

**Usha Devi Vs. the State of Bihar and ors.**

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**Court :** Patna

**Decided On :** Feb-26-2008

**Judge :** S.P. Singh, J.

**Acts :** Dowry Prohibition Act - Sections 3 and 4; Indian Penal Code (IPC) - Sections 498A; Code of Criminal Procedure (CrPC) - Sections 156(3), 408, 408(1), 409, 409(1) and 409(2)

**Appeal No. :** Cr. Misc. No. 57212 of 2007

**Appellant :** Usha Devi

**Respondent :** The State of Bihar and ors.

**Disposition :** Application dismissed

**Judgement :**

**S.P. Singh, J.**

1. Heard the petitioner, the state and the informant.

Petitioner is aggrieved by the order dated 28.11.2007, passed in Criminal Misc (Transfer) by which an application to recall criminal appeal No. 16 of 2001 was rejected by the learned Sessions judge, Buxar observing that as the hearing of appeal has already begun, he has got no jurisdiction under Section 409(2) of the Code of Criminal Procedure (in short 'the Code') to recall the aforesaid appeal

from the court of learned Addl. Sessions judge, Buxar which being not maintainable, was dismissed.

2. The fact of the case in short is that the complainant/petitioner Usha Devi filed a complaint under Section 498A of the penal code and 3/4 of the Dowry Prohibition Act which was sent to the concerned police station for institution of case under Section 156(3) of the Code. In course of trial accused parties were convicted by the trial court under Section 498A of the penal code and 3/4 of the Dowry Prohibition Act. Opp. parties went in appeal before the learned Sessions judge, Buxar which was instituted as Cr appeal No. 16 of 2001 and file was made over to the court of 1st Addl Sessions judge, Buxar for disposal. After start of hearing petitioner filed an application dated 1.10.2007 numbering Cr. Misc (T) application No. 59 of 2007 for transfer of the case from the court of 1st Addl sessions judge to another competent court in the interest of justice.

3. Transfer was sought also on the ground that the appellate court of Addl Sessions judge, Buxar seemed to be biased as he raised certain points in favour of appellant/opp party which were not mentioned in the memo of appeal. Furthermore, the latter asked the counsel for the accused parties to come in the chambers with law books. It has also been alleged that opp parties were claiming that they have settled the matter with the appellate court.

4. Learned Counsel for the petitioner submits that the learned Sessions judge committed an error of law in observing that he has no jurisdiction to transfer the case under Section 409(2) of the Code once the hearing of appeal has begun as the Sessions judge has ample power to transfer case on appeal from one criminal court to another criminal court in his Sessions division Under Section 408(1) of the Code. He submitted that it is true that under Section 409(2) of the Code learned Sessions judge has no administrative power to transfer a case from the court of one Addl Sessions judge to another Addl sessions judge once the trial has commenced or hearing in appeal begins. He submits that, however, on judicial side this power is not fettered and under Section 408(1) of the Code learned Sessions judge has ample power to transfer such case mentioned aforesaid from one criminal court to another criminal court in his Session division. In this respect,

learned Counsel for the petitioner relied upon two decisions of the Allahabad High Court reported in 1997 (4) Crimes 381 (Md Shami Khan and Anr. v. Naresh Dixit and Ors.) and 1984 All LJ 666 Full Bench (Radhey Shyam and Anr. v. State of UP).

5. Learned Counsel appearing for opp. party submitted that the power of learned Sessions judge to transfer a case from one criminal court to another criminal court in his Sessions division under Section 408(1) of the code is subject to the limitation contained in Section 409(2) of the Code which restricts the power of a Sessions Judge from transferring a case or appeal under the aforesaid provision in which trial and hearing have commenced respectively.

6. Opp parties relied upon two decisions of this court reported in 2002(3) PLJR 642 (Raj Kali Devi v. The state of Bihar and Ors.) and 2008(1) PLJR 490 (Mukesh Kumar Mahto v. State of Bihar and Ors.).

7. Before I take up the issue, it would be useful to quote Sections 408 (1) & (2) and Sections 409(1) & (2) of the Code.

Section 408. Power of Sessions Judge to transfer cases and appeals.-

(1) Whenever, it is made to appear to a Sessions judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal court to another Criminal court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower court, or on the application of a party interested or on his own initiative.

Section 409. Withdrawal of cases and appeals by Sessions judges.-

(1) A Sessions judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, as Sessions Judge may recall

any case or appeal which he has made over to any Additional Sessions Judge.

8. This court notices that there are conflicting decisions on the issue whether the power of Sessions Judge to transfer a case or appeal under Section 408(1) of Code is subject to the limitation prescribed under Section 409(2) of the Code. Interpreting Section 409(2) of the Code some courts have observed that the restriction on power of the Sessions judge to transfer a case from one Addl Sessions Judge to another, once trial has begun or hearing of appeal has begun is in respect of his administrative and routine power. This restriction does not extend to power on judicial side to transfer a case from Addl Sessions judge once trial or hearing of appeal has commenced.

9. I find that a Full Bench of the Allahabad High Court has held in the case of Radhey Shyam and Anr. v. The State of Utter Pradesh, reported in 1984 All LJ 666 that the Sessions judge is empowered under Section 408 of the Code to transfer a part-heard case or appeal from a court of an Additional Sessions Judge to another competent court within his Sessions division if it is expedient in the interest of justice and the limitations imposed under Section 409(2) are not applicable in exercise of the power of transfer conferred under Section 408. The same view has been expressed by the Delhi High Court in the case of Avinash Chandra v. The State, reported in 1983 Cri LJ 595.

10. However, contrary views have been taken by many High Court including our own High Courts that a Sessions judge has no power to transfer a case from an Addl sessions judge to another once trial has commenced or hearing of appeal has begun. Some of the decisions in this line are as follows:

1. Raj Kali Devi v. The State of Bihar and Ors. reported in 2002 (3) PLJR 642
2. Mukesh Kumar Mahto v. The State of Bihar and Ors. reported in 2008 (1) PLJR 490.
3. Deepchand and Ors. v. State of MP, reported in 1998 Cr.L.J., 3521.
4. P. Sridhan v. State of Karnataka, reported in 1997 Cr.L.J. 1401

5. In Re Smt Tarn Lata Kala, reported in 1977 Cr.L.J.R 1401.

11. The issue:- whether a sessions judge has power under Section 408 of the Code to transfer a part heard cases in which trial has commenced or hearing in appeal has begun from one Addl. Sessions judge to another in same sessions division is subject to limitation under Section 409(2) of the Code on Judicial side has cropped up for adjudication time and again. As there are conflicting decisions on this point, I find it expedient to refer the same to the Division Bench of this Court for authoritative pronouncement.

12. Though I have referred the issue to Division Bench for adjudication on the point of law, I am taking up the issue on merit on facts so that the hearing of appeal may not get delayed. I find that the allegation made by the petitioner against the appellate court is not supported by any cogent material or any worthwhile proof, as such, application is devoid of any merit and same is dismissed on this score alone.

Notwithstanding the reference of issue on law, the appellate court will proceed with the appeal expeditiously and dispose of the matter at the earliest.

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