SMT. MONA PANWAR

v.

THE HON'BLE HIGH COURT OF JUDICATURE AT ALLAHABAD THROUGH ITS REGISTRAR AND OTHERS

(Criminal Appeal No. 298 of 2011)

FEBRUARY 02, 2011

[J.M. PANCHAL AND H.L. GOKHALE, JJ.]

Judicial restraint: Disparaging remarks normally should not be made against the members of the lower judiciary – Higher courts should observe restraint – In the instant case, application was filed u/s.156(3),Cr.P.C. by a woman alleging that her father-in-law had committed rape on her and the police had refused to register her FIR – Appellant-judicial officer passed an order registering her application u/s.156(3), Cr.P.C. as complaint and directing registry to present the file before her for recording the statement of the complainant u/s.200, Cr.P.C. – Single Judge of High Court held that the appellant had done the gravest injustice to the complainant and she being a lady magistrate ought to have thought about the nature of crime committed by the accused and the order was passed ignoring all judicial disciplines and without application of judicial mind – Appellant sought expunging of remarks – Held: Disparaging remarks made by the Single Judge of the High Court were not justified at all – While passing the order registering application u/s.156(3), Cr.P.C. as complaint, the appellant had considered the report called from the concerned police station wherein it was mentioned that no case was registered on the basis of complaint – At the time of filing of application before the appellant, the complainant had filed her own affidavit, copy of the application sent by her to the Senior Superintendent of Police with its postal registration and photocopy of the medical certificate – If on a reading of a complaint, appellant found that the

A *allegations therein disclosed cognizable offence and forwarding of the complaint to the police for investigation u/ s.156(3), Cr.P.C. would not be conducive to justice then there was no error on her part in adopting the course suggested in s.200, Cr.P.C. – The judicial discretion exercised by appellant* B *was in consonance with the scheme postulated by the Code and was neither arbitrary nor perverse – Disparaging remarks made by the Single Judge of the High Court quashed – Code of Criminal Procedure, 1973 – ss.156(3), 200.*

C *Code of Criminal Procedure, 1973: s.156(3) – Power of Magistrate under – Discussed.*

The appellant was a member of judicial service of the State of Uttar Pradesh. An application under Section 156(3), Cr.P.C. was filed by respondent no.3 before the D **appellant. The grievance of respondent no.3 was that her father-in-law had committed rape on her and the police had refused to register her FIR. She had also filed an application before the Senior Superintendent of Police but he had also not taken any action, and, therefore, she** E **filed the application under Section 156(3), Cr.P.C. before the appellant. In the application the details of the incident of rape were mentioned and prayer was made for direction to the Officer-in-charge of Police Station to register her complaint and investigate the case against** F **the accused under Section 156(3), Cr.P.C.**

The appellant passed an order on August 1, 2009 registering the application filed by complainant-respondent no. 3 under Section 156 (3), Cr.P.C. as G **complaint and directing the Registry to present the file before her on August 9, 2009 for recording the statement of the complainant under Section 200, Cr.P.C.**

Respondent No.3 filed the petition under Section 482 Cr.P.C. for quashing the order dated August 1, 2009 H

passed by the appellant and for direction to the police to register FIR and to investigate the same as provided under Section 156(3), Cr.P.C. The Single Judge of the High Court was of the view that the appellant had done the gravest injustice to respondent No. 3 and the appellant being a lady magistrate ought to have thought about the outcome of ravishing the chastity of daughter-in-law by her father-in-law and the nature of crime committed by the accused. The Single Judge noticed that the incident had occurred inside the room and there was no mention of any witness in application filed by the respondent but in the order passed by the appellant it was noted that the victim was in the knowledge of all the facts and that the witnesses were also known to her and that this indicated non-application of mind by the appellant. The Single Judge expressed the view that the appellant had passed the order ignoring all judicial disciplines and had not at all applied her judicial mind and had only referred to some of the judgments of the Allahabad High Court, which were contrary to the opinion expressed by the Apex Court rendered in many decisions. The Single Judge set aside the order dated August 1, 2009, passed by the appellant, and directed the appellant to decide the application of respondent no. 3 within the ambit of her power under Section 156(3), Cr.P.C. and also directed her to pass order for registration of FIR against the erring police officers, who had refused to register the FIR of respondent No. 3. The instant appeal was filed for expunging the remarks made by the Single Judge of the High Court.

Disposing of the appeal, the Court

HELD: 1. The reply affidavit filed by the Deputy Superintendant of Police stated inter alia that the office record maintained at the Police Station, Nakur or in the

A office of the Senior Superintendant of Police, Saharanpur did not disclose receipt of any complaint from respondent no. 3. It was mentioned therein that when the impugned judgment passed by the Single Judge of High Court was brought to the notice of the authorities
B concerned, an FIR was lodged at the Police Station, Nakur against accused and offence punishable under Section 376 IPC was registered. The reply proceeded to state that the Investigating Officer had recorded the statement of respondent no. 3 as well as that of her
C mother and the statement of her brother-in-law. But the mother and the brother-in-law had mentioned that they were not eye-witnesses to the incident. The reply mentioned that inquiries made by Investigating Officer with the neighbourers of the accused indicated that
D respondent no. 3 was a divorcee and was residing at her parents house from the date of divorce. As per the reply of Deputy Superintendant of Police almost all neighbourers had unanimously informed the Investigating Officer that respondent no. 3 was not seen
E at her husband's house on 17th, 18th and 19th June, 2009 and thus the incident referred to by respondent no. 3 in her complaint was found to be a concocted story. The reply further mentioned that the Investigating Officer had recorded the statement of doctor who had medically
F examined respondent no. 3 and the doctor had categorically stated that medical examination of respondent no. 3 did not confirm allegation of rape made by her. In the reply it was stated that on completion of investigation, the Investigating Officer had closed the
G investigation and submitted the final report as contemplated by Section 169, Cr.P.C. [Para 8] [426-F-H; 427-A-E]

2. Section 156(1), Cr.P.C. authorizes the police to
H investigate into a cognizable offence without requiring

any sanction from a judicial authority. However, sub-section (3) of Section 156, Cr.P.C. provides that any Magistrate empowered under Section 190, Cr.P.C. may order such an investigation as mentioned in sub-section (1) of the said Section. Section 190, Cr.P.C. deals with cognizance of offences by Magistrates and inter alia provides that any Magistrate of the first class may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts and (c) upon information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Neither Section 154 nor Section 156, Cr.P.C. contemplates any application to be made to the police under Section 156(3), Cr.P.C. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by Section 156(3), Cr.P.C. and second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in Section 200 and proceed further with the matter as provided by Section 202, Cr.P.C. An order made under sub-section (3) of Section 156, Cr.P.C. is in the nature of a pe-remptory reminder or intimation to the police to exercise its plenary power of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with the final report either under Section 169 or submission of charge sheet under Section 173, Cr.P.C. A Magistrate can under Section 190, Cr.P.C. before taking cognizance ask for investigation by the police under Section 156(3), Cr.P.C. The Magistrate can also issue warrant for production, before taking cognizance. If after cognizance has been taken and the Magistrate wants any investigation, it will

A be under Section 202, Cr.P.C. The phrase "taking cognizance of" means cognizance of offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected
B commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person
C other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b), Cr.P.C., he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of
D proceeding under Section 200 and the provisions following that Section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3), Cr.P.C. or issued a warrant for the purposes of investigation, he cannot be said to have
E taken cognizance of an offence. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of complainant and his witnesses as mentioned in Section 200, Cr.P.C. is to ascertain whether there is prima facie case against the
F person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for
G proceeding further. [Para 9] [427-F-H; 428-A-H; 429-A-F]

Gulab Chand v. State of U.P. 2002 Cr.L.J. 2907, *Ram Babu Gupta v. State of U.P.* 2001 (43) ACC 50, *Chandrika Singh v. State of U.P.* 2007 (50) ACC 777; *Sukhwasi S/o*
H *Hulasi v. State of U.P.* 2007 (59) ACC 739 – referred to.

3. From the order dated August 1, 2009, passed by the appellant, it is evident that the appellant had called for report from the concerned police station and considered the said report wherein it was inter alia mentioned that no case was registered on the basis of the application made by respondent no. 3. Respondent no.3 at the time of filing complaint before the appellant had filed her own affidavit, carbon copy of the application sent by her to the Senior Superintendent of Police, Saharanpur with its postal registration and photocopy of the medical certificate. Under the circumstances, the appellant had exercised judicial discretion available to a Magistrate and directed that the application, which was submitted by respondent no.3 under Section 156(3), Cr.P.C. be registered as complaint and directed the Registry to present the said complaint before her on August 28, 2009 for recording the statement of respondent no.3 under Section 200, Cr.P.C. The judicial discretion exercised by the appellant was in consonance with the scheme postulated by the Code. There is no material on the record to indicate that the judicial discretion exercised by the appellant was either arbitrary or perverse. There was no occasion for the Single Judge of High Court to substitute the judicial discretion exercised by the appellant merely because another view was possible. The appellant was the responsible judicial officer and after assessing the material placed before him she had exercised the judicial discretion. In such circumstances, the High Court had no occasion to interfere with the discretion exercised judiciously in terms of the provisions of Code. Normally, an order under Section 200, Cr.P.C. for examination of the complainant and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the

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A duty of the police to investigate. However, the practice which has developed over the years is that examination of the complainant and his witnesses under Section 200, Cr.P.C. would be directed by the Magistrate only when a case is found to be serious one and not as a matter of
B routine course. If on a reading of a complaint, the Magistrate finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation under Section 156(3), Cr.P.C. will not be conducive to justice, he will be justified in adopting
C the course suggested in Section 200, Cr.P.C. In the instant case, respondent no. 3 had averred in the application submitted before the appellant that the Officer-in-charge of the Nakur Police Station had refused to register her complaint against her father-in-law
D regarding alleged rape committed on her and that no action was taken by the Senior Superintendent of Police though necessary facts were brought to his notice. Under the circumstances, the judicial discretion exercised by the appellant, to proceed under Section 200, Cr.P.C.
E could not have been faulted with nor the appellant could have been subjected to severe criticism as was done by the Single Judge. There was no reason for the Single Judge of the High Court to record his serious displeasure against the order of the appellant which was challenged
F before him as an illegal order nor the Single Judge was justified in severely criticizing the conduct of the appellant as Judicial Magistrate because the application submitted by respondent no. 3 was ordered to be registered as a complaint and was not dismissed. Higher
G courts should observe restraint and disparaging remarks normally should not be made against the members of the lower judiciary. [Paras 10, 11] [429-F-H; 430-A-H; 431-A-H; 432-A]

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Ishwari Prasad Mishra v. Mohd. Isa **(1963) 3 SCR 722;** *'K' a Judicial Officer v. Registrar General, High Court of Andhra Pradesh* **2001 (3) SCC 54 – relied on.**

4. The record would show that the appellant had discharged her judicial duties to the best of her capacity. To err is human. It is often said that a Judge, who has not committed an error, is yet to be born. This dictum applies to all the Judges at all levels from the lowest to the highest. The difference in views of the higher and the lower courts is purely a result of a difference in approach and perception. But merely because there is difference in views, it does not necessarily establish that the lower courts are necessarily wrong and the higher courts are always right. Therefore, there is need to adopt utmost judicial restraint against making the disparaging remarks so far as members of lower judiciary are concerned. On the facts and in the circumstances of the case, the disparaging remarks made by the Single Judge of the High Court, were not justified at all. The disparaging remarks made by the Single Judge of the High Court are set aside and quashed. [Paras 11, 12 and 13] [433-H; 434-A-D; F-G]

K.P. Tiwari vs. State of M.P. **1994 Supp. (1) SCC 540 – relied on.**

Case Law Reference:

2002 Cr.L.J. 2907	**Referred to**	**Para 4**
2001 (43) ACC 50	**Referred to**	**Para 4**
2007 (50) ACC 777	**Referred to**	**Para 4**
2007 (59) ACC 739	**Referred to**	**Para 4**
(1963) 3 SCR 722	**Relied on**	**Para 11**
2001 (3) SCC 54	**Relied on**	**Para 11**

A **1994 Supp. (1) SCC 540 Relied on Para 11**

CRIMINAL APPELLATE JURISDICITON : Criminal Appeal No. 298 of 2011.

From the Judgment & Order dated 10.09.2009 of the High
B Court of at Allahabad in Criminal Miscellaneous Application No. 21606 of 2009.

Rakesh Dwivedi, Kavin Gulati, Rashmi Singh, T. Mahipal for the Appellant.

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Ratnakar Dash, Rajeev Dubey, Ravi Prakash Mehrotra, Deepti R. Mehrotra, Kamlendra Mishra for the Respondents.

The Judgment of the Court was delivered by

D **J.M. PANCHAL, J.** 1. Leave granted.

2. The present appeal is filed by the appellant, who is member of judicial service of the State of Uttar Pradesh, for expunging the remarks made by the learned Single Judge of the High Court of Judicature at Allahabad in Criminal Misc.
E Application No. 21606 of 2009 while setting aside order dated August 1, 2009, passed by the appellant in case No. nil of 2009 titled as Shabnam vs. Irshad registering the application filed by the respondent No. 3 under Section 156(3) of the Code of Criminal Procedure ("Code" for short) as complaint and
F directing the Registry to present the file before the appellant on August 9, 2009 for recording the statement of the complainant, i.e., of Shabnam under Section 200 of the Code.

3. The facts giving rise to the present appeal are as under:

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The respondent No. 3 is wife of one Mustqeem and resides at Village Sayyed Mazra, District Saharanpur with her husband and in-laws. It may be stated that the accused is her father-in-law. According to the respondent No. 3 her father-in-law had bad eye on her since her marriage. The case of the respondent
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No. 3 was that in the intervening night of June 18/19, 2009 at about 3 O'clock she was all alone in her room as her husband had gone out and she was sleeping but the doors of the room were kept open due to heat. The allegation made by the respondent No. 3 is that Irshad, i.e., her father-in-law came inside her room, caught hold of her with bad intention, scratched her breasts, forcibly pushed cloth in her mouth and forcibly committed rape on her. The case of the respondent No. 3 was that though she offered resistance, Irshad did not pay any heed and committed rape on her. The allegation made by her was that because of the incident she became unconscious and in the morning she narrated the whole incident to her mother-in-law Bindi, but she advised her not to disclose the incident to anyone as it was a matter of reputation of the family. According to respondent No. 3 she telephoned her mother, who arrived at her in-laws' place along with Muneer, her brother-in-law, on a motor cycle but Irshad in the meanwhile had fled away from the village. The case projected by the respondent No. 3 was that as her condition was deteriorating, she was got medically examined in District hospital by her mother and thereafter she had gone to the Police Station, Nakur, but the police had refused to register her FIR. It was claimed by the respondent No. 3 that under the circumstances she had moved an application before the Senior Superintendent of Police, Saharanpur but he had also not taken any action and, therefore, she had filed an application under Section 156(3) of the Code before the learned Judicial Magistrate II, Court No. 14, Saharanpur mentioning therein as to how the incident of rape with her had taken place and praying the learned Magistrate to direct the Officer-in-charge of Police Station, Nakur, to register her complaint and investigate the case against the accused under Section 156 (3) of the Code.

4. On receipt of the application the appellant called for report from the concerned police station. As per the report received no case was registered regarding the incident narrated by the respondent No. 3. The respondent No. 3 had

A filed her own affidavit in support of the case pleaded in the application filed before the appellant and produced a carbon copy of the application sent by her to the Senior Superintendent of Police, Saharanpur with its postal registration as well as photocopy of medical certificate. The learned Magistrate B perused the averments made by the respondent No. 3 in her application as well as documents annexed to the said application. The appellant was of the view that the respondent No. 3 was acquainted with the facts and circumstances of the case and was also familiar with the accused and knew the C witnesses too. The appellant was of the view that the respondent No. 3 would be able to produce all the evidence herself. The appellant referred to the principles of law laid down by the Allahabad High Court in *Gulab Chand vs. State of U.P.* 2002 Cr.L.J. 2907, *Ram Babu Gupta vs. State of U.P.* 2001 (43) ACC 50, *Chandrika Singh vs. State of U.P.* 2007 (50) ACC D 777 and *Sukhwasi S/o Hulasi vs. State of U.P.* 2007 (59) ACC 739 and after taking into consideration the principles laid down in the above referred to decisions the appellant was of the view that this was not a fit case to be referred to the police for investigation under Section 156(3) of the Code and, E therefore, directed that the application submitted by the respondent under Section 156(3) of the Code be registered as complaint and further ordered the Registry to present the file before her on August 28, 2009 for recording the statement of the respondent No. 3 i.e. the original complainant under Section F 200 of the Code.

5. Feeling aggrieved, the respondent No. 3 invoked jurisdiction of the High Court under Section 482 of the Code by filing Criminal Misc. Application No. 21606 of 2009 and G prayed the High Court to quash the order dated August 1, 2009, passed by the appellant and to direct the police to register her F.I.R. filed against Irshad and to investigate the same as provided under Section 156(3) of the Code.

6. The learned Single Judge of the High Court, who heard H

the matter, was of the view that the appellant had done the gravest injustice to the respondent No. 3. According to the learned Single Judge though the appellant is a lady Magistrate yet she could not think about the outcome of ravishing the chastity of daughter-in-law by her father-in-law and the nature of crime committed by the accused. After going through the order dated August 1, 2009, passed by the appellant, the learned Single Judge expressed the view that the order indicated total non-application of mind by the appellant. The learned Single Judge noticed that the incident had occurred inside the room in early hours of June 19, 2009 and there was no mention of any witness in application filed by the respondent but in the order passed by the appellant it was noted that the victim was in the knowledge of all the facts and that the witnesses were also known to her, which indicated non-application of mind by the appellant. The learned Single Judge while setting aside the order dated August 1, 2009, passed by the appellant, observed that the order was a blemish on justice meted out to a married lady who was ravished by her own father-in-law. The learned Single Judge expressed the view that the appellant had passed the order ignoring all judicial disciplines and had not at all applied her judicial mind and had only referred to some of the judgments of the Allahabad High Court, which were contrary to the opinion expressed by the Apex Court rendered in many decisions. After observing that a judicial order should be passed by applying judicial mind, the learned Single Judge severely criticized the conduct of the appellant and recorded his serious displeasure against the appellant for passing such type of illegal orders. The learned Single Judge further warned the appellant for future and cautioned the appellant to be careful in passing the judicial orders. The learned Single Judge observed that the appellant should have thought that the rape not only causes physical injury to the victim but also leaves scars on the mind of the victim for the whole life and implant the victim with such ignominy which is worse than her death. The learned Single Judge expressed the view that he was inclined to refer the matter to the

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A Administrative Committee for taking action against the appellant but refrained from doing so because the appellant is a young officer and has a long career to go. The learned Single Judge by his judgment dated September 9, 2009 set aside the order dated August 1, 2009, passed by the appellant, and B directed the appellant to decide the application of the respondent No. 3 within the ambit of her power under Section 156(3) of the Code and also directed her to pass order for registration of FIR against the erring police officers, who had refused to register the FIR of the respondent No. 3. The learned C Single Judge directed the Registry of the High Court to send a copy of his judgment to the appellant for her future guidance and also to the Senior Superintendent of Police, Saharanpur. As noted above, the disparaging remarks made by the learned Single Judge while setting aside the order passed by the D appellant has given rise to the present appeal.

7. This Court has heard the learned counsel for the appellant as well as the learned counsel for the State Government and the learned counsel representing the High Court of Judicature at Allahabad. The record shows that the E Respondent No.3 i.e. the original complainant is duly served in the matter but she has neither appeared through a lawyer or in person nor has filed any reply in the matter. This Court has also considered the documents forming part of the present appeal.

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8. On receipt of notice issued by this Court, Mr. Anand Kumar, Deputy Superintendant of Police, Saharanpur, U.P. has filed reply affidavit mentioning inter alia that as per the office record maintained at the Police Station, Nakur or in the officer G of the Senior Superintendant of Police, Saharanpur does not disclose receipt of any complaint from the Respondent No. 3. It is mentioned in the reply that when the impugned judgment dated September 10, 2009 passed by the learned Single Judge of High Court was brought to the notice of the authorities concerned a first information report was lodged at the Police H

Station, Nakur being FIR 36/2009 against accused Irshad and offence punishable under Section 376 IPC was registered. The reply proceeds to state that the Investigating Officer had recorded the statement of the Respondent No. 3 as well as that of her mother and the statement of her brother-in-law. But the mother and the brother-in-law had mentioned that they were not eye-witnesses to the incident. The reply mentions that inquiries made by Investigating Officer with the neighbourers of the accused indicated that Respondent No. 3 was a divorcee and was residing at her parents house from the date of divorce. As per the reply of Deputy Superintendant of Police almost all neighbourers had unanimously informed the Investigating Officer that the Respondent No. 3 was not seen at her husband's house on 17th, 18th and 19th June, 2009 and thus the incident referred to by Respondent No. 3 in her complaint was found to be a concocted story. The reply further mentions that the Investigating Officer had recorded the statement of doctor who had medically examined the Respondent No. 3 and the doctor had categorically stated that medical examination of the Respondent No. 3 did not confirm allegation of rape made by her. What is relevant to notice is that in the reply it is stated that on completion of investigation the Investigating Officer had closed the investigation and submitted the final report as contemplated by Section 169 of the Code on December 18, 2009.

9. Section 156(1) of the Code authorizes the police to investigate into a cognizable offence without requiring any sanction from a judicial authority. However, sub-section (3) of Section 156 of the Code provides that any Magistrate empowered under Section 190 of the Code may order such an investigation as mentioned in sub-section (1) of the said Section. Section 190 of the Code deals with cognizance of offences by Magistrates and inter alia provides that any Magistrate of the first class may take cognizance of an offence (a) upon receiving a complaint of facts which constitute such offence, (b) upon a police report of such facts and (c) upon

A information received from any person other than a police officer or upon his own knowledge that such offence has been committed. Neither Section 154 nor Section 156 of the Code contemplates any application to be made to the police under Section 156(3) of the Code. What is provided in Section
B 156(1) of the Code is that any officer in charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquiry into or try under the provisions of Chapter XIII. However, this
C Court finds that in the present case it was alleged by the respondent No. 3 that she had filed complaint before police but according to her, the police officer in charge of the police station had refused to register her complaint and, therefore, she had made application to the Senior Superintendent of Police
D as required by Section 154(3) of the Code, but of no avail. Therefore, the respondent No. 3 had approached the appellant, who was then discharging duties as Judicial Magistrate II, Court No. 14, Saharanpur. When the complaint was presented before the appellant, the appellant had mainly two options available to her. One was to pass an order as contemplated by Section
E 156(3) of the Code and second one was to direct examination of the complainant upon oath and the witnesses present, if any, as mentioned in Section 200 and proceed further with the matter as provided by Section 202 of the Code. An order made under sub-section (3) of Section 156 of the Code is in the nature
F of a peremptory reminder or intimation to the police to exercise its plenary power of investigation under Section 156(1). Such an investigation embraces the entire continuous process which begins with the collection of evidence under Section 156 and ends with the final report either under Section 169 or
G submission of charge sheet under Section 173 of the Code. A Magistrate can under Section 190 of the Code before taking cognizance ask for investigation by the police under Section 156(3) of the Code. The Magistrate can also issue warrant for production, before taking cognizance. If after cognizance has
H been taken and the Magistrate wants any investigation, it will

be under Section 202 of the Code. The phrase "taking cognizance of" means cognizance of offence and not of the offender. Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate applies his mind to the suspected commission of an offence. Cognizance, therefore, takes place at a point when a Magistrate first takes judicial notice of an offence. This is the position whether the Magistrate takes cognizance of an offence on a complaint or on a police report or upon information of a person other than a police officer. Before the Magistrate can be said to have taken cognizance of an offence under Section 190(1)(b) of the Code, he must have not only applied his mind to the contents of the complaint presented before him, but must have done so for the purpose of proceeding under Section 200 and the provisions following that Section. However, when the Magistrate had applied his mind only for ordering an investigation under Section 156(3) of the Code or issued a warrant for the purposes of investigation, he cannot be said to have taken cognizance of an offence. Taking cognizance is a different thing from initiation of the proceedings. One of the objects of examination of complainant and his witnesses as mentioned in Section 200 of the Code is to ascertain whether there is prima facie case against the person accused of the offence in the complaint and to prevent the issue of process on a complaint which is either false or vexatious or intended only to harass such person. Such examination is provided, therefore, to find out whether there is or not sufficient ground for proceeding further.

10. From the order dated August 1, 2009, passed by the appellant, it is evident that the appellant had called for report from the concerned police station and considered the said report wherein it was inter alia mentioned that no case was registered on the basis of the application made by the respondent No. 3. The respondent No. 3 at the time of filing complaint before the appellant had filed her own affidavit, carbon copy of the application sent by her to the Senior

A Superintendent of Police, Saharanpur with its postal registration and photocopy of the medical certificate. Under the circumstances the appellant had exercised judicial discretion available to a Magistrate and directed that the application, which was submitted by the respondent No. 3 under Section B 156(3) of the Code, be registered as complaint and directed the Registry to present the said complaint before her on August 28, 2009 for recording the statement of the respondent No.3 under Section 200 of the Code. The judicial discretion exercised by the appellant was in consonance with the scheme C postulated by the Code. There is no material on the record to indicate that the judicial discretion exercised by the appellant was either arbitrary or perverse. There was no occasion for the learned Single Judge of High Court to substitute the judicial discretion exercised by the appellant merely because another D view is possible. The appellant was the responsible judicial officer on the spot and after assessing the material placed before him he had exercised the judicial discretion. In such circumstances this Court is of the opinion that the High Court had no occasion to interfere with the discretion exercised E judiciously in terms of the provisions of Code. Normally, an order under Section 200 of the Code for examination of the complainant and his witnesses would not be passed because it consumes the valuable time of the Magistrate being vested in inquiring into the matter which primarily is the duty of the police to investigate. However, the practice which has F developed over the years is that examination of the complainant and his witnesses under Section 200 of the Code would be directed by the Magistrate only when a case is found to be serious one and not as a matter of routine course. If on a reading of a complaint the Magistrate finds that the allegations G therein disclose a cognizable offence and forwarding of the complaint to the police for investigation under Section 156(3) of the Code will not be conducive to justice, he will be justified in adopting the course suggested in Section 200 of the Code. Here, in this case the respondent No. 3 had averred in the H application submitted before the appellant that the Officer-in-

charge of the Nakur Police Station had refused to register her complaint against her father-in-law regarding alleged rape committed on her and that no action was taken by the Senior Superintendent of Police though necessary facts were brought to his notice. Under the circumstances, the judicial discretion exercised by the appellant, to proceed under Section 200 of the Code in the light of principles of law laid down by the Allahabad High Court in various reported decisions could not have been faulted with nor the appellant could have been subjected to severe criticism as was done by the learned Single Judge. There was no occasion for the learned Single Judge to observe that the appellant, a Judicial Magistrate, had done the gravest injustice to the victim or that though the appellant is a lady Magistrate, yet she did not think about the outcome of ravishing the chastity of daughter-in-law by her father-in-law or the seriousness of the crime committed by the accused and the reason assigned by the learned Magistrate in not directing the police to register the FIR indicated total non-application of mind by the appellant and that the order dated August 1, 2009, passed by the appellant, was a blemish on the justice system. The learned Single Judge was not justified in concluding that the appellant as Judicial Magistrate had passed the order dated August 1, 2009 ignoring all judicial disciplines or that the appellant had not at all applied her judicial mind and had only referred to some of the judgments of the Allahabad High Court, which were contrary to the opinion of the Apex Court rendered in many decisions. There was no reason for the learned Single Judge of the High Court to record his serious displeasure against the order of the appellant which was challenged before him as an illegal order nor the learned Single Judge was justified in severely criticizing the conduct of the appellant as Judicial Magistrate because the application submitted by the respondent N. 3 was ordered to be registered as a complaint and was not dismissed.

11. This Court has laid down in several reported decisions that higher courts should observe restraint and disparaging

A remarks normally should not be made against the learned members of the lower judiciary. In *Ishwari Prasad Mishra vs. Mohd. Isa* (1963) 3 SCR 722, a Three Judge Bench of this Court has emphasized the need to adopt utmost judicial restraint against using strong language and imputation of
B motive against the lower judiciary by noticing that in such matters the concerned Judge has no remedy in law to vindicate his position. The law laid down by this Court in the matter of expunction of remarks where a subordinate Judge has been subjected to disparaging and undeserved remarks by the
C superior Court, is well settled by this Court in the matter of *'K' a Judicial Officer Vs. Registrar General, High Court of Andhra Pradesh* 2001 (3) SCC 54. In the said decision this Court has succinctly outlined the guidelines in this regard in paragraph 15 of the said Judgment as under:

D "".....The existence of power in higher echelons of judiciary to make observations even extending to criticism incorporated in judicial orders cannot be denied. However, the High Courts have to remember that criticisms and observations touching a subordinate judicial officer
E incorporated in judicial pronouncements have their own mischievous infirmities. Firstly, the judicial officer is condemned unheard which is violative of principles of natural justice. A member of subordinate judiciary himself dispensing justice should not be denied this minimal
F natural justice so as to shield against being condemned unheard. Secondly, the harm caused by such criticism or observation may be incapable of being undone. Such criticism of the judicial officer contained in a judgment, reportable or not, is a pronouncement in the open and
G therefore becomes public. Thirdly, human nature being what it is such criticism of a judicial officer contained in the judgment of a higher court gives the litigating party a sense of victory not only over his opponent but also over the Judge who had decided the case against him. This is
H subversive of judicial authority of the deciding Judge.

Fourthly, seeking expunging of the observations by a judicial officer by filing an appeal or petition of his own reduces him to the status of a litigant arrayed as a party before the High Court or Supreme Court- a situation not very happy from the point of view of the functioning of the judicial system. And last but not the least, the possibility of a single or casual aberration of an otherwise honest, upright and righteous Judge being caught unawares in the net of adverse observations cannot be ruled out. Such an incident would have a seriously demoralizing effect not only on him but also on his colleagues. If all this is avoidable why should it not be avoided?"

However, this Court has further provided that the parameters outlined hereinbefore must not be understood as meaning that any conduct of a subordinate judicial office unbecoming of him and demanding a rebuff should be simply overlooked. This Court has outlined an alternate safer and advisable course of action in such a situation, that is of separately drawing up proceedings, inviting the attention of the Hon'ble Chief Justice to the facts describing the conduct of the subordinate Judge concerned by sending a confidential letter or note to the Chief Justice. The actions so taken would all be on the administrative side with the subordinate Judge concerned having an opportunity of clarifying his position and he would be provided the safeguard of not being condemned unheard, and if the decision be adverse to him, it being on the administrative side, he would have some remedy available to him under the law.

Again, in *K.P. Tiwari vs. State of M.P.* 1994 Supp. (1) SCC 540, this Court had to remind all concerned that using intemperate language and castigating strictures on the members of lower judiciary diminishes the image of judiciary in the eyes of public and, therefore, the higher courts should refrain from passing disparaging remarks against the members of the lower judiciary. The record would show that the appellant had discharged her judicial duties to the best of her

A capacity. To err is human. It is often said that a Judge, who has not committed an error, is yet to be born. This dictum applies to all the learned Judges at all levels from the lowest to the highest. The difference in views of the higher and the lower courts is purely a result of a difference in approach and B perception. But merely because there is difference in views, it does not necessarily establish that the lower courts are necessarily wrong and the higher courts are always right. Therefore, this Court in several reported decision has emphasized the need to adopt utmost judicial restraint against C making the disparaging remarks so far as members of lower judiciary are concerned.

12. On the facts and in the circumstances of the case, this Court is of the opinion that the disparaging remarks referred to above, made by the learned Single Judge of the Allahabad D High Court, were not justified at all and, therefore, the appeal will have to be accepted.

13. For the foregoing reasons, the appeal succeeds. The disparaging remarks made by the learned Single Judge of the E High Court of Judicature at Allahabad in Criminal Misc. Application No. 21606 of 2009, decided on September 9, 2009, while setting aside order dated August 1, 2009, passed by the appellant in case No. nil of 2009 titled as *Shabnam vs. Irshad* directing that the application submitted by the F respondent No. 3 be registered as complaint and ordering the Registry to present the same before her for recording statement of the respondent No. 3 under Section 200 of the Code, are hereby set aside and quashed. In this Appeal prayer is to expunge remarks made by the learned Single Judge of High Court against the Appellant. The other directions are not subject G matter of challenge in the appeal, therefore, those directions are not interfered with.

14. The appeal accordingly stands disposed of.

H D.G. Appeal disposed of.