

**(2011) 03 AHC CK 0407**

**Allahabad High Court (Lucknow Bench)**

**Case No:** Criminal Revision No. 66 of 2011

Baccharam Shukla

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

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**Date of Decision:** March 10, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 11
- Criminal Procedure Code, 1973 (CrPC) - Section 158, 177, 197, 309, 311

**Citation:** (2011) 3 ADJ 872 : (2011) 8 RCR(Criminal) 1972

**Hon'ble Judges:** Narayan Shukla, J

**Bench:** Single Bench

**Advocate:** Oaya Shankar Misra and Umesh Chandra Yadav, for the Appellant; Govt. Advocate, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Shri Narayan Shukla, J.

Heard Mr. Daya Shanker Mishra, learned Counsel for the revisionist and Mr. Rajendra Kumar Dwivedi, learned

Additional Government Advocate for the State as well as Mr. Sharad Dixit, learned Advocate appearing for the victim.

2. The revisionist has challenged the order dated 11th of February, 2011, passed by the Special Judge (Gangster Act), Gonda in Sessions Trial

No. 146 of 2002, rejecting the revisionist's application being application No. Kha-219. Further he has also challenged the subsequent order dated

14th of February, 2011, passed by the Court concerned, whereby the revisionist's request to provide time for additional arguments has been rejected.

3. Upon perusal of the record it appears that the revisionist moved an application u/s 311 of the Code of Criminal Procedure to summon P.W.1 to

P.W.5, namely, Ram Pujan, Munna Ram, Anand Prakash, Shiv Das and Amar Nath for re-cross-examination, which has been rejected by the Court.

4. Upon perusal of the record it is obvious that earlier also the revisionist moved an application being application No. 91-Kha for summoning those

witnesses for their re-examination, which had already been rejected on 25th of September, 2008, whereas the revisionist did not choose to

challenge the said order, rather after two years again moved the application in question.

5. Keeping in view the past conduct of the revisionist during the course of trial as he has not cooperated with the proceedings, the trial Court has

expressed its opinion to the effect that the revisionist is not interested in disposal of the matter, rather he is interested in lingering on the case for one

or another reason by moving such an application, which is fortified by his conduct as when he could not succeed upon the said application, he

sought further time for an additional argument, even after arguments are over in the matter, which has been rejected by the Court concerned, as the

revisionist is involved in a heinous crime like murder. The revisionist is on bail that is why he is making his all efforts to delay the trial.

6. The learned Additional Government Advocate raised objection against the maintainability of the revision on the ground that the Hon"ble

Supreme Court in the case of Sethuraman v. Rajamanickam, 2009 (2) JIC 586 (SC), has held that the order passed by the trial Court, refusing to

call the witnesses and documents and rejecting the application u/s 311 of the Code of Criminal Procedure, was interlocutory in revision and as

such the revision against the said order is clearly barred u/s 397(2) Code of Criminal Procedure In support of his submission he has also cited the

following decisions:

(1) Asif Hussain v. State of U.P. and Anr., LVII 2007 ACC 1036.

(2) Hanuman Ram Vs. The State of Rajasthan and Others,

7. In reply, on the point of maintainability, the learned Counsel for the revisionist has cited the decision of Mahabir Singh and Another Vs.

Emperor, but I am of the view that once the Hon"ble Supreme Court held that the order passed on the application moved u/s 311 of the Code of Criminal Procedure is not revisable, there was no occasion to deviate from the aforesaid dictum of the Hon"ble Supreme Court and in view of the settled view of the Hon"ble Supreme Court, no further discussion is needed.

8. The learned Counsel for the revisionist further submitted that the principles of res judicata as enumerated in Section 11 of the Code of Code of

CPC or the general principles thereof will have no application in a criminal procedure, as has been held by the Hon"ble Supreme Court in the case

of Devendra and Others Vs. State of U.P. and Another,

9. Without discussing the aforesaid preposition of law laid down by the Hon"ble Supreme Court, I am of the view that the revisionist kept mum for

two years and as such he accepted the earlier order, but after a considerable delay, he again raised the same plea, which does not appear

reasonable and bonafide keeping in view the revisionist's conduct in the proceeding, therefore, I am of the view that the aforesaid plea raised by

the revisionist does not help him in the matter. It is a clear instance of misuse of the process of Court by the revisionist.

10. The revisionist has also raised the question on the jurisdiction of the Court by asserting that once the Court to whom the matter being entrusted

was exercising the power, was very much available for functioning, there was no occasion for the District and Sessions Judge to transfer the matter

to another Court i.e. Special Judge (Gangster Act) for trial that too after recording the evidences of the witnesses.

11. The Sessions Judge has to exercise his power to transfer the case and appeal u/s 408 of the Code of Criminal Procedure, which is extracted

below:

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) The provisions of Sub-sections (3), (4), (5), (6), (7) and (9) of Section 407 shall apply in relation to an application to the Sessions Judge for an order under Sub-section (1) as they apply in relation to an application to the High Court for an order under Sub-section (1) of Section 407, except that Sub-section (7) of that section shall so apply as if for the words ""one thousand rupees"" occurring therein, the words ""two hundred and fifty rupees"" were substituted.

Since some of the provisions as inserted u/s 407 and 326 of the Code of Criminal Procedure, apply in proceeding with an application moved u/s 408 of the Code, it is pertinent to reproduce Sections 407 of the Code of Criminal Procedure, which are as under:

407. Power of High Court to transfer cases and appeals.--(1) Whenever it is made to appear to the High Court--

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or

is it may order-

(i) that any offence be inquired into or tried by any Court not qualified under Sections 177 to 185 (both inclusive), but in other respects competent

to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other

such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same

sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under Sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General

of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the

payment of any compensation which the High Court may award under Sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of

the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between

the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary

so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on

such terms as the High Court may think fit to impose.

Provided that such stay shall not affect the subordinate Court's power of remand u/s 309.

(7) Where an application for an order under Sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous

or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one

thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under Sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial

the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government u/s 197.

Section 326 of the Code of Criminal Procedure is also relevant for the matter, which is extracted below:

326. Conviction or commitment on evidence partly recorded by one Judge or Magistrate and partly by another.--(1) Whenever any Judge or

Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein and

is succeeded by another Judge or Magistrate who has and who exercises such jurisdiction, the Judge or 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

reexamination, 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 u/s 322 or in which proceedings have been

submitted to a superior Magistrate u/s 325.

12. Learned Counsel for the revisionist has cited a case i.e. Panjab Singh and Ors. v. State of Uttar Pradesh, 1983 (2) All Cri C 37. The scope of

Sections 407 and 326 of the Code of Criminal Procedure has been dealt with in the present case. In this case the question for decision was that

whether a Sessions Trial commenced by an Additional Sessions Judge who continues to be Additional Sessions Judge in the same Sessions

division but whose designation has changed, should be concluded by him or by another Additional Sessions Judge who has been conferred the

designation earlier possessed by the Additional Sessions Judge who had commenced the trial".

13. In the aforesaid case it has been held that it is the right of an accused that his case should be decided by a Judge who has heard and recorded

the evidence. Thus, unless the jurisdiction of the Judge to continue the trial is taken away expressly or by necessary implication either under a

statutory provision or an order passed to that effect by a competent authority, the Judge shall continue to exercise the jurisdiction to continue a

part-heard trial, and he would not be deemed to have been divested of it merely because a change has taken place in his designation. If this be not the true rule, successive changes in the designation of Additional Sessions Judges would result in successive change of hands in the trial of part heard cases, which does not seem to be the intention of the legislature behind the provisions of Section 326.

14. So far as the jurisdiction of District and Sessions Judge to transfer a case from one Additional Sessions Judge to another Additional Sessions

Judge is concerned, that has also been discussed by the Division Bench of this Court in the aforesaid case, but slightly, as it was not the issue for

decision. On the aforesaid point the Court has expressed its opinion as under:

On the question of the powers of the Sessions Judge to transfer a case from one Additional Sessions Judge to another Additional Sessions Judge,

it was canvassed by Sri Keshav Sahai, learned Counsel for one of the Petitioners, that words "criminal Court" in Section 408 did not include an

Additional Sessions Judge, and hence this provision did not apply to an Additional Sessions Judge. IN the reference made in State of U.P. v. Gyan

Chand and Ors. (4) and State v. Gyan Chand (5) it was held by the Division Bench by the order dated 17.9.1974 that the Additional Sessions

Judge was a criminal Court, and was covered by the provisions of Section 408. But a Sessions Judge, under that section had no power to transfer

a part-heard sessions trial from one Additional Sessions Judge to another. As at present advised, we are in respectful agreement with this view.

But since that question is not involved in the instant cases, we refrain from discussing that question and giving an opinion therein.

15. It is not in dispute that the present case was not a part heard with the earlier Court, therefore, in light of the opinion as expressed above by the

Division Bench of this Court, it is always open to the District and Sessions Judge to transfer the case from one Additional District and Sessions

Judge to another Additional District and Sessions Judge, therefore, I am of the view that the order impugned passed by the transferee Judge, does

not suffer from jurisdiction and further it is observed that the Court is competent enough to proceed with the trial.

16. With the aforesaid view the petition is dismissed.