

HIGH COURT OF MADHYA PRADESH, JABALPUR

Cr.Rf. No.01/2015

In References

-Versus-

State of Madhya Pradesh

**Present : Hon'ble Shri Justice Rajendra Menon, Acting Chief Justice
Hon'ble Shri Justice Anurag Shrivastava**

Ms. Kishwar Khan, appears as Amicus Curiae in the matter.

Shri S.S. Chouhan, Government Advocate for the respondent/State.

Whether approved for reporting : Yes/No

ORDER
(19.07.2016)

Per :-Anurag Shrivastava, J

The learned Special Judge, Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989, Raisen vide letter dated 18.06.2015 has preferred three references under Section 395(1) of Code of Criminal Procedure, 1973 (hereinafter referred as Code) pertaining to common question of law.

2. The relevant facts leading to the reference are that a Special Case No.118/2014 (State of M.P. Vs. Sunny @ Sandeep and others) under Section 294, 323/34, 324/34, 506(II) of IPC and Section 3(1) (X) Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred as SC/ST Act) is pending before the Special Court. A Criminal Case No.676/2014 under Section 294, 323 and 506 of IPC arising out of the same incident was presented before the JMFC, Raisen. Finding the case as counter case the Magistrate vide order dated

11.03.2015 has committed the criminal case to Special Judge, under Section 323 of Cr.P.C.

3. The facts of the second reference is that the Special Case No.106/24 (State Vs. Halke and others) under Section 294, 323/34, 506 (II) of IPC and Section 3(1) (X) SC/ST Act is pending before the Special Court. A criminal case No.367/2014 under Section 294, 323, and 506 of IPC arising out of the same incident was presented before the JMFC, Begumganj, District-Raisen. Finding the case as counter case the Magistrate vide order dated 18.03.2015 has committed the criminal case to Special Judge, under Section 323 of Cr.P.C.

4. The facts of the third reference is that the Special Case No.11/24 (State Vs. Komal Singh and others) under Section 294, 323/34, 506 (II) of IPC and Section 3(1) (X) SC/ST Act is pending before the Special Court. A criminal case No.594/2013 under Section 294, 323, and 506 of IPC arising out of the same incident was presented before the JMFC, Gairatganj, District-Raisen. Finding the case as counter case the Magistrate vide order dated 09.02.2015 has committed the criminal case to Special Judge, under Section 323 of Cr.P.C.

5. Learned Special Judge finding the committal of all three cases by Magistrate directly to Special Court as irregular and not lawful in view of Section 193 and 194 of the Code referred the matter to Session Judge with a request to exercise suo-motto power of revision for setting aside the order of committal and directing the Magistrate to commit the cases to Session Judge.

6. Learned Session Judge by order dated 28.05.2015 holding that since the cases committed by the Magistrate were counter cases of Special Cases which were already pending before the Special Court, therefore, the Special Court is competent to take cognizance of counter cases, which are directly committed under Section 323 of Cr.P.C. and the prayer of Special Court was rejected.

7. However, the learned Special Judge was of the view that under the provision of Section 193 of the Code, the Special Court is not competent to take cognizance of the cross-cases, which are not registered under SC/ST Act and if such a cognizance is taken then in that situation the whole proceeding will be void as per provisions of Section 461(K) and (L) of the Code.

8. The learned Special Judge while referring the matter has framed the following questions:-

(1) Whether the Magistrate can commit a case, arising out the same incident, cross to the case pending before the Special Court (SC/ST) directly to Special Court?

(2) Whether in those cross cases the Special Court (SC/ST) is even with the restriction under Section 193 of Cr.P.C. competent to take cognizance directly without the case being committed?

9. We have heard Ms. Kishwar Khan, Amicus Curiae.

10. Before advertng to consider the questions referred to, we have to consider the procedure, which ought to be followed in cross cases.

Hon'ble Supreme Court in Nathi Lal and Others Vs. State of U.P and Others, reported in 1990 (Supp) SCC 145 has described the procedure in para-2, which is as under:-

"We think that the fair procedure to adopt in a matter like the present where there are cross-cases, it to direct that the same learned Judge must try both the cross-cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross-case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross-case cannot be looked into. Nor can the Judge be influenced by whatever is argued in the cross-case.

Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross-case. But both the judgments must be pronounced by the same learned Judge one after the other."

11. Therefore, it is clear that in such a situation both, the cross case and the main case have to be tried by the same Court. That being so, the counter-case, which was pending before the Magistrate ought to be tried by Special Court alongwith special case, which is pending for trial under SC/ST Act.

12. The Special Court is established by the State Government with the concurrence of Chief Justice of High Court under Section 14 of SC/ST Act, for speedy trial of the offences under the Act. The Special Court has power to directly take cognizance of the offences under the Act. Since, counter-cases pending before the Magistrate was not for an offences under SC/ST Act, therefore, Special Court may not directly take cognizance of the offences under Section 14 of the Act. Here the question arises whether Special Court is competent to try the counter-cases not involving the offence under Special Act.

13. It is not disputed that the Additional Sessions Judges are posted and given powers to preside over the Special Courts constituted under SC/ST Act. ***Hon'ble Supreme Court in Gangula Ashok and another Vs. State of A.P. (2000) 2 SCC 504*** while considering the old Section 14 of SC/ST Act held that:-

"It is clear from Section 14 and 2 (1) (d) of the SC/ST Act that it is for trial of the offences under the Act that a particular Court of Session in each district is sought to be specified as a Special Court. Though the word "trial" is not defined either in the Code or in the Act it is clearly distinguishable from inquiry. Inquiry must always be a forerunner to the trial. Thus the Court of Session is specified to conduct a trial and no other court can conduct the trial of offences under the Act. Evidently the

legislature wanted the Special Court to be a Court of Session. Hence, the particular Court of Session, even after being specified as a Special Court, would continue to be essentially a Court of Session and designation of it as a Special Court would not denude it of its character or even powers as a Court of Session. The trial in such a Court can be conducted only in the manner provided in Chapter XVIII of the Code which contains a fasciculus of provisions for "trial before a Court of Session".
(Paras 8 & 9)

14. Therefore, it is clear that even after being specified as Special Court, the Additional Sessions Judge would continue to be essentially a Court of Session and can exercise powers as a Court of Sessions.

Although a new Section 14 in SC/ST Act has been substituted vide Amendment Act 1 of 2016 w.e.f 18th January, 2016 giving power to directly take cognizance of offence under this Act, but still for the offences which are not involving offences under SC/ST Act, 1989 the trial can be conducted by Special Court exercising jurisdiction as Additional Sessions Judge in the manner provided in Chapter XVIII of the Cr.P.C. under provisions for "trial before the Court of Sessions."

15. Now we will consider the procedure, which has to be followed in a situation where in a counter/cross-cases, that Magistrate finds that one case arising out of the same incident is exclusively triable by Court of Sessions and second one is not involving the offences exclusively triable by the Court of Sessions like in the present cases. The provisions for committal of cases to Court of Sessions are given in Sections 209 and 323 of Cr.P.C., which reads as under:-

"Section. 209. - 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 Sessions, 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).....

(c).....

(d).....

Section 323. - 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 on which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained."

16. Therefore, in cases where it appears that the offence is one triable exclusively by the Court of Sessions the Magistrate shall commit it to Court of Sessions. But, in cases where the offence is not exclusively triable by the Court of Sessions the Magistrate has to follow the procedure under Section 323 of Cr.P.C for its committal to the Court of Sessions. **Hon'ble Supreme Court in the case of Sudhir Vs. State of M.P. reported in (2001) 2 SCC 688** held that as under:-

"Where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Session, but none of the offences involved in the other case is exclusively triable by the Sessions Court as provided in Section 209 Cr.P.C. Though, the next case cannot be committed in accordance with Section 209 of the Code, the Magistrate has, nevertheless, power to commit the case to the Court of Session. Section 323 is incorporated in Cr.P.C. to meet similar cases also." (Para 12)

17. It is also evident that in both under Sections 209 and 323 of Cr.P.C the cases are committed to the Court of Sessions but after committal both cases either are to be exclusively tried by the Court of Sessions or otherwise has to be tried following the provisions contained in Chapter-XVIII of Cr.P.C. Hon'ble Supreme Court in the case of **Sudhir** (supra) explained that:-

"Section 323 Cr.P.C. does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a Magistrate has committed a case on account of the legislative compulsion by Section 209, its cross-case, having no offence exclusively triable by the Sessions Court, must appear to the Magistrate as on which ought to be tried by the same Court of Session. Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelized by the provisions contained in Chapter XVIII. (Para 13)"

18. A Sessions Judge has power to try any offence under IPC, it is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. This power of Sessions Court is given in Section 26 of Cr.P.C.

19. Here the question arises whether a Magistrate can commit the cross-case, which is not exclusively triable by the Court of Sessions directly to the Additional Sessions Judge or Assistant Sessions Judge where the counter-case is pending or he has to commit it to the Court of Sessions Judge. For this we have to consider the difference between Sessions Judge and Additional Sessions Judge.

20. Section 6 of Cr.P.C has classified only a Court of Session, there is no other Additional Court of Sessions. Section 9 of Cr.P.C which reads as under:-

"Section 9. (1) The State Government shall establish a Court of Sessions for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session."

(4)

(5)

(6)

21. A Court of Session for every session division is established by the State Government, which has to be presided over by a Sessions Judge. Sub Section (3) of Section 9 enables the High Court to appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in Court of Sessions. This provision has been made for appointment of Judges in addition to the Sessions Judge in a Session division to man the work of the Court of Sessions, which could not be handled by the Sessions Judge alone. The Sessions Judge has power to transfer the cases to the Court of Additional Sessions Judge. As per Section 381 (2) and Section 400 of Cr.P.C a Additional Sessions Judge can hear only such appeals and revision which are make over to them by Sessions Judge. Rule 574 of Criminal Rules and Orders provides a Register of Cases tried by Court of Sessions to be maintained only in Court of Sessions Judge. Therefore, it becomes clear that while the Sessions Judge presides over the session division, an Assistant Sessions Judge merely exercises jurisdiction in that session division. Ordinarily the expression Court of Sessions would include not only the Sessions Judge, but also Additional or Assistant Judge, the expression Sessions Judge cannot be treated to include an Additional Sessions Judge unless otherwise provided by law.

22. The power of taking cognizance of an offence by Sessions Court has been described in Sections 193 and 194 of of Cr.P.C. Section 193 of Cr.P.C restricts a Sessions Court from taking cognizance of any offence except in certain cases, unless the case has been committed to it by a Magistrate. Sections 193 and 194 of Cr.P.C reads as under:-

"Section 193. Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court or Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code.

Section 194. An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try."

Section 194 is newly incorporated by the legislature by amending section 193 (2) of old Cr.P.C 1898. The words "only as a State Government by the general or special order may direct that to try or" appearing in the Section 193 of old Cr.P.C 1898 have been omitted. Further in sub section (2) the words "or as the High Court may by a special order direct him to try have been added." This change has been brought about to give power of distribution of work among the Courts in a district to Sessions Judge and High Court.

23. The expression "cognizance" used in Section 193 of Cr.P.C indicates the point when a Court or a Magistrate takes judicial notice of an offence with a view to initiate proceeding in respect of such offence (See S.K. Sinha, Chief Enforcement Officer Vs. Videocon International AIR 2008 SC 1213, (2008) 2 SCC 492). Therefore, by conjoint reading of Sections 193 and 194 of Cr.P.C it appears that the Sessions Judge is competent to take cognizance and initiate trial of a case exercising original jurisdiction after being committed by the Magistrate under Section 193 of Cr.P.C. but, Additional Sessions and Assistant Sessions Judge derives no jurisdiction, as a Court of original jurisdiction, to take cognizance of an offence exclusively triable by a Court of Sessions unless the Sessions Judge of that division by general or special order makes over to him such a cases for trial or unless the High Court, by a special order directs him to try. Therefore, the cases involving offences exclusively triable by Court of Sessions or ought to be tried by Court of Sessions should be committed to Court of Sessions Judge because Additional Sessions Judge/Assistant Sessions Judge lacks jurisdiction to try the same without it is made over by Sessions Judge.

24. In the present case the Special Court constituted under SC/ST Act, 1989 is a Court of Additional Sessions Judge. The counter-cases have to be tried and decided separately and there will be no joint trial. In the present case all the counter-cases which are pending before the Magistrate are relating to offences under Sections 294, 323, 324, 506-B of IPC. These cases are triable by Judicial Magistrate First Class but being counter-cases of special cases registered under SC/ST Act, 1989 they have to be tried and decided by the Court of Special Judge. The Special Judge has to try above cases as Additional Sessions Judge following procedure envisaged under chapter XVIII of the Cr.P.C. Simply a case is being tried by the Special Court as counter-case it does not become a special case under SC/ST Act. The Special Judge is competent to take cognizance of offences under SC/ST Act, but not competent to take cognizance of offences other than SC/ST Act, 1989 or offences under Penal Code, unless it is made over to him by Sessions Judge under Section 194 of Cr.P.C. Therefore, the counter-cases pending before the Magistrate ought to be committed to the Court of Sessions Judge with a request for their transfer to Special Court for trial.

25. Applying the above principle we arrive to following conclusion:-

- i. If a counter-case involves offences not exclusively triable by Sessions Court then it will be committed to the Court of Sessions Judge under Sections 209 or 323 of Cr.P.C as the case may be, who can then transfer the case (i.e the counter-case) to the Court of Additional Sessions Judge/Special Court where the other case is pending for trial.
- ii. The special Court under SC/ST Act, 1989 is not competent to take cognizance and initiate trial of the case not involving the offence under the special Act unless it is made over to it by Sessions Judge under Section 194 of Cr.P.C.

iii. The cases involving offences under Special Act can be committed directly to a Special Court if no special provision for taking cognizance of offence is provided in a Special Act or it is not otherwise directed by High Court.

26. Therefore, we answer the reference as under:-

(i) Magistrate cannot commit a case, arising out the same incident, cross to the case pending before the Special Court (SC/ST) directly to Special Court.

(ii) In those cross cases the Special Court (SC/ST) is even with the restriction under Section 193 of Cr.P.C., is not competent to take cognizance directly without the case being committed.

27. Here a question arises as to whether trial of a case not involving offences under the Special Act, which has been directly committed to Special Court (being a Court of Additional Sessions Judge) by Magistrate gets vitiated.

28. Section 465 of Cr.P.C reads as under:-

"(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity if any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity if any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings."

29. Since, Additional Sessions Judge is competent to exercise jurisdiction in Court of Sessions, therefore, it is a Court of competent jurisdiction to try the offences under Penal Code. Ordinarily a case cannot be tried by an Additional Sessions Judge unless the same has been made over to him by Sessions Judge or has been directed to be tried by him by the High Court. But, a trial of case by Additional Sessions Judge on direct committal by Magistrate to him is not a illegality but would be an irregularity or an error and it may attract Section 465 of Cr.P.C. ***Hon'ble Supreme Court in the case of Rattiram and Others Vs. State of Madhya Pradesh, reported in (2012) 4 SCC 516*** held that cognizance taken by a Sessions Court directly without commitment of case by Magistrate in accordance with Section 193 of Cr.P.C, the trial will not automatically vitiated. The trial would only be vitiated if failure of justice has in fact been occasioned thereby or accused can established that he has been prejudiced thereby.

30. Therefore, it becomes clear that Magistrate shall not commit any case triable by the Court of Sessions or ought to be tried by the Court of Sessions (cross case) to an Additional or Assistant Sessions Judge and if it is so committed then such an error must be objected too at the earliest possible opportunity or else error may not be made a ground for interference with the finding of guilt etc., if no failure of justice is shown to have been occasioned by such an error.

31. Before parting we would like to express our gratitude to Ms. Kishwar Khan, Amicus curiae for the able assistance render during hearing of the matter.

32. In the light of the above discussion the impugned orders passed by the Magistrates committing the cross cases to Special Judge are hereby set-aside and all three cross-cases be remanded to respective Magistrates for its committal to the Court of Sessions Judge by following due procedure.

A.F.R

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**(RAJENDRA MENON)
ACTING CHIEF JUSTICE**

**(ANURAG SHRIVASTAVA)
JUDGE**

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