

Deepchand and ors. Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : Feb-19-1998

Reported in : 1998CriLJ3521

Judge : N.K. Jain, J.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 9, 406, 407, 407(2), 408, 409 and 409(2); Indian Penal Code (IPC) - Sections 306 and 498A

Appeal No. : Cr. Rev. No. 423 of 1996

Appellant : Deepchand and ors.

Respondent : State of M.P.

Advocate for Def. : A.J. Bhojwani, Adv.

Advocate for Pet/Ap. : H.S. Soni, Adv.

Disposition : Revision allowed

Judgement :

ORDER

N.K. Jain, J.

1. The applicants are aggrieved by the order dated 10-10-19 passed by the Sessions Judge, Dhar in Cr. Misc. Case No. 200/96 transferring Sessions Trial No.

394/95 from 1st Additional Sessions Judge, Dhar to the Special Judge, Dhar.

2. The accused applicants are facing trial in the Sessions Court, Dhar on the charges under Section 306 and 498A of IPC. The case was registered at S.T. No. 394/95 and made over for trial to the 1st Addl. Sessions Judge. However, at the far end of the trial, when 9 prosecution witnesses were already examined, one Suresh Chandra, the father of the deceased on whose report the First Information Report in the case was registered, moved Transfer Application under Section 408, Cr. P.C. before the Sessions Judge. Some personal allegations were made against the 1st Addl. Sessions Judge (Smt. Jaishree Verma, who now stands transferred to some other Sessions Division). The learned Sessions Judge by his order impugned, although held that the allegations made against the Presiding Officer were unfounded, but allowed the transfer application in following terms :

It is well settled principle that 'justice should not only be done, but it should be appeared to have done'. In the light of the above principle, when the applicant is apprehending that he will not get justice from the Court of 1st Addl. Sessions Judge, Dhar, it is necessary that his apprehension should be removed. Therefore, in the interest of Justice, the application filed by the applicant, who is also an aggrieved person, is allowed and the Sessions Trial No. 394/95 (State Police, Dhar v. Deepchand son of Laxminarayan) is withdrawn from the Court of 1st Addl. Sessions Judge, Dhar and transferred to the Court of Special Judge & Addl. Sessions Judge, Dhar for disposal according to law. Both the Courts be informed accordingly.

3. I have heard Shri Bhojwani, learned Counsel for applicants and Shri G. Desai, Government Advocate for State.

4. The order is impugned on the grounds that it is passed in contravention of the express bar contained under Sub-section (2) of Section 409, Cr. P.C. that, it is violative of the principles of natural justice as accused applicants were not given any opportunity of hearing before passing of the order and, that, no ground for transfer was made out.

5. Chapter XXXI of the Criminal Procedure Code deals with the transfer of criminal cases. While Sections 406 and 407 confer power on the Supreme Court and the High Court respectively to transfer cases, the power of the Sessions Judge to transfer or recall cases are set out under Sections 408 and 409 of the Code. These two provisions thus read as follows :

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.

(3)....

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

(3)....

6. Both these Sections are different in their scope. While Section 408 relates to transfer of a case from one Criminal Court to another Criminal Court within the same Sessions Division, Section 409 empowers the Session Judge subject to the limitation contained in Sub-section (2), to withdraw any case or appeal which he had made over to any Addl. Sessions Judge, Asstt. Sessions Judge or Chief Judicial Magistrate and either to try hear the case appeal himself or make it over to another Court for trial hearing. These two provisions are clearly intended to deal

with two different situations. Section 409 obviously deals with a case or an appeal which though originally instituted in the Court of Session, has been made over by the Sessions Judge to an Addl. Sessions Judge or Asstt. Sessions Judge or Chief Judl. Magistrate and which in the opinion of the Sessions Judge is, for any reason administrative or judicial, required to be tried or heard either by himself or by some other Court. Transfer of all other cases from one criminal Court to another criminal Court in the same Sessions Division are to be regulated by Section 408. It needs to be clarified here that a Chief Judl. Magistrate has no power under the Code to try a case cognizable exclusively by the Sessions Court. He can hear only some appeals made over to him, by the Sessions Judge. Section 409, therefore, applies to him with respect to such appeals only. The Additional Session Judge or Asstt. Sessions Judge does not constitute a separate Court but as provided by Section 9 of the Code, they exercise jurisdiction in the Sessions Court itself which is presided over by a Sessions Judge. They can only try such cases and hear such appeals as may be made over to them by general or a special order, by the Sessions Judge. So transfer of any such case or appeal from their file by the Sessions Judge can be made only under Section 409. Sub-section (2) of Section 409 deals with the withdrawal of cases from an Additional Session Judge and places a restriction that any such withdrawal can be made only before the trial of the case or hearing of appeal has commenced. Under the scheme of things, Section 408 has no application when transfer of a case is required to be made by the Sessions Judge from one Additional or Asstt. Session Judge to another Additional or Assistant Sessions Judge in the same Sessions Division.

7. In *State of M.P. v. Raja* (1994) II MPWN 18 this Court while considering a transfer application made directly to this Court under Section 407, Cr. P.C, touched the point projected in this revision and observed;

It seems that the Sessions Judge stood divested of the jurisdiction in view of Section 409, P.C. as the trial had commenced. It is pointed out that the proviso as reproduced hereunder, of Section 407(2) of Cr. P.C. provided no fetters in view of the position envisaged by Section 409, Cr. P.C.

8. In the aforesaid case, this Court was clearly of the view that in the matter of transfer of case from, one Additional Sessions Judge to another Addl. Sessions Judge in the same Sessions Division, the Sessions Judge has to resort to Section 409(2) and not to Section 408 and if such an application is barred in view of the clog contained under Sub-section (2), then the party may approach to High Court directly and in such a situation the proviso to Sub-section (2) of Section 407 would not be attracted.

9. Similar view is taken by the High Courts of Calcutta and Karnataka reported in 1988 (III) Crimes 408 : (1989 Cri LJ 563); and 1982 Cr LJ 1336.

10. I thus hold that the Sessions Judge in the present case stood divested of the jurisdiction in view of the bar contained under Section 409(2), Cr. P.C. as the trial of the case has commenced. The order impugned is, therefore, without jurisdiction.

11. This revision must succeed on yet another ground of not giving opportunity of hearing to the accused persons before passing the order impugned. Further the Sessions Court having held that the allegations made against the Presiding Officer were not correct, should not have transferred the case. (See Nirmal Singh 1996 (III) Crimes 176 : (1996 Cri LJ 3998)) (SC). It may also be noted here that the Judge before whom the trial was pending stands transferred to some other Sessions Division. That being so, the grievance of the complainant no more survives and the case can very well be tried by the successor Judge of that Court.

12. In the result, the revision succeeds and is allowed. The order impugned is set aside. The case shall now go back to the Court of 1st Additional Sessions Judge, Dhar for proceeding with the trial in accordance with law.