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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: July 12, 2019
Decided on: August 08, 2019

\+ CRL.M.C. 4120/2016

ASHOK CHAWLA & ORS. ..... Petitioners

Through: Mr. Kunal Malhotra, Advocate with Ms. Palak Kharbanda, & Mr. Vivek, Advocates.

versus

C.B.I. ..... Respondent

Through: Mr. Mridul Jain, Special P.P. with Mr. K.P. Sharma, Deputy SP, CBI.

CORAM:
HON'BLE MR. JUSTICE R.K.GAUBA

JUDGMENT

1. Some confusion prevails concerning the procedure governing the criminal cases involving accusations of offences under the Official Secrets Act, 1923 ("the Official Secrets Act"), certain notifications issued by the central government, some observations in an earlier judgment of a single bench of this court, and a seemingly unreasonable posture adopted by Central Bureau of Investigation (CBI) in the case from which the present petition arises, having possibly added to the causes. The petition at hand presents the opportunity for such confusion to be dispelled and clarity in the approach expected to be adopted brought about such that cases of this nature do not suffer unnecessary hiccups or delay.

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2. The background facts may be noted at the outset *albeit* restricted to the extent necessary. In the wake of searches statedly carried out in a premises located in Defence Colony, New Delhi on 31.08.1995 and 01.09.1995, by the officials of income tax department, recovery of certain classified documents, described as secret and confidential, of Ministry of Defence in the Govt. of India was reported, this resulting in first information report (FIR) being registered by CBI on 30.08.1996 vide RC No.6(S)/1996, the investigation having been taken up into the acts of commission and omission *prima facie* constituting offences punishable under sections 3 and 5 of the Official Secrets Act and section 120-B of the Indian Penal Code, 1860 (IPC). On 21.11.2000, Inspector Ram Chander Garvan of CBI presented a criminal complaint under section 13 of the Official Secrets Act in the court of Chief Metropolitan Magistrate (CMM) Delhi, on the strength, *inter alia,* of authorization by the Central Government vide order No.11/17017/18/2000-ISUS (D-11), dated 12.09.2000, seeking prosecution of the petitioners for having committed offences punishable under sections 120-B IPC read with section 3(1)(c) of the Official Secrets Act and for substantive offence under section 3(1)(c) of the Official Secrets Act. The complaint referred to, and relied upon, evidence that had been gathered by the CBI during investigation into the above mentioned FIR, documents relating to which were presented with the complaint, the list of witnesses also having been prepared and presented in such light.

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3. The CMM, Delhi passed the following order on the said complaint:-

> *"21.11.00*
>
> *Pr. Sh. Rajpal Singh, Spl.P.P. for CBI with Insp. Ram Chander Garvan I.O.*
>
> *Complaint under section 13 of Official Secret Act 1923 presented.*
>
> *It be checked and registered.*
>
> *Documents also filed along with the complaint. Heard. Perused. I take cognizance of the offence under section 3/5 Official Secret Act R/w section 120B IPC. Accused persons be summoned for 2/3/2001.*
>
> *Sd/-*
>
> *C.M.M. 21.11.00"*

4. On 08.03.2001, the petitioners appeared before the CMM, Delhi with counsel taking preliminary objection that the complaint had been presented by an officer who was not authorized in law to present the same. This objection was repelled by the CMM who noted that the complainant (public servant) had been duly authorized by the Central Government, reference being made to the FIR that had been registered by CBI on 30.08.1996, directions being given to the concerned clerk (*Ahlmad*) to trace the FIR and place the same on record, the matter having been adjourned because the concerned Public Prosecutor for CBI was not available, the application for bail requiring consideration. On 04.05.2001, the *ahlmad* of the concerned court gave a report placing on record copy of the FIR that had been received earlier, also stating that no report (of investigation) under section 173 of the Code

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of Criminal Procedure, 1973 (Cr.P.C.) had been filed. On 20.09.2001, the petitioners were admitted to bail, the CMM, Delhi opting to enforce the trial procedure applicable to warrant cases instituted otherwise than on police report (generally known as "complaint cases") requiring pre-charge evidence to be adduced – presumably in terms of section 244 Cr.P.C. It is apposite to take note of the detailed order passed on 20.09.2001 by the CMM, Delhi in extenso:-

> *"1. Complaint under section 13 Official Secrets Act 1923 was filed by Insp. Ram Chander Gravan, Inspector of Police, C.B.I. New Delhi against Ashok Kumar Chawla and Ms. Vijaya Rajgopal.*
>
> *2. On filing of complaint cognizance for the offence under section 3/5 Official Secrets Act 1923 r/w section 120B IPC was taken and the accused were summoned to appear in Court.*
>
> *3. On appearance the counsel for the accused pointed out that in fact an RC No.6(S)/96 New Delhi was registered with the C.B.I. on 30.08.1996. As per the procedure laid down under section 210 Cr.P.C. if investigation in respect of the same offence is made by the investigating authority on the basis of an FIR then the Police Reprot and the complaint case are to be amalgamated.*
>
> *4. It has now come to surface that in fact no report u/s 173 in terms of Cr.P.C. has been prepared.*
>
> *5. Section 13 of the Official Secrets Act lays down that cognizance of any offence under this Act is only to be taken upon a complaint made by the order of or under authority by the appropriate Government or some officer empowered by the appropriate Government under this behalf. The procedure to be followed in this case is laid down in Chapter 15 of the Cr.P.C. The present complaint*

> *has been filed in terms of section 200 Cr.P.C. Process has been issued u/s 204 Cr.P.C. The accused have put in their appearance after supply of copies in terms of section 207 Cr.P.C. The prosecution is first to lead pre-charge evidence as it is a warrant trial case. Let prosecution lead pre-charge evidence on 20.11.01 and accused are directed to file their bail bonds in sum of Rs.20,000/- with surety in like amount."*

5. It is stated that by proceedings recorded on 05.12.2006 the case was committed to the court of sessions. It appears that pre-charge evidence was adduced before the court of sessions on which basis, by order dated 12.10.2012, charges were framed against the petitioners for offences under sections 3 and 5 of the Official Secrets Act read with section 120-B IPC.

6. When the case had reached post-charge evidence stage of the trial process, the petitioners moved an application on 22.07.2016 praying for stay of proceedings referring in this context to the provision contained in section 210 Cr.P.C. The prime contention urged was that the CMM had erred because she should have stayed the proceedings on the complaint under section 210 (1) Cr.P.C. and called for the final report of investigation under section 173 Cr.P.C. into the above mentioned FIR. It was pointed out that no such report had been submitted by the investigating agency till the date of such application. Reliance was placed, *inter alia,* on decisions of this court reported as *Asmita Agarwal vs. The Enforcement Directorate & Ors. (2001) ILR 2 Delhi 643* and *A.K. Jajodia vs. The State (Through CBI), 2009 SCC OnLine Del 1623: ILR (Supp-2) 25 Delhi.* The trial Judge, by his order

dated 30.09.2016, repelled the said objection referring in this context to the afore-quoted order dated 20.09.2001 of the CMM, also accepting the plea of CBI (prosecution) that there was no illegality in the order of cognizance and issuance of process on the complaint presented under section 13 of the Official Secrets Act by an officer duly empowered by the Central Government this, in the opinion of the trial Judge, being in accord with law.

7. The order dated 30.09.2016 whereby the application of the petitioners seeking stay of the prosecution under section 210 Cr.P.C. was rejected was challenged by the petition at hand invoking inherent power of this court under section 482 Cr.P.C., the plea being that the procedure adopted in the criminal case under the Official Secrets Act suffers from incurable illegality. A co-ordinate bench of this court issued notice by order dated 23.11.2016 directing that the outcome of the trial shall be subject to the decision on this petition.

8. The respondent CBI resists this challenge arguing that the view taken by the trial court is appropriate, the order of cognizance and issuance of process being lawful, there being no reason why the provision contained in section 210 Cr.P.C. would get attracted.

9. The submissions on both sides were summarized in the order dated 01.08.2018 thus:-

> *"In the prosecution pending in the court of Sessions against the petitioners on the charge of offences under Sections 3 and 5 of Officials Secret Act, 1923 read with Section 120 B of Indian Penal Code, 1860 (IPC),*

propriety of the procedure leading to cognizance being taken is questioned by the petition at hand.

Concededly, cognizance was taken on a complaint filed by an authorised officer of the Central Government in terms of Section 13 of Officials Secret Act, 1923. Concededly again, at that stage no report under Section 173 of the Code of Criminal Procedure (Cr.P.C.) had been prepared or submitted in the court in relation to the FIR No. RC 6 (S)/1996 which had been registered by Central Bureau of Investigation qua the crimes respecting which the petitioners face the prosecution till the date cognizance was taken i.e. 20.09.2001.

The core issue raised by the petitioners is that in view of the inhibition of Section 210 Cr.P.C., the investigation being then pending, no cognizance on the criminal complaint could have been taken, such order being vitiated rendering the subsequent proceedings non-est. The petitioners rely on A.K. Jajodia vs. The State (through CBI) 2009 SCC Online Del 1623.

Per contra, the respondent CBI argues on the strength of judgments reported as Aniruddha Bahal vs. Central Bureau of Investigation 210 (2014) DLT 292; Jeewan Kumar Raut & Anr. Vs. CBI AIR 2009 SC 2763 and M/s Viniyoga International, New Delhi & Anr. Vs. The State 1985 CriLJ 761 that the procedure adopted by the court of cognizance cannot be questioned.

Be listed for final hearing on 15th October, 2018.

The interim order to continue."

10. The matter was heard in part on 13.11.2018. The CBI took the position that there is no obligation on its part to file the report of investigation under section 173 Cr.P.C. in a case where such report cannot result in cognizance being taken of the offences which are its subject matter, the facts that emerged at that stage and the submissions made on either side having been recorded as under:-

"Heard for sometime.

The criminal complaint under Section 13 of the Official Secrets Act, 1923 on which the Chief Metropolitan Magistrate took cognizance by her order dated 21.11.2000 itself indicated that the first information report – RC 6(S)-96 - had been registered by Central Bureau of Investigation. The copy of the said FIR registered on 30.08.1996 has been submitted on record by the petitioner on 05.01.2018. It appears from the submissions of both sides that no report under Section 173 Cr. PC based on the result of investigative steps taken on the said FIR has been submitted till date. Reference is made to practice where complaints under Section 13 of the Official Secrets Act, 1923 are presented for cognizance to be taken thereupon alongwith evidence collected during the investigation of FIR correspondingly registered, such material being presented in the form of final report of investigation under Section 173 Cr. PC. There is no explanation offered as at present for a departure to have been made from such practice. The CBI is directed to submit its explanation vis-a-vis the status of the investigation into the aforementioned FIR and also reasons for non-filing of the report under Section 173 Cr.PC till date.

Be listed on 05.02.2019.

The trial court record shall be presently returned."

11. On 07.05.2019 the Special Public Prosecutor for CBI submitted a report of the Deputy Superintendent of Police (DSP) informing, *inter alia,* that report under section 173 Cr.P.C. in the afore mentioned FIR had been presented on 03.05.2019 before the trial court. The submissions made in the context of the said report were noted in the proceedings recorded on 07.05.2019 as under:-

"A report has been submitted by learned Special Public Prosecutor for CBI informing that a report under Section 173 of the Code of Criminal Procedure, 1973 (Cr. PC) was submitted on 03.05.2019 before the concerned court – court of special judge – where the criminal case arising out of the complaint under Official Secrets Act is pending trial, with clarification that it has been submitted "only for the purpose of placing it on record", the said court having listed it "for consideration" on 30.05.2019, copy having been supplied to the accused (i.e. the petitioners). The grievance urged by the CBI in such context, however, is that inspite of being clarified and explained to the contrary, the special judge in his proceedings of 03.05.2019 has chosen to describe the said report as "charge-sheet".

The counsel for the petitioners submits that notwithstanding submission of the report under Section 173 Cr. PC by the CBI on 03.05.2019, his argument that the proceedings were vitiated on account of breach (as alleged by him) of Section 210 Cr. PC still subsists."

12. The petitioners place reliance primarily on the provision contained in section 210 Cr.P.C., and case law including two decisions of the Supreme Court reported as *Rosy & Anr. vs. State of Kerala & Ors., (2000) 2 SCC 230* and *Moti Lal vs. Central Bureau of Investigation & Ors., (2002) 4 SCC 713;* two decisions of this court reported as *Asmita Agarwal vs. The Enforcement Directorate & Ors. (2001) ILR 2 Delhi 643* and *A.K. Jajodia vs. The State (Through CBI), 2009 SCC OnLine Del 1623, ILR (Supp-2) 25 Delhi;* and ruling of a single judge of High Court of Punjab & Haryana reported as *Savesa Sidhu vs. Harleen Sidhu & Anr., 2011 (2) RCR (Criminal) 442.*

13. The prime submission of the petitioners is that by virtue of section 13 of the Official Secrets Act, a criminal case involving charge of offences under the said law cannot result in cognizance being lawfully taken except upon a complaint and, in this view, inhibition in section 210 Cr.P.C. must mandatorily be applied, it being impermissible for cognizance to be taken at any stage anterior to submission of a police report on the investigation into the FIR that may have been correspondingly registered. It is the argument of the petitioners that since the report under section 173 Cr.P.C. has been filed only on 03.05.2019, all proceedings anterior thereto suffer from gross illegality and consequently are vitiated, to be treated as *non est.* Though this contention was not part of the submissions made before the trial court, nor taken in the averments in the petition, it is also the argument of the petitioners that since a criminal complaint had been presented before the CMM on 21.11.2000, it was incumbent upon her to first hold an inquiry in accordance with the procedure envisaged in sections 200 and 202 Cr.P.C. before cognizance could be lawfully taken on said complaint. It is an added argument of the petitioners that since the case was eventually committed to the court of sessions, taking of cognizance on the complaint without the inquiry under sections 200 and 202 Cr.P.C. renders the order of committal to the court of sessions bad particularly in absence of any pre-charge evidence having been adduced in the inquiry leading to the committal order.

14. The learned Special Public Prosecutor for the respondent/CBI, on the other hand, argued that the Official Secrets Act involves a special procedure in terms of section 13 wherein cognizance can be taken only upon a complaint of an officer especially empowered by the appropriate government and, therefore, section 210 Cr.P.C. has no relevance. It was submitted that on compliant of a public servant, empowered under section 13 of the Official Secrets Act, no such inquiry as envisaged in sections 200 and 202 Cr.P.C. is required to be held, there also being no obligation on the court of Magistrate to record pre-charge evidence prior to committal of the case to court of sessions. Reliance is placed by CBI on a decision of the Supreme Court reported as *Jeewan Kumar Raut & Anr. Vs. C.B.I., AIR 2009 SC 2763* besides two decisions of this court reported as *M/s. Viniyoga International New Delhi & Anr. vs. The State, 1985 CriLJ 761* and *Aniruddha Bahal vs. Central Bureau of Investigation, 210 (2014) DLT 292.*

15. The learned counsel for the petitioners referred, and rightly so, to the provision contained in section 4 Cr.P.C. which reads thus:-

> *"4. Trial of offences under the Indian Penal Code and other laws.*
>
> *(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.*
>
> *(2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the*

manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

16. It is trite that the Code of Criminal Procedure, 1973 regulates the procedure for the investigation, inquiry or trial not only of the IPC offences but also of special law offences but, in the case of latter (the special law offences) application of Cr.P.C. provisions is subject to specific provisions (if any), of such special law relating to, *inter alia,* the procedure for investigation, inquiry, trial or otherwise dealing with offence thereby created. To put it simply, if a special law creates any offence, it may create not only a special forum for purposes of its trial but also a special procedure for investigation thereinto, or the authorities vested with the power or jurisdiction to deal with such processes and, further, the nature of such special law offences (cognizable or non-cognizable, bailable or non-bailable, etc.).

17. There can be no quarrel with the proposition that the Official Secrets Act is a special enactment governing the investigation, inquiry or trial of special offences which are not included in the general substantive penal law contained in IPC. The Code of Criminal Procedure, 1973 contains detailed provisions relating, *inter alia*, not only to the manner in which the investigating agencies are to take note of the offences but also as to how they are expected to respond, upon receipt of information in such regard, equipping them with certain investigative powers including on the subjects such as arrest, search, seizure, etc.

18. The Official Secrets Act came on the statute book in 1923 when the criminal process was governed by the Code of Criminal Procedure, 1898 ("old Cr.P.C."). The said Criminal Procedure Code has since been replaced by the Code of Criminal Procedure, 1973 ("new Cr.P.C."). In the context of section 4(2) Cr.P.C., six provisions (sections 8,11,12,13,14 and 15) of the Official Secrets Act are relevant inasmuch as the general criminal procedure envisaged in the new Cr.P.C. is to be read as modified by them. Section 8 creates a duty on the part of the persons specified in the matter of *"giving information as to commission of offence",* this being relatable to section 154 Cr.P.C., making failure to do so a penal offence. Section 11 creates a special procedure in the context of "search warrants". Section 12 makes the provision (on tender of pardon to accomplice) contained in section 337 of old Cr.P.C. (corresponding to section 306 of new Cr.P.C.) applicable to certain prosecutions under the special law. Section 14 creates an exception to the general rule of trial being held in open court by permitting *"exclusion of public from proceedings"*. Section 15 applies to offences by companies providing for vicarious criminal liability.

19. Section 13 of the Official Secrets Act is at the core of the controversy that is raised by the petitioners. It reads thus:-

> *"13. Restriction on trial of offences.—*
>
> *(1) No court (other than that of a Magistrate of the first class specially empowered in this behalf by the Appropriate Government) which is inferior to that of a District or Presidency Magistrate, shall try any offence under this Act.*

(2) If any person under trial before a Magistrate for an offence under this Act at any time before a charge is framed, claims to be tried by the Court of Sessions, the Magistrate shall, if he does not discharge the accused, commit the case for trial by that court, notwithstanding that it is not a case exclusively triable by that court.

(3) No court shall take cognizance of any offence under this Act unless upon complaint made by order of, or under authority from, the Appropriate Government or some officer empowered by the Appropriate Government in this behalf:

(4) For the purposes of the trial of a person for an offence under this Act, the offence may be deemed to have been committed either at the place in which the same actually was committed or at any place in India in which the offender may be found.

(5) In this section, the appropriate Government means—

(a) in relation to any offences under section 5 not connected with a prohibited place or with a foreign power, the State Government; and

(b) in relation to any other offence, the Central Government.

20. For completion of narration, it is essential to note here that the central government, in exercise of the powers conferred by sub-section (1) of Section 13 of the Official Secrets Act had issued a notification on 06.03.1998 vide GSR No. 126 (E) empowering the Chief Metropolitan Magistrate, Delhi to try the offences punishable under the Official Secrets Act. The said notification dated 06.03.1998, however, was rescinded by the central government by notification dated 21.06.2006 vide GSR No.373 (E), though clarifying that *"such rescission shall not affect anything done or omitted to be done under*

the said Notification before such rescission". It may be noted here that in the present case the complaint was presented before the CMM on 20.09.2001 at the time when notification dated 06.03.1998 was in vogue and prior to its rescission vide notification dated 21.06.2006. Further, it is an admitted position of the petitioners that the case against them was committed to the court of sessions on 05.12.2006, no arguments having been raised in such regard except breach of the perceived necessity of recording pre-charge evidence prior to committal.

21. It may not be wholly correct to say that the Official Secrets Act is a complete code in itself. By virtue, *inter alia,* of section 4(2) Cr.P.C., the general procedural law contained in the Code of Criminal Procedure, 1973 regulates the investigation, inquiry or trial of offence even under this special law, the same, however, to be read and applied as modified by the special law to the extent noted above. To test and clarify this further, it may be noted that offence under section 3(1)(c) (penalty for spying) of the Official Secrets Act, as is alleged against the petitioners, if the documents in question relate to such subjects as concern work of defence, arsenal, naval, military or air force establishment, etc., if proved, may attract the punishment of imprisonment for a term which may extend to fourteen years and in any other case imprisonment for a term which may extend to three years. The Official Secrets Act, by section 13(3), places restrictions on cognizance being taken but does not specify the court of cognizance. Section 13(1) only denotes that a criminal court other than

those specified will not be competent to try offences under this law. Generally speaking, the trial of an offence under the Official Secrets Act may be held in the court of a magistrate (a metropolitan magistrate in Delhi). The accused, however, has been given the option to claim trial by a court of sessions. In absence of these provisions, in terms of second part of the first schedule to Cr.P.C. an offence attracting punishment of imprisonment that may be extend to fourteen years – section 3(1)(c) – would ordinarily be triable by the court of sessions. Clearly, by virtue of section 4(2) Cr.P.C. a special dispensation prevails for purposes of trials under Official Secrets Act, 1923.

22. The fact, however, remains that the court of CMM was the appropriate court to be approached by the officer empowered by the central government for presenting a complaint under section 13 of the Official Secrets Act on 21.11.2000. While conceding to the correctness of this position, however, it is the procedure applied by the CMM which is brought in question by the petitioners.

23. The provision contained in section 190 Cr.P.C. empowers the court of Magistrate, with some restrictions, to "*take cognizance of an offence*" (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; or (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

24. The law classifies the offences broadly into two categories, *i.e.* cognizable and non-cognizable. The procedure to be followed and responsibilities that are placed on the police, in the context of

cognizable offences generally begins with what is elaborately provided in the twelfth chapter of Cr.P.C. (*"information to the police and their powers to investigate").* If commission of a cognizable offence is brought to the notice of an officer in-charge of the police station, it is his statutory duty, in terms of sections 154 Cr.P.C. (registration of FIR), to have the information reduced to writing and thereafter investigation thereinto taken up.

25. The scheme of the twelfth chapter makes is abundantly clear that every investigation so undertaken would eventually result in a report in the prescribed form being submitted before the magistrate empowered to take cognizance of the offence which is its subject matter. Such report, submission of such report, its contents and accompaniments, and what is permissible to do in its wake, are provided for at length in section 173 Cr.P.C. It is well settled that if a person has been arrested in the course of investigation, after registration of the FIR under section 154 Cr.P.C. but the evidence is found to be deficient in so far as the suspicion of his involvement is concerned, upon report to that effect being submitted, such arrestee may be released in terms of section 169 Cr.P.C. On the contrary, if sufficient evidence has been gathered regarding commission of a cognizable offence and as to complicity of an individual therein, the final report of investigation under section 173 Cr.P.C. will be contemporaneous with such action as is prescribed by section 170 Cr.P.C.

26. It is trite that a report of investigation under section 173 Cr.P.C., in the event of sufficient evidence having been found, may propose prosecution of an individual on the charge for the offence which has been committed and in such case the report is generally labelled as *"charge sheet"*. On the other hand, if no evidence has been found to support the allegations about commission of a cognizable offence, the final report under section 173 Cr.P.C. may propose cancellation of the case and such report is commonly known as *"cancellation report"*. Further, there can be a situation where the police may have found sufficient evidence showing commission of a cognizable offence but investigation may not have brought to light sufficient evidence to charge for such offence to be brought against, or seek prosecution of, any specific individual. The final report of investigation may thus request the Magistrate to permit closure, such report generally called *"closure report"*. It is incumbent, however, on the part of the investigating police to submit the final report of investigation under section 173 Cr.P.C., regardless of the result of the investigation – whether it culminates in presentation of a *"charge sheet"* or a *"cancellation report"* or a *"closure report"*. Submission of final report of investigation under section 173 Cr.P.C. is the logical end to which each case registered (under section 154 Cr.P.C.) by the police must eventually reach.

27. In this context, it has to be borne in mind that in addition to registration of the FIR under section 154 Cr.P.C., it is also the statutory duty of the officer in charge of the police station, who has

received information about the commission of a cognizable offence, to simultaneously make a report, *inter alia,* to the Magistrate empowered to take cognizance of such an offence, in compliance with section 157 Cr.P.C. The final report of investigation under section 173 Cr.P.C. is the *"police report"* referred to in section 190(1)(b) which the Magistrate so informed awaits.

28. The obligation of the police in respect of a crime of which note has been taken under section 154 Cr.P.C. is, thus, not complete till the final report of investigation under section 173 Cr.P.C. has been presented to the competent Magistrate, action on such report in accordance with law thereafter being the responsibility of the said judicial authority.

29. The general power of taking cognizance, as conferred by section 190 Cr.P.C., also refers to "complaint of facts", or "upon information received" from other sources or "own knowledge". As is clear from various provisions of the code of criminal procedure, the judicial process in cases instituted on a police report (which would be final report of investigation under section 173 Cr.P.C.) differs from those applicable to "cases instituted otherwise than on police report" (refer nineteenth chapter on trial of warrant cases by magistrate). Section 210 Cr.P.C., which would need to be quoted a little later, in fact, refers to case instituted otherwise those on a police report as a "complaint case". The expression "complaint" is defined, by section 2(d), as under:-

> *"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.*
>
> *Explanation.- A report made by a police officer in a case which discloses, after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police officer by whom such report is made shall be deemed to be the complainant;"*

30. In contrast, the expression "police report", is defined in section 2(r), thus:-

> *"police report" means a report forwarded by a police officer to a Magistrate under sub-section (2) of section 173;"*

31. It is clear that the final report of investigation under section 173 Cr.P.C. cannot be treated as a "complaint" and vice-versa.

32. As would also be seen in the context of section 210 Cr.P.C., a complaint within the meaning of the expression defined in Cr.P.C. maybe a complaint presented by a private individual or it may be a complaint instituted by a public authority pursuant to the requirements of the special law governing the subject matter of such complaint. It is essential to bear in mind the difference between the legal or judicial process on a criminal complaint filed by a private individual and a criminal complaint instituted by a public servant in discharge of his official duties. For this, the distinct initial action on a police report (charge sheet) on one hand in contrast to that on a criminal complaint

needs to be highlighted. Speaking of a cognizable offence, the police having taken note of it under section 154 Cr.P.C. (by registering an FIR), the final investigation report (under section 173 Cr.P.C.) presented by it comes up before the magistrate (subject to all requisite pre-conditions *e.g.* prior sanction, etc. being fulfilled), for consideration at the stage of cognizance under section 190(1)(b) Cr.P.C.. Since the investigation carried out would already have gathered the requisite evidence, this also leads to possibility of issuance of process (under section 204 Cr.P.C.) against the accused. In contrast, if a criminal complaint is presented (whether for cognizable or non-cognizable offence), the action at the end of the magistrate begins by consideration as to whether a case is made out for cognizance to be taken under section 190(1)(a) Cr.P.C. If the magistrate does take cognizance on such complaint, he ordinarily proceeds to hold preliminary inquiry (under fifteenth chapter) in terms of sections 200 and 202 Cr.P.C. But, it is here that the action on complaint made by a private individual differs from the action on a complaint presented by a public servant acting or purporting to act in discharge of his official duties (a complaint made by a court under section 195 Cr.P.C. also being clubbed in the latter category).

33. In order to answer, and reject, one of the contentions of the petitioners, it is necessary to quote section 200 Cr.P.C. which reads thus:-

> *"200. Examination of complainant. - A Magistrate 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, 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 192:

Provided further that if the Magistrate makes over the case to another Magistrate under section 192 after examining the complainant and the witnesses, the latter Magistrate need not re-examine them."

(emphasis supplied)

34. It is inherent in the scheme of procedure envisaged in the fifteenth chapter (complaints to magistrates) that the further inquiry (or investigation) under section 202 Cr.P.C. follows due compliance with the initial steps prescribed in afore-quoted section 200 Cr.P.C. It is also clear that if the complaint is presented by a public servant acting or purporting to act in discharge of his official duties, there is no obligation on the part of the inquiring magistrate to compulsorily record the statement of the complainant and witnesses. He may or may not do so. It is his prerogative and a matter of his judicial satisfaction.

35. In the case of *Rosy & Anr. (supra),* the order of committal of the case to the court of session had been quashed by the High Court of

Kerala and the case remitted to the magistrate for conducting a fresh inquiry in terms of proviso to section 202 (2) Cr.P.C. before such order of committal could be passed. The order was set aside by the Supreme Court with directions to the session court to dispose of the case on merits, the issue raised being as to whether the inquiry under the proviso to section 202(2) Cr.P.C. by the magistrate in cases exclusively triable by the sessions court was discretionary or mandatory. There was divergence of opinion between the two hon'ble judges, the decision eventually turning in above way for the reason the objection had been taken belatedly.

36. Since the criminal case against the petitioners herein was instituted on complaint under Section 13 of Official Secrets Act by an authorised public servant acting in discharge of his official duties, there was no obligation on the CMM to record pre-summoning evidence under Sections 200-202 Cr.P.C. The objection raised as to omission is frivolous and rejected.

37. Under the general law, a case is committed by the Magistrate to the court of sessions primarily in terms of two specific provisions *i.e.,* section 209 and section 323 Cr.P.C. (though such committal may also occur in certain other situations *e.g.* under section 324 Cr.P.C.). The two said provisions read thus:-

> *"209. Commitment of case to Court of Session when offence is triable exclusively by it. - When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it*

appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall-

(a) commit, after complying with the provisions of section 207 or section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment has been made;

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session."

"323. Procedure when, after Commencement of inquiry or trial, Magistrate finds case should be committed. - If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made."

38. As is clear from bare reading of section 209 Cr.P.C., the scrutiny of the case for such purposes as of committal is carried out at the threshold, immediately after the accused has appeared, pursuant to the process (under section 204 Cr.P.C.) and after compliance has been made with the statutory obligation of supply to him of copies of the police report and other documents (under sections 207 or 208 Cr.P.C.). The test is as to whether the offence for which the accused has been

summoned is "*triable exclusively by the court of session*". On the other hand, the enabling power to commit the case to Court of session is conferred on the magistrate, also by section 323 Cr.P.C., the touchstone being its opinion that the case pending inquiry or trial before it is one which "*ought to be tried by the court of sessions*". For completion, it may be added that the provision contained in section 323 Cr.P.C. is generally invoked by the courts of magistrate to make over a case to the court of session for clubbing of cross-cases, which "*ought"* to be tried together; for example in situations where case of one side may involve offence triable exclusively by the court of sessions while the case of the opposite side may be ordinarily triable by the court of magistrate.

39. Be that as it may, under the general provision of section 209 Cr.P.C., there is no obligation on the part of the magistrate to hold pre-committal inquiry in the sense of recording evidence of the witnesses. On the other hand, in situations covered by section 323 Cr.P.C., where the magistrate commits the case to the court of sessions, because it "*ought to be tried*" by the said court, it may be at the stage of "*trial*" or "*inquiry*" anterior to the trial. If a trial has commenced before the Magistrate, the possibility of some evidence having come on record exists. But, if the trial has not so commenced and the stage is still of some "inquiry" – for example, consideration of the case for framing of charge – there would have been no occasion for formal evidence to be recorded by the committal court. The fact, however, remains that the provision contained in section 323 Cr.P.C. also casts no obligation on

the magistrate to record evidence before the case is committed to the court of sessions. In the old Cr.P.C. (Code of Criminal Procedure, 1898) there used to be a stage for recording of evidence by a committal magistrate. The said procedure had been abolished long ago and does not survive.

40. As has been noted earlier, the procedural law for purposes of trial of a case involving an offence under Official Secrets Act, respecting the forum of trial, is to be read in light of section 13(2), wherein an accused may opt for the case to be committed for trial to the court of session at any time before charge is framed, it not being the case of the petitioners that charge had been framed against them during the earlier proceedings before the CMM.

41. The above position of law is sufficient to reject the other contention of the petitioners that an illegality was committed by the CMM in the present case by committing the case to the court of sessions without recording evidence.

42. This brings us to the core issue revolving around section 210 Cr.P.C. which reads thus:-

> *"210. Procedure to be followed when there is a complaint case and police investigation in respect of the same offence. -*
>
> *(1) When in a case instituted otherwise than on a police report (hereinafter referred to as a complaint case), it is made to appear to the Magistrate, during the course of the inquiry or trial held by him, that an investigation by the police is in progress in relation to the offence which is the subject- matter of the inquiry or trial held by him, the*

Magistrate shall stay the proceedings of such inquiry or trial and call for a report on the matter from the police officer conducting the investigation.

(2) If a report is made by the investigating police officer under section 173 and on such report cognizance of any offence is taken by the Magistrate against any person who is an accused in the complaint case, the Magistrate shall inquire into or try together the complaint case and the case arising out of the police report as if both the cases were instituted on a police report.

(3) If the police report does not relate to any accused in the complaint case or if the Magistrate does not take cognizance of any offence on the police report, he shall proceed with the inquiry or trial, which was stayed by him, in accordance with the provisions of this Code."

43. The Code of Criminal Procedure, 1898 ("old Cr.P.C.") did not contain any provision corresponding to section 210 of Code of Criminal Procedure, 1973 ("new Cr.P.C."). This provision had been introduced in the new Cr.P.C. on the recommendation of the Joint Select Committee of Parliament which, in its report, had set out the objective thus:-

"78. ... It has been brought to the notice of the Committee that <u>sometimes when a serious case is under investigation by the police</u>, some of the <u>persons file complaint and quickly get an order of acquittal either by cancellation or otherwise</u>. Thereupon the investigation of the case becomes infructuous leading to miscarriage of justice in some cases. <u>To avoid this, the Committee has provided that where a complaint is filed and the Magistrate has information that the police is also investigating the same offence, the Magistrate shall stay the complaint case.</u> If the police report (under Section 173) is received in the

case, the Magistrate should try together the complaint case and the case arising out of the police report. But if no such case is received the Magistrate would be free to dispose of the complaint case. This new provision is intended to secure that private complainants do not interfere with the course of justice."

(emphasis supplied)

44. Referring to the above quoted observations of the Parliamentary Committee, and construing the provision of section 210 Cr.P.C., the Supreme Court in *Sankaran Moitra vs. Sadhna Das, 2006 (4) SCC 584,* held thus:-

"76. A bare reading of the above provision makes it clear that during an inquiry or trial relating to a complaint case, if it is brought to the notice of the Magistrate that an investigation by the police is in progress in respect of the same offence, he shall stay the proceedings of the complaint case and call for the record of the police officer conducting the investigation.

77. The object of enacting Section 210 of the Code is threefold:

(i) it is intended to ensure that private complaints do not interfere with the course of justice;

(ii) it prevents harassment to the accused twice; and

(iii) it obviates anomalies which might arise from taking cognizance of the same offence more than once."

(emphasis supplied)

45. The petitioners refer to the decisions in *Moti Lal (supra)* and *Asmita Agarwal (supra)* in support of their proposition that though the

special law may impel the Criminal Procedure Code to be read in a modified form, the remainder which remains untouched cannot be excluded or ignored. There can be no quarrel with this submission but it needs to be examined as to whether the inhibition in section 210 Cr.P.C. would apply to the factual matrix presented by the case at hand involving initiation of criminal action in the court for offences under Official Secrets Act and, if so, to what extent or to what effect.

46. Before coming to the decision of a learned single judge of this court in *A.K. Jajodia (supra),* which is the main plank of the petitioners, the ruling in *Savesa Sidhu (supra)* of Punjab and Haryana High Court may be noted. The accused in the said case had been summoned by the magistrate to answer the charge for offences under sections 406/498-A/307 read with section 34 IPC, the cognizance having been taken on the private complaint of the alleged victim. The summoning order was challenged before the High Court, reference being made, *inter alia,* to the fact that a report had earlier been lodged with the police which had registered an FIR, investigation whereinto had been completed but a cancellation report under section 173 Cr.P.C. prepared though not presented before the magistrate. The summoning order was set aside and the matter remanded back to the magistrate for appropriate orders to be passed, *inter alia*, in terms of section 210 Cr.P.C., holding that the factum of such investigation having come to the knowledge of the magistrate it was incumbent on him to "stay" the proceedings and to await or call for the police report, observing thus:-

"15. The argument that violation of section 210 Code of Criminal Procedure does not vitiate the proceedings in the facts of the present case as both the complaint and State case stand committed to the Court of Sessions, has no merit. In case, a charge sheet is presented under section 173 Code of Criminal Procedure and the Magistrate, on the basis of the complaint without taking into consideration the report under Section 173 Code of Criminal Procedure, on the same set of allegations, comes to the conclusion that no offence is made out, the same is liable to cause prejudice to the complainant, whereas, in case, a cancellation report is submitted in the FIR and the Magistrate without taking into consideration the cancellation report comes to the conclusion that a prima facie case is made out, the same is likely to prejudice the accused. Thus, ignoring the pendency of the investigation in an FIR, shall prejudice one of the two parties in either of the two situations. As such, the violation of Section 210 Code of Criminal Procedure will vitiate the proceedings. Hence, the provisions of section 210 Code of Criminal Procedure requiring the Magistrate to stay the proceedings of an enquiry or a trial and call for a report on the matter from the police officer conducting the investigation was equally mandatory."

47. The distinguishing feature, however, is that in the above case, the complaint was presented on behalf of the private individual who was also the first informant (victim) in the police case. Unlike that case, criminal action for offences under Official Secrets Act cannot be initiated by private individuals, it being only the prerogative of the appropriate government which acts through the authorised public servant under Section 13.

48. The case against the petitioner in *A.K. Jajodia* (supra) was also one involving charge for offences under sections 3 and 5 of the Official Secrets Act. The background facts taken note of in the judgment of the learned single judge of this court give an impression that the said case, also investigated by CBI, had suffered similar protracted proceedings as seem to have happened in the present case. The offences allegedly had been committed in April, 1987. A complaint under section 13 of the Official Secrets Act had been presented by DSP (CBI) in the court of CMM Delhi on 07.02.1989.

49. The case of *A.K. Jajodia* (supra) was committed to the court of sessions. But, the said court discharged the accused persons by order dated 22.07.1995 for want of sanction under Section 197 Cr. PC. On 17.12.1996, on the strength of sanction under Section 197 Cr. PC, a second complaint was presented, founded on same set of allegations as before. Fresh cognizance was taken by the CMM, the case again committed later to sessions on 01.12.1997. The accused persons were again discharged by the court of session by order dated 30.05.1998, sanction for prosecution being found to be bad in law. A third complaint was filed on 22.06.1999 alongwith report of investigation under Section 173 Cr. PC. The CMM took cognizance on 22.06.1999. The accused moved an application on 09.10.2000 raising objection of non-compliance with the procedure envisaged in proviso to Section 202(2) Cr. PC. The objection was repelled, *inter alia*, with reference to the notification dated 06.03.1998 whereby the Central Government had specified the court of CMM to be the court of trial under Section

13 of the Official Secrets Act. The CMM thereafter took the case to the stage of pre-charge evidence. While the case was pending at such stage, the Central Government rescinded the earlier notification dated 06.03.1998 by notification dated 21.06.2006 referred to earlier.

50. Against the above backdrop, one of the accused (in case against *A.K. Jajodia*) moved this court by a writ petition pointing out delay. A division bench of this court accepted the said grievance and quashed the proceedings. But, the said order was set aside by the Supreme Court by order dated 26.08.2002 remitting the matter for reconsideration. The writ petition was eventually disposed of with direction for day-to-day trial within time bound manner. But, the CMM, in the course of recording pre-charge evidence, referring to the rescission of the notification dated 06.03.1998, committed the case to court of session without completing the recording of pre-charge evidence.

51. It is at the above noted stage that accused *A.K. Jajodia* had moved an application before the court of sessions seeking remand of the matter to CMM with direction that the procedure laid down in proviso to sub-Section (2) of Section 202 and Section 208 Cr. PC be followed. The court of sessions, in *seisin* of the case, dismissed the said application by order dated 16.11.2007 which was impugned before this court leading to the judgment reported as *A.K. Jajodia* (supra).

52. It is noted that the revision petition challenging the above mentioned order dated 16.11.2007 of the CMM in the above

mentioned case (*A.K. Jajodia*) was dismissed. But, in the course of setting out the reasons, the learned single judge referred, *inter alia*, to the decision of the Supreme Court in *Rosy & Anr.* (supra), the contention of the said petitioner being that by virtue of the said ruling, compliance with proviso to sub-section (2) of Section 202 Cr. PC has been held to be mandatory in a complaint case. The relevant background facts and the import of the decision in *Rosy & Anr.* (supra) has been already taken note of in earlier part of this judgment and it does not call for further elaboration.

53. But, the petitioners rely on the decision in *A.K. Jajodia* (supra) primarily because it had also taken note of certain contentions with reference to the application of Section 210 Cr. PC, the thrust of arguments raised here being founded on the following passages:-

> "*24. It is a matter of record that in the entire judgment in Rosy's Case (Supra) no discussion has taken place about the provisions contained under Section 210 Cr.P.C. It is true that on a very strict reading of Section 210 Cr.P.C. one can say that such procedure is contemplated to be followed in a case in which earlier a complaint is filed and thereafter a Police challan is also filed. But even if that may not be so, if both the things are done together which has been done in the present case to say that provisions contained under Section 210 Cr.P.C. are not attracted would make the reading of Section 210 Cr.P.C. redundant and would be contrary to the principles of interpretation of statutes inasmuch, as it will not only be contrary to the golden rule of Interpretation but also purposive theory of interpretation.*"

29. In view of the aforesaid, it is necessary to give a purposive and harminous interpretation to the provision contained under Section 210 Cr.P.C. in the facts of this case. Merely because the Police investigation was conducted prior to the filing of the complaint, it cannot be said that the situation as contemplated under Section 210 Cr.P.C. was not attracted. Thus, when the Magistrate took cognizance and committed the matter to Sessions that also after supplying copies of the statements recorded under Section 161 by the Police coupled with copies of the documents seized during the course of investigation to the accused persons before committing their case to the Sessions, he followed not only the complaint procedure but also the procedure as contemplated under Section 210 Cr.P.C. and, therefore, it was not a case where there was necessity of recording the statement of the witnesses prior to the stage of committal as contemplated under Section 202(2) Cr.P.C. more so because it was a compaint filed by a public servant and which was accompanied with the report of Police investigation which was complete in itself enabling the Court to satisfy as to whether prima facie a case was made out or not. Further the prejudice if any which may have been caused to the accused persons in such a case, as is contemplated under Section 207/208 Cr.P.C., was also not there because of supply of the documents and copies of the statements."

(emphasis supplied)

54. In the considered view of this court, some confusion arises from the above quoted observations drawing a connection between the effect of Section 210 Cr. PC on one hand, the need for recording statement of witnesses under Section 202(2) Cr. PC on the other hand,

and the order of committal (to court of sessions) on yet another. As already observed and concluded, there is no obligation on the part of the magistrate to record the statements of witnesses in the pre-summoning inquiry on a complaint presented by a public servant in discharge of his official duties. Further, there is no obligation on the court of magistrate, in the inquiry held after summoning, to record the statements of witnesses prior to committal of the case to the court of session. The views quoted above are *per incurium* because the effect of inhibition against cognizance except on complaint of authorized public servant as contained in sections 13(3) Official Secrets Act was not noticed. Be that as it may, the above quoted observations of the learned single judge of this court in *A.K. Jajodia* (supra) do not represent the *ratio decidendi* for the simple reason the issue raised in that case for answer by the court was regarding the applicability of Section 202(2) and Section 208 Cr. PC rather than the effect of Section 210 Cr. PC.

55. It bears repetition to say that Official Secrets Act is a special statute which creates a special offence, the legislation partially modifying the general criminal procedure applicable thereto. It is well settled principle of law that if a special statute lays down a modified procedure, the general law to that extent shall not apply [*Jeewan Kumar Raut & Anr. Vs. CBI AIR 2009 SC 2763* and *M/s Viniyoga International, New Delhi & Anr. Vs. The State 1985 CriLJ 761*]. This principle is enshrined in Section 4(2) Cr. PC which stipulates that

general procedure would apply to the special offence subject to modification thereby brought about.

56. In *Aniruddha Bahal* (supra), the issue raised in the revisional jurisdiction of this court also arose out of a similar prosecution for offences under Sections 3 and 5 of the Official Secrets Act initiated by CBI. It is noted (from facts mentioned in paras 3, 10 & 11) and the contention of the said petitioner (as mentioned in para 24) which seems to have been accepted that the complaint under Section 13 of the Official Secrets Act was presented on 04.06.2003, followed by a "charge-sheet" submitted on 12.04.2005, cognizance having been taken by the CMM of offences under Official Secrets Act (besides those under the Arms Act) on the basis of "challan" i.e. charge-sheet. The said case had been committed to the court of sessions which, by order dated 16.10.2002, had found material on record disclosing *prima facie* commission of offences under Official Secrets Act, the said order having been challenged before this court. The revision petition was allowed and the accused persons in that case were discharged, the contention of the petitioner, *inter alia*, to above effect and also about insufficiency of the material placed before the court having been accepted. Though there is no elaborate articulation of the reasons for such conclusion, while dealing with the argument based on Section 210 Cr. PC, the learned single Judge clearly ruled (in para 40) that *"it would have no applicability to the trial of offences under the Official Secrets Act".*

57. Since the argument of the kind raised here with reference to Section 210 Cr. PC is likely to plague other similarly placed prosecutions, it is essential that the legal position is clarified.

58. As noted above, the objective of enactment of the inhibition contained in Section 210 Cr. PC was to ensure that *"private complainants do not interfere with the course of justice"* [see the report of the Joint Select Committee of Parliament (supra)]. In *Sankaran Moitra* (supra), the Supreme Court added that this provision (Section 210) intends to prevent *"harassment to the accused twice"* and *"obviate anomalies"* that may arise from *"taking cognizance of the same offence more than once"*. It is clear from the very scheme of the modified criminal procedure applicable to offences under the Official Secrets Act that cognizance can never be taken by a criminal court on a "private complaint". Section 13(3) of the Official Secrets Act absolutely precludes and prohibits such a possibility. It renders "complaint" by order of, or under authority from, the appropriate government to be *sine qua non* for court to take cognizance. Noticeably, what is necessary is a complaint – it excluding by virtue of its definition a report of investigation under Section 173 Cr. PC.

59. In above view, in a case involving offences under Official Secrets Act, there cannot conceivably be a situation where the criminal court may have the occasion to take cognizance first on a private complaint and thereafter, pass yet another order of cognizance on report of investigation by the police, as is the scenario visualized in section 210 (2) Cr.P.C. The prejudices of the kind envisaged to be the

concern of the legislature in Section 210 Cr. PC, as expounded in *Sankaran Moitra* (supra), are thus not at all likely to occur in the context of criminal action under the Official Secrets Act.

60. This, however, brings us to the justification of the position taken by the CBI in withholding the report under Section 173 Cr. PC even long after having filed a complaint under Section 13 of the Official Secrets Act. This court disapproves of the stand adopted by CBI and would elaborate the reasons as to impropriety and inadvisability of such approach to such cases in the discussion that follows.

61. As said before, it being essential to recapitulate here, having regard to the punishment that is prescribed for the offences under the Official Secrets Act, with which this matter is concerned, there can be no doubt as to the fact that they are "cognizable offences" within the meaning of the expression defined in Cr. PC. It is because of such nature of the crimes that the matter having come to the notice of the concerned agency – CBI in the present case – an FIR was registered in terms of Section 154 Cr.PC. As noted at length in the earlier part of this judgment, the registration of FIR relating to a cognizable offence under Section 154 Cr. PC is bound to be followed up by investigation in accordance with the provisions contained in relevant part (Twelfth Chapter) of Cr. PC, such investigative process expected to culminate eventually in the report of investigation under Section 173 Cr. PC. It is not a matter of choice, whims or fancy of the police officer responsible for investigation into a cognizable offence to decide as to

whether or not he is obliged in law to file such report *"on completion of investigation"*. It is his bounden duty to do so. It is the report under Section 173 Cr. PC which presents before the court the material or evidence which has been gathered during such investigation, leaving the matter in the hands of the court thereafter to pass appropriate orders in its light. But then, in a case of a special law like the Official Secrets Act, such report of investigation under Section 173 Cr. PC cannot result in cognizance being taken by the competent court under Section 190(1)(b) Cr. PC *("upon a police report")*. Section 13 of the Official Secrets Act requires instead a complaint to be presented by a public servant authorised by the appropriate Government to do so. The Official Secrets Act, however, does not create or establish its own investigative machinery. It is inherent in this scheme of things that the complaint submitted by the empowered public servant, under authority from the appropriate government, would be based, in turn, on the material (or evidence) which has been gathered by the police that had registered the cognizable offence under the Official Secrets Act.

62. In the above scenario, it necessarily follows that ordinarily the complaint under Section 13 of the Official Secrets Act would be presented by the empowered or authorised public servant in the wake of *"completion of investigation"* by the police. The allegations in the complaint under Section 13 would thus be based essentially on the evidence that has been gathered in such investigation. The complaint would invariably rely on the evidence which has been gathered during such police investigation. In this scenario, it is desirable that the

report of investigation under Section 173 Cr. PC is also submitted before the court alongside, or in the wake of, if not simultaneous to, the presentation of the complaint under Section 13 of the Official Secrets Act.

63. No doubt, the competent court would be expected, in terms of section 13(3) of Official Secrets Act, to act on the complaint to decide whether a case had been made out for cognizance to be taken in exercise of the power under Section 190(1)(a) Cr.P.C. But, for purposes of seeking assurance that the facts stated in the complaint do constitute offence(s) under the Official Secrets Acts and are well founded, based on evidence which was gathered in accordance with law, it would have the benefit of report of investigation under Section 173 Cr. PC placed before it by the police. The court of cognizance does not act on such police report of investigation but only on the complaint.

64. This court, for detailed reasons set out above, endorses the view taken in *Aniruddha Bahal* (supra) that the provision contained in Section 210 Cr. PC has no applicability to a complaint case instituted by a public servant under Section 13 of the Official Secrets Act. But, in order that such dust as has been raised in the present case is not thrown up in future, it is desirable that the investigating agency bears in mind that no purpose is served by withholding – that too indefinitely – the report of investigation under Section 173 Cr. PC. Once such investigation into a cognizable offence under the Official Secrets Act has been completed, the case at the end of the

investigating police must culminate in a report of investigation being prepared and submitted, though it not expected to be treated as a *"charge-sheet"* on which cognizance is to be taken under Section 190 Cr. PC.

65. For removal of doubts, it may be added that submission of such report under Section 173 Cr.PC does not mean the police would have no power to undertake such *"further investigation"* as may be deemed necessary in terms of Section 173(8) Cr. PC. The law gives such authority to the police and recourse to such power can always be made if the facts of a particular case so demand.

66. For the foregoing reasons, this court disapproves the position taken by the CBI vis-a-vis its obligation in terms of Section 173 Cr. PC. But, as is clear from the earlier discussion, this court finds no substance in the objection based on the provision contained in Section 210 Cr. PC. There has been no breach of the law, nor any prejudice caused to the petitioners, on account of belated submission of report of investigation under Section 173 Cr. PC. At the same time, it must be added that the learned court of session where the report of investigation under Section 173 Cr. PC was submitted in the present case on 03.05.2019 has wrongly described it as "charge-sheet". Such report is not meant to be a charge-sheet in the sense it requires to be acted upon under Section 190(1)(b) Cr. PC. The said report is only intended to make the complete record of evidence gathered during investigation available to the court, to the prosecution and to the

defence for such use as may be permissible in law for complete and effectual justice.

67. Before parting, it is deemed necessary to observe that there is a need to amend the provision contained in Section 13 of the Official Secrets Act at the earliest. The law was enacted in 1923. The expression *"District or Presidency Magistrate"* has outlived its utility. The judicial magistracy by such description no longer exists in this country. The law refers to the court of the Magistrate of the First Class (specially empowered in this behalf). The issuance of notification on 06.03.1998, and its subsequent rescission on 21.06.2006, seem to have only added to the confusion. It is essential that the legislature suitably modifies the provision contained in Section 13(1) of the Official Secrets Act at the earliest so that there is no ambiguity.

68. The petition is dismissed with above observations.

69. Copies of this judgment shall be sent to the Director, Delhi Judicial Academy, the Secretary, Ministry of Home Affairs in the Government of India, the Secretary, Ministry of Law, Justice and Legislative Affairs in the Government of India, as also, of course, to the concerned criminal court.

R.K.GAUBA, J.

AUGUST 08, 2019
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