
Suo Motu Vs State of Kerala

Criminal R.P. No. 3079 of 2010

Court: High Court Of Kerala

Date of Decision: Nov. 1, 2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 193, 194, 209, 323, 4#Penal Code, 1860 (IPC) â€” Section 307, 323, 324, 326, 452

Citation: (2011) 3 Crimes 21 : (2011) 1 KLT 46 : (2011) 1 RCR(Criminal) 581 : (2011) 1 RCR(Criminal) 581

Hon'ble Judges: V.K. Mohanan, J

Bench: Single Bench

Advocate: V. Tek Chand, Public Prosecutor, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V.K. Mohanan, J.

This suo motu revision is registered on the basis of the letter dated 20.7.2010 of the Palakkad District Court,

addressing the Registrar (Subordinate Judiciary), High Court of Kerala. The short facts which lead to the registration of the above Revision Petition

is as follows:

2. One Parameswaran, S/o. Krishnan, Pothuvar House, Vithinassery, Nemmara, Palakkad District, who is an accused in S.C. No. 493/09,

approached the Sessions Court, Palakkad Division by filing Crl.M.P. No. 1264/10 with a prayer to transfer C.C. No. 258/08 pending in the

Court of Judicial First Class Magistrate-Alathur, the case in which he is the de facto complainant, for simultaneous trial along with S.C. No.

493/09. According to the revision Petitioner therein, the above two cases are related to the same incident and at the same time and place, in the

same transaction.

3. On the filing of the above petition, the Sessions Court obtained a report from the police through the Public Prosecutor in which it is stated that

C.C. No. 258/08 pending before the Judicial First Class Magistrate-Alathur, is counter to S.C. No. 493/09, pending before the Addl. Sessions

Court (Ad hoc)-I, Palakkad. The said petition for transfer was not opposed by anybody. According to the learned Sessions Judge, the two cases,

being case and counter, must be simultaneously tried and disposed by the same Judge and since one case is pending in the Sessions Court, the

other case pending before the Court of Magistrate, is liable to be transferred to the Addl. Sessions Court in exercising the powers u/s 408 of Code

of Criminal Procedure Accordingly, the learned Sessions Judge allowed the petition directing the Judicial First Class Magistrate-Alathur to transfer

C.C. No. 258/08 pending there, to the Court of Addl. Sessions Judge (Ad hoc)-I, Palakkad, for simultaneous trial with S.C. No. 493/09.

Consequently, it is directed that the learned Magistrate shall transmit the records to the Court of learned Addl. Sessions Judge, Palakkad.

4. In pursuance of the above order of the learned Sessions Judge, the learned Magistrate issued two orders on 1.7.2010 in C.C. No. 258/08.

First order is as follows:

Heard accused, reported counsel that CrI.M.P. 1264/2010 dated 19.6.2010 of Honourable Sessions Judge, Palakkad, case transferred to Addl.

Sessions Court, Palakkad. Hence send records to Honourable Addl. Sessions Court No. I, Palakkad.

The other order on the same day is as follows:

Converted as C.P. No. 51/10. The case is transmitted to the Honourable Addl. Sessions Court (Fast Track Court) No. I, Palakkad, vide order in

CrI.M.P. No. 1264/2010 dated 19.6.2010 of Honourable Sessions Judge at Palakkad. Hence case committed to Honourable Addl. Sessions

Court (Fast Track No. I) as directed.

5. Thus, against the above order of the learned Sessions Judge and the proceedings of the learned Magistrate, the Addl. District & Sessions Judge

(Ad hoc-I), Palakkad, addressed the Registry of this Court stating that, the learned Magistrate has simply converted the case into a committal

proceedings and numbered as C.P. No. 51/10 and transmitted the case to the Addl. Sessions Court, without the order of committal of this case to

the Sessions Court, Palakkad, and thus it is a grave legal infirmity. Thus relying upon the decision of this Court reported in State of Kerala Vs.

Annamma, , the learned Addl. District and Sessions Judge filed a report, stating that the matter may be submitted before the High Court for

reference and to set aside the order passed by the learned Sessions Judge-Palakkad, u/s 408 of Code of Criminal Procedure, in transferring C.C.

No. 258/08 (C.P. No. 51/10) from the Judicial First Class Magistrate-Alathur to the Addl. Sessions Court (Ad hoc)-I, Palakkad.

6. While forwarding the above report of the Addl. District and Sessions Judge (Ad hoc)-I, Palakkad, the District Judge, Palakkad, in his letter

dated 20.7.2010 recorded his remark that, he issued the transfer order on the following grounds that.

Fast Track Court is a separate Ad hoc Court which can be considered as a Criminal Court for the purpose of Section 408 Code of Criminal

Procedure, though presided over by an Addl. Sessions Judge and Section 193 of Code of Criminal Procedure does not contain a total bar of

direct cognizance-cognizance otherwise than on committal proceedings can be taken by the Sessions Court if it is otherwise provided in the Code

of Criminal Procedure.

Thus, according to the learned Sessions Judge, it is so provided in Section 193 of Code of Criminal Procedure itself and it can be read along with

Section 408 of Code of Criminal Procedure and according to him, the case transferred by his order does not involve any offence exclusively triable

by Court of Sessions and it is only a counter case to the sessions case. It is under the above circumstances the revision petition was registered in

suo motu.

7. Admittedly, though the Sessions Case No. 493/09 pending before the Addl. Sessions Court (Ad hoc)-I, Palakkad and C.C. No. 258/08,

which was pending in the Court of Judicial First Class Magistrate-Alathur, are arising out of the same incident, at the same time and place in the

same transaction. Regarding the trial of the case and counter case, the position is settled as per the decision of the Apex Court in Sudhir and Ors.

v. State of Madhya Pradesh AIR 2001 SCW 491 and the Apex Court has held that, "the case and counter case relating to same incident shall be

tried in the same court". In the above decision, the Apex Court has further held that, Sessions Court should try both the cases, as Sessions Court

has power to try any offence under Penal Code and according to the Apex Court, "it is a solitary practice if two criminal cases relates to the same

incident, they are tried and disposed of by the same court by pronouncing the judgment on the same day." The Apex Court came into such a

conclusion for the following reasons that;

1) It staves off the danger of an accused being convicted before his whole case is before the Court.

2) It deters conflicting judgments being delivered upon similar facts; and

3) In reality the case and the Counter case are, to all intents and purposes, different or conflicting versions of one incident.

8. So in the light of the above decisions and as the above two cases are arising out of the same transaction, it has to be treated as case and counter

and therefore tried and disposed of by the same judicial mind as well as by the same court.

9. If that be so, the next question to be considered is based upon the facts and circumstances involved in the present case, "what is the procedure

to be followed to achieve the object laid down by the Apex Court in the above decisions ?". The answer to the above question is now well settled

by the Division Bench decision of this Court in, Abdul Salam v. Sameera 2007 (1) KLT 592. The facts involved in the above Division Bench cases

are identical to the case-in-hand. The facts involved in that case can be gathered from para 1 of the above decision. In that case also, with respect

to the same incident there were two cases; one was pending before the Judicial First Class Magistrate-II, Kannur, as C.C. No. 148/06 where the

offences alleged are Under Sections 323, 324 and 506(2) of I.P.C. The de facto complainant in the above cases subsequently filed a private

complaint alleging offences punishable Under Sections 307, 324, 326, 452, 506(2) of I.P.C. and the said private complaint was committed to the

Court of Sessions, Thalassery. As the two cases are pending before the two courts, a Transfer Petition was filed before this Court for transfer of

C.C. No. 148/06 to the Court of Sessions-Thalassery. After considering the authorities on the field and various provisions, the Division Bench of

this Court has held as follows:

Section 407(1)(iii) of Code of Criminal Procedure gives power to the High Court to direct the Magistrate Court to commit a case for trial to the

Sessions Division for simultaneous trial with another Sessions Case pending in that Sessions Division. It is a wide power to be exercised in the

interest of justice. Sessions Court has got power u/s 408 to transfer a particular case from a criminal court to another criminal court in that Sessions

Division. Neither Section 408 nor any other provision in Code of Criminal Procedure empowers the Sessions Court to call for a case from the

Magistrate Court for trial to that Court without a committal order. A reading of Section 407(3) would make it clear that a power akin to Section

407(8) is not vested with the Sessions Court even though Sub-sections (3) to (7) and (9) of Section 407 were made applicable to Sessions Court.

However, the question arising for consideration is whether it is possible for the High Court to exercise that power before such an application is filed

before the Sessions Court as held in Santhosh's case. The proviso to Section 407(2) of Code of Criminal Procedure provides 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. It is settled law that before an application can be filed

before the High Court for transfer of a case from one court to another court in the same sessions division one has to file an application before the

Sessions Court and its rejection by the concerned Sessions Judge is a pre-condition."" See Krishna Panicker v. State of Kerala 1981 Cri.LJ. 1973

(Ker.), Radhey Shyam and Anr. v. State of U.P.1984(2) Crimes 50(All.)

and Manindra Kumar Vs. The State of Rajasthan and Another, Section 408(1) of CrP.C. only gives power to the Sessions Judge to transfer a

case pending in one Criminal Court to another Criminal Court in his Sessions Division. However, it does not give power to the Sessions Court to

call for a case to that court from the Magistrate Court without formal committal. Committal of a case from the Magistrate Court to the Sessions

Court cannot be equated to transfer u/s 408(1) of Code of Criminal Procedure In the case of a direction to commit a case from the Magistrate

Court to Sessions Court the proviso is not a bar in exercising the power of the High Court conferred u/s 407(1)(iii) of CrP.C. Therefore, we are in

perfect agreement with the decision of the learned Single Judge of this Court in State of Kerala Vs. Annamma, and we are unable to agree with the

decision in Santhosh @ Appachan Vs. State of Kerala and Others, .

10. On examination of the procedure adopted by the courts below in the present cases and in the light of the above dictum, it can be seen that, the

proceedings of the Court of Sessions, Palakkad, and the learned JFCM Court-Alathur, are irregular, improper and illegal.

11. In the light of the above Division Bench decision, it is crystal clear that all the powers enjoined by the High Court u/s 407 are not given to

Sessions Court u/s 408 of Code of Criminal Procedure In "Abdul Salam"s case, the Division Bench has specifically found that Section 407(1)(iii)

gives power to the High Court to direct the Magistrate to commit the case for trial to the Sessions division for simultaneous trial with another

sessions case pending in that Sessions division. Thus it can be seen that the caption of Sections 407 and 408 of Code of Criminal Procedure are

though similarly worded with respect to the powers of the High Court as well as of the Sessions Court, the power of High Court to transfer a case

or appeal is wider than the powers of the Sessions Court. On a close reading of the above sections, it can be seen that, the power of a Sessions

Court to transfer a case or an appeal is limited to cases or appeals which are properly instituted. So, by virtue of Section 408 of Code of Criminal

Procedure, transfer of any appeal or case properly instituted and pending before any subordinate court to that Sessions court, can be transferred to

another subordinate Criminal Court which has same jurisdiction. But regarding the powers of High Court to transfer the case or appeal, especially

in the light of Sub-clause (i) to (iv) series, Sub-section (1) of Section 407, it can be seen that even the cases covered by those clauses can also be

amenable to the jurisdiction of the High Court for transfer. Most important example is the one which is pointed out by the Division Bench in the

"Abdul Salam"s case. By virtue of Section 407(1)(iii) of Code of Criminal Procedure, even if a case is pending before the Magistrate court and if it

appears to the High Court that it should be transferred to the Sessions Court and to effect that transfer properly, the High Court can direct the

Magistrate to commit the case as contemplated by Section 193 of Code of Criminal Procedure or u/s 323 of Code of Criminal Procedure But as

far as Sessions Courts are concerned, no such powers are given while exercising the jurisdiction to transfer a case or appeal. So in the present

case, the order dated 19.6.2010 in Crl.M.P. 1264/10 of the Court of Sessions, Palakkad Division, is illegal and irregular and Section 408 of Code

of Criminal Procedure confers no jurisdiction on the Sessions Court to transfer a case wherein the offences involved are triable by the Magistrate

Court, directly to the Addl. Sessions (Ad hoc-I), Palakkad, without adopting the process contemplated u/s 209 of Code of Criminal Procedure

and on the basis of the said order of the learned Sessions Judge, the Court of Addl. Sessions Judge (Ad hoc-I), Palakkad, has no jurisdiction to

take cognizance with respect to the offences covered by the connected case pending before the Court of Judicial First Class Magistrate- Alathur,

in view of the bar contained u/s 193 of Code of Criminal Procedure

12. On a reading of Section 193 of Code of Criminal Procedure it can be seen that, ""the Sessions Court can not take cognizance of any offence as

a Court of original jurisdiction unless the case has been committed to it by a Magistrate under the provisions of the Code of CPC or otherwise

provided in Code of Criminal Procedure or by any other law for the time being in force"". The grounds mentioned by the learned Sessions Judge

justifying his order, appear to be incorrect and not tenable, since the same is totally against the provisions contained in Section 193 of Code of

Criminal Procedure By virtue of Section 4 and 5 of Code of Criminal Procedure and in view of Section 193 of Code of Criminal Procedure, the

Sessions Court will get original jurisdiction to take cognizance of any offence only on the basis of special provisions contained any special

enactment. So in the absence of any special enactment conferring original jurisdiction for taking cognizance and without the procedure

contemplated u/s 209 or 323 of Code of Criminal Procedure, no Sessions Court can take cognizance of any offence. In the light of the above

provisions and the limitations of the Sessions Court, the learned Sessions Judge ought to have dismissed the petition for transfer, by rendering a

speaking order or the case ought to have been referred to this Court u/s 407(2) of Code of Criminal Procedure Therefore, the above mentioned

orders of the learned Sessions Judge as well as the learned Magistrate are not legally sustainable.

13. In the result, this Revision Petition is disposed of setting aside the order dated 19.6.2010 in CrI.M.P. No. 1264/10 of the Court of Sessions-

Palakkad division and also the order passed by the learned Magistrate in pursuance of the above order of the Sessions Judge, transferring and

placing the files before the Addl. Sessions Judge (Ad hoc-I), Palakkad. Accordingly, the learned Addl. District and Sessions Judge-Palakkad, is

directed to transmit the file pertained to C.C. No. 258/08 to the Court of Judicial First Class Magistrate-Alathur, who in receipt of the file shall

consider and dispose C.P. No. 51/10 afresh and commit the case u/s 323 r/w 209 of Code of Criminal Procedure to the Court of Sessions-

Palakkad, who in turn will pass appropriate orders in terms of Section 194 of Code of Criminal Procedure, for the trial and disposal of the above

case along with S.C. No. 493/09, pending in the Court of Addl. District and Sessions Judge (Ad hoc-I), Palakkad.

14. Criminal Revision Petition is disposed of accordingly.