

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **Crl. M.A.No.8903/2009 in W.P.(Crl.)1489/2008**

% Judgment delivered on: 26.08.2009

Jai Nandan Lal Petitioner
Through: Mr. Tarun Sharma, Advocate

versus

State of U.P. & Ors. Respondents

Through: Mr. Manoj Prasad for the
applicant/ Respondent no.3.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

KAILASH GAMBHIR, J. (Oral)

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By way of the present application filed under Section 482 Cr.P.C., the applicant seeks recalling of order dated 6.7.2009.

Brief facts of the case relevant for deciding the matter are as under:-

The petitioner is the brother of deceased Anju who died due to harassment and torture, by the accused husband and his

relatives, for dowry demands, on 4.2.1999. An FIR was registered against the husband and eight other relatives. Charge sheet was filed after completion of investigation and CCM, Kanpur took cognizance of the offences against the accused persons. Respondent No.3 was charged with offences under Section 467/471/120-B IPC. The petitioner filed transfer petition before the Hon'ble Supreme Court and matter was transferred to Sessions Court, New Delhi. Trial of accused/R-3 could not be held due to stay on the same directed by the Allahabad High Court and therefore, trial of respondent no.3 was segregated from other accused persons. Vide order dated 12.2.2003, out of other eight accused, seven were acquitted by the Ld. Addl. Sessions Judge except Mr. Mohinder Modi, husband of the deceased. Aggrieved with the same, a revision petition was filed before this court and accused husband was acquitted by this court and aggrieved with it, an SLP was filed in the Hon'ble Supreme Court. In the meanwhile learned Addl. Sessions Judge framed charge against respondent No.3 under Section 465 IPC and fixed the case for prosecution evidence. The learned Sessions Judge rejected the application made by the petitioner to seek transfer of the trial on the ground that S. 465 IPC being triable by Magistrate of Ist Class

as per I Schedule to Cr.P.C. Aggrieved with the said order of Ld. ASJ present petition has been filed by the petitioner. Vide order dated 6.7.2009 this court passed an order directing the matter to be transferred to the court of Magistrate from Sessions Court. Aggrieved with the said order present application is moved by respondent No.3.

Mr. Manoj Prasad counsel for the applicant respondent No. 3 submits that the case in question is an off shoot of the main case which was earlier tried by the Sessions Court and simply because the respondent no.3 accused is now separately being tried, the same itself would not afford any ground for the case to be tried by the learned Magistrate. The contention of the counsel for the applicant is that once the main case was tried by the Sessions Court and the present case being the off shoot of the main case therefore, the same has to be tried by the same court and not by the Court of Magistrate, even if the charge framed against the accused is triable by the court of Magistrate. In support of his argument counsel for the applicant placed reliance on the judgment of the Apex Court in **Sudhir & Ors. Vs. State of M.P. (2001) 2 SCC 688**. Counsel thus urges that the case of the applicant stands on a higher pedestal than the above case

decided by the Apex Court, where in a cross case the Apex Court held that the same should be tried by the court of Sessions even though one case was exclusively triable by the Magistrate. Counsel for the applicant further submits that the petitioner has not correctly placed the correct facts before this court and rather made suppression by not disclosing that the petitioner had earlier withdrawn the request from the Sessions Court seeking transfer of the said case. In support of his submission, counsel for the applicant has drawn attention of this court to the order dated 15.9.2007 passed by the court of Additional Sessions Judge and the statement dated 15.9.2007 made by the counsel for the complainant, whereby he withdrew the said application, seeking transfer of the case. Counsel for the applicant has further placed reliance on Section 223 (d) Cr.P.C to contend that the person accused of different offences but committed in the course of the same transaction is to be tried together by the same court not by the different court.

Refuting the said submissions, counsel for the non-applicant/petitioner submits that the charge against the respondent no.3 has been framed by the Sessions Court only under Section 465 IPC and since Section 465 is triable by the

Magistrate therefore, there was no option left with the Court of Sessions but to remand the matter back to the Magistrate for its trial. The contention of the counsel for the petitioner is once under the India Penal Code case is triable by a lower court then the same can not be tried by a higher court. Counsel has placed reliance on Section 461 Cr.P.C. The contention of the counsel for the petitioner is that the purpose of filing the present petition by the petitioner was primarily on account of the fact that once the offence is triable by the Magistrate and if it is tried by the Sessions Court or the Higher Court then such an irregularity will vitiate the entire proceedings as envisaged under Section 461 of Cr.P.C. As regards the fact that the petitioner has not disclosed the fact of the withdrawal of his earlier application, seeking transfer of the case from the Court of Sessions to the court of Magistrate, counsel states that the petitioner has placed all the relevant orders on record, and therefore, it cannot be said that the petitioner wanted to suppress any material fact from this Court. Counsel further submits that the said plea of transfer of the trial is purely legal and can always be taken by the petitioner. Counsel for the petitioner has further placed reliance on Section 228 of the Cr.P.C. to contend that after framing of charges if the Court of Sessions

finds that the charge framed against the accused was triable by the Magistrate then the Court has no other option but to transfer the case to the Court of Magistrate. Counsel for the petitioner also placed reliance on Section 326 Cr.P.C., to support his submission that even if whole or any part of the evidence has been recorded by the Court of Sessions then also the successor court, even if happen to be the court of Magistrate can act on the evidence already recorded by his predecessor and may proceed with further trial of the case.

I have heard learned counsel for the parties at considerable length and gone through the record.

Vide order dated 6.7.2009, after placing reliance on Section 228 Cr.P.C. and after hearing the counsel for the petitioner and taking into consideration no objection raised by the counsel for the respondents 1 and 2, directions were given for the transfer of the case from the Sessions Court to the Court of learned C.M.M. for its onward transfer to the court of concerned M.M.. Respondent no.3 who was already served did not choose to appear on the last date, and no explanation has been given by the applicant in the present application as to what prevented the respondent no.3 or his counsel to appear on the last date. Be that

as it may, I do not find myself in agreement with the contentions raised by the counsel for the applicant/respondent no.3 that the case against the respondent no.3 being an off shoot of the main case and therefore, it should be tried by the Sessions Court alone. It is not in dispute that the other accused persons already stood acquitted and the trial against the respondent no.3/applicant was segregated on account of the stay order granted by the Allahabad High Court, so presently, the respondent no.3 is the only accused person being tried for the commission of the offence under Section 465 of the IPC. It is also not in dispute that Section 465 is triable by the Magistrate and not by the Sessions Court.

The extraordinary power under Article 226 or S. 482 Cr.P.C. is exercised either to prevent abuse of process of any court or otherwise to secure the ends of justice.

It is a settled legal position that any offence which is triable by the lowest court should not be tried by the higher court. Even otherwise, under the 1st Schedule of the Cr.P.C. the offences under Section 465 is triable by the Magistrate of First Class.

Chapter III of the Code deals with the subject of "Power of Courts" S. 26, according to its head-note deals with "Courts by

which offences are triable”, and inter alia provides that an offence may be tried, inter alia, by any “Court by which such offence is shown in the First Schedule to be triable.

The First Schedule to the Code of Criminal Procedure relates to “Classification of Offences” for purposes of cognizance, bail and trial.

When there is an express provision, I Schedule, wherein it is mentioned that offence U/S 465 IPC is triable by magistrate then it cannot be said that the order passed by the Sessions Court transferring the case to the Magistrate tantamount to abuse of process of any court warranting exercise of power Under Article 226 of Constitution or S. 482 Cr.P.C. by this Court.

The judgment of the Apex Court cited by the counsel for the applicant is not applicable to the facts of the present case. I do not find any substance in the arguments of the counsel for the applicant that the case of the applicant stands on a higher footing. The position in the cross cases or the counter cases is clearly different and the same cannot be equated with the case in hand where the applicant alone is being tried for the offence charged under Section 465 IPC. The analogy of Section 223 (d) will also be of no help to the facts of the present case as the other accused

persons have already been acquitted and now the respondent no.3 alone is facing trial. Although, the petitioner should have disclosed the fact of his moving application earlier before the court of Sessions, seeking transfer of the case, but the plea being legal can be examined even in the absence of the said disclosure. Even otherwise, the applicant or the counsel for the applicant did not choose to appear in the matter, therefore, because of negligent conduct of the applicant the said plea of non-disclosure is not available to him. There is no substance in the application. The same is hereby dismissed.

August 26, 2009
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KAILASH GAMBHIR,J