

**Dillip Kumar Routray and ors. Vs. the State and anr.**

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**SooperKanoon Citation :** [sooperkanoon.com/533146](http://sooperkanoon.com/533146)

**Court :** Orissa

**Decided On :** Aug-17-1994

**Reported in :** 1994(II)OLR518

**Judge :** A. Pasayat, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 408, 409, 410 and 412

**Appeal No. :** Crl. Misc. Case No. 1493 of 1994

**Appellant :** Dillip Kumar Routray and ors.

**Respondent :** The State and anr.

**Advocate for Def. :** Y. Mohanty, P.C. Biswal and B.N. Mohanty (for opp. party No. 2) and ;Addl. Standing Counsel (for opp. party No. 1)

**Advocate for Pet/Ap. :** G. Tripathy, G.C. Mishra and R.K. Nayak

**Judgement :**

**A. Pasayat, J.**

1. Petitioners call in question legality of order dated 21-6-1994 passed by learned sessions Judge, Cuttack in Criminal Misc. Case No, 707 of 1994 in purported exercise of power Under Section 409 of the Code of Criminal Procedure, 1973 (in

short, the 'Code').

2. According to the petitioners, they were impleaded as opposite parties in the application filed by Tushar Kanra Routray (opp. party No. 2 herein) before learned Sessions Judge seeking transfer of Sessions Trial No. 200 of 1994 pending disposal in the Court of Addl. Sessions Judge-, Kendrapara. No notice was issued to them, and solely on the concession of the learned Public Prosecutor, prayer of Tushar Kanta was accepted. Transfer of the aforesaid Case from the Court of Addl. Sessions Judge, Kendrapara to the file of Sessions Judge, Cuttack has been directed. Such a course, according to the petitioners, is illegal because no opportunity was granted to them, who are arraigned as accused and have vital interest in the matter. It is further urged that Section 412 of the Code mandates recording of reasons when action is taken Under Section 409, but no reason has been recorded in the case, and merely on the concession of the Public Prosecutor and submission of the learned counsel appearing for Tushar. who was petitioner in the application, transfer has been directed.

Learned counsel for Tushar on the other hand submitted that the learned Sessions Judge has taken note of all relevant circumstances which were elaborately dealt with in the application filed for transfer, and when the State which is the prosecuting agency has no objection, inconvenience if any of the accused is of no relevance.

3. Sub-section (2) of Section 403 deals with power of Sessions Judge to recall any case or appeal which has been made over to any Addl. Sessions Judge at any time before trial of the case or commencement of hearing of the appeal. Order passed by the learned Sessions Judge is admittedly impugned in this case to have been passed by exercise of power under the said provision It restricts the scope of power of withdrawal and confines it to a stage prior to the commencement of stage of trial. Section 408 deals with power of a Sessions Judge to entertain transfer applications regarding cases pending on the file of one Criminal Court in the sessions division to another Criminal Court in the same division The effect of withdrawal or recall of cases and appeals by the Sessions Judge Under Section 409 is identical with that of a transfer Under Section 408. Although the section

does not provide for giving of a notice to the opposite party, still on general principles of natural justice, notice should be given to the party affected, so as to give him an opportunity of showing cause against an order of transfer. Section 412 of the Code obligates reasons to be recorded by a Sessions Judge making an order Under Sections 408 or Under Section 409. The Law Commission in its 41st Report at paras 44.12 at page 348 recommended that the principle of recording reasons for decision being sound should also apply to the orders of the Sessions Judge. Sec, 412 substantially corresponds to Sufe-sec. (SJ of Section 528 of the Code of Criminal Procedure, 1898 (in short, the 'old Code'). The material change in the new Code is that earlier reference was to a Magistrate making an order for transfer, but Section 412 of the Code includes within its scope even Sessions Judges. The necessity for recording reasons flows from the fact that though the discretion of Sessions Judge in transferring cases from the subordinate Courts under Sec 403 is unfettered, yet before an order is made, reasons must exist and those reasons should be such as the law regards as satisfactory from the point of view of principle. It is no doubt correct that when there is reason to think that an accused person has a reasonable apprehension that he would not get impartial and fair justice at the hands of any particular Court where his case is pending. the case should be transferred. But it has been held again and again that the apprehension should be of the kind which a reasonable man can have, that is to say, a mere allegation would not be sufficient. Similar where the witnesses/parties apprehend that they may be subjected to harassment the Court can take note of those matters. Power of a Sessions Judge to transfer a case is not to be exercised in a routine manner sufficient reason must exist and party seeking such transfer must show that it is imperated. This appears to be legislative intent as appears from the provisions of Section 412 which mandate recording of reasons for making an order Under Section 403 of the Code While considering a prayer for transfer. Sessions Judge has to weigh pros and cons of reasons given for seeking transfer, objection if any made thereto, convenience of parties, witnesses and other relevant factors. It is a matter of principle of public policy that justice should not merely be done but should manifestly be seen to be done. The object is to clear away anything which might engender suspicion and distrust in the mind of a party concerned and promote a feeling of confidence that he shall get a fair justice either

to prove accusation or innocence, as the case may be. Trial of a case should be in an atmosphere which does not create even a suspicion that there has been or is likely to be an improper interference with course of justice. These aspects were highlighted by me in *Satyabhama v. State* : Vol. 34 (1992) OJD 168 (Crl). Omission to record reasons is a curable irregularity Under Section 465 of the Code. It does not vitiate the proceeding in the transferee Court unless it has prejudiced the party. Whether prejudice has been caused or not is a matter which has to be factually decided and no sweeping generalisation can be made.

4. In Sections 409 and 410 word transfer is not used, and, on the other hand the words 'withdraw or recall' have been used. A Sessions Court consists of the Sessions Judge, Addl Sessions Judge and Asst. Sessions Judge. Therefore, when it is contemplated Under Section 403(1) that the Sessions Judge can transfer a case from one Criminal Court to another Criminal Court in a sessions division, it would mean that the Sessions Judge would be referring to a case filed not in the Sessions Court but pending before the Magistrate. Otherwise, if the Sessions Court comprise of the same three authorities, then it cannot transfer in that sense, a case from . that file to another Sessions Court. In other words, when the section contemplates a case pending in the Criminal Court, it would embrace all the cases pending on the file of such Courts subordinate to the Sessions Court. The words 'withdraw or recall' used in Sec 409 are used to mean that a Sessions Judge can withdraw or recall any case or appeal made over by him to the Addl. Sessions Judge or the Assistant. Sessions Judge. The use of the term 'withdrawal' or 'recall' is done whenever a regional distribution is made by the Sessions Judge. Thus. it is because the Sessions Judge makes over sessions cases and appeals to the Addl or Asst, Sessions Judge, that he gets a power to withdraw or recall the said cases or appeals. That would obviously not apply to such cases which are on the file of the Magistrate, inasmuch as, the criminal cases are not made over by the Sessions Judge to the Magistrate, as the cases are filed directly in the Court of the Magistrate. This has necessitated employment of the different terminology in Sections 409 and 410 as against the earlier three sections. However, the effect of a transfer Under Section 403 and the withdrawal or recalling of a case Under Section 409 would be identical. In effect, the case cannot be transferred by the Sessions Judge under Sec. 409 because it is originally not filed in that particular

Court. It has to be withdrawn or recalled, because it is the authority which has already made over a case to another Court. It is also worth noting that after withdrawal or recalling of such a case or appeal, the Sessions Judge is empowered Under Section 409(3) either to make it over to the other Judge, that is, Asst. Sessions Judge or the Addl. Sessions Judge or to try to hear the matter himself. This is again in contest to the provisions contained in Sec, 409, in as much as, a Sessions Judge after directing transfer of a case from one Criminal Court to another Criminal Court, obviously, has no jurisdiction to hear that case himself as the said case is only triable by a Judicial or Metropolitan Magistrate. An Addl. Sessions Judge or an Asst. Sessions Judge gets jurisdiction to try a case only after it is allotted to him by the Sessions Judge of the division concerned, The High Court also may by special order direct such a judge to try a case. This power to the Sessions Judge or the High Court to allot a case is given by Section 194, and not by Section 409. Section 409 nowhere deals with the powers of the High Court to transfer a case. The provisions of Sections 194 and 409) are meant to serve different purposes. One does not overlap the other. The former deals with the powers of the Sessions Judge or the High Court to make over a case or cases, while the latter deals with the powers of the Sessions Judge to recall a case. Section 194 gives power to the Sessions Judge for distribution of business.

5. Omission to record reasons is a mere irregularity and does not vitiate the subsequent proceeding. But when the statute mandates recording of reasons it should be done. Merely because it is a curable defect, it cannot be said that there has to be no application of mind by the Sessions Judge at the time of directing transfer. Where there is no inherent lack of jurisdiction, merely on the ground of lack of territorial jurisdiction or on the ground of lack of territorial jurisdiction or on the ground of irregularity of procedure, the ultimate trial and conviction by the Court cannot be challenged. Section 462 and Section 466 would respectively cure those defects.

6. In the instant case, without going to the question whether prejudice has been caused or not, it is appropriate that the learned Sessions Judge should hear the petitioners who are accused in the case. Absence of notice to present petitioners has added vulnerability to the order. Same is set. aside. The matter is reemitted

back to the learned Sessions Judge to hear the parties on 23-8-1994, and pass reasoned order as provided in Section 412, of the Code.

The application is accordingly disposed of.

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