

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Misc. Petition No.1058 of 2017

Order reserved on: 6-5-2019

Order delivered on: 20-5-2019

1. Nimish Agarwal, S/o Shri Sunil Agarwal, aged about 38 years,
2. Sunil Agarwal, S/o Late Shri Laxminarayan Agarwal, aged about 67 years
3. Smt. Rekha Agarwal, W/o Sunil Agarwal, aged about 64 years,

All R/o 1/45, Nehru Nagar (East), Bhilai, P.S. Supela, District Durg (C.G.)

---- Petitioners

Versus

State of Chhattisgarh, Through Station House Officer, Police Station Supela, Bhilai, District Durg (C.G.)

--- Respondent

For Petitioners: Mr. Anil Khare, Senior Advocate with Mr. Jasneet S. Hora and Mr. Akhilesh Mishra, Advocates.

For Respondent / State: -

Mr. Ravi Kumar Bhagat, Govt. Advocate.

For Objector: Mr. Surendra Singh, Senior Advocate with Mr. Jaydeep Singh Yadav, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Order

1. Can a committing Magistrate during committal enquiry under Section 209 of the CrPC has power and jurisdiction to entertain an application under Section 91 of the CrPC and direct for production of documents in exercise of jurisdiction under that provision, is the short question involved in this petition, which arises for consideration in the following factual backdrop: -
2. The jurisdictional police charge-sheeted the petitioners herein in

Crime No.415/2016 for offences punishable under Sections 498A, 377, 376 & 323 read with Section 34 of the IPC and Sections 3 & 4 of the Dowry Prohibition Act on 16-3-2017 before the Chief Judicial Magistrate, Durg and on that day, the learned Magistrate took cognizance of the aforesaid offences under Section 190(1) of the CrPC. Since the offence under Section 376 of the IPC was exclusively triable by the Court of Session, the criminal proceeding was pending before the learned Chief Judicial Magistrate awaiting committal of said case to the Court of Session. During the pendency of the said proceeding on 18-4-2017, the petitioners herein moved an application under Section 91 of the CrPC for production of number of documents stating inter alia that the production of documents is necessary and desirable as those documents incorporated in the application were not produced deliberately by the prosecution.

3. The learned Judicial Magistrate by the impugned order held that out of the offences charged to the petitioners, offence under Section 376 of the IPC is exclusively triable by the Court of Session and in consequence thereof, fixed the case for hearing on the question of committal of the case to the Court of Session and simultaneously, decided the application under Section 91 of the CrPC holding that the documents sought for relate to defence of the accused persons and therefore necessity and desirability of those documents cannot be entertained at the present stage proceeding i.e. the committal proceeding, as also for the reason that one of the offences charged is triable by the Court of Session and the submissions raised with

regard to defence seeking production of documents could be considered at the time of commencement of defence or during proceeding of trial to be considered upon the court trying such offences relying upon the judgment of the Supreme Court in the matter of State of Orissa v. Debendra Nath Padhi¹ and accordingly rejected that application holding it to be not maintainable. Feeling aggrieved and questioning that order rejecting the application under Section 91 of the CrPC, the instant petition under Section 482 of the CrPC has been filed.

4. Mr. Anil Khare, learned Senior Counsel appearing on behalf of the petitioners, would submit that the documents sought for by the petitioners are admitted documents and are of sterling quality and of unimpeachable character and therefore ought to have been directed to be produced by the learned Magistrate in light of the decision rendered by the Supreme Court in the matter of Dharam Pal and others v. State of Haryana and another² in which it has been held that the Magistrate has vital role to play while committing the case to the Court of Session upon taking cognizance on the police report submitted before him and can even proceed to try the person mentioned in column 2 of the charge-sheet. He would further submit that the words “any Court” used in Section 91(1) of the CrPC would include the committing court. He would further rely upon the judgment of the Supreme Court in the matter of Nitya Dharmananda alias K. Lenin and another v. Gopal Sheelum Reddy also known as Nithya Bhaktananda and another³.

1 (2005) 1 SCC 568

2 (2014) 3 SCC 306

3 (2018) 2 SCC 93

5. Mr. Ravi Kumar Bhagat, learned State counsel appearing on behalf of the State/respondent, would support the impugned order and submit that the learned Judicial Magistrate is absolutely justified in rejecting the application as not maintainable, as the trial has not yet commenced and therefore the application under Section 91 of the CrPC was rightly rejected by the learned Magistrate.
6. Mr. Surendra Singh, learned Senior Counsel appearing for the complainant, would submit that the stage of committal is neither an inquiry nor a trial as held by the Constitution Bench of the Supreme Court in the matter of Hardeep Singh v. State of Punjab and others⁴. He would further submit that the duty of the committing court is only to see, if the offence is triable by the Court of Session, he must commit the case to the Court of Session and he should not involve himself with other job, and relied upon the decision of the Supreme Court in the matter of Ajay Kumar Parmar v. State of Rajasthan⁵.
7. I have heard learned counsel for the parties, considered the rival submissions made herein and went through the record with utmost circumspection.
8. Section 207 of the CrPC provides for supply to the accused of copy of police report and other documents and in fact, only upon complying the requirement of Section 207, a Magistrate can commit a case to the Court of Session under Section 209. Section 208 is similar provision applicable to sessions cases instituted upon private complaints. Such compliance is condition precedent for

4 (2014) 3 SCC 92

5 (2012) 12 SCC 406

commitment of the cases to the Court of Session. If the copies of the documents mentioned in Section 207 are not supplied to the accused either in full or in part, he cannot effectively defend himself before the trial Court, namely, Session Court.

9. Now, at this stage, it would be expedient to notice Section 209 of the CrPC which provides for commitment of case to Court of Session when offence is triable exclusively by it and which provides as under: -

“209. Commitment of case to Court of Session when offence is triable exclusively by it.—When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate that the offence is triable exclusively by the Court of Session, he shall—

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

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

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

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

10. The object of Section 209 of the CrPC is to expedite the trial of sessions case. It provides that if it appears to the Magistrate, when in a case instituted on a police report or otherwise, that the offence is triable exclusively by the Court of Session, he has to commit the case to the Court of Session. (See Rizwan v. Waqar Ahmad and

others^{6.)}

11. In the matter of **Sanjay Gandhi v. Union of India and others**⁷,

Their Lordships while delineating the scope of enquiry under Section 209 of the present Code have held that under the new Code in cases where offence is triable exclusively by the Court of Session, the Committing Magistrate has no power to discharge the accused, nor has he power to take oral evidence save where a specific provision like Section 306 of the CrPC enjoins and observed as under: -

“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 the Parliament's purpose in remoulding Section 207A (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 Cr.P.C. to discharge the accused. This provision takes care of the alleged grievance of the accused.”

12. In the matter of **Superintendent and Remembrancer of Legal Affairs, West Bengal v. Ashutosh Ghosh and others**⁸, the

6 1993 Supp (2) SCC 121

7 (1978) 2 SCC 39

8 (1979) 4 SCC 381

Supreme Court considering the provisions contained in the new Code has held that under the Code of Criminal Procedure, 1973 (new Code), the committing Court need not take any evidence but has only to see whether the case is exclusively triable by the Court of Session and has to commit the case to the Court of Session. It was observed in paragraph 3 of the report as under: -

“3. In view of the clear language enshrined in this proviso, it is obvious that the new Code will now apply to the proceedings before the committing Magistrate. Under the new Criminal Procedure Code the committing Court need not take any evidence but has only to see whether the case is exclusively triable by the Court of Session which undoubtedly it is, in view of the allegations made against the respondents. The Magistrate, therefore, will now commit the case to the Court of Session. It will, however, be open to the respondents to urge at the time of the framing of the charge before the Sessions Judge any legal plea that is open to them which will be duly considered by the Sessions Court. We would also like to make it clear that the Sessions Judge shall decide the case of the accused untrammelled and uninfluenced by any observations made by the High Court in its judgment.”

13. The principle of law laid down in Sanjay Gandhi (supra) was followed with approval in Ajay Kumar Parmar (supra) in which their Lordships while following the view taken in Sanjay Gandhi (supra) have held that the committing Magistrate cannot probe into the matter (when the offence is exclusively triable by the Court of Session) and discharged the accused. It was further held that 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 Court of Session has been mentioned, he must

commit the case to the Court of Session and do nothing else.

14. In Ajay Kumar Parmar (supra), Their Lordships while delineating the scope of the provisions contained in Sections 207 to 209 of the CrPC and holding the provision to be mandatory held as under: -

“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 Sessions, 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.”

15. The principle of law laid down in Sanjay Gandhi (supra) and Ajay Kumar Parmar (supra) was followed recently in the matter of Balveer Singh and another v. State of Rajasthan and another⁹ (see para 23).

16. In Hardeep Singh (supra), the Constitution Bench of the Supreme Court after considering its earlier decisions has clearly held that the stage of committal is neither an enquiry nor a trial with reference to Section 319 of the CrPC and held as under: -

“23. In *Yeluchuri Venkatachennaya, In re*¹⁰, the Court held that an inquiry is a stage before the committal to a higher court. In fact, from a careful reading of the judgments under reference i.e. *Ranjit Singh*¹¹ and *Kishun Singh*¹², it emerges that there is no dispute even in these two cases that the stage of committal is neither an inquiry nor a trial, for in both the cases, the real dispute was whether Section 193 CrPC can be invoked at the

9 (2016) 6 SCC 680

10 (1920) 11 LW 435 : ILR (1920) 43 Mad 511

11 *Ranjit Singh v. State of Punjab*, (1998) 7 SCC 149 : 1998 SCC (Cri) 1554

12 *Kishun Singh v. State of Bihar*, (1993) 2 SCC 16 : 1993 SCC (Cri) 470

time of committal to summon an accused to face trial who is not already an accused. It can safely be said that both the cases are in harmony as to the said stage neither being a stage of inquiry nor a trial.”

17. Now, the question is, whether in view of such a limited power conferred to the committing Magistrate in a committal enquiry, application under Section 91 of the CrPC for production of documents can be entertained competently by that Court?

18. Section 91 of the CrPC provides as under: -

“91. Summons to produce document or other thing.

—(1) Whenever any Court or any officer in charge of a police station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed—

(a) to affect, sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), or the Bankers' Books Evidence Act, 1891 (13 of 1891) or

(b) to apply to a letter, postcard, telegram or other document or any parcel or thing in the custody of the postal or telegraph authority.”

19. A careful perusal of the aforesaid provision would show that the power to issue a summons for the production of a document or a thing is to be exercised whenever the Court considers that its production is necessary or desirable for the purposes of investigation, inquiry, trial or other proceeding. In other words, the

power is available to the Court at every stage of proceedings contemplated under the Code. It has to be noticed that this power is available not only to the Court but also to any officer-in-charge of a police station and the only condition for the exercise of the power is that the production of the document or the thing should be necessary or desirable for purposes of the proceedings and the only restriction is that contained under sub-section (3) which provides that the provisions of the Section shall not affect Sections 123 and 124 of the Indian Evidence Act or apply to articles in the custody of the Postal or Telegraph authorities.

20. The Supreme Court has on occasion to consider the scope and ambit of Section 91 of the CrPC in a three-Bench judgment in **Debendra Nath Padhi's** case (supra) in which Their Lordships of the Supreme Court have held that Section 91 of the CrPC does not confer right on the accused to seek production of document to prove his defence at the stage of framing the charge and observed as under: -

“25. Any document or other thing envisaged under the aforesaid provision can be ordered to be produced on finding that the same is “necessary or desirable for the purpose of investigation, inquiry, trial or other proceedings under the Code”. The first and foremost requirement of the section is about the document being necessary or desirable. The necessity or desirability would have to be seen with reference to the stage when a prayer is made for the production. If any document is necessary or desirable for the defence of the accused, the question of invoking Section 91 at the initial stage of framing of a charge would not arise since defence of the accused is not relevant at that stage. When the section refers to investigation, inquiry, trial or other proceedings, it is to be borne in mind that under the section a police officer may move the Court for summoning and production of a document as may be necessary at any of

the stages mentioned in the section. Insofar as the accused is concerned, his entitlement to seek order under Section 91 would ordinarily not come till the stage of defence. When the section talks of the document being necessary and desirable, it is implicit that necessity and desirability is to be examined considering the stage when such a prayer for summoning and production is made and the party who makes it, whether police or accused. If under Section 227 what is necessary and relevant is only the record produced in terms of Section 173 of the Code, the accused cannot at that stage invoke Section 91 to seek production of any document to show his innocence. Under Section 91 summons for production of document can be issued by Court and under a written order an officer in charge of a police station can also direct production thereof. Section 91 does not confer any right on the accused to produce document in his possession to prove his defence. Section 91 presupposes that when the document is not produced process may be initiated to compel production thereof.”

21. Their Lordships further considered the matter with reference to its earlier decision in the matter of Om Parkash Sharma v. CBI¹³ and held as under: -

“28. We are of the view that jurisdiction under Section 91 of the Code when invoked by accused, the necessity and desirability would have to be seen by the court in the context of the purpose — investigation, inquiry, trial or other proceedings under the Code. It would also have to be borne in mind that law does not permit a roving or fishing inquiry.”

22. The principle of law laid down in Debendra Nath Padhi's case (supra) was followed with approval by their Lordships in the matter of V.L.S. Finance Limited v. S.P. Gupta and another¹⁴. Their Lordships agreed with the proposition of law laid down in Debendra Nath Padhi's case (supra). (See paragraph 49 of that report.)

23. Very recently, in Nitya Dharmananda alias K. Lenin (supra),

13 (2000) 5 SCC 679

14 (2016) 3 SCC 736

Their Lordships followed the principle of law laid down in **Debendra Nath Padhi's** case (supra) and held that defence has no right to invoke Section 91 of the CrPC de hors the satisfaction of the Court, at the stage of charge and observed as under: -

“8. Thus, it is clear that while ordinarily the Court has to proceed on the basis of material produced with the charge-sheet for dealing with the issue of charge but if the court is satisfied that there is material of sterling quality which has been withheld by the investigator/prosecutor, the court is not debarred from summoning or relying upon the same even if such document is not a part of the charge-sheet. It does not mean that the defence has a right to invoke Section 91 CrPC de hors the satisfaction of the court, at the stage of charge.”

24. Mr. Khare, learned Senior Counsel, has placed reliance upon the judgment of the Supreme Court (Constitution Bench) in **Dharam Pal** (supra) in his written note submitted before this Court. He referred to questions No.7.1 and 7.2 formulated by their Lordships for answer which state as under: -

“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?

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?”

25. Their Lordships answered the questions so formulated in paragraph 35 of the report which states as under: -

“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.”

26. In **Dharam Pal** (supra), their Lordships had delineated the power of committing Magistrate when he disagrees with the police report and indicated the course open to that Magistrate who disagreed with the report and options available to him at that stage, as such, that is clearly distinguishable from the present case, as this Court in the instant petition is concerned with the maintainability of application under Section 91 of the CrPC at the stage of committal enquiry.

27. Thus, from the aforesaid enunciation of law, it is quite vivid that the committal inquiry at the stage of committal is not an inquiry or trial within the meaning of Section 91(1) of the CrPC as held in **Hardeep Singh** (supra) and it is also not the other proceeding for the purpose of Section 91 and therefore, if the case put-forth before the committing Magistrate is exclusively triable by the Court of Sessions, the said committing Magistrate has no option except to pass an order committing the case to the Court of Session to be tried after complying with the provisions contained in Sections 207 & 208 of the CrPC and at that stage, he has no power and jurisdiction to entertain the application under Section 91 of the CrPC for production of document, as the Legislature has consciously not conferred any such jurisdiction to the committing Magistrate, as such, that responsibility is conferred to the Sessions

Court trying the offences upon committal. In Debendra Nath Padhi's case (supra), the Supreme Court has clearly held that entitlement of the accused to invoke Section 91 of the CrPC would not ordinarily come till the stage of defence and no such right is conferred by Section 91 to the accused to seek production of document even by the prosecution. Thus, in my considered opinion, the committing Magistrate has no power and jurisdiction to entertain any application competently for production of document from the prosecution at that stage, as committal inquiry or proceeding is neither an inquiry nor a trial as held by the Constitution Bench of the Supreme Court in Hardeep Singh (supra), nor the accused is entitled at the stage of committal inquiry for production of document under Section 91 of the CrPC as a matter of right and therefore the committing Court, in my opinion, is absolutely justified in rejecting the application filed by the petitioner during the committal proceeding. I do not find any perversity or illegality in the said finding.

28. As a fallout and consequence of the aforesaid discussion, I do not find any merit in the instant petition under Section 482 of the CrPC, it deserves to be and is accordingly dismissed. However, rejection by the trial Court which is being upheld by this Court will not prevent or bar the petitioner to move an appropriate application before the appropriate Court at appropriate stage.

Sd/-
(Sanjay K. Agrawal)
Judge

HIGH COURT OF CHHATTISGARH, BILASPUR

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Nimish Agarwal and others

Versus

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Head Note

Committal Magistrate during committal enquiry under Section 209 of the CrPC has no jurisdiction to entertain application under Section 91 of the CrPC.

दंड प्रक्रिया संहिता की धारा 209 के अंतर्गत उपार्षण जाँच के दौरान, उपार्षण मैजिस्ट्रेट को दंड प्रक्रिया संहिता की धारा 91 के अंतर्गत आवेदन पत्र ग्रहण करने की अधिकारिता नहीं है ।