

**Avinash Chander Vs. the State**

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**Court :** Delhi

**Decided On :** Dec-21-1982

**Reported in :** 1983CriLJ595; 23(1983)DLT214; 1983(4)DRJ356; 1983RLR104

**Judge :** M.L. Jain, J.

**Acts :** [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 407, 407(2), 408, 409, 526 and 528

**Appeal No. :** Criminal Misc. (Main) No. 614 of 1982

**Appellant :** Avinash Chander

**Respondent :** The State

**Advocate for Pet/Ap. :** B.G. Singh and; O.P. Sharma, Advs

**Judgement :**

ORDER

1. The petitioner was facing a trial before Mr. T. S. Oberoi, Addl. Sessions Judge, Delhi. The learned Addl. Sessions Judge framed charges and adjourned the case for recording of the prosecution evidence. Two more cases were pending against him in the court of Mr. R. C. Jain, Additional Sessions Judge. The case which was pending before Mr. Oberoi was transferred by the learned Sessions Judge by his order dated 4-1-1982 to the court of Mr. R. C. Jain. The petitioner made an application to the learned Sessions Judge that in the face of S. 409 the case

pending in the court of the one Additional Sessions Judge could not be transferred to the court of another Additional Sessions Judge because the trial had already begun. Relying upon my decision in Suresh Kumar v. State, : 19(1981)DLT212 , the learned Sessions Judge rejected the application on 16-11-1982 stating that the transfer was ordered under S. 408 and not under S. 409, Cr.P.C. This order is under challenge in this petition. It is also requested that this court may direct re-transfer under S. 407, Cr.P.C. In fact, this is a petition for reconsideration of the decision in Suresh Kumar (supra). The learned counsel for the petitioner feels that the decision was made because certain authorities of other High Courts were not brought before me. In Suresh Kumar (supra) I had said :

'No authorities were cited at the bar in support of the rival contentions. But, I have been able to find two, which appear to be the nearest relevant. In Reg. v. Gulabdas Kuberdas, (1874) 11 Bom HCR 98. West, J. did observe that in one sense no doubt the Sessions Judge the Joint Judge and the Asst. Judge may be regarded as one court of Session but for purposes of S. 473 of the 1861 Code (Section 345 new), it is a separate court. Now, four aspects deserve to be noticed. One is that, an Addl. Sessions Judge may be treated as a separate court for some purposes, vide Reg. v. Gulabdas Kuberdas. 1874 Bom HCR 98 (supra). The second is that the power to transfer a case has not been given to the court of session but to the Sessions Judge who presides over the entire court of session manned by Asst. and/or Addl. Sessions Judges. The third is, that S. 407(1)(ii) while dealing with the powers of the High Court to transfer a case speaks of transfer 'from a criminal court subordinate to it.' But, S. 408 in case of a Sessions Judge does not use these words. The fourth is, that Sections 408 and 409, Cr.P.C. deal with two separate types of powers of the Sessions Judge to transfer, and to withdraw or recall cases respectively. The former is to be exercised in the interests of justice and the latter may inter alias cover a simple administration of business. Distinction between these two powers has to be spelt out. In Bhabutmal v. State, 1970 Raj LW 242, Beri, J. (later on Chief Justice) while discussing the corresponding provisions in the old Code pointed out that the intention of the legislature, seems to be, as gathered from the plain language of S. 528(1C) old Code (S. 408(1) new Code), that within a sessions division of the ends of justice, the Sessions Judge has the power to transfer a case from one criminal court to

another regardless of the fact whether the court from which the case is sought to be transferred is subordinate to the Sessions Judge or not. Sub-sections (1A) and (1B) of S. 528 (old Code). S. 409(1) and (2) (new Code), advisedly employ the word 'recall' as distinguished from the word 'transfer'. He held that a case can be recalled but that must be a case which has been made over by the Sessions Judge to the Addl. Sessions Judge and the trial must not have commenced therein. He further held that the Sessions Judge can transfer a case from one criminal court to another criminal court in the same sessions division and that the court of an Addl Sessions Judge is a criminal court and further that a Sessions Judge must be moved in the first instance if the case is sought to be transferred from one criminal court to another criminal court in the same sessions division. I am in respectful agreement with these views and I do not think that the addition of sub-section (2) to S. 408 on the lines of S. 407(2). Cr.P.C. makes any change in this position.'

What I meant was that though the court of an Addl. Sessions Judge is part of the court of session yet the court of Addl. Sessions Judge may be treated as a separate court for some purposes such as S. 345 and S. 408. Same was the conclusions reached by the learned Judges of the High Court of Allahabad in State of U.P. v. Gyanchand, Cr.M. 747/71 and Cr.M. 3218/72, decided on 17-9-1974. After examining the provisions of S. 528, Cr.P.C. they said :

'The expression 'criminal court' in so far as S. 526 and S. 528. Cr.P.C. are concerned, must be given wider meaning. The court exercising criminal jurisdiction for purposes of these two sections, the court of each Additional Sessions Judge shall be a criminal court, though all of them shall be exercising jurisdiction in the same court of session.'

Yet, the learned Judges held that in view of sub-section (1A) of S. 528, the Sessions Judge has no power to entertain an application for transfer even under sub-section (1C) thereof from the Court of Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced before him; also see State of U.P. v. Khurkhundi, 1971 All LJ 362 and Karam Chand v. State of U.P. (1980) 6 All LR 625; 1980 UPLT NOC 175.

2. In *Smt. Gulzar v. Nizam*, 1981 All WC 23 : 1981 Cri LJ NOC 22, the trial of the case started in the Court of the IV Addl. Sessions Judge Shri K. L. Sharma. Later on he was designated as II Addl. Sessions Judge. One Shri Sarkar took over IV Addl. Sessions Judge and took up the case left by his predecessor and examined one witness of the defense. The Sessions Judge was requested to transfer the case to the Court of Shri Sharma the II Addl. Sessions Judge. The learned Sessions Judge rejected the application. While accepting a transfer petition made to it, the High Court held that the intention behind the Code seems to be that part heard cases should be tried by the Judge before whom the trial had commenced and who was seized of the case. This case does not support the contention raised by Shri Bawa because the Sessions Judge had made no order of transfer from the court of one Addl. Sessions Judge to another Addl. Sessions Judge, and the reasoning adopted by the High Court is no more of any validity in view of the amendment of S. 326 in virtue of which a part heard case may be tried by a successor Judge.

3. I have not been able to quite see how, having once said that the Court of Addl. Sessions Judge is a criminal court, does it then cease to be so under S. 408, Cr.P.C. and limit the power of the Sessions Judge exercisable under that section. It is not possible by any principle of interpretation to have read sub-section (1A) as a proviso or qualification to the powers available under sub-section (1C) of S. 528. The new Code has split S. 528 into S. 408 (old S. 528(1C)) and S. 409 (old S. 526(1A)). That cannot be and is not without any significance. Section 408 is the general power to be exercised for the ends of justice while S. 409 provides for a power more of an administrative nature given to the Sessions Judge. It should also be noticed that S. 409 speaks of cases and appeals while S. 408 speaks of a case only.

4. In *Superintendent and Remembrancer of Legal Affairs, Government of W.B. v. Tulshi Mondal*, 1975 80 Cal WN 54, A. K. De, J. almost gave to reason for the view he took. Talukdar, J. who swung the balance observed that if the expansive interpretation is given to sub-section (1C) of S. 528 (S. 408 new), it would only attribute redundancy to the preceding sub-section (1A) of the same Section 528 (S. 409 new). Each of these sub-sections dovetails into the scheme of the

provisions of S. 528 (Ss. 408 and 409 new). It was, therefore, held that a transfer of a case from the Addl. Sessions Judge, to another Addl. Sessions Judge made by the learned Sessions Judge, would come within the ambit of S. 528(1A) because the Addl. Sessions Judge is to be equated with the Sessions Judge and does not form really a different court of session and is not a separate entity so as to constitute a different court having different powers, though a line does divide them which is not an imaginary one. Having conceded a real dividing line between the various courts to Addl. Sessions Judges, it is not possible now to see that line in S. 408. Since the splitting of S. 528 into Sections 408 and 409, it is no longer available to urge that the sub-sections dovetail into the scheme of the same section. The Law Commission considered it desirable to split up S. 528 into five sections because it was a composite provision dealing with different classes of courts in two or three different matters, vide para 44.14 of Law Commission Forty First Report.

5. With utmost respect to the views of the High Courts of Allahabad and Calcutta, I do not find any reason whatsoever to make me change mine. Fortunately, I am not alone. Bhattacharya, J. in *Tulsi Mondal* (1975) 80 Cal WN 54(supra), had reached the same conclusion as I did after a detailed examination of the matter. He has noticed one more reason and that is that sub-section (1A) of S. 526 and sub-section (1C) of S. 528 were twins born of the Central Act No. 26 of 1955. In the absence of the one the other cannot be of any effect. According to sub-section (1A) of S. 526, any application to the High Court for transfer of a case from one criminal court to another was not maintainable unless an application for such transfer has been made to the sessions Judge and rejected by him. In order to invest the Sessions Judge with the requisite, jurisdiction in consonance with the newly enacted sub-section (1A) of S. 526, the legislature introduced sub-section (1C) of S. 528, Cr.P.C. by the same Act of 1955. The criminal court referred to in those, two sub-sections, therefore, includes the Court of Addl. Sessions Judge. Each of the constituent courts presided over by the Sessions Judge, Addl. Sessions Judge and Assistant Sessions Judge, forming the court of session is a criminal court, within the same sessions division. The power to transfer cases from one criminal court to the court in the same sessions division is a special jurisdiction not given to the court of session but is given to the Sessions Judge

only. The learned Judge also relied on Bhabutmal 1970 Raj LW 242 (supra) to which I had also done in my judgment.

6. As regards merits, there is nothing which can justify an interference with the order of the learned Sessions, Judge. I, therefore, see no reason to revise my earlier opinion and uphold the order made by the learned Sessions Judge.

7. The petition is rejected.

8. Petition rejected.

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