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**(2012) 05 AHC CK 0326**  
**In the Allahabad High Court**  
**Case No : Criminal M. Case No. 670 of 2010**

Smt. Shiv Kumari

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

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**Date of Decision :** 24-05-2012

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 173, 239, 240, 482  
Penal Code, 1860 (IPC) — Section 419, 420, 467, 468, 471

**Citation :** (2012) 3 ACR 3101

**Hon'ble Judges :** Sudhir Kumar Saxena, J

**Bench :** Single Bench

**Advocate :** Amarjeet Singh Rakhra, for the Appellant; Indrajeet Shukla, for the Respondent

**Final Decision :** Allowed

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## Judgement

Sudhir Kumar Saxena, J.—Heard learned counsel for the petitioner and learned A.G.A. From the record, it transpires that charge-sheet was submitted against applicant under Sections 419, 420, 467, 468 and 471, I.P.C. Petitioner had filed Criminal Misc. Case No. 2742 of 2007 (under Section 482, Cr.P.C.) which was disposed of finally on 23.4.2009 by Hon'ble Mr. Justice D.V. Sharma (Retd.) directing the petitioner to move application u/s 239, Cr.P.C. which was to be disposed of within 30 days. Another petition was filed by the petitioner being Criminal Misc. Case No. 3294 of 2009 (under Section 482, Cr.P.C.) which too was disposed of on 11.9.2009 with the direction to consider the bail application, if possible on the same day.

2. In pursuance of this judgment, petitioner concerned had got himself bailed out on 23.9.2009, thereafter, she moved application to discharge u/s 239, Cr.P.C. before the Chief Judicial Magistrate, Gonda, raising that defendants of suit are wrongly claiming the ownership of the property on the basis of sale deed. Civil Suit No. 49 of 1991 was pending for cancellation of the sale deed. F.I.R. has been lodged after 15 years. Suit having been dismissed, has been restored on

16.7.2005 and nothing incriminating has been collected or found by the Investigating Officer against the applicant. This application has been rejected by Judicial Magistrate-II, Gonda, which order has been impugned in the instant petition.

3. With the consent of parties, I propose to decide this case finally. Section 239, Cr.P.C. is being reproduced below:

If, upon considering the police report and the documents sent with it u/s 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge the accused, and record his reasons for so doing.

4. From the above section, it is manifest that Magistrate has to consider the police report and documents sent therewith u/s 173, Cr.P.C., examine the accused and give opportunity of hearing to both the parties. He can discharge the accused if he finds that charge against the accused groundless and he will have to record reasoning therefor. On the other hand, if he finds the grounds for presuming that the accused has committed an offence then charge will be framed u/s 240, Cr.P.C. Application moved u/s 239, Cr.P.C., raises many grounds, however, learned Magistrate has not considered any ground and has rejected the application by one sentence:

5. From the above, It appears that learned Magistrate proceeded on the assumption that he has no power to evaluate the materials forwarded by police u/s 173, Cr.P.C. and at that stage, prayer for discharge cannot be entertained. This is in violation of clear mandate of Sections 239 and 240, Cr.P.C. which require a finding by the Magistrate with regard to the charge against the accused being groundless or that there is ground for presuming that the accused has committed offence. This finding was to be recorded upon considering the police report, the documents sent therewith and after hearing both the parties. Magistrate has not considered any document or material forwarded by the police nor has even referred to the contentions raised by the applicant. Magistrate has not applied his mind to the contentions raised by the applicant and provisions of section, thus the order cannot be upheld. Section 239, Cr.P.C. contemplates discharge even before the commencement of the trial which factor, has been overlooked by the Magistrate. Thus, order suffers from vice of non-application of mind.

6. Accordingly, the petition is allowed. Order dated 8.1.2010 passed by Judicial Magistrate-II, Gonda, in Case No. 3550 of 2007 is quashed. Magistrate is directed to decide the application in accordance with law within a period of six weeks from the date a certified copy of this order is produced before him.