

of the Code of Civil Procedure, also follow in the case of non-payment of the entire balance within 15 days in case of the sale under the Act as provided by section 89 thereof. The learned Judge further held that there is no material difference between the language of Rule 86 of Order 21 of the Code and that of section 89 of the Act. The above observations fully apply to the present case. Admittedly, in the present case, 75 per cent of the amount was not deposited within the period prescribed by section 88. In the aforesaid situation, the sale is a nullity. In case, it is so, the Civil Court has the jurisdiction to decide the matter.

(25) For the reasons recorded above, I do not find any merit in the appeal and dismiss the same with no order as to costs.

Prem Chand Jain, J.—I agree.

N.K.S.

REVISIONAL CRIMINAL.

Before Pritam Singh Pattar, J.

THE STATE,—*Petitioner.*

*versus*

PHULA, SON OF SHANKER SINGH,—*Respondents.*

Reported Criminal Revision No. 62 of 1975.

December 1, 1975.

*Code of Criminal Procedure (2 of 1974)—Sections 209, 228(1)(a) and 484(2) Proviso—Commitment proceedings under the old code pending for an offence triable by a Court of Sessions—New Code coming into force during such pendency—Such offence triable by a Magistrate under the new Code—Magistrate—Whether should try the offence himself—Magistrate committing the accused after coming into force of the new Code—Sessions Judge—Whether should transfer the case to the Magistrate under section 228(1)(a).*

*Held*, that when for an offence triable by the Court of Session the committal proceedings under the Code of Criminal Procedure 1898 were pending before the Judicial Magistrate on the date, when the new Code of Criminal Procedure 1973 came into force, the Magistrate

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by virtue of the proviso of section 484(2)(a) must deal and dispose of the same in accordance with the provisions of the new Code. If, according to the provisions of the new Code the offence is exclusively triable by the Court of Session, then under section 209, Criminal Procedure Code, the Magistrate must commit the case for trial to the Court of Session without recording any evidence. However, if under the new Code the offence has ceased to be exclusively triable by the Court of Session and is triable by the Magistrate, then no order for commitment can be passed and the Magistrate must proceed to try the case himself. However, if a Judicial Magistrate commits an accused for offence, which is not exclusively triable by the Court of Session, then the Sessions Judge should frame charge and by order passed under section 228(1)(a), Criminal Procedure Code, transfer the case to the Court of the Chief Judicial Magistrate for trial in accordance with law as a warrant case instituted on a police report.

(Para 8).

*Case reported under section 395(2) of the New Code of Criminal Procedure, by Shri R. L. Lamba, Additional Sessions Judge, Hissar,—vide his order, dated 16th May, 1975, for laying down the law on the following points arising out of the order of Shri H. S. Kathuria, J.M.I.C., Sirsa, dated 18th May, 1974, committing the accused under section 27 of Indian Arms Act, 1950, read with section 324 and 337 I.P.C. :—*

- (i) *Whether, in the particular facts of the case, the commitment of the case to the court of Sessions is valid or invalid.*
- (ii) *Whether the Judicial Magistrate 1st Class would commit any irregularity or illegality if, instead of committing the case he decides to frame the charges and to try the accused for the offence under section 27, Arms Act, which he is now competent to try under the new Code.*
- (iii) *Whether the Court of Sessions should record a formal declaration that the commitment of the case is illegal, when the commitment is not in accordance with law for the reasons stated before.*
- (iv) *Whether the Court of Sessions can ignore the illegal commitment and return the case to the Judicial Magistrate, 1st Class with a direction that he should frame the charges and try the accused himself.*
- (v) *Whether the views expressed in this order are in accordance with the new Code or not.*

Rajesh Chaudhry, Advocate, for the state.

D. S. Bali, Advocate, for the respondent.

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**JUDGMENT**

P. S. Pattar, J.—(1) This is a reference made by Shri R. L. Lamba, Additional Sessions Judge, Hissar, under section 395(2) of the Code of Criminal Procedure, 1973, for decision on points of law mentioned in his order dated 16th May, 1975.

(2) The facts of this case are that Phula accused was arrested by the police of Police Station, Rania, Tehsil and District Sirsa, in case First Information Report No. 236 registered under sections 337 and 324, Indian Penal Code, and section 27 of the Indian Arms Act. It is alleged that on 10th October, 1973, Kishan, Baj Singh and Phula accused, residents of Ferozabad, were taking liquor at the house of Kishan. At about 2 P.M., when they were taking meals there was an altercation between Kishan and Phula accused and they exchanged fist blows and slapped each other. Kishan accused out of fear entered the house of Resham Singh complainant. Phula accused followed him having a licensed gun in his hand. He abused Resham Singh to turn out Kishan from his house. He also fired a shot from the gun and some of the pellets struck on the right arm of Resham Singh. On the report made by Resham Singh, this case was registered. After the investigation of the case, Phula accused was challaned under sections 337 and 324, Indian Penal Code, and section 27 of the Arms Act. The counsel for the accused contended before the Judicial Magistrate, 1st Class, Sirsa, that after the coming into force of the Code of Criminal Procedure, 1973, with effect from 1st April, 1974, the offence under section 27, Arms Act, has also become exclusively triable by the Judicial Magistrate and, therefore, this case should be tried by that Court. The challan in this case was filed in his Court on 20th March, 1974, and admittedly at that time the offence under section 27 of the Arms Act was exclusively triable by the Court of Session. After hearing the counsel for the parties, the Judicial Magistrate, 1st Class, Sirsa, held in his order dated 18th May, 1974, that the offence under section 27 of the Indian Arms Act was exclusively triable by the Court of Session and, therefore, in view of the provisions of section 209 read with section 484(2) of the Code of Criminal Procedure, 1973, he committed Phula accused to stand his trial in the Court of Session under sections 324 and 337, Indian Penal Code, and section 27 of the Arms Act.

(3) When the case came up for framing of charges before Shri R. L. Lamba, Additional Sessions Judge, Hissar, an objection was

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raised by the Public Prosecutor that the case may be sent back to the Court of the Judicial Magistrate as all the offences were exclusively triable by him. The counsel for the accused, however, contested this objection. After hearing the counsel for the parties, the Additional Sessions Judge came to the conclusion that there are no specific provisions in the new Code of Criminal Procedure for quashing the order of commitment of the case and in his opinion the order of commitment was not proper but since there was no authoritative pronouncement on the point of law involved in the case, he referred the following questions of law for decision of the High Court under section 395(2), Criminal Procedure Code:—

- (1) Whether, in the particular facts of the case, the commitment of the case to the Court of Sessions is valid or invalid.
- (2) Whether the Judicial Magistrate, 1st Class, would commit any irregularity or illegality if, instead of committing the case he decides to frame the charges, and to try the accused for the offence under section 27, Arms Act, which he is now competent to try under the New Code?
- (3) Whether the Court of Session should record a formal declaration that the commitment of the case is illegal, when the commitment is not in accordance with law for the reasons stated before?
- (4) Whether the Court of Session can ignore the illegal commitment and return the case to the Judicial Magistrate, 1st Class, with a direction that he should frame the charges and try the accused himself?
- (5) Whether the views expressed in this order are in accordance with the new Code or not?

Notices were given to the counsel for the State and also to the counsel for Phula accused and arguments have been heard.

(4) Admittedly, the offences under section 337 and 324, Indian Penal Code, are exclusively triable by a Judicial Magistrate, 1st Class. It is undisputed that before the coming into force of the new

Code of Criminal Procedure, 1973, with effect from 1st April, 1974, the offence under section 27 of the Arms Act was exclusively triable by the Court of Session. However, after the coming into force of new Code of Criminal Procedure, the offence under section 27 of the Arms Act is now triable by a Judicial Magistrate, 1st Class. The challan in this case was filed against the accused in the Court of the Judicial Magistrate, 1st Class, Sirsa, on 20th March, 1974. I set out below the provisions of the Code of Criminal Procedure, which are relevant for the decision of this case:—

#### Section 484

(1) . . . . .

(2) Notwithstanding such repeal,—

- (a) if, immediately before the date on which this Code comes into force, there is any appeal, application, trial inquiry or investigation pending, then, such appeal, application, trial, inquiry or investigation shall be disposed of, continued, held or made, as the case may be, in accordance with the provisions of the Code of Criminal Procedure 1898, as in force immediately before such commencement, (hereinafter referred to as the Old Code), as if this Code had not come into force:

Provided that every inquiry under Chapter XVIII of the Old Code, which is pending at the commencement of this Code, shall be dealt with and disposed of in accordance with the provisions of this Code.

#### Section 209.

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;

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(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.

(5) Admittedly, the commitment proceedings in this case under Chapter XVIII of the old Code were pending in the Court of the Judicial Magistrate on 1st April, 1974, when the new Code of Criminal Procedure, 1973, came into force. Therefore, according to the proviso to clause (a) of Section 484(2), Criminal Procedure Code, 1973, these proceedings had to be dealt with and disposed of in accordance with the provisions of the new Code. Section 209 of the new Code of Criminal Procedure lays down the procedure of commitment of cases to Court of Session when the offence is exclusively triable by it. A joint reading of Section 209 and the proviso of Section 484 (2)(a) of the new Code of Criminal Procedure shows that if an offence is exclusively triable by the Court of Session then the Magistrate must commit the case to that Court. But if the offence after 1st April, 1974, has ceased to be exclusively triable by the Session Court and is triable by a Magistrate, 1st Class, then he must try the case himself and no order for commitment can be passed.

(6) In the instant case, although the chalan was filed on 20th March, 1974, but the order of commitment was passed on 18th May, 1974. It is admitted that on 18th May, 1974, when the order of commitment of this case for trial to the Court of Session was passed, the offence under section 27 of the Arms Act was not exclusively triable by the Court of Session and that this offence was triable by the Judicial Magistrate, 1st Class. The order of commitment passed by the Judicial Magistrate is, therefore, invalid and is liable to be quashed under section 482, Criminal Procedure Code, by the High Court. Further, if a case which is not exclusively triable by a Court of Session has been committed, then the Sessions Judge/ Additional Sessions Judge, may frame a charge against the accused, and by order passed under section 228(1)(a) of the Code of Criminal Procedure, transfer the case for trial to the Chief Judicial Magistrate, who shall then try the case in accordance with the procedure for the trial of warrant cases on a police report.

(6) Mr. D. S. Bali, the learned counsel for the accused, relied on **Sakati Narayan v. Bhasani Lachu and another** (1), wherein a Single Judge of the Orissa High Court held as follows:—

“Where in an offence under section 467 Penal Code the committal proceedings under the Criminal Procedure Code, 1898, were pending before the Magistrate on 1st April, 1974, when the new Criminal Procedure Code, 1973, came into force, the Magistrate by virtue of section 484(a) proviso must submit the case to the Sessions Judge under section 209 without taking any evidence as the offence under section 467 Penal Code is triable exclusively by the Court of Sessions”.

Similar view was taken by a Single Judge of the Patna High Court in **Adya Prasad and others v. Rajindra Mahto** (2). In the Orissa High Court case, the offence under section 467, Indian Penal Code, was exclusively triable by the Court of Session prior to 1st April, 1974, but the order of commitment was passed after 1st April, 1974. Similarly, in the Patna High Court case, the offence under section 386, Indian Penal Code, was triable by the Court of Session prior to 1st April, 1974, and the order of commitment was passed after this date. With due respect, I do not agree with the views expressed in these decisions. In both these cases, it was simply held by virtue of the proviso to section 484(2)(a), Criminal Procedure Code, 1973, the Judicial Magistrate must commit the case to the Sessions Judge for trial under section 209, Criminal Procedure Code, without taking any evidence as the offence was triable exclusively by the said Court.

(8) The legal position, therefore, is that when for an offence triable by the Court of Session the committal proceedings under the Code of Criminal Procedure, 1898, were pending before the Judicial Magistrate on 1st April, 1974, when the new Code of Criminal Procedure, 1973, came into force, the Magistrate by virtue of the proviso of Section 484(2)(a) must deal and dispose of the same in accordance with the provisions of the new Code. If, according to the provisions

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(1) 1975 Cr. Law Journal 995.

(2) 1975 Cr. J. 997.

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of the new Code the offence is exclusively triable by the Court of Sessions, then under section 209, Criminal Procedure Code, the Magistrate must commit the case for trial to the Court of Session without recording any evidence. However, if under the new Code the offence has ceased to be exclusively triable by the Court of Session and is triable by the Magistrate, then no order for commitment can be passed and the Magistrate must proceed to try the case himself. However, if a Judicial Magistrate commits an accused for offence, which is not exclusively triable by the Court of Session, then the Sessions/Additional Sessions Judge should frame charge and by order passed under section 228(1)(a), Criminal Procedure Code, transfer the case to the Court of the Chief Judicial Magistrate for trial in accordance with law as a warrant case instituted on a police report.

(9) For the above reasons, it is held that the order of commitment dated 18th May, 1974, passed by the Judicial Magistrate, 1st Class, Sirsa, in this case is invalid and the same is quashed. The case is ordered to be sent back to the Judicial Magistrate, 1st Class, Sirsa, for trial.

H.S.B.

APPELLATE CIVIL

Before R. N. Mittal, J.

IQBAL SINGH—JD/Appellant.

versus

THE TRADERS BANK LIMITED, NEW DELHI,—DH/Respondent.

E.F.A. No. 454 of 1975.

December 2, 1975.

*Code of Civil Procedure (V of 1908)—Section 60(1), proviso (CCC)—More than one residential house owned and occupied by a judgment-debtor—Attachment of one such house at the instance of the decree holder—Judgment-debtor—Whether entitled to claim exemption of the attached house under proviso (CCC) to section 60(1).*