* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% ***Pronounced on: 25th July, 2025***

\+ **CRL.M.C. 1495/2025, CRL.M.A. 6762/2025 (stay)**

BRAND PROTECTORS INDIA PVT. LTD.
Add: 122, Sector-15, Part-1,
Gurgaon, Haryana, 122001

.....Petitioner

Through: Mr. Shubham Dayma, Advocate.

versus

ANIL KUMAR
S/o Late Mr. Shamlal Abrol
R/o: Ward No. 8, Near Dangeshwar Mandir,
Samba, Jammu-184121

Also at: M/s Shiva Export House,
Veer Nagar, Sanoli Road, Ward No. 12,
Veer Nagar, Bapoli, Panipat, Haryana

Also at: Chamber No. 312,
New Chambers Block,
Patiala House Courts, New Delhi-110001 .....Respondent

Through:

CORAM:
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. Petition under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (*hereinafter referred to as 'B.N.S.S.'*) read with Article 227 of the Constitution of India, 1950, has been filed on behalf of the Petitioner, Brand

Protectors India Pvt. Ltd. for partially setting aside the impugned Judgment and Order dated 25.01.2025 in CR No. 251/2024, whereby the learned ASJ, Delhi has set-aside the Order of learned Metropolitan Magistrate taking cognizance without issuing a Notice to the accused persons with the direction that the accused persons be heard before taking cognizance on the Complaint.

2. ***Briefly stated***, the Complaint Case bearing CT No. 980/2024 titled *Mr. Anil Kumar Proprietor of M/s Shiva Export House vs. Brand Protectors India Pvt. Ltd*. under Section 222 of the B.N.S.S. for defamation was filed. The learned Metropolitan Magistrate *vide* Order dated 19.07.2024, took cognizance and directed the matter to be listed for pre-summoning evidence on 09.08.2024.

3. This *Order of Summoning* was challenged by the Petitioner (*Respondent/Accused in the Complaint*), on the grounds that the cognizance of the offence has been taken without hearing the Petitioner, in violation of Section 223 of B.N.S.S.

4. The Petitioner preferred her Revision Petition bearing CR No. 251/2024 before the learned ASJ, who *vide* his impugned Order dated 25.01.2025 observed that the *cognizance* could not have been taken without giving prior Notice to the Petitioner and thereby set-aside the Order of cognizance with the directions that the Petitioner be heard before taking cognizance. However, the second part of the Order regarding recording of pre-summoning evidence and consequent examination of Complainant on 05.12.2024, was held to be not in violation of Section 223 of B.N.S.S. was held to be valid and was not set-aside.

5. The ***second part of the Order is challenged*** on the ground that in the case of *Raj Kumar vs. State of NCT of Delhi*, 2013 SCC OnLine Del 774, *C. Ilavarasu vs. State*, 2019 SCC OnLine Mad 1119 and *Kishori Mohan Guchhait vs. Apurba Baran Mondal*, 1979 SCC OnLine Cal 98 it has been held that without taking cognizance, there can be no direction for conducting pre-summoning evidence.

6. Learned counsel has further argued that Section 223(1) of B.N.S.S., is *para materia* to Section 200 of the Code of Criminal Procedure, 1973 (*hereinafter referred to as 'CrPC'*) and merely because Section 223 of B.N.S.S. states "*a Magistrate having jurisdiction while taking cognizance of offence*" cannot be interpreted to imply that pre-summoning evidence has to be recorded before issuing the Notice to the accused for taking cognizance. This phrase neither affects the operation of the proviso in any manner nor does it warrant creation of new jurisprudence for taking cognizance. Furthermore, the pre-summoning evidence as envisaged under CrPC, was not to be carried out under Section 200 but under Section 202(2) CrPC, which is manifestly clear from the language used in Section 200 and Section 202 CrPC. Section 200 CrPC uses a word '*examine'* whereas the expression used in Section 202(2) CrPC is '*taking evidence'*, of witnesses on oath. This leads to inescapable conclusion that the concept of pre-summoning evidence is rooted in Section 202(2) Cr.P.C (*now 225(2) of B.N.S.S*) and not in Section 200 CrPC (*now Section 223(1) of B.N.S.S*).

7. It is emphasised that the enquiry under Section 200(2) CrPC, cannot be undertaken without first taking cognizance of the offence. Moreover, the expression used in Section 225(2) of B.N.S.S. is para-materia with Section

202(2) CrPC, which is *'taking cognizance'* and not *'while taking cognizance.'* Therefore, the Appellate Court erred in treating the examination of Complainant as envisaged under Section 223(1) of B.N.S.S. as conducting pre-summoning evidence under Section 225(2) of B.NS.S.

8. Reliance has been placed on the case of *Ghanshyam Kumar Shukala vs. State of U.P.*, 2006 SCC OnLine All 44 wherein the Allahabad High Court observed that it is settled principle that while summoning an accused, the Court has to see the *prima facie* evidence. Prima facie evidence means evidence sufficient for summoning the accused and not the evidence, which is sufficient to warrant the conviction. Enquiry under Section 202 of Cr.P.C. is limited only to ascertain the truth or falsehood of the allegation made in the Complaint and whether on the material placed by the Complainant a *prima facie* case was made out for summoning of the accused.

9. Likewise, in the case of *State of West Bengal vs. Mohd. Khalid*, (1995) 1 SCC 684 and *Manharibhai Muljibhai Kakadia vs. Shaileshbhai Mohanbhai Patel,* (2012) 10 SCC 517, it was observed that it is trite law that Magistrate takes cognizance of the offence when he applies his judicial mind to take steps to ascertain whether there is material to initiate judicial proceedings against an offender.

10. Recording of *'pre-summoning evidence'* is fundamentally a judicial proceeding and is carried out to ascertain whether the accused must be issued Notice under Section 227 of B.N.S.S. (corresponding to Section 204 Cr.P.C.). Therefore, taking cognizance is a mandatory pre-requisite for conducing *'pre-summoning evidence'* and no cognizance can be taken without hearing the accused under Section 223 of B.N.S.S.

11. It is thus, submitted that the impugned Order to the extent of upholding the directions for pre-summoning evidence in the Order dated 19.07.2024 by the learned ACMM, is bad in law and is liable to be set-aside.

Submissions heard and the record perused.

12. The core question which has arisen for consideration is: *whether the pre-summoning evidence as well as Cognizance can be taken only after giving Notice to the Accused.*

13. To comprehend the conspectus of the contention raised on behalf of the Petitioner, it would be pertinent to reproduce Section 223 BNSS, which 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 .....*
> *(2) ..."*

14. In this context, it would also be pertinent to refer to 225 BNSS which reads as under:-

> ***"225: 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 212, may, if he thinks fit, 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 223.*
>
> *(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 Sanhita on an officer in charge of a police station except the power to arrest without warrant".*

15. From the comprehensive reading of these two Sections, it becomes evident that though under Section 200 Cr.P.C (now S. 223 BNSS) at the stage of pre-cognizance, no Notice was required to be served upon the

accused, this aspect has undergone a change in Section 223 BNSS, to which the *proviso is added that no Cognizance of an Offence can be taken without giving a prior opportunity to the accused of being heard*.

16. In this regard, it may be pertinent to understand the meaning of word *"cognizance"* which was explained by the Apex Court in *Narayan Das Bhagwandas Madhavdas vs. State of West Bengal* AIR 1959 SC 111 that when a cognizance is taken of an offence, would depend upon the facts and circumstances of each case and it is difficult to attempt to define what is meant by taking cognizance. It is only when the Magistrate applies his mind for the purpose of proceeding under Section 200 and sub-sections of Chapter XVI of Cr.P.C. or under Section 204 of Chapter XVII, that the Court can be positively stated to have applied his mind and taken cognizance.

17. Similarly, in *Darshan Singh Ram Kishan vs. State of Maharashtra,* 1971 (2) SCC 654 the Apex Court reiterated the observations made in *R.R. Chari vs. State of U.P.* 1951 SC 250.

18. The cognizance involves application of mind to the given facts to ascertain whether the Accused needs to be summoned. The purpose of recording statements prior to taking cognizance, is only to ascertain if any prima facie case is disclosed in the Complaint and thereby enable taking of cognizance in appropriate cases and avoid unnecessary harassment of the Respondent/Accused.

19. From the express language of the Section 223 and the aforesaid meaning of "Cognizance", it is abundantly evident that taking Cognizance of an Offence is the stage when the Magistrate applies his mind to the

Complaint for the purpose of proceeding as per provisions of Chapter XVI of BNSS.

20. While under the erstwhile Section 200 Cr.P.C and S. 202 Cr.P.C. (which are *para materia* with Section 223 and 225 of BNSS), it was clear that till the stage of Cognizance, the Accused had no role and it is only after the Cognizance was taken that summons were issued to the Accused. However, under the BNSS, there is a marked change as a procedural safeguard has been incorporated by way of *first proviso to S. 223 (1) BNSS* which mandates that no cognizance of an offence shall be taken by the Magistrate without giving the accused an opportunity of being heard.

21. On this change in the BNSS, the Calcutta High Court in *Tutu Ghosh vs. Enforcement Directorate*, 2025 LiveLaw (Cal) 174, has observed that the Legislature, in its wisdom, has deliberately introduced the first proviso to Section 223, thereby conferring on the accused the right to have an opportunity of hearing at the pre-cognizance stage, despite the Legislature being obviously aware of the subsequent stages of a proceeding and criminal trial where a right of hearing is again given to the accused.

22. The Coordinate Bench of this Court in *Neeti Sharma vs. Saranjit Singh* 2025DHC 2367, has observed that the first proviso to Section 223(1) of BNSS puts an embargo on the power of the Court to take Cognizance upon a Complaint, by providing that no Cognizance of an Offence shall be taken by the Magistrate without giving the accused an opportunity of being heard. This proviso marks a substantive procedural safeguard that did not exist under the earlier regime.

23. Therefore, the ld. ASJ has rightly held that the taking of Cognizance and issuing the summons to the Accused/ Petitioner without prior Notice was bad in the light of proviso to Section 223 (1) Cr.P.C and thereby set it aside.

24. Similar observations have been made by the Calcutta High Court in *Tutu Ghosh vs. Enforcement Directorate*, 2025 LiveLaw (Cal) 174 and , the Kerala High Court in *Suby Antony v. Judicial First-Class Magistrate III* 2025 SCC OnLine Kar 96, and *Prateek Agarwal v. State of U.P.* 2024 SCC Online All 8212.

25. The Petitioner/Accused is not aggrieved to the extent that the Order taking Cognizance has been set aside with the direction to first issue a Notice to the Petitioner.

26. *The main grievance of the Petitioner is that the pre-summoning evidence also could not have been recorded by the ld. MM without giving prior notice to the Petitioner and an opportunity to cross-examine the witnesses.*

27. Section 223 provides that *"while taking cognizance of an offence on Complaint the Court shall examine upon oath the Complainant and the witnesses present"*.

28. The words *"while taking cognizance of an offence"* clearly indicate that at the time of taking cognizance, first the witnesses present need to be mandatorily examined on oath. This aspect is further supported by Section 225 which deals with postponement of issue of process. It states that any Magistrate on receipt of Complaint may postpone issue of process against the Accused and can direct an investigation to be made by a Police Officer

or by such other person as he thinks fit and may take evidence of witnesses on oath.

29. This reinforces that it is prior to taking Cognizance on the Complaint that the witnesses are required to be examined. The objective is evident that the recording of the statement of the Complainant/ witnesses is to ensure the authenticity of the allegations made in the Complaint. It is only when the Magistrate is fully satisfied with the averments made in the Complaint and that it discloses a cognizable offence that the second stage of taking cognizance would arise. The purpose of recording of the statement of the Complainant/ witnesses is only to satisfy that the allegations/ averments made in the Complaint *prima facie* disclose a cognizable offence. This procedure, in fact, is for the protection of the accused from being summoned on frivolous Complaints.

30. The procedure to be followed on filing of the Complaint under Section 200 Cr.P.C. (now Section 223 BNSS) was discussed by the Supreme Court in *Ram Das vs. Shri Niwas Nair* (1984) 2 SCC. It was explained that when a private Complaint is filed, the Complainant has to be examined on oath except when it is a public servant. After examining the complainant on oath and the witnesses present, it would be open to the Court to judicially determine whether the case is made out for issuing process. When it is said that the Court issues process, it means that the Court has taken cognizance of the offence and has decided to initiate the proceedings and as a visible manifestation of taking cognizance, process is issued which means that the accused is called upon to appear before the Court. A reference was also made to Section 200 and Section 202 Cr.P.C. to observe that the power to

take cognizance can be postponed and an enquiry be held under 202 and an enquiry or investigation by a Police Officer can be directed to decide whether there is sufficient grounds for proceeding. The matter is left to the judicial discretion of the Court whether to examine the Complainant and the witnesses if any as contemplated under Section 200 Cr.P.C or to postpone the issue of process and seek further investigations by the police or any other person.

31. In the case of *Manharibhai Muljibhai Kakadia vs. Shaileshbhai Mohanbhai Patel*, (2012) 10 SCC 517 the Apex Court succinctly encapsulated the objective of Section 202 Cr.P.C. and stated that the twin objectives to be achieved are:

I. *To enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face any unnecessary frivolous or meritless complain*

II. *To find out whether there is some material to support the allegations made in the complaint.*

32. To elicit all these facts and having regard to the interest of the absent accused and also to bring to book a person against whom the allegations have been made, the Magistrate may hold an enquiry under Section 202 himself or direct the same to be made by a Police Officer. The dismissal of the Complaint under Section 203 is without doubt, a pre-issuance of process stage. It does not permit the accused person to intervene in the course of enquiry by the Magistrate under Section 202 Cr.P.C.

33. This legal position has been established by the Apex Court in V*adilal Panchal vs. Dattatraya Dulaji*, AIR 1960 SC 111(3) wherein in reference to Section 202 Cr.P.C, it was held that the purpose of the enquiry under Section 202 was to ascertain the truth of the falsehood of the Complaint, i.e. there was evidence in support of the Complaint so as to justify the issuance of a process and commencement of proceedings against the accused.

34. This proposition of law has been reiterated by three-Judge Bench of the Apex Court in *Adalat Prasad vs. Roop Lal Jugal* (2004 7 SCC 338) wherein it was stated that when a Complaint is filed, the Magistrate on examination of the complainant and the witnesses, does not want to issue the process. Thus, if it is found that no sufficient ground is made out of proceeding, the Complaint can be dismissed forthwith under Section 203 Cr.P.C. without issuing any Notice to the Accused. *Per contra*, if the evidence and enquiry made under Section 202 shows that there is enough material, he may proceed to issue process under Section 204 Cr.P.C. *It was reiterated that the condition precedent for issuing process under 204 is the satisfaction of the Magistrate either by examination of the Complainant and witnesses or by the enquiry contemplated under Section 202, that there is sufficient ground to proceed by issue of process under Section 204 Cr.P.C.*

35.

36. Similar interpretation has been given by the Karnataka High Court in the case of *Sri Basanagouda R. Patil vs. Sri Shivananda S. Patil*, (Criminal PP No. 7526/2024) while interpreting Section 223 BNSS. It was held that *while taking Cognizance of an Offence*, a Magistrate should have with him a statement on oath of the Complainant and any witnesses present at the time

of taking Cognizance under Section 223 BNSS. *The stage of Cognizance comes only after the recording of the statement and only thereafter, the issue arises of giving a Notice to the Accused for the purpose of taking Cognizance.* It was further explained that the proviso indicates that an accused should have an opportunity of being heard, which would not be an empty formality. Therefore, Complainant in terms of proviso to sub-section to S.223 of BNSS, shall append the copy of the Complaint, the small statements of the Complainant and the witnesses, if any, for the accused to appear and submit his case before the cognizance is taken.

37. Thus, it may be concluded that Section 223 BNSS has reiterated the procedural framework of Section 200 Cr.P.C. with regard to examination of the Complainant and the witnesses, but has introduced significant departure that after the Complainant/ witnesses as the Court may desire has been recorded, an opportunity of being heard be given to the accused before cognizance is taken.

38. In view of the above discussion, it is held that the law has been rightly interpreted by ld. ASJ. The impugned Order does not suffer from any infirmity. The Petition is accordingly dismissed.

39. The pending Application(s), if any, are disposed of accordingly.

(NEENA BANSAL KRISHNA)
JUDGE

JULY 25, 2025/RS