

Court No. - 12

Case :- APPLICATION U/S 528 BNSS No. - 862 of 2025

Applicant :- Rakesh Kumar Chaturvedi

Opposite Party :- State Of U.P. Thru. Addl. Chief Secy. Deptt. Of Home Lko. And Another

Counsel for Applicant :- Shantanu Sharma, Anshuman Sharma, Athar Ali

Counsel for Opposite Party :- G.A.

Hon'ble Rajnish Kumar, J.

1. Heard Sri Shantanu Sharma, learned counsel for the applicant and Sri Anurag Verma, learned A.G.A. for the State.
2. The instant application under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (here-in-after referred as BNSS) has been moved with a prayer to quash/set aside the impugned order dated 10.02.2025 passed by learned Additional Chief Judicial Magistrate-II, Lucknow in Misc. Case No.807/2025 alongwith notice i.e. Annexure No.1.
3. Learned counsel for the applicant submits that the notice, which has been issued to the applicant by means of the impugned order dated 10.02.2025, is against the statutory provision made under Section 223 of the BNSS because before taking cognizance, the notices can be issued for affording the opportunity of hearing, but only after recording all the statements of the complainant and the witnesses, if required. He relies on a co-ordinate Bench decision dated 26.11.2024 passed in **Application under Section 482 Cr.P.C. No.10390 of 2024; Prateek Agarwal Vs. State of U.P. and Another**, decision of the High Court of Karnataka passed in the case of **Basanagouda R. Patil Vs. Shivananda S. Patil; 2024 SCC Online Kar 96** and judgment rendered by the High Court of Kerala at Ernakulam in the case of **Suby Antony S/o Late P.D. Antony Vs. Judicial First-Class Magistrate passed in Crl. MC 508 of 2025 on 22.01.2025**. Thus, the submission of learned counsel for the applicant is that the impugned notice is not sustainable under law and liable to be quashed.

4. Learned A.G.A. for the State, though opposed the prayer but he could not contradict the legal position. He further submits that the impugned notice may be quashed and the matter may be remitted back, so that the learned Magistrate may proceed in accordance with law after recording the statements of the complainant and the witnesses and the respondent No.2 cannot be said to be prejudiced at this juncture because his statement has still not been recorded, to which, there is no objection by learned counsel for the applicant.

5. Having considered the submissions of learned counsel for the parties and on perusal of record, it is apparent that a complaint has been filed by the respondent No.2 and without recording any statement of the complainant or the witnesses, a notice has been issued to the applicant by means of impugned order dated 10.02.2025.

6. Section 223 BNSS provides that the 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. The first proviso appended to the Section provides that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard. The second proviso appended to the Section provides certain contingencies under which, the Magistrate need not examine the complainant and witnesses, if complaint is in writing. The relevant Section 223(1) BNSS is extracted here-in-below:-

"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)....."

7. In view of above, after recording statement of the complainant and the witnesses, if any, the Magistrate before taking cognizance in the matter, shall afford an opportunity of being heard to the accused. It is for the reason that if upon consideration of the statements and enquiry got conducted, if any, the Court finds that there is no sufficient ground to proceed, it can dismiss the complaint under Section 226 BNSS, which is extracted here-in-below:-

"226. Dismissal of complaint- *If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under section 225, the Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing. Chapter XVII Commencement of Proceedings before Magistrates."*

8. In view of above, after filing of complaint under Section 210 BNSS, the learned Magistrate has to first examine upon oath the complainant and the witnesses, if any, and the substance of such examination is to be reduced in writing, which shall be signed by the complainant and the witnesses and also by the Magistrate as per Section 223(1) of BNSS, thereafter, after considering the same, if he finds that there is no sufficient ground to proceed, he shall dismiss the complaint under Section 226 BNSS and if he finds that it can not be dismissed as such, he shall afford opportunity to the accused for which the notice of being heard shall be issued at that stage and only thereafter he would take cognizance after affording him opportunity of hearing. It is because, if the complaint is dismissed under Section 226 BNSS, the accused may not be harassed unnecessarily of appearing and the opportunity of hearing may not be a mere formality and it should be with material, which is required to be considered for taking cognizance. Thus, after recording of the statement under Section 223 BNSS and upon consideration that some sufficient ground is made out to

proceed, learned Magistrate shall issue notice to the accused.

9. A co-ordinate Bench of the High Court of Karnataka has examined the legal position with regard to Section 223 BNSS and held that 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. The relevant paras are being extracted hereinbelow:-

"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."

10. A co-ordinate Bench of this Court has taken similar view and after considering the aforesaid judgment of the Karnataka High Court, has allowed petition filed under Section 482 Cr.P.C. in the case of **Prateek Agarwal (Supra)**. Similar view has been taken by the High Court of Kerela at Ernakulam in the case of **Suby Antony S/o Late P.D. Antony (Supra)**.

11. Adverting to the facts of the present case, it is apparent that notices have been issued to the applicant without recording the statements of the complainant and witnesses, which is against the prescribed procedure under the the BNSS, therefore, this Court is of the view that the impugned order is not sustainable in the eyes of law. It is also noticed that the notice issued to the applicant, contained as Annexure No.1 is a blank notice without filling the blanks and mentioning the name of the applicant only, whereas notice should have been issued properly after filling all the relevant blanks and the concerned Court shall ensure that such notice is not issued in future.

12. Since the prescribed procedure has not been followed and the statements of the respondent No.2 and witnesses still have not been recorded, it cannot be said that he will be prejudiced by quashing of the impugned order dated 10.02.2025 and the notice because after recording the statements of the complainant and the witnesses, the Court can issue notice to the accused in accordance with law before taking cognizance in the matter. Thus, notice to respondent No.2 is dispensed with.

13. The application is **allowed**. The impugned order dated 10.02.2025 passed by learned Additional Chief Judicial Magistrate-II, Lucknow in Misc. Case No.807/2025 is hereby **quashed**.

14. The trial court shall proceed to record statements of the complainant and witnesses and proceed accordingly in accordance with law and the observations made here-in-above.

(Rajnish Kumar,J.)

Order Date :- 29.7.2025/Saurabh