
(2007) 02 GAU CK 0058
In the Gauhati High Court

Bhuban Chandra Sharma

APPELLANT

Vs

The State of Meghalaya

RESPONDENT

Date of Decision : 21-02-2007

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 2, 9
Criminal Procedure Code, 1973 (CrPC) — Section 10, 190, 193, 194, 195
Penal Code, 1860 (IPC) — Section 376

Citation : (2007) CriLJ 3315 : (2008) GLT 109 Supp

Hon'ble Judges : I.A. Ansari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

I.A. Ansari, J.—This criminal revision has raised a question of law of great significance and the question is : Whether the trial, in the Court of an Additional Sessions Judge, of a person, who is an accused of an offence, triable exclusively by a Court of Session, shall stand vitiated if the case has not been made over to him, by general or special order, of the Sessions Judge for trial or if the High Court has not, by special order, directed the Additional Sessions Judge to try the case ? This question, in turn, rise to another important question and the question is : Whether the expression "Court of Session", occurring in the Code of Criminal Procedure 1973 (hereinafter referred to as "the new Code), shall, always and invariably, mean the Sessions Judge alone and not Additional and/or Assistant Sessions Judge or does the expression "Court of Session" means and includes, unless the context otherwise requires, not only" the Sessions Judge, but also the Additional and the Assistant Sessions Judges. Yet another question, which this revision has raised, is : What is the difference between a Sessions Judge, on the one hand, and Additional Sessions Judge and/or Assistant Sessions Judge, on the other ?

2. Before making any endeavour to answer the questions posed above, it is apposite that the material facts and various stages, which have given rise to this

revision, may be taken note of:

(i) A charge-sheet was filed, in Lumdingiri Police Station Case No. 73(7)/2004 (corresponding to GR Case No. 240(S)/2004, u/s 376, IPC, against the present petitioner as accused, whereupon Judicial Magistrate, 1st Class, Chillong, committed the case to the Court of Additional Sessions Judge (ad hoc), Shillong, commonly known as Fast Track Court. On receipt of the case record, the learned Judge, Fast Track Court, passed an order, on 11-4-2006, directing issuance of summons to the accused. The accused accordingly appeared in the Fast Track Court and when the case was taken up for consideration of charge, it was contended, on behalf of the accused, that the trial of the accused by the learned Fast Track Court is in violation of the provisions of Sections 193 and 194 of the new Code inasmuch the case ought to have been committed, in terms of the provisions of Section 209 of the new Code, to the Court of Sessions Judge and since the case has been directly committed to the Fast Track Court, the learned Fast Track Court has derived no jurisdiction to try the accused, for there is no order by the learned Sessions Judge, Shillong, making over the case for trial to the Fast Track Court. As this objection was turned down by order, dated 29-11-2006, passed by the learned Judge, Fast Track Court, the accused has impugned the order, dated 29-11-2006, aforementioned, in this revision, seeking interference by this Court.

3. I have heard Mr. K. Agarwal, learned counsel, for the accused-petitioner, and Mr. T. Baidya, learned P. P., Meghalaya. I have also heard Mr. N. Dutta, learned Senior counsel, as Amicus Curiae.

4. For the purpose of finding out an answer to the question as to whether the trial, if held, by the learned Judge, Fast Track Court, Shillong, in the present case, would be without jurisdiction and void, the scheme of the Code, relating to the trial of a case, by a Court of Assistant Sessions Judge or Additional Sessions Judge, on the one hand, and the Court of the Sessions Judge, on the other, needs to be closely examined and, for this purpose, not only the provisions of the new Code (as contained in the Code of Criminal Procedure, 1973), but also the relevant provisions of the Code of Criminal Procedure, 1898, (in short, "the old Code or the Code of 1898") need to be taken note of.

5. Before proceeding any further, it is also important to bear in mind that a Fast Track Court is nothing, but a Court of Additional Sessions Judge, though this Court is ad hoc and not permanent. Hence, in the case at hand, what is required to be determined is the question of jurisdiction of an Additional Sessions Judge to try a case, which has been directly committed to him by a Magistrate instead of the Sessions Judge having made over the case to him for trial or the High Court having directed him to try the case.

6. Since it is Section 209 of the Code, whereunder a case is committed to a Court of Session for trial, let me take note of Section 209, which, I find, reads as under:

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 Sessions, he shall -

(a) commit, after complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail remand the accused to custody until such commitment has been made.

(b) subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

7. From a careful reading of the provisions of Section 209. what transpires is that a Magistrate shall commit a case to the Court of Session if the offence is triable exclusively by a Court of Session. Does the expression "Court of Session", appearing in Section 209, mean a Sessions Judge alone or will the expression "Court of Session", occurring in Section 209, include Additional and Assistant Sessions Judges is the moot question.

8. For determining the question as to whether the expression "Court of Session", which appears in Section 209, does or does not include, within its fold, Additional Sessions Judges and/or Assistant Sessions Judges, it may be noted that the expression "Court of Session" has not been defined in the new Code nor was the expression "Court of Session" defined in the old Code.

9. Bearing in mind what is indicated above, let me, now, turn, to Section 6, which reads as under:

6. Classes of Criminal Courts.

Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely.

(i) Courts of Session;

(ii) Judicial Magistrate of the first class and, in any Metropolitan area, Metropolitan Magistrate;

(iii) Judicial Magistrate of the second class; and

(iv) Executive Magistrate.

10. A cautious reading of Section 6 shows that an Additional Sessions Judge or Assistant Sessions Judge has not been specifically made a Court of Session in the

first category of Courts as contained in Section 6. Section 6 makes provisions for only Court of Session. Hence, if the expression "Court of Session" is held not to include Additional and/or Assistant Sessions Judges, then, these Courts would not be regarded as a Court of Session. Necessarily; therefore, a Court of Session shall, ordinarily, mean not only the Sessions Judge's Court, but also the Courts of Additional and Assistant Sessions Judges.

11. It is, now, necessary to take note of Section 7 of the Code, which states thus:

Territorial divisions.- (1) Every State shall be a

sessions division or shall consist of sessions divisions : and every sessions division shall, for the purpose 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.

(2) The State Government may, after consultation with the High Court alter the limits or the number of such division and districts.

(3) The State Government may, after consultation with the High Court, divide any district into sub-divisions and may alter the limits or the number of such sub-divisions.

(4) The sessions divisions, districts and sub-divisions existing in a State at the commencement of this Code, shall be deemed to have been formed under this section.

12. From a careful reading of Section 7, it becomes clear that every State shall be a sessions division or shall consist of sessions division; and every sessions division shall, for the purpose of the new Code, be a district or consist of several districts and that every metropolitan area shall, for this purpose, be a separate sessions division and district. This, in turn, clearly shows that a state may have one sessions division or several sessions divisions and every such sessions division may either consist of one district or more than one district.

13. How a "Court of Session" is established and what is the jurisdiction of a Sessions Judge, Additional Sessions Judge or Assistant Sessions Judge are found contained in Section 9 of the Code. This section reads:

9. Court of Session.

(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judges of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions divisions and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Sessions shall ordinarily hold this sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division. It may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation. For the purposes of this Code, "appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government.

14. From the reading of Section 9, what emerges is that Sub-section (1) of Section 9 empowers the State Government to establish a Court of Session for every sessions division and Sub-section (2) of Section 9 requires that every Court of Session shall be presided over by a Judge to be appointed by the High Court. There is no dispute with regard to the fact that the Sessions Judge of Shillong is the Sessions Judge of the Court of Session in the sessions division of Shillong. Sub-section (3) of Section 9 enables the High Court to appoint Additional Sessions Judge and/or Assistant Sessions Judge to exercise jurisdiction in the Court of Session. Thus, the 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 and/or Assistant Sessions Judges to exercise jurisdiction in such a Court of Session. Section 9(5) states that where the office of the Sessions Judge is vacant, the High Court may make arrangement for the disposal of any urgent application, which is, or may be made, or pending before such Court of Session, by Additional Sessions Judge or Assistant Sessions Judge, or, if there be no Additional Sessions Judge or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the session division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

15. From a patient reading of the provisions contained in Section 9, it is plain 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 and/or Assistant Sessions Judge, appointed by the High Court, their appointment would be to only to exercise jurisdiction in the Court of Session. As indicated in Section 9, an Additional Sessions Judge or Assistant 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 or Assistant Sessions Judge merely exercises jurisdiction in such a Court of Session. Notwithstanding, however, the fact that an Additional or Assistant 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".

16. Thus, in a sessions division, apart from the Court of Sessions, which is presided over by the Sessions Judge, an Additional and/or Assistant Sessions Judge can be appointed to discharge functions of the Court of Session. Clearly, therefore, the Additional or Assistant Sessions Judge will not be a Sessions Judge, but, by virtue of their appointment as Additional or Assistant Sessions Judge, they nevertheless exercise jurisdiction in a Court of Session and must, ordinarily and unless the context, otherwise, requires, be regarded as Court of Session.

17. That there lies a distinction between the Sessions Judge, on the one hand, and an Additional or Assistant Sessions Judge, on the other, becomes transparent, when one carefully reads Section 381 of the new Code, which states as under:

381. Appeal to Court of Session how heard.

(1) Subject to the provisions of Sub-section (2), an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided that an appeal against a conviction on a trial held by a Magistrate of the second-class may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate.

(2) An Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate shall hear only such appeals as the Sessions Judge of the division may, by general or special order, make over to him or as the High Court may, by special order, direct him to hear.

18. On a careful reading of Section 381(2) of the new Code, it becomes clear that an Additional Sessions Judge or Assistant Sessions Judge or a Chief Judicial Magistrate can hear "only" such appeals as the Sessions Judge of the sessions division may, by general special order, make over to him for hearing or as the High Court may, by special order, direct him to hear. Thus, in the face of clear language used in Section 381, one cannot but conclude that the hearing of an

appeal by an Additional Sessions Judge or an Assistant Sessions Judge or a Chief Judicial Magistrate would be wholly without jurisdiction and order(s) passed, on hearing of such 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.

19. Bearing in mind the distinction between a Sessions Judge, on the one hand, and an Additional or Assistant Sessions Judge, on the other, which Section 381 clearly brings out, let me, now, revert to the question as to whether a trial by an Additional or Assistant Sessions Judge of a case, exclusively triable by a Court of Session, would be a mere irregularity or wholly without jurisdiction if the case has been directly committed by a Magistrate to such an Additional or Assistant Sessions Judge or without the same having been made over to him for trial by the Sessions Judge of the sessions division or without the case having been directed by the High Court to be tried by him. My quest for an answer to this momentous question brings me to Section 209 and Section 193 of the new Code, which read 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, after complying with the provisions of Section 207 or Section 208 as the case may be, the case to the Court of Session, and subject to the provisions of this Code relating to bail, remand the accused to custody until such commitment had been made;

(b) subject to the provisions of this Code relating to bail remand the accused to custody during, and until the conclusion of, the trial;

(c) send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) notify the Public Prosecutor of the commitment of the case to the Court of Session.

20. A combined reading of Sections 209 and 193 makes it clear that a Court of Session cannot take cognizance of any offence as a Court of original jurisdiction unless the case has been committed to it by a Magistrate. If the provisions of Section 209 were read in the light of the provisions of Section 193, it becomes clearer that Section 209 requires a Magistrate to commit a case, which discloses

commission of an offence, triable exclusively by a Court of Session, to a Court of Session and it is only then that the Court of Session can take cognizance of such an offence.

21. The question, now, is as to whether the expression "Court of Session", which occurs in Sections 209 and 193, must necessarily be read to mean a Sessions Judge alone, or can this expression "Court of Session" be held to include an Additional or Assistant Sessions Judge too. My search for an answer to this question takes me to Section 194 of the new Code, which reads, "94. Additional and Assistant Sessions Judge to try cases made over to them. An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division" may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try".

22. At the first blush, Section 194 appears to convey that an Additional Sessions Judge or an Assistant Sessions Judge derives no jurisdiction to take, as a Court of original jurisdiction, cognizance of an offence exclusively triable by a Court of Session unless the Sessions Judge of the division, by a general or special order, makes over to him such a case for trial or unless the High Court, by special order, directs him to try the case and that a trial, held in violation of the provisions of Section 194, would ipso facto be without jurisdiction and make the finding of guilt or otherwise reached, in such a trial, illegal and ineffective. Is this the correct position of law ?

23. An effective answer to the question, posed above, cannot be given unless the provisions of Sections 193 and 194 of the new Code are compared with Section 193 of the old Code. I may point out that Section 193 of the Code of 1898 contained two sub-sections. While Sub-section (1) of Section 193 has been made Section 193 in the new code, Sub-section (2) of Section 193, with a strikingly noticeable amendment, has been turned into presently enacted Section 194. In order to appreciate correctly this change, one has to carefully read, as a whole, Section 193 of the Code of 1898, and, particularly, Sub-section (2) thereof, which read as under:

193. Cognizance of offences by Courts of Session. (1) 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 accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the State Government by general or special order may direct them to try, or 12 [***] as the Sessions Judge of the division, by general or special order may make over to them for trial.

24. When the provisions contained in Sub-section (2) of Section 193 of the old Code are read in the light of what Section 194 of the new code, now, contains, there appears to be three distinct changes, which have been made by the

legislature, while enacting Section 194. In Sub-section (2) of Section 193, the State Government had the power to direct, by general or special order, an Additional or Assistant Sessions Judge to try cases, which are exclusively triable by a Court of Session. While enacting Section 194, the legislature has withdrawn the power from the State Government and vested in the High Court the power, which earlier rested in the State Government. However, while so vesting the power in the High Court, the High Court has not been given the general power to direct trial of cases by an Additional or Assistant Sessions Judge, rather, the High Court can, now, direct an Additional or an Assistant Sessions Judge to try cases only by a special order and not by a general order. The more important change, which Section 194 has introduced into the scheme of the new Code, is that while under Sub-section (2) of Section 193, an Additional or Assistant Sessions Judge could have tried "only" such cases, which were made over to him, by general or special order of the Sessions Judge of the division or the cases, which were directed to be tried by him by the order of the State Government, the legislature has chosen to omit the word "only", while enacting Section 194, indicating thereby that the exclusive nature of Jurisdiction, which the State Government or the Sessions Judge had exercised in the past by virtue of the provisions of Sub-section (2) of Section 193 stands withdrawn and Section 194 merely clarifies, now, that an Additional or Assistant Sessions Judge can try a case if the Sessions Judge of the division makes over the case to him, by special or general-order, for trial or if the High Court, by special order, directs him to try.

25. The fallout of the above discussion is that under Sub-section (2) of Section 193 of the old Code, an Additional or Assistant Sessions Judge could try a case "only" when the State Government, by general or special order, directed him to try or when the Sessions Judge of the division, by general or special order, made over to him for trial. Subsection (2) of Section 193 of the old code, thus, made it abundantly clear that unless the case was either made over for trial by the Sessions Judge or directed by the State Government to be tried, as indicated hereinbefore, an Additional or Assistant Sessions Judge derived no jurisdiction to take cognizance of such a case if the offence was exclusively triable by a Court of Session. The limitation, which the use of the word "only", in Section 193(2), had imposed on the powers of an Additional or Assistant Sessions Judge to try case, has, now, been dispensed with in Section 194. No wonder, therefore, that a three Judge Bench, in *H.N. Rishbud and Inder Singh Vs. The State of Delhi*, , while holding that trial follows cognizance and cognizance is preceded by investigation and that taking of cognizance, on the basis of an invalid investigation, does not nullify the cognizance or trial held on the basis of such investigation, made it nevertheless clear that the language of Section 190 of the Code (i.e., old code) was in marked contrast with that of Sections 193 (now, Sections 193 and 194) and 195 to 199, for the latter Sections, namely, Sections 193 (i.e. Section 193 and 194 of the new Code) regulate competence of the Court and bars its jurisdiction in certain cases except in compliance therewith. The decision in *H. N. Rishbud* (supra), thus, left it to no doubt that Section 193 (of the old Code)

regulate competence of the Court and barred its jurisdiction to try a case except in compliance therewith.

26. What logically follows from the above discussion is that u/s 193 of the old Code, an Additional or Assistant Sessions Judge could not have taken cognizance of an offence exclusively triable by a Court of Session unless the case was made over to him for trial either by the State Government or by the Sessions Judge of the division in terms of Sub-section (2) of Section 193. It is in this legal perspective that the decisions in Kamleshwar Singh Vs. Dharamdeo Singh, and Nima Tshering Bhutia and Another Vs. State of Sikkim, need to be considered and when it is so considered, it becomes apparent that an Additional or Assistant Sessions Judge was held competent to try a sessions triable case "only" when the case was made over to him for trial either by the Sessions judge of the division or by the State Government. In fact, in Nima Tshering Bhutia (supra), the Court, had observed, "10....if without using such expression "only" it was merely provided that Additional Sessions Judge shall try such cases and hear such appeals as the State Government may direct or as the Sessions Judge may make over to them for trial or hearing then it could have been argued that when a case or appeal is to be and can be tried or heard by a Court of Sessions, the trial or hearing thereof by an Addl. Sessions Judge even without such direction or making over, might not have amounted to any breach of any. mandatory p/o visions. But when the Legislature has expressly and affirmatively provided that Addl. Sessions Judges shall try or hear only such case or appeals as the State Government may direct or the Sessions Judge may make over the Legislature must be deemed to have provided impliedly and negatively that the Additional Sessions Judge shall not try or hear any other case or appeal. And if the provisions, therefore, have such an obligatory mandate and, therefore really go to create jurisdiction and regulate the competence of Addl. Sessions Judges to try cases or to hear appeals, a breach thereof would strike at the very root of jurisdiction."

27. From what had been observed in Nima Tshering Bhutia (supra), it becomes clear that had the expression "only" not been used in Section 193 of the old Code, trial of a case by an Additional or Assistant Sessions Judge would not have become ipso facto without jurisdiction. To put it a little differently, but for the word "only", which had occurred in Section 193(2) of the old Code, trial by an Additional Sessions Judge of a case, which had been directly committed to him by a Magistrate, would not have been without jurisdiction.

28. A microscopic reading of Sub-section (2) of Section 193, in the old code, made it more than abundantly clear that an Additional or Assistant Sessions Judge could have tried "only" such sessions triable cases, which were made over to him for trial by the Sessions Judge of the division or which were directed to be tried by him by the State Government. The use of the expression "only" in Sub-section (2) of Section 193 of the old Code was, thus, of paramount importance in determining the competence of an Additional or Assistant Sessions Judge to try a

case, which disclosed commission of an offence exclusively triable by a Court of Session. The dictionary meaning of the word "only" is "no other". The word "only" is used for the purpose of conveying exclusive nature of the power exercisable by a person or authority. That the use of the word "only", in a legislation, reflects exclusiveness is a judicially recognized fact. One may, in this regard, readily refer to Hari Ram and others Vs. Babu Gokul Prasad, , wherein Section 166 of Madhya Pradesh Land Revenue Code, 1954, came up for interpretation. Section 166 of the Code of Madhya Pradesh Land Revenue Code read, "166. Any person who holds land for agricultural purposes from a tenure holder and who is not an occupancy tenant u/s 169 or as protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, shall be ordinary tenant of such land.

Explanation section - For the purposes of this

(i) any person who pays lease money in respect of any land in the form of crop share shall be deemed to hold such land;

(ii) any person who cultivates land in partnership with the tenure holder shall not be deemed to hold such land;

(iii) any person to whom only the right to cut grass or to graze cattle or to grow Singhara (*Trapa bispinosa*) or to propagate or collect lac is granted in any land shall not be deemed to hold such land for agricultural purposes.

29. In Hari Ram (supra), Section 166 showed that any person, who holds land for agricultural purposes from a tenure holder and who is not an occupancy tenant u/s 169 or is not a protected lessee under the Berar Regulation of Agricultural Leases Act, 1951, shall be ordinary tenant of such a land. Answering the question as to whether a person, who has a mere right to cut grass or to graze cattle or to grow singhara (*Trapa bispinosa*) or to propagate or collect tax shall be deemed to hold such a land for agricultural purposes, the Apex Court observed, "The word "only" in Explanation (ii) is significant. It postulates that entire land should have been used for the purposes enumerated. If part of the land was used for cultivation, then the land could not be deemed to have been granted for cutting grass only. It has been found that out of 5 and odd acres of land, the land under cultivation was 2 acres. Therefore, the negative clause in Explanation (iii) did not apply and the appellant became ordinary tenant u/s 166."

30. The decision, in Hari Ram (supra), makes it clear that the use of the word "only" reflects exclusiveness and conveys negativity of the power meaning thereby that had a case not been made over for trial to an Additional or Assistant Sessions Judge by the Sessions Judge "of the division or had the State Government not directed a case to be tried by an Additional or Assistant Sessions Judge, such a Judge derived no jurisdiction to try such a case, under the old Code, as a Court of Session, for Sub-section (2) of Section 193 used the word "only".

31. Let me, now, turn to the case *Bhatia International Vs. Bulk Trading S.A. and Another*, wherein a three Judge Bench considered the effect of the omission of the word "only" used in the UNCITRAL Model Law. Article 1(2) of the UNCITRAL Model Law reads, The provisions of this law, except Articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State. As against what Section 1(2) aforementioned reads, Sub-section (2) of Section 2 of the Arbitration and Conciliation Act, 1996 states, "This part shall apply where the place of arbitration is in India."

32. From a bare reading of Section 1(2) of the UNCITRAL vis-a-vis Section 2(2) of the Arbitration and Conciliation Act, 1996, it becomes transparent that in Sub-section (2) of the Arbitration and Conciliation Act, 1996, the word "only" stands omitted. It was contended in *Bhatia International* (supra) that India had purposely not adopted Article 1 (2), as a whole, of Article 1(2) of UNCITRAL Model Law and, hence, Section 9 would not apply to arbitral proceedings, which took place outside India. Reacting to the submissions so made, the Apex Court observed and held, "Thus Article 1(2) of the UNCITRAL Model Law uses the word "only" to emphasize that the provisions of that law are to apply if the place of Arbitration is in the territory of that State. Significantly, in Section 2(2) the word "only" has been omitted. The omission of this word changes the whole complexion of the sentence. The omission of the word "only" in Section 2(2) indicates that this sub-section is only an inclusive and clarificatory provision. As stated above, it is not providing that provisions of Part I do not apply to arbitrations which take place outside India. Thus there was no necessity of separately providing that Section 9 would apply."

33. The observations made above, in *Bhatia International* (supra), clearly show that the omission of the word "only" in subsection (2) of Section 2, was treated by the Apex Court to have changed the whole complexion of the sentence. The Apex Court accordingly point out, in *Bhatia International* (supra), that with the omission of the word "only", the provisions of Sub-section (2) of Section 2 had become inclusive and clarificatory and had not, therefore, retained its exclusive characteristic. It is, thus, clear that while enacting Section 194 of the new Code, since the word "only", which appeared in Sub-section (2) of Section 193 of the old Code, has been omitted by the legislature, the effect is that though, ordinarily, an Additional or Assistant Sessions Judge shall not try a case, which discloses commission of an offence exclusively triable by a Court of Session, if the case has not been made over to him for trial by general or special order of the Sessions Judge of the sessions division or unless the High Court directs such a Additional or Assistant Sessions Judge to try the case, yet a trial by an Additional or Assistant Sessions Judge, in contravention of the provisions of Section 194 and/or on the basis of case having been committed to him by a Magistrate u/s 209, would not be without jurisdiction, void and ab initio would not necessarily render the findings reached, on such a trial, completely illegal or void.

34. It is also extremely important to note that the 5th Law Commission, while making its recommendations, which brought changes in the language of Section 193(2) of the old Code had not suggested any change in the language of Section 193(2), which has been made Section 194 in the new Code. The Legislature, however, deliberately dropped the use of the word "only", while enacting Section 193(2) of the old code as Section 194 of the new Code. The omission of the word "only" in Section 194 cannot, therefore, be said to be insignificant or immaterial. The conclusion, therefore, which is inescapable is that ordinarily, an Additional or Assistant Sessions Judge shall not take cognizance of a case, which discloses commission of an offence, which is exclusively triable by a Court of Session unless such a case has been made over to him by the Sessions Judge or by the High Court, as indicated hereinbefore, for trial. However, as a corollary thereto, it cannot be held that the trial of an accused in a case, which has not been made over, for trial, to an Additional or Assistant Sessions Judge by an order of the Sessions Judge of the division or by the High Court, would be wholly without jurisdiction and non est in law. It further follows that the expression "Court of Session", occurring in Sections 209 and 193, includes not only a Sessions Judge, but also an Additional or Assistant Sessions Judge.

35. The impression that the omission of the word "only", while converting Sub-section (2) of Section 193 of the old Code into Section 194 of the new Code, was not an accidental omission, but a deliberate act of codification becomes transparent if one takes into account the provisions of the Code, both old as well as new, which relate to hearing of appeals. For this purpose, Section 409 of the old Code and Section 381 of the new Code are reproduced hereinbelow.

409. Appeals to Courts of Session how heard.- (2) Subject to the provisions of this section, an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge or an Assistant Sessions Judge:

Provided that no such appeal shall be heard by an Assistant Sessions Judge unless the appeal is of a person convicted on a trial held by any Magistrate of second or third class.

(2) An Additional Sessions Judge or an Assistant Sessions Judge shall hear only such appeals as the State Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

"381. Appeal to Court of Session how heard.

(1) Subject to the provisions of Sub-section (2), an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided that an appeal against a conviction on a trial held by a Magistrate of the second-class may be heard and disposed of by an Assistant Sessions Judge or a Chief Judicial Magistrate.

(2) An Additional Sessions Judge, or Assistant Sessions Judge or a Chief Judicial Magistrate shall hear only such appeals as the Sessions Judge of the division may, by general or special order, make over to him or as the High Court may, by special order, direct him to hear.

36. When Section 381(2) of the new Code is read in the light of Section 409(2) of the old Code, it becomes clear that the legislature has, while enacting Section 381(2), retained the word "only", which occurred in Section 409(2). Obviously, therefore, an Additional Sessions Judge or Assistant Sessions Judge or a Chief Judicial Magistrate can hear "only" such appeals as the Sessions Judge of the sessions division may, by general or special order, makes over to him for hearing or as the High Court may, by special order, direct him to hear. The language, used in Section 381, makes the legislative intent clear and the legislative intent is that the hearing of an appeal by an Additional Sessions Judge or Additional or an Assistant Sessions Judge or a Chief Judicial Magistrate is wholly without jurisdiction and would be nullity unless the appeal has been made over to him for hearing by the Sessions Judge or unless the High Court directs him to hear. Thus, while the legislature has retained, in Section 381(2), the word "only" (which occurred in Section 409 of the old code) in respect of the exercise of appellate jurisdiction of the Additional Sessions Judge or Assistant Sessions Judge, the legislature has done away with the word "only, which had occurred in Section 193(2) of the old Code, while making provisions for trial of Sessions cases u/s 194 of the new Code. This glaringly noticeable change makes it transparent that an appeal cannot be heard by anyone other than a Sessions Judge to whom the appeal has to be preferred unless the Sessions Judge, by general or special order, makes over the appeal preferred to him, as Sessions Judge, to an Additional or Assistant Sessions Judge or a Chief Judicial Magistrate, as the case may be, for hearing or unless the High Court directs any of them to hear the appeal, but in a sessions triable case, it is, now, possible for an Additional or Assistant Sessions Judge to try such a case if it has been directly committed to him by a Magistrate for trial. Thus, the Additional or Assistant Sessions Judge does not suffer from complete lack of jurisdiction to try a case, which has been directly committed to him by a Magistrate.

37. Had the legislature intended that the Additional or Assistant Sessions Judge shall have no jurisdiction to try a case unless it has been made over to him by a Sessions Judge to whom the case has been committed or unless the High Court has directed such an Additional or Assistant Sessions Judge to try, the legislature would have retained the word "only" even in Section 194, which has replaced Section 193(2) of the old Code, as the legislature has done, while enacting Section 381 of the new Code out of Section 409 of the old Code.

38. The conclusions reached above are fortified if one carefully reads the recommendations of the 5th Law Commission; contained in its 41st Report, in this regard and subsequent enactment of Section 194 visa-vis Section 193(2) of the old Code and Section 381 vis-a-vis Section 409 of the old Code, which run

thus : "15.85. Sub-section(2) of Section 193 provides that Additional Sessions Judge and Assistant Sessions Judge shall try such cases only as the State Government may direct them to try or as the Sessions Judge of the division may make over to them for trial. It appears unnecessary to bring the State Government into what is, mainly, a matter of distribution of work among the Courts in district, a matter of day-to-day control of the work of the Court which as pointed out by the Supreme Court, must rest with the High Court. In Bombay, the power of the State Government to issue directions under this provision is exercisable only in consultation with the High Court. Even this restricted power need not be retained with the State Government. As it is, the distribution of cases is mainly attended to by the Sessions Judges and they should continue to do so under the overall control of the High Court. We recommend that the sub-section may be amended to read, "(2). An Additional Sessions Judge or Assistant Sessions Judge shall try such cases only as the Sessions Judge of the division, by general or special order, may make over to him for trial or as the High Court, by special order may direct him to try."

39. From what has been observed by the Law Commission, it becomes clear that the system of making over the case for trial to an Additional or Assistant Sessions Judge by order of the Sessions Judge is a day-to-day affair and aims at providing control of the work of the Courts. It does not, as such, relate to jurisdiction of the Court, rather the system or the scheme, which the Code so contemplates, concerns discipline under the overall supervision and control of the High Court. Though the Law Commission did not suggest any change in the language of Section 193(2), which has, now, been made Section 194, nor it did suggest any change in the language of Section 409(2), which has been made Section 381(2), what is, however, curious to note is that while the legislature retained the word "only" in respect of hearing of appeal u/s 381(2), it has dispensed with the use of the word "only" in the case of Section 194 meaning thereby that while an appeal cannot be heard by an Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate unless the same has been made over to him for hearing by the Sessions Judge or has been directed to be heard by him by the High Court, a sessions triable case can be tried by an Additional or Assistant Sessions Judge on being directly committed to any of them by a Magistrate. If such trial is in terms of the order of the Sessions Judge or the High Court u/s 194, there is absolutely no irregularity; if, however, a case is committed to an Additional or Assistant Sessions Judge without any order having been passed, in this regard, by the Sessions Judge or the High Court, then, such committal is an irregularity. Such an irregularity will not be interfered with, in appeal or revision, unless such error or irregularity has occasioned failure of justice and unless objection to such irregularity has been taken at the earliest opportunity, for, Section 465 of the new Code reads as under:

465. Finding or sentence when reversible by reason of error, omission or irregularity.

(1) Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or Other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.

40. From a careful reading of Section 465, it becomes clear that unless an objection to an irregularity is taken at an earlier stage of the proceeding and unless, in the opinion of the Court, failure of justice has, in fact, been occasioned by such irregularity or error, such irregularity would not be interfered with in revision.

41. What emerges from the above discussion is that though, ordinarily, a case cannot be tried by an Additional or Assistant Sessions Judge unless the same has been made over to him by the Sessions Judge or has been directed to be tried by him by the High Court, the trial of an accused, if held, by an Additional Sessions Judge or a Assistant Sessions Judge, for an offence, which such a Judge has the power to try, would not stand completely vitiated; rather, such a trial would be an irregularity or an error and it may attract, in a given case, Section 465.

42. The impression that a "Court of Session", ordinarily, includes not only Sessions Judge, but also Additional or Assistant Sessions Judges is strengthened from the fact that Section 376(b) of the new Code lays down that where a Court of Session passes only a sentence of imprisonment for a term not exceeding three months or of fine not exceeding rupees two hundred or of both, there shall be no appeal by a convicted person against such sentence of imprisonment or fine. The expression "Court of Session", which occurs in Section 376(b), thus, includes not only a Sessions Judge, but also an Additional or Assistant Sessions Judge. This, however, does not mean, I must has ten to add, that a Sessions Judge stands on the same footing as does an Additional or Assistant Sessions Judge. In fact, Section 10 specifically makes an Assistant Sessions Judge subordinate to the Sessions Judge for such sessions division. Though there is no provision making the Additional Sessions Judge subordinate to Sessions Judge, Section 408 of the new Code empowers the Sessions Judge to transfer any case from any criminal Court, in his sessions division, to another criminal Court. Similarly, Section 409 of the new Code empowers the sessions Judge to withdraw any case or appeal from, or recall any case or appeal, which he has made over to, Additional or Assistant Sessions Judge or Chief Judicial Magistrate subordinate

to him. The only limitation on this power of withdrawal is that a Session Judge's power to withdraw any case or appeal from Court of the Additional Sessions Judge is possible only when the trial of the case or hearing of the appeal has not commenced.

43. What emerges from the above discussion is that while the Court of Session would necessarily include an Additional or Assistant Sessions Judge, the expression "Sessions Judge", under the scheme of the new Code, may not include Additional or Assistant Judge. This becomes all the more clear if one takes into account the provisions of Section 397, which empowers the High Court and Sessions Judge to exercise revisional jurisdiction. This Section (Section 397) reads as follows:

397. Calling for records to exercise powers of revision.- (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation : All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub section and of Section 398.

(2) The powers of revision conferred by Sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.

44. In the light of the language used in Section 397, it is clear that had the scheme of the Code not made any provision for exercise of revisional jurisdiction by an Additional Sessions Judge, revisional power would have been exercisable u/s 397 by only the High Court and Sessions Judge and not by Additional or Assistant Sessions Judge. The question, therefore, is as to how does an Additional Sessions Judge exercise revisional jurisdiction? The answer is found contained in Section 400 of the new Code, which reads as under:

400. Power of Additional Sessions Judge.

An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

45. From a minute reading of Section 400, it becomes clear that unless a Sessions Judge transfers a revision petition, by general or special order, to an Additional Sessions Judge, an Additional Sessions Judge derives no jurisdiction to exercise such a power, for, Section 397 does not use the expression "Court of Session", but Sessions Judge. Similarly, in Section 381(2), the Code does not use the expression "Court of Session", but Sessions Judge. The same is the case u/s 194 too.

46. As against what have been indicated above, Sections 438 and 439 of the new Code speak of Court of Session. If the expression "Court of Session", occurring in Sections 436 and 439, be not read to include an Additional or Assistant Sessions Judge, it would not be possible for an Additional or Assistant Sessions Judge to exercise jurisdiction under Sections 438 and 439. The scheme of the Code, however, shows that ordinarily, it is only the High Court and the Sessions Judge, who can exercise powers under Sections 438 and 439. An Additional or Assistant Judge can exercise power under Sections 438 and 439 only when an order is made, in this regard, by a Sessions Judge u/s 10(3) of the Code. Section 10(3) reads, "10. Subordination of Assistant Sessions Judges....(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application."

47. From a careful reading of Section 10(3), it becomes clear that ordinarily, it is the Sessions Judge, who has to hear applications" under Sections 438 and 439 and that it is only in the event of his absence or his inability to act that an Additional or Assistant Sessions Judge may exercise jurisdiction u/s 438 and/or 439, the authority to exercise jurisdiction u/s 438 and 439 can be given to an Additional or even Assistant Sessions Judge not necessarily when the Sessions Judge is absent, but also when he is unable to attend to such application for some other reason. The inability to act, as envisaged in Section 10(3), may be due to pressure of work or for a variety of other reasons; but unless there is a specific order u/s 10(3), it is not possible for even an Additional Sessions Judge to directly take up an application for anticipatory bail under Sections 438 and 439 of the new Code.

48. What crystallizes from the above discussion is that the expression "Court of Session", which occurs in the new Code, is contextual in nature. While, ordinarily, the expression "Court of Session" would include not only the Sessions Judge, but also Additional or Assistant Judge, the expression Sessions Judge, unless the context, otherwise, requires, cannot be treated to include an Additional or Assistant Sessions Judge. While the Sessions Judge presides over the sessions-division, an Additional or Assistant Sessions Judge merely exercises jurisdiction in a Court of Session. The overall control of administration, in a given sessions division, rests in the Sessions Judge. Wherever the Code intended that

the power can be exercised only by a Sessions Judge, the Code has used the expression Sessions Judge and not "Court of Session".

49. What further emerges from the discussion held above, as a whole, that while an appeal cannot be heard by an Additional Sessions Judge, Assistant Sessions Judge or a Chief Judicial Magistrate unless the same has been made" over to him for hearing by the Sessions Judge or has been directed to be heard by him by the High Court, a sessions triable case can be tried by an Additional or Assistant Sessions Judge on being directly committed to any of them by a Magistrate. If such trial is in terms of the order of the Sessions Judge or the High Court u/s 194, there is absolutely no irregularity; if, however, a case is committed to an Additional or Assistant Sessions Judge without any order having been passed, in this regard, by the Sessions Judge or the High Court, then, such committal is an irregularity. Such an irregularity will not be interfered with, in appeal or revision, unless such error or irregularity has occasioned failure of justice. What further becomes clear from a critical analysis of the scheme of the new Code is that a Magistrate shall not, on his own, commit any sessions triable case to an Additional or Assistant Sessions Judge. If a sessions triable case is committed by a Magistrate, on his own, to an Additional or Assistant Sessions Judge, then, such an error must be objected to at the earliest possible opportunity or else, the error may not be made a ground for interference with a finding of guilt or otherwise reached, on the basis of a trial so held, if no failure of justice is shown to have been occasioned by such an error.

50. Bearing in mind the position of law as discussed above, when I turn to the case at hand, what attracts the eyes, most prominently, is that on receiving summons issued by the learned Court below, the accused-petitioner appeared in the case and when the matter came up for consideration of charge, it was pointed out, on behalf of the accused-petitioner, that the case had been committed directly by the learned Magistrate and since the case had not been made over for trial, in terms of the provisions of Section 194, the learned Additional Sessions Judge had no jurisdiction to hold the trial. This objection has been overruled by the learned Court below on the basis of two notifications. I have closely examined the two notifications aforementioned, but I do not find that any of these notifications permits committal of sessions triable cases to the learned Court below directly by a Magistrate. Though trial, if held, in such a case, may not suffer from complete lack of jurisdiction, the fact remains that since the objection has been raised at the very initial stage and the irregularity pointed out is a serious one, this Court is firmly of the view that appropriate order needs to be passed, in the present case, so as to stop committal of such cases by Magistrates directly to a Fast Track Court.

51. Considering the matter in its entirety and in the interest of justice, the revision is allowed. The impugned order is hereby set aside. The orders, if any, passed subsequent to the impugned order, shall also accordingly stand set aside and the case is remanded to the learned Judicial Magistrate, 1st Class, Shillong,

with direction to pass necessary order(s), in accordance with law and in the light of the discussions held above, committing the case to the Court of Sessions, Shillong, and, on passing of such a committal order, the case may be made over by the Sessions Judge, Shillong, to such a Court of Sessions, at Shillong, as the learned Sessions Judge, Shillong, may deem fit. The learned Sessions Judge, may, however, retain the case, in his Court, for trial and, then, dispose of the same in accordance with law.

52. With the above observations and directions, this revision shall stand disposed of.