

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 2849 of 2019

Nirmala Devi Goenka

Vs

The State of West Bengal & Anr.

For the Petitioner : Mr. Sandipan Ganguly,
Mr. Dipanjan Dutt,
Mr. Surojit Saha.

For the Kolkata Municipal Corporation : Mr. Goutam Dinda,
Mr. Anindya Sundar Chatterjee.

For the State : Ms. Shreyashee Biswas.

Heard on : 09.01.2023

Judgment on : 31.01.2023

Shampa Dutt (Paul), J.:

The instant revision has been preferred against an order dated 17.08.2019 passed by the Court of the Learned 3rd Municipal Magistrate, Calcutta in M/F No. 394 of 2017 (Reg No. 1853/2017), thereby arraigning the petitioner herein as an accused in the instant case with the aid of Section 319 of the Code of Criminal Procedure, 1973 **and directing the issuance of summons** against the Petitioner herein. M/F NO. 394 of 2017 (Reg No. 1853/2017), under Section 401A of the Kolkata Municipal Corporation Act, 1980, pending before the Court of the learned 3rd Municipal Magistrate, Calcutta, which arose out of Gariahat Police Station Case No. 129 dated 24.08.2017.

The petitioner's case is that Gariahat Police Station Case No. 129 dated 24.08.2017 was registered for investigation against one Prahlad Goenka, the husband of the petitioner herein, under Section 401A of the Kolkata Municipal Corporation Act. 1980, on the basis of a letter of complaint lodged by the opposite party no. 2 with the Officer-in-Charge of Gariahat Police Station.

The allegations in the said letter of complaint are inter alia to the effect that in terms of an enquiry report submitted by the Assistant Engineer(C)/Building Department, one Kanti Kumar Chatterjee, duly endorsed by the opposite party no. 2, it would allegedly appear that one

Mr. Prahlad Goenka, was allegedly making construction in the premises no. 21/1, Mandeville Gardens, Kolkata, without any sanctioned plan. It was further alleged that if the construction was allowed to stand, it may collapse any day, endangering human life and water supply, etc., and hence the letter was to be treated as a First Information Report under Section 401A of the Kolkata Municipal Corporation Act, 1980.

After completion of a purported investigation in Gariahat Police Station Case no. 129 dated 24.08.2017, the police authorities submitted their report in final form vide Final Report No. 75/17 dated 03.11.2017 as a "Mistake of Fact".

Subsequently, the Learned Magistrate was pleased to direct fresh investigation in the instant case, whereupon, the police authorities resumed their investigation in Gariahat Police Station Case No. 129 dated 24.08.2017, and in conclusion thereof, submitted their report in final form vide Charge Sheet No. 81/18 dated 05.07.2018 against the said Prahlad Goenka alleging commission of the offence punishable under Section 401A of the Kolkata Municipal Corporation Act, 1980.

That upon receipt of such Charge Sheet, the Court of the Learned 3rd Municipal Magistrate, Kolkata, was pleased to take cognizance of the said offence and subsequently, copies of documents intended to be relied upon by the prosecution in order to prove its case,

was supplied to the said Prahlad Goenka, in terms of Section 207 of the Code of Criminal Procedure, 1973. In course of trial, on 17.08.2019 was fixed for examination of the accused, Prahlad Goenka, under Section 313 of the Code of Criminal Procedure, 1973. On that day, by order of even date, the Learned Trial Court was pleased to record that **on perusal of Exhibit 18 and 19 series, it appeared that the recorded owner of the premises is the petitioner. The Learned Trial Court was thereafter pleased to hold that the petitioner should be held responsible for unauthorized construction** and as such the Learned Trial Court proceeded to arraign the petitioner herein as an accused in the instant case with the aid of Section 319 of the Code of Criminal Procedure, 1973 and directed the issuance of summons against the Petitioner herein.

Mr. Sandipan Ganguly, Learned Counsel for the petitioner submitted that Section 401A of the Kolkata Municipal Corporation Act, 1980, makes a person, who supervises or causes the construction of any new building or additional floor or floors of any building in contravention of the provisions of the said Act, liable for the offence made punishable therein. However, in the instant case, there exists not even a whisper of any allegation against the petitioner herein supervising or causing any alleged construction as stated/alleged. In such circumstances, the Learned Trial Court by arraigning the

petitioner as an accused, has palpably erred in passing the impugned order and the same is liable to be set aside for the ends of justice.

It is further submitted that a person who is proposed to be added as an accused under Section 319 of the Code of Criminal Procedure, 1973 is required to be heard before being so added, in the event it appears to the Learned Court from strong and cogent evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused. The Learned Court is required to issue prior notice to such person calling upon him or her to show cause as to why he/she should not be made an accused. **Only in the event where the said proposed accused fails to satisfactorily show cause as to why he/she should not be made an accused, can such person be arraigned as an accused in the case.**

In the instant case, the Learned Trial court by the impugned order gravely erred by arraigning the petitioner herein as an accused without providing her with an opportunity of being heard against such arraignment. It is furthermore reiterated that the Learned Trial Judge has no cogent evidence before him which would disclose that the petitioner herein has committed any offence for which she could be tried together with the accused.

In the circumstances, the impugned order being palpably erroneous, is liable to be set aside/quashed.

Mr. Ganguly has relied upon the decision of the Supreme Court in **Jogendra Yadav and Ors. vs. State of Bihar & Anr., (2015) 9 SCC 244 (Para 9)**.

“9. It was, however, urged by learned counsel for the appellants that in order to avail of the remedies of discharge under Section 227 of the Cr.P.C., the only qualification necessary is that the person should be accused. The learned counsel submitted that there is no difference between an accused since inception and the accused who has been added as such under Section 319 of the Cr.P.C. It is, however, not possible to accept this submission since there is a material difference between the two. An accused since inception is not necessarily heard before he is added as an accused. However, a person who is added as an accused under Section 319 of the Cr.P.C., is necessarily heard before being so added. Often he gets a further hearing if he challenges the summoning order before the High Court and further. It seems incongruous and indeed anomalous if the two sections are construed to mean that a person who is added as an accused by the court after considering the evidence against him can avail remedy of discharge on the ground that there is no sufficient material against him. Moreover, it is settled that the extraordinary power under Section 319 of the Cr.P.C., can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court.”

It is thus submitted by Mr. Ganguly that before invoking the power under Section 319 Cr.P.C., the learned Magistrate should have summoned the petitioner and given an opportunity of hearing.

The extraordinary power under Section 319 of the code of Criminal Procedure, 1973 can be exercised only if very strong and cogent evidence occurs against a person from the evidence led before the Court. The impugned order, arraigning the petitioner herein as an accused, being unsupported by any cogent evidence, is thus an abuse of the process of the court which is gravely harrassive and persecutory to the petitioner herein. In such circumstances, the impugned order is liable to be set aside/quashed.

The impugned order is a gross abuse of the process of court which if allowed to continue will degenerate itself into a weapon of harassment and persecution and as such the same is liable to be quashed for the ends of justice.

It is expedient in the interest of justice, to uphold the dignity of law that the impugned order being otherwise bad in law is liable to be quashed and/or set aside.

Mr. Gautam Dinda, Learned counsel for the Kolkata Municipal Corporation submits that the order of the Learned Magistrate under revision is in accordance with law and needs no interference by this court and the revision is the liable to be dismissed.

On hearing both sides and also **Ms. Shreyashee Biswas learned Counsel for the State**, considering the material on record, the order challenged in revision, is reproduced herein:-

M/F 394 of 2017**Order dated, 17th day of August, 2019.**

Today is the date fixed for examination of the accused person U/s 313, CR.P.C. But on perusal of the Exhibit No. 18 and 19 series I find that the recorded owner of the case premises is Smt. Nirmala Devi Goenka. So, it transpires that she should be also held responsible for such unauthorized construction at the case premises being the owner of the case premises. **As per Section 319(1) of the Cr. P.C. she should be tried as co-accused in this case and also as per Section 319(4)(b) of the Cr.P.C. the case should proceed as if such person had been accused person when the court took cognizance of the offence U/s 401A of the K.M.C. Act upon which the trial of this case commenced.**

Accordingly, issue summons upon said Smt. Nirmala Devi Goenka, the co-accused in this case as per this order. B/C-II to comply.

To 11.09.2019 for awaiting S/R.

**Sd /-
Indrajit Deb
Metropolitan Magistrate, Calcutta
& Judicial Magistrate, 1st Court.
Out Side Metropolitan Area.**

This Court now relies upon a decision of a constitution Bench of the Supreme Court in **Sukhpal Singh Khaira vs. The State of Punjab (2022 LiveLaw (SC) 1009) in Criminal Appeal No. 885 of 2019 on December 05, 2022**, where in the Court issued elaborate **guidelines on the exercise of powers to summon additional accused under Section 319 Cr.P.C.**

The relevant paragraphs applicable in the present case before this Court are:-

“13. In the background of the rival contentions, in order to determine the question referred to us, it would be appropriate for us to at the outset, take note of the provision as contained in Section 319 of CrPC, which reads as hereunder: -

“319. Power to proceed against other persons appearing to be guilty of offence. —

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then—

(a) the proceedings in respect of such person shall be commenced afresh, and witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.”

14. At the outset, having noted the provision, it is amply clear that the power bestowed on the Court is to the effect that in the course of an inquiry into, or trial of an offence, based on the evidence tendered before the Court, if it appears to the Court that such evidence points to any person other than the accused who are being tried before the Court to have committed any offence and such accused has been excluded in the charge sheet or in the process of trial till such time could **still be summoned and tried together** with the accused for the offence **which appears to have been committed by such persons summoned as additional accused.**

15. In that regard, the object of incorporating the provision in the CrPC and bestowing such power to the Court was based on the recommendation made by the Law Commission of India in its Forty-First Report to which all the learned senior counsel have made extensive reference, read as hereunder:-

24.80. It happens sometimes, though not very often, that a Magistrate hearing a case against certain accused finds from the evidence that some person, other than the accused before him, is also concerned in that very offence or in a connected offence. It is only proper that the Magistrate should have the power to call and join him in the proceedings. Section 351 provides for such a situation, but only if that person happens to be attending the Court. He can then be detained and proceeded against. There is no express provision in section 351 for summoning such a person if he is not present in Court. Such a provision would make section 351 fairly comprehensive, and we think it proper to expressly provide for that situation.

24.81. Section 351 assumes that the Magistrate proceeding under it has the power of taking cognizance of the new case. It does not, however, say in what manner cognizance is taken by the Magistrate. The modes of taking cognizance are mentioned in section 190, and are, apparently, exhaustive. The question is, whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrate's own information under section 190(1)(c), or only in the manner in which cognizance was first taken of the offence against the other accused. In concrete terms, if the original case was instituted on a police report, i.e. under section 190(1)(b), will cognizance against the new accused be supposed to have been taken in the same manner, or under section 190(1)(c)? The question is important, because the methods of enquiry and trial in the two cases differ. About the true position under the existing law, there has been difference of opinion, and we think it should be made clear. It seems to us that the main purpose of this particular provision is, that the whole case against all known suspects should be proceeded with expeditiously, and convenience requires that cognizance against the newly added accused should be taken in the same manner as against the other accused. We, therefore, propose to re-cast section 351 making it comprehensive and providing that there will be no difference in the mode of taking cognizance if a new person is added as an accused during the proceedings. It is, of course, necessary (as is already provided) that in such a situation the evidence must be re-heard in the presence of the newly added accused.

24.82 The offence for which the newly added accused can be tried is not indicated in precise terms in the section. Obviously, that offence should be connected with the one for which the original accused is under trial. To bring that out, a small verbal amendment is recommended.

16. In the above backdrop, the issue relating to the power to be exercised under Section 319 of CrPC had arisen for detailed consideration in *Hardeep Singh* (supra) wherein the scope, procedure and the stage at

which such power was to be exercised was considered and summarised as follows:-

*12. Section 319 CrPC springs out of the doctrine *judex damnatur cum nocens absoluitur* (Judge is condemned when guilty is acquitted) and this doctrine must be used as a beacon light while explaining the ambit and the spirit underlying the enactment of Section 319 CrPC.*

*13. It is the duty of the court to do justice by punishing the real culprit. Where the investigating agency for any reason does not array one of the real culprits as an accused, the court is not powerless in **calling the said accused to face trial**. The question remains under what circumstances and at what stage should the court exercise its power as contemplated in Section 319 CrPC?*

15. It would be necessary to put on record that the power conferred under Section 319 CrPC is only on the court. This has to be understood in the context that Section 319 CrPC empowers only the court to proceed against such person. The word "court" in our hierarchy of criminal courts has been defined under Section 6 CrPC, which includes the Courts of Session, Judicial Magistrates, Metropolitan Magistrates as well as Executive Magistrates. The Court of Session is defined in Section 9 CrPC and the Courts of the Judicial Magistrates have been defined under Section 11 thereof. The Courts of the Metropolitan Magistrates have been defined under Section 16 CrPC. The courts which can try offences committed under the Penal Code, 1860 or any offence under any other law, have been specified under Section 26 CrPC read with the First Schedule. The Explanatory Note (2) under the heading of "Classification of offences" under the First Schedule specifies the expression "Magistrate of First Class" and "any Magistrate" to include Metropolitan Magistrates who are empowered to try the offences under the said Schedule but excludes Executive Magistrates.

40. Even the word "course" occurring in Section 319 CrPC, clearly indicates that the power can be

exercised only during the period when the inquiry has been commenced and is going on or the trial which has commenced and is going on. It covers the entire wide range of the process of the pre-trial and the trial stage. The word “course” therefore, allows the court to invoke this power to proceed against any person from the initial stage of inquiry up to the stage of the conclusion of the trial. The court does not become functus officio even if cognizance is taken so far as it is looking into the material qua any other person who is not an accused. The word “course” ordinarily conveys a meaning of a continuous progress from one point to the next in time and conveys the idea of a period of time : duration and not a fixed point of time.

*42. To say that powers under Section 319 CrPC can be exercised only during trial would be reducing the impact of the word “inquiry” by the court. It is a settled principle of law that an interpretation which leads to the conclusion that a word used by the legislature is redundant, should be avoided as the presumption is that the legislature has deliberately and consciously used the words for carrying out the purpose of the Act. The legal maxim *a verbis legis non est recedendum* which means, “from the words of law, there must be no departure” has to be kept in mind.*

47. Since after the filing of the charge-sheet, the court reaches the stage of inquiry and as soon as the court frames the charges, the trial commences, and therefore, the power under Section 319(1) CrPC can be exercised at any time after the charge- sheet is filed and before the pronouncement of judgment, except during the stage of Sections 207/208 CrPC, committal, etc. which is only a pre- trial stage, intended to put the process into motion. This stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than a judicial application of mind. At this pre-trial stage, the Magistrate is required to perform acts in the nature of administrative work rather than judicial such as ensuring compliance with Sections 207 and 208 CrPC, and committing the matter if it is exclusively triable by the Sessions Court. Therefore, it

would be legitimate for us to conclude that the Magistrate at the stage of Sections 207 to 209 CrPC is forbidden, by express provision of Section 319 CrPC, to apply his mind to the merits of the case and determine as to whether any accused needs to be added or subtracted to face trial before the Court of Session.

57. Thus, the application of the provisions of Section 319 CrPC, at the stage of inquiry is to be understood in its correct perspective. **The power under Section 319 CrPC can be exercised only on the basis of the evidence adduced before the court during a trial.** So far as its application during the course of inquiry is concerned, it remains limited as referred to hereinabove, adding a person as an accused, whose name has been mentioned in Column 2 of the charge-sheet or any other person who might be an accomplice.

(emphasis supplied)

17. In view of the reference contained in the order passed by the Bench consisting of two Hon'ble Judges seeking clarity in the matter due to the view taken by another Bench of two Hon'ble Judges in **Shashikant Singh** (supra) where, purportedly the summoned accused was proceeded against after the judgment was passed against the accused who were originally charged, it is necessary to take note of the situation that had arisen therein and the conclusion reached in that case. It is noted that in a case under Section 302/34 of IPC wherein Shivakant Singh, the brother of Shashikant Singh (supra) was murdered, the trial proceeded against one Chandra Shekar Singh. When the evidence was recorded it was found that Tarkeshwar Singh and two others had also committed the offence of murder of Shivakant Singh. **The learned Additional Sessions Judge by order dated 07.04.2001 exercised the power under Section 319 of CrPC and ordered to issue a warrant of arrest so that they may be tried together with Chandra Shekar Singh, the accused against whom the trial was proceeding.** The said order dated 07.04.2001 summoning the

accused came to be assailed by Tarkeshwar Singh before the High Court in Criminal Revision No.269 of 2001. During the pendency of the said Revision Petition before the High Court the learned Additional Sessions Judge concluded the pending trial against the originally charged accused Chander Shekar Singh and convicted him by the judgment dated 16.07.2001. The question which therefore arose in that context was as to whether the trial in the case in which additional accused were summoned under Section 319 of CrPC including Tarkeshwar Singh can proceed in view of the phrase "could be tried together with the accused" contained in Section 319(1) of CrPC after the trial against other accused had concluded with the order of conviction.

18. In that context the Bench of two Hon'ble Judges which allowed the trial to proceed against the summoned accused, Tarkeshwar Singh and others held as hereunder:

"9. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. **The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be"**

cannot under these circumstances be held to be “must be”. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court.”

(emphasis supplied)

19. Thus, to put the matter in perspective, a perusal of the recommendation of the Law Commission would indicate the intention that an accused who is not charge sheeted but if is found to be involved should not go scot-free. Hence, Section 319 of CrPC was incorporated which provides for the Court to exercise the power to ensure the same before the conclusion of trial so as to try such accused by summoning and being proceeded along with the other accused. In **Shashikant Singh** (supra), a Bench of two Hon'ble Judges, on holding that the joint trial is not a must has held the requirement as contained in Section 319(1) of CrPC as only directory, and as such the judgment of conviction dated 16.07.2001 against the charge-sheeted accused was considered not to be an impediment for the court to proceed against the accused who was added by the summoning order dated 07.04.2001, which in any case was prior to the conclusion of the trial which in our view satisfies the requirement since the summoning order was before the judgment. In the case of **Hardeep Singh** (supra) also the power of the Court under Section 319 of CrPC has been upheld, reiterated, and it has been held that such power is available to be exercised at any time before the pronouncement of judgment. Therefore, there is no conflict or diverse view in the said decisions insofar as the exercise of power, the manner and the stage at which power is to be

exercised. However, a certain amount of ironing the crease is required to explain the connotation of the phrase “could be tried together with the accused” appearing in sub-section (1) read with the requirement in sub-section 4(a) to Section 319 of CrPC and to understand the true purport of exercising the power as per the phrase “before the pronouncement of judgment”.

20. *A close perusal of Section 319 of CrPC indicates that the power bestowed on the court to summon any person who is not an accused in the case is, when in the course of the trial it appears from the evidence that such person has a role in committing the offence. **Therefore, it would be open for the Court to summon such a person so that he could be tried together with the accused and such power is exclusively of the Court. Obviously, when such power is to summon the additional accused and try such a person with the already charged accused against whom the trial is proceeding, it will have to be exercised before the conclusion of trial.** The connotation ‘conclusion of trial’ in the present case cannot be reckoned as the stage till the evidence is recorded, but, is to be understood as the stage before pronouncement of the judgment as already held in **Hardeep Singh** (supra) since on judgment being pronounced the trial comes to a conclusion since until such time the accused is being tried by the Court.*

27. *Therefore, from a perusal of the provisions and decisions of this Court, it is clear that the conclusion of the trial in a criminal prosecution if it ends in conviction, a judgment is considered to be complete in all respects only when the sentence is imposed on the convict, if the convict is not given the benefit of Section 360 of CrPC. Similarly, in a case where there are more than one accused and if one or more among them are acquitted and the others are convicted, the trial would stand concluded as against the accused who are acquitted and the trial will have to be concluded against the convicted accused with the imposition of sentence. When considered in the context of Section 319 of CrPC, there would be no dichotomy as argued, since what **becomes relevant***

here is only the decision to summon a new accused based on the evidence available on record which would not prejudice the existing accused since in any event they are convicted.

28. In that view of the matter, if the Court finds from the evidence recorded in the process of trial that any other person is involved, such power to summon the accused under Section 319 of CrPC can be exercised by passing an order to that effect before the sentence is imposed and the judgment is complete in all respects bringing the trial to a conclusion. While arriving at such conclusion what is also to be kept in view is the requirement of sub-section (4) to Section 319 of CrPC. **From the said provision it is clear that if the learned Sessions Judge exercises the power to summon the additional accused, the proceedings in respect of such person shall be commenced afresh and the witnesses will have to be re-examined in the presence of the additional accused.** In a case where the learned Sessions Judge exercises the power under Section 319 of CrPC after recording the evidence of the witnesses or after pronouncing the judgment of conviction but before sentence being imposed, the very same evidence which is available on record cannot be used against the newly added accused in view of Section 273 of CrPC. **As against the accused who has been summoned subsequently a fresh trial is to be held.** However while considering the application under Section 319 of CrPC, if the decision by the learned Sessions Judge is to summon the additional accused before passing the judgment of conviction or passing an order on sentence, the conclusion of the trial by pronouncing the judgment is required to be withheld and the application under Section 319 of CrPC is required to be disposed of and only then the conclusion of the judgment, either to convict the other accused who were before the Court and to sentence them can be proceeded with. This is so since the power under Section 319 of CrPC can be exercised only before the conclusion of the trial by passing the judgment of conviction and sentence.

29. Though Section 319 of CrPC provides that such person summoned as per sub-section (1) thereto could be jointly tried together with the other accused, keeping in view the power available to the Court under Section 223 of CrPC to hold a joint trial, it would also be open to the learned Sessions Judge at the point of considering the application under Section 319 of CrPC and deciding to summon the additional accused, to also take a decision as to whether a joint trial is to be held after summoning such accused by deferring the judgment being passed against the tried accused. If a conclusion is reached that the fresh trial to be conducted against the newly added accused could be separately tried, in such event it would be open for the learned Sessions Judge to order so and proceed to pass the judgment and conclude the trial insofar as the accused against whom it had originally proceeded and thereafter proceed in the case of the newly added accused. However, what is important is that **the decision to summon an additional accused** either suo-moto by the Court or on an application under Section 319 of CrPC shall in all eventuality be considered and disposed of before the judgment of conviction and sentence is pronounced, as otherwise, the trial would get concluded and the Court will get divested of the power under Section 319 of CrPC. Since a power is available to the Court to decide as to whether a joint trial is required to be held or not, this Court was justified in holding the phrase, “could be tried together with the accused” as contained in Section 319(1) of CrPC, to be directory as held in **Shashikant Singh** (supra) which in our opinion is the correct view.

30. One other aspect which is necessary to be clarified is that if the trial against the absconding accused is split up (bifurcated) and is pending, that by itself will not provide validity to an application filed under Section 319 of CrPC or the order of Court to summon an additional accused in the earlier main trial if such summoning order is made in the earlier concluded trial against the other accused. This is so, since such power is to be exercised by the Court based on the evidence recorded in that case pointing

to the involvement of the accused who is sought to be summoned. If in the split up (bifurcated) case, on securing the presence of the absconding accused the trial is commenced and if in the evidence recorded therein it points to the involvement of any other person as contemplated in Section 319 of CrPC, such power to summon the accused can certainly be invoked in the split up (bifurcated) case before conclusion of the trial therein.

31. *In analysing the issue and making the above conclusion on all aspects, we are also persuaded by the view taken by this Court, among others, in the case of **Rajendra Singh vs. State of U.P. and Another** (2007) 7 SCC 378 wherein it is concluded with regard to the object of Section 319 of CrPC as hereunder:-*

“20. The power under Section 319 of the Code is conferred on the court to ensure that justice is done to the society by bringing to book all those guilty of an offence. One of the aims and purposes of the criminal justice system is to maintain social order. It is necessary in that context to ensure that no one who appears to be guilty escapes a proper trial in relation to that guilt. There is also a duty to render justice to the victim of the offence. It is in recognition of this that the Code has specifically conferred a power on the court to proceed against others not arrayed as accused in the circumstances set out by this section. It is a salutary power enabling the discharge of a court's obligation to the society to bring to book all those guilty of a crime.

21. Exercise of power under Section 319 of the Code, in my view, is left to the court trying the offence based on the evidence that comes before it. The court must be satisfied of the condition precedent for the exercise of power under Section 319 of the Code. There is no reason to assume that a court trained in law would not exercise the power within the confines of the provision and decide whether it may proceed against such person or not. There is no rationale in fettering that power and the discretion, either by calling it extraordinary or by stating that it will be exercised only in exceptional circumstances. It is intended to be

used when the occasion envisaged by the section arises.”

32. *We have also kept in view the point by point analysis of the object and power to be exercised under Section 319 of CrPC, as has been indicated in para 34 of **Manjit Singh vs. State of Haryana and Others** (2021) SCC Online SC 632.*

33. *For all the reasons stated above, we answer the questions referred as hereunder:-*

“I. Whether the trial court has the power under Section 319 of CrPC for summoning additional accused when the trial with respect to other co-accused has ended and the judgment of conviction rendered on the same date before pronouncing the summoning order?

The power under Section 319 of CrPC is to be invoked and exercised before the pronouncement of the order of sentence where there is a judgment of conviction of the accused. In the case of acquittal, the power should be exercised before the order of acquittal is pronounced.

Hence, the summoning order has to precede the conclusion of trial by imposition of sentence in the case of conviction. If the order is passed on the same day, it will have to be examined on the facts and circumstances of each case and if such summoning order is passed either after the order of acquittal or imposing sentence in the case of conviction, the same will not be sustainable.

II. Whether the trial court has the power under Section 319 of the CrPC for summoning additional accused when the trial in respect of certain other absconding accused (whose presence is subsequently secured) is ongoing/pending, having been bifurcated from the main trial?

The trial court has the power to summon additional accused *when the trial is proceeded in respect of the absconding accused after securing his presence, subject to the evidence recorded in the split*

up (bifurcated) trial pointing to the involvement of **the accused sought to be summoned**. But the evidence recorded in the main concluded trial cannot be the basis of the summoning order if such power has not been exercised in the main trial till its conclusion.

III. What are the guidelines that the competent court must follow while exercising power under Section 319 CrPC?”

(i) If the competent court finds evidence or if application under Section 319 of CrPC is filed regarding involvement of any other person in committing the offence based on evidence recorded at any stage in the trial before passing of the order on acquittal or sentence, it shall pause the trial at that stage.

(ii) The Court shall thereupon first decide the need or otherwise to summon the additional accused and pass orders thereon.

(iii) **If the decision of the court is to exercise the power under Section 319 of CrPC and summon the accused**, such summoning order shall be passed before proceeding further with the trial in the main case.

(iv) If the summoning order of additional accused is passed, depending on the stage at which it is passed, the Court shall also apply its mind to the fact as to whether such summoned accused is to be tried along with the other accused or separately.

(v) If the decision is for joint trial, the fresh trial shall be commenced only after securing the presence of the summoned accused.

(vi) If the decision is that the summoned accused can be tried separately, on such order being made, there will be no impediment for the Court to continue and conclude the trial against the accused who were being proceeded with.

(vii) If the proceeding paused as in (i) above is in a case where the accused who were tried are to be

acquitted and the decision is that the summoned accused can be tried afresh separately, there will be no impediment to pass the judgment of acquittal in the main case.

(viii) If the power is not invoked or exercised in the main trial till its conclusion and if there is a split-up (bifurcated) case, the power under Section 319 of CrPC can be invoked or exercised only if there is evidence to that effect, pointing to the involvement of the additional accused to be summoned in the split up (bifurcated) trial.

(ix) If, after arguments are heard and the case is reserved for judgment the occasion arises for the Court to invoke and exercise the power under Section 319 of CrPC, the appropriate course for the court is to set it down for re-hearing.

(x) On setting it down for re-hearing, the above laid down procedure to decide about summoning; holding of joint trial or otherwise shall be decided and proceeded with accordingly.

(xi) Even in such a case, at that stage, if the decision is to summon additional accused and hold a joint trial the trial shall be conducted afresh and de novo proceedings be held.

(xii) If, in that circumstance, the decision is to hold a separate trial in case of the summoned accused as indicated earlier;

(a) The main case may be decided by pronouncing the conviction and sentence and then proceed afresh against summoned accused.

(b) In the case of acquittal the order shall be passed to that effect in the main case and then proceed afresh against summoned accused.”

Thus in the present case the submission and the prayer in the revisional application on behalf of the petitioner is not in accordance with the guidelines of the Supreme Court as laid down in **Sukhpal Singh Khaira vs The State of Punjab (Supra)** and it is clear that the provision under Section 319 Cr.P.C. empowers the Courts to:-

(a) **Summon** such a person so that **he could be tried together.**

(para 20)

(b) Such power is to **summon the additional accused** and try such a person. (para 20)

(c) The decision to **summon a new accused.** (para 27)

(d) As against the **accused who has been summoned.** (para 28)

(e) **Section 319 of Cr.P.C. provides that such person summoned as per Section (1) there to could be jointly tried together with other accused person.** (para 29)

(f)the decision to **summon an additional accused.** (para 29)

(g) If the decision of the Court is to **exercise the power** under Section 319 of Cr.P.C. **and summon the accused.** (para 33 (iii))

Accordingly, in view of the above and the provision under Section 319 of Cr.P.C., there is **no scope of hearing** prior to the issuance of summons under Section 319 of Cr.P.C. to an additional accused. Summon is issued only after Court exercises its power under Section 319 of Cr.P.C., holding that the person is an accused (Additional). Summons under Section 319 of Cr.P.C. is issued against

an additional accused after the exercise of **the Court's exclusive power.**

The Supreme Court in **Civil Appeal No. 7356 of 2012, Dipak Kumar Mukherjee Vs. Kolkata Municipal Corporation and Ors.**, held that:-

“2. In last four decades, the menace of illegal and unauthorised constructions of buildings and other structures in different parts of the country has acquired monstrous proportion. This Court has repeatedly emphasized the importance of planned development of the cities and either approved the orders passed by the High Court or itself gave directions for demolition of illegal constructions - (1) K. Ramadas Shenoy v. Chief Officers, Town Municipal Council (1974) 2 SCC 506; (2) Virender Gaur v. State of Haryana (1995) 2 SCC 577; (3) Pleasant Stay Hotel v. Palani Hills Conservation Council (1995) 6 SCC 127; (4) Cantonment Board, Jabalpur v. S.N. Awasthi 1995 Supp.(4) SCC 595; (5) Pratibha Coop. Housing Society Ltd. v. State of Maharashtra (1991) 3 SCC 341; (6) G.N. Khajuria (Dr) v. Delhi Development Authority (1995) 5 SCC 762; (7) Manju Bhatia v. New Delhi Municipal Council (1997) 6 SCC 370; (8) M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu (1999) 6 SCC 464; (9) Friends Colony Development Committee v. State of Orissa (2004) 8 SCC 733; (10) Shanti Sports Club v. Union of India (2009) 15 SCC 705 and (11) Priyanka Estates International Pvt. Ltd. v. State of Assam (2010) 2 SCC 27.

3. In K. Ramadas Shenoy v. Chief Officers, Town Municipal Council (supra), the resolution passed by the Municipal Committee authorising construction of a cinema theatre was challenged on the ground that the site was earmarked for the construction of Kalyan Mantap-cum-Lecture Hall and the same could not have been used for any other purpose. The High Court held that the cinema theatre could not be constructed at the disputed site but declined to quash

the resolution of the Municipal Committee on the ground that the theatre owner had spent huge amount. While setting aside the High Court's order, this Court observed:

“An illegal construction of a cinema building materially affects the right to or enjoyment of the property by persons residing in the residential area. The Municipal Authorities owe a duty and obligation under the statute to see that the residential area is not spoilt by unauthorised construction. The Scheme is for the benefit of the residents of the locality. The Municipality acts in aid of the Scheme. The rights of the residents in the area are invaded by an illegal construction of a cinema building. It has to be remembered that a scheme in a residential area means planned orderliness in accordance with the requirements of the residents. If the scheme is nullified by arbitrary acts in excess and derogation of the powers of the Municipality the courts will quash orders passed by Municipalities in such cases.

The Court enforces the performance of statutory duty by public bodies as obligation to rate payers who have a legal right to demand compliance by a local authority with its duty to observe statutory rights alone. The Scheme here is for the benefit of the public. There is special interest in the performance of the duty. All the residents in the area have their personal interest in the performance of the duty. The special and substantial interest of the residents in the area is injured by the illegal construction.”

4. In *Pratibha Coop. Housing Society Ltd. v. State of Maharashtra* (supra), this Court approved the order passed by the Bombay Municipal Corporation for demolition of the illegally constructed floors of the building and observed:

“Before parting with the case we would like to observe that this case should be a pointer to all the builders that making of unauthorised constructions never pays and is against the interest of the society at large. The rules, regulations and bye- laws are made by the Corporations or development authorities taking in view the larger public interest of the society and it is the bounden duty of the citizens to obey and follow such rules which are made for their own benefits.”

5. In *Friends Colony Development Committee v. State of Orissa* (supra), this Court noted that large number of illegal and unauthorised constructions were being raised in the city of Cuttack and made the following significant observations:

“.....Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the

designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders.....

In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and

control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building

regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.”

(emphasis supplied)

6. In *Shanti Sports Club v. Union of India* (supra), this Court approved the order of the Delhi High Court which had declared the construction of sports complex by the appellant on the land acquired for planned development of Delhi to be illegal and observed:

“In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal

and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians

and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc.

Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned

development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions.”

7. *In Priyanka Estates International Pvt. Ltd. v. State of Assam (supra), this Court refused to order regularisation of the illegal construction raised by the appellant and observed:*

“It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety

of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder.”

8. *What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors.”*

Section 401A of the KMC Act, lays down:-

“401A. Construction of building in contravention of the provisions of the Act or the rules made thereunder:-

(1) Notwithstanding anything contained in this Act or the rules made thereunder or in any other law for the time being in force, any person who being responsible by himself or by any other person on his behalf, so constructs or attempts to so construct or conspires to so construct any new building or additional floor or floors of any building in contravention of the

provisions of this Act, or the rules made thereunder as endangers or is likely to endanger human life, or any property of the Corporation whereupon the water-supply, drainage or sewerage or the road traffic is disrupted or is likely to be disrupted or is likely to cause a fire hazard, shall be punishable with imprisonment of either description for a term which may extend to five years and also with fine which may extend to fifty thousand rupees.

Explanation.--"Person" shall include an owner, occupier, lessee, mortgagee, consultant, promoter or financier, or a servant or agent of an owner, occupier, lessee, mortgagee, consultant, promoter or financier, who supervises or causes the construction of any new building or additional floor or floors of any building as aforesaid.

(2) The offence under sub-section (1) shall be cognizable and non-bailable, within the meaning of the Code of Criminal Procedure, 1973 (2 of 1974).

(3) Where an offence under sub-section (1) has been committed by a company, the provisions of section 619 shall apply to such company.

Explanation.--"Company" shall have the same meaning as in the Explanation to section 619."

The explanation clearly provides. That "person" shall **include an owner**, the petitioner, Nirmala Devi Goenka (as in this case). **It is not denied that the petitioner is the recorded owner.**

More so Ext. 18 and 19 series before the learned Magistrate show that the petitioner is the owner of the premises and as such the petitioner/owner becomes liable. Under Section 401A of the KMC Act . Section 319 Cr.P.C. gives the power to the learned Magistrate to proceed against other persons **appearing** to be guilty of offence. In the present

case the petitioner is liable as the “owner” under Section 401A of the KMC Act and thus the learned Magistrate has rightly invoked the power under Section 319 Cr.P.C. and the order is in accordance with law.

Thus in view of the observations of the Supreme Court in **Dipak Kumar Mukherjee vs. KMA (Supra)** and **Sukhpal Singh Khaira vs. The State of Punjab (Supra)** and on perusal of the order of the Learned Magistrate it is found that the order under revision is in accordance with law and needs no interference by this Court.

Accordingly, CRR 2849 of 2019 is dismissed.

There will be no order as to costs.

All connected Application stand disposed of.

Interim order if any stands vacated.

A copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)