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Court : Kerala

Decided On : Aug-21-1981

Reported in : 1981CriLJ1793

Judge : P. Janaki Amma, J.

Appellant : Krishna Panicker

Respondent : State of Kerala

Judgement :

ORDER

P. Janaki Amma, J.

1. The petitioners herein are respondents in M. P. No. 1 of 1980 before the court of the Sub-Divisional Magistrate, Kasaragod, a proceeding initiated under Section 133 of the Code of Criminal Procedure. While the proceedings were pending the petitioners moved the District Magistrate, Cannanore, for a transfer of the case from the Court of the Sub-Divisional Magistrate, Kasaragod, to some other court. The ground mentioned for transfer was that the Sub-Divisional Magistrate, Kasaragod, is the son-in-law of one Mammu Haji, who, according to the petitioners, is backing the 4th respondent (the petitioner in M. P. No. 1 of 1980_ and is assisting him in the conduct of the case. The District Magistrate dismissed the petition stating that Mammu Haji. the father-in-law of the Sub-Divisional Magistrate was not the counsel for the petitioner in the proceedings

before the Sub-Divisional Magistrate and that he did not expect any miscarriage of justice merely because one of the parties was known to the father-in-law of the presiding officer. In the present petition filed under Sections 407 and 482 of the Code of Criminal Procedure the petitioners reiterate their contention and pray for transfer of the case.

2. The petition is opposed. A preliminary objection is raised that the petition is not maintainable, firstly on the ground that Section 407 has no application in the case of transfer of cases pending before the Executive Magistrates; and, secondly, on the ground that assuming that the section applies there is the bar under the proviso to Section 407(2) in as much as the petitioner has not moved the Sessions Judge for the relief sought. It is also contended that even assuming that the petition is maintainable, sufficient grounds for transfer have not been made out.

3. As regards the preliminary objection the learned Counsel for the respondent relied on S 411 of the Code of Criminal Procedure, which is a special provision regarding the making over and withdrawal of cases pending before Executive Magistrates. Under the said section any District Magistrate or Sub-Divisional Magistrate may make over for disposal any proceeding which has been started before him any Magistrate subordinate to him and also' withdraw any case or recall any case which has been made over to any Magistrate subordinate to him, and dispose of such proceeding himself Or refer it for disposal to any other Magistrate. The argument is that this is the only provision relating to transfer of cases pending before an Executive Magistrate and that in the absence of special mention the provisions of Section 407 have no Profit is also pointed out that Court intends that particular should apply to Executive special mention thereof is made and therefore in the absence of special mention in S- 407 that section has no application to matters pending before Executive Magistrates. Reference to made that connection to Section 397 dealing with revisional jurisdiction of the High Court and the Sessions Judges. The explanation to Section 397(1); specifically mentions that all Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of exercising re-visional jurisdiction. It is argued that in the absence of similar provision in Section 407 neither the High Court nor the Court of Session is

empowered to exercise the powers of transfer with reference to Executive Magistrates.

4. Section 23 of the Code of Criminal Procedure deals with subordination of Executive Magistrates. It states that all Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to the District Magistrate, and every Executive Magistrate (other than the Sub-Divisional Magistrate) exercising powers in a sub-division shall be subordinate to the Sub-Divisional Magistrate, subject to the general control of the District Magistrate. The section does not say that the Executive Magistrates are subordinate to either the Sessions Judges or the High Court. But Section 407 confers on the High Court the power to transfer any particular case or appeal, or class of cases or appeals, pending before a criminal court subordinate to its authority to any other such criminal court of equal Or superior jurisdiction. Executive Magistrates are included in the list of criminal court under Section 6 of the Code. There is no scope for doubt that Executive Magistrates are subordinate to the authority of the High Court. Therefore the High Court is competent to transfer a case from one Executive Magistrate to another Executive Magistrate both being subordinate to its authority. Similarly S- 408 confers power on Sessions Judge to transfer cases from one criminal court to another criminal court in his Sessions Division. It is therefore clear that the Sessions Judge is competent to transfer a case pending before one Executive Magistrate in his Sessions Division to another Executive Magistrate in the same division Thus both the High Court and the Sessions Judge are competent to exercise powers of transfer in appropriate cases However the proviso to Sub-section (2) of Section 407 states that no application shall lie to the High Court for transferring a cas1 from one criminal court to another criminal court unless an application for such transfer has been made to the Sessions Judge and rejected by him. In the present case no such application has been filed before the Sessions Judge. Therefore, this petition for transfer is not maintainable.

5. I may also state here that in the counter affidavit filed by the contesting respondents it is specifically mentioned that Mammu Bai mentioned in the petition has nothing to do with the contesting respondents and that he has not been conducting cases on their behalf. Bui in view of the fact that the present petition is

hit by the proviso to Section 407(2) and is not maintainable I need not consider whether there are sufficient grounds for transfer.

6. When a report was called for the Sub-Divisional Magistrate stated that since the petitioners apprehend that they may not get justice if the case is tried by him it may be transferred to some other Court. In case the learned Sub-Divisional Magistrate feels any embarrassment in disposing of the case in view of the allegations made by the petitioners it is open to him to report that fact to the District Magistrate in which case the latter can withdraw the case under Section 411 and see that it is disposed of either by himself or another Executive Magistrate.

The petition is dismissed.

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