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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ TR.P.(CRL.) 6/2012

SATTAR ALI

..... Petitioner

Through: Mr.I.A.Alvi, Advocate.

versus

STATE & ORS.

..... Respondents

Through: Ms.Rajdipa Behura, APP for State/R-1.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

ORDER

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15.10.2012

1. The petitioner has filed this transfer petition under Section 482 Cr.P.C feeling aggrieved from the order dated 29.02.2012 passed by the learned District & Sessions Judge, whereby his application seeking transfer of cross case to the Court of Sessions was declined. The prayer was declined for the case FIR No.208/2010 P.S. Timarpur pertains to offences under Sections 323/325/34 IPC. The said FIR was registered in the complaint case on directions of learned M.M to the Police under Section 156(3) Cr.P.C. The case FIR No.208/2010 is at the initial stage, whereas case FIR No.464/2008, under section 308/34 IPC is pending before the learned ASJ and is at the advanced stage i.e. defence evidence. The learned Trial Court was of the view that transfer of case from the Court of M.M to the Court of Sessions will deprive the accused from his right to appeal; that it was not expedient in the ends of justice to allow transfer of case which was triable by the

4

Magistrate and hence prayer for trial of both the cross cases together by the same Court was rejected.

2. Notice of the petition was issued to the State as well as to respondents No.2 & 3, but respondents No.2 & 3 preferred not to appear despite service. Learned APP for the State very fairly conceded that both the cases i.e. case FIR No.208/2010, under Sections 323/325/34 IPC and case FIR No.464/2008 under Section 308/34 IPC arising out of the same incident, are triable by the same Court.

3. The Apex Court in the report *Sudhir and Others vs. State of M.P. (2001) 2 SCC 688* held that cross cases should be disposed of by the same Court and judgment should be pronounced on the same day. It was also held that if one of the cross cases is triable by the Magistrate and the other is by Court of Sessions, the Magistrate in exercise of his power under Section 323 Cr.P.C. could commit even the Magistrate Trial case. The procedure to be followed in trial of cross cases arising out of same incident has been enumerated as under:

8. *It is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter case" by some High Courts and "cross cases" by some other High Courts. Way back in nineteen hundred and twenties a Division Bench of the Madras High Court (Waller, and Cornish, JJ) made a suggestion (In Re Goriparthi Krishtamma - 1929 Madras Weekly Notes 881) that "a case and counter case arising out of the same affair should always, if practicable, be tried by the same court, and each party would represent themselves as having been the innocent victims of the aggression of the other."*

9. *Close to its heels Jackson, J, made an exhortation to the then legislature to provide a mechanism as a statutory provision for trial of both cases by the same court (vide Krishna Pannadi vs . Emperor MANU/TN/0429/1929 : AIR1930Mad190 . The learned judge said thus:*

8

"There is no clear law as regards the procedure in counter cases, a defect which the legislature ought to remedy. It is a generally recognized rule that such cases should be tried in quick succession by the same Judge, who should not pronounce judgment till the hearing of both cases is finished."

10. We are unable to understand why the legislature is still parrying to incorporate such a salubrious practice as a statutory requirement in the Code. The practical reasons for adopting a procedure that such cross cases shall be tried by the same court, can be summarised thus: (1) It staves off the danger of an accused being convicted before his whole case is before the court. (2) It deters conflicting judgments being delivered upon similar facts; and (3) In reality the case and the counter case are, to all intents and purposes, different or conflicting versions of one incident.

11. In fact, many High Courts have reiterated the need to follow the said practice as a necessary legal requirement for preventing conflicting decisions regarding one incident. This court has given its approval to the said practice in *Nathi Lal & ors. vs. State of U.P. & anr.* MANU/SC/0339/1988. The procedure to be followed in such a situation has been succinctly delineated in the said decision and it can be extracted here:

"We think that the fair procedure to adopt in a matter like the present where there are cross cases, is to direct that the same learned Judge must try both cross cases one after the other. After the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other."

12. How to implement the said scheme in a situation where one of the two cases (relating to the same incident) is charge-sheeted or complained of, involves offences or offence exclusively triable by a Court of Sessions, but none of the offences involved in the other case is exclusively triable by the Sessions Court. The magistrate before whom the former case reaches has

6

no escape from committing the case to the Sessions Court as provided in Section 209 of the Code. Once the said case is committed to the Sessions Court, thereafter it is governed by the provisions subsumed in Chapter XVIII of the Code. Though, the next case cannot be committed in accordance with Section 209 of the Code, the magistrate has, nevertheless, power to commit the case to the court of Sessions, albeit none of the offences involved therein is exclusively triable by the Sessions Court. Section 323 is incorporated in the Code to meet similar cases also. That section reads thus:

"If, in any inquiry into an offence or a trial before a Magistrate, it appears to him at any stage of the proceedings before signing judgment that the case is one which ought to be tried by the Court of Session, he shall commit it to that Court under the provisions hereinbefore contained and thereupon the provisions of chapter XVIII shall apply to the commitment so made."

13. The above section does not make an inroad into Section 209 because the former is intended to cover cases to which Section 209 does not apply. When a magistrate has committed a case on account of his legislative compulsion by Section 209, its cross case, having no offence exclusively triable by the Sessions Court, must appear to the magistrate as one which ought to be tried by the same Court of Sessions. We have already adverted to the sturdy reasons why it should be so. Hence the magistrate can exercise the special power conferred on him by virtue of Section 323 of the Code when he commits the cross case also to the Court of Sessions. Commitment under Section 209 and 323 might be through two different channels, but once they are committed their subsequent flow could only be through the stream channelised by the provisions contained in Chapter XVIII.

4. In view of the legal position enumerated above, the learned District and Sessions Judge ought to have allowed the prayer of the petitioner for transfer of the case pending before the learned M.M. to the Court of Sessions so that both the cross cases could be tried and disposed of by the same Court.

5. Accordingly, the petition is allowed and the impugned order is set aside. The learned M.M. is directed to send the file of case FIR No.208/2010, under Sections 323/325/34 IPC, P.S. Timarpur to Court of

2

Sessions.

6. Learned Sessions Judge shall assign the case FIR No.208/2010, under Sections 323/325/34 IPC, P.S. Timarpur to the Court of learned ASJ before whom trial of case FIR No.464/2008 under Section 308/34 IPC, P.S. Timarpur is pending, for disposal in accordance with law.

7. Parties are directed to appear before the learned M.M. on 25.10.2012.


PRATIBHA RANI, J

OCTOBER 15, 2012

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