

Surendra Kumar Vs. Vijayan

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Court : Kerala

Decided On : Oct-07-2005

Reported in : 2005(4)KLT475

Judge : Kurian Joseph and; R. Basant, JJ.

Acts : Negotiable Instruments Act - Sections 138; [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 9, 9(3), 10, 177 to 185, 194, 381, 381(2), 397, 400, 406, 407, 407(1), 407(2), 407(3), 407(4), 407(5), 407(6), 407(7), 407(9), 408, 408(1), 408(2), 409, 409(1), 409(2), 410, 411 and 412; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 24 and 24(3)

Appeal No. : Tr.P.C.(Crl) No. 25 of 2005

Appellant : Surendra Kumar

Respondent : Vijayan

Advocate for Def. : P. Vijayaraghavan, Adv. and; Noorji Noushad, Public Prosecutor

Advocate for Pet/Ap. : P. Gopakumaran Nair,; C.S. Dias and; T.O. Noushad, A

Judgement :

ORDER

Kurian Joseph, J.

1. Whether a Sessions Judge has power under Section 408 of the Code of Criminal Procedure, 1973 to transfer a case after commencement of trial or a part heard appeal from the court of Additional Sessions Judge to another competent court within the sessions division is the crucial and main question that arises for consideration in this case. Another important question is, whether a litigant as a matter of right can approach the Sessions Judge for invocation of power under Section 409 for withdrawing or recalling a case which is already made over to an Additional Sessions Court. And the third is whether a litigant should necessarily exhaust his remedy before the Sessions Court under Section 408 or 409 before approaching the High Court under Section 407 for the transfer. The matter has been placed before us pursuant to reference made by V. Ramkumar, J.

2. Though several questions are posed in the order, answer to the three points referred to above would cover all the issues. The reference was necessitated since according to the learned Judge, the decision in *State of Kerala v. Reny George and Ors.* (1981 KLT 557) required reconsideration. It was held in the said decision that an application for transfer of a case can be entertained only in a court of superior jurisdiction. The Court of Sessions Judge not being a court of superior jurisdiction qua that of an Additional Sessions Judge, Narendran, J. in the said decision took the view that invocation of Section 408 of the Code is not possible; the only resort being Section 407 before the High Court. But proviso under Section 407(2) stipulates that

'no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same Sessions Division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.'

In *Reny George's case*-(supra) the view taken is that the proviso would apply only to cases where the Sessions Judge has power to transfer, viz., for transferring cases from and to courts subordinate to the court of a Sessions Judge.

3. To make a minimal reference to the factual situation, the first respondent herein had filed three complaints under Section 138 of the Negotiable Instruments Act against the petitioner (two cases) and his wife (one case) before the Judicial First

Class Magistrate, Mavelikkara. All the three ended in conviction. Three appeals were preferred before the Sessions Court, Alappuzha as CrI. A.381/03, 13/04 and 77/04. One appeal was made over to the I Additional Sessions Court, Mavelikkara and other appeals were made over to the II Additional Sessions Court, Mavelikkara. Since the subject matter, the issues and evidence in the said three cases are similar in nature and since common questions of law and facts arise in all the three appeals, petitioner sought transfer of one appeal pending before the I Additional Sessions Court, Mavelikkara to the II Additional Sessions Court, Mavelikkara to be heard along with two other appeals pending before the said court. In the reference order, the learned Single Judge has posed the question as to whether it was not possible and feasible for the petitioner to approach the Sessions Court under Section 408 or 409 Cr.P.C., for transfer or for recalling the case already made over to one Additional Sessions Judge.

4. In order to understand the scheme of functioning of the criminal courts, we shall refer to the relevant provisions under the Code. Section 9 of the Code provides for the establishment of a Court of Session. Section 9 to the extent relevant reads as follows:--

'9. Court of Session.--

(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.'

It is fairly clear that there shall only be one Court of Session for every sessions division and naturally there has to be a Sessions Judge to preside over the court. To the extent required there may also be Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session. Section 10 deals with subordination of Assistant Sessions Judges, which reads as follows

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'10. Subordination of Assistant Sessions Judges.--

(1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed, to have jurisdiction to deal with any such application.'

The position is clear that only the Assistant Sessions Judges are subordinate to the Sessions Judge of the division and not the Additional Sessions Judges. Section 194 deals with the procedure regarding making over of the cases to the Additional and Assistant Sessions Judges in the sessions division. The said section reads as follows:--

'194. Additional and Assistant Sessions Judges to try cases made over to them.--
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Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try.'

Section 381 deals with appeals to the Court of Session which reads as follows :-

'381. Appeal to Court of Session how heard.--(1) Subject to the provisions of Sub-section (2), an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge:

Provided that an appeal against a conviction on a trial held by a Magistrate of the second class may be heard and disposed of by an Assistant Sessions Judge or a

Chief Judicial Magistrate.'

In the case of revision under Section 397 instead of the word 'subordinate' appearing in Section 10 in relation to Sessions Judge, the expression used is 'inferior' in relation to the court. The said section reads as follows :-

'397. Calling for records to exercise powers of revision.--

(1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situated within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding. Sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.'

Section 400 deals with the power of Additional Sessions Judges. Incidentally, it is the only provision where the word 'transferred' is used in relation to the cases before the additional Sessions Judges. The Section reads as follows:--

'400. Power of Additional Sessions Judge.--

An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.'

5. Section 407 deals with the power of the High Court to transfer cases and appeals. To the extent relevant the provision reads as follows:--

'407. Power of High Court to transfer cases and appeals.--

(1) Whenever it is made to appear to the High Court--

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise; or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order--

(i) that any offence be inquired into or tried by any Court not qualified under Sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative:

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him'.

Section 408 deals with the power of Sessions Judge to transfer cases and appeals. It reads as follows :--

'408. Power of Sessions Judge to transfer cases and appeals.--

(1) Whenever it is made to appear to a Sessions Judge that an order under this Sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested or on his own initiative.

(3) The provisions of Sub-sections (3), (4), (5), (6), (7) and (9) of Section 407 shall apply in relation to an application to the Sessions Judge for an order under Sub-section (1) as they apply in relation to an application to the High Court for an order under Sub-section (1) of Section 407, except that Sub-section (7) of that section shall so apply as if for the words 'one thousand rupees' occurring therein, the words 'two hundred and fifty rupees' were substituted.'

Section 409 deals with withdrawal of cases and appeals by Sessions Judges. It reads as follows:--

'409. Withdrawal of cases and appeals by Sessions Judges.--

(1) A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(3) Where a Sessions Judge withdraws or recalls a case or appeal under Sub-section (1) or Sub-section (2), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

Section 412 stipulates that reasons are to be recorded while exercising the powers under Sections 408, 409, 410 or 411. The said section reads as follows:--

'412. Reasons to be recorded.-- A Sessions Judge or Magistrate making an order under Section 408, Section 409 or Section 411 shall record his reasons for making it.'

6. The provisions quoted above would clearly give a picture as to the making over, recalling and transferring of cases within a sessions division. It is clear from

Section 194 that an Additional Sessions Judge is to handle only those cases which are made over to him by the Sessions Judge of the division. It needs no elaborate discussion to note that the expression 'case' used in this context is meant to include appeals, as can be seen from Section 400 also, under Section 409, the Sessions Judge who made over the cases to the Additional Sessions Judge is empowered to withdraw any case or appeal before the trial of the case or the hearing of the appeal has commenced. Being the Sessions Judge, he has to take over the administration of criminal justice in his sessions division and hence in the exigencies of such administration, he has to make over, withdraw or recall cases and appeals and make over the same appropriately for the proper streamlining of the administration of criminal justice in the sessions division. It is fairly clear from the scheme of the Code that the exercise of power by the Sessions Judge under Sections 194 read with 409(2) is administrative in nature, it is simple distribution of work. The question is how to invoke the power under Section 409. Is it open to a litigant to move the Sessions Court for such withdrawal or recall? Once there is source of power as conferred under the Code, one need not labour much as to how to exercise that power. It could be suo motu and it could be on motion made by a litigant. But the scope of the motion is only for administrative convenience. As in the instant case, since the facts and law are intertwined in all the three appeals, the petitioner is certainly free to move the Sessions Judge under Section 409 Cr.P.C. for withdrawing and making over the appeals to one Additional Sessions Court so that all the three appeals could be heard together. Since Section 412 warrants reasons to be recorded for such withdrawal, naturally the Sessions Judge has to record the administrative convenience for which the withdrawal and making over is made.

7. Though posed as an incidental question in the reference order, as already noted above, the crucial question is whether a transfer is possible at the hands of the Sessions Judge. Under Section 9 of the Code, there is only one Court of Session for every sessions division and that is to be presided by a Sessions Judge. However, there could be Additional Sessions Judges, as provided under Sub-section 3 of Section 9. The courts manned by such Additional Sessions Judges are known and described as courts of Additional Sessions Judges. Such courts manned by Additional Sessions Judges in a sessions division are also criminal

courts, as far as Chapter XXXI of the Code is concerned. Chapter XXXI deals with Transfer of Criminal Cases. The first provision Section 406 deals with the power of the Supreme Court and 407 with that of the High Court. While dealing with the powers of the High Court it is provided that the High Court may exercise its power under Section 407 in three modes; (1) on the report of the lower court, (2) on the application of a party interested and (3) suo motu. As far as the second mode, viz., transfer on the application of a party interested is concerned, it is clearly stipulated in the proviso that an application by the party interested shall lie before the High Court only if an application for such transfer had already been made before the Sessions Judge and rejected by him. In other words, it is clear that the jurisdiction is not concurrent. The interested litigant is entitled to approach the High Court for transferring a case pending before one criminal court to another criminal court in the same sessions division only after approaching the Sessions Judge and aggrieved by the refusal thereof. As already noted above, one course is under Section 409 for withdrawing or recalling and making over. But under Section 409(2), once the trial of the case has commenced, or the hearing of the appeal has started, exercise of that power under Section 409-administrative exercise of power-is barred. Should it mean that in such a situation, the only resort is the High Court? If so, what is the logical meaning and purpose of the proviso under Section 407(2), and Section 408

8. Section 408 is captioned as Power of Sessions Judge to transfer cases and appeals. It is not a power on the Court of Session. It is a power conferred on the Sessions Judge presiding over the Court of Session. Section 408 provides that the power of transfer of a criminal case from one criminal court to another criminal court in the sessions division is to be exercised only if it is expedient for the ends of justice. It does not require an elaborate discussion to hold that it is a judicial exercise of power. The power under Section 408 can be exercised in three modes; (1) on the application of an interested party, (2) suo motu, (3) on the report of the lower court. There is no quarrel for the proposition that the Sessions Judge is empowered to transfer any case or appeal at any stage pending before the Assistant Sessions Court. But should that power be limited to transfer of cases in the inferior criminal courts only? 'Inferior criminal court' is an expression used only under Section 397 while dealing with the powers of revision. It is pertinent to note

that the expression 'subordinate' is conspicuously absent under Section 408. The Additional Sessions Judge is not subordinate to the Sessions Judge also. But it has to be noted that the Additional Sessions Judge gets jurisdiction to deal with a case only if such a case or appeal is made over to him by the Sessions Judge. Any time prior to the trial or hearing of the case or appeal as the case may be, the Sessions Judge is also empowered to withdraw such cases. Thus, though the Court of Additional Sessions Judge is not inferior and though the Additional Sessions Judge is not subordinate to the Sessions Judge, as far as administration of criminal justice in the sessions division is concerned, there is an administrative subordination in the sense that the Additional Sessions Judge gets jurisdiction only in respect of the cases made over to him and such cases are liable to be withdrawn also before commencement of the trial or hearing. It appears that the legislature had advisedly used the expression 'lower' and not 'subordinate or inferior' to ensure that the power under Section 408 can extend to issue of directions for transfer of a case pending before the Additional Sessions Court. As already noted above, the Court of an Additional Sessions Judge is also a criminal court in the sessions division. Under the proviso to Section 407(2) in the matter of transfer of a case on the application of an interested litigant before the High Court, such application would lie only if a motion had already been made before the Sessions Judge and rejected by him. That power conferred on the Sessions Judge is meant in the interests of the litigant public as also for lessening the burden of the High Court, lest for every transfer of a criminal case or appeal in a sessions division, the litigant public will have always to approach the High Court. Since the power under Section 408 is judicially exercised and since reasons are to be recorded as provided under Section 412, any party aggrieved can always take recourse to the revisional remedy under Section 397. So much so, the conferment of the power of the Sessions Judge to transfer a criminal case at any stage from the Court of one Additional Sessions Judge will not cause any irreparable injury to a party to the litigation.

9. It will also be profitable to draw an analogy regarding the exercise of power by the District Court under Section 24 of the Code of Civil Procedure, 1908. The said section reads as follows:--

'24. General power of transfer and withdrawal.--

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage--

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under Sub-section (1), the Court which [is thereafter to try or dispose of such suit or proceeding] may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

(3) For the purposes of this section.--

(a) Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court;

(b) 'proceeding' includes a proceeding for the execution of a decree or order.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

(5) A suit or proceeding may be transferred under this section from a Court which has no jurisdiction to try it.'

The Presiding Officer of a District Court is the District Judge. The District Judge on the civil side is empowered to transfer any case at any stage from one Additional District Court. If so why should there be a restricted meaning for transfer on the criminal side for the only reason that a provision akin to Section 24(3) regarding subordination is not expressly provided under the Code of Criminal Procedure? Should not that enabling provision be read into under Section 408 since Section 408 appears under Chapter XXXI of the Code dealing with the transfer of criminal cases and since Section 408 itself is captioned as power of Sessions Judge to transfer cases and appeals from one criminal court to another criminal court and in view of the bar under the proviso to Section 407(2) of the Code? It has also to be noted that the power under Section 408 is to be exercised only if it is expedient for the ends of justice and not for any other reason.

10. A Full Bench of the Allahabad High Court had occasion to consider the same issue and the decision is reported in *Radhey Shyam and Anr. v. State of U.P.*(All.) (1984(2) Crimes 50). It has been held in the said case that all courts manned by Additional Sessions Judges in a Sessions Division are separate criminal courts for the purpose of proviso to Sub-section (2) of Section 407 and Section 408 of the Cr.P.C. To quote from paragraphs 8, 9 and 15,

'8. The reason for imposing a bar on a direct application to the High Court by the proviso to Sub-section (2) of Section 407 Criminal Procedure Code appears to be the conferment of concurrent power of transfer on the Sessions Judge of case from one Criminal court to another Criminal court in his sessions division if it is expedient for the ends of justice under Section 408(1), Criminal Procedure Code and the exercise of this power on an application of a party interested under Section 408(2), Criminal Procedure Code. A party interested is thus required to move such an application before the Sessions Judge first and only after it is rejected that such an application is maintainable in the High Court under Section 407(2), Criminal Procedure Code. It may be mentioned that in view of Section 412, Criminal Procedure Code reasons have to be given by the Sessions Judge for

rejecting an application under Section 408, Criminal Procedure Code. It, therefore, follows that the Sessions Judge is empowered under Section 408(1), Criminal Procedure Code to transfer a trial or an appeal from one Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not an application by a party interested if it is expedient in the interest of justice.

*** **9. It is significant to note that the proviso to Sub-section (2) of Section 407, Criminal Procedure Code only bars an application by a party interested to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division unless such an application for transfer has been made to the Sessions Judge and rejected by him. It does not impose any bar on the power of the High Court under Section 407(1), Criminal Procedure Code to transfer a case from one Criminal Court to another Criminal Court in the same sessions division, either on the report of the lower court or on its own initiative under Section 407(2), Criminal Procedure Code.

*** **15. The power conferred on the Sessions Judge under Section 408(1) Criminal Procedure Code to transfer a case or an appeal pending in the Court of an Additional Sessions Judge to another Additional Sessions Judge in his sessions division whether its hearing has commenced or not, is thus an independent judicial power which is not subject to the bar imposed by Section 409(2) Criminal Procedure Code on the administrative power of the Sessions Judge of recalling a case or an appeal from an Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced.'

The High Court of Delhi also has taken a similar view and the decision is reported in Avinash Chander v. The State (1983 Cri.L.J.595).

11. In Reny George's case (supra), a learned Single Judge of this Court took the view that transfer is always a power to be exercised by a court of superior jurisdiction and therefore, the power of transfer of a Sessions Judge is limited to the cases pending before the courts of Assistant Sessions Judges or Magistrates. With great respect we are unable to agree. As we have already seen, the Additional Sessions Judge gets jurisdiction to deal with only those cases/appeals

which are made over to him and the Sessions Judge is free to withdraw or recall such cases at any time before the trial or hearing as the case may be commenced. Thus there is a statutory, but administrative subordination in the matter of making over, recalling, withdrawing and transfer of cases, as far as Additional Sessions Judge is concerned to the Sessions Judge. Power of transfer need not always depend on the superior jurisdiction. It can be a power conferred also, as we see from Section 24 of the Civil Procedure Code. Thus, in view of the scheme provided under the Criminal Procedure Code conferring power on the Sessions Judge to transfer a case/appeal pending before the Additional Sessions Judge, the decision in *State of Kerala v. Reny George and Ors.* (supra) requires to be overruled and we do so.

12. To sum up,

(1) An interested litigant is entitled to invoke Section 409 of the Code before the Sessions Judge for the purpose of withdrawing or recalling cases including revisions and appeals already made over to an Additional Sessions Judge, provided the trial or hearing of the cases or revisions or appeals as the case may be, has not commenced. It is an administrative exercise of power by the Sessions Judge.

(2) An interested litigant is entitled to move the Sessions Judge for transferring cases including revisions and appeals at any stage from the court of an Additional Sessions Judge, if such transfer is expedient for the ends of justice.

(3) Unless the litigant thus first moves the Sessions Judge, an application for transfer under Section 407 before the High Court is not maintainable.

(4) The Additional Sessions Judge concerned is entitled to make a report to the Sessions Judge for transferring any cases including revisions and appeals pending before him irrespective of the stage of such matters.

13. In the instant case, the appeals are not part heard either by the First Additional Sessions Judge, Mavelikkara or by the Second Additional Sessions Judge, Mavelikkara. Therefore, it is for the petitioner to appropriately move the Sessions

Judge, Alappuzha for a consolidated hearing of all the appeals.

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