

**Court No. - 73**

**Case :-** APPLICATION U/S 528 BNSS No. - 17850 of 2025

**Applicant :-** Krishna Nand Tiwari And 4 Others

**Opposite Party :-** State of U.P. and Another

**Counsel for Applicant :-** Devaang Savla

**Counsel for Opposite Party :-** G.A.

**Hon'ble Vikas Budhwar,J.**

1. Heard Sri Ambleshwar Pandey (AOR No. 1046/23) holding brief of Sri Devaang Savla, learned counsel for the applicants as well as Sri Moti Lal, learned AGA for the State.

2. This is an application U/s 528 BNSS filed for quashing impugned summoning order dated 19.04.2025 passed in Complaint Case No. 22 of 2025 (Shalini Tiwari vs. Krishna Nand Tiwari & Ors) pending before the Judicial Magistrate/ Civil Judge (J.D.) Chitrakoot U/s 498A, 406, 323, 504, 506 IPC and Section 3/4 D.P. Act, 1961 P.S. Karvi Kotwali Nagar, District Chitrakoot.

3. The case of the applicants is that a complaint was lodged by the opposite party no.2 who happened to be the wife against the applicant who are husband, mother-in-law, father-in-law, brother-in-law and maternal uncle with an allegation that offences had been committed U/s 498A, 406, 323, 504, 506 IPC and Section 3/4 D.P. Act, post recording of the statements, the applicants have been summoned on 19.04.2025 in complaint case no. 22 of 2025 U/s 498A, 406, 323, 504, 506 IPC and Section 3/4 D.P. Act. Questioning the summoning order, the applicants has filed the present application.

4. Learned counsel for the applicants has though sought to argue that the summoning order cannot be sustained as the allegations do not attract the penal provisions but he confines his argument to the fact that as per first proviso of section 223 of BNSS 2023, the applicants who are marked as an accused ought to have been put to notice at pre-cognizance stage. According to him, since the said exercise has not been undertaken thus the order cannot be sustained and is liable to be set aside.

5. Learned AGA on the other hand could not dispute the said facts that BNSS came into effect from 01.07.2024 and the complaint

was lodged on 24.10.2024 that to under Section 173 (4) of the BNSS and the summoning order is dated 19.04.2025. Thus, the first proviso to Section 223 of BNSS would come into play. He submits that the order be set aside and the matter be remitted back to the court below to pass a fresh order.

6. I have heard the submissions so made across the bar and perused the record carefully.

7. Section 223 BNSS 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. Since in the present facts and circumstances of the case, it is apparent that the complaint stood lodged on 24.10.2024 and the summoning order came to be passed on 19.04.2025 thus, chapter XVI of the BNSS relating to the complaint to Magistrate would come into play and according to first proviso to section 223, the Magistrate has to mandatorily accord opportunity of hearing at the pre cognizance stage. As the cognizance has been taken without

putting to notice the accused at the pre cognizance stage, thus the order cannot be sustained. A coordinate bench of this Court in application U/s 482 Cr.P.C. No. 10390 of 2024 (Prateek Agrawal vs. State of U.P. through Addl. Chief Secretary Dept. Home Lko & Ors) decided on 26.11.2024 had the occasion to consider the said aspect and it was observed as under:

*"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."

9. Accordingly, the application is allowed in the following manner:

(i) The order dated 19.04.2025 summoning the applicants U/s 498A, 406, 323, 504, 506 IPC and Section 3/4 D.P. Act, in complaint case no. no 22 of 2025 (Shalini Tiwari vs. Krishna Nand Tiwari & Ors) is set aside.

(ii) The Matter stands remitted to the court below to pass a fresh

order strictly in accordance with law as per mandate of Section 223 of the BNSS 2023.

(iii) For facilitation the applicant shall furnish a certified copy of the order by 13.06.2025.

**Order Date :- 27.5.2025**

C. MANI

**(Vikas Budhwar,J.)**