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**(2008) 09 AHC CK 0093**  
**In the Allahabad High Court**

Nawab Saiyyed Zafar Hussain

APPELLANT

Vs

State of U.P.

RESPONDENT

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**Date of Decision :** 05-09-2008

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 156, 173, 190, 200, 202  
Penal Code, 1860 (IPC) — Section 147, 148, 323, 441, 452

**Citation :** (2008) 09 AHC CK 0093

**Hon'ble Judges :** Vijay Kumar Verma, J

**Bench :** Single Bench

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## Judgement

Vijay Kumar Verma, J.—"Is the Magistrate bound to adopt the procedure of complaint case in each and every case at the time of disposal of the final report and protest petition?" is the main question that falls for consideration in this revision, by means of which, the order dated 13.10.2004 passed by 6th Metropolitan Magistrate, Kanpur Nagar in Misc. Case No. 68 of 2004 under Sections 147, 148, 441, 452, 506, 323 I.P.C. P.S. Kohna, District Kanpur Nagar has been challenged.

By the impugned order, the learned Magistrate after dismissing the protest petition of the complainant, accepted the final report in case crime No. C-7/2003 of P.S. Kohna, Kanpur Nagar.

2. Shorn of unnecessary details, the facts leading to the filing of this revision, in brief, are that an application u/s 156(3) of the Code of Criminal Procedure (in short, "the Cr.P.C.") was moved by the revisionist Sri Nawab Saiyyed Zafar Hussain in the Court of 6th Metropolitan Magistrate, Kanpur Nagar on 23.05.2002, which was allowed by the learned Magistrate vide order dated 05.08.2002, whereby S.O. P.S. Kohna was directed to register the case against opposite party Raj Kumar and investigate the same. That order was challenged by the prospective accused Raj Kumar in criminal revision No. 297 of 2002 in the Court of Sessions Judge, Kanpur Nagar, which was allowed by the Addl. Sessions Judge, Court No. 17, Kanpur Nagar vide order dated 31.03.2003, whereby the

order dated 05.08.2008 passed by the Metropolitan Magistrate was set-aside and it was directed that the application u/s 156(3) Cr.P.C. be treated as complaint.

3. The order dated 31.03.2003 of lower revisional court was challenged by the revisionist in this Court by means of criminal revision No. 5939 of 2003, in which interim order was passed on 15.10.2003, whereby the operation of the order dated 31.03.2003 was stayed. It appears that after staying the operation of the order dated 31.03.2003 by this Court, an F.I.R. was registered at P.S. Kohna, whereby a case u/s 147, 148, 441, 452, 506, 323 I.P.C. was registered at case crime No. C-7/2003 against Raj Kumar. After investigation, final report was submitted in that case on 14.04.2004, against which the revisionist filed protest petition (Annexure-9) on 08.10.2004.

4. The learned Magistrate vide impugned order dated 13.10.2004 dismissed the protest petition and accepted the final report. Hence, this revision.

I have heard Sri Ashwani Kumar Awasthi, learned Counsel for the revisionist and learned A.G.A. for the State and perused the entire record carefully.

5. The first and foremost submission made by the learned Counsel for the revisionist was that at the time of disposal of the final report, the learned Magistrate was bound to treat the protest petition of the complainant as complaint and after adopting the procedure laid down in Chapter XV Cr.P.C., order u/s 203 or 204, as the case may be, ought to have been passed and since this procedure was not followed by the learned Magistrate while deciding the final report and protest petition, hence, the impugned order being wholly illegal should be set- s aside and the case be sent back to the learned Magistrate for passing fresh order on the protest petition filed by the complainant against the final report treating the same as complaint and following the procedure u/s 200 and 202 Cr.P.C. For these contentions, the learned Counsel has placed reliance on the following rulings:

1. Gangadhar Janardan Mhatre v. State of Maharashtra and Ors. 2004 (3) ACR 2758 .

2. Bhagwant Singh Vs. Commissioner of Police and Another,

3. Pakhandu and Ors. v. State of U.P. and Anr. 2001 (3) A.Cr.R. 2541.

4. Anil Kumar Chauhan v. State of U.P. and Anr. 2004(11) (U.P. Cri) 161.

5. Mohd. Yusuf and Ors. v. State of U.P. and Anr. 2008 (1) ACR 68.

6. The learned A.G.A. on the other hand submitted that the Magistrate is not bound in each and every case to treat the protest petition as complaint, and hence, there is no scope to make any interference by this Court in the impugned order, as the said order does not suffer from any legal infirmity.

7. Having taken the submissions made by the parties' Counsel into consideration and after carefully going through the above-cited rulings on which reliance has

been placed by the learned Counsel for the revisionist, I am of the opinion that the Magistrate is not bound in each and every case to treat the protest petition as complaint, although option to treat the protest petition as complaint is available to him.

8. In none of the rulings cited by the learned Counsel for the revisionist, it is held that the Magistrate at the time of making disposal of the final report is bound to treat the protest petition as complaint in each and every case.

There is no provision in the Code of Criminal Procedure to file the protest petition against the final report. However, the Hon''ble Apex Court in the case of *Bhagwant Singh v. Commissioner of Police (supra)* held that when on consideration of the report made by the Officer Incharge of the Police Station under Sub-section (2)(i) of Section 173 Cr.P.C., the Magistrate is not inclined to take cognizance of the offence and issue process, the informant must be given an opportunity of being heard, so that he can make his submission to persuade the Magistrate to take the cognizance of the offence and issue process.

9. Similar view has been expressed by the Hon''ble Apex Court in the case of *Gangadhar Janardan Mhatre v. State of Maharashtra (supra)*. It is further held in *Gangadhar Janardan Mhatre case (supra)* that in a case where the Magistrate, to whom a report is forwarded under Sub-section (2)(i) of Section 173 Cr.P.C., decides not to take cognizance of the offence and to drop the proceeding or takes the view that there is no sufficient ground for proceeding against some of the persons mentioned in the first information report, the Magistrate must give notice to the informant and provide him an opportunity to be heard at the time of consideration of the report. There is nothing in both the rulings that in each and every case the Magistrate is bound to adopt the procedure of complaint case on the protest petition.

10. Only the opportunity of hearing is to be granted to the informant at the time of consideration of the final report. If from the allegations made in the first information report any criminal offence is not *prima facie* disclosed, then the Magistrate is not bound to treat the protest petition as complaint and in such case after dismissing the protest petition, the final report may be accepted. However, if in any case, from the averments made in the First Information Report, *prima facie* criminal offence is disclosed, but the material in the case diary submitted with the final report is not sufficient to take cognizance and to issue process against the accused, then in such case, as held by this Court in the cases of *Anil Kumar Chauhan v. State of U.P.* and *Mohd Yusuf v. State of U.P. (supra)*, the accused can not be summoned to face the trial merely on the basis of the protest petition and other material including affidavits filed in support thereof without following the procedure laid down u/s 200 and 202 Cr.P.C.

11. The Division Bench of this Court in the case of *Pakhandu v. State of U.P. (supra)* after making reference of certain decisions of Hon''ble Apex Court has held as under in para 14 of the report at page 2546:

14. From the aforesaid decisions, it is thus clear that where the Magistrate receives final report, the following four courses are open to him and he may adopt any one of them as the facts and circumstances of the case may require:

(i) he may agree with the conclusions arrived at by the police, accept the report and drop the proceedings. But before so doing, he shall give an opportunity of hearing to the complainant; or

(ii) he may take cognizance u/s 190(1)(b) and issue process straightway to the accused without being bound by the conclusions of the investigating agency, where he is satisfied that upon the facts discovered or unearthed by the police, there is sufficient ground to proceed; or

(iii) he may order further investigation, if he is satisfied that the investigation was made in a perfunctory manner; or

(iv) he may, without issuing process or dropping the proceedings decide to take cognizance u/s 190(1)(a), upon the original complaint or protest petition treating the same as complaint and proceed to act u/s 200 and 202, Cr.P.C. and thereafter decide whether complaint should be dismissed or process should be issued.

12. From the afore-cited observations of the Division Bench also, it is clear that the Magistrate is not bound to treat the protest petition as complaint in each and every case and if the Magistrate agreeing with the conclusions arrived at by the police decides to accept the final report and to drop the proceedings, then opportunity of hearing has to be given to the complainant before passing order on the final report.

13. According to the Pakhandu case (supra), the fourth course open to the Magistrate is "Jit: without issuing process or dropping the proceedings, he may decide to take cognizance u/s 190(1)(a) Cr.P.C. upon the original complaint or protest petition treating the same as complaint and proceed to act u/s 200 and 202 Cr.P.C. and thereafter to decide whether the complaint may be dismissed or process should be issued, but in the cases, where the first information report does not disclose any criminal offence and final report is submitted by the investigating officer, then there is no justification in such cases to compel the Magistrate to treat the protest petition against final report as complaint and to follow the procedure laid down in Chapter XV Cr.P.C.

14. In view of the observations made herein-above, let us now see whether in instant case, the learned Magistrate was justified in dismissing the protest petition of the revisionist at the time of disposal of the final report. Annexure (IX) is the copy of the application moved by the revisionist u/s 156(3) Cr.P.C. in the Court of 6th Metropolitan Magistrate, Kanpur Nagar. On the basis of the averments made in the accompanying affidavit, it can not be said that no offence is disclosed in this case. On the basis of the allegations made in the affidavit of the revisionist Nawab Saiyyed Zafar Hussain filed in support of the application u/

s 156(3) Cr.P.C. prima facie cognizable offences are disclosed.

15. Therefore, if the material in the case diary submitted with the final report by the investigating officer in case crime No. C-7/2003 was not sufficient to take cognizance against the accused and if the Magistrate had decided to accept the final report, then having regard to the allegations made in the first information report, the protest petition of the revisionist ought to have been treated as complaint and after following the procedure laid down in Chapter XV Cr.P.C., he ought to have decided whether the complaint may be dismissed or process against the accused should be issued. In case the process is issued against the accused, then the final report has to be rejected.

16. On the basis of the foregoing discussion, I am of the considered opinion that the Magistrate is not bound to treat the protest petition as complaint in the cases where no criminal offences is disclosed on the basis of the allegations made in the first information report and in such cases, the final report may be accepted after dismissing the protest petition. However, in instant case, for the reasons mentioned herein-above, the protest petition filed by the revisionist against the final report ought to have been treated as complaint, as prima facie offences are disclosed on the basis of the allegations made in the first information report.

17. Consequently, the revision is allowed. The impugned order is set-aside and the learned Magistrate concerned is directed to pass fresh order on the final report in case crime No. C-7/2007 of P.S. Kohna (Kanpur Nagar), following the procedure laid down u/s 200 and 202 Cr.P.C. after treating to the protest petition of the revisionist as complaint.