

Attar Singh Narayan Singh Vs. State of Madhya Pradesh and anr.

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Court : Madhya Pradesh

Decided On : Feb-09-1996

Reported in : 1997(1)MPLJ298

Judge : T.S. Doabia, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 326; [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 350

Appeal No. : Cri. Revision No. 30 of 1993

Appellant : Attar Singh Narayan Singh

Respondent : State of Madhya Pradesh and anr.

Advocate for Def. : K.B. Chaturvedi, Govt. Adv.

Advocate for Pet/Ap. : R.K. Sharma, Adv.

Judgement :

ORDER

T.S. Doabia, J.

1. The trial magistrate formed an opinion that he can decide the case only when evidence is recorded by him. He accordingly passed an order for de novo trial. It is this order which is being impugned in the present petition. The petitioner submits

that he is facing a protracted trial. A case under, sections 3 and 7 of the Essential Commodities Act, 1955, was registered against him. This happened on 10th of December, 1987. The evidence in this case was recorded by the Special Judge. Upto 15th of March, 1990 about 19 witnesses were examined. It is stated that the last witness was examined on 23rd of February, 1991. Later on, the matter came to be transferred to the Court which passed the order on 12th of February, 1992. It has come to the conclusion that the entire evidence shall have to be recorded de novo. For this, reliance has been placed on a decision given by the Supreme Court of India in the case reported as Pyare Lal v. State of Punjab, AIR 1962 SC 690. The above decision has been held to be an authority for the proposition that when a case is tried by special judge and is later on transferred to another Court, then the entire evidence has to be recorded de novo. This decision was given under the Code of Criminal Procedure, 1898. The present trial is governed by section 326 of the Code of Criminal Procedure, 1973.

2. I am of the view that the decision relied on by the trial Court would not be attracted to the facts of this case. Before giving reasons for this, it would be apt to notice the provisions of section 350 of the Code of 1898 which were considered by their Lordships of the Supreme Court in Pyare Lal (supra) and also the provisions of section 326 of the Code of 1973. These be noticed as under :

Section 350 of the Code of 1898 Section 326 of the Code of 1973

Whenever any Magistrate, after having 326. Conviction or committment on
heard and recorded the whole or any part evidence partly recorded by one
magistrate
of the evidence in an inquiry or a trial, and partly by another. - (1) Whenever
ceases to exercise jurisdiction therein, and any Judge or Magistrate after having
is succeeded by another Magistrate who heard and recorded the whole or any
has and who exercises such jurisdiction, part of the evidence in an inquiry or a
the Magistrate so succeeding may act on trial, ceases to exercise jurisdiction

the evidence so recorded by his therein and is succeeded by another predecessor, or partly recorded by himself Judge or Magistrate who has and who or he may resummon the witnesses and exercises such jurisdiction, the Judge or recommence the inquiry or trial. Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself :

Provided that if the succeeding Judge or Magistrate is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interests of justice, he may re-summon any such witness, and after such further examination, cross-examination and re-examination, if any, as he may permit, the witness shall be discharged.

(2) When a case is transferred under the provisions of this Code from one Judge to another Judge or from one Magistrate

to another Magistrate, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter, within the meaning of sub-section (1).

(3) Nothing in this section applies to summary trials or to cases in which proceedings have been stayed under section 322 or in which proceedings have been submitted to a superior magistrate under section 325.

3. It would also be apt to note that section 326 of the code of 1973, as it was originally brought on the statute book used the word 'Magistrate'. Later on, by Act No. 45 of 1978 the word 'Magistrate' was substituted by the words 'Judge or Magistrate'. The statement of objects and the reasons which led to the original enactment of 326 and the later amendment of 1978 be noticed. These read as under :

'OBJECTS AND REASONS

(i) The Law Commission in its 41st Report observed :-

'24.77. Section 350 deals with 'part heard cases' when one Magistrate who has partly heard the case is succeeded by another Magistrate, either because the first Magistrate is transferred and is succeeded by another, or because the case is transferred from one Magistrate. The rule mentioned in section 350 is that second Magistrate need not re-hear the whole case, he can start from the place the first

Magistrate left it, unless of course he is of opinion that 'further examination of the any of the witnesses, whose evidence has already been recorded is necessary in the interest of justice.' The decision for a rehearing thus rests with the Magistrate, and this arrangement is, we think, satisfactory.

The section is confined to cases in the Magistrate's Courts, and is inapplicable to the Courts of Session. We have considered the advisability of extending the rule to Sessions cases, as we understand that sometimes Sessions Judges are transferred, leaving behind part-heard cases which have to be heard all over again. It would be an ideal position if such transfers did not take place, as Sessions Cases are to be heard from day to day and to be decided within a few days. It is obviously desirable that in serious cases the whole evidence should be heard by the Judge who finally decides the case. However, having regard to the realities of the situation, it is necessary to make some provision for cases where such transfers do take place, because a mandatory provision for a de nova trial may often cause considerable inconvenience and hardship. We, therefore, propose to extend the section to Judges of Sessions Courts by referring to 'Judge or Magistrate' instead of 'Magistrate' only.' (Last recommendation has not been accepted).

(ii) 'Clause 326. - The Committee feels that the provision which enables a succeeding judicial officer to proceed on the basis of evidence recorded by his predecessor should be applicable only to Courts of Magistrates and not to Judges of a Court of Session. It is one of the important principles of Criminal Law that the person who hears the entire evidence must give judgment. The departure from this principle should not be permitted in the case of Sessions Judges who usually try more serious offences.' - J. O. R.

(iii) Clause 28. - Under the existing provision a de novo trial is not obligatory when there is a charge of Magistrate. It is proposed to extend the scope of the section to the Court of Session also to expedite trial of cases therein. - S.O.R. Gaz. of Ind., 15-5-1978, Pt.II, Section 2, Extra., Page 670.

(iv) 'Clause 333 (Section 326 as amended in 1978) enables part-heard cases in Courts of Session being heard and disposed of by the successors in office; at

present this facility is available under section 350 only in respect of Courts of Magistrate. Summary trials are being excluded from this provision. - S.O.R. Gaz. of Ind. 10-12-1970, Pt.II, Section 2, Extra., P.1309 (1324).'

Thus, the purpose of enacting section 326 in its present form is to enable Part-heard cases in a criminal court to be heard and disposed of by the successor Court. The word 'magistrate' has been substituted by the words 'Judge or Magistrate'. This cannot be ignored. Therefore, on account of the change made in the statutory provision, what was said by the Supreme Court in Pyare Lal (supra) would not apply to the instant case. In the above Supreme Court case, the right of an accused to get his case tried from the very Judge who had recorded the evidence was noticed in para 11. This para be noticed. It reads as under :

'It is true that section 350 of the Code is not a provision applying to all magistrates and, therefore, also to a magistrate trying a warrant case. That however does not in our opinion decide the question. We think it relevant to observe that it is a right of an accused person that his case should be decided by a judge who has heard the whole of it and we agree with the view expressed in Fernandez's case, 1958-2 Mad.LJ. 294, AIR 1958 Mad. 571 (FB) that very clear words would be necessary to take away such an important and well established right. We find no such clear case here.'

It was this principle of law which was found to be embodied in section 350 of the old Code as the trial was being held by Special Judge. It was found imperative that the same Judge should not only record the evidence but should decide the case. The fact that the situation would have been different had the case been not tried by the special judge were noticed in para 17 of the aforementioned judgment. It was said as under :

'Lastly, we have to say a few words on the amendment of the Act expressly making section 350 of the Code applicable to the proceedings before a special Judge. That amendment came long after the decision of the case by S. Jagjit Singh and had not expressly been made retrospective. It was said on behalf of the respondent, the prosecutor, that the amendment being in a procedural provision was necessarily retrospective, and, therefore, no exception can now be taken to

the action taken by S. Jagjit Singh. Assuming that the rule contained in section 350 of the Code is only a rule of procedure, all that would follow would be that it would be presumed to apply to all actions pending as well as future: *Kimbray v. Draper*, (1868) 3 QB 160. Such a retrospective operation does not assist the respondent's contention.'

4. Thus, what was said by the Supreme Court in para 17 of the aforementioned judgment would be attracted to the facts of this case. Even otherwise when the statement of objects and reasons which led to the enactment of section 326 of the Code of 1973 and its later amendment in 1978 is perused, it becomes apparent that there was a clear legislative intent that the successor Court can proceed with the case even if evidence is not recorded by such a Court. In any case, on account of phraseology used in section 326 'Judge or Magistrate', it becomes apparent that a 'Judge' or 'Magistrate' can proceed with the giving of decision even if evidence is not recorded by him. In this view of the matter, the order passed by the trial Court cannot be sustained. The same is set aside. It may now proceed to decide the matter as early as possible and it would see that the case does not enter into a second decade.

Disposed of accordingly.