

Lithu Vijayan vs Anoop.E.K

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Court : Kerala

Decided On : Apr-10-2023

Judge : Honourable Mr.Justice C.S.Dias

Appeal No. : Tr.P(C)/57/2023

Appellant : Lithu Vijayan

Respondent : Anoop.E.K

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE BECHU KURIAN
THOMAS MONDAY, THE 31ST DAY OF JULY 2023 / 9TH SRAVANA,
1945 AGAINST THE ORDER/JUDGMENT IN CC 27/2022 OF JUDICIAL
MAGISTRATE OF FIRST CLASS -II, CHERTHALA PETITIONER/S:
JEFRY HENSILAR AGED 43 YEARS S/O. AVARALORENZ,
EDAYEZHATH HOUSE, AROOR P.O., CHERTHALA, ALAPPUZHA.,
PIN - 688534 BY ADVS. B.PRAMOD AYYAPPADAS V BIJU
VIGNESWAR RESPONDENT/S:

1 STATE OF KERALA REPRESENTED BY PUBLIC
PROSECUTOR,HIGH COURT OF KERALA, PIN - 682031 2 THE

STATION HOUSE OFFICER AROOR POLICE STATION, AROOR, ALAPPUZHA ., PIN - 688534 3 JESVAL ANTONY AGED 41 YEARS S/O. ANTONY, VALLOMTHAYYIL, EZHUPUNNA P.O., CHERTHALA, ALAPPUZHA ., PIN - 688548 4 AUGUSTINE LORENZ AGED 41 YEARS S/O. AVARALORENZ, EDAYEZHATH HOUSE, AROOR P.O., CHERTHALA, ALAPPUZHA ., PIN - 688534 BY ADVS. PUBLIC PROSECUTOR SRI.C.N.PRABHAKARAN Martin Jose P

THIS TRANSFER PETITION (CRIMINAL) HAVING COME UP FOR ADMISSION ON 31.07.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

BECHU KURIAN THOMAS, J.

===== Tr.P(Crl.) No.57 of 2023
----- Dated this the 31st day of July 2023

ORDER

Petitioner is the accused in S.C.No.499/2019 on the files of the Assistant Sessions Court, Cherthala. He is also the defacto complainant in C.C.No.27/2022 on the files of the Judicial First Class Magistrate Court, Cherthala. Through this petition under Section 407 of the Cr.P.C, petitioner seeks for a direction to commit C.C.No.27/2022 from the Judicial First Class Magistrate Court, Cherthala to be tried jointly and disposed along with S.C.No.499/2019, pending before the Assistant Sessions Court, Cherthala.

2. S.C.No.499/2019 now pending before the Sessions Court is

a case instituted, which was committed to the court of Sessions, on a police report. C.C.No.27/2022, pending before the Judicial First Class Magistrate Court-II, Cherthala, was registered subsequently on the basis of a private complaint. Those two cases are alleged to be case and counter case.

3. In instances where case and a counter case are alleged, the

Supreme Court had in *Sudheer vs. State of Madhya Pradesh* [AIR 2001 SCW 491] held that both cases must be tried one after the other and disposed of by the same court by pronouncing judgments on the same day.

4. The procedure to be followed in a case and counter case

was explained earlier in *Nathi Lal v. State of U.P.* [1990 Supp. SCC 145]. It was observed therein that, in such a situation, after completion of evidence in one case, the learned Judge must hear the arguments and reserve the judgment in that case and thereafter proceed with the cross- case and after recording the evidence, he must hear the arguments and reserve the judgment of that case also. The same Judge must thereafter dispose of the matter by two separate judgments. Each case must be decided on the basis of the evidence 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.

5. In view of the above legal propositions, it is evident that a case and a counter case must be tried by the same learned Judge and be disposed of one after the other, after taking evidence separately.

6. Be that as it may, when S.C. No.499/2019 before the

Assistant Sessions Court, Cherthala was scheduled for trial, the defacto complainant in C.C.No.27/2022 approached this Court, through this petition seeking to commit the case pending before the Magistrate Court to the Sessions Court, to be tried jointly with the sessions case.

7. An objection was taken by Sri. Martin Jose, the learned

Counsel for the respondents, that without approaching the Sessions Court as provided under the proviso to Section 407(2) Cr.P.C., this application is not maintainable. Reliance was placed on the decision in *Surendra Kumar vs. Vijayan* [2005 4 KLT 475] , where it was observed that without approaching the Sessions

Court, an application for transfer under Section 407 Cr.P.C. is not maintainable before this Court.

8. Sri.B.Pramod, learned Counsel for the petitioner, on the

other hand, placed, for my consideration, the decision in C.H.Abdul Salam v. Sameera and another [2007 (1) KLT 592] , wherein this Court had held that the approach to a Sessions Court was not required as provided under the proviso to Section 407(2) Cr.P.C, in cases where a committal of the case from the Magistrate Court to the Sessions Court is sought.

9. I have considered the rival contentions.

10. In Surendra Kumars case (supra), transfer was sought

from an Additional Sessions Court to another competent court within the same Sessions Division. In such a situation, this Court observed that without approaching the Sessions Court, transfer, even, if it is within the same Sessions Division, but from one Sessions Court to another competent Court, is not permissible without first approaching the Sessions Court.

11. The situation in the instant case is different. Petitioner

seeks committal of the case based on the principle when the case is pending before the Sessions Court, the counter case must also be tried by the same Judge. By virtue of the decision in Sudhirs Case (supra), the counter-case can be tried only by the Sessions Court since the main case is pending before the Sessions Court.

12. Therefore, strictly speaking, what is sought by the petitioner is not a transfer but a committal of the case from the

Magistrates Court to be tried by the Sessions Court. Due to the existence of S.C. No.499/2019, before the Sessions Court,Cherthala, the counter-case pending as C.C.No.27/2023 on the files of the Judicial First Class Magistrate Court-II, Cherthala, becomes a case to be tried by a Sessions Court, though it is not a case triable exclusively by a Sessions Court.

13. When a case, though not exclusively triable by a Sessions

Court, is still required to be tried by the Sessions Court the provisions under Section 209 Cr.P.C. cannot apply. However, in such instances, Section 323 Cr.P.C. can be resorted to.

14. Section 323 Cr.P.C. confers a comprehensive power upon a

Magistrate to commit a case to the Sessions Court at any time before signing the judgment, if it appears to the Magistrate that the case is one which ought to be tried by the Magistrate. If the case is one which is exclusively triable by a Sessions Court, committal is to be effected under Section 209 Cr.P.C. If the case is not one that is exclusively triable by Sessions Court but should still be tried by a Sessions Court, the power under Section 323 Cr.P.C. can be invoked. The words in any inquiry or a trial and at any stage indicates the wide amplitude of power available to the Magistrate to commit a case to the Sessions Court. The case is before the Magistrate as C.C.No.27/2023 is, in view of the principles of case and counter-case, to be committed to the Sessions Court.

15. In the decision in C.H.Abdul Salams Case (supra), a transfer was sought from the Magistrates Court to the Sessions Court due

to the existence of case and counter case. The Division Bench of this Court observed that what is required is not a transfer but a committal of the case and therefore, the restriction in the proviso under Section 407(2) will not apply. It was held that the parties would be at liberty to approach the High Court directly without moving the Sessions Court, though such a procedure would also be available to an aggrieved person before the Session Court.

16. In view of the above proposition, I am satisfied that

C.C.No.27/2022 on the files of the Judicial First Class Magistrate Court-II, Cherthala, is required to be committed to the Assistant Sessions Court, Cherthala, to be tried simultaneously with S.C.No.499/2019 pending in that court.

17. Therefore, there will be a direction to the Judicial First Class

Magistrate Court-II, Cherthala, to consider and pass orders committing C.C.No.27/22022 on its files to the Assistant Sessions Court, Cherthala to be tried simultaneously with S.C.No.499/2019 on the files of Assistant Sessions Court, Cherthala. Orders, as directed, shall be issued within a period of two weeks from the date of receipt of a copy of this order.

The transfer petition is allowed as above. sd/ BECHU KURIAN THOMAS JUDGE
jm/ APPENDIX OF TR.P(CRL.) 57/2023 PETITIONER ANNEXURES Annexure A1
TRUE COPY OF THE FINAL REPORT IN CRIME NO. Annexure A2 TRUE COPY
OF THE MEMORANDUM OF C. M. P. NO. CHERTHALA. Annexure A3 TRUE
COPY OF THE WOUND CERTIFICATE DATED 12.03.2018 ISSUED TO THE
PETITIONER FROM THE GOVERNMENT MAHARAJA'S TALUK HOSPITAL,
KARUVELIPADY, COCHIN Annexure A4 TRUE COPY OF THE OUT PATIENT
REGISTRATION CARD DATED 13.03.2018 ISSUED TO THE PETITIONER
FROM THE GENERAL HOSPITAL, ERNAKULAM

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