

Ramesh Kumar Soni's Case - Effect on Forum for Trial

The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007, came into force with effect from 22nd February 2008. The amendment *inter alia* changed the forum for the trial of offences punishable under sections 317, 318, 326, 363, 363-A, 365, 377, 392, .393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477A, from that of a Court of Magistrate of First Class to that of a Court of Sessions. The portions of the amendment, relevant for the purposes of this article are hereinbelow reproduced:

“An Act further to amend the Code of Criminal Procedure, 1973 in its application to the State of Madhya Pradesh.

Be it enacted by the Madhya Pradesh Legislature in the Fifty-eighth Year of the Republic of India as follows:

1. Short title- This Act may be called the Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007.

2. Amendment of Central Act No. 2 of 1974 in its application to the State of Madhya Pradesh - The Code of Criminal Procedure, 1973 (No. 2 of 1974)(hereinafter referred to as the Principle Act), shall in its application to the State of Madhya Pradesh, be amended in the manner hereinafter provided.

3. Amendment of Section 167 - ...

4. *Amendment of the First Schedule - In the First Schedule to the Principle Act, under the heading “I-Offences under the Indian Penal Code in column 6 against section 317, 318, 326, 363, 363-A, 365, 377, 392, .393, 394, 409, 435, 466, 467, 468, 471, 472, 473, 475, 476, 477 and 477A, for the words “Magistrate of First Class” wherever they occur, the words “Court of Sessions” shall be substituted.”*

February, 2008 and was published in Madhya Pradesh Gazette (Extra Ordinary) on 22nd February, 2008.

3 No sooner aforesaid amendment came into force on 22nd February 2008; then a question arose as to whether the same is prospective and will be applicable only to offences committed after that date or would be retrospective and also govern the offences committed before that date and were either being investigated or were pending in the Court or the date of filing of charge-sheet / cognizance by the Magistrate, would be the date of reckoning?

4. In this scenario, the Sessions Judge, Jabalpur made a reference to the High Court under section 395 of the Code of Criminal Procedure; whereon, a full bench of the High court of Madhya Pradesh in Re: Amendment of First Schedule of Criminal Procedure Code by Criminal Procedure Code (M.P. Amendment) Act, 2007, reported in 2008 (3) MPLJ 311 held that all cases pending before the Court of Judicial Magistrate First Class as on 22nd February, 2008 remained unaffected by the amendment and were triable by the Judicial Magistrate First Class as the Amendment Act did not contain a clear indication that it was retrospective and even the cases that were pending on the date on which the amendment came into force, shall be affected and shall have to be committed to the Court of Sessions for trial. The Court further directed that all such cases as were pending before the Judicial Magistrate First Class on the date of amendment and had subsequently been committed to the Court of Sessions, shall be sent back to the Judicial Magistrate First Class in accordance with law.

5. Relying upon the decision of the full bench, one Ramesh Kumar Soni, accused in Crime No 129 of 2007, for commission of offences punishable u./ss. 408, 420, 467, 468 and 470 of the I.P.C., registered on 18.05.2007 at Police Station Bhedaghat, Jabalpur, claimed to be tried before the court of Judicial Magistrate First Class and filed an application before

the Sessions Court for remission of the case back to a Judicial Magistrate for trial.

6. After unsuccessful challenge before the Sessions Court Jabalpur and High Court of Madhya Pradesh, accused Ramesh Kumar Soni preferred an Appeal before the Apex Court. Relying upon the principle laid down by the apex Court in the cases of Jamuna Singh and Ors. v. Bahdai Shah, AIR 1964 SC 1541, Devrapally Lakshminarayana Reddy and Ors. v. Narayana Reddy and Ors. (1976) 3 SCC 252 and Kamalapati Trivedi v. State of West Bengal (1980) 2 SCC 91 the Supreme Court observed that a case is said to be instituted only when the Magistrate takes cognizance thereof on filing of charge sheet.

7. Referring to the law laid down in the cases of New India Insurance Company Ltd. v. Smt. Shanti Misra, Adult (1975) 2 SCC 840, Hitendra Vishun Thakur and Ors. etc V. State of Maharashtra and Ors. (1994) 4 SCC 602, the Apex Court reiterated the legal position with regard to retrospective operation of a statute in the following words:

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(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial, is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied

retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication.”

8. Consequently, the Supreme Court held that no charge-sheet had been filed against the appellant Ramesh Kumar and the Magistrate had not taken cognizance of any offence against him on the date of amendment; therefore, his case was covered by the amendment and it was rightly committed to the Court of Session for trial. However, on the strength of aforesaid decisions it was held that an amendment changing the forum of trial was procedural in nature and in the absence of any indication to the contrary in the amending act, was applicable retrospectively. As a result it was further held that the Full Bench of the High Court had erred in holding that the amendment did not affect the cases that had been instituted prior to coming into force of the amending act and were pending on that date. The amendment being retrospective in nature, was applicable to all those cases that were pending before the Magistrate on the date of amendment and such cases ought to have been committed to the Court of Session. Consequently, the decision of the Full Bench was overruled.

The judgment of the Full Bench had been rendered in the year 2008 and following that judgment the Magistrates all over the state of Madhya Pradesh had proceeded with the trial of such case and many such cases had been disposed of. Obeying the directions issued by the Full Bench, the Courts of Session had remitted back all those cases that were pending on the date of amendment before the Magistrate and had been committed pursuant to the directions of the Full Bench. In such cases Magistrates had proceeded with the trial and had disposed of many such cases. The logical consequence of overruling the judgment of Full Bench in ordinary course would have been invalidation of all such proceedings, which would have resulted in tremendous hardship to the accused as the cases that were pending before the Magistrates on the date of amendment, and had meanwhile reached advanced

stages of trial would have had to be committed to the Court of Sessions. The Supreme Court, however, was alive to this eventuality, and observed that *"the trial of the cases that were sent back from Sessions Court to the Court of Magistrate First Class under the orders of the Full Bench may also have been concluded or may be at an advanced stage. Any change of forum at this stage in such cases would cause unnecessary and avoidable hardship to the accused in those cases if they were to be committed to the Sessions for trial in the light of the amendment and the view expressed by us."*

(Emphasis supplied)

After considering numerous authorities on the point, the Supreme Court invoked the doctrine of prospective overruling. Consequently, the judgment of the Full Bench, no doubt, was overruled but only prospectively, thus saving the cases which had already been decided from being reopened and the cases which had reached advanced stages of trial before the Magistrate, from committal. It may be noted however that the Supreme Court refrained from elaborating as to what constitutes an "advanced stage of trial"

7. The judgment gives rise to following questions:

1. Which stage of a case may be considered to be an advanced stage of a case ?
2. What would be the position if a Magistrate, being of the opinion that a case is not in advanced stage of trial, commits it and the Court of Sessions is of the opinion that the case had reached the advanced stage? In such a case, whether the sessions court is empowered to remit the case back to the Court of the Magistrate?
3. What would be the forum for trial where an accused had absconded and the case of co-accused had been disposed of by Judicial Magistrate First Class before 22nd Feb 2008 and absconding accused appears or is brought before court after 22nd Feb 2008?

Now we shall consider aforesaid questions one by one.

What constitutes advanced stage of trial in a case?

The Supreme Court has not dilated upon the phrase "advanced stage of trial" in the judgment of Ramesh Kumar Soni but in the case of Sathish Mehra v. State of N.

C. T. of Delhi, 2013 CRI. L. J. 411 advanced stage has been held to be the stage after framing of charge against the accused. In the cases of Akil v. State of NCT of Delhi, 2013 CRI. L. J. 571 and State of U. P. v. Shambhu Nath Singh, 2001 CRI. L. J. 1740 advanced stage has been held to be the stage when examination of witnesses begin. However, we shall have to distinguish between "advanced stage of a **case**" and advanced stage of **trial in a case**". The trial of a case begins when the Court applies its mind to facts of a case with a view to frame a charge. As such framing of charge may be advanced stage of a case but not advanced stage of trial in a case.

In any case, if we were to assume that a case reaches advanced stage of trial with framing of charge, it may not be in conformity with the purpose of saving clause rather it will adversely affect the retrospective operation of the procedural amendment. Take for example, a case where the charge has been framed by the Judicial Magistrate of First Class and in view of the mandate of the Supreme Court the case is committed to the Court of Session. In such a case the Court of Session may reconsider the framing of charge and if *prima facie*, a case is made out, may frame the charge. Such a procedure would neither cause any significant amount of delay in the case nor entail any substantial hardship or prejudice to any party. As such, in this peculiar scenario, trial of a case cannot be said to be in an advanced stage, merely because charge has been framed therein.

To gather true import of the phrase "advanced stage of trial", reference may have to be made to paragraph nos. 24 & 25 of the judgment in the case of Ramesh Kumar Soni, which read as follows:

24. *In Rajasthan State Road Transport Corporation and Anr. V. Bal Mukund Bairwa (2009)4SCC299, this court relied upon the observation made by Justice Benjamin N. Cardozo in his famous compilation of lectures: "The Nature of Judicial Process" that in the vast majority of cases, a judgment would be retrospective. It is only where the hardship are too great that retrospective operation is withheld.'*

25. *The present case, in our opinion, is one in which we need to make it clear that the overruling of the Full Bench decision of the Madhya Pradesh*

High Court will not affect cases that have already been tried or are at an advanced stage before the Magistrates in terms of the said decision.

8. "Unnecessary and avoidable hardship to the accused" sought to be avoided by retrospective operation of the amendment by the Apex Court in Ramesh Kumar's case, would really be caused in the cases where material witness / witnesses have been examined on behalf of the prosecution. This is so, because in case a *de novo* trial is held after examination of such witness / witnesses those witness / witnesses would have to be examined afresh and their statement before Magistrate would be treated as previous statement under section 145 of the Evidence Act and the witness may be cross-examined as to that previous statement in addition to the one under section 161 of the Cr.P.C. and contradiction may arise which may affect the merits of the case

There is another angle to the problem. A material witness, who had supported the prosecution case before Magistrate, may be pressurized or influenced to turn hostile in the trial held *de novo*. Likewise, a witness who had turned hostile before the Magistrate, may support the prosecution case in the Court of Session. In both situations, the merits of the case would be affected, causing prejudice to the parties.

Now the question arises, who is a material witness? The phrase material witness has been examined by the Apex court in the case of **Narain v. State of Punjab, AIR 1959 SC 484**. The Court observed that a witness essential to the unfolding of the narrative on which the prosecution case is based, is a material witness. Whether a witness is so essential or not would depend on whether he could testify to any part of the prosecution case or whether the evidence led disclosed that he was so situated that he would have been able to give evidence of the facts on which the prosecution relied.

9. Thus, the trial of a case may be said to be in advanced stage where a material witness / witnesses have been examined on behalf of the prosecution. In this regard, it is not so much the number of the witnesses examined by the prosecution but the nature of the evidence given by such witness / witnesses, is what would have to be

seen. In a given case many witnesses might have been examined on behalf of the prosecution but none might have deposed to any essential part of the prosecution case, or the evidence of such witnesses might have been of a formal character. In both situations the case may not be said to be at the advanced stage of trial. On the other hand, if only single witness is examined on behalf of the prosecution but that witness unfolds the narrative on which the prosecution is based or deposes to any essential part of the prosecution case, then the witness would come under the category of material witness and the trial would be said to be in advance stage. Either way, one thing is certain that in a case in which only charge is framed but no witness has been examined or only formal witnesses have been examined, cannot be said to be in advance stage of trial.

What would be the position if a Magistrate, being of the opinion that a case is not in advanced stage of trial, commits it and the Court of Sessions is of the opinion that the case had reached the advanced stage? In such a case, whether the sessions court is empowered to remit the case back to the Court of the Magistrate?

10. The answer of this question is dependent upon the jurisdiction of Sessions Court to try cases and powers of the Sessions Court when a case is committed.

11. In **Sudhir v. State of Madhya Pradesh, AIR 2001 SC 826** it was held that :

A Sessions Judge has the power to try any offence under the Indian Penal Code. It is not necessary for the Sessions Court that the offence should be one exclusively triable by a Court of Sessions. The employment of word 'may' at one place and the word 'shall' at another place in same sub-section (1) (a) of S. 228 unmistakably indicates that when an offence is not triable exclusively by Sessions Court it is not mandatory that he should order transfer of case to the Chief Judicial Magistrate after framing a charge.

12. In **Sammun v. State of M.P., 1988 CRI. L. J. 498 (M.P.)** also it is held that Once the case is committed to the Sessions Court, it becomes clothed with the

jurisdiction to try it and the mere fact that the offence disclosed is not one exclusively triable by the Sessions Court does not divest it of that jurisdiction. The provision in S. 228 (1)(a); therefore, has to be interpreted as clothing the Court with a discretion to transfer the case for trial to the Chief Judicial Magistrate.

13. In aforesaid backdrop, the question being considered shall have to be looked into from a different perspective. Such cases would have been committed by the Magistrate in view of the directions made by the apex Court in Ramesh Kumar Soni's case because the Magistrate was of the opinion that the trial of the case had not reached advanced stage. If the Sessions Judge is, for the reasons to be recorded, of the opinion that the trial had indeed reached advanced stage, it may deal with the matter in the same manner as it would deal with the matter in which it is of the opinion that the case is not triable exclusively by a Court of Sessions. That is to say, it may either try the case itself or remit the case to the Court of Chief Judicial Magistrate for trial in accordance with law. Both options are within the scope of the jurisdiction of Sessions Court but Session Court has to exercise this jurisdiction so that the purpose of saving is not frustrated and no prejudice is caused to either party. Thus, there should be no doubt that after receiving the case on committal the Court of Session has jurisdiction to remit it to the Court of C.J.M.

What would be the forum for trial where an accused had absconded and the case of co-accused had been disposed of by Judicial Magistrate First Class before 22nd Feb 2008 and absconding accused appears or is brought before court after 22nd Feb 2008?

15. Answer of this question is dependent upon the stage of the proceedings at which the accused had absconded. If the accused had absconded at the initial stage of the case i.e. before the examination of any material prosecution witness then certainly the forum would be Sessions Court in spite of the fact that the case of co-accused had been disposed of by the Judicial Magistrate First Class and the plea of parity would not be available to the accused who appears or is brought before the Court after the commencement of the Code of Criminal Procedure (Madhya Pradesh

Amendment) Act, 2007.

16. However, the situation would be different, where the accused had absconded after examination of material prosecution witness / witnesses. In that case, it shall be deemed that trial of the case had reached advanced stage and the trial shall be continued before the Judicial Magistrate, without the case of the absconding accused being committed to the Court of Session.

Conclusions

- (1) The Code of Criminal Procedure (Madhya Pradesh Amendment) Act, 2007 is retrospective in its operation.
- (2) Retrospective operation of the Amendment Act will not affect the cases wherein the trial before the Magistrate has reached an advanced stage.
- (3) The trial of a case may be said to have reached an advanced stage where any material witness / witnesses have been examined by the prosecution.
- (4) A witness is material who is essential to the unfolding of the narrative on which the prosecution is based or who deposes to any part of the prosecution case but is not a formal witness.
- (5) In a case in which only charge is framed but no witness has been examined or only formal witnesses have been examined would not come under the category of a case which has reached an advanced stage.
- (6) Where the Magistrate being of the opinion that the case is not at the advanced stage of trial, commits it to the Court of Session but the Sessions Court differs and is of the opinion that the trial in the case is already in advanced stage, it has option either to try the case itself or remit it back to the Chief Judicial Magistrate or Judicial Magistrate of First Class but Session Court has to exercise this Jurisdiction in such a way that the purpose of saving is not frustrated and no prejudice is caused to either party.
- (7) If the accused had absconded before commencement of amending Act, before the examination of any material witness by the prosecution, the forum for trial would be Sessions Court if he appears or is brought before the Magistrate after commencement of the Act, regardless of the fact that the case of co-accused had been disposed off by

the Judicial Magistrate First Class.

(9) In aforesaid circumstances, if the accused had absconded after the examination of material witness / witnesses, the trial before the Judicial Magistrate First Class shall continue.

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