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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**% ***Date of decision: 5th December, 2023***+ **CRL.M.C. 42/2023 & CRL.M.A. 142/2023(stay)**

SHANKAR @ GORI SHANKAR Petitioner
Through: Mr. Rajat Wadhwa, Ms. Dhreti Bhatia
and Mr. Gurpreet Singh Gill,
Advocates.

Versus

STATE OF NCT OF DELHI & ANR. Respondents
Through: Mr. Shoaib Haider, APP for State.
Ms. Rachna Jaiswal, Mr. Akshay
Kumar and Mr. Sandeep Nain,
Advocates for R-2 along with R-2 in
person.
SI Jitender Singh, PS Inderpuri.

**CORAM:
HON'BLE MR. JUSTICE AMIT BANSAL**

JUDGMENT

AMIT BANSAL, J. (ORAL)

1. The present petition has been filed impugning the order dated 22nd November, 2022, passed by the learned Additional Sessions Judge (ASJ), Patiala House Courts, New Delhi, whereby it has been held that a *de novo* trial is not required to be started when the matter is committed by the Court of Magistrate to the Court of Session.
2. The present petition raises an important question of law i.e., whether a



de novo trial is required to be conducted when a case is committed by the Court of Magistrate to the Court of Session in terms of Section 323 of the Code of Criminal Procedure, 1973 (CrPC).

3. Brief facts leading to the filing of the present petition are as follows:

3.1 The respondent no.2 (complainant) had filed FIR No.119/2003 dated 17th June, 2003 under Sections 341/323/506/34 of the Indian Penal Code, 1860 (IPC) at Police Station Inder Puri. After completion of investigation, charge sheet was filed under Sections 341/323/308/506/34 of the IPC on 31st December, 2003.

3.2 The learned Metropolitan Magistrate (MM) *vide* order on charge dated 16th April, 2005, framed charges for the offences under Sections 323/341/326/506/34 of the IPC, which are all triable by the Court of Magistrate.

3.3 During the course of trial, the learned MM examined 10 witnesses. After this, the complainant filed an application under Section 323 of the CrPC seeking committal of the case to the Court of Session on the ground that the accused persons were also liable to be prosecuted under Section 307 of the IPC, which is exclusively triable by the Court of Session. This application was dismissed by the learned MM *vide* order dated 4th July, 2014.

3.4 A revision petition was filed by the complainant challenging the aforesaid order dated 4th July, 2014, passed by the learned MM, which was allowed by the learned ASJ *vide* order dated 3rd September, 2015, setting aside the aforesaid order by observing that an offence under Section 307 of the IPC has been made out. Consequently, the learned MM *vide* order 15th October, 2015 committed the case to the Sessions Court.



3.5 The learned ASJ *vide* order dated 19th April, 2016 framed charges for the offences under Sections 307/341/323/326 read with Sections 506-II/34 of the IPC.

3.6 Thereafter, trial commenced before the Sessions Court and three prosecution witnesses were examined, cross-examined and discharged.

3.7 Subsequently, *vide* order dated 22nd November, 2022, the learned ASJ ordered that a fresh *de novo* trial is not to be started, especially when all the witnesses have been examined by the learned MM.

4. Hence, the present petition has been filed by the petitioner accused challenging the order dated 22nd November, 2022, passed by the learned ASJ.

5. Counsel for the petitioner submits that in the present case, charges have been framed by the learned Sessions Court *vide* order dated 19th April, 2016 and subsequent thereto, three prosecution witnesses have been examined by the learned ASJ. He further submits that it will cause procedural confusion and prejudice if the evidence recorded before the learned MM is read in the present case. In this regard, reliance is placed on the following judgments:

- i. ***Sudhir v. State of M.P.***, (2001) 2 SCC 688.
- ii. Judgment dated 30th April, 2020 passed by the Madras High Court in Crl.R.C. No.952 of 2020 titled ***Dr. G.Ilangovan v. Gokul @ Gokulakrishnan***.
- iii. ***Mahmood Hasan v. State of Haryana***, 2019 SCC OnLine P&H 7637.

6. Learned APP appearing for the State supports the case of the petitioner.



7. *Per contra*, counsel appearing for the respondent no.2/complainant submits that there is no infirmity in the order passed by the learned ASJ. It is further stated that since the incident in the present case happened as far back in 2003, a *de novo* trial would only cause delay and cause prejudice to the complainant. He places reliance on the provisions of Section 326 of the CrPC in this regard.

8. Both parties have filed written submissions along with judgments in support.

9. I have heard the counsels for the parties and perused the material on record.

10. At the outset, reference may be made to the provisions of Sections 323 and 326 of the CrPC which are set out below:

“323. Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.—*If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing the judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of Chapter XVIII shall apply to the commitment so made.*

...

326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.—*(1) Whenever any Judge or Magistrate, after having heard and recorded the whole or any part of the evidence in any enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself:*

Provided that if the succeeding Judge or Magistrate is of



opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of Justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.”

11. In ***Sudhir*** (supra), the Supreme Court observed that once a matter has been committed by the Court of Magistrate to the Court of Session under Section 323 of the CrPC, the provisions of Chapter XVIII of the CrPC would be applicable.

12. In ***Dr. G.Ilangovan*** (supra), the Madras High Court considered the scope of Sections 323 and 326 of the CrPC in a situation where 13 witnesses had been already examined before the Magistrate committed the trial to the Sessions Court. The Madras High Court held that once the case has been committed to the Sessions Court, the Sessions Court would have to proceed as per the provisions of Chapter XVIII of the CrPC and in such a case, provisions of Section 326 of the CrPC would not apply. The relevant observations are set out below:

“13. A reading of Sections 323 of Cr.P.C clearly shows that if any enquiry into an offence or a trial before the learned Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions therein. Thereupon provisions of Chapter XVIII of Cr.P.C shall apply to the committal so made. Chapter XVIII of Cr.P.C. starts from Section 225 Cr.P.C to 237 Cr.P.C. Therefore, any Magistrate or Metropolitan Magistrate cannot be equated with the Sessions Judge and language employed is committal. Though the abovesaid provisions says that if the case is triable by the Sessions Judge, the case has to be committed by the Magistrate. The Magistrate includes Chief Metropolitan Magistrate and Chief Judicial Magistrate. Once



the case is committed, the committal Court (Sessions Court) follows the procedure as contemplated under Sections 225 to 237 Cr.P.C.

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18. The language employed in both Sections 323 and 326 Cr.P.C., is very clear. In this case, since Chief Metropolitan Magistrate has no jurisdiction to try as he has got power only to pass sentence for a term upto 7 years, he has committed the case to Court of Session. Therefore, once the case is committed to Sessions Court, as per section 323 Cr.P.C., provisions of Chapter XVIII has to be followed. In such view of the matter, the Chief Metropolitan Magistrate cannot be treated as Predecessor of the Sessions Court and the Sessions Court cannot be stated as Successor of Chief Metropolitan Magistrate. As per Section 323 Cr.P.C., the procedure when after commencement of inquiry or trial, if the Magistrate finds case should be committed, if any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court and thereupon provisions of Chapter XVIII shall apply. Therefore, Section 326 Cr.P.C., regarding evidence partly recorded by one Judge or Magistrate and partly by another cannot be applied herein.”

13. The SLP against the aforesaid judgment was dismissed by the Supreme Court *vide* order dated 18th April, 2022.

14. A similar view was taken by the Punjab and Haryana High Court in *Mahmood Hasan* (supra). The relevant observations of the said judgment are set out below:

“16. In fact, it was neither appropriate nor proper for the learned Magistrate to pass order under Section 319 of the Code summoning the petitioners as additional accused, once the Court had reached at a conclusion that the case is one which ought to be tried by the Court of Sessions, it should have



committed the case to the Court of Sessions. Before the Court of Sessions, the trial has to start de novo in accordance with the procedure prescribed under Chapter XVIII of “the Code”.

17. This matter can be examined from another angle. **Whatever evidence has been led before the Court of Judicial Magistrate, would not be read as evidence while deciding the case by the Court of Sessions.** The Court of Sessions is obligated upon to follow the procedure as provided in Chapter XVIII of “the Code” which requires framing of charge and thereafter proceeding to record evidence of the prosecution in case the accused does not plead guilty. The Court of Sessions also has a power to remit the case back to the Magistrate after finding that the case does not involve the offence which is exclusively triable by the Court of Sessions. **If the Court of Sessions agrees with the committing Magistrate, first the charge has to be framed and thereafter the evidence has to be led de-novo.** Therefore, once the Magistrate found that the case is exclusively triable by the Court of Sessions, he should have left it to the Court of Sessions to proceed in accordance with law.”

15. Punjab and Haryana High Court has categorically held that if the Court of Session agrees with the committing Magistrate, then the trial has to be started *de novo* in accordance with the procedure prescribed under Chapter XVIII of the CrPC and first the charge has to be framed and thereafter, evidence has to be led *de novo*.

16. *Vires* of Section 323 of the CrPC was challenged before the Division Bench of the Madhya Pradesh High Court in ***Raju v. Union of India***, MANU/MP/0436/2000 and one of the grounds taken was that if the trial is complete before the Magistrate before committal to the Court of Session, the accused would have to face trial *de novo* before the Court of Session which would violate the right to speedy trial of the accused in terms of Section 21 of the Constitution of India. The Division Bench of the Madhya Pradesh



High Court rejected the aforesaid challenge by making the following observations:

“9. The provision of Section 323 Cr.P.C. does not adversely affect the right of speedy trial, but, it goes to the very root of the trial where the case should be tried. If a case is not triable or ought not to be tried by Magistrate and during the course of enquiry he comes to such a conclusion, he obviously refers the case to the Competent Court as offence cannot be allowed to go unpunished, is also underlining principle of public policy under Section 323 Cr.P.C. The power of a Magistrate under Section 323 Cr.P.C. is in addition to his power under Section 209 of the Code to commit cases exclusively triable by the Court of Sessions to that Court. The provisions contained in Section 244 Cr.P.C. cannot take away the powers vested in the Magistrate under Section 323 to commit the case to the Court of Sessions at any stage of the proceedings before signing the judgment provided the case is one which ought to be tried by the Court of Sessions. Merely because a case has been instituted otherwise then on a police report, cannot take away the power vested in Magistrate under Section 323 Cr.P.C. to commit the case to the Court of Sessions at any stage of the proceedings. Whether that course should have been adopted in the instant case? The question on merits of case which has also attained finality and that does not affect the validity of the provisions contained in Section 323 Cr.P.C.”

17. I am in respectful agreement with the aforesaid views taken by the High Courts of Madras, Punjab and Haryana and Madhya Pradesh. The mandate of Section 323 of the CrPC is clear. When a case is committed by the Magistrate to the Court of Session, the trial would have to begin *de novo*. The Court of Session would first frame charges and then proceed with the examination of the witnesses.

18. When a case is committed by the Court of Magistrate to the Court of Session, the Magistrate becomes *functus officio* and any evidence recorded



therein cannot be held to be admissible for the purposes of a *de novo* trial before the committal Court. Therefore, the evidence would also have to be recorded *de novo*.

19. Section 326 of the CrPC covers cases wherein a Magistrate/Judge has been succeeded by another Magistrate/Judge and such successor can act on the evidence recorded by his predecessor. However, as correctly observed by the Madras High Court in *Dr. G. Ilangovan* (supra), the Sessions Court cannot be treated as a successor of the Magistrate. Therefore, Section 326 of the CrPC would not be applicable to the present case.

20. With regard to the submission on behalf the complainant that a *de novo* trial would cause prejudice to the complainant on account of delay, it is pertinent to note that it was the complainant who moved the application for committal before the learned MM, which was rejected *vide* order dated 4th July, 2014. Thereafter, the complainant preferred a revision against the aforesaid order, which was allowed and consequent thereto, the learned MM committed the case to the Sessions Court. In view thereof, the aforesaid submission cannot be accepted.

21. In view of the above, the present petition is allowed and the impugned order dated 22nd November, 2022 passed by the learned ASJ is set aside and it is directed that the trial shall proceed before the Court of Session from the stage it was before the impugned order was passed.

22. Counsel for the complainant submits that since one of the witnesses, PW-1 Kishore Kumar has since expired, therefore, his evidence cannot be recorded *de novo*. In terms of Section 33 of the Indian Evidence Act, 1872, evidence given by a witness in a judicial proceeding can be considered relevant in a subsequent judicial proceeding in case the witness has since



expired. In view thereof, it is directed that the evidence of PW-1 recorded before the Court of Magistrate shall be read in evidence before the Sessions Court.

23. However, taking note of the fact that the present FIR was registered in the year 2003, the learned ASJ is requested to expeditiously complete the trial in the present case, preferably within a period of six months from the date fixed.

24. Counsels for the parties assure the Court that they shall not take any unnecessary adjournments.

25. The present petition, along with all pending applications, stands disposed of.

AMIT BANSAL, J.

DECEMBER 5, 2023

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