



IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Reserved on</i>	<i>Pronounced on</i>
12.04.2018	08.06.2018

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THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

Crl.O.P.(MD) No.4802 of 2018
and Crl.M.P.(MD) No.2357 of 2018

1. Ganesan
2. Suresh
3. Ramesh
4. Muthu
5. Kalimuthu
6. Kala
7. Indira

... Petitioners

Vs

- 1 The Inspector of Police
Seevalperi Police Station,
Tirunelveli District
(Crime No.163 of 2011)

... Respondent/Complainant

- 2 Kavitha

... Respondent/Defacto complainant

PRAYER: This Criminal Original Petition is filed under Section 407 of Criminal Procedure Code to transfer the case in S.C.No.419 of 2013 from the Court of the learned I Additional District and Sessions Judge, Tirunelveli to the Court of the learned I Additional District and Sessions Judge, Kanyakumari District at Nagercoil.

For Petitioner : Mr.R.Anand
For Respondent No.1 : Mr.M.Chandrasekaran, A.P.P.

O R D E R

According to the petitioners, the first respondent herein has charge sheeted the petitioners for the offences under Sections 147, 148, 341, 323, 302 and 109 of I.P.C. After committal proceedings were over, the aforesaid case was made over before the learned I Additional District and Sessions Judge, Tirunelveli. On the side of prosecution, 18 witnesses have been examined and both sides have completed arguments and posted the case on 23.3.2018 for delivering judgment. At this juncture, the Presiding officer of the I Additional District and Sessions Court, Tirunelveli has



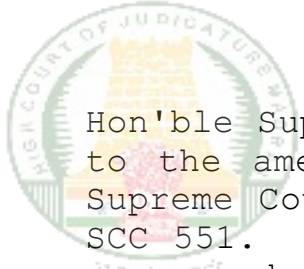
been transferred to Kanyakumari District. Hence, the petitioners seek to transfer the case in S.C.No.419 of 2013 to the file of I Additional District and Sessions Judge, Kanyakumari District at Nagercoil.

2 The main ground raised by the petitioners is that in the event of placing the case before the successor in office, a situation may arise in which either of the parties may be made to re-do the exercise of not only advancing arguments, but also if necessity arises, examination of the witnesses already examined. Hence, in order to avoid such contingency, the present petition has been filed.

3 According to the learned counsel for the petitioners, a Judge who recorded the deposition of witnesses only can perceive the credibility of the witnesses and while scrutinizing the evidence, it is necessary for the Judge to be aware of the demeanor of the witnesses examined. In the case in hand, Section 326 Cr.P.C. Would not stand in the way of transfer since the said provision only says about the part heard matters whereas in the case in hand, the entire trial was over, both sides arguments completed and the case was adjourned for delivering judgment. According to the learned counsel for the petitioners, the second limb of Section 407 Cr.P.C. authorizes the Court to pass the order of transfer of cases in the event of any complicated question of law which gives room for an unusual difficulty. In the present case in hand, if the successor is permitted to deliver the judgment based on the evidence recorded and arguments heard by the predecessor, it would mean that the successor is permitted to act as an appellate Judge of his predecessor. Hence, S.C.No.419 of 2013 be transferred from the file of the learned I Additional District and Sessions Judge, Tirunelveli to the file of the learned I Additional District and Sessions Judge, Kanyakumari District at Nagercoil. In support of his contention, the learned counsel for the petitioner relied on the decision in Payare Lal vs. State of Punjab [AIR 1962 SC 690].

4 Per contra, the learned Additional Public Prosecutor appearing for the first respondent would submit that the petition filed under Section 407 of Cr.P.C. On the ground of demeanor is not legally sustainable. In a judgment reported in 2005 CrL.J. 2293 KER (DB), the defacto complainant has filed writ petition to transfer the case for delivering of judgment by the same Judge by exercising power under Article 226 of Constitution of India. However, the same was dismissed by the learned Single Judge and also confirmed by the Hon'ble Division Bench of this Court.

5 Further, the provision under Section 326 Cr.P.C was amended with effect from 18.12.1978 by incorporating Judge "from one Judge to another Judge" which clearly conferred jurisdiction to act as per Section 326 Cr.P.C. In the sessions case also, whatever decision rendered on the basis of interpretation of old provision under Section 350 Cr.P.C. by the



Hon'ble Supreme Court in Payare Lal case (supra) is not applicable to the amended provision of 326 Cr.P.C. as held by the Hon'ble Supreme Court in 1995(4) SCC 392 and 2011 (9) SCC 638 and 1999(9) SCC 551. In so far as provision under Section 407 of Cr.P.C. is concerned, there is no complicated question of law which gives room for unusual difficulties. In the case in hand, in view of the amended provision of 326 Cr.P.C., there is no question of complication for the learned Judge to appreciate the evidence recorded by his predecessor. Once provision under Section 326 Cr.P.C. comes into effect, petition under section 407 Cr.P.C. on the ground of demeanor of witness does not arise. Hence, the transfer petition is not maintainable and the same is liable to be dismissed.

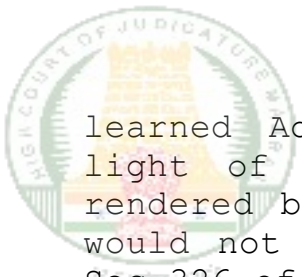
6 Heard the learned counsel for the petitioners and the learned counsel for the respondent and perused the materials on record.

7 The issue involved in the present Crl.O.P. is that whether the petition for transfer of case in S.C.No.419 of 2013 from the Court of the learned I Additional District and Sessions Judge, Tirunelveli to the Court of the learned I Additional District and Sessions Judge, Kanyakumari District at Nagercoil is to be allowed in the light of the decision cited supra.

8 In the case in hand, examination of witnesses have already been concluded arguments also advanced by both parties. At this stage, the present petition has been filed by the petitioner to transfer the case in S.C.No.419 of 2013 from the I Additional District and Sessions Court, Tirunelveli to the I Additional District and Sessions Court, Kanyakumari District at Nagercoil. The learned counsel for the petitioner strongly relied upon the decision of the Hon'ble Supreme Court in Payare Lal vs. State of Punjab [AIR 1962 SC 690] wherein the Hon'ble Supreme Court in para 11 held as under:

"11. It is true that Sec.350 of the code is a provision applying to all magistrates and, therefore also to a magistrate trying a warrant case. That however does not in our opinion decide the question. We think it relevant to observe that it is a right of an accused person that his case should be decided by a Judge who has heard the whole of it and we agree with the view expressed in Fernandez case 1958-2 Mad LJ 294 that very clear words would be necessary to take away such an important and well established right. We find no such clear words here."

9 The learned counsel for the petitioner also relied upon the decision of the Gujarat High Court in KOLI NANA BHANA AND OTHERS VS. STATE OF GUJARAT [1986 CRL L.J. 571] to state that a Judge should aware of the demeanor of the witnesses examined. The



learned Additional Public Prosecutor would submit that in the light of amended provision of Sec.326 Cr.P.C., the decision rendered by the Hon'ble Supreme Court in PAYARE LAL case (supra) would not apply to the present case. The amended provision of Sec.326 of Cr.P.C. reads as under:

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"Sec.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 witness whose evidence has already been recorded is necessary in the interest of justice, he may re-summon any such witness, and after such further examination, cross examination and re-examination, if any, as he may permit the witness shall be discharged."

10 Further, in support of his submission, the learned Additional Public Prosecutor relied upon the judgment of the Hon'ble Supreme Court in *Ranbir Yadav v. State of Bihar*, [(1995) 4 SCC 392] wherein it was held as under:

"17.To appreciate the above contentions of Mr Jethmalani it will be imperative to first refer to the legislative history behind Section 326 of the Code. In the Code of 1898 the corresponding section was Section 350 and, so far as is material for our purposes, read as under [Ed.: Prior to its amendment by Act 26 of 1915] :

"(1) Whenever any 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 Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself or he may re-summon the witnesses and recommence the inquiry or trial.



Provided as follows:

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and reheard;

(b) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial." (emphasis supplied)

In interpreting the words "ceases to exercise jurisdiction therein" in the above-quoted sub-section (1) some of the High Courts held that Section 350 was intended to provide for a case where an inquiry or trial had commenced before one incumbent of a particular post and that officer had ceased to exercise jurisdiction in that post and was succeeded by another officer, whereas some other High Courts held that it referred to the inquiry or trial and not to a particular post. Similarly the words "succeeded by another Magistrate" were interpreted by some High Courts as importing that the first Magistrate had left his post but other High Courts held that the word 'succeeded' should not be construed in the narrower sense. Though, in our view, the word 'therein' appearing after the words "ceases to exercise jurisdiction" in the context of the preceding words "in an inquiry or trial" admits of no doubt that it refers to the inquiry or trial, the Legislature thought it necessary to add the following sub-section to Section 350(1) by Section 4 of Act XVIII of 1923, to put the issue beyond any pale of controversy.

"(3) When a case is transferred under the provisions of this Code from one Magistrate to another, 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)."

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20. From a comparative reading of sub-section (1) of Section 350 as it stood prior to



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its amendment in 1955 and as it stands since then with the change in its numeral and inclusion of the word 'Judge' therein we find that the discretion earlier given to the Presiding Officer of the Court to act on the evidence recorded by his predecessor or partly recorded by his predecessor and partly recorded by him still remains. But so far as the other option is concerned, while earlier he could re-summon the witnesses and recommence the inquiry or trial – which necessarily meant a de novo trial – he can now only re-summon a witness who has already been examined for further examination and discharge him after such further examination, cross-examination and re-examination, if any. It is evident therefore that now the Magistrate or Judge can exercise his judicial discretion only for further examination of a witness already examined and not for fresh examination of witnesses for a fresh trial. Obviously, keeping in view the inevitable frequent changes in the office of the Magistrate and Judge and in order to provide a speedy trial the legislature has taken away the well-established right of the accused to claim a de novo trial and that of the court to so direct by express words of the amending statute of 1955. Considered in that perspective we are of the opinion that the case of Payare Lal [(1962) 3 SCR 328 : AIR 1962 SC 690] which was decided when Section 350 was operating in the field without its amendment of 1955 has no relevance here. In that case, Payare Lal and another were prosecuted for offences under Section 5(2) of the Prevention of Corruption Act, 1947. The 1952 Act which laid down the procedure for trial of such offences required the trial to be held by a Special Judge appointed under it and in accordance with certain provisions of the Code of 1898 as mentioned in Section 8 of 1952 Act. The Special Judge accordingly, heard the evidence but before he could deliver the judgment he was transferred and was succeeded by another Special Judge. The latter did not recall the witnesses and did not hear the evidence over again but proceeded with the trial without any objection from either side from the stage at which his predecessor had

The trial ultimately ended in conviction and in appeal the Punjab High Court held that Section 350 of the Code of 1898 applied to the



trial before a Special Judge in view of Section 8(1) of the 1952 Act and that, therefore, the succeeding Special Judge was entitled to proceed on the evidence recorded by his predecessor. In setting aside the above finding of the Punjab High Court this Court held that the 1952 Act did not intend that Section 350 of the Code of 1898 would be available as a rule of procedure prescribed for the trial of warrant cases to a Special Judge as the Special Judge was not a Magistrate for the purpose of the Act nor did the Act require that he was deemed to be such. This Court further held that the succeeding Special Judge, therefore, had no authority under the law to proceed with the trial of the case from the stage at which his predecessor had left it and that the conviction of the appellants could not be supported as he (the succeeding Special Judge) has not heard the evidence himself. That necessarily meant, according to this Court that the proceeding before the succeeding Special Judge was clearly incompetent. In negating the contention of the respondent-State therein that the defect was a mere irregularity and the conviction of the appellant could, if sustainable on evidence, be upheld under Section 537 of the Code of 1898 (which corresponds to Section 465 of the Code) this Court held, relying upon the following observations of the Privy Council in *Pulukuri Kottaya v. Emperor* [AIR 1947 PC 67 : 51 CWN 474 : 49 Bom LR 508] :

"When a trial is conducted in a manner different from that prescribed by the Code (as in *N.A. Subramania Iyer* case [*N.A. Subramania Iyer v. King Emperor*, (1901) LR 28 IA 257 : 25 Mad 61]), the trial is bad, and no question of curing an irregularity arises; but if the trial is conducted substantially in the manner prescribed by the Code, but some irregularity occurs in the course of such conduct, the irregularity can be cured under Section 537, and nonetheless so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code."

that the case fell within the first category mentioned by the Privy Council, being one of lack of competency and not of irregularity. With the above findings the Court sent the case back for re-trial."



11 The learned Additional Public Prosecutor also relied upon the decision of the Hon'ble Supreme Court in *Bhaskar @ prabaskar & others vs. State rep. By Inspector of Police, Vellore Taluk Police Station [(1999)8 SCC 551]*, wherein the Hon'ble Supreme Court observed as under:

"15. The archaic concept was that the very same judicial personage who heard and recorded the evidence must decide the case. The concept was in vogue for a long time. But over the years it was revealed in practice that fossilisation of the said concept, instead of fostering the administration of criminal justice, was doing the reverse. Very occasionally judicial officer of one court was changed and was repealed by another. As evidence had to be recorded afresh by the new officer under the old system, witnesses who were already examined in the cases at the cost of considerable strain and expenses - not only to them but to the exchequer - were re-summoned and re-examined. The litigation cost thereby inflicted on the parties used to soar up. The process would have to be repeated over and again if such next judicial personage also was changed. Eventually it was learnt that the object sought to be achieved by such repetitions, when compared with the enormous cost and trouble, was not of much utility. Hence, the legislature wanted to discontinue the aforesaid ante-diluvian practice and decided to afford option to the successor judicial officer. Legislature conferred such option only to the magistrates at the first instance and at the same time empowered them to reexamine the witnesses already examined if they considered such a course necessary for the interest of justice. As the new experiment showed positive results towards fostering the cause of criminal justice the Law Commission recommended that such option should advisedly be extended to judges of all other trial courts also"

12. In *Kerala Streevedi vs. State of Kerala and another* (2005 Cr1.L.J. 2293) the Kerala High Court held as under:

"8. This case is already more than five year old. Both the defacto complainant and the 2nd respondent are highly placed. While the complainant is a senior I.A.S. Officer now holding the post of Commissioner for Rural Development in the State Government, the 2nd



respondent had been a cabinet rank Minister when the allegations are made against him and even now, he is a Member of the Legislative Assembly. We are not concerned with the merits of accusation, as the same need to be decided by the competent court of Magistrate where it is pending adjudication. After concluding the trial by crossing so many legal obstacles, the arguments are in part-heard stage. It has been said by the Supreme Court in A.R.Anthulay's case (Abdul Rehman Antulay vs. R.S.nayak (1992) 1 SCC 225 : AIR 1992 SC 1701 (3) that speedy criminal trial is a fundamental right guaranteed under Article 21 of the Constitution of India and the said principle has been reiterated time and again by the Supreme Court and various High Courts. Pendency of cases of this nature for five years itself can be called as inordinate delay and noting the same the learned Single Judge, in criminal proceedings referred to above, had set the dates for completion of the defence evidence and also disposal of the case. The writ petition can be a cause for further delay. But this is not the cause for not entertaining this writ petition and we are of the considered view that for the reasons mentioned infra, the writ petition is fit to be dismissed."

13. In H.M.Chandragowda & another vs. State of Karnataka (2001 CrL.L.J. 2710) the Karnataka High Court held as under:

"Transfer of a case from one Court to another Court solely on the ground that the Judge who recorded the evidence by observing the demeanour of the witness, may be inexpedient, but cumulatively, with other circumstances, it may be availed in a given case, to effect transfer of a case. It cannot be forgotten that a demeanour of a witness, unless recorded, cannot be availed of to reject or accept evidence and it could be availed of as a factor in assessment of evidence. However, demeanour is not a conclusive factor in evidence assessment. If the demeanour of a witness is recorded, it would be available not only to the Judge who recorded the evidence, but also to the successor Judge in assessment of evidence. It is clear that demeanour of a witness, observed by a Judge cannot be the sole consideration in determination of expediency for transfer of a case to the Judge



who recorded the evidence, when he is transferred in the middle of a trial. Acceptance of such a principle, as of universal application, has its grave administrative difficulties, including an apprehension unfounded or toherwise as to the quality of justice that may be rendered in the case."

In view of the above, the contention of the petitioner that a Judge should aware of the demeanor of witness cannot be accepted and the same is liable to be rejected.

14. In Chandigarh Administration and another vs. Jasmine Kaur and others (2014)10 SCC 521) the Hon'ble Supreme Court held as under:

"60.5 Remitting the matter for denova trial should be exercised as a last resort and should be used sparingly when there is grave miscarriage of justice in the light of illegality, irregularity, incompetent or any other defect which cannot be cured at an appellate stage. The appellate court should be very cautious and exercise the discretion judiciously while remanding the matter for de nova trial."

15 The decision relied upon by the petitioner viz., PAYARE LAL case (supra) was rendered by the Hon'ble Supreme Court prior to the amendment to Section 326 Cr.P.C. which conferred jurisdiction on the Successor Judge. Pursuant to the PAYARE LAL case (supra), the Hon'ble Supreme Court in NITINBHAI SAEVATILAL SHAH & ANOTHER VS. MANUBHAI MANJIBHAI PACHAL & ANOTHER [CDJ 2011 SC 838] in paragraph 10 held as under:

"10. Section 326 of the Code deals with the procedure to be followed when any Magistrate after having heard and recorded the whole or any part of the evidence in an enquiry or a trial, ceases to exercise jurisdiction therein and is succeeded by another Magistrate who exercise such jurisdiction.

11. Section 326 of the Code reads as under:

"326. conviction or commitment on evidence partly recorded by one 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 exercise 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 interest of justice, he may resummon any such witness, and after such further examination, cross examination and re-examination, 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 under Section 322 or in which proceedings have been submitted to a superior Magistrate under Section 325."

16. The manner in which the record in summary trials is to be maintained is provided in Section 263 of the Code. Section 264 mentions that:

"264. Judgments in cases tried summarily- In every case tried summarily in which the accused does not plead guilty, the Magistrate shall record the substance of the evidence and a judgment containing a brief statement of the reasons for the finding."

Thus, the Magistrate is not expected to record full evidence which he would have been, otherwise required to record in a regular trial and his judgment should also contain a brief statement of the reasons for the finding and not elaborate reasons which otherwise he would have been required to record in regular trials."

16 In Anil Kumar Agarwal vs The State Of U.P (Crl.Mis. Application No.67 of 2014 dated 4.12.2014) Allahabad High Court held as under:

"The main controversy is on the issue; Whether transferred judge have 'ceased to exercise jurisdiction in that case ?

The learned Counsel for the applicant would submit that transferred ADJ has not been transferred from session division Lucknow to any

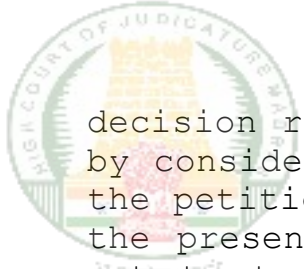


other sessions division. In view of notification of State Government issued on 19.2.2008 having no.444/chha:-Pu--9-2008-31(8)/08 by Home(Police) Section-9 every Session Judge and Additional Session Judge have been authorised to act as Special Judge under the provisions of Prevention of corruption Act,1988 for the area in that district or on those districts over which they are competent to exercise jurisdiction as Sessions Judge or Additional Sessions Judge. As such on transfer of a particular Additional Session Judge from one court to another in the same district would continue to exercise the powers of Special Judge under the provisions of Prevention of Corruption Act 1988. Therefore, the term "have ceased to exercise jurisdiction in that case" would not attract in this case and the earlier Presiding Judge of Special Judge Anti Corruption (UPSEB) would not have ceased to exercise jurisdiction in this case. In such situation the provisions of section 326 CrPC of Code shall not apply. It is now well settled that if section 326 CrPC would not apply the right of accused to get his case decided by the judge who partly or wholly recorded the evidence in the case will subsist and accused would be entitled to invoke his aforesaid right as held in *Nitinbhai Saevatilal Shah v. Manubhai Manjibhai Panchal*, (2011) 9 SCC 638.

The Law Commission in its 41st Report recommended in this regard:

"It is obviously desirable that in serious cases the whole evidence should be heard by the Judge who finally decides the case. However, having regard to the realities of the situation, it is necessary to make some provision for cases where such transfers do take place, because a mandatory provision for a de novo trial may often cause considerable inconvenience and hardship. We, therefore, propose to extend the section to Judges of Sessions Courts by referring to 'Judge or Magistrate' instead of 'Magistrate' only."

The aforesaid recommendation was later accepted by the Government and was finally approved by Parliament through Section 27 of Act 45 of 1978."



decision relied upon by the petitioner in PAYARE LAL case (supra) by considering the scope of section 350 Cr.P.C. is not helpful to the petitioner. Further, section 407 Cr.P.C. would not attract on the present case on hand. Therefore, no prima facie case is made out to transfer the case and no merits in the Crl.O.P. and the same is liable to be dismissed.

18 In the result, Criminal original petition fails and accordingly dismissed. Consequently, Crl.MP(MD)No.2357 of 2018 is closed.

Sd/

Assistant Registrar(CS-III)

/True copy/

Sub Assistant Registrar

To

I Additional District and Sessions Judge, Tirunelveli

Crl.O.P.(MD) No.4802 of 2018
and Crl.M.P.(MD) No.2357 of 2018
08.06.2018

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