IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 630 OF 2023
WITH
INTERIM APPLICATION NO. 1998 OF 2023
WITH
INTERIM APPLICATION NO. 2733 OF 2023

Ramesh Abhishek ... Appellant
V/s.
National Spot Exchange Ltd. & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 2665 OF 2023
IN
CRIMINAL APPEAL NO. 630 OF 2023

Rajesh Goradhandas Kamani ... Applicant
V/s.
National Spot Exchange Ltd. & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 461 OF 2023
WITH
INTERIM APPLICATION NO. 1826 OF 2023

Roop Kishor Bhootra ... Appellant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1821 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Lalit Mundra ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1775 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Tilak

Priti Gupta ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1819 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Almondz Global Securities Ltd. ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1771 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Subodh Shinkar ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1772 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Anil Salvi ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1770 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Surendra Nayak ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1774 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Anand Rathi Financial Services Ltd. ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1822 OF 2023
IN
CRIMINAL APPEAL NO. 461 OF 2023

Ganpathy Vishwanathan ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 462 OF 2023

Roop Kishor Bhootra ... Appellant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1776 OF 2023
IN
CRIMINAL APPEAL NO. 462 OF 2023

Anand Rathi Financial Services Ltd. ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

INTERIM APPLICATION NO. 1777 OF 2023
IN
CRIMINAL APPEAL NO. 462 OF 2023

Priti Gupta ... Applicant
V/s.
The State of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 1155 OF 2023

The State Of Maharashtra ... Appellant
V/s.
National Spot Exchange Limited ... Respondent

WITH

CRIMINAL APPEAL NO. 664 OF 2023

Preeti Gupta ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 665 OF 2023

Preeti Gupta ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 666 OF 2023

Roop Kishor Bhootra ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 667 OF 2023

Roop Kishor Bhootra ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 668 OF 2023

Anand Rathi Financial Services Ltd. ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 669 OF 2023

Anand Rathi Financial Services Ltd. ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 679 OF 2023

Nirmal Jain ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 681 OF 2023

Nirmal Jain ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 682 OF 2023

IIFL Finance Limited ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 683 OF 2023

IIFL Finance Limited ... Appellant
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 684 OF 2023

Shiny Geoge & Anr. ... Appellants
V/s.
The State Of Maharashtra & Anr. ... Respondents

WITH

CRIMINAL APPEAL NO. 884 OF 2023

The State Of Maharashtra ... Appellants
V/s.
National Spot Exchange Limited & Anr. ... Respondents

....

Mr.Amit Desai, Senior Advocate a/w. Mr. Gopalakrishna Shenoy, Mr.Vaibhav Singh, Ms. Radhika Indapurkar, Mr.Bryan Pillai, Mr. Manas Kotak, Mr. Dhruv Dandekar, Mr. Pranav Chandhoke i/by. Shardul Amarchand Mangaldas & Co. for Appellant in Criminal Appeal No. 461/2023.

Mr. Pranav Badheka, Senior Advocate a/w. Mr. Prashant Pawar, Mr.Vaibhav Singh, Ms. Radhika Indapurkar, Mr.Bryan Pillai, Mr. Manas Kotak, Mr. Dhruv Dandekar, Mr. Pranav Chandhoke i/b Shardul Amarchand Mangaldas & Co. for appellant in Criminal Appeal No. 462/2023.

Mr. Prashant Pawar, Advocate for Intervenor in IA No. 1770/2023, IA No.1771/2023, IA No.1772/2023, IA 1774/2023 and IA 1775/2023 and IA 1776/2023.

Mr. Vaibhav Singh a/w. Ms. Radhika Indapurkar, Mr. Bryan Pillai, Mr. Manas Kotak, Mr. Dhruv Dandekar, Mr. Pranav Chandhoke i/b Shardul Amarchand Mangaldas & Co. for applicant in Interim Application No. 1826/2023 in Criminal Appeal No. 461/2023.

Mr. Prateek Seksaria, Senior Advocate i/b Prashant Pawar, for Intervenor in IA No.1777/2023 in Criminal Appeal No.462/2023.

Mr.Amit Desai, Sr.Advocate a/w Mr. Mihir Gheewala a/w. Mr. Vikrant Singh Negi, Ms. Ekta Tyagi, Ms.Sneha Barange, Ms.Priyamvada Singhania, Mr.Gopalakrishna Shenoy, Sneha Barange i/b. DSK Legal for appellant in Appeal Nos.679/2023 & 681/2023.

Mr.Raja Thakare, Senior Adv. a/w. Mr. Mihir Gheewala, Mr. Vikrant Singh Negi, Ms. Ekta Tyagi, Ms. Sneha Barange, Ms.Priyamvada Singhania, Mr. Siddharth Jagushte i/b. DSK Legal for Appellant in Appeal 682/2023 & 683/2023.

Mr.Aditya Mehta for Applicant in Interim Application No.1819/ 2023, 1821/2023 & 1822/2023.

Mr. Mihir Gheewala a/w Aditya Mehta, Farhad Panthaki Rishabh Botadra i/b Santosh Pawar for Appellant in Appeal 684/2023.

Mr. Mihir Desar, Sr. Advocate a/w. Mr. Mihir Mody, Dhaval Patil, Shreyas Menkudle i/b M/s.K.Ashar & Co. for Appellant in Appeal 630/2023.

Mr. Aabad Ponda Sr. Advocate, Arvind Lakhawat, Javed Dhorajiwala, Nimeet Sharma, Vinit Vaidya, Jalpa Shah, Himani Narula i/b. MZM Legal LLP for Respondent No.2 in Appeal No.461/2023.

Mr.Arvind Lakhawat a/w Mr.Javed Dhorajiwala with Mr.Nimeet Sharma, Mr. Vinit Vaidya, Ms.Jalpa Shah & Ms. Himani Narula i/b. MZM Legal LLP for Respondent No.1 in Appeal No.1155 /2023 a/w Appeal 630/2023 and for respondent no.2 in Appeal 667/2023, 669/2023, 665/2023, 681/2023, 683/2023 and 684/2023.

Mr.Rajiv Chavan, Sr. Advocate i/b. Mr.Gaurav Parkar for Respondent No.2 in Appeal no. 462/2023, 664/2023, 666/2023, 668/2023, 679/2023, 682/2023.

Mr. Manoj Mohite, Senior Advocate a/w Mr.Nimeet Sharma,Ms. Jalpa Shah, Mr. Vinit Vaidya, Mr.Javed Dhorajiwala, i/b MZM Legal LLP, for the respondent no.1 in Criminal Appeal No.884 of 2023.

Mr. Avinash B. Avhad, Spl. Public Prosecutor a/w. Mr. Mahesh V. Rawool a/w. Mr. Sachin D. Gawade, Mr. Sahil S. Ghule a/w. Mr. J.P. Yagnik, Addl. P.P. and Dr. Ashvini A. Takalkar, APP, for State in all other Appeals.

Sr. PI Prakash Bagal (EOW) present.

CORAM : BHARATI DANGRE &
MANJUSHA DESHPANDE, JJ
RESERVED ON : 3rd SEPTEMBER, 2024
PRONOUNCED : 7th FEBRUARY, 2025

Tilak

JUDGMENT :- (Per Bharati Dangre, J)

I - THE BACKGROUND GIVING RISE TO APPEALS

1. On 30/9/2013, Pankaj Ramnaresh Saraf, Director of Vostak Far East Securities Pvt Ltd, Company involved in the business of investment, trading and financing, filed a complaint against the Directors and other persons holding key management post in National Spot Exchange Limited (for short 'NSEL'), a Company incorporated under the Companies Act, 2013, being a wholly owned subsidiary of Financial Technologies (India) Ltd, at the relevant time, known as '63 Moons Technologies Ltd'. The complaint also involved 25 borrowers/trading members and some brokers of NSEL and it invoked offence punishable u/s. 120B, 409, 465, 468, 471, 474 and 477A of Indian Penal Code, 1860. The complainant made a grievance that he had primarily been transacting in T + 2 + T + 25 contracts and since NSEL suspended trading and deferred settlement of all one day forward contract by 15 days, he did not receive payment of Rs. 202 lakhs that was due to him under various contracts. In addition, he alleged that the commodities were traded by providing 'false' warehouse receipts of 'non-existent commodities' as NSEL held the commodities in warehouses accredited to it as 'trustee' on behalf of the depositors (buyers) and therefore, the misappropriation amounted to criminal breach of trust. In addition, it was also alleged that the Settlement Guarantee Fund has been misused by NSEL.

This FIR was transferred to EOW and a case was registered under Section 3 and 4 of the Maharashtra Protection of Interest of Depositors (in Financial Establishments) Act, 1999 (for short "MPID Act") in addition to the relevant provisions of the Indian Penal Code and the case was transferred to the Special Court constituted under the MPID Act.

2. The present Appeals revolve around the said case which is pending before the Special Court in form of MPID Special Case No. 1/2014.

Before we come to the subject matter of the Appeals and the controversy raised therein, arising out of the impugned order passed by the Special Court, we must refer to the nature of transactions entered into by NSEL, a Company which received an exemption from the Union of India under section 27 of the Forward Contracts (Regulation) Act 1952, exempting the forward contracts of one day duration for sale and purchase of commodities traded on NSEL.

NSEL operated as an exchange for spot trading in commodities and it launched contracts for buying and selling of commodities on its platform with different settlement periods, ranging from T + 0 to T + 36 days, 'T' indicating the trade date i.e. the date on which the trade took place.

NSEL offered 'paid contracts' which enabled traders either by themselves or through their brokers, to simultaneously enter into paid contracts of T + 2 and T + 25 duration. The seller

through his broker, put the commodities on sale and the buyer who was interested in these commodities through his broker, purchased commodities as per his requirement and NSEL paired the buyer and seller, if there was a match between the requirement of the buyer and the available commodities with the seller. This resulted into a contract between the buyer and seller in form of T + 2 and T + 25 contracts.

A structured stepwise trading process of the paid contracts was operated by NSEL and it would facilitate the transaction between the seller, who wish to trade on the platform and who placed a specific quantity of commodity in a warehouse accredited to NSEL, who offered the commodity for sale, stipulating the price and quantity offered.

3. Reciprocating this transaction, was a step initiated on behalf of the buyer, a trading members or his broker, who would input buy orders of a particular commodity and quantity on the NSEL trading platform and pursuant thereto, it would communicate all the trades effected at the end of the day and the obligation report recording the pay-in and delivery obligations would be forwarded to the trading members. NSEL would then debit the trading members designated settlement account for the amount of the buying members pay-in obligations, which would be credited to its settlement account and its Operation Department would inform the Delivery Department of the selling members delivery obligations which would confirm to the Operations Department

if the requisite quantity of commodity is available according to the warehouse receipts. After such a confirmation, the Operations Department would release the purchase price to the selling brokers bank account.

4. With this modus operandi, the NSEL received a notice from the Department of Consumer Affairs (DCA) as to why action should not be taken against it for permitting the transactions in violation of the exemption notification and NSEL was directed not to execute any contract and all the existing contracts must be settled as on 27/4/2012. About 13,000 persons who traded on the platform of NSEL alleged that the other trading members had defaulted in payment of approximately Rs.5,600 crores. NSEL suspended its Spot exchange operations by issuing a circular on 31/7/2013 and declared that the delivery and settlement of all pending contracts would be merged and the contracts would be settled after the expiry of 15 days. A new pay-in Schedule was announced by NSEL on 14/8/2013, by which the exchange commenced the pay-in schedule and it also declared that the members will be entitled to get a simple Interest on the outstanding dues till the end of the settlement calendar.

The Central Government also withdrew the exemption granted in favour of NSEL and the Forward Markets Commission made certain recommendations to DCA, which included fixing of liability on the promoters of NSEL. Economic Offences Wing registered cases against the Directors and the key management

personnel of NSEL and 63 Moons Technologies Pvt Ltd and also against trading members and broker of NSEL under the provisions of IPC and MPID Act.

The investigation in the subject C.R proceeded and the first charge-sheet was filed on 16/1/2014 against five persons, the office bearers of NSEL and one defaulter, whereas the third charge-sheet impleaded '63 Moons Technologies' as an accused. Till date, 11 charge-sheets are filed before the Competent Court, the last being filed on 2/12/2022 and 220 persons are arraigned as accused, which include the individuals, broking agencies, defaulter company, broking entities, etc.

II- THE CHALLENGE IN THE APPEALS

5. It is in the aforesaid background the present Appeals are filed under Section 11 of the MPID Act, 1999 raising a challenge to the impugned orders dated 31/3/2023 as well as order dated 18/5/2023 passed by the Special Judge for MPID , being passed on the distinct applications of the following descriptions.

(a) Miscellaneous Application No.619/2023 is filed by NSEP, one of the accused, captioned as "Application under Section 190 of the Code for taking cognizance under section 3 of the MPID Act against the promoters and directors of accused financial establishment" praying for taking cognizance of the offence under section 3 of the MPID Act against the named seven persons and entities in Special Case No.1/2014 and the persons were enlisted as under:-

> *"1 Nirmal Jain, Director of the charge-sheeted Financial Establishment India Infoline Commodities Ltd.*
> *2 India Infoline Finance Ltd, Promoter of the charge-sheeted Financial Establishment India Infoline Commodities Ltd.*

3. Preeti Gupta, Director of the charge-sheeted Financial Establishment Anand Rathi Commodities Ltd.
4. Rupkishore Bhutada, Director of the charge-sheeted Financial Establishment Anand Rathi Commodities Ltd.
5. Anand Rathi Financial Services Ltd, Promoter of the charge-sheeted Financial Establishment Anand Rathi Commodities Ltd.
6. Shiney Geoge, Director and Promoter of the charge-sheeted Financial Establishment Geojit Comtrade Ltd, and
7 Manish Gupta, Director of the charge-sheeted Financial Establishment Geojit Comtrade Ltd."

(c) Inspector of Police, U-EOW-14 filed application (Exhibit-3) raising objection regarding locus standi and maintainability of Exhibit 619.
(e) Application filed by Roop Kishor Bhootra, (Exhibit-4) in Miscellaneous Application No.339 of 2023, filed by Arvind Kumar Bahl.
(b) Roop Kishor Bhootra, the proposed accused, filed application (Exhibit-5) seeking permission to intervene in Application Exhibit 619 filed by NSEL.
(d) Miscellaneous Application No.339/2023 filed by Arvind Kumar Bahl, an investor, praying for taking cognizance against various Directors and promoters of financial establishment who were not charge-sheeted by the EOW.

On the above applications, the following orders are passed :-
(a) 31/3/2023 – order rejecting application filed by Roop Kishor Bhootra, refusing the permission to intervene.
(b) Order dated 31/3/2023 – rejected application filed by EOW holding that NSEL has locus standi to file the application (Exhibit 619).
(d) Order dated 31/3/2023 rejected Exhibit-4 in Miscellaneous Application No. 339/2023.
(c) Order dated 18/5/2023 – order allowing Miscellaneous Application 339/2023 and Exhibit 619 filed in MPID Special

Case No.1/2014 and of taking cognizance of the offences against the accused named in Exhibit-619 and issuance of process against the persons/companies for the offence punishable u/s.409, 465, 467, 468, 471 474, 477A, 120B of IPC r/w Section 3 of the MPID Act, 1999.

6. We shall now take up the main application (Exhibit 619) filed by NSEL seeking issuance of process against the persons named therein for securing their appearance before the Special Court and face the trial for consideration.

The application was premised on the ground that pursuant to the charge-sheet filed, the Court had taken cognizance of the offences u/s.3 of the MPID Act and the relevant provisions of IPC and issued process to the individuals and entities named therein as accused persons including IICL, ARCL, GCL and the case was pending before the Court at the stage prior to framing of charges.

7. By placing reliance upon Section 3 of the Act, making it imperative that in case of default by a financial establishment "every person including the promoter, partner, director, manager, or any other person, or an employee responsible for the management of, or conducting of the business or affairs of such financial establishment, shall be liable to be punished" it was alleged that the charge-sheet dated 27/12/2018 had categorically concluded that the three broker Companies i.e. IICL, ARCL and GCL are "financial establishments" and if that is so, each of the promoter and director of each of the accused financial

establishment are liable to be charge-sheeted along with the accused financial establishments. However, it was alleged that the Investigating Officer has shut his eyes to the statutory mandate in case of the three broker companies who have been charge-sheeted just like the applicant, as the financial establishment, but in case of IICL, only two out of the three directors were charge-sheeted, whereas in case of India Infoline Finance Limited (IIFL), which is the promoter of the financial establishment IICL, it is not charge-sheeted despite the clear statutory mandate u/s.3 of the MPID Act. Further, in case of charge-sheeted financial establishment ARCL, it was alleged that the Investigating Officer had charge-sheeted only two out of the four Directors as Mr.Amit Rathi and Mr.Pradeep Gupta were charge-sheeted, but Ms.Preeti Gupta, the promoter/director and the brain behind functioning of ARCL and Mr.Roop Kishore Bhootra, another whole time director of ARCL., were left out. Similarly, Anand Rathi Finance Service Limited (ARFL), the promoter of the accused financial establishment was also not charge-sheeted. In addition, though GCL, the financial establishment was charge-sheeted, only one out of the three directors was charge-sheeted, leaving Ms.Shiny George and Manish Gupta, another whole time director, being not charge-sheeted.

8. NSEL therefore, requested the Court to take judicial notice of the lapse at the stag of pre-trial inquiry and to take cognizance of offence u/s.3 of the MPID Act against the Promoters and

Directors of the three broker accused financial establishment and issue process against them.

The justification offered for the necessary directions was found in the application which stated that, if as per the charge-sheet dated 27/12/2018, the Companies IICL, ARCL and GCL have committed offence under section 3 of the MPID Act, in that event, it is a natural corollary to arraign all those persons as co-accused who were the members of the Board of Directors of these companies during the period of commission of the offence i.e. September 2009 to 31/7/2013.

9. The application provided the material against the persons against whom the summons were prayed for, and it was alleged that they cannot be permitted to escape the criminal liability of the criminal acts and omissions committed by the the accused financial establishment in defrauding the innocent depositors on NCEL's trading platform and cheating them of their hard earned money through their deposit scheme run by them under the garb of commodity trading.

10. The prosecution/EOW opposed the application (Exhibit 3) and prayed for its dismissal on three counts; (a) the NSEL being the main accused, has no right to prefer such an application against the promoter companies and the directors who were prayed to be summoned. (b) No sufficient evidence has been collected, so that they can be charge-sheeted and (c) the participation of the aforesaid accused is prima facie not made out.

It was also stated by EOW that charge-sheet is already filed against the three companies and out of the five directors, Amit Rathi, C.P. Krishnan and Chintan Modi were also arrested.

Exhibit-619 was prayed to be dismissed on the ground that it was filed purely out of vengeance against the broker companies and their directors.

11. During the pendency of the application filed by the NSEL, Roop Kishore Bhootra against whom NSEL had prayed for an action under Section 190 of Code filed an Intervention Application, alleging that the contents Exhibit 619 are ex-facie false and baseless and the application was without any merit and substance and deserve to be dismissed *in limine*. The opposition was based on the following grounds:-

(a) NSEL has no locus to file the present application.

(b) The application filed by NSEL is not maintainable, misconceived and it is devoid of any legal basis

(c) No offence u/s.3 of the MPID Act has been made against the applicant.

The intervention was sought on the ground that the application filed by NSEL cannot be permitted to be used as a tool of harassment as NSEL itself was the main accused and merely because of its whims and fancies, the intervenor applicant shall not be subjected to criminal proceedings, despite the case of the prosecution that no case has been made out against him. Describing the act of the NSEL as gross abuse of process of law,

which would make the applicant face undue hardship, it was prayed that the application be dismissed.

12. On 31/03/2023, the Special Judge, decided the application filed by EOW raising objection regarding locus standi and maintainability of Exhibit 619 filed by NSEL.

Recording the crux of the objection, that an accused do not have locus standi to implicate the other co-accused who are not charge-sheeted by the Investigating Officer, the MPID Judge placed reliance upon the decision in case of **R N Agarwal vs. R.C. Bansal**[1], as well as the decision in case of **Jashwant Rathore vs. State of M.P**[2]**.**

Reliance was also placed upon the decision of the Apex Court in case of **LokRam vs. Nihal Singh and anr**[3] and **Bholu Ram Vs. State of Punjab and anr**[4]**,** which had held that an application filed by accused under Section 190 r/w 193 is maintainable.

The Special Judge recorded his conclusion in the following words- -

> *"13 The Ld. Prosecutor though raised the objection about the maintainability and locus standi of the application filed by the applicant, but failed to show the same with any proof of documents. The prosecution on the contrary tried to take search from the applicant by stating that he has to sow how this application is maintainable and it has locus standi to file the same, instead to ask the applicant how the application is maintainable, the prosecution failed to show on what basis and by which provision the filed application by the accused is not maintainable. On the*

1 (2015) 1 SCC 48
2 I.R (2015) M.P. 257
3 (2006) 10 SCC 192
4 (2008) 9 SCC 140

contrary, the applicant successfully justified its stand alongwith various judicial pronouncements discussed in the forgoing para that it has lawful right and the application filed by NSEL is legally maintainable."

Recording that applicant (NSEL) has made out its case to show it has locus standi, the application was held to be maintainable.

13. On the very same day, the Special Judge passed an order on application filed by Roop Bhootra who sought intervention in Exhibit-619, since it raised a similar plea that NSEL, a prime accused cannot be permitted to be heard as if it is a victim and on the other hand, he has a right to intervene.

On extensive hearing of the arguments advanced on behalf of Roop Bhootra as well as the counsel for NSEL and the Special P.P for EOW, the application filed by Roop Bhootra was rejected and disposed of.

In determining the maintainability of the application filed by the Intervenor, the learned Judge appreciated the counter arguments and while rejecting the application recorded his conclusion as below :-

"26 It is settled law that section 190 empowers the Magistrate to take cognizance of criminal cases taking cognizance implies the application of judicial mind in the facts of consideration of particular case. A Magistrate can take cognizance of case on the receipt of a complaint, or a report by the police, or information received from the person other than police officer or upon his own knowledge. The aforesaid law makes it clear that while taking cognizance of offence, proposed accused have no role to play. The proposed accused person has no locus-standi before the order of summoning is passed and since cognizance order is interlocutory in nature and merely because process has been issued against proposed accused persons, it will not infringe their rights as

they have been merely asked to face trial. The same process is being followed in cases instituted on the behest of police. A merely decision to take cognizance of the matter in the light of additional facts and evidence doesn't attract principal of nature justice and the proposed accused have no say in the matter as to whether they should be made accused or not. Therefore, proposed accused has no locus-standi to intervene in the present application under section 190 of Cr.P.C. which is akin to application under section 156(3) of Cr.P.C. Since in the instant matter, it is a pure question of law involved regarding the maintainability of the application filed by the intervener. It would profitable to make reference to some other decisions which are on the direct point of locus-standi of the proposed accused hereinafter."

For the aforesaid reason, the application of Roop Bhootra, seeking intervention in Exhibit 619 is also rejected.

14. Pursuant to the passing of the orders on 31/3/2023, rejecting the application at the stage of taking cognizance, as well as the application filed by the prosecution, the Special Judge heard NSEL on Exhibit-619 and even Mr. Mihir Gheewala, learned counsel for accused no.65 was heard by the MPID Court. On 18/04/2023, rejoinder argument on behalf of NSEL was heard, and on conclusion of arguments, the matter was posted on 9/05/2023 for Orders.

15. On 18/05/2023, the Special Judge, passed a common order on Miscellaneous Application no.339 of 2023, filed by Arvind Kumar Bahl and Exhibit 619 filed by NSEL.

At this stage, it must be mentioned that Arvind Kumar Bahl an investor, who had invested an amount through his broker, IICL on the platform of NSEL made a grievance that the charge-sheet dated 27/12/2018, is based on pick and choose policy and

several directors, promoters and brokers despite of having their active involvement and sufficient documentary evidence, were not deliberately charge-sheeted by the Investigating Officer. Alleging that the offence involved was of high magnitude as it involved an amount of Rs.5600 crores and several gullible investors like the applicant were awaiting justice, the applicant named 8 persons along with their designation and the company whom he intended to be impleaded as accused, and prayed for summons to be issued to them.

Though Exhibit 619 faced strong opposition from the prosecution by objecting to its maintainability, however, the Investigating Officer did not oppose the application filed by the investor Mr. Bahl and the Court recorded that the Investigating Officer has not disagreed with any contents made by the applicant Mr. Bahl regarding cognizance as sought for and therefore, the application was remained unopposed. On consideration of the matter on merit, the Special Judge, allowed miscellaneous application no.339 of 2023 as well as Exhibit 619 and issued process against the persons and companies named in the application filed by NSEL by impleading them as accused nos.2 to 9.

16. It is this order which is assailed in Appeal No.664 to 684 of 2023 at the instance of the persons against whom process was issued by the MPID Court on 18/5/2023 by directing their impleadment as accused in MPID Special Case No.1/2014 as

accused nos.221 to 227. One more Appeal i.e. Appeal No.884/2023 filed by State of Maharashtra also raise a challenge to the order dated 18/5/2023.

III- COUNTER SUBMISSIONS ADVANCED IN SUPPORT OF THE APPEALS AND ITS OPPOSITION.

It is in this background, we have heard learned senior counsel Mr. Amit Desai for the appellant Roop Kishor Bhootra in Appeal No.461/2023, Appeal 664/2023, Appeal 665/2023, 679, 681. We have also heard Mr.Badheka appearing for appellant in Appeal No. 462/2023 along with Mr.Avhad for EOW and learned senior counsel Mr.Ponda for NSEL in all Appeals except Criminal Appeal No.1155/2023 filed by State of Maharashtra, in which NSEL is represented by Mr.Lakhawat.

(A) ARGUMENTS ON BEHALF OF THE APPELLANT/ PROPOSED/ACCUSED

17. Learned senior counsel Mr.Amit Desai has opened the arguments and though we have heard the other counsel for the appellants, we have recorded the arguments by treating Appeal No.461/2023 as the lead Appeal. Highlighting the background of the NSEL scam, Mr. Desai, has taken us through the application filed by NSEL requesting the Court to take cognizance of the offence against Promoter/Director ARCL along with the application filed by one of the investor Mr. Bahl seeking somehow similar relief. Pointing out to the application filed by Roop Bhootra for intervention claiming to be heard on 27/3/2023, Mr. Desai has taken us through the order dated

31/3/2023, which rejected the application filed by his client. According to Mr. Desai, Roop Bhootra is cited as witness in charge-sheet no.11 but despite this the request for intervention on behalf of the proposed accused is turn down by the Court and the application was even opposed by the State. According to Mr. Desai, while rejecting the objection of the State, the learned Judge has reversed the burden and instead of NSEL demonstrating as to how the application was maintainable, the burden was cast on the State to establish why it was not maintainable.

18. Coming to the merits of the matter, Mr. Desai fairly states that it may not be an absolute proposition that at the instance of the co-accused, the material against a proposed accused cannot be looked into, but he has hedged it, with a question of significant importance being, at what stage it would be permissible. According to him, after the 10th and 11th charge-sheet is filed, of which no cognizance of which is taken, NSEL approached the Court by invoking power under Section 190 of the Code of Criminal Procedure (for short 'the Code') According to Mr. Desai, two questions fall for consideration, in the background of the impugned orders viz. (a) the locus of NSEL to file such an application and (b) whether it is permissible to entertain the application under Section 190 of the Code.

According to Mr. Desai, if the impugned orders dated 31/3/2023 are not sustained, there may be no propriety in proceeding with the Appeals which raise challenge to the

impugned order dated 18/5/2023.

19. According to Mr. Desai, there are two modes of taking cognizance as contemplated under Section 190 of the Code when upon filing of an FIR under Section 154, it results into a final report under Section 169/173 and a request is made to take cognizance. This report goes to the Magistrate, who takes cognizance under Section 190 of the Code, but in case of special statute, the report could be placed before the Special Court, surpassing the step of taking cognizance by the Magistrate and in this cases since it is the Special MPID Court, it would directly go to the Special Court. In the scheme of the Code, under Section 190, when the cognizance is taken upon a police report pursuant to registration of FIR under Section 154, Section 204 would kick in as contemplated under Chapter XVI of the Code, when the proceedings would commence before the Magistrate, whereas Section 209 provide for committal of a case to Court of Sessions, when the offence is triable exclusively by it, and this is the procedure to be adopted by the Special Court under a special statute.

Mr.Desai pose a question as to whether at this stage, it is permissible to hijack the process, being adopted by the State, since 11 charge-sheets are already filed and whether indulgence can be shown at the instance of the principal accused i.e. NSEL. It is his contention that primacy should be given to the discretion in the prosecution to decide who will be arraigned as an accused,

who may be made an approver, witness etc, and therefore NSEL could not assert as to who shall be an accused and particularly in MPID Special Case No.1 of 2014, when the properties of NSEL as well as its Directors are already attached, but with a malafide intent to rope in the Directors/Promoters of other companies on a specious ground that they must be charged as accused, Exhibit-619 is filed.

20. In support of his contention, Mr. Desai has placed reliance upon series of authoritative pronouncements. At the outset, he would invite our attention to the descending opinion of Venkat Chaliah in case of **AR Antulay vs. RS Nayak and anr**[5], to the following effect :-

> *"133 Before going into these challenges, it is necessary to say something on the merits of the order under appeal itself. An accused person cannot assert any right to a joint trial with his co-accused. Normally it is the right of the prosecution to decide whom it prosecutes. It can decline to array a person as a co-accused and, instead, examine him as a witness for the prosecution. What weight is to be attached to that evidence, as it may smack of the testimony of a guilty partner, in crime, is a different matter. Prosecution can enter Nolle proseque against any accused-person. It can seek to withdraw a charge against an accused person. These propositions are too well settled to require any further elaboration. Suffice it to say that the matter is concluded by the pronouncement of this Court in Choraria v. Maharashtra, [1968] 2 SCR 624 where Hidayathullah J referred to the argument that the accomplice, a certain Ethyl Wong in that case, had also to be arrayed as an accused and repelled it, observing:*
>
> > *"... Mr. Jethmalani's argument that the Magistrate should have promptly put her in the dock because of her incriminating answers overlooks S. 132 (proviso)".*
> >
> > *"... The prosecution was not bound to prosecute her, if they thought that her evidence was necessary to break a smugglers' ring. Ethyl Wong was prosecuted by S. 132 (proviso) of the Indian Evidence Act even if she gave evidence incriminating herself. She was a competent witness although her evidence could only be received with the caution necessary in all accomplice evidence ...*

5 (1988) 2 SCC 602

144 On this point, really, appellant cannot be heard to complain. Of the so called co-conspirators some have been examined already as prosecution witnesses; some others proposed to be so examined; and two others, it would appear, had died in the interregnum. The appeal on the point has no substance and would require to be dismissed. We must now turn to the larger issue raised in the appeal."

He has also placed reliance upon the decision in case of **Lakshmipat Choraria and ors vs. State of Maharashtra**,[6] which has relied upon the above decision.

Another decision on which reliance is placed in support of the contention that it is the choice of the prosecution to arraign any person as accused, is the decision in **P. Sirajuddin Etc Vs. State of Madras**[7].

21. In support of the contention whether the application could have been preferred by NSEL under Section 190 of the Code. Mr. Desai has invited our attention to Section 319, which according to him, is the provision available to proceed against any person, when in the course of any inquiry into, or trial of an offence, it appears from the evidence that the said person has committed an offence but he is not an accused and he could be tried together with the accused.

Relying upon the said provision, it is his submission that even when a person is not named in the charge-sheet as an accused, the trial court has adequate powers to summon such a person as well and he has taken us through precedents throwing light upon the scope and ambit of Section 319 and this include

6 1968 SC 938
7 1970(1) SCC 595

the Constitution Bench decision in case of **Hardeep Singh vs. State of Punjab and ors**[8], which has highlighted the scope of Section 319 as well as the stage(s) at which the power can be exercised. Heavy reliance is placed upon the Constitution Bench decision by Mr. Desai for two purposes; firstly to submit that this is the only provision which is available once the Special Judge has taken cognizance of the offence through various charge-sheets which have filed and once the cognizance of the offence has been taken for the purpose of taking cognizance of the offender, the only provision available is Section 319, when the Court can exercise the power to add an accused, whose name has been shown in column 2 of the charge-sheet. In addition, he has also placed reliance upon the decision in case of **Dharam Pal and ors vs. State of Haryana and anr**[9] in support of his submission that once the inquiry has commenced after filing of the charge-sheet, the only stage where addition of accused is permissible, is the 319 stage as Section 190 – 204 -209 is a scheme by itself in form of an ongoing process and in between, no one else than the prosecution can step in. He do not doubt the proposition in Hardeep and in particular observations in paragraph no.54, but he would submit that the court contemplated a rare situation, but it do not deserve an invocation, in the facts of the present case and the application preferred under Section 190 could not have been entertained at the stage when the inquiry had already commenced. In any case,

8 (2014) 3 SCC 92
9 (2014) 3 SCC 306

according to Mr. Desai, a balance has to be struck between the right of the prosecution and the right of the accused, who are sought to be arraigned at this stage at the request of NSEL.

22. Mr. Desai, has distinguished the decision in case of **R.N Agarwal Vs. R.C. Bansal & Ors**,[10] by submitting that it was a case at the stage of framing of charge, when the application was filed under Section 190.

23. On the point of hearing being refused to the accused persons and the appellants he is representing, he would rely upon the following decisions:-

(1) *Jogendra Yadav vs. State of Bihar (2015) 9 SCC 244*

(2) *Ram Janam Yadav and ors vs. State of Uttar Pradesh and anr (2023) 9 SCC 130.*

(3) *Yashodhan Singh and ors vs State of Uttar Pradesh and anr (2023) 9 SCC 108.*

Responding to our query that if an accused has no right to be heard when he is arraigned as accused or charged, and why this opportunity should be afforded at the stage of 319, he would submit that in the former situation, there are filters like, at the stage of framing of charge, an accused can be discharged, but at the final stage at section 319, there is no remedy available to an accused. Apart from this, he would submit that in a complaint case, there is some evidence before charge, and he would submit that if a perpetrator is free as not charge-sheeted, it would be only at 319 stage, this aspect can be looked into and that too, it is a

10 (2015) 1 SCC 48

power of the Court not to be exercised at the instance of the accused.

In support of the submission, as to what should be the material to be looked into at the stage of 319, he would place reliance upon the decision in case of **Girish Sharma and ors vs. State of Chattisgarh and ors**[11]**,** and the decision in case of **Brijendra Singh vs. State of Rajasthan**[12]**.** Another decision on which reliance is placed is in case of **S. Mohammed Ispahani vs. Yogendra Chandak and ors**[13]

24. On facts, Mr. Desai has vehemently submitted that after the cognizance was taken of the 4th charge-sheet filed against the 63 Moons and whose Director/promoters were included in the charge-sheet and cognizance is already taken, the request of NSEL to the Court to take cognizance of some other directors cannot be entertained. According to him, effectively what NSEL has done is, akin to filing of a protest petition as to why the other Directors are not arraigned as accused, but according to him, protest petition is permissible to be filed only by the informant and assuming for a moment that NSEL comes before the Court by way of a protest petition or a complaint as it has set out allegations/charges and request for action to take cognizance against some persons, in that case, it was imperative for the Court to follow the procedure under Section 200 of the Code or even it

11 (2018) 15 SCC 192
12 (2017) 7 SCC 706
13 (2017) 16 SCC 226

was open for NSEL to come through the route of Section 156(3) of the Code.

According to him, at the stage of Section 190, the cognizance can be taken only upon receiving a complaint of facts which constitute such offence or upon a police report of such facts and neither of the contingency exists here to persuade the Court to take cognizance of the offenders.

25. Another question which Mr. Desai, has raised is whether NSEL could file a complaint or go beyond the material collected by the prosecution and compiled in the charge-sheet as NSEL had filed some 500 pages application, which run beyond the investigation conducted.

26. As far as the application of Mr. Bahl, one of the investor is concerned, who projected himself to be a victim. Mr. Desai would submit that he filed his application precisely 17 days after NSEL had filed its application i.e. on 20/02/2023. According to him, in the present offence there are around 12,000 victims as contemplated under Section 2(wa) of the Code of Criminal Procedure and he express a serious objection about anybody walking in and seeking action, as according to him, the first informant who lodged an FIR may be a victim, but Mr. Bahl is not the informant at whose instance the investigating machinery was set into motion. In fact, it is his specific contention that the police had never recorded his statement as investor and therefore,

he selectively seeking impleadment of certain accused must be looked at with grave suspicion. Further, it is the submission of Mr. Desai that if every investor comes before the Court make an application like this, the matter will never progress as it is not an open path for everyone and anyone to walk in, at any time.

27. In the end, Mr. Desai has placed reliance upon the observations of the Apex Court in case of **Sandeep Kumar Bafna Vs. State of Maharashtra**,[14] when the Court observed that no vested right is granted to a complainant or informant or aggrieved party to directly conduct the prosecution and while the prosecution must remain being robust and comprehensive and effective, it should not abandon the need to be free, fair and diligent. According to him, the complainant or informant or aggrieved party may be heard at a crucial and critical juncture of the trial, so that his interest in the prosecution is not prejudiced or *jeopardised* and as a word of caution coming from the Apex Court; "it seems to us that constant or even frequent interference in the prosecution should not be encouraged as it will have a deleterious impact on its impartiality".

28. Mr. Badheka, learned counsel appearing for appellant in Appeal No.462/2023 would submit that he was approached by IICL and he traded on NSEL platform and according to him, he was not an accused till the 13th charge-sheet was filed and since he was never arraigned as an accused, why should he be arraigned as

14 2014 (16) SCC 623

an accused at this stage is the question. He has placed reliance upon the decision of the Apex Court in case of **Rekha Murarka vs. State of West Bengal** [15], highlight the right of the victim and he would submit that it is always open to file an appropriate application or an appropriation by the victim and it is necessary to balance the rights of the victims with that of the accused.

29. Learned counsel Mr. Avhad, appearing for the State would submit that the EOW is still at investigation stage and he would question the attempt on part of the NSEL to file the application, which according to him is reflective of distress towards the State, as he would submit that while investigating, time and again charge-sheets were filed and accused were added as at the stage of first CC there were only 5 accused. According to him, the impugned order failed to consider his objection and he would thus submit that no cognizance has been taken of the 10th and 11th charge-sheet and at this stage NSEL has filed an application to add 64 accused.

Mr.Avhad, on instructions of Investigating Officer make a statement before us that Arvind Bahl who claims to be an investor has not given any statement. He would submit that the State had not opposed the application filed by Arvind Bahl by filing any specific affidavit. Learned Senior counsel Mr.Chavan representing Bahl has vehemently urged before us that Bahl, an investor and therefore a victim who is very much interested in the outcome of

15 (2020) 2 SCC 474

the procedure of investigation and want every person responsible for the default on behalf of the Financial Establishment to be appropriate punished.

IV-Arguments Advanced on behalf of NSEL

30. Contesting the submissions advanced on behalf of the counsel for the appellant, Mr.Ponda representing the NSEL has invited our attention to the FIR filed by Pankaj Ramnaresh Saraf against the NSEL and its directors which had named 25 borrowing companies/trading members along with the directors as accused, with a request to initiate action against the named individuals and unknown persons as per the complaint.

According to him, in charge-sheet no.4 filed by EOW on 25/12/2018, column no.12 as regards 'Particulars of the accused persons not charge-sheeted" included the following:-

"Other directors of NSEL, IBMA and M/s. 63 Moon Technologies Pvt Ltd, defaulter brokers and audit of NSEL etc."

The charge-sheet mentioned that collection of evidence against all these persons is under process and their role is under investigation. On 27/12/2018, the MPID Court allowed filing of the charge-sheet, in absence of the accused and granted permission to supply the copies of the Forensic Audit Report after the final charge-sheet is submitted on completion of investigation.

It is submitted that on 4/3/2019, summons were issued to accused nos.1 to 63. The final charge-sheet in form of charge-

sheet no.11 was filed by EOW and on page no.281 thereof, it is stated that the entire investigation in the NSEL scam has been completed and the charge-sheet filed on 2/12/2022 is the final charge-sheet.

It is the submission of Mr.Ponda that though the brokers were always in the loophole of the accusations but when they were ignored, NSEL waited till the filing of the last charge-sheet, but on noticing that the investigation against them has fizzled out, the application was filed by NSEL (Exhibit 617) for issuance of summons to the brokers.

31. It is the submission of the learned senior counsel that in the Code of Criminal Procedure, 1973, the Court has the power to do justice and in responding to the objection that NSEL, who is one of the accused could not have approached the Court for arraigning other persons as accused, he would submit that it is the duty of the Magistrate under the Code to find out who are the offenders, even though they are not named by the police and once the involvement of others is brought to his notice, then the Court must proceed against them. Summoning of additional accused is part of taking cognizance, according to Mr. Ponda, and this applies with equal force whether the cognizance is taken on a private complaint or on a police complaint.

32. Dealing with the objection that NSEL itself is an accused and therefore, it was not open for it to make request to the Court for arraigning others as accused, Mr. Ponda has argued that there

is no prohibition in the Code for an accused pointing out to the Court that some other person involved in the offence is left out, and ultimately it is for the Court whether to accept it or reject it, as when the offence is being investigated, it is the duty of the Magistrate to take cognizance of the offence. In the facts of the case, since the offence is under section 4 of the MPID Act, according to him, every director/promoter shall come within its sweep and there is no discretion vested in the Special Court to pick up some and leave the others.

Responding to the point urged by Mr.Desai that the cognizance of the offence has been taken when the series of charge-sheets are filed before the MPID Court, and the process is already issued to some of the accused and therefore, at this stage, it is not open for the Court to once again take cognizance, as cognizance is taken only once and it is not open to repeat the said act. He would place reliance upon the decision in case of **Swil Ltd Vs. State of Delhi & Anr,**[16] where on the basis of a charge-sheet, the Metropolitan Magistrate on 3/8/1999, issued summons against all the accused persons shown in the FIR for the offence u/s.406, 420, 120B of the IPC. However, on the next date of hearing, i.e. 20/12/1999, i.e. four months later, he issued summons to respondent no.2 and that part of order was challenged by him by filing the petition before the High Court of Delhi.

16 (2001) 6 SCC 670

Recording that it was clear that at the stage of taking cognizance of the offence, provisions of Section 190 of the Code would be applicable and this provision clearly contemplated taking of the cognizance of the offence and not the offender. In this background, the Apex court observed thus:-

> *"6. As per this provision, Magistrate takes cognizance of an offence and not the offender. After taking cognizance of the offence, the Magistrate under Section 204 Cr.P.C. is empowered to issue process to the accused. At the stage of issuing process, it is for the Magistrate to decide whether process should be issued against particular person/persons named in the charge sheet and also not named therein. For that purpose, he is required to consider the FIR and the statements recorded by the police officer and other documents tendered along with charge sheet. Further, upon receipt of police report under Section 173 (2) Cr.P.C., the Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) even if the police report is to the effect that no case is made out against the accused by ignoring the conclusion arrived at by the investigating officer and independently applying his mind to the facts emerging from the investigation by taking into account the statement of the witnesses examined by the police. At this stage, there is no question of application of Section 319 Cr.P.C. Similar contention was negatived by this Court in Raghubans Dubey vs. State of Bihar (supra)*
>
> *7. Further, in the present case there is no question of referring to the provisions of section 319 Cr.P.C. That provision would come into operation in the course of any inquiry into or trial of an offence. In the present case, neither the Magistrate was holding inquiry as contemplated under section 2(g) Cr.P.C. nor the trial had started. He was exercising his jurisdiction under section 190 of taking cognizance of an offence and issuing process. There is no bar under section 190 Cr.P.C. that once the process is issued against some accused, on the next date, the Magistrate cannot issue process to some other person against whom there is some material on record, but his name is not included as accused in the charge-sheet."*

33. Relying upon the aforesaid pronouncement, it is the submission of Mr. Ponda that there is no bar that once process is issued against some of the accused, it cannot be issued against others on the next date, as the stage of Section 190 continue even after the process was issued. Reliance is also placed upon the

decision of Delhi High Court in case of **Jitender Singh @ Motu Vs. State Government of NCT of Delhi**,[17] where the cognizance was taken by the Magistrate of the offence u/s.394 and 506 of IPC on 16/12/1995 and summons were issued to the accused, pursuant to which he appeared before the Court and was granted bail. Thereafter, the case was adjourned for hearing on the question of charge on three dates upto the year 2002 and on 9/1/2002 i.e. after a long gap, the Magistrate considered the case and on finding that the Investigating Officer has not clearly investigated it, ordered that the accused named in the complaint should also be summoned as they are equally involved during commission of the offence.

The petitioners who were not sent for trial along with Gurvinder Pal Singh being aggrieved by the order, filed the petition before the Court and the Delhi High Court which recorded that the case is covered by the observations of the Apex Court in Raghubans Dubey which received approval in **Swil Limited**, where it was held that Section 319 of the Code would come into operation in the course of an inquiry into a trial of an offence and in exercising the jurisdiction u/s.190 of the Code of taking cognizance of an offence, there is no bar if once the process is issued against some accused on the next day, the Magistrate cannot issue process to some other person, against whom there is some material on record, but his name is not included in the

17 2022 SCC Online Del 981

charge-sheet.

34. Mr.Ponda has strenuously invited our attention to the decision in case of **Kishun Singh Vs. State of Bihar**[18] when a question was formulated as to 'whether de hors Section 319, can similar power be traced to any other provision in the Code, or can such power be implied from the scheme of the Code' and the question came to be answered, by holding that once the Court takes cognizance of the offence (not offender) it becomes a Court's duty to find out the real offenders, and if it comes to a conclusion that besides the person put up for trial by the police, some other persons are involved in the commission of the crime, it is the Court's duty to summon them, to stand for trial along with those already named, since summoning them would only be a part of taking cognizance and with this finding, the conclusion was drawn in the following words:

> *"17 For the reasons stated above while as are in agreement with the submission of the learned counsel for the appellants that the stage for tile exercise of power under section 319 of the Code had not reached, inasmuch as, the trial had not commenced and evidence was not led, since the Court of Session had the power under section 193 of the Code to summon the appellants as their involvement in the commission of the crime prima facie appeared from the record of the case, we see no reason to interfere with the impugned order as it is well-settled that once under it is found that the power exists the exercise of power under a wrong provision will not render the order illegal or invalid. We, therefore, dismiss this appeal."*

35. According to Mr.Ponda, the Three Judges Bench of the Apex Court in case of **Ranjit Singh Vs. State of Punjab**,[19] did not

18 (1993) 2SCC 16
19 (1998) 7 SCC 149

agree with the observations in Kishun Singh that the powers of the Sessions Court u/s.193 could include summoning of a person or persons whose complicity in the commission of trial can prima facie be gathered from the material available on record. This resulted in the Constitution of larger Bench in **Dharam Pal & Others Vs. State of Haryana & Anr**[20], when this conundrum was resolved as specific questions for reference before the Bench were formulated as below:-

> *"7.4 Can the Session Judge issue summons under Section 193 Cr.P.C. as a Court of original jurisdiction?*
> *7.5 Upon the case being committed to the Court of Session, could the Session Judge issue summons separately under Section 193 of the Code or would he have to wait till the stage under Section 319 of the Code was reached in order to take recourse thereto?*
> *7.6 Was Ranjit Singh's case (supra), which set aside the decision in Kishun Singh's case(supra), rightly decided or not?"*

The Reference was answered after due deliberation that the decision in Kishun Singh was the correct decision and the learned Sessions Judge acting as a Court of original jurisdiction could issue summons u/s.193 on the basis of the records transmitted to him as a result of the committal order passed by the learned Magistrate, and it was thus confirmed that the Magistrate and the Sessions Court has unfettered power to do so and the view in Ranjit Singh was overruled.

36. According to Mr.Ponda, Raghubans Dubey, Kishun Singh, Dharam Pal, Hardeep are all column 2 cases, but the present accused are not column 2. In any case, it is his submission that the power u/s.190 or 193 is not restricted to column 2, and the

20 (2014) 3 SCC 306

law laid down for almost five decades do not prohibit going against non-column 2 persons.

The learned senior counsel would invoke the principle of law laid down in **Nahar Singh vs. State of Uttar Pradesh**[21] which has followed Dharam Pal, Raghubans Dubey as well as Kishun Singh and even the decision in M/s. Swil Limited that there is no bar u/s.190 that once process is issued against some accused, in the Magistrate issuing process to some other person on a future date.

37. On behalf of NSEL, and relying upon the aforesaid authoritative pronouncements reflective of a uniform view, Mr. Ponda has urged that irrespective of the fact as to whether cognizance is taken by the Magistrate u/s.190 of the Code or jurisdiction is exercised by the Court of Sessions, u/s. 193 thereof, the view is that the judicial authorities would not have to wait till the case reach the stage when jurisdiction u/s.319 of the Code is capable of being exercised for summoning a person as accused, but not named in the police report. In short, it is urged by learned senior counsel Mr.Ponda that NSEL was perfectly justified in making an application u/s.190 and calling upon the Court to take cognizance of the offence against other accused who had escaped the clutches of the prosecution and the learned Judge has rightly appreciated its locus and exercise the power at the stage of section 190 instead of making it wait till the stage of 319 reaches.

21 (2022) 5 SCC 295

38. In Criminal Appeal No. 1153/2022, filed by the State of Maharashtra, Mr. Lakhawat has represented NSEL and he has expressed his consensus in regards the submission advanced by learned senior counsel Mr. Ponda in reiterating that the accused has a locus to file an application under Section 190 as there is no expressed of inclined bar to join other persons who are not charge-sheeted by the police as accused. One decision of Madhya Pradesh High Court, in case of *Jaswant Rathore vs. State of M.P.* prior to the decision in case of R.N. Agrawal is placed by Mr. Lakhawat that is in case of ***Jaswant Rathore vs. State of M.P.*** when he submit that Sessions Court can take cognizance against the persons who are not accused and issue summons to them to face trial. Similarly according to him even Section 319 does not prescribe any qualification for the person, who can file an application to join other persons as accused and therefore according to him the judgments holding that even an accused can file an application under Section 319 are equally relevant to justify the locus of the accused to file an application under Section 190 of the Code. He would draw the distinction in the decision in case of ***Laxmipat Choraria vs. State of Maharashtra***[22], cited by Mr. Desai as by submitting that it was the approver in the case who were sought to be prosecuted by submitting that sometimes to give way to larger conspiracy you need to spare someone though he may be an accused and such is an exceptional

22 (1967) SCC Online SC 30

case. According to him, the decisions in case of **Laxmipat Choraria as well as *P Sirazuddin* vs. *State of Madras***[23] arise out of an exceptional situation, while the prosecution, in exercise of its prosecutral discretion, choose not to prosecute a person involved in a crime so as to secure his testimony to unearth the entire crime and catch the real perpetrator. It is in this background according to him the Supreme Court has held that the primary accused cannot be permitted to seek prosecution of such star witnesses by filing an application under Section 190 or 390 of the Code, with an objective of rendering the testimony in admissible, thereby jeopardizing the entire case of the prosecution. According to him, there is nothing on record to show that the present case falls within the 'exceptional situation' as perusal of the statements recorded under Section 161 in case of Mr. Roop Kishor Bhootra a and Mr. Manish Gupta, who have been cited as witnesses by the prosecution, do not reveal any incriminating details against NSEL or other prime accused and hence they cannot be said to be star witnesses, whose prosecution would jeopardize the case of the prosecution. He has also placed reliance upon the decision in case of Rahgubans Dubey to submit that it is a duty of the trial court to find out, who the offenders are and summoning of additional accused person is part of his duty which continue till the stage of framing of the charge. Therefore, it is his submission that even if the application is filed by the accused like NSEL, it do not

23 (1970) 1 SCC 595

deserve its dismissal on the ground that locus standi since the case do not fall within the 'exceptional situation' and rather it has been filed in 'peculiar situation' and according to him the impugned order dated 31/03/2023, by the Trial Court rejecting the application filed by the State does not suffer from any legal infirmity and hence must be upheld.

ARGUMENT OF OTHERS

39. Mr. Sekseria, who has filed an application for intervention at the instance of one of the Director in Anand Rathi, who has been issued the summons has also joint hands with Mr. Desai in submitting that Section 190 is not the enabling power but it is the power of the Court and according to him, once cognizance is taken by the Court, how can it be reviewed at the behest of NSEL, at the stage of filing of 10th and 11th charge-sheet. Inviting our attention to the application of NSEL, he has submitted that the application has admitted that the cognizance is already taken of the offence and therefore, according to him there is no question of adding other persons as accused once cognizance of the offence has been taken, and in fact, the application filed by NSEL is nothing but a disguised application seeking review of the order dated 4/03/2019, accepting the police report dated 27/09/2018 and when the cognizance is already taken and some of the brokers have already been brought in.

It is also his submission that the application necessarily

prejudice the intervenor, who otherwise, after the investigation of the police has not been arraigned as an accused or as a witness in the stage of 10th charge-sheet and a primary accused after lapse of 6 years is coming to the Court and asking it revisit an earlier order, accepting the report under Section 173 of the Code. According to Mr. Sakseria, once the cognizance is taken by a Magistrate his power under Section 190 is exhausted and it is only an enabling provision, which is not relatable to an accused but to the offence. According to him, the cognizance of an offence can be taken only once and therefore in the event the Magistrate take cognizance of the offence and then commits the case to the Court of Session, the question of taking fresh cognizance of the offence and issuance of summons to the accused do not arise. It is also his submission that the nature of the application filed by NSEL is neither in form of a complaint within meaning of Section 200 nor can it be termed as a report under Section 173 and therefore, according to him there is question of exercise of power under Section 190, which only contemplate three possibilities as contemplated in the said section. Therefore, according to him if the application was to be treated as a complaint under Section 200 then the law mandate that the procedure prescribed under Section 200 and 202 shall be followed.

40. Criticizing the order dated 31/03/2023, filed by the State, is described by him as a perfunctory approach and he has attempted

to distinguish the decision in case of R N Agrawal (supra) by submitting that it was the CBI Special Judge, who was seized with the matter, when the application was made contemporaneously and the witnesses were summoned. According to him barring the fact that the Supreme Court recorded that the application was moved ostensibly under Section 190 r/w 193 of the Code, the Supreme Court has not laid down that an application can be made under Section 190 of the Code, much less by an accused. Submitting that in the present case, there were 3 charge-sheets pending consideration before the learned Judge and therefore he had the option to consider the material contained in the charge-sheet or the material available with the Court if wanted to disagree with the report but he could not have entertained an application under Section 14.

ANALYSIS OF THE COUNTER SUBMISSIONS.

Two points fall for our consideration and we shall deal with it in sequence.

(a) Whether Application by NSEL seeking summons against persons not charge-sheeted is maintainable.

41. We shall first deal with the point which fall for our consideration whether one accused is entitled to seek impleadment of another person as an Accused on the pretext of doing complete justice and in such a contingency, what is expected of the Court.

In the Code of Criminal Procedure, the investigating machinery is set into motion, on receipt of an information as to a cognizable case or a non cognizable case, Section 154 prescribing the procedure to be followed in respect of the information received in cognizable cases, whereas, Section 155 setting out the procedure in case of the information being received in as non cognizable case.

In the scheme of the Code, the procedure to be followed for investigation is set out with clear instructions about how the report shall be submitted to the Magistrate and this include the power to hold investigation or preliminary enquiry. While the Investigating Officer undertake the investigation, he may require attendance of any person acquainted with the facts and circumstances of the case before him and it will be imperative for the person to abide by the directions. During the course of investigation, a Police Officer is allowed to examine orally any person who is acquainted with the facts and circumstances and such person is duty bound to answer truly all questions relating to such case put to him, other than those questions which may expose him to a criminal charge or to penalty or forfeiture. The power of a Police Officer also extend to carrying out search, which may be at times accompanied by a Search Warrant. The procedure to be followed when the investigation cannot be completed within 24 hours when a person is arrested and detained in custody, is clearly set out in Section 167, but he cannot get into

the details of the said provision as it is self sufficient to take care of the contingency.

42. Upon investigation being carried out, if it appears to the Officer in charge of a Police Station that there there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such Officer shall in the wake of Section 169 release him on executing a bond with or without surety with a direction that he shall appear whenever it is so warranted by the Magistrate.

On the other hand, if the material is sufficient to forward him to the Magistrate, the Officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police report and to try the accused or commit him for trial, or if the offence is bailable and the accused is able to give security, by obtaining the security, he shall ensure his appearance before the Magistrate on the date fixed for his appearance.

43. Section 173 of the Code is a provision set out the procedure to be followed on completion of investigation and as soon as it is so done, the Officer in charge of the Police Station shall forward a report to the Magistrate empowered to take cognizance of the offence on a police report and what shall be the contents of the said report is highlighted in sub-section (2) of Section 173.

The Report under Section 173 is in common parlance referred to as 'Charge Sheet' and whenever the Officer find it

convenient to do so, he may furnish to the accused copy of all or any of the documents referred to in Sub Section (5) which include all the documents or relevant extract thereof, on which the prosecution proposed to rely, other than those which are already forwarded to the Magistrate during investigation and and also the statements recorded under Section 161 of all the persons whom the prosecution proposed to examine as witnesses.

What is relevant is the power under Sub Section (8) of Section 173, i.e. the power of further investigation and it is necessary that we reproduce the same :-

> *"8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."*

44. Chapter XIV which comprise of Section 190 is captioned as "Conditions requisite for initiation of proceedings" and Section 190 is the cognizance of offences by Magistrate, which reads thus :-

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

> *(2) The Chief Judicial Magistrate may empower any Magistrate of the second class to take cognizance under sub-section (1) of such offences as are within his competence to inquire into or try."*

Section 193 which imposes a restriction on the Court of Sessions to take cognizance of any offence as a Court of original jurisdiction reads thus :-

> *"193. Cognizance of offences by Courts of Session – Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate under this Code."*

Upon the cognizance being taken the Additional Sessions Judge and Assistant Sessions Judge shall try the case as contemplated under Section 194.

45. Chapter XV in the Code which involve complaints to the Magistrate and Section 200 set out a procedure before the Magistrate take cognizance of an offence on complaint and this cognizance is the one contemplated under Section 190(a). Chapter XV then set out the procedure to be followed by the Magistrate as set out in Section 202 and 203.

Chapter XVI captioned under the title "Commencement of proceeding before Magistrate" include Section 204 which relates to the issuance of process and specify that in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, then he shall issue summons for attendance of the accused before him, the procedural safeguards to be followed by the Magistrate being clearly set out.

In this Chapter the most important provision is in form of Section 209 which is for commitment of case to the Court of Sessions when the offence is triable exclusively by it and in such circumstances, the Magistrate may follow the following course of action :-

> *"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."*

46. Another important provision which we must make a mention at this stage itself, is in form of Section 319 and this provision is found in Chapter XXIV pertaining to general provisions as to enquiries and trials.

Since the rival contentions advanced before us revolve around Section 319, we deem it appropriate to reproduce the same :-

> *"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 the 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."*

47. As far as special enactment i.e. Maharashtra Protection of Interest of Depositors Act, 1999 is an enactment to protect the interest of depositors of the Financial Establishments and which has come into force with effect from 29/04/1999. The offences under the said statute are triable by the Designated Court which is constituted under Section 6 of the Act, to be headed by District and Sessions Judge to be appointed for such areas for such for such case or class or group of cases as may be specified. in the Notification.

Section 13 of the Act is a special provision which permit the designated Court to take cognizance of an offence without the accused being committed to it for trial and it is prescribed that in trying the accused person, the Court shall follow the procedure prescribed in the Code of Criminal Procedure.

48. In the wake of the aforesaid statutory scheme it is clear that the Special Judge under the MPID Act is empowered to take cognizance of the offence without the case being committed to him and thus Section 209 kicks in and the Special Judge become a Court of original jurisdiction.

In the present case, on 02/12/2022, the final charge sheet was filed before the Special Judge, and it is not in dispute that the cognizance of the offence was taken by the Special Judge, when the first charge sheet was filed before him on 16/1/2014. It is the argument of NSEL at whose instance the applications are filed that with bated breath they waited for the brokers to be added as accused, but on realising that they are not to be added as accused, it filed an Application on 28/02/2023 and albeit under Section 190 of Code, requesting the Special Judge for taking cognizance against the promoters and Directors of the accused Financial Establishment.

49. We have perused the Miscellaneous Application filed by the NSEL and on its reading the underlying purpose therein becomes evidently clear to us.

NSEL, one of the accused, sought issuance of process to the persons who were the Promoters and Directors of the following accused Financial Establishments viz. (a) M/s. India Infoline Commodities Ltd. (IICL), (b) M/s. Anand Rathi Commodities Ltd. (ARCL); (c) M/s. Geojit Comtrade Ltd. (GCL) in view of the statutory mandate of Section 3 of the MPID Act.

Stating that the EOW/Respondent, the investigating agency has been investigating CR No.89/2013 for last 9 years and charge sheeted various persons and entities for their acts and omissions including NSEL being charge-sheeted through the supplementary charge sheet, the premise on which the relief is claimed is to be

found in paragraph 6 onwards where it is stated that in the charge-sheet dated 27/12/2018 IICL, ARCL, GCL and their respective Directors Chintan Mody, Amit Rathi and C.P Krishnan have been arraigned as accused, on the ground that they had lured and accepted deposits by promising guaranteed returns, but they defaulted in making repayment of such deposits. The Application specifically state that by order dated 5/03/2019, the Court took cognizance of the offence under Section 3 of the MPID Act and relevant provisions of IPC and had issued process to the individuals and entities named therein. Focusing its attention upon Section 3 of the MPID Act which clearly set out that in case of default by a Financial Establishment "every person" including a Promoter Partner, Director, Manager or any other person or an employee responsible for the management or conducting its business or affairs, shall also be liable for punishment, the grievance set out is that in case of ARCL, only two out of four Directors are charge-sheeted. But Ms.Preeti Gupta, Promoter/Director of ARCL and Mr. Roop Bhootra, another whole time Director, have been selectively given clean chit without offering any justification.

Similar is the grievance made in respect of GCL, since it is alleged that the Investigating Officer has charge-sheeted only one out of three Directors and Ms.Shiny George who was the Promoter/Director and Mr.Manish Gupta another whole time Director has been left out.

In case of IICL also, a similar allegation is levelled by placing before the Court the evidence available against them as Promoters/Directors and Mr.Nirmal Jain, Roop Bhootra as well as India Infoline Finance Ltd., Promoter of the charge-sheeted financial establishment India Infoline Commodities Ltd, is also prayed to be added as accused.

50. At this stage, we will not reflect upon the justiciability of the material for impleading them as accused persons, but limit ourselves to the issue as to whether at the instance of NSEL, the persons/entities named in Exhibit 617 are liable to be arraigned as accused.

51. It is trite position in law that under Section 190 of the Code, the Magistrate takes cognizance of an offence made out in the police report or in the complaint and there is nothing like taking cognizance of the offenders at that stage. Who are the offenders who are actually involved in the offence of which cognizance has been taken, will be decided by the Magistrate after taking cognizance of the offence and under Section 204, the Magistrate is empowered to issue process to such of the accused. At the stage of issuance of process, the Magistrate shall satisfy himself that there is sufficient ground for proceeding i.e. issuance of summons/warrant causing his appearance before the Court.

At this stage, the Magistrate shall also decide whether the process should be issued against a particular person or persons, who is named in the charge-sheet and one who is not named in

the charge-sheet, but the Magistrate feels that he need to be summoned in the wake of the material placed before him.

When the Magistrate take cognizance of offence under Section 190, and issue process against some of the accused persons, we do not find any bar in the Code of Criminal Procedure, 1973 in prohibiting the Magistrate from issuing process to other accused persons when some material against them come to his notice, but such person was not arraigned as an accused in the charge-sheet submitted by the Investigating Officer who conducted the investigation.

52. In **Raghubans Dubey vs. State of Bihar** (supra), this very point came up for consideration when an argument was advanced on behalf of the appellant that no proceeding was instituted against him on a police report within meaning of Section 207-A of the Code because he was not to be found in the charge-sheet and therefore though cognizance might have been taken of an offence under Section 190(1)(b) no proceedings was instituted against him, and therefore, the proceedings would fall within Section 207(b).

Dealing with the aforesaid contention, the Apex Court specifically observed thus :-

> *"8. In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders; once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart rom the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As*

pointed out by this Court in Pravin Chandra Mody vs. State of A.P. [Pravin Chandra Mody v. State of A.P. (1965) 1 SCR 269 : AIR 1965 SC 1185: (1965) 2 Cri LJ 250] the therm "complaint" would include allegations made against persons unknown. If a Magistrate takes cognizance under Section 190(1)(a) on the basis of a complaint of facts he would take cognizance and a proceeding would be instituted even though persons who had committed the offence were not known at that time. The same position prevails, in our view, under Section 190(1)(b)."

The aforesaid pronouncement was followed in Hareram Satpathy vs. Tikaram Agarwal, 1978 (4) SCC 58, where an investigation was carried out and on completion thereof a charge sheet was submitted against 6 persons on the ground that they had intentionally caused the death of the appellant's brother, but from the charge sheet no offence was made out against the respondents. On a complaint filed by the Appellant, the sub divisional Magistrate found a prima facie case under Section 302 against him and directed issuance of non bailable warrant.

The High Court in exercise of writ jurisdiction set aside the order and the Apex Court by relying upon Raghubans Dubey held that under Section 190 the Magistrate take cognizance of the offence and there is nothing like taking cognizance of an offender, and therefore, when the sub divisional magistrate took cognizance of the offence on police report, and he satisfied himself that there was prima facie grounds for issuing process against the Respondent, it was held that the Magistrate did not exceed the power vested in him in law.

53. We must keep in mind the settled position of law that at the stage of issuance of process, the Magistrate is only concerned with

the allegations made in the complaint or the evidence produced before him in support thereof and he has to only prima facie satisfy about the sufficiency of the grounds for proceeding against the accused and it is not expected of him to have a detail discussion on merits or demerits of the sufficiency of evidence. What is expected at this stage is a prima facie view of the existence present, in support of the allegations of the complainant which would justify issuance of process and commencement of proceedings against the accused. It is not expected that at this stage the Magistrate shall sift the evidence or weigh it to find out whether it is sufficient to warrant a conviction.

54. Mr. Ponda has placed reliance upon the decision in **Swil Ltd. vs. State of Delhi & Anr**[24], which is subsequently affirmed by the Constitution Bench in **Dharam Pal vs. State of Haryana** (supra) and **Nahar Singh vs. State of U.P.** (supra).

The Apex Court was approached when the High Court of Delhi vide its impugned Judgment and Order found the trial Court to be in error in summoning the Petitioner though he was not shown in column of accused persons in the charge-sheet and it was held that he could have been summoned by the Court only after the evidence has been recorded i.e. at Section 319 stage.

In the background facts, the C.R being registered with Kalkaji Police Station, New Delhi against M/s.Malbar Cashewnuts and Allied Products during investigation, it was

24 (2001) 6 SCC 670

revealed that Respondent No.2 was the Managing Director of another sister company and two letters of credit given by the appellant were transferred by one of the accused in its favour.

55. A notice under Section 160 was issued to him, but because of the stay granted by the High Court of Kerala, it was not possible to interrogate him and he was not joined as an accused in the charge-sheet submitted by the police, but his name was shown in Column 2. On the basis of the charge sheet, summons were issued against all accused for the offences under Section 406, 420, 120B of the IPC. On the next date of posting, which was four months later, summons was issued to respondent No.2 and in this peculiar circumstance, the Apex Court observed thus :-

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

56. The aforesaid observation clearly cut across the argument of Mr.Desai, the learned senior counsel that after Section 204, i.e. on issuing summons against the persons named in the charge sheet after taking cognizance under Section 190, the Magistrate can only resort to Section 309 as by relying upon Raghubans Dubey (supra), their Lordships have clearly held that there is no question of referring to the provisions of Section 319, as this provision would come into operation in the course of any inquiry into or trial of an offence and at the stage of 190 the Magistrate do not hold an enquiry as contemplated under Section 2(g) of the Code. nor the trial had not commenced, but he was at the stage of 190.

When we turned our attention to the definition of the term 'inquiry', it means every inquiry other than trial, as trial contemplate recording of evidence and at the stage of Section 190 when the Magistrate take cognizance of an offence and issue summons, he is at a very nascent stage when he has to only satisfy himself about the existence of sufficient ground for proceedings against an accused, which may not be conclusive in nature and may not be sufficient enough to convict him as issuance of process is a preliminary step in the stage of trial contemplated in Chapter XX of the Code. Section 204 do not mandate the Magistrate to explicitly state the reasons when he issues summons, not does it contemplate offering of the reasons and therefore it is distinct from the stage of 319, which is a stage in trial. When the

Magistrate has taken cognizance of an offence he is duty bound to find out the persons who are responsible for committing the offence i.e. who are the offenders. The Investigating Officer who has filed the charge sheet/report may have named some of them, but nothing precludes the Magistrate from applying his mind to the material placed before him so as to ascertain whether some of those persons who ought to have been arraigned as accused, are left out.

On coming to know about the role of certain persons from the charge-sheet, but who are not been arraigned as accused, it is his duty to proceed against such persons, as summoning of these persons as accused, is a part of taking cognizance of the offence and from the authoritative pronouncements referred to above, it is clear that the Magistrate must discharge his duty, irrespective of the report before him arising from private complaint or police complaint, and in any case, if the Magistrate/Court can do it suo motu, we wonder as to why being pointed out by any other person, apart from the complainant, the Court shall not look into it.

57. By applying the aforesaid principle, we do not find any justification in the Special MPID Court not looking into the application only because it is brought to the notice of the Court by NSEL, who is described as the prime accused. Even if it is pointed out by one of accused like the NSEL, the Court can always test the contention and upon finding any justification, we

see no legal embargo in the Special Judge not proceeding ahead. While an offence is being investigated an Investigating Officer is bound by the contours of the offence and under the MPID Act, if Section 3 contemplate that every person including the Promoter/Partner, Director, Manager or any other person or an employee responsible for the management or for conducting of business or affairs of such Financial Establishment is liable for conviction, when the Financial Establishment has fraudulently defaulted in making repayment of deposits then definitely the Special Court is empowered, and rather duty bound to look at this contention as set out in the Application. Merely because cognizance is taken of an offence when the first charge sheet is filed, it definitely did not preclude the Special Judge to take cognizance of those offenders who have committed the offence, every time the supplementary charge sheet was filed. Merely because on the first date process was issued against some of the accused persons, there is no bar in issuing process against the others and this is very clear from the observations of the Apex Court in Swil Ltd. (supra).

58. The criminal law can be set into motion by filing of an information under Section 154 or in receipt of a complaint or information by the Magistrate and the investigation carried out by the police would culminate in a report under Section 173 of which the cognizance will be taken by the Magistrate under Section 190 (1) (b) of the Code. In a complaint case, the

Magistrate may either order investigation by the police under Section 156 (3) of the Code, or himself hold an inquiry under Section 202, before taking cognizance of the offence under Section 190 (1) (a) or (c) as the case may be read with Section 204 of the Code. Once the Magistrate takes cognizance of the offence, he may proceed to try the offender or commit him for trial under Section 209, if the offence is triable exclusively by the Court of Sessions.

As the Court takes cognizance of the offence and not the offender under Section 190, after taking cognizance, the Court is required to frame charge, offering the details as to the time and place of the alleged offence and also of the person against whom the offence is committed.

However, before the charge is framed there comes a stage of Section 227, when upon consideration of the record of the case and the documents submitted therewith, the Sessions Judge, comes to a conclusion that there is no sufficient ground for proceeding against the accused, then he shall, for the reasons to be recorded discharge him. However, if he is of the opinion that there is a ground for presuming that, he has committed an offence, he will proceed to frame a charge and record the plea of the accused. At this stage, whether to frame or not to frame charge, the Judge is required to examine the record of the case, including the documents furnished along with the charge-sheet and on scrutiny of this material if he find that besides the

arraigned accused there are others involved in the offence, then the question arises what he should do and it received an answer in in ***Kishun Singh vs. State of Bihar*** (supra). To ascertain as to what course of action is available to a Magistrate/Sessions Judge, and what is the stage at which such an option becomes available, the Apex Court relied upon the law laid down in *Raghubans Dubey and Hariram* and by way of illustration set out in paragraph no.15, as two persons A and B attack and kill X and it is found from the material placed before the Court, that the fatal blow was given by A, whereas blow inflicted by B was on the non-vital part of the body. But if A is not charged by the police, the Judge may find it difficult to charge B, for murder of X with the aid of Section 34, then what is the course of action available?

In such scenario, whether he will wait till the evidence is laid at the trial to enable him to invoke Section 319, when the proceedings would commence afresh, the argument advanced on behalf of the State was, it would result in waste of public time.

In light of this submission and by recapitulating the law already laid down through the precedence, the Apex Court observed thus:-

> *"16. We have already indicated earlier from the ratio of this Court's decisions in the cases of Raghubans Dubey and Hariram that once the court takes cognizance of the offence (not the offender) it becomes the court's duty to find out the real offenders and if it comes to the conclusion that besides the persons put up for trial by the police some others are also involved in the commission of the crime, it is the court's duty to summon them to stand trial along with those already named, since summoning them would only be a part of the process of taking cognizance. We have also pointed*

> *out the difference in the language of section 193 of the two Codes; under the old Code the Court of Session was precluded from taking cognizance of any offence as a Court of original jurisdiction unless the accused was committed to it whereas under the present Code the embargo is diluted by the replacement of the words the accused by the words the case. Thus, on a plain reading of section 193 as it presently stands once the case is committed to the Court of Session by a magistrate under the Code, the restriction placed on the power of the Court of Session to take cognizance of an offence as a court of original jurisdiction gets lifted. On the magistrate committing the case under section 209 to the Court of Session the bar of section 193 is lifted thereby investing the Court of Session complete and unfettered jurisdiction of the Court of original jurisdiction to take cognizance of the offence which would include the Summoning of the person or persons whose complicity in the commission of the crime can prima pacic be gathered from the material available on record. The Full Bench of the High Court of Patna rightly appreciated the shift in section 193 of the Code from that under the old Code in the case of S.K Lutfur Rahman (supra) as under :*
>
> *"Therefore, what the law under section 193 seeks to visualise and provide for now is that the whole of the incident constituting the offence is to be taken cognizance of by the Court of Session on commitment and not that every individual offender must be so committed or that in case it is not so done then the Court of Session would be powerless to proceed against persons regarding whom it may be fully convinced at the very threshold of the trial that they are prima facie guilty of the crime as well …. Once the case has been committed, the bar of section 193 is removed or, to put it in other words, the condition therefore stands satisfied vesting the Court of Session with the fullest jurisdiction to summon and individual accused of the crime."*
>
> *We are in respectful agreement with the distinction brought out between the old Section 193 and the provision as it now stands."*

59. The aforesaid observation is clear indication that dehors Section 319 of the Code, a power is available at the stage of Section 190/193, when the stage for exercise of power under Section 319 has not yet reached, in as much as the trial has not commenced and the evidence is not lead, but the Court of Sessions has the power under Section 193 of the Code, to summon an accused/(s) if his involvement in commission of crime has *prima facie* surfaced from the record. What specifically

follows from the aforesaid exposition of law from the Apex Court, is that once the case is committed to the Court of Sessions by the Magistrate under the Code, the restriction placed on its power to take cognizance of an offence as the Court of original jurisdiction is lifted and infact in the present case under the MPID Act, the designated Court act as a Court of original jurisdiction.

60. The exposition of law received approval in ***Nisar and anr vs. State of Uttar Pradesh***[25], when it is reiterated that once the bar of Section 193 is lifted it invest the Court of Session, complete an unfettered jurisdiction as a Court of original jurisdiction, which would include summoning of the person/(s) whose complicity in the commission of crime can be *prima facie* gathered, and this power available to do complete justice.

The Three Judge Bench in ***Ranjit Singh vs. State of Punjab***[26] however raised some doubt on the law laid down in Kishun Singh, when it expressed that once the Sessions Court takes cognizance of an offence pursuance to a committal order, the only other stage when the court is empowered to add any person to the array of accused is after collection of evidence collection, when powers under Section 319 can be invoked, though it was clarified that it was not necessary for the Court to wait until the entire evidence is collected, before it exercises the power. However, in ***Dharam Pal and others vs. State of Haryana***

25 (1995) 2 SCC 23
26 (1998) 7 SCC 149

and anr[27], the Constitution bench once again enforced the law laid down in Kishun Singh, by expressing that the view was more acceptable since the Magistrate had ample power to disagree with the final report that may be filed by the police under Section 173(2) of the Code and to proceed against the accused persons de hors the police report, which power the Sessions Court does not have till Section 319 stage is reached.

The Constitution Bench analyzed the situation and inferred that upshot of such a situation would be that even though the Magistrate had power to disagree with the police report filed under Section 173 of the Code, he was helpless in rectifying the situation as he was unable to proceed against any person other than the accused **sent** up for trial, till such time evidence has been adduced and the witness has been cross-examined on behalf of the accused. Recording that the Magistrate cannot be a mute spectator, the position was clarified by the following observation :-

> *"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) Cr.P.C. 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 no.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."*

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61. In paragraph 40, the Constitution Bench expressed its agreement with the view in Kishun Singh, that the Sessions Court has jurisdiction on committal of a case to it, to take cognizance of the offences of persons not named as offender, but whose complicity in the case would be evident from the material available on record and even without recording the evidence, upon committal order under Section 209, the Sessions Judge may summon the persons in column 2 of the police report to stand to trial along with those, who are already named therein.

62. Once we have clarity about the sessions Judge being vested with such a power, the next question that falls for consideration is whether this power deserve to be exercised at the instance of a person who is an accused like in the present case the 'NSEL'. The answer to this question is to be found in ***R.N. Agarwal vs. R.C. Bansal***[28]**,** when the power of the Special Judge to proceed against persons not included as accused in the charge-sheet was recognized, but this was done at the instance of the appellant at the stage of arguments on charge.

The facts before the Court reveal that CBI filed a charge-sheet before the Special Judge against six persons, two of whom being public servants, while the other four, the members of the bogus Managing Committee, which had taken over the affairs of a dormant society and who faced accusation of resorting to forgery. The Special Judge CBI on 23/07/2008, took cognizance of the

28 (2015) 1 SCC 48

offences under IPC as well as Section 13(1)(d) of the Prevention of Corruption Act, 1988 and issued summons to 6 persons, named by the CBI in the charge-sheet. After all the accused persons entered appearance, the Special Judge complied with the mandate of Section 207 and adjourned the proceedings.

On the next date of hearing, R.N. Agarwal, one of the accused moved an application under Section 190 r/w Section 193 of the Code, before the Special Judge, for summoning three more persons, who were cited by CBI as witnesses. At the stage, when the matter was fixed for arguments on charge, the application was allowed by the Special Judge, and three persons, who were to participate in the trial as witnesses were summoned and direction was issued to the CBI to register a case against the investigating officer under Section 217 of IPC, for letting off these persons.

63. The observations in Kishun Singh, as well as the two Constitution Bench in Dharam Pal and Hardeep and specific in para 53 and 54 was invoked in deciding the peculiar facts.

R.N. Agrawal was a case, where the charge-sheet was filed in the Court of Special Judge dealing with cases under Prevention of Corruption Act and with reference to the powers of the Special Judge, under Section 5. Recording that since Section 5 allowed the Special Judge to take cognizance of the offence without the accused being committed to him for trial, the Court was deemed to be a Court of Sessions.

Deriving benefit from the principle laid down in case of *Raghubans Dubey* , to the effect that summoning of additional accused is part of proceeding initiated by his taking cognizance of an offence and it was held that the order passed by the Special Judge, while issuing summons against the respondents, was based on the material brought on record during investigation and the relevant observations of the Special Judge referring to the material available against the accused was sufficient enough to summon them.

The conclusion derived by the Special Judge, considering the material brought on record and reliance placed upon the decision in case of *Swill Ltd, Nisar, Kishun Singh* and *Raghubans Dubey*, in arriving at a conclusion that the respondents are involved in commission of offence and consequently summons were issued against them was upheld by reversing the order of the High Court, which had reversed the order passed by the Special Judge, relying upon the decision of the Single Judge of Delhi High Court.

64. The above decision was once again followed by the Three Judge Bench in case of ***Pradeep S Wodeyar vs. State of Karnataka***[29]***,*** when the purpose of taking cognizance of offence instead of accused under Section 190 was focused upon and it was held that a mere change in the form of cognizance order would not alter the effect of the order for any injustice to be

29 (2021) 19 SCC 62

meted out. Recording that since the cognizance was taken by the Special Judge based on the police report and not on a private complaint, it was held that it is not obligatory for the Special Judge to issue a fully reasoned order, if it otherwise appears that the Special Judge has applied his mind to the material placed before him.

The finding was rendered, when the appellants raised a grievance that the Special Judge could not have taken cognizance of an offence, under the MMDR Act without an order of committal by the Magistrate under Section 209 and this contention was repelled by reasoning, that though the order taking cognizance was irregular, the same would not vitiate the proceedings in view of Section 465 of the code. In paragraph no.55, the conclusions reached by the bench in R.N. Agrawal (supra) and in paragraph no.56 the observations in Kishun Singh and Dharam Pal are reproduced with approval.

At this stage, we must clarify that R.N. Agrawal was a case decided at 190/193 stage, and it was a case of a Special Judge exercising original jurisdiction under the Prevention of Corruption Act and though it was a case dealt by Special Court, as sought to be suggested by senior counsel Mr. Desai, it is not an authority for the proposition that it case of a power exercised at Section of 319 stage.

65 In ***Nahar Singh vs. State of U.P.***[30], a decision which followed Kishun Singh, and Hardeep Singh is one more peculiar case, where in an offence registered on a complaint lodged by the victims mother under Section 363, 366, 376 of IPC, the appellant Nahar Singh was not named in the FIR or in the initial statement of the prosecutrix recorded under Section 161 of CrPC and pursuant to the re-examination of the witnesses under Section 161, charge-sheet was submitted only against two persons of whom the Magistrate took cognizance . The mother of the prosecutrix filed an application for summoning the appellant on the basis of her statement, recorded under Section 164 of the Code, where she clearly named him and even, Section 376 (g) of IPC was added in the charge-sheet, but the investigation officer did not attach any importance to her statement and did not charge sheet him.

Before the High Court, argument advanced was that the exercise of jurisdiction by the Chief Judicial Magistrate, under Section 190 (1) (b) of Code was impermissible as it was the case of the appellant, that he was not being named as an accused in the charge-sheet, and he could only be summoned in exercise of power under Section 319 of CrPC.

The High Court relied upon the well established principle of criminal jurisprudence that it was the duty of the Magistrate to find out with respect to the complicity of any person, apart from

30 (2022) 5 SCC 295

those who were charge-sheeted by sifting the corroborative evidence on record and since the Magistrate came to a conclusion that, there was clinching evidence supporting the allegations, made against the persons, who was not charge-sheeted, it was his duty to proceed by issuing summons. Affirming the ruling of the High Court, the Apex Court speaking through the Division Bench, followed Raghubans Dubey, Swill Ltd and Dharam Pal and concluded thus:-

> *"28. As we have already observed that in the aforesaid authorities, the question of summoning the persons named in column (2) of the chargesheet was involved, in our opinion inclusion in column (2) was not held to be the determinant factor for summoning persons other than those named as accused in the police report or chargesheet. The principle of law enunciated in Raghubans Dubey (supra), Dharam Pal (supra) and Hardeep Singh (supra) does not constrict exercise of such power of the Court taking cognizance in respect of this category of persons (i.e., whose names feature in column (2) of the chargesheet)."*
>
> *29. In the cases of Raghubans Dubey (supra), SWIL Ltd supra) and Dharam Pal (supra), the power or jurisdiction of the Court or Magistrate taking cognizance of an offence on the basis of a police report to summon an accused not named in the police report, before commitment has been analysed. The uniform view on this point, irrespective of the fact as to whether cognizance is taken by the Magistrate under Section 190 of the Code or jurisdiction exercised by the Court of Session under Section 193 thereof is that the aforesaid judicial authorities would not have to wait till the case reaches the stage when jurisdiction under Section 319 of the Code is capable of being exercised for summoning a person as accused but not named as such in police report. We have already expressed our opinion that such jurisdiction to issue summons can be exercised even in respect of a person whose name may not feature at all in the police report, whether as accused or in column (2) thereof if the Magistrate is satisfied that there are materials on record which would reveal prima facie his involvement in the offence. None of the authorities limit or restrict the power or jurisdiction of the Magistrate or Court of Session in summoning an accused upon taking cognizance, whose name may not feature in the F.I.R. or police report."*

66. The Apex Court clearly noted a distinction in the position of law based on which the opinions were expressed by the two Constitution Benches in Dharam Pal and Hardeep Singh, where summons were issued against the persons, whose names had figured in column (2) of the charge-sheet, as regards the exercise of jurisdiction by the Court of Sessions under Section 193 of the Code by recording that the jurisdiction to take cognizance has been vested by the Magistrate (under Section 190) as also the Court of Sessions (under Section 193), and this question had received a clear answer in Dharam Pal, to the effect that the language of Section 193 of the Code clearly indicated that once the case is committed to the Court of sessions by the Magistrate, it assumes original jurisdiction and all that goes with the assumption of such jurisdiction.

In any case, Nahar is a case, where the appellant accused was not at all added in column (2), and being conscious of this fact, the law laid down in Raghubans Dubey was reiterated though Raghubans was a case, were the name of the accused figured in column 2 of the charge-sheet under the heading "not sent up". Paragraph no.26, deal with an argument advanced that Raghubans Dubey was a column (2) case, but in Nahar Singh case he was not even arraigned as accused and this contention was turned down by the following specific observation:-

> *"26.The other difference so far as this case is concerned in relation to the factual basis on which the decision of the Constitution Bench in Dharam Pal (supra) as also the judgment in the case of*

> *Raghubans Dubey (supra) were delivered is that in both these cases, the names of the persons arraigned as accused had figured in column (2) of the charge sheet. This column, as it appears from the judgment in the case of Raghubans Dubey (supra), records the name of a person under the heading "not sent up". In that case, the person concerned was named in the F.I.R. But that factor, by itself, in our opinion ought not to be considered as a reason for the Court in not summoning an accused not named in the F.I.R. and whose name also does not feature in chargesheet at all. These judgments were delivered in cases where the names of the persons sought to be arraigned as accused appeared in column (2) of the police report. In our opinion the legal proposition laid down while dealing with this point was not confined to the power to summon those persons only, whose names featured in column (2) of the chargesheet. In the case of Dharam Pal (supra), the second point formulated (para 7.2) related to persons named in column (2), but the issue before the Constitution Bench related to that category of persons only. This is the position of law enunciated in the cases of Hardeep Singh (supra) and Raghubans Dubey (supra). In the latter authority, the duty of the Court taking cognizance of an offence has been held "to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons are involved, it is his duty to proceed against those persons". Such duty to proceed against other persons cannot be held to be confined to only those whose names figure in column (2) of the chargesheet"*

67. In light of the aforesaid discussion, we find that, it is a duty of the Court either of the Magistrate under Section 190 or of the Court of original jurisdiction taking cognizance of an offence to proceed against person/s, who are involved in the offence, but who are not arraigned as accused, and if such a duty is cast upon the Court, merely because it is one of the accused who has invited the attention of the Court to this aspect, it cannot afford to refuse to discharge such duty. Once the Magistrate takes cognizance of an offence, it is his duty to find out who the offenders are and then to proceed against them despite the fact that they have not been charge-sheeted by the investigating machinery. Further more, it is not necessary that the process of issuing summons to

the accused persons, who occur as a offer on a single date or as a single process as it may happen on a subsequent date, and there is no bar in the Court exercising the power despite the fact that on earlier occasion, process/summons was issued against some of the accused, as summoning of the additional accused is also a part of the proceedings initiated by the Magistrate on taking cognizance of an offence. At the stage of section 190 of the Code, the Magistrate definitely takes cognizance of the offence made out in the police report/complaint and he may or he may not take cognizance of the offender, at that stage as the exercise of ascertaining who the offenders are follow the act of taking cognizance of the offence by him. After taking cognizance of the offence, under Section 204 of CrPC, the Magistrate is empowered to issue process and it is within his powers even to issue process against the persons, who are not mentioned in the charge-sheet it is his duty to issue process to those who are named in the charge-sheet, and there is no bar in issuing process on the next date if some material is brought on record against some other person under Section 190 of Cr.PC or in the entire code that, once process is issued against some accused, on the next date the process cannot be issued against other persons if there is a material against the additional accused and if it comes to the Magistrate, which may be either from the charge-sheet or the complainant or even an accused.

68. It is worth to note that the position of law by this time is crystallized and the law laid down in Raghubans Dubey though based upon the old code, has remained unchanged, despite the enactment of new Code of 1973. There is no embargo on the jurisdiction of the Magistrate or Court of Sessions in summoning an accused and since we are dealing with a trial under the MPID Act tried by the Sessions Court (designated Court), it is triable as a warrant- triable case and the law laid down in R N Agarwal case would clearly govern the same. The Designated Court is a Court of original jurisdiction like a Magistrate Court till the charge sheet is filed and post filing of charge-sheet, it shall carry out the trial as per the Magistrate Court.

We therefore, concluded that the application filed by the applicant NSEL (Exhibit 619), one of the accused is maintainable and deserve to be entertained.

(b) Whether it was permissible to entertain the application at the stage of 190 or the application has to wait till the trial reaches the stage of evidence and will deserve indulgence only at the stage of 319.

69. Dealing with the second contention that if at all, there was any scope to interfere, it is not the stage of Section 190, but the appropriate stage would be at the stage of Section 319, Mr.Desai would rely upon Dharam Pal (supra) and Hardeep Singh, in support of his submission that the Code comprise of a triangular scheme- Section 190 (taking cognizance)- Section 204 (issuance of process)- 209 (commitment of case to the Court of Sessions).

According to the appellants it is a Scheme by itself and there is no scope for any stoppage, at either of the stage and no one can step in, but if at all any interjection is possible, it is at stage of Section 319. It is his case that MPID Court is a deemed Magistrate and therefore, the procedure to be followed is of a warrant trial. It has also urged before us that since the inquiry has already commenced, the only the stage which would warrant an intervention is at 319, which may permit permit addition of an accused.

According to Mr. Desai Para 58 in Hardeep Singh, is an exceptional circumstance and in fact, what is expected of the Court is a balancing act since the persons who are not accused, are being sought to be brought in at the stage of taking cognizance. He has distinguished the decision in R.N. Agrawal, by submitting that it was a case where the proceedings were ripe for framing of charge and at that stage, Section 190 application was filed.

70. We have given a thoughtful consideration to the said submission in the wake of the rival contentions to note the power u/s.319. The crucial words in the said section being "any person not being the accused and the power conferred", empower the Court to proceed against such person and the cognizance against the newly added accused is deemed to have been taken in the same manner in which cognizance was first taken of the offence committed against the earlier accused.

Power u/s.319 of the Code can be exercised by the Court suo motu or an application by someone including the accused already before it, and this power in Lokram Vs. Nahil Singh & Anr, (2006) 10 SCC 192 has been described as a discretionary power, although the discretion is expected to be exercised judicially having regard to the facts and circumstances of the case.

The word "evidence" received an interpretation to contemplate the evidence of a victim given in a Court and by relying upon sub-clause (4)(1)(b), it is held that a legal fiction is created at the stage of 319 when it would be presumed that cognizance has been taken against the newly added accused.

71. The power u/s. 319 to add any person not being the accused before it to face the trial along with other accused persons, deserve it's exercise if the Court is satisfied at any stage, of the proceedings on the evidence adduced that the person/s who has not been arraigned as accused should face the trial. Such person may include a person who has been named in the FIR, but not charge-sheeted and the Court can take such steps to add him as accused only on the basis of the evidence adduced before it and not on the basis of the material available in the charge-sheet or the case diary, as it do not constitute evidence.

72. In **Bholu Ram Vs. State of Punjab & Anr**,[31] the scope of manner of exercise of power u/s.390 came to be reiterated in the wake of the existing judicial pronouncements, when one such

31 (2008) 9 SCC 140

application at the instance of the accused was entertained and it was held that, it is no where stated in Section 319 that an application cannot be filed by a person other than an accused nor does it prescribe any time limit, such application can be filed in the Court.

In Hardeep Singh, which is a decision which has dealt with the power u/s.319 by laying down the test and guidelines in relation to the term 'evidence' appearing in the said provision.

We were also made aware of the decision of the Division Bench in case of Hardeep Singh Vs. State of Punjab,[32] (2009) 16 SCC 785, when the matter was referred to a Three Judge Bench, since the two Division Benches in case of **Rakesh & Anr Vs. State of Haryana**[33], and **Mohd Shafi Vs. Mohd Rafiq & Anr**,[34] there was a contradictory opinion about the word 'occurring' in Section 319. Although in Ranjit Singh, it was held that 'evidence' envisaged in Section 319 is the evidence tendered during trial of a case, if the evidence is triable for the Court of Sessions and not the material placed before the Committal Court. The said decision in Ranjeet Singh was however doubted by the Three Judge Bench by Dharam Pal vs. State of Haryana,[35] and in Dharam Pal (supra), the Supreme Court referred the question of power of Sessions Court to take cognizance of the offence against the persons not charge-sheeted, whose complicity in the crime comes to light

32 (2009) 16 SCC 785
33 (2001) 6 SCC 248
34 (2007) 14 SCC 544
35 (2014) 13 SCC 9

from the material available on record at the stage of committal to a larger Bench.

We have before us the authoritative pronouncement of the Constitution Bench in **Hardeep Singh V/s. State of Punjab** & Ors,[36], when the Bench was required to answer the following questions.

> *(i) What is the stage at which power under Section 319 Cr.P.C. can be exercised?*
>
> *(ii) Whether the word "evidence" used in Section 319(1) Cr.P.C. could only mean evidence tested by cross-examination or the court can exercise the power under the said provision even on the basis of the statement made in the examination-in-chief of the witness concerned?*
>
> *(iii) Whether the word "evidence" used in Section 319(1) Cr.P.C. has been used in a comprehensive sense and includes the evidence collected during investigation or the word "evidence" is limited to the evidence recorded during trial?*
>
> *(iv) What is the nature of the satisfaction required to invoke the power under Section 319 Cr.P.C. to arraign an accused? Whether the power under Section 319(1) Cr.P.C. can be exercised only if the court is satisfied that the accused summoned will in all likelihood convicted?*
>
> *(v) Does the power under Section 319 Cr.P.C. extend to persons not named in the FIR or named in the FIR but not charged or who have been discharged?*

73. The use of the expression “in the course of” inquiry or trial received the following interpretation

> *“..**para** 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. the word “course” occurring in Section 319 Cr.P.C., clearly indicates that the power can be exercised only during the period when the inquiry has been commenced by the Court 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 before the court. The word “course” therefore, allows the court to invoke the power u/s.319 of*

36 (2014) 3 SCC 92

> *Cr.P.C to proceed against any person from the initial stage of inquiry by the court upto 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."*

While deciding the question as to what is the stage at which the power u/s.319 can be exercised, the meaning assigned to the term "inquiry" u/s.2(g) was taken into consideration and it was held that trial is distinct from an inquiry and must necessarily succeed it. The purpose of the trial being to fasten the responsibility upon a person on the facts presented and the evidence laid in this behalf, it was held that 'inquiry' must always be a four-runner to the trial. While referring to the catena of decisions, in paragraph no.38, the following conclusion was arrived at

> *"38 In view of the above, the law can be summarised to the effect that as 'trial' means determination of issues adjudging the guilt or the innocence of a person, the person has to be aware of what is the case against him and it is only at the stage of framing of the charges that the court informs him of the same, the 'trial' commences only on charges being framed. Thus, we do not approve the view taken by the courts that in a criminal case, trial commences on cognizance being taken.*
>
> *39 Section 2(g) Cr.P.C. and the case laws referred to above, therefore, clearly envisage inquiry before the actual commencement of the trial, and is an act conducted under Cr.P.C. by the Magistrate or the court. The word 'inquiry' is, therefore, not any inquiry relating to the investigation of the case by the investigating agency but is an inquiry after the case is brought to the notice of the court on the filing of the charge-sheet. The court can thereafter proceed to make inquiries and it is for this reason that an inquiry has been given to mean something other than the actual trial.*

74. Taking note of the various stages in a trial and recording that after filing of the charge-sheet, the Court reaches the stage of inquiry and as soon as the Court frame the charge, the trial

commences. It was concluded that the power u/s. 319(1) can be exercised at any time after the charge-sheet is filed and before the pronouncement of the judgment, except during the stage of Section 207/208 of the Code, committal etc, which is only a pre-trial stage, intended to put the process into motion. It is concluded that this stage cannot be said to be a judicial step in the true sense for it only requires an application of mind rather than judicial application of mind, and it was therefore, concluded that it would be legitimate to conclude that the Magistrate at the stage of Section 207 to 209 of the Code is forbidden by express provision of Section 319 of the Code to apply his mind to the merits of the case and to determine as to whether any accused need, to be added or subtracted from the trial before the Sessions Court.

75. The proposition that until the case reaches the stage of inquiry or trial, the power u/s.319 cannot be exercised remained intact in **Dharam Pal**, which approved the decision in **Kishun Singh** (supra), holding that the Sessions Judge has original power to summon the accused u/s.193 upon the case committed to him by the Magistrate. The soul of the decision lies in paragraph nos.54 and 55 and 57 which reads thus:-

> *54. In our opinion, the stage of inquiry does not contemplate any evidence in its strict legal sense, nor the legislature could have contemplated this inasmuch as the stage for evidence has not yet arrived. The only material that the court has before it is the material collected by the prosecution and the court at this stage prima facie can apply its mind to find out as to whether a person, who can be an accused, has been erroneously omitted from being arraigned or has*

> *been deliberately excluded by the prosecuting agencies. This is all the more necessary in order to ensure that the investigating and the prosecuting agencies have acted fairly in bringing before the court those persons who deserve to be tried and to prevent any person from being deliberately shielded when they ought to have been tried. This is necessary to usher faith in the judicial system whereby the court should be empowered to exercise such powers even at the stage of inquiry and it is for this reason that the legislature has consciously used separate terms, namely, inquiry or trial in Section 319 Cr.P.C.*
>
> *55. Accordingly, we hold that the court can exercise the power under Section 319 Cr.P.C. only after the trial proceeds and commences with the recording of the evidence and also in exceptional circumstances as explained herein above.*
>
> *57. Thus, the application of the provisions of Section 319 Cr.P.C., at the stage of inquiry is to be understood in its correct perspective. The power under Section 319 Cr.P.C. 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.*

76. While answering the question as to whether the word "evidence" used in Section 319 has been used in a comprehensive sense and includes the evidence collected during investigation or it is to be limited to the evidence recorded during trial, it was categorically held that "evidence" is only such evidence as is made before the Court, in relation to statements and as produced before the Court in relation to documents and it is only such evidence that can be taken into account by the Magistrate when the Power u/s.319 is to be exercised and shall not include the material collected during investigation. In paragraph no.85, the question was answered by the Constitution Bench as below:-

> *"85. In view of the discussion made and the conclusion drawn hereinabove, the answer to the aforesaid question posed is that apart from evidence recorded during trial, any material that has been received by the court after cognizance is taken and before the trial*

commences, can be utilised only for corroboration and to support the evidence recorded by the court to invoke the power under Section 319 Cr.P.C. The 'evidence' is thus, limited to the evidence recorded during trial."

77. There are certain other issues which are also answered but we need not get to the said point, as the amplitude and scope of the power has been clearly found to be stated, that the power u/s.319 is discretionary and extra-ordinary power to be exercised exercised sparingly only in those cases where circumstances so warrant and not merely because the Magistrate or the Sessions Judge is of the opinion that some other person may also be guilty, but necessarily require its exercise when strong and cogent evidence appear against a person from the evidence led before the Court in contrast to a duty of the Court to be exercised u/s.190. One thing is clear that when you go at the stage of 319, the power contemplate existence of more than a prima facie case which is the parameter on which the charge is to be framed, but it is a satisfaction to an extent that the evidence, if goes unrebutted would lead to conviction.

78. In **Dharam Pal & Ors Vs. State of Haryana**,[37] a decision subsequent to the Constitution Bench decision in Hardeep Singh (supra), it is specifically held that for the offences exclusively triable by the Sessions Court, the Sessions Court alone is competent to arraign persons as accused, from and during the cognizance stage itself, u/s.193 (upon committal by Magistrate)

37 (2014) 3 SCC 306

and then during the course of the inquiry, and trial. While answering the specific question placed for consideration as to whether the committing Magistrate has any other role to play, while committing the case to Sessions Court, and if he decide to issue summons, was he required to follow the procedure of a complaint case, another issue that fell for consideration as to whether the Sessions Judge can issue summons u/s.193 as a Court of original jurisdiction.

79. On a detail analysis of Section 193, where the case is committed to the Court of Sessions by the Magistrate, the contention advanced that only after the case has been committed to it, could the Court of Sessions take cognizance of the offence exercising original jurisdiction, as Section 193 do not deal with cognizance of offence, but of the committal order passed by the learned Magistrate, the submission was rejected by holding that the Court of Sessions may take cognizance of the offences under the said provision. The view taken in **Kishun Singh** (supra) that the Sessions Court has jurisdiction of committal of a case to it, to take cognizable of the offence of persons not named as offender, but whose complicity would be evidence from the material available on record has been upheld, with a specific finding to the following:-

> *"Hence, even without recording the evidence, upon committal u/s.209, the Sessions Judge may summon the persons shown in column no.2 of the police report to stand trial along with those already named therein".*

80. The latest position of law has been placed before us by the respective counsel and the law as laid down in Nahar Singh (supra) where it is categorically held that once the process if issued u/s.190 against some of the accused, there is no prohibition to issue process to some other person against whom there is some material on record, but whose name is not included as accused in charge-sheet, according to us, is an exercise permitted to be carried u/s.190 of the Code. The argument that an accused can be summoned only in exercise of jurisdiction u/s.319 came to be turned down, by relying upon Raghubans Dubey (supra) as well as Kishun Singh, which explain the scope of jurisdiction of the Court of Sessions u/s.193 of the Code. Nahar Singh (supra) is a decision where the FIR lodged by victim's mother did not find him added as an accused, and she filed an application on the basis of the statement of the prosecutrix recorded u/s.164 naming the appellant. On account of the fault of an Officer, he was not named as an accused and the concerned Magistrate refused to summon the appellant for trial and being aggrieved, the de facto complainant invoked the revisional jurisdiction of the Sessions Judge who set aside the order of the Magistrate and remanded the mater to the Chief Judicial Magistrate. The Chief Judicial Magistrate on hearing the matter, summoned the appellant Nahar Singh and before the High Court, it was urged that the Chief Judicial Magistrate u/s.190(1)(b) of the Code, could not have

summoned the appellant as he was not named as an accused in the charge-sheet, but he could be only summoned at the stage of Section 319, on reference to the Constitution Bench decision in Dharam Pal and Hardeep Singh, the Court concluded thus:-

> *"In the present case, the name of the accused had transpired from the statement made by the victim under Section 164 of the Code. In the case of Dharam Pal (supra), it has been laid down in clear terms that in the event the Magistrate disagrees with the police report, he may act on the basis of a protest petition that may be filed and commit the case to the Court of Session. This power of the Magistrate is not exercisable only in respect of persons whose names appear in column (2) of the chargesheet, apart from those who are arraigned as accused in the police report. In the subject-proceeding, the Magistrate acted on the basis of an independent application filed by the de facto complainant. If there are materials before the Magistrate showing complicity of persons other than those arraigned as accused or named in column 2 of the police report in commission of an offence, the Magistrate at that stage could summon such persons as well upon taking cognizance of the offence. As we have already discussed, this was the view of this Court in the case of Raghubans Dubey (supra). Though this judgment dealt with the provisions of the 1898 Code, this authority was followed in the case of Kishun Singh (supra). For summoning persons upon taking cognizance of an offence, the Magistrate has to examine the materials available before him for coming to the conclusion that apart from those sent up by the police some other persons are involved in the offence. These materials need not remain confined to the police report, charge sheet or the F.I.R. A statement made under Section 164 of the Code could also be considered for such purpose.*

V - CONCLUSION

81. Mr.Desai has placed before us the latest decision of the Apex Court in **Ram Janam Yadav Vs. State of Uttar Pradesh** & Anr,[38] when the decision of the Two Judges Bench in **Jogendra Vs. State of Bihar**,[39] that an accused would be entitled to prior hearing, has received approval. In any case, at this stage, we are

38 (2023) 9 SCC 130
39 (2015) 9 SCC 244

not concerned with the aforesaid proposition of law, since we are of the view that the order passed at the stage of Section 190/193 of the Code, is a proper order passed at that stage, taking into consideration the power vested in the Court of original jurisdiction to issue summons and therefore, does not require for us to get into the niceties to be followed at the stage of Section 319.

We thus conclude that the Special Court was justified in entertaining the Application by NSEL at the stage of Section 190/193 and need not have waited till the stage of 319 arises.

82. Upon answering the aforesaid issues raised before us, and by recording that the Special Judge has rightly rejected Exhibit-3 filed by the EOW, Exhibit 4 filed by Bhootra opposing application of Bahl as well as Exhibit 5 filed by Roop Kishor Bhootra objecting to the application filed by NSEL being Exhibit 619 of 2023 praying for taking cognizance against the Promoters and Directors of the accused financial establishment by invoking Section 190 of the Code. We therefore, do not find any justification in inferring the impugned orders passed by the Special Judge on 31/03/2023.

83. As far as the Appeals which raised a challenge to the impugned order dated 18/05/2023, which has allowed the application filed by the NSEL as well as Arvind Kumar Bahl, seeking issuance of summons to the accused is concerned, we

deem it appropriate to hear the respective counsel, since the order is passed on merits by the learned Special Judge by scrutinizing the material that was placed by NSEL as well as one of the investor Arvind Kumar Bahl and since we have not heard the respective counsel on the impugned order dated 18/05/2023, as it was urged before us by Mr. Desai that the Appeals which raise the challenge to this order shall be argued at a subsequent point of time if the Court arrive at a conclusion that the application filed by NSEL was maintainable with the two objections being raised about its maintainability.

Once we have answered that the application filed by NSEL (Exhibit 619) is maintainable, despite it being filed by accused at the stage of Section 190/193, we direct listing of the Appeals, which raise a challenge to this order at future point of time. However, Appeal No. 461/2023, Appeal No.462/2023 and Appeal No. 1155/2023 are dismissed by upholding the impugned orders. The pending interim applications therein also stand disposed off.

(MANJUSHA DESHPANDE, J) (BHARATI DANGRE,J)

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