> it to be "residential building". Unless the user has been defined under a statute to be commercial dehors of element of profit and loss, such building shall be termed as "non residential building". Thus, in each case, it shall have to be examined whether the element of business or trade has crept in with the necessary element of profit and loss and as a sequel thereto, the purpose and object of occupation by the landlord shall stand defined accordingly".

(32) In view of the above, the interpretation rendered by a judgment in re: ***Shri Mohan Lal*** versus ***Arya Smaj Sewa Sadan, C.R. No. 1217 of 2000 on November 30, 2000,*** by a Single Bench of this Court stands overruled. However, review application is pending before the learned Single Judge which has not been listed before us. It shall be appropriate that the review petition be decided by the learned Single Judge accordingly.

(33) In view of the above, the case file be placed before Hon'ble the Chief Justice for listing the case as per the roster for finally deciding the revision petition i.e. C.R. No. 4999 of 2000.

***R.N.R.***

*Before J.S. Narang, J*

AMAR NATH—*Petitioner*

*versus*

STATE OF HARYANA —*Respondent*

*Crl. M. No. 5238/M of 2000*

24th October, 2002

*Code of Criminal Procedure, 1973—S. 319—Accused filing an application under section 319 Cr. P.C. for summoning the petitioner as an accused—Trial Court allowing the application—Ist Appellate Court setting aside the trial Court order while holding the application under section 319 Cr. P.C. by a co-accused not maintainable—Prosecution filing application for summoning the additional accused after the*

*conclusion of the trial and acquittal of the accused—Whether such an application can be entertained by the Trial Court—Held, yes—Powers of the Court under section 319 Cr. P.C.—Scope and object, stated.*

Held, that the powers conferred under section 319 of the Code are extraordinary powers and it enjoins upon the Court to summon a person not being the accused to stand trial if the Court is of the view that such person has committed the offence. The words "in the course of inquiry into, or trial of an offence" would only indicate that if the Court while conducting the trial comes to a conclusion that such other person also seems to be involved, summoning orders can be issued. The other words i.e. "tried together with the accused" have been qualified under sub-section (4) of Section 319 i.e. the proceedings in respect of such person shall be commenced afresh and the witnesses reheard. Thus, the trial of such person together with the accused stands qualified that even if the trial in respect of the accused has concluded, the additional accused can be tried. The powers of the Court have not been put into water tight jacket to be used with buts and ifs. The scope is much wider. It is obvious that the facts would be divulged only in the course of inquiry into, or when the trial has commenced and is going on qua the accused already named. The word "any person not being the accused" has also been interpreted that even if a person has not been proceeded against by the prosecution, though his name has occurred in the complaint/FIR, would not deter the power of the Court to proceed under section 319. The scope and object of the aforesaid provision is that if a fact is disclosed/divulged during the aforesaid stages, the Court would be competent to proceed against such person.

(Para 16)

Further held, that the Magistrate has correctly summoned the petitioner to stand trial upon the basis of the facts which have been disclosed during the trial. The extraordinary powers which have been conferred upon the Courts by virtue of Section 319 cannot be allowed to be diluted by any buts and ifs and the rigor of any other procedural provision. The power is so explicit as the legislature did not want that any person who may be found guilty on the occasion when the evidence is disclosed before the Court should go scot free. A word of

caution needs to be followed that the power has to be exercised cautiously and with an endeavour that no one should suffer unnecessarily. It is categorically required that the Court must apply its mind before invocation of extraordinary power. Once such power has been exercised, normally the process and procedure should be allowed to be followed.

(Para 17)

R.K. Girdhar, Advocate *for the petitioner*

S.R.S. Brar, DAG Haryana for the State.

**JUDGMENT**

*J.S. NARANG. J.*

(1) An FIR No. 285 dated 17th October, 1989, under Sections 406/408/420/468/471, IPC was registered with Police Station City Dabwali, on the basis of a complaint letter dated 13th October, 1989, filed by the Incharge of Haryana Agro Industries Corporation Limited. It has been alleged that one Roshan Lal Chawla, Supervisor, Cooperative Store Keeper and M/s Amar Nath Bansal and sons have defrauded the Corporation and that some embezzlements have been committed. After investigation, the police submitted challan against Roshan Lal Chawla only who was charged on 27th November, 1991 and thereafter he is stated to have been acquitted by the trial Court on 5th June, 1998.

(2) During the pendency of the trial, the accused Roshan Lal Chawla filed an application under Section 319 of the Cr. P.C. for summoning the petitioner as an accused in the case. The application was allowed and the petitioner Amar Nath son of Baisakhi Ram was summoned as an accused to face the trial. Aggrieved of the order, the petitioner filed a revision petition before the learned Sessions Judge, Sirsa, and that the revision petition was allowed,—vide order dated 16th September, 1998 and that the impugned order dated 7th August, 1997, was set aside. However, the learned Additional Sessions Judge while concluding the order observed that the trial Court may summon the petitioner as co-accused on the asking of the prosecution.

(3) The complainant filed an application under Section 319 of the Cr. P.C. for summoning the petitioner, resultantly,—vide order dated 21st October, 1998 passed by the trial Court the petitioner has been summoned to stand trial. The petitioner has been charged,—vide order dated 7th December, 1998.

(4) The petitioner aggrieved of the aforesaid order filed a revision petition before the learned Sessions Judge, Sirsa, which has been dismissed vide order dated 3rd December, 1999. Being aggrieved of the same, the present petition for quashing the order dated 21st October, 1998, and so also the order dated 7th December, 1998 and the order dated 3rd December, 1999, has been filed by the petitioner.

(5) Learned counsel for the petitioner has argued that the Courts below have failed to appreciate the import of Section 319 of the Code of Criminal Procedure (hereinafter as "the Code"). The power which vested with the court to summon a person to stand the trial alongwith the co-accused, could be exercised only during the pendency of the trial. It is argued that once the trial is concluded, power under Section 319, as aforesaid, cannot be exercised. Admittedly, the trial concluded and the co-accused has been acquitted vide order dated 5th June, 1998. No doubt, an application had been filed under Section 319 of the Code by the co-accused before the trial Court and that the petitioner had been summoned in pursuant to the said application but the said order has been set aside by the learned Additional Sessions Judge holding that such application is not maintainable by a co-accused, however, such application can be filed by the prosecution. Resultantly, the application is stated to have been filed on 16th October, 1998 i.e. after the trial had concluded and the co-accused stood acquitted. The question which has been raised is "Can an application be entertained under Section 319 Cr. P.C. by the trial Court after the trial has concluded?"

(6) It is argued that the provision is self explanatory. The power to proceed against the other person appearing to be quilty of offence can be exercised only in the course of an enquiry or during the course of trial but in a given case where the inquiry has concluded but the trial has commenced and is continuing, such power can be exercised but where the trial has concluded, such power cannot be

exercised and that the remedy lies elsewhere. For reference, the aforesaid provision is reproduced as under:—

> **"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."

(7) Learned counsel has placed reliance upon a judgment of Rajasthan High Court in ***Penchu Lal*** versus ***State of Rajasthan (1),*** it has been held "summoning a person as additional accused, cognizance could be taken during trial and that no cognizance could be taken after the trial is over."

(8) On the other hand, learned Deputy Advocate General, has argued that the application had been filed before the trial Court during the pendency of the trial and that the order had been passed

(1) 1999 (2) RCR (Criminal) 245

which was challenged by way of revision before the learned Sessions Judge. The revision was allowed on the technical ground that the application could only be filed by the prosecution and not by a co-accused. It is during this period the trial had been completed and the co-accused facing the trial stood acquitted. It is argued that the trial Court has not been rendered powerless as the scope and ambit of the aforesaid provision is very wide, as such, the trial Court has correctly exercised the jurisdiction in directing the trial of the petitioner.

(9) I have given thoughtful consideration to the respective arguments addressd by learned counsel for the parties.

(10) The perusal of Section 319 of the Cr. P.C. confers very wide powers upon the trial Court and that the said power has not been subjugated by any provision. The power so conferred is exercisable in respect of any person not being the accused and that it has come to the notice of the Court during the course of inquiry into or trial of an offence that any other person not being the accused has committed an offence for which such person could be tried together with the accused. If the Court makes up its mind to invoke the power conferred under sub section (1) of section 319, the *de novo* proceedings have to be initiated qua such person. This further stands clarified from sub-section (4) of the aforesaid provision.

(11) Interpretation of the aforesaid provision has arisen before the courts on a number of occasions. In one such case, the question posed was : **"Can the Sessions Court add such a person as an accused in absence of any committal order against him ?"** The apex Court while rendereing judgment in **re: *Joginder Singh and another*** versus ***State of Punjab and another (2),*** categorically held that no such committal order need be passed once the Court of Session exercised its powers under the aforesaid provision. In this regard, pointed reference has been made to Sections 193 and 209 of the Code. In this regard, the observations of the apex Court made in various paragraphs needs to be noticed, which read as under:—

> "5 Under the 1898 Code the equivalent provision was to be found in Section 351 (1) under which it was provided

(2) AIR 1979 SC 339

that any person attending a criminal Court, although not under arrest or upon a summons, may be detailed by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned: sub-Sec. (2) provided that in such a situation the evidence shall be reheared in the presence of the newly added accused. With regard to this old provision, the Law Commission in its 41st Report (vide para 24.80) observed that the power conferred upon a criminal Court thereunder could be exercised only if such person happened to be attending the Court and he could then be detained and proceeded against, but there was no express provision in S. 351 for summoning such a person if he was not present in Court, and, therefore, a fairly comprehensive provision was recommended which now forms the subject matter of the present S. 319(1). The Law Commission further observed in its said Report (vide para 24.81) that the old Section 351 assumed that the Magistrate proceeding under it had the power of taking cognizance of the new case but did not say in what manner cognizance was taken by the Magistrate and the question was whether against the newly added accused, cognizance will be supposed to have been taken on the Magistrate's own information under S. 190 (1) (c) or only in the manner in which cognizance was first taken of the offence against the other accused and the question was important because the methods of inquiry and trial in the two cases differed : the law Commission felt that the main purpose of this particular provision was that the whole case against all known suspects would be proceeded with expeditiously and convenience required that cognizance against the newly added accused should be taken in the same manner as against the other accused and the Law Commission, therefore, proposed that a new provision should be incorporated providing that there will be no difference in the mode of taking

cognizance if a new person was added as an accused during the proceedings and that is how Cl. (b) of sub-Sec. (4) of S. 319 came to be enacted as set out above which incorporates a deeming provision. The above recommendation of the Law Commission in its 41st Report clearly brings out the true scope and ambit of the power that was intended to be conferred upon a criminal Court under the present Section 319(1).

6. A plain reading of Section 319(1), which occurs in Chap. XXIV dealing with general provisions as to inquiries and trials, clearly shows that it applies to all the Courts including a Sessions Court and as such a Sessions Court will have the power to add any person, not being the accused before it, but against whom there appears during trial sufficient evidence indicating his involvement in the offence, as an accused and direct him to be tried alongwith the other accused; but the question is whether it has power to do so without there being a committal order against such person? In this context the provisions of Ss. 193 and 209 of the present Code vis-a-vis the equivalent provisions under the Old Code will have to be considered. S. 193 and S. 209 of the present; Code run as follows :

"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."

"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 the case to the Court of Session;

(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."

It will be noticed that both under section 193 and S. 209, the commitment is of the case and not of 'the accused' whereas under the equivalent provision of the old Code viz. S. 193(1) and Section 207-A it was 'the accused' who was committed and not 'the case'. It is true that there cannot be a committal of the case without there being an accused person before the Court, but this only means that before a case in respect of an offence is committed there must be some accused suspected to be involved in the crime before the Court is committed then the cognizance of the offence can be said to have been taken properly by the Sessions Court and the bar of S. 193 would be out of the way and summoning of additional persons who appear to be involved in the crime from the evidence led during the trial and directing them to stand their trial alongwith those who had already been committed must be regarded as incidental to such cognizance and a part of the normal process that follows it; otherwise the conferral of the power under Section 319(1) upon the Sessions Court would be rendered nugatory. Further S. 319(1) enacts a deeming provision in that behalf dispensing with the formal committal order against the newly added accused. Under the provision it is provided that where the Court proceeds against any person under sub-section (1) then 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, in other words, such person must be deemed to be an

accused at the time of commitment because it is at that point of time the Sessions Court in law takes cognizance of the offence".

7. In the above context it will be useful to refer to a decision of this Court in *Raghubans Dubey* versus *State of Bihar, AIR 1967 SC* 1667 where this Court has explained what is meant by taking cognizance of an offence. The appellant was one of the 15 persons mentioned as the assailants in the First Information Report. During the investigation the police accepted the appellent's plea of alibi and filed a charge sheet against the others for offences under Ss. 302, 201 and 149 I.P.C., before the Sub-Divisional Magistrate. The Sub- Divisional Magistrate recorded that the appellant was discharged and transferred the case for inquiry to another Magistrate, who, after examining two witnesses, ordered the issue of a non-bailable warrant against the appellant, for proceeding against him alongwith the other accused under S. 207-A of the old Code. The order was confirmed by the Sessions court and the High Court and in further appeal to this court it was held first, that there could be no discharge of the appellant as he was not included in the charge sheet submitted before the Magistrate by the police and, second, that the appellant could be proceeded against alongwith other accused under S. 207A, Cr. P.C. and this Court confirmed the order of the Magistrate. One of the contentions urged before this Court was that the Magistrate had taken cognizance of the offence so far as the other accused were concerned but not as regards the appallant and with regard to this contention Sikri J. (as he then was) observed as follows (at p. 1169):

"In our opinion, once cognizance has been taken by the Magistrate, he takes cognizance of an offence and not the offenders: once he takes cognizance of an offence it is his duty to find out who the offenders really are and once he comes to the conclusion that apart from the persons sent up by the police some other persons

are involved, it is his duty to proceed against those persons. The summoning of the additional accused is part of the proceeding initiated by his taking cognizance of an offence. As pointed out by this Court in *Pravin Chandra Mody versus State of Andhra Pradesh* (1965) 1 SCR 269: (AIR 1965 SC 1185) the term "complainant" 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 S. 190(1)(b)."

"It will thus clear that under S. 193 read wth S.209 of the Code when a case is committed to the Court of Session, in respect of an offence the court of Session, takes cognizance of the offence and not of the accused and once the Sessions Court is properly seized of the case as a result of the committal order against some accused the power under S. 319(1) can come into play and such Court can add any person, not an accused before it, as an accused and direct him to be tried along with other accused for the offence which such added accused appears to have committed from the evidence recorded at the trial. Looking at the provision from this angle there would be no question of reading S. 319 (1) subject or subordinate to S. 193.

(12) In another case a question had arisen that if trial proceedings against some person have been quashed under Section 482 Cr.P.C. can the court proceed against them under Section 319 of the Code. The apex Court observed while rendering judgment in re: ***Municipal Corporation of Delhi*** v. ***Ram Kishan Rohtagi and others (3),*** that Section 319 of the Code ccontains an extraordinary power which has been conferred on the Court, whch should be exercised very sparingly and only if compelling reasons for taking cognizance against the other person against whom action has not been taken. The very fact that the proceedings have been quashed under Section 482

(3) 1983 SCC (Crl.) 115

of the Code against some of the accused persons, will not prevent the court for exercising its discretion if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it. It shall be apposite to make a reference to para 19 of the judgement, which reads as under :—

> "19. In these circumstances, therefore, if the prosecution can at any stage produce evidence which satisfies the court that the other accused or those who have not been arrayed as accused against whom proceedings have been quashed have also committed the offence, the court can take congizance against them and try them along with the other accused. But, we would hasten to add that this is really an extraordinary power which is conferred on the court and should be used very sparingly and only if compelling reasons exist for taking congnizance against the other person against whom action has not been taken. More than this we would not like to say anything further at this stage. We leave the entire matter to the discretion of the court concerned so that it may act according to law. We would, however, make it plain that the mere fact that the proceedings have been quashed against respondents 2 to 5 will not prevent the court from exercising its direction if it is fully satisfied that a case for taking cognizance against them has been made out on the additional evidence led before it."

(13) Another question which arose—Can the Sessions Court, without itself recording evidence independently of section 319, summon additional accused on the basis of documents furnished under section 173 Cr. P.C. ?" The question was referred to a larger Bench and a Full Bench of Patna High Court, while rendering judgement in re: ***S.K. Latfur Rahman and others*** v. ***The State (4),*** held that section 319 of the Cr. P.C. is not the sole respository of power for summoning the additional accused for trial by a Magistrate or a Court of Session. It is observed that Section 319 operates in the narrow field where the trial has already proceeded or an inquiry has already been commenced. Indeed the key words are "where, in the course of any enquiry into,

(4) 1985 Crl. L. J. 1238

or trial of, an offence". It has been further observed that the aforesaid section is designed to meet the specific and limited situation which may arise before the court when the evidence discloses in the midst of a trial or inquiry that a person not being tried as an accused should be tried together with the accused already before it. Thus, this provision has no relevance whatsoever with the pre-trial or pre-inquiry stage i.e. before the framing of the charge after cognizance has been taken or before inquiry has as yet commenced. It shall be apposite to notice the observations of the Full Bench, which read as under :—

" xxx xxx xxx xxxx

Again with considerable deference it seems to me that the basic error which crept in Satyanarayan Yadav's case was the assumption that section 319 of the Code is the sole repository of power for summoning the additional accused for trial by a Magistrate or a Court of Session. This conclusion has been arrived at more as a dictum than on any exhaustive consideration of principle or precedent in support thereof. It seems to have been missed that Section 319 operates in the narrow field where the trial has already proceeded or an inquiry has already been commenced. Indeed the key words are the opening ones "Where, in the course of any inquiry into, or trial of, an offence." It is thus patent that section 319 is designed to meet the specific and limited situation of a court discovering in the midst of a trial or inquiry that some additional accused should also be tried together with the persons already before it. This provision, indeed, has no relevance whatsoever with the pre-trial or the pre-inquiry stage i.e. before the framing of the charge after cognizance has been taken or before any inquiry has as yet commenced. Therefore, section 319 operates in a field or an arena altogether different from that of the taking of the cognizance of the offence and procedures which are part and parcel thereof under the rule of Raghubans Dubey's case (1967) Cri LJ 1081) (SC). Again the earlier provisions of sections 209, 227, 228, 239 and 240 pertain to the stage before the actual framing of the charge and commencement of the trial

and, therefore, operate in a field distinct from that under section 319. It is obvious that the attention of the Bench was not at all drawn to this aspect of the matter under sections 209, 227, 228, 239 and 240 and, consequently, there is no discussion in this context at all. Even the placing of section 319 in the Chapter of general provisions as to inquiries and trials is itself indicative of its limited import. When statutory provisions are dealing with distinct situations and providing distinct procedures therefore, it seems, with respect, erroneous to say that one of the procedures would be the sole repository of the power of summoning additional accused. With great respect, therefore, the distinction betwixt the situation in the midst of a trial and inquiry and the situation preceding such inquiry or trial seems to have been altogether missed in Satyanarayan Yadav's case [1977 BBCJ (HC) 442]. With the deepest respect, I am unable to subscribe the view that section 319 of the Code is the sole repository of the power of summoning additional accused even at the stage of cognizance and what may be part and parcel of that procedure as also of the stages for commitment and for consideration for the framing of a charge or the discharging of an accused person, with respect, section 319 was never intended to cover all these distinct and separate fields. Satyanarayan Yadav's case in so holding does not lay down the law correctly."

14. xxx xxx xxx xxx xxx

"15. The aforesaid legislative history seems to make it manifest that section 319 of the Code was merely an elaboration of the old provision of section 351 to make it comprehensive to cover certain lacuna discovered therein. The evil that was sought to be remedied by Parliament was to provide express power to summon the absent accused who was not attending the Court and to clarify that the cognizance against the added accused would be deemed to be taken as originally against the co-accused and further the purpose was

that the whole case against all known suspects may be taken up expeditiously. That is the triple reason for which the old section was made somewhat more comprehensive and detailed. The language employed in section 319 and the location of the section in Chapter XIV is clearly a pointer to the effect. Thus it was never intended nor do the provisions of section 319 remotely convey that the section was sought to be enacted now as the sole repository of power for summoning the additional accused in all situation. Section 319 was in no way intended to make any radical or drastic departure from the law on this point under the old Code. It was not even remotely intended to override the salutary rule in Raghubans Dubey's case (1967 Cri. L.J. 1081) which the Supreme Court has reiterated at least twice in the context of the new Code as well.

16. xxx xxx xxx xxx

To finally conclude, in answer to the question posed at the outset, it is held that the Court of Session, prior to the framing of the charge, can, without itself recording evidence, summon a person as an additional accused on the basis of the documents in the final report of the investigating officer under section 173 of the Code independently of the provision of section 319 thereof and further that the substitution of section 319 of the new Code in place of Section 351 of the old one has not wrought any radical change in the law by making the former as the sole repository of such power."

(14) The apex Court has held that a person summoned as additional accused, when in the meantime trial of main case concludes, additional accused has to face trial because *de novo* trial has to be held *qua* him. The pointed question raised was that the additional accused could be tried only with the accused who was being already tried and that if the trial *qua* the said accused has concluded, the additional accused cannot be tried pursuant to order passed under section 319 of the Code. This view has been rejected and the apex Court has held that even if trial of the accused who was being tried has concluded and

that the power has been invoked under section 319 and the additional accused has been summoned to stand the trial, the *de novo* trial shall be held and that in such a situation the summoning order shall not become inoperative.

(15) The question had once again come up for consideration before the apex Court as to what is the effect of conclusion of trial against the accused who was being proceeded with, when the order is passed under section 319 (1) for proceeding against newly added person. The apex Court has observed in re: ***Shashikant Singh*** versus ***Tarkeshwar Singh,*** **(5),** as under :—

"8. The effect of the conclusion of the trial against the accused who was being proceeded with when the order was passed under section 319(1) for proceeding against the newly added person, is to be examined in the light of sub-section (4) of section 319 which stipulates a *de novo* trial in respect of the newly added persons and certain settled principles of interpretation.

9. When a statute is passed for the purpose of enabling something to be done, and prescribes the way in which it is to be done, it may be either an absolute enanctment or a directory enactment. The difference being an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substaintially. No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get the real intention of the legislature by carefully attending to the whole scope of the statute to be construed. (Craies on Statute Law, 7th Edn. Pages 260—262).

10. The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the

(5) 2002 (3) RCR (Criminal) 191

court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the Court facing the trial. The safeguard provided in respect of such person is that the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses re-heard. In short, there has to be a *de novo* trial against him. The provision of *de novo* trial is mandatory. It vitally affects the rights of a person so brought before the Court. It would not be sufficient to only tender the witnesses for the cross-examination of such person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of cross-examination of the newly added accused is mandate of section 319(4). The words could be tried together with the accused in section 319(1), appear to be only directory. Could be cannot under these circumstances be held to be must be. The provision cannot be interpreted to mean that since the trial in respect of a person who was before the Court has concluded with the result that the newly added person cannot be tried together with the accused who was before the Court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the Court on the basis of evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the Court.

11. Where a statute does not consist merely of one enactment, but contains a number of different provisions regulating the manner in which something is to be done, it often happens that some of these provisions are to be treated as being directory only, while others are to be considered absolute and essential; that is to say

some of the provisions may be disregarded without rendering invalid the thing to be done, but others not. (Craies on Statute Law, 7th Edn. Pages 266-267).

12. The mandate of the law of fresh trial is mandatory whereas the mandate that newly added accused could be tried together the accused directory.

13. On facts, the court could not have intended while concluding the trial against Chandra Shekhar Singh, to nullify its earlier order directing issue of warrants against respondent No. 1. The construction to be placed on a provision like this has to commend to justice and reason. It has to be reasonable construction to promote the ends of justice. The words could be tried together with the accused, in Section 319(1) cannot be said to be capable of only one construction. If it was so approach to be adopted would be different since the intention of the Parliament is to be respected despite the consequences of interpretation. There is, however, a scope for two possible constructions. That being the position, a reasonable and common sense approach deserves to be adopted and preferred rather than a construction that would lead to absurd results of respondent No.1 escaping the trial despite passing of all order against him on Court's satisfaction under Section 319(1) and despite the fact that the proceedings against him have to commence afresh. In this view, the fact that trial against Chandra Shekhar Singh has already concluded is of no consequence insofar as respondent No. 1 is concerned."

(16) The powers conferred under Section 319 of the Code are extraordinary powers and it enjoins upon the Court to summon a person not being the accused to stand trial if the court is of the view that such person has committed the offence. The words "in the course of inquiry into, or trial of an offence" would only indicate that if the Court while conducting the trial comes to a conclusion that such other

person also seems to be involved, summoning orders can be issued. The other word i.e. "tried together with the accused" have been qualified under sub-section (4) of Section 319 i.e. the proceedings in respect of such person shall be commenced afresh and the witnesses reheard. Thus, the trial of such person together with the accused stands qualified that even if the trial in respect of the accused has concluded, the additional accused can be tried. The powers of the Court have not been put into water tight jacket to be used with buts and ifs. The scope is much wider. It is obvious that the facts would be divulged only in the course of inquiry into, or when the trial has commenced and is going on *qua* the accused already named. The word " any person not being the accused" has also been interpretted that even if a person has not been proceeded against by the prosecution, though his name has occurred in the complaint/FIR, would not deter the power of the Court to proceed under Section 319. The scope and object of the aforesaid provision is that if a fact is disclosed/divulged during the aforesaid stages, the Court would be competent to proceed against such person.

(17) I am of the opinion that in the case at hand, the Magistrate has correctly summoned the petitioner to stand trial upon the basis of the facts which have been disclosed during the trial. The extraordinary powers which have been conferred upon the Courts by virtue of Section 319, cannot be allowed to be diluted by any buts and ifs and the rigor of any other procedural provision. The power is so explicit as the legislature did not want that any person who may be found guilty on the occasion when the evidence is disclosed before the Court should go scot free. A word of caution needs to be followed that the power has to be exercised cautiously and with an endeavour that no one should suffer unnecessarily. It is categorically required that the Court must apply its mind before invocation of extraordinary power. Once such power has been exercised, normally the process and procedure should be allowed to be followed.

(18) In the case at hand, I do not find any reason to interfere in the power exercised by the Court under Section 319 of the Code of Criminal Procedure. Consequently, the petition is dismissed.

***R.N.R.***