

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl.M.C. 1021/2009**

% Date of reserve: 20.05.2009
Date of decision: 02.07.2009

MR. SASHI KANT ...PETITIONER
Through: Mr. Vijay Aggarwal, Mr. Vishal
Garg, Mr. Vishal Garg, advs.

Versus

STATE AND ANR. ...RESPONDENTS
Through: Mr. P.S. Singal, Mr. Manoj Pant, Mr.
Ankur, Mr. Pradeep Kumar, advs.
for respondent No.2.

+ **Crl.M.C. 352/2009**

MRS. SUDESH KOHLI ...PETITIONER
Through: Mr. Vijay Aggarwal, Mr. Vishal
Garg, Mr. Vishal Garg, advs.

Versus

STATE AND ANR. ...RESPONDENTS
Through: Mr. Ramesh Gupta, Sr. adv. with
Mr. P.S. Singal, Mr. Ankur, Mr.
Pradeep Kumar, advs. for
respondent No.2.

CORAM:
HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

: **MOOL CHAND GARG, J.**

1. This order shall dispose of the aforesaid two connected petitions filed under Section 482 Code of Criminal Procedure (Cr.P.C.) which arises out of the charge sheet filed in FIR No. 148/2002 registered at P.S. Defence Colony, New Delhi and the order dated 28.05.2008

whereby both the petitioners whose name figured in column No.2 in the charge sheet presented by the SHO concerned have been summoned as accused persons in this case.

2. It may be observed here that once the chargesheet was filed the trial Court issued summons to persons whose name appears in column No.4 as an accused. However, summons were not issued to the present petitioners. It is only after an application was filed on behalf of the complainant/FIR maker, the present petitioners were also summoned as an accused vide order dated 28.05.2009 which order is challenged by way of this petition.

3. It is the contention of the petitioners that summoning the petitioners subsequently is violative of the judgment delivered by the Apex Court in the case of Adalat Prasad Vs. Roop Lal Jindal, 2004 III AD(Crl.) SC 545 and the subsequent judgment delivered in the case of Subramaniam Sethuraman Vs. State of Maharashtra, 2004 Crl.L.J. 4609.

4. It is submitted that once the case was fixed for hearing arguments on the question of framing of the charge, the trial had commenced and therefore the order issuing summons to the present petitioners was an order which was passed after the commencement of the trial and thus, it was not within the competence of the trial Court to have issued such an order. The only opportunity when the petitioners could have been summoned in this case even if there was any material on record would have been after recording of the evidence of the prosecution and, if the Court was satisfied, then only the court could have exercised its powers under Section 319 Cr.P.C. which is not the

case. It is submitted that taking cognizance twice is not permissible in law inasmuch as the stage prescribed under Section 190 Cr.P.C. was already over. Reference has also been made to the judgment of this Court in the case of Anirudh Sen Vs. State (NCT of Delhi) 2006 (3) JCC 2081, and to another judgment delivered in the case of Jamuna Singh Vs. Bhadaai Shah AIR 1964 SCC 1541 where it has been held that there cannot be no second cognizance of the offence. Reliance has also been placed upon the following judgments:-

- 1) S.N. Palantikar & Ors. Vs. State of Bihar & Anr. AIR 2001 SC 2960
- 2) Shri Ram Lal & Ors. Vs. Sh. Parvinder Singh & Ors. 1986 (10) DRJ 188
- 3) Atma Ram Singhal & Ors. Vs. State & Anr. CrI.M.C. 924/2005, decided on 02.05.2007

5. The case has been contested by the respondents. Learned senior counsel appearing for the respondents submitted that the judgments relied upon by the petitioners are not of any worth in view of the judgment delivered by the Supreme Court in the case of M/s. Swil Ltd. Vs. State of Delhi JT 2001 (6) SC 405. According to the respondents, there is no bar in issuing summons to the other persons whether their name appears in the chargesheet or not if the Magistrate is satisfied that their presence is necessary as accused persons in the case, before commencement of the trial at the stage when summons have been issued to the present petitioners. It is submitted that in the present case when the impugned orders were passed a supplementary chargesheet had been filed and in fact arguments on charge were not even heard and therefore it was a stage which was continuing after the cognizance was taken by the Magistrate

of the offence. It is submitted that what is prescribed under Section 190 Cr.P.C. is taking of the cognizance of the offence and not the offender which may be taken once, twice or even thrice and even at the stage when evidence is recorded by exercising powers under Section 319 Cr.P.C. It has been submitted that taking cognizance of the offence does not prohibit the Court to take cognizance of the offender at different stages. It is also submitted that in this case, the question of application of Section 319 Cr.P.C. was not attracted as the trial has not yet commenced. The jurisdiction of the Magistrate to summon the accused persons at the stage when the summons were issued was very much in existence and the order passed in this matter is perfectly justified and legal.

6. It is submitted that this very issue has been dealt with by the Apex Court in M/s. Swil Ltd.'s Case (Supra). It has also been submitted that the judgment delivered in Anirudh Sen's case (Supra) has no application to the facts of the present case.

7. Before advertng to the submissions of the parties, I may refer to some of the essential facts leading to the passing of the order dated 28.05.2008.

8. In the present case a charge sheet was filed by the concerned police officials after investigating the FIR which was registered on the basis of a complaint filed by Mr. T.B. Gupta, the Managing Director of M/s VLS Finance Ltd., C-489, Defence Colony, New Delhi practically on behalf of the said company. The relevant portion of the FIR detaling the allegations against the present petitioners is as under:

In July 1999 one Shri Suresh Chand and Shashi Kant

Arora called a press conference on 5th July, 1999 at the Press Club of India under the banner of an alleged “VLS Finance Investors Forum” showing their address to be MB-17, Inder Prakash Building, 21, Barakhamba Road, New Delhi. To ensure adverse press coverage and to blackmail VLS, these persons circulated false, bogus and defamatory material. On the basis of these false allegations certain government departments were acticiated to enquire into affairs of the complainant company. However the allegations levelled in the said press conference were investigated upon even by the RBI and Delhi Police and they found the same to be bogus and baseless. Around the same time the said Shashi Kant Arora had also called up at the complainant’s office and demanded a sum of Rs. 5 lacs, last he would continue to harm both the conspiracy as well as its officers. (Extract from FIR)

It is alleged Ms. Sudesh Kohli mentioned in cl. No.2 allegedly lodged false and frivolous complaints against VLS Finance wherein she alleged that she was manhaldled on 25.9.03 during the AGM of VLS Finance Ltd. and she accused VLS of misappropriating the money of the small investors. During the course of investigation, it was learnt from the record of Gandhi Co-Ed. Sr. Secondary School, Brahmpuri, Delhi where she is a teacher that she attended the school on 25.9.03 and the certified copy of the attendance reigster shows her arrival as 6.50 hrs, and departure 12.40 hrs. On the contrary, the AGM meting was at 10.30 AM on 25.9.03. Shashi Kant mentioned in col.no.2 has also been alleged of becoming the member of Small Investors Forum and lodging complaints against VLS Finance Ltd. Nothing concrete has come up against him except the alleged complaints and threatening by him to VLS people. (Extract from charge-sheet)

9. In the chargesheet filed by the police after investigating the matter Sh. S.P. Gupta, Sh. Giriraj Singh and one Sh. Pradeep Kumar Dhingra were sent for trial whose names appear in column No.4 of the charge sheet under Section 384/406/409/417/422/465 /468/471/500/120B IPC while the present petitioners whose names appear in column No.2 were not sent for trial inasmuch as in the report qua the petitioners, it was alleged:

Ms. Sudesh Kohli mentioned in col. no.2 allegedly lodged false and frivolous complaints against VLS Finance wherein she alleged that she was manhandled on 25.9.03 during AGM of VLS Finance Ltd. and she accused VLS of misappropriating the money of the Small Investors. During the course of investigation, it was learnt from the record of Gandhi Co-Ed. Sr. Secondary School, Brahmpuri, Delhi where she is a teacher that she attended the school on 25.9.03 and the certified copy of the attendance register shows her arrival as 6:50 hrs.

and departure 12:40 hrs. On the contrary, the AGM meeting was at 10:30 AM on 25.9.03. Shashi Kant mentioned in col. no.2 has also been alleged of becoming the member of Small Investors Forum and lodging complaints against VLS Finance Ltd. Nothing concrete has come up against him except the alleged complaints and threatening by him to VLS people. The name of Vinod Bindal employee of Sunair Hotels Ltd. is mentioned in the FIR as associates of S.P. Gupta. No particular allegation and evidence has come on record against him.

10. It was, thus, prayed that proceedings be initiated against the accused persons named in column No.4. However, as regards the petitioners it was observed that conclusive and cogent evidence has not surfaced against the accused mentioned in column No.2.

11. It appears that on the basis of the aforesaid conclusions drawn by the I.O. summons were not issued to the petitioners at the initial stage. However, after supplementary charge sheet was filed on 20.11.2007 and a request was made on behalf of the complainant relying upon the judgment delivered by the Supreme Court in Swil Ltd.'s Case (Supra), the trial Court considered it appropriate to defer the hearing of arguments on charge and to first decide the issue as to whether the petitioners should have been summoned in this case as accused persons and for that purpose adjourned the matter for hearing arguments on 13.12.2007. It appears that the arguments were not heard on 13.12.2007 as well as on 23.02.2008 when the P.O. was on leave and therefore an application for summoning of the petitioners was heard on 17.04.2008 as well as on 07.05.2008 and the orders were reserved on 13.05.2008 but the relevant order was passed on 28.05.2008. Thus, it is apparent that at the time when the impugned order was passed, the case was not set down for trial as submitted on behalf of the petitioners.

12. At this stage, it would be appropriate to also take note of the impugned dated 28.05.2008 which reads as under:

“Matter is fixed for today for the order on the application of the complainant which is forwarded by Id. APP for summoning the accused who have been placed in column No.2. The chargesheet was filed on 28.1.2006 vide order dt. 13.2.2006, the court took the cognizance of the offence and directed that accused placed in column No.4 be summoned. Subsequently, the present application has been moved. I have considered the submission made by the Id. Counsel for the complainant who assisted Id. APP and I have carefully perused the record. The first question which needs to be answered is that whether at this stage the Court can summon the accused placed in the column no.2? This question is answered in affirmative in view of the judgment by Hon’ble High Court in Jagdish Sahai Mathur & Ors. V. State reported as 1991 Cr.L.J. 1069. The second question is that whether there is sufficient material against the accused placed in the column no.2 to summon them? 3 accused have been placed I column no.2 and their role and allegations against them are mentioend at page no. 7 in the chargesheet. The original letters allegedly written by the accused Vijay Kaushik have not been recovered. In my opinion, there is no sufficient ground to summon the accused Vijay Kaushik who is placed in the column no.2 as far as the other accused namely Mrs. Sudesh Kohli and Sashi Kant are concerned there are suficient material against them at this stage to summon them. The application is allowed in respect of accused Mr. Sudesh Kohli and Sashi Kant for the next date. I.O. is also directed to get the copies prepared for accused persons who have been summoned today. File be put on 16.07.2008. The accused who are already appearing are also directed to appear on next date.”

13. I have already extracted the observation made in the charge sheet about the role of the present petitioners in this case. At this juncture, it would also be relevant to take note of some of the letters which have come on record explaining the role played by the present petitioners which has led to initiation of various inquiries against the petitioners which are available at page 157-160 of the LCR which is a letter written by the petitioner Shashi Kant to Commissioner of Police as well as the letter written by him to Securities and Exchange Board of India on 18.04.2001 available at page 164 of the LCR. As far as Sudesh Kohli is concerned, her complaint made against the

complainant company M/s V.L.S. Finance Ltd. is available at page 168 to 170. Perusal of these documents goes to show that serious allegations were made against M/s V.L.S. Finance Ltd. alleging playing of fraud on the investors which included the petitioners also. There is no necessity for this Court to detail the contents of those letters.

14. In these circumstances, now it is to be decided as to whether the order passed by the Metropolitan Magistrate concerned can be said to be a review order as contended on behalf of the petitioners as the first argument to assail the impugned order. Similarly it is also to be seen as to what are the powers with the Magistrate under Section 190 of the Cr.P.C. and at what stage the summoning orders in the nature of the order issued on 28.05.2008 against the petitioners could have been passed by the Magistrate concerned. I would also try to analyse as to whether the judgment of *Anirudh Sen (Supra)* relied upon by the petitioners prohibits the trial Court in passing the order dated 28.05.2008.

15. First of all, I may refer to the definition of “inquiry” as appearing in Section 2(g) of the Cr.P.C. where inquiry has been defined. The said provision reads as under:

2. **Definitions:-** In this code, unless the context otherwise requires,-
 - (a) to (f) xxxxxx
 - (g) “inquiry” means every inquiry, other than a trial, conducted under this Code by a Magistrate or Court.

16. The order sheets placed on record goes to show that till 20.11.2007 even the process regarding appearance of the other accused persons who were summoned earlier was not complete. In

this regard, the order dated 20.11.2007 needs a reproduction:

Present: Ld. APP for the State, Ld. Counsel for the complainant, IO Sukhdev Singh, P/S HC Jawahar Lal.

Matter is listed today for 2.30 PM however, file taken up as the P/S is present. IO wants to file supplementary chargesheet (GEQD result).

Statement of the P/S Jawahar Lal recorded. Accused No.3 Giriraj Singh has failed to appear before the Court despite due proclamation. He is declared proclaimed offender. File now be put up for 2.30 PM for appearance of the other accused persons and supply of the copies of supplementary chargesheet to them

At 2.30 PM

Present: Sh. Ramesh Gupta, Sh. P.S. Singhal, & Sh. Mohit Mathur, Ld. Counsel for the complainant, Sh. R. Menon Ld. Counsel for accused no. 1 & 4, accused no.2 is exempted through Sh. S.P. Kaushal Ld. Counsel is not present. Accused no.3 is P.O.

Copy of the supplementary chargesheet be sufficient to Ld. Counsel for the accused. Ld. Counsel for the complainant submits that the accused cited in column 2 should also be summoned. Ld. Counsel for the complainant has cited a judgment by Hon'ble Supreme Court in M/s SWIL Ltd. Vs. State of Delhi & Anr., 2001 11 AD (Cr.) SC. 883. The complainant may file written submission in this regard. Accused no.1 & 4 exempted on an application for today. Before proceedings with arguments on charge for the accused cited in column no.4 it would be appropriate to decide the prayer of complainant for summoning accused mentioned in column no.2. Put up for submission on this point on 13.12.2007.

17. The aforesaid order clearly goes to show that the question of hearing arguments on charge was deferred because after the supplementary charge sheet was filed and arguments could have been heard on the question of framing of charge a request came from the side of the complainant relying upon the judgment delivered in the case of *Swil Ltd. (Supra)* that arguments be heard on the question of issuing summons to the petitioners and for that purpose the matter was taken up on various days and finally the order dated 28.05.2008 has been passed. In these circumstances, it does not lie in the mouth of the petitioners to say that the matter was listed for hearing

arguments on charge.

18. Now I may also refer to the judgment delivered by the Apex Court in the case of Swil Ltd. (supra) where the precise issue as to what are the powers of the Magistrate concerned at the stage of the 190 Cr.P.C. has been discussed.

6. In our view, from the facts stated above it is clear that at the stage of taking cognizance of the offence, provisions of S. 190, Cr.P.C. would be applicable. Section 190 inter alia provides that 'the Magistrate may take cognizance of any offence upon a Police report of such facts which constitute an offence'. As per this provision. Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under S. 204, Cr.P.C. is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charge-sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the Police Officer and other documents tendered along with charge-sheet. Further, upon receipt of Police report under S. 173(2), Cr.P.C., the Magistrate is entitled to take cognizance of an offence under S. 190(1)(b) even if the Police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the Investigating Officer and independently applying his mind to the facts merging from the investigation by taking into account the statement of the witnesses examined by the Police. At this stage, there is no question of application of S. 319, Cr.P.C. Similar contention was negatived by this Court in *Raghubans Dubey v. State of Bihar* (1967) 2 SCR 423 : (AIR 1967 SC 1167 : 1967 Cri LJ 1081) by holding thus (para 9 of AIR, Cri LJ) :

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the Police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

7. Further, in the present case there is no question of referring to the provisions of S. 319, Cr.P.C. That provision would come into operation in the course of any

inquiry into or trial of an offence. In the present case, neither the Magistrate was holding inquiry as contemplated under S. 2(g), Cr.P.C. nor the trial had started. He was exercising his jurisdiction under S. 190 of taking cognizance of an offence and issuing process. There is no bar under S. 190, Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge-sheet.

8. In the result, the appeal is allowed, the impugned order passed by the High Court is set aside.

19. This judgment has been taken note of by the learned Single Judge of this Court in its judgment delivered in the case of Anirudh Sen (Supra) much relied upon by the petitioners. While referring to the judgment delivered in M/s. Swil Ltd. (supra), learned Single Judge has been pleased to observe as under:

The clear implication of the circumstances is that the Metropolitan Magistrate had taken a conscious decision not to issue summons to the petitioner. This decision continued right from the date on which the order taking cognizance was passed up to the date on which the impugned order was passed, that is, for a period of almost 4 1/2 years. Clearly, therefore, the impugned order cannot but be regarded as a review of the earlier orders passed by the Metropolitan Magistrate. It is true that there is no explicit statement contained in the order dated 21.2.2002 that the Metropolitan Magistrate was not issuing summons against the petitioner in as much as he did not regard him as an accused, but by implication it is abundantly clear that the Metropolitan Magistrate consciously did not issue summons against the petitioner.

It is also not a case in which would be covered by the ratio of the decision in SWIL Ltd (supra), in as much as this is not a case where the Metropolitan Magistrate, after taking cognizance, was contemplating the issuance of process/summons against the accused on different dates and different stages. The facts in the present case reveal that, after taking cognizance, the Metropolitan Magistrate took a conscious decision to issue summons only against the accused shown in column number four of the charge-sheet and not against the persons shown in column number two. Several dates and, in fact, four years passed without any change in this position. therefore, the present case is not one where it could be said that the Magistrate, after having issued summons against some of the accused, was contemplating the issuance of summons against others on the next date or in the near future. This case is entirely different from that to which the ratio in SWIL Ltd (supra) would apply.

20. However, the aforesaid observation made by the learned Single Judge in the case has no application to the facts of this case inasmuch as here the order dated 28.05.2008 has been passed soon after the supplementary charge sheet was filed on 20.11.2007 and not after a period of four and half years as was the case in the case of Anirudh Sen. At the stage when the summoning order has been passed the Court was yet to hear arguments on the question to decide as to whether charges are to be framed against the accused persons who had been summoned earlier or not. Once the matter was brought to the notice of the Court that there was material available even against the present petitioners on behalf of the complainant and the court was also satisfied that the petitioners were also required to be summoned, the impugned order was passed. Thus, the judgment of Anirudh Sen is distinguishable on facts in the present case.

21. At this stage I may again refer to the impugned order of the Metropolitan Magistrate concerned in which the trial Court has also referred to a Division Bench judgment of this Court delivered in the case of Jagdish Sahai Mathur & Ors. Vs. State 1991 Crl.L.J. 1069 where the scope of Section 190 Cr.P.C. has been discussed in the following words:

6. The language of S. 190 of the Code is loaded with significance. It talks of cognizance and that too of the 'offence' and not the offender'. The Magistrate first takes cognizance of the offence and thereafter only proceeds to find out who the offenders are. The steps though appear to be intertwined are distinct. The Supreme Court makes it clear in *Raghubans Dubey v. State of Bihar* (AIR 1967 SC 1167) : 1967 Cri LJ 1081. Sikri J. speaking for the Bench observed at page SC 1169, AIR 1967 :

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders, once he takes cognizance of an offence it is his duty to find out who the offenders really are and

once he comes to the conclusion that apart from the persons sent up by the Police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

22. The Judgment delivered in the case of *Jagdish Sahai Mathur (supra)* was not even brought to the notice of the learned Single Judge while delivering the judgment in *Anirudh Sen's Case (Supra)*. Similarly, judgments delivered in the case of *Jitender Singh @ Moti Vs. State (Govt. of NCT of Delhi) 2003 I AD (Crl.) DHC 151* and the judgment delivered in the case of *Murari Lal Goel Vs. State of NCT of Delhi 2003 (Crl.L.J.) 4044* where also similar view has been taken were also not brought to the notice of the learned Single Judge.

23. Moreover, the judgment in *Anirudh Sen's Case (supra)* was passed at the stage of consideration of charge against the accused which is not the case in hand and in any event in view of the clear cut observation made in the case of *M/s Swil Ltd. (Supra)* by the Apex Court and a Division Bench judgment of this Court in Jagdish Sahai Mathur's case, this Court is not found to follow the views taken by a learned Single Judge in *Anirudh Sen's Case* as the said judgment is distinguishable on many counts as aforesaid and cannot be considered as binding precedent.

24. Since it is not an order passed under Section 319 Cr.P.C. there is no need to discuss the provisions of Section 319 Cr.P.C. At this stage it may also be observed that distinction between the two provisions, namely, Section 190 Cr.P.C. and 319 Cr.P.C. has already been explained in the case of *M/s Swil Ltd (Supra)*

25. In view of the aforesaid, it becomes crystal clear that in view of

the judgment delivered in the case of *M/s Swil Ltd. (supra)*, the submissions made on behalf of the petitioner have no legs to stand. On facts also it is apparently clear that on 20.11.2007, a supplementary charge-sheet was filed and on the same day prayer has been made by the complainant for summoning the other accused persons mentioned in the column no.2 and Trial Court decided to proceed with an application of issue of process rather than to proceed with arguments on charge.

26. It is well settled proposition that once the Court takes cognizance of the offence it becomes the duty of the Court to find out that who are the real offenders and if the Court comes to the conclusions that besides the persons put up for the trial by the investigating agency some other persons are also involved in the commission of the crime. It becomes the duty of the Court to summon them also, to stand for trial along with those already arrayed, since summoning them would only be a part of process of taking cognizance. *Anirudh Sen (supra)* does not differ from above proposition but facts of the case shows that in that case Trial Court had crossed the stage of cognizance and was at the charge stage and therefore it was not appropriate for the Trial Court to revert back to the stage of issue of process but in the present case from the order dated 20.11.2007 it is crystal clear that Court is still at the stage of taking cognizance of the offenders and proceeded well within the powers envisaged under Section 190 (1)(b) Cr.P.C.

27. There can hardly be any doubt that Magistrate has power under Section 190(1)(b) Cr.P.C. to take cognizance against one of the accused persons even if he is put in column no.2 by the investigation

agencies because Magistrate takes cognizance of the offence and not of the offender. Magistrate may exercise his power and issue the process to such person under Section 204 Cr.P.C. Section 319 Cr.P.C. has no application in the above mentioned situations. Both Sections 319 and 190 of the Cr.P.C. operates on entirely different legal situations. Section 319 Cr.P.C. deals with after cognizance stage and on the other hand Section 190 talks about pre-trial stage. After the report was filed in the Court of Learned MM, New Delhi, the Magistrate could take cognizance of the offence in terms of the requirement of Section 190 Cr.P.C. This Section expressly lay down that the Magistrate may take cognizance of any offence upon a police report if the facts mentioned in the FIR constitute the offence and also fully empowered to issue the process against those persons. It is apparently clear that Magistrate has not summoned the petitioners by exercising his powers under Section 319 Cr.P.C. rather while passing the order dated 28.05.2008, Magistrate had taken the recourse envisaged under Section 190 of the Cr.P.C.

28. It would also be appropriate to take note of few more precedents operating on this issue.

a) In the case of Rajinder Prasad Vs. Bashir and Ors. AIR 2001 SC 3524:

11. Under this section, a Magistrate has jurisdiction to take cognizance of offences against such persons also who have not been arrested by the police as accused persons, if it appears from the evidence collected by the police that they were prima facie guilty of offence alleged to have been committed. Section [209](#) of the Code prescribes that 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 commit, after compliance with the provisions of Section [207](#) or Section [209](#), as the case may be, the case to the court of Sessions and subject to the

provisions of the Code, pass appropriate orders. This Section refers back to Section [190](#), as is evident from the words "instituted on a police report" used in Section [190\(1\)\(b\)](#) of the Code. While dealing with the scope of Section [190](#) this Court in Raghubans Dubey v. State of Bihar [1967 (2) SCR 43] held that the cognizance taken by the Magistrate was of the offence and not of the offenders. Having taken cognizance of the offence, a Magistrate can find out who the real offenders were and if he comes to the conclusion that apart from the persons sent by the police some other persons were also involved, it is his duty to proceed against those persons as well.

12. Approving the judgment in Raghubans Dubey's case (supra) this Court in M/s. SWIL Ltd. v. State of Delhi & Anr. [JT 2001 (6) SC 405] held:

"...in the present case there is no question of referring to the provisions of Section [319](#) Cr. P.C. That provision would come into operation in the course of any inquiry into or trial of an offence. In the present case, neither the Magistrate as holding inquiry as contemplated under Section [2\(g\)](#) Cr. P.C. nor the trial had started. He was exercising his jurisdiction under Section [190](#) of taking cognizance of an offence and issuing process. There is no bar under Section [190](#) Cr. P.C. that once the process is issued against some accused on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge-sheet."

13. The present case is squarely covered by the aforesaid judgments which renders the order impugned not sustainable under law.

b) In the case of Hareram Satpathy Vs. Tikaram Agarwala and

Ors. 1978 Crl. L.J. 1687 (1) SC

4. The first point is no longer res integra. It is squarely covered by the decision of this Court in Raghubans Dubey v. State of Bihar, (1967) 2 SCR 423: (AIR 1967 SC 1167) where it was held as follows (at p. 1169 of AIR):

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons, The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence."

5. In Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi, (1976) Supp SCR 123: (AIR 1976 SC 1947) this Court while laying down the categories of the cases in which an order of a Magistrate issuing process against the accused can be quashed observed (at p. 1950 of AIR) :

"It is well settled by a long catena of decisions of this Court that at the stage of issuing process the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the

accused. It is not the province of the Magistrate to enter into a detailed discussion of the merits or demerits of the case nor can the High Court go into this matter in its revisional jurisdiction which is a very limited one."

6. To the same effect is the decision of this Court in *Chandra Deo Singh v. Prokash Chandra Bose*, (1964) 1 SCR 639, at p. 648: (AIR 1963 SC 1430 at p. 1433) where after a full discussion of the matter it was held that at the time of taking a decision whether a process should issue against the accused or not what the Magistrate has to see is whether there is evidence in support of the allegations of the complainant so as to justify the issue of process and commencement of proceedings against the accused, and not whether the evidence is sufficient to warrant his conviction.

7. From the foregoing it is crystal clear that under S.190 of the Code of Criminal Procedure the Magistrate takes cognizance of an offence made out in the police report or in the complaint and there is nothing like taking cognizance of the offenders at that stage. As to who actually the offenders involved in the case might have been has to be decided by the Magistrate after taking cognizance of the offence.

9. The first point is accordingly decided in the affirmative, The second point does not present any difficulty. It is well settled that once the Magistrate has after satisfying himself *prima facie* that there is sufficient material for proceeding against the accused issued process against him, the High Court cannot go into the matter in exercise of its revisional jurisdiction which is very limited. The following observations made in *Smt. Nagawwa v. Veeranna Shivalingappa Konjalgi* (AIR 1976 SC 1947) (*supra*) are apposite in this connection:

"It is true that in coming to a decision as to whether a process would be issued the Magistrate can take into consideration inherent improbabilities appearing on the face of the complaint or in the evidence led by the complainant in support of the allegations but there appears to be a very thin line of demarcation between a probability of conviction of the accused and establishment of a *prima facie* case against him. The Magistrate has been given an undoubted discretion in the matter and the discretion has to be judicially exercised by him. Once the Magistrate has exercised his discretion it is not for the High Court or even this Court to substitute its own discretion for that of the Magistrate or to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. These considerations, in our opinion, are totally foreign to the scope and ambit of an inquiry under S.202 of the Code of Criminal Procedure."

10. Now as the Magistrate was restricted to finding out whether there was a *prima facie* case or not for proceeding against the accused and could not enter into detailed discussion of the merits or demerits of the case and the scope of the revisional jurisdiction was very limited the High Court could not in our opinion launch on a detailed and meticulous examination of the case on merits. As the High Court has clearly exceeded its jurisdiction in setting aside the order of the Sub-Divisional Magistrate, we cannot do otherwise than to allow the appeal. In the result the appeal succeeds and the judgment and order of the High Court is set aside.

29. In view of the aforesaid, the arguments addressed on behalf of the petitioners that it was a case of review of the order passed earlier is not tenable. The order passed by the Magistrate is in accordance with law. It is supported by the judgment of the Apex Court as referred to above. As far as the question of framing of charges against the petitioners is concerned, it would be the prerogative of the Magistrate to frame charges after hearing the parties including the petitioners. At that stage nothing stated herein would preclude the petitioners to make the submissions that no offence is made out as alleged by the learned counsel for the petitioner and the trial Court will take into consideration all the submissions as may be addressed uninfluenced by the order passed by this Court while disposing of these two petitions.

30. With these observations, both the petitions filed by the petitioners are dismissed.

31. The parties shall now appear before the trial Court on 17.07.2009.

32. A copy of this order along with the LCR be sent forthwith to the trial Court concerned.

MOOL CHAND GARG, J.

JULY 02, 2009
anb/ag