A BHASKAR @ PRABASKAR AND ORS.

v.

STATE REPRESENTED BY INSPECTOR OF POLICE, VELLORE TALUK POLICE STATION, VELLORE

B SEPTEMBER 22, 1999

[K.T. THOMAS AND M.B. SHAH, JJ.]

Criminal Procedure Code, 1973—S.326 (as amended by Act 45 of 1978)—Trial of offences by Designated TADA Court—Abolition of Designated C *Court on expiry of TADA Act—Transfer of part-heard cases to regular Courts—Power of succeeding Judge to act on the evidence already recorded—Demand for de novo trial—Rejected—Validity of—Held, Trial Court can act upon the evidence recorded by TADA Court—Accused not entitle to de novo trial of the case—Terrorist and Disruptive Activities (Prevention) Act, 1987—Ss.3 & 5—Penal Code, 1860—S.302 read with S.120-B—* D *Tamil Nadu Public Property (Prevention of Damage and Loss) Act, 1992—S.4.*

Terrorist and Disruptive Activities (Prevention) Act, 1987—S.18—Applicability of.

E *Words and Phrases :*

"Succeeded by another Judge" meaning and scope of in the context of S.326 of the Criminal Procedure Code, 1973.

F **Appellant was prosecuted by a Designated Court constituted under the Terrorist and Disruptive Activities (Prevention) Act, 1987 for offences under S.302 read with S.120-B of IPC and S. 4 of the Tamil Nadu Public Property (Prevention of Damage and Loss) Act, 1992 besides under Ss. 3 and 5 of TADA Act. During the progress of trial, TADA Act expired and** G **TADA Courts were abolished. Consequently, part-heard cases were transferred to regular Court for trial of remaining offences. In the instant case, Sessions Court decided to proceed with the trial from the stage at which the Designated Court left the trial by acting upon the evidence already recorded in the case. Appellant's demand for *de novo* trial was rejected. On appeal, High Court held that the Trial Court was not obliged to hold** H ***de novo* trial in view of S.326 of the Criminal Procedure Code. Hence the**

present appeal. A

Dismissing the appeal, the Court

HELD : 1.1. Appellant-accused is not entitled to *de novo* trial of case and Trial Court can act upon the evidence already recorded by the Designated Court. [118-B] B

1.2. S.326 of the Code empowers the succeeding Judge or Magistrate to act on the evidence already recorded in the case by his predecessors. For application of S.326 of the Code three postulate must be concatenated together. First is, a Judge should have recorded the evidence in the case C either in part or in whole. Next is, the said Judge should have ceased to exercise jurisdiction in that case, and the third is, another Judge should have succeeded him and such successor Judge must have jurisdiction to try the offences concerned. In the Instant case, the Judge of Designated Court, a Sessions Judge who partly recorded the evidence in the case, ceased to have jurisdiction on account of abolition of that Court. The Sessions Judge D to whom the case is transferred for trial of the offences charged must be regarded as a successor Judge who can act on the evidence already recorded and proceed with the matter. [120-G; H; 121-A; 122-G]

2. No prejudice would be caused to the accused if the evidence already E on record is treated as evidence in the case as he can invoke the powers envisaged in the proviso to sub-section (1) of Section 326 of the Code. If the successor Judge is of the opinion that further examination of any witness, whose evidence has already been recorded is necessary in the interest of justice, the Judge would re-summon such witness either for further examination or further cross-examination and re-examination. A contrary F interpretation would lead to unwholesome repetition of the entire exercise involving considerable cost to the exchequer, financial strain to the accused and waste of time of the courts. Greater than all those, it would inflict untold inconveniences to the witnesses who are the innocent parties in the case, Witnesses who were once summoned before the Court and have undergone the agony should be spared from resummoning unless it is G absolutely necessary to meet the ends of justice. [123-E; 123-D]

3. The legislative intention is clear from a reading of Section 326 of the Code that the words "succeeded by another Judge" must get a wide amplitude. It is for the said purpose that sub-section (2) is incorporated H

bringing even cases transferred from one Judge to another, within the scope of the Section. The words "Such jurisdiction" in the sub-section (1) are not intended to narrow down the ambit of the provision to Judges who could have exercised exactly the same jurisdiction which his predecessor Judge exercised. It is enough that the successor judge has jurisdiction to try the offences sought to be proved against the accused. Initially the section was meant to apply only to cases before Court of Magistrate. Subsequently on the recommendation of Law Commission the Act was amended and the application of the Section was extended to Judges of all Trial Courts also. [121-B; C; G]

4. S.18 of the TADA Act, enabling the Designated Court to transfer the case to regular courts is not applicable in the instant case. Under the said provision, when the Designated Court forms an opinion, that it has no jurisdiction to try any of the offences involved in the case, then it has power to transfer the case to the Court having jurisdiction to try such offence. However, in the instant case, the matter was transferred on account of abolition of the Designated Court established under TADA. [118-C; H; 119-A]

Niranjan Singh Karam Singh Punjabi **v.** *Jitendra Bhimraj Bijja,* **AIR (1990) SC 1962, held inapplicable.**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 986 of 1999.

From the Judgment and Order dated 2.8.99 of the Madras High Court in Crl.O.P. No. 12482 of 1999.

S. Sivasubramaniam, S. Thoananjayay and M.A. Chinnaswamy for the Respondent.

The Judgement of the Court was delivered by

THOMAS, J. Leave granted.

This is typical of procrastination of an already long drawn trial. But the irony is that this is at the instance of the accused who should have normally complained of prolongation of his agony in facing the ordeal of a criminal prosecution. At one level almost fifty witnesses have been examined by the prosecution, but when there was a change of venue of the trial the accused demanded that the whole exercise should of repeated *de*

novo. However, the Court to which he applied for such *de novo* trial spurned down his request and proposed to proceed from where the erstwhile forum arrived at with the trial of the case. The accused then approached the High Court for a direction that the trial should be conducted afresh over again but he did not succeed in the High Court as a Single Judge declined to reverse the progress of the trial thus far attained. This appeal is at the instance of the accused. After hearing learned counsel for the appellant we did not feel the necessity to call upon the respondent State to answer the grounds taken up by the appellant. Hence we dispose of this appeal on merits against the appellant.

Appellant was challanned before a Designated Court at Madras (now Chennai) which was constituted under the Terrorist and Disruptive Activities (Prevention) Act 1987 ('TADA' for short). The Judge of the Designated Court framed the charge against him for offences under Section 302 read with Section 120B IPC and Section 4 of the Tamil Nadu Public Property (Prevention of Damage and Loss) Act, 1992, besides Sections 3 and 5 of TADA. During the progress of the trial the appellant was released on bail and he continues to be at large on the strength of the said bail order.

When the period of TADA expired by efflux of time the Public Prosecutor seems to have withdrawn the offences under TADA from the present prosecution. More than that, the Designated Courts under TADA in the State of Tamil Nadu were closed down after the expiry of the said period, although such courts could still have continued to function by virtue of Section 1(4) of TADA.

Be that as it may, in the meanwhile, the present case was made over to the court of Additional Sessions Judge, Vellore (Tamil Nadu) as per an order dated 31.12.1996 for trial of the remaining offences. The said Sessions Court then proposed to proceed with the trial from the stage at which the Designated Court had ceased to function by keeping the evidence already recorded before the Designated Court as duly recorded evidence in the case. Appellant objected to the aforesaid course and demanded a *de novo* trial. But the learned Sessions Judge over-ruled the objections raised by the appellant as per a reasoned order pronounced by him on 30.7.1998. Appellant persisted with his objection by approaching the High Court under Section 482 of the Code of Criminal Procedure (for short 'the

A Code') which ended up in the impugned order.

Learned Single Judge of the High Court found that the Trial Court is not obliged to hold a *de novo* trial in view of Section 326 of the Code. Appellants contended that the trial under TADA is materially different from a trial in the Sessions Court particularly in view of the narrower scope
B of admissibility of evidence in the Sessions Court. He further contended that there is no provision for *de novo* trial under TADA and hence a resort to Section 326 of the Code for the purpose of securing continuity in the trial is impermissible.

C Appellant relied on the decision of this Court in *Niranjan Singh Karam Singh Punjabi* v. *Jitendra Bhimraj Bijja*, AIR (1990) SC 1962 to buttress up his contention. When a Designated Court took the view that the offences involved in that case were not triable by it, it was held that the course then open was to transfer the case for trial to the court having jurisdiction under the Code as provided in Section 18 of the TADA.
D Learned Single Judge of the High Court did not find any use to countenance the said contention on the premise that the question now involved would not fall under Section 18 of TADA.

The position which developed in the present case was on account of
E abolition of the Designated Court established under TADA. No offence defined under that Act can be tried by any other court. Section 18 of TADA is only for the limited purpose of enabling a Designated Court to transfer the case for trial to another court having jurisdiction under the Code to proceed with the trial in a particular situation. Section 18 of TADA is extracted below :

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> "*18. Power to transfer cases to regular Courts.* — Where, after taking cognizance of any offence, a Designated Court is of opinion that the offence is not triable by it, it shall, notwithstanding that it has no jurisdiction to try such offence, transfer the case for the trial
G of such offence to any Court having jurisdiction under the Code and the Court to which the case is transferred may proceed with the trial of the offence as if it had taken cognizance of the offence."

It is clear from the aforesaid provision that when the Designated Court forms an opinion, that it has no jurisdiction to try any of the offences
H involved in the case then that case shall be transferred to the court having

jurisdiction under the Code although the Designated Court had already taken cognizance of the offences. It is pertinent to note from Section 18 that once the case is so transferred then the transferee court has the power to proceed with the trial "as if it had taken cognizance of the offence". In other words, the transferee Court can start from the stage upto which the Designated court proceeded.

Even so Section 18 of TADA would not arise in the present case because the Designated Court itself has ceased to exist during the progress of the trial. In fact, appellant can heave a sigh of relief at least for getting extricated from the clutches of the offences under TADA because of the disappearance of Designated Courts under TADA in the State of Tamil Nadu to try such offences.

No doubt normally offences under Sections 302 and 120B of the IPC etc. are triable by Court of Sessions. A Designated Court established under TADA could try such offences only on the strength of a charge framed against the appellant for those offences along with offences under TADA. Under Section 12 of TADA, all Designated Courts can try any other offence also, while trying any offence under TADA if such other offence is also triable in the same case together with the offence under TADA. But a Sessions Court cannot try an offence under TADA even in conjunction with other non TADA offences. Section 12(1) of TADA reads thus :

> "When trying any offence, a Designated Court may also try any other offence with which the accused may, under the Code, be charged at the same trial if the offence is connected with such other offence."

So the fall out of non-existence or cessation of the existence of a Designated Court is that no offence under TADA can be tried against any accused. But what would happen to the offences not falling under TADA, which could be tried in regular Sessions Court? The answer is simple that the case then must go for trial to a regular court.

It is in the above context that Section 326 of the Code has to be read. That section is extracted below :

> "*326. Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.* – (1) Whenever any Judge or

A Magistrate after having heard and recorded the whole or any part of the evidence in any 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
B 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 interests of justice,
C 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.

(2) When a case is transferred under the provisions of this Code
D from one 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).

E (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."

F The section, as it originally remained, was meant to apply only to cases before courts of Magistrates. By Act 45 of 1978 the words 'Judge or' were also inserted just before the word 'Magistrate'. So from 1978 onwards the applicability of the section was extended to all trial courts. The earlier position was that a Judge or Magistrate who heard the evidence alone could decide the case. Later any successor Magistrate was conferred with
G the option to act on the evidence recorded by his predecessor Magistrate in the same case. Now that option is extended to Judges of all trial courts also.

For the application of Section 326 of the Code three postulates must
H be concatenated together. First is, a Judge should have recorded the

evidence in the case either in part or in whole. Next is, the said Judge should have ceased to exercise jurisdiction in that case, and the third is, another Judge should have succeeded him and such successor Judge must have jurisdiction to try the offences concerned. If the above conditions are completed the successor Judge stands empowered to act on the evidence already recorded in the case.

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The legislative intention is clear from a reading of the section that the words "succeeded by another Judge" must get a wide amplitude. It is for the said purpose that sub-section (2) is incorporated bringing even cases transferred from one Judge to another, within the scope of the Section. The words 'such jurisdiction' in the sub-section (1) are not intended to narrow down the ambit of the provision to Judges who could have exercised exactly the same jurisdiction which his predecessor Judge exercised. It is enough that the successor judge has jurisdiction to try the offences sought to be proved against the accused.

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The archaic concept was that the very same judicial personage who heard and recorded the evidence must decide the case. That 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 replaced 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 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 re-examine 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.

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A The Law Commission in its 41st Report recommended thus :

"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 man-
B datory 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."

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

In this context it is to be borne in mind that only a Sessions Judge could be appointed as Judge of the Designated Court under TADA. This
D can be seen from Section 9(6) of TADA which reads thus :

> "A person shall not be qualified for appointment as a judge or an additional judge of a Designated Court unless he is, immediately before such appointment, a Sessions Judge or an Additional Ses-
E sions Judge in any State."

His appointment can be made by the Government only with the concurrence of the Chief Justice of the High Court. Section 14 of TADA which deals with the procedural powers of the Designated Court stipulated in sub-section (3) that "subject to the other provisions of this Act, a
F Designated Court shall, for the purpose of trial of any offence, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session so far as may be in accordance with the procedure prescribed in the Code for the trial before a Court of Session."

Thus the Judge of the Designated Court is in effect a Sessions Judge,
G his powers are those of a Sessions Judge and the procedure to be followed by him is that of a trial before a Court of Sessions. In such a situation when the Judge of Designated Court ceased to have jurisdiction on account of abolition of that court, the Sessions Judge to whom the case is transferred for trial of the offences charged (after dropping out the offences under
H TADA) must be regarded as a successor Judge. It is immaterial that such

successor Judge cannot try the offences under TADA or that in the trial before a Designated Court certain items of materials could be admitted as evidence which could not get such admission in the trial before regular criminal courts.

A contrary interpretation would lead to unwholesome repetition of the entire exercise involving considerable cost to the exchequer, financial strain to the accused and waste of time of the courts. Greater than all those, it would inflict untold inconveniences to the witnesses who are the innocent parties in the case. The Court cannot afford to be oblivious to the reality that no witness is, on his own volition, desirous of going to the Court for remaining there until his turn is called to mount the witness stand and to undergo the agony of facing grueling questions. He does it as he has no other option when summoned by the Court. Most of the witnesses can attend the courts only by bearing with all the inconveniences to themselves and at the cost of loss of their valuable time. When any witness had already undergone such agony once in connection with the same case, no effort to save him from undergoing that agony once again for the very same case should be spared, unless such re-summoning is absolutely necessary to meet the ends of justice.

On the contrary, no prejudice would be caused to the accused as he can invoke the powers envisaged in the proviso to sub-section (1) of Section 326 of the Code. If the successor Judge is of opinion that further examination of any witness, whose evidence has already been recorded is necessary in the interest of justice, the Judge would re-summon such witness either for further examination or further cross-examination and re- examination. When such a course is permitted by law there can be no possible grievance for the accused that prejudice would be caused to him if the evidence already on record is treated as evidence in the case.

We therefore concur with the conclusion arrived at by the Trial Court which has been confirmed by the learned Single Judge of the High Court. This appeal is accordingly dismissed.

S.V.K. Appeal dismissed.