

**Procedural niceties of National Investigation Agency Act  
&  
Incompetency of Magistrate to deal with Section 370 IPC**

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Despite enactment of a central legislation called National Investigation Agency Act in the year 2008, no one was following the same in letter and spirit. Later on, in some quarters of the judicial system some persons raised the voice by judicial orders or otherwise and then the Act became a concern for all. Government has also recently in August 2019 enforced an amendment which changed certain perspective. It is in such circumstances I thought to go to the root of the matter for easy awareness.

2. Section-6 of National Investigation Agency Act provides:

*“6. (1) On receipt of information and recording thereof under section 154 of the Code relating to any Scheduled Offence the officer-in-charge of the police station shall forward the report to the State Government forthwith.*

*(2) On receipt of the report under sub-section (1), the State Government shall forward the report to the Central Government as expeditiously as possible.*

*(3) On receipt of report from the State Government, the Central Government shall determine on the basis of information made available by the State Government or received from other sources, within fifteen days from the date of receipt of the report, whether the offence is a Scheduled Offence or not and also whether, having regard to the gravity of the offence and other relevant factors, it is a fit case to be investigated by the Agency.*

*(4) Where the Central Government is of the opinion that the offence is a Scheduled Offence and it is a fit case to be investigated by the Agency, it shall direct the Agency to investigate the said offence.*

*(5) Notwithstanding anything contained in this section, if the Central Government is of the opinion that a Scheduled Offence has been committed which is required to be investigated under this Act, it may, suo motu, direct the Agency to investigate the said offence.*

*(6) Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence shall not proceed with the investigation and shall forthwith transmit the relevant documents and records to the Agency.*

*(7) For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to continue the investigation.*

*(8) Where the Central Government is of the opinion that a Scheduled Offence has been committed at any place outside India to which this Act extends, it may direct the Agency to register the case and take up investigation as if such offence has been committed in India.*

*(9) For the purposes of sub-section (8), the Special Court at New Delhi shall have the jurisdiction”.*

2.1. Sub-section-1 has used the expression “shall” means the officer-in-charge does not have any discretion to withheld the information from the state government. There is nothing in this

section or the entire Act suggesting any type of particular format in which information has to be given to the state government or any requirement of rules or regulations. It simply says that officer-in-charge shall forthwith forward the report to the state government. The expression “forthwith” further prohibits the officer-in-charge from making delay on any count.

2.2. Sub-section-2 again by its mandatory expression “shall” enjoins upon the state government to forward the report to the central government. No time limit has been prescribed. However, use of expression “as expeditiously as possible” shows the anxiety of the legislature. As such, the state government is obliged to forward the report within such time which is found reasonable to obtain approval of the competent authority in the government.

2.3. It is only for the central government to decide whether offence should be tried by the NIA or not. There is no say of state government or officer-in-charge in that matter. The only starting point is the recording of information under section-154 Cr.PC. Once that is done, the whole process automatically starts culminating in the direction of the central government to the NIA to start investigation or refusal of the central government. It is also pertinent that central government has no authority to sit on the report for unlimited time. It further cannot deny to take a decision on the report. Sub-section-3 gives only 15 days time to central government, means in those 15 days, the central government has to decide either way.

2.4. If central government directs the NIA to take up the investigation, nothing survives for the officer-in-charge or for the state government except to hand over all the documents to the NIA and further to assist the NIA whenever they are called upon.

3. Once an FIR is registered under Section-154 CrPC and the offence is found to be a scheduled one, four situations may arise. First, SHO sends the required information and central government directs the NIA to undertake the investigation. Second, SHO sends the required information but central government refused to do so within stipulated time. Third, SHO sends the required information but central government does not do anything at all. Fourth, SHO does not send the information at all.

3.1. In first situation, Section-6(6) says that in such situation the state police **shall not proceed with the investigation** and **shall forthwith transmit the relevant documents** and records to the Agency. It is clear that there is no discretion for the state police.

3.2. In all the other three situations, whether the state police can investigate the offence or not is the question. For this purpose Section-6(7), Section-7 and Section-10 are relevant. We may start with Section-10 which reads as “*Save as otherwise provided in this Act, nothing contained in this Act shall affect the powers of the State Government to investigate and prosecute any Scheduled Offence or other offences under any law for the time being in force*”. First of all, this section recognizes that state police has power to investigate every offence including the scheduled offence and the provisions contained in the Act shall not affect that power. This is also in consonance with the provisions of CrPC which empowers the state police to investigate every offence. The only prohibition contained in Section-10 is that this prescription shall not apply if

there is something provided in the Act itself about the investigating powers of the state police. This is clear from the expression “**Save as otherwise provided in this Act**”. Meaning thereby that there must be something specially provided in the Act which is otherwise than the general power of state police to investigate any offence.

3.3. A bare look at the Act goes to show that only Chapter-III having Sections-6 to 10 is concerned with the investigation. We have already discussed Section-10. Section-8 talks about additional power of NIA to investigate other offences connected with the scheduled offence and therefore it has no concern with the state police. Section-9 requires the state to extend assistance to NIA during investigation and as such, it also has no concern to a situation where NIA is not investigating the offence. Then remain Section-6 and Section-7.

3.4. Section-7 basically becomes applicable only when the NIA has already started the investigation. It reads as “*Power to transfer investigation to State Government.- While investigating any offence under this Act, the Agency, having regard to the gravity of the offence and other relevant factors, may- (a) if it is expedient to do so, request the State Government to associate itself with the investigation; or (b) with the previous approval of the Central Government, transfer the case to the State Government for investigation and trial of the offence*”. First part empowers the NIA to associate the state in the investigation. However, it is the second part which is relevant. NIA is empowered to transfer investigation to the state even if scheduled offence is committed. Section-7 therefore supports that state police can also investigate the scheduled offence. Meaning thereby that Section-7 is not a provision which provides otherwise than the general powers of state police to investigate an offence.

3.5. If we look at Section-6, we may find that Section-6(7) is very relevant which reads as “*For the removal of doubts, it is hereby declared that till the Agency takes up the investigation of the case, it shall be the duty of the officer-in-charge of the police station to **continue the investigation***”. This provision may have two interpretations. First, if the central government directs the NIA to take up the investigation, the state police may continue with the investigation till the time the NIA actually takes up the investigation. Second, considering the time gap between registration of crime, communication through proper channel and actual decision by the central government, the state police may continue with investigation as there may be chances of destruction of evidence, abscondance of culprit etc.

3.6. The first interpretation cannot be adopted for a simple reason. The provision contained in Section-6(7) comes immediately after Section-6(6). This provision reads as “*Where any direction has been given under sub-section (4) or sub-section (5), the State Government and any police officer of the State Government investigating the offence **shall not proceed** with the investigation and shall forthwith transmit the relevant documents and records to the Agency*”. Clearly, it stops the state police from proceeding with the investigation. The only activity which the state police can do is to handover the documents of the case to the NIA and nothing else. It would be absurd to contend that immediately after such prohibition, the Parliament allowed the state police to investigate the matter.

3.7. At this stage, we may note that Patna High Court in **Bahadur Kora vs State of Bihar** 2015 CLJ 2134 without considering the Section-6(7) properly took a view that state police has no independent power to investigate a scheduled offence and that it can do so only when NIA transfers the investigation by virtue of Section-7. The premise of the Patna High Court was interesting. It assumed that when the specialized agency like NIA cannot suo moto take the investigation and has to wait for an order of central government, state police cannot claim itself to be more powerful and cannot take investigation suo moto. The High Court certainly missed the point that it is only when the central government issues a direction that the state police has been prohibited from proceeding with the investigation under Section-6(6). It does not talk anything about the situation prior to the issuance of direction by the central government. Even further, Patna High Court appears to have not taken note of the fact that Section-6(7) has used an expression “**to continue with the investigation**” in respect of the duty of SHO. Continuance can only occur when something is already in progress. Means, unless the investigation by SHO is already in progress, there cannot be a question of continuing the same.

3.8. Atleast for Delhi, we are not required to deal with the issue independently. Delhi High Court in **Aqil Hussain vs State** dated 22.06.2020 has already said that power of investigation also lies with the state police. It has observed “*Thus, it is clear that apart from NIA, the other police establishments are equally competent to investigate cases under the UAPA. This position is also clear from Section 6(7) of NIA Act, which clears doubts, if any, by declaring that till the NIA takes over the investigation of the case, it shall be the duty of the officer-in-charge of the police station where the case is registered, to continue to investigate*”.

3.9. The second option is a feasible one. Considering the time gap between registration of crime, communication through proper channel and actual decision by the central government, the state police have to continue with investigation otherwise there may be chances of destruction of evidence, abscondance of culprit etc. It cannot be accepted that the Parliament wanted to create a situation wherein despite an offence being committed, no agency initiate the process of collection of evidence for several days that too in serious cases which the scheduled offences are.

3.10. Considering the scope of Section-6(7), and Section-10, it can be safely said that state police will have general powers to investigate all offences including a scheduled offence and the only prohibition is that if the NIA takes up the investigation, then the state police cannot claim any power of independent investigation. State police can also start investigation if the same is transferred to it by the NIA. Meaning thereby that if for any reason the NIA is not investigating a scheduled offence (either central government has refused or has not taken any decision in stipulated time or information has not reached or there is still available with the central government or NIA itself has transferred the investigation), the state police is empowered to investigate the scheduled offence.

4. Now we can discuss the proceedings which have to be taken once the state police start investigating a scheduled offence.

4.1. Section-22 is very relevant. It reads as under:

*“22. Power of State Government to designate Court of Session as Special Courts.—(1) The State Government may designate one or more Courts of Session as Special Courts for the trial of offences under any or all the enactments specified in the Schedule.*

*(2) The provisions of this Chapter shall apply to the Special Courts designated by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely-*

*(i) references to “Central Government” in sections 11 and 15 shall be construed as references to State Government;*

*(ii) reference to “Agency” in sub-section (1) of section 13 shall be construed as a reference to the “investigation agency of the State Government”;*

*(iii) reference to “Attorney-General for India” in sub-section (3) of section 13 shall be construed as reference to “Advocate-General of the State”.*

*(3) The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is designated by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter.*

*(4) On and from the date when the Special Court is designated by the State Government the trial of any offence investigated by the State Government under the provisions of this Act, which would have been required to be held before the Special Court, shall stand transferred to that Court on the date on which it is designated”.*

4.2. Section-22 empowers the state government to designate a court of session as special court under this Act. This section also contemplates the role of state police when it says that the reference to “Agency” in sub-section (1) of section 13 shall be construed as a reference to the “investigation agency of the State Government”.

4.3. Section-13(1) in general reads as *“Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the Agency shall be tried only by the Special Court within whose local jurisdiction it was committed”.*

4.4. If we read section-13(1) in the context of section-22(2)(ii), we find the same as *“Notwithstanding anything contained in the Code, every Scheduled Offence investigated by the investigation agency of the State Government shall be tried only by the Special Court within whose local jurisdiction it was committed”.*

4.5. As can be seen from the above, even if the state police investigate a scheduled offence, the trial has to be done by the special court only. The expression “only” clearly excludes all other courts of general criminal jurisdiction.

5. The question now is as to which is the special court that can try the scheduled offence investigated by the state police.

5.1. If the NIA investigates the offence, it is clear that the same shall be tried by the special court constituted by the central government. However, if the scheduled offence is investigated by the state investigation agency, the same has to be tried by the special court constituted by the state government. How?

5.2. Section-22 itself contemplates that state government may designate a court of session as special court. It is therefore the special court which has been designated by the state government which can try the offence investigated by the state police.

5.3. Means, even if the scheduled offence has been investigated by the investigation agency of the state, the same can only be tried by the special court having local jurisdiction and none else. The provision has used mandatory expression “shall”. Which special court? Certainly not that which is constituted by the central government. The court should be the special court which is constituted by the state by virtue of Section-22(1) which reads as “*The State Government may designate one or more Courts of Session as Special Courts for the trial of offences under any or all the enactments specified in the Schedule*”.

5.4. At this stage one interesting feature may be noted. Section-22(1) is a discretionary provision as it has used “may designate”. But once the state government chooses to exercise its discretion for designating a special court, everything becomes mandatory. Section-22(2) says “*The provisions of this Chapter shall apply to the Special Courts designated by the State Government under sub-section (1) and shall have effect subject to the following modifications, namely*”. One of the modifications so suggested is change of central government in Section-11 with state government.

5.5. If we read section-11(1) in the context of section-22(2)(i), we find the same as “*The **State Government** shall, in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, for the trial of Scheduled Offences, designate one or more Courts of Session as Special Court for such area or areas, or for such case or class or group of cases, as may be specified in the notification*”. On a superficial reading it may appear that once Section-22 gives discretion to designate the special court, the power of so doing has to be found in that provision itself. But a closer look will show that such an interpretation will give unguided powers to the state government to do anything. Section-22(1) does not provide as to how or for which area the special court can be designated. It is Section-11(1) which mandates that the designation process shall be in consultation with the chief justice. It does not require any emphasis that High Court being the final authority in the State for judicial matters need a say for such a serious activity. Further, Section-11(1) also provides for area or cases for which special court can be designated whereas Section-22(1) only talks about enactments.

6. What would happen when the state does not constitute a special court? Answer lies in Section-22(3) which reads as *“The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is designated by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter”*.

6.1. Clearly, the scheduled offences have to be tried by the Court of Session in the absence of a special court and such Court of Session.

6.2. It is here that the question arises as to which of the Courts of Session in the State shall have jurisdiction to try a scheduled offence in the absence of special court. Section-22(3) says **“be exercised by the Court of Session of the division in which such offence has been committed”**. It is clear that not any court of session has been empowered to do so. It is the court of session of a specific division where the offence has been committed which has the power of special court.

6.3. Delhi High Court in **Sayed Mohd. Ahmad Kazmi vs Union Of India** dated 31.03.2014 has observed *“Sub-section (3) does not carve out or confer territorial jurisdiction on the Court of Session of a Division. Court of Session of the Division has not been defined in the NIA Act but stands defined and explained in Sections 7, 9 and 10 of the Code of Criminal Procedure. **The expression “in which offence has been committed” refers to Court of Session which under the provisions of Code would have jurisdiction to try the offence.** The object and purpose of sub-section (3) is clear from the last part of the said sub-section, which stipulates that Court of Session shall have all powers and follow the procedure provided under Chapter IV of the NIA Act. This is the intended purpose and object behind sub-section (3) and the non-obstante expression used in the said sub-section is for the said purpose. Thus, where special courts have not been constituted by the State Government under Section 22(1), the Court of Session which normally has jurisdiction to try the offence under the Code of Criminal Procedure will be entitled to proceed and adjudicate whether or not offence has been committed and also have all powers conferred and follow the procedure stipulated under Chapter IV of the NIA Act”*.

6.4. It is therefore clear that it is not any court of session in the state but only the court of session pertaining to a division in which the offence has been committed can deal with the scheduled offences in the absence of special court.

7. In specific context of Delhi, we may discuss as to which court will have jurisdiction in the absence of special court.

7.1. Section-7(1) of CrPC is very relevant. It reads as *“Territorial divisions.-(1) Every State shall be a sessions division or shall consist of sessions divisions; and every sessions division shall, for the purposes of this Code, be a district or consist of districts. Provided that **every metropolitan area shall, for the said purposes, be a separate sessions division and district”***.

7.2. Clearly by virtue of Section-7(1) a state can be divided into several session divisions and such sessions division can be treated as a district or may consist of more districts. However, we are in Delhi which is required to be dealt with by the Proviso appended thereto. It talks about metropolitan area and provides that **every such metropolitan area shall be a separate sessions division.**

7.3. At this juncture we can usefully refer to section-8 of Cr.P.C. Section-8 of Cr.P.C. Provides about creation of Metropolitan areas. By virtue of notification issued in the year 1974, Delhi was declared as a metropolitan area. As such Delhi was bound to be treated as one session division by virtue of Proviso appended to Section-7(1) Cr.P.C. as Delhi was a metropolitan area. Meaning thereby that for the purpose of criminal justice administration, Delhi was a single district. Reason is simple. At that point of time, the entire Delhi was a single sessions division and the NIA Act was only talking about court of session.

7.4. However, the confusion arose when Delhi was divided into several metropolitan areas. How it happened is required to be noted. In the original Section-8 of Cr.P.C., there was no power for State Government to divide any metropolitan area. The only power left with the State Government was to reduce or alter or extend the limits of a metropolitan area by virtue of sub-section-3 thereof. The Delhi State Legislature however with the consent of President enacted the Code of Criminal Procedure (Delhi Amendment) Act, 2011 and amended Section-8 of the Cr.P.C. By this amendment State Government was empowered to divide a metropolitan area or to reduce, alter or extend limits of metropolitan area. The amended Section-8 of Cr.P.C. to the extent necessary reads as under:

*“8. Metropolitan areas.-(1) The State Government may, by notification, declare that, as from such date as may be specified in the notification, any area in the State comprising a city or town or part thereof whose population exceeds one million shall be a metropolitan area for the purposes of this Code.*

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*(3) The State Government may, by notification, **divide a metropolitan area** into two or more such areas or extend or reduce or alter the limits of a metropolitan area: provided that-*

*(a) the division of metropolitan areas shall not be so made as to result in the population of any of the areas into which it has been divided being less than one million; and*

*(b) the reduction or alteration of metropolitan area shall not be so made as to reduce the population of such area to less than one million”.*

7.5. Then the State Government in the year 2012 divided Delhi into 11 metropolitan areas. Later, Delhi High Court issued administrative notification creating 11 metropolitan areas for judicial work in Delhi. Now by virtue of Proviso appended to Section-7(1) Cr.P.C. **each of the 11 metropolitan areas has to be treated as a separate session division** for the purpose of criminal justice administration.

7.6. At this stage, we may notice an incidental development. Earlier, the State Govt had notified ASJ(North-01) for trial of offences under Drugs and Cosmetics Act for entire Delhi. Vide a letter dated 26.10.2013, the Registrar General of Hon'ble High Court of Delhi requested the executive to notify one court in each of the 11 districts for trial of such offences in view of division of Delhi. Ultimately, vide Notification No. **F.13(43)/09/Misc/DC/Enft./3355-3363 dated 05.03.2014**, the State notified ASJ-01 in each of 11 districts as special court for such purpose. This shows that one court established in one particular district cannot deal with a case of another district and similar situation will arise also in respect of court of session mentioned in NIA Act.

7.7. This concept has also been recognized by Delhi High Court on judicial side in **Sayed Mohd. Ahmad Kazmi vs Union Of India** dated 31.03.2014. It observed "*The entire National Capital Territory of Delhi prior to 1st March, 2013 was one division with a Session Judge. 11 Divisions were created vide notification dated 22nd February, 2013 w.e.f. 1st March, 2013. Police Station Special Cell, Lodhi Colony falls in New Delhi Division at Patiala House Courts. Additional Session Judge 02, Patiala House Courts, New Delhi Division is one of the Additional Session Judges falling within the said jurisdiction, whereas Additional Session Judge 03 (Central), Tis Hazari Courts is not one of the Additional Session Judge within the New Delhi Division. In the aforesaid factual background, challenge to the territorial jurisdiction of Additional Session Judge 02, Patiala House Courts, New Delhi Division, has to even otherwise fail*".

7.8. It is therefore clear that since Delhi now has 11 sessions division and 11 court of session, the general criminal jurisdiction under the CrPC shall be independent and a court of session cannot exercise any power in respect of another session division. As such, the expression "the Court of Session of the division in which such offence has been committed" appearing in Section-22(3) becomes very significant. It is only the court of session under whose jurisdiction the scheduled offence is committed, can deal with the offence in the absence of special court, if the state police has made the investigation.

8. Now we can discuss the procedure before the court of session to be followed in respect of scheduled offence.

8.1. Section-22(3) says "*The jurisdiction conferred by this Act on a Special Court shall, until a Special Court is designated by the State Government under sub-section (1) in the case of any offence punishable under this Act, notwithstanding anything contained in the Code, be exercised by the Court of Session of the division in which such offence has been committed and it shall have all the powers and follow the procedure provided under this Chapter*".

8.2. It is clear that the court of session dealing with the scheduled offence will have all the powers of the special court and even it has to follow the procedure available in the chapter. Meaning thereby that the court of session is not required to look into CrPC in respect of things which are provided in the Chapter-IV of NIA Act. Delhi High Court in **Sayed Mohd. Ahmad**

**Kazmi vs Union Of India** dated 31.03.2014 has observed “*Thus, where State Government has not constituted special courts under sub-section (1) to Section 22, the powers conferred under Chapter IV of the NIA Act shall be exercised by the Court of Session of the Division in which such offence is committed and the procedure in the said chapter of the NIA Act is to be followed. The provisions of Chapter IV on the power/authority of the court and procedure to be followed override the provisions contained in the Code of Criminal Procedure, 1973. The non-obstante stipulation in sub-section (3) is with reference to the power of the Court of Session and the procedure and even normal court of Session of the Division will have all powers in terms of sub-section (3) which are conferred on special courts under Chapter IV of the NIA Act. The procedure under chapter IV is to be followed*”.

8.3. The first and foremost power of the special court is to take cognizance of offence without any committal of the accused. Section-16(1) reads as “*A Special Court may take cognizance of any offence, without the accused being committed to it for trial, upon receiving a complaint of facts that constitute such offence or upon a police report of such facts*”. Means, if special court is not constituted and court of session is exercising powers of special court u/s-22(3), it can take cognizance of scheduled offence without committal. Since the provision is having a non-obstinate clause vis a vis Cr.PC, the restriction of Section-193 thereof cannot come in the way of such sessions court while excusing power of special court.

8.4. Special court can take cognizance upon complaint or police report and that too without committal. Court of Session where special court is not constituted can also take cognizance upon complaint or police report and that too without committal. Clearly, there is no necessity that a Magistrate first looks after the police report or complaint. Means, complaints and police reports are not required to be filed before the Magistrate because he cannot do anything on such complaints or police reports. So the complaints or police reports should be filed with the court of sessions where special court has not been constituted so far as investigation conducted by state investigation agency into scheduled offences is concerned.

9. The question then is before whom an arrested accused can be produced. NIA Act virtually does not have any answer. Answer has to be gathered from Article-22 of the Constitution, provisions of the Cr.PC and also of NIA Act.

9.1. Article-22 requires that every arrested person has to be produced before a Magistrate within 24 hours. Same has also been provided in Section-57 Cr.PC. Therefore, it has to be accepted that an arrested person should be produced before a Magistrate unless there is some law prescribing contrary mode. The NIA Act does not provide any mode. So the accused has to be produced before a Magistrate within 24 hours of his arrest.

9.2. Section-167 Cr.PC empowers a Magistrate irrespective of jurisdiction to grant custody of such produced accused but it goes only to a length of 15 days. The same section provides that if

the Magistrate has no jurisdiction for committal or trial, he may forward the accused to the Magistrate having jurisdiction.

9.3. Certainly, this prescription is not for the first production of the accused as provision provides in the starting phase that Magistrate may authorize detention irrespective of jurisdiction. It is clear that such Magistrate has to consider jurisdictional prescription upon first remand. Though seemingly, the forwarding part uses an expression “may” and therefore some fertile mind can contend that the Magistrate is not required to forward the accused to the jurisdictional Magistrate. It however seems that such a contention cannot be accepted. If this was the intention of the legislature, there was not even a need for enacting such prescription. It is well settled law that in certain circumstances even an expression “*may*” can be deemed to be mandatory. The initial Magistrate has to forward the accused to the jurisdictional Magistrate upon the expiry of the first 15 days.

9.4. Who will be the Jurisdictional Magistrate? A Magistrate who has jurisdiction to commit the case or to try the case will be called jurisdictional Magistrate for the Section-167. Which Magistrate can try a case? A Magistrate who has taken cognizance of an offence or a Magistrate to whom a case has been transferred or made over in accordance with the law can try the case. Transfer and making over concept can not apply at the initial stage and therefore we are required to consider the cognizance part. Which Magistrate can take cognizance? The Magistrate who has power to take cognizance u/s-190 Cr.PC can take cognizance. The same Magistrate shall also have the jurisdiction to commit the case.

9.5. For any trial or committal, the pre-requisite is a cognizance. And for taking cognizance there must be a power to take cognizance. If there is no such power available with the Magistrate, he cannot take any cognizance. If he cannot take cognizance, he can not commit the case or try the case. And therefore he cannot be a jurisdictional Magistrate.

9.6. For the sake of clarity, it may be noted that though, there is a decision of Hon'ble Supreme Court in **State vs Arul Kumar** 2016 SCC OnLine SC 582 in the context of corruption cases, holding that special court may take cognizance but other avenue has not been foreclosed, the same cannot be treated as a precedent in view of the earlier decision in **Essar Teleholdings Ltd. vs Delhi High Court**, (2013) 8 SCC 1 wherein it was held that special judge alone can take cognizance.

9.7. It is at this stage the basic problem comes into picture. As discussed earlier, in NIA Act cases, a Magistrate does not have any jurisdiction. Then where would be the accused forwarded by the initial Magistrate upon expiry of first 15 days? The answer lies somewhere else.

9.8. NIA act only provides that a Special Court can take cognizance of offence upon complaint or police report. But it does not provide any thing as to what will happen thereafter. Section-4(2) Cr.PC provides that offences even under any other law shall be dealt with according

to the provisions of Cr.PC subject to any other law providing separate provisions. Section-5 Cr.PC further saves the special procedure provided by any other enactment.

9.9. NIA Act does not provide anything about the procedure to be adopted after taking cognizance by the Special Court. As such by virtue of Section-4(2) Cr.PC, the procedure prescribed in Cr.PC has to be followed.

9.10. In a complaint case, Cr.PC requires that procedure prescribed in Section-200 to 204 be complied with. There is no doubt that a Special Court under NIA Act can take cognizance upon a complaint. As such it has to follow the procedure prescribed in Section-200 to 204 Cr.PC. These sections however use the word “Magistrate”. Is anyone going to say that since these sections use the word “Magistrate”, the Special Court is not required to follow the procedure prescribed in Section-200 to 204? The Special Court has to follow the procedure. And therefore we have to read “Special Court” in section-200 to 204 instead of “Magistrate”.

9.11. Even upon taking cognizance on police report, a process (summons or warrant) has to be issued under Section-204 Cr.PC. Even this section uses the expression “Magistrate”. Since the Special Court has to follow the same procedure, we have to read “Special Court” in all such sections instead of Magistrate. Now if we are reading the expression “Special Court” in place of “Magistrate” in several provisions of Cr.PC on the basis of jurisdictional competence of taking cognizance, there seems to be no reason as to why we should not read the same expression “Special Court” in Section-167 Cr.PC when it talks about the jurisdictional competence.

9.12. It may be noted that a three judges bench of Supreme Court in **Harshad S. Mehta v. State of Maharashtra**, (2001) 8 SCC 257 while dealing with special court of another enactment has said that we have to read special court in place of magistrate in Section-157 CrPC. Similarly, Supreme Court while dealing with special court in another enactment in **State of T.N. vs Krishnaswami Naidu**, (1979) 4 SCC 5 has held that we have to read special court in place of magistrate in Section-167 CrPC and that for initial 15 days, a magistrate irrespective of jurisdiction can pass remand order.

9.13. We should and have to read section-167 Cr.PC as if it uses “Special Court” for the purposes of jurisdictional Magistrate. Once read in such manner, no doubt will remain. Upon expiry of first 15 days, the initial Magistrate has to forward the accused to the Special Court having jurisdiction. And as discussed earlier, a Court of Sessions has to also exercise powers of special court and to follow the prescribed procedure by virtue of Section-22(3) NIA Act. As such, in the absence of state designated special court, the police has to pray for remand from the court of session instead of a magistrate if the offence involved is a scheduled offence.

10. We have seen that for a scheduled offence, three situations may arise. Firstly, the NIA may take up the investigation as per prescribed procedure. In such a case, the matter has to be mandatorily dealt with by the special court designated by the central government and there

cannot be any absence of the special court as the central government is mandated to designate special courts. Secondly, the investigation may be conducted by the state police. In such situation, if the state government has designated special court then the matter again has to be dealt with by the special court. Here it may be noted that such cases cannot be dealt with by the special court designated by the central government. Thirdly, the investigation is though conducted by the state police; the state government has not designated any special court. In such circumstances, it is the court of session of the division in which the offence has been committed shall have the jurisdiction to try the case.

10.1. First two situations do not pose any difficulty. The matter will directly go to the special court. In third situation, if the provision is not properly understood, technical problem will arise. Firstly, we have to note that it is only the court of session which has normal criminal jurisdiction over the offence so committed which will have to deal with the matter. Secondly, such court of session has to follow the procedure of NIA Act instead of CrPC and shall have all the powers of special court including that of taking cognizance without committal. In such circumstances, clearly a Magistrate will have no role to play either during the investigation of a scheduled offence or cognizance or trial thereof except that for the initial 15 days, any Magistrate irrespective of jurisdiction can exercise remand power.

11. Now we have to see what are the offences which have been scheduled. NIA Act defines scheduled offence as an offence which is mentioned in the schedule appended to the Act. Therefore we have to see the schedule. Apart from different enactments, Schedule also mentions the offence of IPC. Some of them have been inserted in the schedule vide amendment notified w.e.f. 02.08.2019. The offence of IPC are mentioned at Serial No.-8 and are as under:

*“(a) Chapter VI of the Indian Penal Code (45 of 1860) sections 121 to 130 (both inclusive);*

*(b) Sections 370 and 370A of Chapter XVI of the Indian Penal Code (45 of 1860);*

*(c) Sections 489-A to 489-E (both inclusive) of the Indian Penal Code (45 of 1860)”.*

11.1. A bare look at the schedule shows that offence punishable under Section-370 IPC has been made a scheduled offence under NIA Act. Like every scheduled offence, this offence under Section-370 also has to be governed for investigation and trial in accordance with the provisions contained in NIA Act and only the residuary proceedings have to be dealt with under the provisions of CrPC. Meaning thereby that once the SHO records FIR for offence under Section-370 IPC, he has to send required information to the state government which in turn will send the same to central government which shall decide as to whether the offence should be investigated by the NIA or not.

11.2. In case the offence is not investigated by the NIA for any reason whatsoever, the state police shall investigate the offence and if there is a special court designated by the state government, the chargesheet shall be filed before such special court. If no such special court is designated by the state government, the state police shall file the chargesheet before a court of session which has jurisdiction in the division where the offence is committed. Then such court of

session treating itself as a special court shall deal with the case and exercise all powers and follow the NIA procedure instead of CrPC including taking direct cognizance of the offence without committal. It may be noted that Delhi has 11 sessions division and therefore a court of session will have jurisdiction only in its division and not over any other division. So if the offence is committed within the jurisdiction of west sessions division holding court in Tis Hazari, the state police cannot bring the case to a court of session of New Delhi division holding court in Patiala House.

11.3. It is therefore clear that even for an offence under Section-370 IPC, if the state police conduct the investigation, it has to take remand from the court of sessions in the absence of special court and such court of session will have to take a decision on cognizance without the accused being committed to it.

12. Now we can look into the meaning of “Court of Session” as appearing in the NIA Act. This expression is not defined in the Act and therefore we have to see the provisions of CrPC.

12.1. A bare reading of Section 6 CrPC shows that an Additional Sessions Judge has not been specifically made a Court of Session in the first category of Courts as contained therein, which makes provisions for only Court of Session. Hence, if the expression Court of Session is treated as not to include Additional Sessions Judges, then, these Courts would not be regarded as a Court of Session. Scheme of the new Code is that there will be one Court of Session for every sessions division. Obviously, therefore, every Court of Session, constituted for a sessions division, would be presided over by a Sessions Judge. In addition thereto, the High Court may appoint Additional Sessions Judges to exercise jurisdiction in such a Court of Session. If we read the provisions contained in Section 9, it is found that there will be one Sessions Judge presiding over the Court of Session for every sessions division and that if there be Additional Sessions Judge, appointed by the High Court, their appointment would be to only to exercise jurisdiction in the Court of Session.

12.2. As indicated in Section 9, an Additional Sessions Judge cannot, therefore, be regarded as a Sessions Judge, for, while a Sessions Judge presides over the Court of Session, constituted for a sessions division, an Additional Sessions Judge merely exercises jurisdiction in such a Court of Session. Notwithstanding, however, the fact that an Additional Sessions Judge cannot be regarded as a Sessions Judge, the fact remains that their Courts too, unless can be shown otherwise, fall within the expression "Court of Session". Clearly, therefore, the Additional Sessions Judge will not be a Sessions Judge, but, by virtue of their appointment as Additional Sessions Judge, they nevertheless exercise jurisdiction in a Court of Session and must, ordinarily and unless the context, otherwise, requires, be regarded as a Court of Session.

12.3. Despite this, if one sees the language used in Section 381, one cannot but conclude that the hearing of an appeal by an Additional Sessions Judge would be wholly without jurisdiction and order(s) passed, on hearing of such an appeal, would be nullity unless the appeal had been made over to him by the Sessions Judge for hearing or unless the High Court had directed him to

hear the appeal. Even session judge has power to transfer cases from additional session judge. This makes it clear that though an additional sessions judge may be included in the expression Court of Session for the purpose of CrPC but he cannot be equated with a Sessions Judge. CrPC has used different expressions at different places in respect of Court of Sessions and a Sessions Judge. Therefore, it has to be accepted that both the expressions are different.

12.4. Now we can deal with the concept in the context of NIA Act. Section-11 before amendment was somewhat different and provided as under:

*“11. Power of Central Government to constitute Special Courts.—(1) The Central Government shall, by notification in the Official Gazette, for the trial of Scheduled Offences, constitute one or more Special Courts for such area or areas, or for such case or class or group of cases, as may be specified in the notification.*

*(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.*

*(3) A Special Court shall be presided over by a judge to be appointed by the Central Government on the recommendation of the Chief Justice of the High Court.*

*(4) The Agency may make an application to the Chief Justice of the High Court for appointment of a Judge to preside over the Special Court.*

*(5) On receipt of an application under sub-section (4), the Chief Justice shall, as soon as possible and not later than seven days, recommend the name of a judge for being appointed to preside over the Special Court.*

*(6) The Central Government may, if required, appoint an additional judge or additional judges to the Special Court, on the recommendation of the Chief Justice of the High Court.*

*(7) A person shall not be qualified for appointment as a judge or an additional judge of a Special Court unless he is, immediately before such appointment, a Sessions Judge or **an Additional Sessions Judge** in any State.*

*(8) For the removal of doubts, it is hereby provided that the attainment, by a person appointed as a judge or an additional judge of a Special Court, of the age of superannuation under the rules applicable to him in the service to which he belongs shall not affect his continuance as such judge or additional judge and the Central Government may by order direct that he shall continue as judge until a specified date or until completion of the trial of the case or cases before him as may be specified in that order.*

*(9) Where any additional judge or additional judges is or are appointed in a Special Court, the judge of the Special Court may, from time to time, by general or special order, in writing, provide for the distribution of business of the Special Court among all judges including himself and the additional judge or additional judges and also for the disposal of urgent business in the event of his absence or the absence of any additional judge”.*

12.5. By amending the Act, Parliament has deleted sub-section-3 to 7 and made certain changes in other sub-sections. It now looks as under:

*“11. Power of Central Government to designate Court of Session as Special Courts.- (1) The Central Government shall, in consultation with the Chief Justice of the High Court, by notification in the Official Gazette, for the trial of Scheduled Offences, designate one or more Courts of Session as Special Court*

*for such area or areas, or for such case or class or group of cases, as may be specified in the notification. Explanation.- For the purposes of this sub-section, the expression "High Court" means the High Court of the State in which a Court of Session to be designated as Special Court is functioning.*

*(2) Where any question arises as to the jurisdiction of any Special Court, it shall be referred to the Central Government whose decision in the matter shall be final.*

*(8) For the removal of doubts, it is hereby provided that the attainment, **by the Sessions Judge** of the Court of Session referred to in sub-section (1), of the age of superannuation under the rules applicable to him in the service to which he belongs shall not affect his continuance as judge of the Special Court and the appointing authority in consultation with the Central Government may by order direct that he shall continue as judge until a specified date or until completion of the trial of the case or cases before him, whichever is earlier.*

*(9) When more than one Special Court is designated for an area or areas, the senior-most Judge shall distribute the business among them".*

12.6. A comparative reading shows that earlier the Government was required to constitute a special court and then to appoint a judge. For being appointed as a judge, specific qualification was provided in Section-11(7) i.e. the person so chosen must be a sessions judge or additional session judge. Meaning thereby that earlier even additional sessions judge could have been appointed in the special court. Now this Section-11(7) has been deleted by way of amendment. Government is now not required to constitute but is required only to designate a court of session as special court. The change in the manner of creation of special court and deletion of additional sessions judge from the prospect have to be given due weightage while considering the expanse of the expression "Court of Session" in NIA Act.

12.7. Additionally, Section-11(8) after amendment specifically mentions two different expressions i.e. "Sessions Judge" and "Court of Session" in respect of the concept of superannuation. It nowhere talks about the additional sessions judge of the court of session. We have already seen that even in CrPC, there is a clear difference between sessions judge and additional sessions judge even though an additional sessions judge may exercise powers in a court of session. Clearly therefore the expression "Sessions Judge" mentioned in the Section-11(8) cannot include an additional sessions judge. Now if an additional sessions judge is treated as equally eligible for being designated as special court, the same will run counter to the deletion of Section-11(7) which earlier contemplated additional sessions judge as qualified for being appointed as special court. Not only this, such additional sessions judge will not have any protection regarding superannuation as given to the sessions judge under Section-11(8). This cannot be the intention of the Parliament that one judge is given protection from superannuation but the other judge is not given such protection.

12.8. Two views may be possible here. First, the provision includes additional session judge and Second, it does not so include. First view will be directly contrary to deletion of Section-11(7) and also renders the use of different expressions in Section-11(8) nugatory. Such intention cannot be attributed to the Parliament. The Second view that the additional sessions judge is not included in the expression "Court of Session" for the purpose of NIA Act will not create any difficulty at all. There is no law or presumption that whatever is provided in the CrPC has to be

accepted at all the time. Special Law has to be construed as per the scheme available in such law and residuary matter has to be dealt with under the provisions of CrPC.

12.9. It can therefore be said that even if Court of Session includes an additional sessions judge for the purpose of CrPC, the same interpretation cannot be accepted for the purpose of NIA Act. As such, the Government cannot designate an additional sessions judge as special court and in the absence of special court, an additional sessions judge cannot exercise any power for the purpose of NIA Act. It is the Court of Session which can be designated as special court. Further, it is the Court of Session of the jurisdictional division which alone can deal with the scheduled offence investigated by the state police in the absence of a special court.

13. At this stage, two judgments of Delhi High Court are required to be noted. In **Rambeer Shokeen vs State** dated 22.05.2017, it cited a government order of the year 2010 wherein powers of some special courts were conferred on every DHJS officer. Though it noted that the government order also stipulated that the conferment would be from the date the officer assume charges of special court in response to transfer–posting made by the High Court, but did not comment on its effect. However, we are not required to deal with that judgment for a simple reason that the government order of the year 2010 has not mention of NIA Act and therefore, the same cannot apply to this Act at all.

13.1. The second judgment is **Aqil Hussain vs State** dated 22.06.2020 wherein the High Court quoted from Rambeer Shokeen case in paragraph-19. However, a reading of the judgment shows that though it pertains to the UAPA offence (a scheduled one), the power of additional sessions judge of the case was upheld for diverse reasons. It may be noted that the quotation from Rambeer Shokeen case basically finds place in paragraph-19 which is a submission paragraph of the Government and not the finding of the court. Even the government had said subsequently that the concerned additional sessions judge was a notified designated court. Apart from this, there is no detraction from the fact that a document has to be read as it is and the document (the government order) does not mention the NIA Act.

13.2. Further, the judgment has not taken note of the provision of Section-22 which changes the word “agency” appearing in Section-13. It is clear from a bare reading of Paragraph-22 of the judgment that the word “investigated by the Agency” has been underlined in respect of Section-13. This shows that effect of Section-22 was not even noted in particular context of Section-13. Interestingly, even paragraph-22 is the submission paragraph of the government. Submission of the parties cannot become law or binding ratio.

13.3. At one point, the court even stated that *defacto doctrine* will save the impugned order even if the additional sessions judge was not competent. Even the court did not deal with the argument pertaining to non production of accused before Magistrate, on the ground that the court was only concerned with the validity of one specific order. Court has not taken note of Section-22 which makes changes in Section-13 providing that even if investigating agency of the state investigates a scheduled offence, the case has to be dealt with by the special court and in its absence, by the court of session. Entire judgment shows that no issue was raised as to whether

after the amendment in NIA Act, an additional sessions judge can be included in the Court of Session for the purpose of NIA Act or not. Some of the portions of the judgment therefore may be governed by the doctrine of sub-silentio.

13.4. It is therefore clear that none of these judgments can be treated as a precedent on the point as to who will remand the accused, before whom the chargesheet can be filed, who will be designated as special court, who will deal with the case investigated by the state police, whether additional sessions judge is covered under the expression Court of Session in NIA Act etc.

14. From the discussion held above, following conclusion can be arrived at:

- If any scheduled offence is registered, SHO has to inform the state government which in turn will convey the information to the central government;
- The Central Government alone has the powers to direct the NIA to investigate a scheduled offence;
- Central Government can issue such direction either on the information received from the state or suo moto;
- Central Government may choose to direct such investigation or may choose to refuse the same or even it may not take any action on the same;
- Though it is an obligation of SHO to convey information, but breach of such obligation has not been made punishable nor any consequence has been given in the Act and therefore, even if he has not conveyed the information, the crime so committed cannot be neglected;
- If NIA takes up the investigation, the state police will have to immediately stop the investigation on its part and hand over the documents to the NIA;
- Till the time NIA does not take up the investigation, State police has to conduct the investigation;
- Law does not prohibit the state police from investigating even a scheduled offence;
- State police is precluded from investigating only where the NIA has taken up the investigation;
- State police can investigate the scheduled offence in diverse scenario such as, when the Central Government refuses to direct the NIA or does not take any action on the information, or there is still time for NIA to take up the investigation or the NIA itself transfers the investigation to the state police;
- If NIA investigates the matter, the case has to be dealt with by a special court designated by the central government and for such matter; there is no role for special court designated by the state;
- If the state police investigate the matter, the case has to be dealt with by a special court designated by the state government only;
- If the state government has not designated any special court, the case has to be dealt with by the Court of Session of the division where the offence has been committed;

- For Delhi, if the scheduled offence is committed in the West sessions division holding court at Tis Hazari, the case (investigated by state police) cannot be dealt with by any Court of Sessions in New Delhi division holding court at Patila House;
- Court of Session does not include an additional session judge for the purpose of NIA Act though it may be so under CrPC where he may exercise jurisdiction;
- A Sessions Judge is different from the Court of Sessions under CrPC and also under NIA Act;
- Every scheduled offence has to be dealt with by the special court or in its absence, by the court of sessions;
- Special court and Court of Session working as special court has to follow the procedure prescribed in the NIA Act irrespective of any consideration of CrPC;
- Court of Session while dealing with the scheduled offence shall have all the powers of special court including the power to take cognizance directly without committal and also to initiate case on the basis of a complaint;
- So far as remand is concerned, if the special court or court of session as the case may be, is available the accused should be produced before it in respect of scheduled offence;
- If the special court or court of session as the case may be, is not available, such accused can be produced before Magistrate irrespective of jurisdiction and such Magistrate may grant remand for the initial 15 days;
- However, remand after 15 days can be done only by the special court or court of session as the case may be;
- Chargesheet for scheduled offences even if investigated by the state police cannot be filed before a Magistrate and the same has to be filed before special court or court of session as the case may be.

15. The result shown above shall be applicable to the offence punishable under Section-370 IPC as the Parliament by way of amendment has made it a scheduled offence under the National Investigation Agency Act. Consequently, if FIR is registered for an offence under Section-370 IPC, all the required formalities as provided in NIA Act has to be followed. Even if the state police for any reason investigate the offence of Section-370 IPC, the matter will be dealt with by the special court designated by the state government and in the absence thereof, by the Court of Session of the division where the offence has been committed. Chargesheet has to be directly filed by the state police before the special court or in the absence thereof, before the Court of Session. As such, it is clear that chargesheet for an offence punishable under Section-370 IPC cannot be filed before a Magistrate.

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