Balveer Singh And Anr vs State Of Rajasthan And Anr on 10 May, 2016

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Bench: R.K. Agrawal, A.K. Sikri

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 253 OF 2016

BALVEER SINGH & ANR.	.....APPELLANT(S)	
VERSUS		
STATE OF RAJASTHAN & ANR.	.....RESPONDENT(S)	

J U D G M E N T

A.K. SIKRI, J.

The appellants in this appeal are the parents of one Abhimanyu Singh who was married to Renu on 24.02.2014. Renu was found dead on 27.11.2014 i.e. within ten months of the wedding. Cause of death was Asphyxia due to hanging. An FIR was lodged by respondent No. 2 herein (Father of deceased) alleging that Renu was done to death by her husband Abhimanyu Singh as well as his parents (appellants herein) for not satiating the dowry demands of the accused persons. FIR has been registered under Sections 304-B and 498-A of the Indian Penal Code. The appellants claimed that it was a case of suicide by hanging committed by Renu. Matter was investigated which resulted into the filing of chargesheet against Abhimanyu only, that too for committing the offence under Section 306 IPC, namely, abetting the suicide committed by Renu. As per the Police investigation

there was no dowry demands and no offence under Sections 498-A and 304-B of IPC was made out. Instead it was a case of suicide and at the most Abhimanyu could be charged of abetting the suicide committed by Renu. For that reason, no challan was filed against the appellants herein. On the filing of the aforesaid chargesheet by the Police on 24.02.2015, respondent No. 2 filed an application before the learned Judicial Magistrate, First Class, (JMFC) for taking cognizance against the appellants and Abhimanyu under Sections 304-B and 498-A IPC. This application was dismissed by the learned Magistrate vide order dated 11.03.2015. Thereupon, the learned Magistrate committed the case before the Sessions Court as the offence under Section 306 IPC is triable by the Sessions Court. Before the Sessions Court, respondent No. 2 preferred similar application once again. Here, respondent No. 2 succeeded in his attempt inasmuch as vide order dated 08.10.2015, the learned Sessions Court took cognizance for offences punishable under Sections 304-B and 498-A IPC and, in the alternative, Section 306 IPC, against the appellants and their son. He, thus, directed issuance of bailable warrant against the appellants.

2. Aggrieved by the said order, appellants along with their son Abhimanyu approached the High Court. High Court vide its order dated 04.11.2015 remanded the matter back to the Sessions Court with a direction to hear the parties and pass further orders in the light of judgment of this Court in Dharam Pal & Ors. v. State of Haryana and Anr.[1]. The Sessions Court accorded fresh hearing and thereafter passed order dated 08.12.2015 thereby allowing the application once again to the extent of taking cognizance under Sections 304-B and 498-A IPC and, in the alternative, Section 306 IPC against the appellants as well as their son. The appellants challenged this order by filing revision petition before the High Court which has been dismissed by the High Court on 18.12.2015. This order is impugned in the present proceedings.

We may record at the outset that the sole ground on which the order was challenged before the High Court, as well as before us, is that when the Magistrate had dismissed the application of the complainant vide order dated 11.03.2015 and refused to take cognizance under Sections 304-B and 498-A IPC and this order had attained finality as no revision petition/criminal miscellaneous appeal was preferred either by the complainant or by the Public Prosecutor, second application with the same relief was not maintainable before the Sessions Court. It was emphatically argued that it amounted to second time cognizance by the Court of Sessions which was impermissible in law. It was argued that under Section 190 of the Code of Criminal Procedure, 1973 (for short, the 'Code'), cognizance of the offence can be taken only once.

Thus, the question that falls for consideration before us is as to whether the Court of Sessions was empowered to take cognizance of offence under Sections 304-B and 498-A of IPC, when similar application to this effect was rejected by the JMFC while committing the case to Sessions Court, taking cognizance of offence only under Section 306 IPC and specifically refusing to take cognizance of offence under Sections 304-B and 498-A IPC. Mr. Raju Ramachandran, learned senior counsel appearing for the appellants, submitted that when the case is triable by the Sessions Court, Judicial Magistrate after completing the committal proceedings can commit the case for trial before the Court of Sessions. He can do so by simply committing the case on finding from the Police report that the case was triable by the Court of Sessions. In the alternative, he can take cognizance of offence on the basis of Police report and then commit the case for trial to the Court of Sessions. When the

Judicial Magistrate adopts the former approach by not taking the cognizance of offence under Section 190 of the Code and commits the case for trial before the Sessions Court, Sessions Court is competent to exercise its power under Section 193 of the Code and to take cognizance of offence in the light of judgment of this Court in Dharam Pal's case. However, if the Magistrate adopts alternate course of action, namely, takes cognizance of the offence and then commits the case to the Court of Sessions, Sessions Court has no power to take fresh cognizance of the offence inasmuch as cognizance of offence can be taken only once. Again, in support of this proposition, aid of the judgment in Dharam Pal's case is taken.

Per contra, Dr. Sushil Balwada, learned counsel who appeared for respondent No. 2 and Mr. Anish Maheshwari, learned counsel who appeared for the State argued that since the case is triable by the Court of Sessions, it is the Court of Sessions only which is competent to take cognizance and, therefore, order passed by the Sessions Court on 08.12.2015 should be treating as taking cognizance of offence for the first time in terms of Section 193 of the Code. Interestingly, in support of their submissions, the respondents also rely upon the judgment in Dharam Pal's case. In addition, they also took support from the judgment of this Court in Nisar and Another v. State of U.P.[2] The aforesaid narration unequivocally demonstrates that both the sides are trying to find support from the judgment in Dharmpal's case. It would, thus, be apposite to take note of the ratio in the said judgment. However, before we do so, we would like to refer to the provisions of Sections 190 and 193 of the Code which have come into play in the instant case as proper understanding thereof, in our opinion, shall provide categorical answer to the issue at hand and will help us in tracing the underlying legal principle laid down in that case. These provisions make the following reading:

> “190. Cognizance of offences by Magistrates. -
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> (1) Subject to the provisions of this Chapter, any Magistrate of the first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence -
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> (a) upon receiving a complaint of facts which constitute such offence;
>
> (b) upon a police report of such facts;
>
> (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try.

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193. Cognizance of offences by Courts of Session. - Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of 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." Sections 190 and 193 of the Code are in Chapter XIV. This Chapter contains the title "Conditions requisite for initiation of proceedings". Section 190 deals with cognizance of offence by Magistrates. It empowers any Magistrate of the First Class, and any Magistrate of the Second Class which are specially empowered to take cognizance "of any offence" under three circumstances mentioned therein. These three circumstances include taking of cognizance upon a Police report of such facts which may constitute an offence. It is trite law that even when Police report is filed stating that no offence is made out, the Magistrate can ignore the conclusion arrived at by the Investigating Officer and is competent to apply its independent mind to the facts emerging from the investigation and take cognizance of the case if it thinks that the facts emerging from the investigation do lead to prima facie view that commission of an offence is made out. In such a situation, the Magistrate is not bound to follow the procedure laid down in Sections 200 and 202 of the Code for taking cognizance of the case under Section 190(1)(a) though it is open for him to act under Section 200 or Section 202 as well {See Minu Kumari & Anr. v. State of Bihar & Ors.[3]}. Thus, when a complaint is received by the Magistrate under Section 190(1)(a) of the Act, the Magistrate is empowered to resort to procedure laid down in Section 200 or 202 of the Code and then take cognizance. If Police report is filed, he would take cognizance upon such a report, as provided under Section 190(1)(b) of the Code in the manner mentioned above as highlighted in the case of Minu Kumari.

Likewise, Section 193 of the Code empowers Court of Session to take cognizance of offences and states that the Court of Session shall not take cognizance of any offence as the Court of original jurisdiction unless the case has been committed to it by the Magistrate under this Code. As per this Section, the Court of Session can take cognizance only after the case has been committed to it by the Magistrate. However, once the case is committed to it by the Magistrate, the Court of Session is empowered to take cognizance acting 'as a Court of original jurisdiction'.

In view of the aforesaid provisions, question that arises is as to whether Magistrate can take cognizance of an offence which is triable by the Court of Session or he is to simply commit the case to the Court of Session, after completion of committal proceedings as it is the Court of Session which is competent to try such cases. On the one hand, Section 190 of the Code empowers the Magistrate to "take cognizance of any offence" which gives an impression that such Magistrate can take cognizance even of an offence which is triable by the Court of Session. On the other hand, when the case is committed to the Court of Session by the Magistrate, Section 193 of the Code stipulates that Court of Session shall take cognizance 'as a Court of original jurisdiction' which shows that the cognizance is taken by the Court of Session as a Court of original jurisdiction and, thus, it is the first time the cognizance is taken and any order passed by the Magistrate while committing the case to the Court of Session did not amount to taking cognizance of the offence which are triable by the Court of Session.

A bare reading of Section 190 of the Code which uses the expression "any offence" amply shows that no restriction is imposed on the Magistrate that Magistrate can take cognizance only for the offence triable by Magistrate Court and not in respect of offence triable by a Court of Session. Thus, he has the power to take cognizance of an offence which is triable by the Court of Session. If it is so, the question is as to what meaning is to be assigned to the words "as a Court of original jurisdiction"

occurring in Section 193 of the Code when Court of Session takes cognizance of any offence. To put it otherwise, when the Magistrate has taken cognizance and thereafter only committed the case to the Court of Session, whether the Court of Session is not empowered to take cognizance of an offence again under Section 193 of the Code or it still has power to take cognizance acting as Court of original jurisdiction. In order to find the answer, we now advert to the appraisal of Dharampal's case.

In Dharam Pal's case, an FIR was registered against one N and the appellants for commission of offence under Section 307 and 323 read with Section 34 IPC. The police after investigation submitted its report under Section 173(2) of the Code before the Magistrate sending only N for trial while including the names of the appellants in Column 2 of the report. On receipt of such police report, the Magistrate did not, straightaway, commit the case to the Sessions Court but, on an objection being raised by the complainant, issued summons to the appellants therein to face trial with the other accused N as the Magistrate was convinced that a prima facie case to go for trial had been made out against the appellants as well. Further, while doing so, the Magistrate did not hold any further inquiry, as contemplated under Sections 190, 200 or even 202 of the Code, but proceeded to issue summons on the basis of the police report only. In this background, the following questions arose for the consideration by the Constitution Bench:

> "7.1 Does the Committing Magistrate have any other role to play after committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session?
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> 7.2 If the Magistrate disagrees with the police report and is convinced that a case had also been made out for trial against the persons who had been placed in column 2 of the report, does he have the jurisdiction to issue summons against them also in order to include their names, along with Nafe Singh, to stand trial in connection with the case made out in the police report?
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> 7.3 Having decided to issue summons against the appellants, was the Magistrate required to follow the procedure of a complaint case and to take evidence before committing them to the Court of Session to stand trial or whether he was justified in issuing summons against them without following such procedure?
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> 7.4 Can the Sessions Judge issue summons under Section 193 CrPC as a court of original jurisdiction?
>
> 7.5 Upon the case being committed to the Court of Session, could the Sessions Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?
>
> 7.6 Was Ranjit Singh v. State of Punjab[4], which set aside the decision in Kishun Singh v. State of Bihar[5] , rightly decided or not?" Answering the reference, the

Constitution Bench held that:

(a) The Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report. The Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) of the Code. In the event the Magistrate disagrees with the police report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being prima facie satisfied that a case had been made out to proceed against the persons named in Column 2 of the report, he may proceed to try the said persons or if he is satisfied that a case had been made out which was triable by the Court of Session, he must commit the case to the Court of Session to proceed further in the matter. Further, if the Magistrate decides to proceed against the persons accused, he would have to proceed on the basis of the police report itself and either inquire into the matter or commit it to the Court of Session if the same is found to be triable by the Sessions Court.

(b) The Sessions Judge is entitled to issue summons under Section 193 of the Code upon the case being committed to him by the Magistrate. Section 193 speaks of cognizance of offences by the Court of Session. The key words in the section are that 'no Court of 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'. The provision of Section 193 entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. The submission that the cognizance indicated in Section 193 deals not with cognizance of an offence but of the commitment order passed by the Magistrate, was specifically rejected in view of the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.

(c) Cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceeding to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction. The provisions of Section 209 of the Code will, therefore, have to be understood as the Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the Sessions Judge.

In the process of coming to the aforesaid conclusions, this Court accepted the view expressed in Kishun Singh's[6] case that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the person not named as offenders but whose complicity in the case would be evident from the materials available on record. It specifically held that upon committal under Section 209 of the Code, the Sessions Judge may summon those persons shown in Column 2 of the police report to stand trial along with those already named therein.

Interestingly, at the same time, the Court also held that it would not be correct to hold that on receipt of a police report and seeing that the case is triable by a Court of Session, the Magistrate has no other function but to commit the case trial to the Court of Session and the Sessions Judge has to wait till the stage under Section 319 of the Code is reached before proceeding against the persons against whom a prima facie case is made out from the material contained in the case papers sent by the Magistrate while committing the case to the Court of Session. This is reflected in the following passage:

> "33. As far as the first question is concerned, we are unable to accept the submissions made by Mr. Chahar and Mr Dave that on receipt of a police report seeing that the case was triable by Court of Session, the Magistrate has no other function, but to commit the case for trial to the Court of Session, which could only resort to Section 319 of the Code to array any other person as accused in the trial. In other words, according to Mr Dave, there could be no intermediary stage between taking of cognizance under Section 190(1)(b) and Section 204 of the Code issuing summons to the accused. The effect of such an interpretation would lead to a situation where neither the Committing Magistrate would have any control over the persons named in column 2 of the police report nor the Sessions Judge, till the Section 319 stage was reached in the trial. Furthermore, in the event the Sessions Judge ultimately found material against the persons named in column 2 of the police report, the trial would have to be commenced de novo against such persons which would not only lead to duplication of the trial, but also prolong the same." However, when we see the discussion in totality, it would be clear that the aforesaid observations were made in respect of the first question posed by the Constitution Bench in para 7.1, already reproduced above, as per which the powers of the Magistrate while committing the case to the Sessions Court were to be answered. This is so made clear in the very next para, i.e. para 34 of the judgment, wherein, while approving the dicta laid down in Kishun Singh's case, the Constitution Bench held that 'the Magistrate has ample powers to disagree with the final report that may be filed by the police authorities under Section 173(2) of the Code and to proceed against the accused persons dehors the police report, which power the Sessions Court does not have till the Section 319 stage is reached'. This was put beyond the pale of any controversy in para 35 of the judgment, which reads as under:
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> "35. In our view, the Magistrate has a role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him under Section 173(2) CrPC. In the event the Magistrate disagrees with the police

report, he has two choices. He may act on the basis of a protest petition that may be filed, or he may, while disagreeing with the police report, issue process and summon the accused. Thereafter, if on being satisfied that a case had been made out to proceed against the persons named in column 2 of the report, proceed to try the said persons or if he was satisfied that a case had been made out which was triable by the Court of Session, he may commit the case to the Court of Session to proceed further in the matter." Discussion up to this stage answers the powers of the Magistrate by laying down the principle that even if the case is triable by the Court of Session, the function of the Magistrate is not to act merely as a post office and commit the case to the Court of Session, but he is also empowered to take cognizance, issue process and summon the accused and thereafter commit the case to the Court of Session. The position with regard to that would become clearer once we find the answer that was given by the Constitution Bench to questions at paras 7.4 to 7.6 extracted above. We would like to reproduce paras 37 to 41 of the said judgment in this behalf, which are as follows:

"37. Questions 4, 5 and 6 are more or less interlinked. The answer to Question 4 must be in the affirmative, namely, that the Sessions Judge was entitled to issue summons under Section 193 CrPC upon the case being committed to him by the learned Magistrate.

38. Section 193 of the Code speaks of cognizance of offences by the Court of Session and provides as follows:

"193.Cognizance of offences by Courts of Session.—Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of 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." The key words in the section are that "no Court of 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". The above provision entails that a case must, first of all, be committed to the Court of Session by the Magistrate. The second condition is that only after the case had been committed to it, could the Court of Session take cognizance of the offence exercising original jurisdiction. Although, an attempt has been made by Mr Dave to suggest that the cognizance indicated in Section 193 deals not with cognizance of an offence, but of the commitment order passed by the learned Magistrate, we are not inclined to accept such a submission in the clear wordings of Section 193 that the Court of Session may take cognizance of the offences under the said section.

39. This takes us to the next question as to whether under Section 209, the Magistrate was required to take cognizance of the offence before committing the case to the Court of Session. It is well settled that cognizance of an offence can only be taken once. In the event, a Magistrate takes cognizance of the offence and then

> commits the case to the Court of Session, the question of taking fresh cognizance of the offence and, thereafter, proceed to issue summons, is not in accordance with law. If cognizance is to be taken of the offence, it could be taken either by the Magistrate or by the Court of Session. The language of Section 193 of the Code very clearly indicates that once the case is committed to the Court of Session by the learned Magistrate, the Court of Session assumes original jurisdiction and all that goes with the assumption of such jurisdiction.

The provisions of Section 209 will, therefore, have to be understood as the learned Magistrate playing a passive role in committing the case to the Court of Session on finding from the police report that the case was triable by the Court of Session. Nor can there be any question of part cognizance being taken by the Magistrate and part cognizance being taken by the learned Sessions Judge.

40. In that view of the matter, we have no hesitation in agreeing with the views expressed in Kishun Singh case that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of the persons not named as offenders but whose complicity in the case would be evident from the materials available on record. Hence, even without recording evidence, upon committal under Section 209, the Sessions Judge may summon those persons shown in column 2 of the police report to stand trial along with those already named therein.

41. We are also unable to accept Mr Dave's submission that the Sessions Court would have no alternative, but to wait till the stage under Section 319 CrPC was reached, before proceeding against the persons against whom a prima facie case was made out from the materials contained in the case papers sent by the learned Magistrate while committing the case to the Court of Session." It is manifest from the above that the question at para 7.4 was specifically answered in the affirmative holding that the Sessions Judge is entitled to issue summons under Section 193 of the Code 'as a Court of original jurisdiction'. This was notwithstanding the fact that the Magistrate had taken cognizance and only thereafter committed the case to the Court of Session, as is clear from the facts of the said case already noted above. This seems to be in conflict with the other well-settled position in law, viz., cognizance of an offence can only be taken once and in the event a Magistrate takes cognizance of the offence and then commits the case to the Court of Session, the question of taking first cognizance of the offence thereafter would not be in accordance with law. In order to resolve this seeming contradiction, the Court provided the answer by clarifying that the provisions of Section 209 of the Code will have to be understood to mean that the Magistrate plays passive role in committing the case to the Court of Session on finding from the Police report that the case was triable by the Court of Session.

As pointed out above, the Constitution Bench in this judgment agreed with the view taken in Kishun Singh's case. In that judgment, the Court had explained and clarified the legal position in the following manner:

> "16. We have already indicated earlier from the ratio of this Court's decisions in the cases of Raghubans Dubey, (1967) 2 SCR 423, and Hareram, (1978) 4 SCC 58, that

> once the court takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. We have also pointed out the difference in the language of Section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is diluted by the replacement of the words the accused by the words the case. Thus, on a plain reading of Section 193, as it presently stands once the case is committed to the Court of Session by a Magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the Magistrate committing the case under Section 209 to the Court of Session the bar of Section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the court of original jurisdiction to take cognizance of the offence which would include the summoning of the person or persons whose complicity in the commission of the crime can prima facie be gathered from the material available on record...." Yet another case, which reiterated the aforesaid legal position in Kishun Singh's case, is Nisar & Anr. v. State of U.P.[7] Insofar as judgment in Hardeep Singh v. State of Punjab & Ors.[8] case is concerned, that pertains to the powers of the trial court as contained in Section 319 of the Code, which empower the trial court to proceed even against persons not arraigned as accused. The Constitution Bench in the said case primarily considered the issue about the stage at which such a power under Section 319 of the Code is to be exercised and the related issue as to what is the meaning of the word 'evidence' used in Section 319(1) of the Code on the basis of which power to summon those who have not been arraigned as accused earlier can be exercised. Therefore, it is not necessary to discuss that judgment in detail as the answer to the question with which we are concerned is provided by the Constitution Bench in its judgment in Dharam Pal's case itself, which binds us. As per this judgment, since the Court of Session is acting as the Court of original jurisdiction under Section 193 of the Code, after the committal of proceedings to it by the Magistrate, it is empowered to take cognizance and issue summons and it cannot be treated as taking second cognizance of the same offence.

This view further gets strengthened from another judgment of this Court in Ajay Kumar Parmar v. State of Rajasthan[9]. In that case, the Court held that when the offence is exclusively triable by the Sessions Court, the Magistrate must commit the case to the Sessions Court and cannot refuse to take cognizance of the offence and acquit the accused on the basis of material produced before it. It would be useful to reproduce the following discussion in the said judgment:

> "14. In Sanjay Gandhi v. Union of India, (1978) 2 SCC 39, this Court while dealing with the competence of the Magistrate to discharge an accused, in a case like the instant one at hand, held: (SCC pp. 40-41, para 3) "3.... it is not open to the committal

court to launch on a process of satisfying itself that a prima facie case has been made out on the merits. The jurisdiction once vested in him under the earlier Code but has been eliminated now under the present Code. Therefore, to hold that he can go into the merits even for a prima facie satisfaction is to frustrate Parliament's purpose in remoulding Section 207-A (old Code) into its present non-discretionary shape. Expedition was intended by this change and this will be defeated successfully if interpretatively we hold that a dress rehearsal of a trial before the Magistrate is in order. In our view, the narrow inspection hole through which the committing Magistrate has to look at the case limits him merely to ascertain whether the case, as disclosed by the police report, appears to the Magistrate to show an offence triable solely by the Court of Session. Assuming the facts to be correct as stated in the police report, ...the Magistrate has simply to commit for trial before the Court of Session. If, by error, a wrong section of the Penal Code is quoted, he may look into that aspect. ... If made-up facts unsupported by any material are reported by the police and a sessions offence is made to appear, it is perfectly open to the Sessions Court under Section 227 CrPC to discharge the accused. This provision takes care of the alleged grievance of the accused." (emphasis added) Thus, it is evident from the aforesaid judgment that when an offence is cognizable by the Sessions Court, the Magistrate cannot probe into the matter and discharge the accused. It is not permissible for him to do so, even after considering the evidence on record, as he has no jurisdiction to probe or look into the matter at all. His concern should be to see what provisions of the penal statute have been mentioned and in case an offence triable by the Sessions Court has been mentioned, he must commit the case to the Sessions Court and do nothing else.

15. Thus, we are of the considered opinion that the Magistrate had no business to discharge the appellant. In fact, Section 207-A in the old CrPC, empowered the Magistrate to exercise such a power. However, in CrPC, 1973, there is no provision analogous to the said Section 207-A. He was bound under law, to commit the case to the Sessions Court, where such application for discharge would be considered. The order of discharge is therefore, a nullity, being without jurisdiction.

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17. The court should not pass an order of acquittal by resorting to a course of not taking cognizance, where prima facie case is made out by the investigating agency. More so, it is the duty of the court to safeguard the rights and interests of the victim, who does not participate in the discharge proceedings. At the stage of application of Section 227, the court has to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. Thus, appreciation of evidence at this stage, is not permissible. (Vide P. Vijayan v. State of Kerala, (2010) 2 SCC 398, and R.S. Mishra v. State of Orissa, (2011) 2 SCC

689)

> 18. The scheme of the Code, particularly, the provisions of Sections 207 to 209 CrPC, mandate the Magistrate to commit the case to the Court of Session, when the charge-sheet is filed. A conjoint reading of these provisions makes it crystal clear that the committal of a case exclusively triable by the Court of Session, in a case instituted by the police is mandatory. The scheme of the Code simply provides that the Magistrate can determine, whether the facts stated in the report make out an offence triable exclusively, by the Court of Session. Once he reaches the conclusion that the facts alleged in the report, make out an offence triable exclusively by the Court of Session, he must commit the case to the Sessions Court.

19. The Magistrate, in exercise of its power under Section 190 CrPC, can refuse to take cognizance if the material on record warrants so. The Magistrate must, in such a case, be satisfied that the complaint, case diary, statements of the witnesses recorded under Sections 161 and 164 CrPC, if any, do not make out any offence. At this stage, the Magistrate performs a judicial function. However, he cannot appreciate the evidence on record and reach a conclusion as to which evidence is acceptable, or can be relied upon. Thus, at this stage appreciation of evidence is impermissible. The Magistrate is not competent to weigh the evidence and the balance of probability in the case." Keeping in view the aforesaid legal position, we may now discuss the circumstances under which the cognizance was taken by the Session Judge. Here is a case where the Police report which was submitted to the Magistrate, the IO had not included the appellants as accused persons. The complainant had filed application before the learned Magistrate with prayer to take cognizance against the appellants as well. This application was duly considered and rejected by the learned Magistrate. The situation in this case is, thus, not where the investigation report/chargesheet filed under Section 173(8) of the Code implicated the appellants and appellants contended that they are wrongly implicated. On the contrary, the Police itself had mentioned in its final report that case against the appellants had not been made out. This was objected to by the complainant who wanted the Magistrate to summon these appellants as well and for this purpose the application was filed by the complainant under Section 190 of the Code. The appellants had replied to the said application and after hearing the arguments, the application was rejected by the Magistrate. This shows that order of the Magistrate was passed with due application of mind whereby he refused to take cognizance of the alleged offence against the appellants and confined it only to the son of the appellants. This order was not challenged. Normally, in such a case, it cannot be said that the Magistrate had played 'passive role' while committing the case to the Court of Sessions. He had, thus, taken cognizance after due application of mind and playing an "active role" in the process. The position would have been different if the Magistrate had simply forwarded the application of the complainant to the Court of Sessions while committing the case. In this scenario, we are of the opinion that it would be a case where Magistrate had taken the cognizance of the offence. Notwithstanding the same, the Sessions Court on the similar application made by the complainant before it, took cognizance thereupon. Normally, such a course of action would not be permissible.

The next question is as to whether this Court exercise its powers under Article 136 of the Constitution to interdict such an order. We find that the order of the Magistrate refusing to take cognizance against the appellants is revisable. This power of revision can be exercised by the superior Court, which in this case, will be the Court of Sessions itself, either on the revision petition

that can be filed by the aggrieved party or even suo moto by the revisional Court itself. The Court of Sessions was, thus, not powerless to pass an order in his revisionary jurisdiction. Things would have been different had he passed the impugned order taking cognizance of the offence against the appellants, without affording any opportunity to them, since with the order that was passed by the learned Magistrate a valuable right had accrued in favour of these appellants. However, in the instant case, we find that a proper opportunity was given to the appellants herein who had filed reply to the application of the complainant and the Sessions Court had also heard their arguments. For this reason, we are not inclined to interfere with the impugned order and dismiss this appeal.

.....J. (A.K. SIKRI) .....J. (R.K. AGRAWAL) NEW DELHI;

MAY 10, 2016.

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[1] (2014) 3 SCC 306 [2] (1995) 2 SCC 23 [3] (2006) 4 SCC 359 [4] (1998) 7 SCC 149 [5] (1993) 2 SCC 16 [6] Footnote 6 above [7] (1995) 2 SCC 23 [8] (2014) 3 SCC 92 [9] (2012) 12 SCC 406