet to determine "existence of sufficient ground to proceed". Category of cases falling under para 120.6 in *Lalita Kumari* may fall under Section 202.

22.3 Subject to these broad guidelines available from the scheme of the Code, exercise of discretion by the Magistrate is guided by interest of justice from case to case."

In paragraph No.38 of the same judgment, the Supreme Court concluded thus:-

"38. In *Devrapalli Lakshminaryanan Reddy &Ors. vs. V. Narayana Reddy &Ors, National Bank of Oman vs. Barakara Abdul Aziz &Anr, Madhao & Anr. vs. State of Maharashtra &Anr, Rameshbhai Pandurao Hedau vs. State of Gujarat*, the scheme of Section 156(3) and 202 has been discussed. It was observed that power under Section 156(3) can be invoked by the Magistrate before taking cognizance and was in the nature of pre-emptory reminder or intimation to the police to exercise its plenary power of investigation beginning Section 156 and ending with report or chargesheet under Section 173. On the other hand, Section 202applies at post cognizance stage and the direction for investigation was for the purpose of deciding whether there was sufficient ground to proceed."

21. From the aforesaid discussion, the answer to the question formulated at S.Nos.1 and 2 of paragraph No.6 is, thus, obvious. The position of law on the issues can, therefore, be summed up in the following manner:-

(i) The term 'taking cognizance' though not capable of being given straitjacket definition and is of indefinite import. It merely means 'become aware of' and when used with reference to the court or

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judge, it connotes 'to take notice of judicially'. Taking cognizance which merely means judicial application of mind of the Magistrate to the facts mentioned in the complaint with a view to proceed under Section 200 Cr.PC and succeeding Sections in Chapter XVI of Code of Criminal Procedure, but if the Magistrate applies his mind not for the purposes of proceeding under Chapter XVI but for taking action of other kind, e.g., directing investigation by the Police under Section 156(3) Cr.PC, it cannot be said to have taken cognizance of the offence.

(ii) That Section 156(3) Cr.PC operates and can be invoked by the Magistrate before taking cognizance and is in the nature of the pre-emptory reminder or intimation to the police to exercise its preliminary power of investigation beginning with section 156(3) Cr.PC and ending with report or charge sheet under Section 173 Cr.PC. Whereas, section 202 Cr.PC operates at post-cognizance stage where the Magistrate after recording the statement of the complainant under Section 200 Cr.PC directs investigation/inquiry in the case for ascertaining the truth or falsehood of the

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complaint for making a decision whether there was a ground to proceed.

(iii) The inquiry or investigation can be made by the Magistrate himself or by any Magistrate subordinate to him or by a Police Officer or by such other person as the Magistrate thinks fit.

(iv) The Magistrate, if after considering the statement of the complainant on oath of the complaint or witnesses, if any, recorded under Section 200 Cr.PC and the result of investigation or inquiry conducted under Section 202 Cr.PC, finds that there is in his judgment, no sufficient ground for proceeding may dismiss the complaint and shall briefly record his reason for so doing. This is so provided under Section 204 of Cr.PC but if the Magistrate finds sufficient ground for proceeding shall issue process for compelling the attendance of the person/persons complained against and proceed with the trial accordingly.

22. Considering the case in hand in the light of the position of law, discussed hereinabove, it is evident that though the complaint was filed by the complainant before the Magistrate invoking the power of the latter under Section 156(3) Cr.PC for registration of FIR against the

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respondents 5 to 7, yet, the Court in his discretion decided to take cognizance and to proceed under Chapter XVI. As a matter of fact, initially when complaint was filed, the Magistrate had summarily directed the Incharge Police Station concerned to register the FIR, this order, as stated above was set aside by the High Court on the petition filed by the respondent No.6, and in the SLP, before the Supreme Court the order of the High Court was not interfered with, but, a direction was issued to the Magistrate to record the statement of the complainant and to have relook on the whole matter. This is how the matter again landed before the Chief Judicial Magistrate, Jammu. He recorded the statement of the complaint and after going through the same found that the facts stated in the complaint and narrated by the witness in her statement disclosed the commission of cognizable offence, he took the cognizance in terms of Section 190 Cr.PC and decided to proceed under Chapter XVI. As a matter of fact, recording of the statement of the complainant after receiving the complaint of facts is traceable to Section 200 Cr.PC contained in Chapter XVI of Cr.PC. The plea of the learned counsel for the petitioner, that the statement was recorded pursuant to the direction of the Supreme Court would not change the position. That apart, even if this Court accepts the plea of the learned counsel for the

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petitioner that recording of statement of the complainant pursuant to the direction of the Supreme Court would not be a bar for the Magistrate to direct registration of FIR under Section 156(3) Cr.PC even then the Magistrate has discretion in the matter either to proceed under Section 156(3) Cr.PC or proceed under Chapter XVI of the Cr.PC. The Magistrate, in his wisdom, thought it expedient and in the interest of justice to take the cognizance of offence and proceed under Chapter XVI. As already stated that the petitioner has no vested right to claim that once he makes a complaint of facts constituting the cognizable offence to the Magistrate, the Magistrate must necessarily exercise powers under Section 156(3) Cr.PC and cannot take cognizance and proceed under Chapter XVI. As already submitted that this is well within the discretion of the Magistrate and such discretion if exercised fairly cannot be interfered with by this Court in exercise of inherent jurisdiction vested under Section 561-A Cr.PC. It may be worthwhile to notice that the scope of inquiry/investigation to be conducted under Section 202 Cr.PC is to ascertain truth or falsehood of the complaint and, therefore, same is required to be restricted to the aforesaid purpose. The Magistrate has, however, restricted the inquiry to seven points formulated by it in the penultimate para of the order impugned. Most of which are even peripheral to the

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complaint. I am aware that the complaint made by the complainant contains very serious allegations and is directed against the police and public officers and the same is required to be inquired into, in a fair and transparent manner so as to instil the confidence of the complainant in the judicial process. In these circumstances, I find that it would be in the fitness of things, if inquiry to ascertain the truthfulnessor falsehood of the complaint, is entrusted to the Crime Branch of the State instead of Inspector General of Police, Jammu. This would allay the apprehensions of the complainant as well.

23. For the foregoing reasons I find no reason or justification to interfere with the order impugned except providing that the inquiry directed by the Chief Judicial Magistrate, Jammu in the matter shall be restricted to ascertainment of the truth or falsehood of the complaint and the same shall be conducted by an officer of the Crime Branch not below the rank of Senior Superintendent of Police as may be appointed by the IGP Crime, Jammu and shall be completed and submitted to the Chief Judicial Magistrate, Jammu on or before 29.06.2019. The learned Chief Judicial Magistrate, Jammu shalltake up the case for further proceeding on 29.06.2019.

24. Since this Court has endeavoured to elaborately discuss the role of Magistrate on receiving a complaint of

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facts constituting the cognizable offence in the light of the provisions of Section 156(3), 190, 200, 202 and 204 Cr.PC, it would be in the fitness of things to circulate copy of this judgment to all the judicial Magistrates working in the State. Registrar General shall ensure that copy of judgment is circulated to all the judicial Magistrates of the State for their guidance on the issue of law discussed in the judgment.

25. Before parting, I also take this opportunity to place on record my concern regarding the manner in which our Magistracy acts when it receives an application for bail, release of vehicle or other seized property and even a complaint under Section 156(3) Cr.PC. Invariably, it is seen that the applications in original are forwarded to the police as if the Police Station is an extension of their Court. It needs to be appreciated that any application filed before the Magistrate is record of the Court, needs to be properly diarized and not sent in original to the Police Station. Such act may even amount to destroying the record of the Court. It is, thus, emphasized that henceforth, whenever any application whether on civil side or criminal side is received by a Court, the same shall be necessarily diarized and registered. Any Magistrate/Court found violating; shall be liable to action on the administrative side and may also be charged for destroying the record of

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the Court. Let all Magistrates (Judicial) note that whenever they receive such applications, they will diarize/register the same in the concerned Register. It is only the copy of the order along with copy of such application, which shall be sent to the Police or other authority for report or action, as the case may be.

26. **Disposed** of as above along with connected IA(s).

Jammu
10.05.2019
(Madan-PS)

(Sanjeev Kumar)
Judge

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Copy of judgement dt. 10-5-19 forwarded to worthy Registrar General, vice High Court at ~~Jammu~~ Srinagar for information & necessary Compliance Please.

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