

Deepchand and Others Vs State of M.P.

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Feb. 19, 1998

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 408, 409, 409(2)

Citation: (1998) 2 JLJ 293 : (1998) 2 MPLJ 670

Hon'ble Judges: Nirmal Kumar Jain, J

Bench: Single Bench

Advocate: A.J. Bhojwani, for the Appellant; G. Desai, Government Advocate, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

N.K. Jain, J.

The applicants are aggrieved by the Order dated 10-10-1996 passed by the Sessions Judge, Dhar in Cri. Misc. Case No. 200/96 transferring

Sessions Trial No. 394/95 from 1st Additional Sessions Judge Dhar to the Special Judge, Dhar.

The accused applicants are facing trial in the Sessions Court, Dhar on the charges Under Sections 306 and 498A of Indian Penal Code. The case

was registered at S.T. No. 394/95 and made over for trial to the 1st Addl. Sessions Judge. However, at the fag 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 u/s 408, Criminal Procedure Code 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 and Ors.) is withdrawn from the Court of 1st Addl. Sessions

Judge, Dhar and transferred to the Court of Special Judge and Addl. Sessions Judge, Dhar for disposal according to law.

Both the Courts be informed accordingly.

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

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,

Criminal Procedure Code; 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.

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)..

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).. ..

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 Sessions 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 Sessions, has been made over by

the Sessions Judge to an Addl. Sessions Judge or Asstt. Sessions Judge or Chief Judicial 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 Judicial 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 Sessions 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 u/s 409. Sub-section (2) of Section 409 deals with the withdrawal of cases from an Additional Sessions 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. Sessions Judge to another additional or Assistant Sessions Judge in the same Sessions Division.

In State of M.P. v. Raja 1994 II MPWN 18, this Court while considering a transfer application made directly to this Court u/s 407, Criminal

Procedure Code, 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, Criminal Procedure Code as the trial had commenced.

It is pointed out that the proviso as reproduced hereunder, of Section 407(2) of Criminal Procedure Code provided no fetters in view of the

position envisaged by Section 409, Criminal Procedure Code.

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

Additional 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.

Similar view is taken by the High Courts of Calcutta and Karnataka reported in 1988 (III) Cri 408 and 2952 Cri.L.J. 336.

I thus hold that the Sessions Judge in the present case stood divested of the jurisdiction in view of the bar contained u/s 409(2), Criminal

Procedure Code as the trial of the case has commenced. The order impugned is, therefore, without jurisdiction.

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 (3) Cri 176 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.

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.