(2013) 1 ALD(Cri) 150 : (2013) 2 ALT(Cri) 317

Andhra Pradesh High Court

Case No: Transfer Criminal Petition No. 154 of 2012

Aijaz Ali Qureshi and Others		APPELLANT
	Vs	
The State of A.P. and Another		RESPONDENT

Date of Decision: Oct. 5, 2012

Acts Referred:
Criminal Procedure Code, 1973 (CrPC) â€" Section 177, 178, 179, 180, 181

Citation: (2013) 1 ALD(Cri) 150 : (2013) 2 ALT(Cri) 317

Hon'ble Judges: G. Krishna Mohan Reddy, J

Bench: Single Bench

Advocate: M. Layeeq Khan, for the Appellant;

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

G. Krishna Mohan Reddy

1. This Criminal Petition is filed u/s 407 of the Code of Criminal Procedure, 1973 (Cr.P.C.) to set aside order dated 03.5.2012 passed in Transfer

Crl.M.P. No. 202 of 2012 (Crl.M.P.) on the file of the Court of Metropolitan Sessions Judge, Hyderabad, transferring C.C. No. 725 of 2009

(C.C.) on the file of the Court of VIII Additional Metropolitan Sessions Judge, Hyderabad, to try and dispose of along with S.C. No. 540 of

2011 on the file of the latter Court u/s 408 Cr.P.C. Whereas the petitioners herein are the respondents in the Crl.M.P. and A1 to A8 in the C.C.,

the second respondent herein is the petitioner in the Crl.M.P. and defacto complainant in the C.C. For convenience sake, I refer the parties as

arrayed in the Crl.M.P. from here afterwards.

2. The question raised here is whether by virtue of clause (iii) of Section 407(1)(c) Cr.P.C., the Sessions Judge got authority to transfer the case as

was done in this case.

3. Learned counsel for the respondents would contend that by virtue of the said clause u/s 407(1)(c) Cr.P.C., only the High Court got the authority

to commit the case to the Court of Session for conducting necessary trial along with the Sessions Case by reason of which the Metropolitan

Sessions Judge got no authority to transfer the C.C., which in fact amounts to committing the case to the Court of VII Additional Metropolitan

Sessions Judge, Hyderabad directly which is not permissible under law. He has placed reliance in this context upon a decision reported in Abdul

Salam C.H. Vs. Sameera and Another, rendered by Kerala High Court.

4. Therefore, it is to be seen as to whether the transfer of the case effected by the Metropolitan Sessions Judge is proper or not. With regards to

the subject on hand it is necessary to distinguish what is meant by committal and what is meant by transfer of a criminal case from one criminal

court to another criminal Court within a sessions division as per law. In fact the language employed in Section 209 Cr.P.C. itself gives a clear

picture of this distinction which is fortified by the corresponding provisions enumerated in the Sections 407 and 408 Cr.P.C. This section deals

with the question of committal of a case to the Court of Session from a Court of Judicial Magistrate of First Class when an offence is exclusively

triable by the court of Sessions subject to the conditions incorporated thereunder. Only in this Section the question of sending a criminal case,

which is exclusively triable by a Court of Session, to a Court of Session is termed as ""committal"". The language used is to be taken in the true spirit

of the intendment of the legislation. Therefore, any other mode of sending a criminal case from one Court to another Court as employed in the

Code cannot be taken as ""committal"" of that case from the first Court to the second Court. It actually enjoins:

Commitment of case to Court of Session when offence is triable exclusively by it

When in a case instituted on a police report or otherwise, the accused appears or is brought before the Magistrate and it appears to the Magistrate

that the offence is triable exclusively by the Court of Session, he shall-

(a) Commit, after Complying with the provisions of Section 207 or Section 208, as the case may be, the case to the Court of Session, and subject

to the provisions of this code relating to bail, remand the accused the custody until Such commitment has been made;

(b) Subject to the provisions of this Code relating to bail, remand the accused to custody during, and until the conclusion of, the trial;

(c) Send to that Court the record of the case and the documents and articles, if any, which are to be produced in evidence;

(d) Notify the Public Prosecutor of the commitment of the case to the Court of Session.

5. Section 407 Cr.P.C., deals with the power of the High Court in respect of transfer of cases and appeals, whereas Section 408 Cr.P.C., deals

with the power of Sessions Judge to do so. It is necessary to extract these provisions for proper appreciation of the question on hand.

Section 407 reads:

Power of High Court to transfer of 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.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General

of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the

payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with copy of the

grounds on which it is made; and no order shall be made on of the merits of the application unless at least twenty-four hours have elapsed between

the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary

so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on

such terms as the High Court may think fit to impose: Provided that such stay shall not affect the subordinate Court''s power of remand u/s 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or

vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one

thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial

the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government u/s 197.

Section 408 reads:

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 session''s 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 subsection (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.

6. Pertinently the emphasis of learned counsel for the defacto complainant in this context is upon clause (iii) of Section 407(1)(c) Cr.P.C., which

reads that whenever it is made to appear to the High Court that any particular case be committed for trial to a Court of Session, it has power to do

so.

7. It is emphatical that with reference to the power of High Court three clauses i.e., clauses (ii), (iii) and (iv) are incorporated in sub-section(1)(c)

of Section 407, two with regards to the transfer of a criminal case and the other with regards to committal of a criminal case. Subject to the sub-

section clause (ii) enjoins ""That it may order transfer of a case or appeal or class of cases or appeals from a criminal court subordinate to its

authority to any other such criminal court of equal or superior jurisdiction"", clause (iv) enjoins ""That any particular case or appeal be transferred to

and tried before itself"" which are subject to sub-section (2), which contemplates ""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."" and clause (iii) enjoins ""That any particular case be committed for trial to a Court of Session"". Thus these aspects are

dealt with under different contexts with regards to the question of the powers of the High Court in that behalf. What is significant is that the

procedural aspects regarding the transfer of a criminal case have been separately dealt with under sub-sections 3 to 9 in Section 407 which are

adopted in Section 408 which separately deals with such power of the Sessions Court within its sessions division. If the word ""committal"" does not

differ from the word ""transfer"" within the parameters of the legal terminology, the employment of such different sub-sections or clauses would not

have been done.

8. The powers of committal or transfer of criminal cases of the Judicial Magistrate of First Class, High Court and Sessions Judge have been

categorically given in the provisions enumerated respectively. There is no confusion or overlapping of any of the provisions. The power given u/s

209 Cr.P.C. to commit a criminal case to a Court of Session subject to that that case should be exclusively triable by the Court of Session is quite

distinguishable from the power of the Sessions Judge to transfer a criminal case from one criminal court to another criminal court within his

Sessions Division as enjoined by Section 408 Cr.P.C. Significantly Section 209 Cr.P.C. does not speak of committing a criminal case to the Court

of Session, which is not exclusively triable by the Sessions Court whereas Section 408 does not speak of committal of a criminal case in specific

terms. There is no provision in the Code which enables the Judicial Magistrate of First Class to transfer a criminal case from his court to any other

criminal court within the Sessions Division, nor there is any provision in the Code which enables the Sessions Judge to commit any case to the

Court of Sessions as envisaged in Section 209 Cr.P.C.

9. In every Sessions Division there would be number of criminal courts of the category of Judicial Magistrate of First Class, Assistant Sessions

Judge, and Additional Sessions Judge. u/s 408 Cr.P.C. vide powers have been conferred on the Sessions Judge to transfer a criminal case or an

appeal from one criminal court to another criminal court of higher jurisdiction within his Sessions Division without putting any restrictions when it is

made to appear to him that it is expedient to do so to meet the ends of justice. Thereby the words used in the Section, ""From one criminal court to

another criminal court"" cannot be confined only to a particular category of courts within the Sessions Division. Hence the word, ""committal"" as

used in clause (iii) of Section 407(1)(c) Cr.P.C. cannot be equated with the word ""Transfer"" as used in Section 408 Cr.P.C. In other words, the

power of a Sessions Judge to transfer a criminal case from one criminal court to another criminal court within his Sessions Division cannot be

curtailed by virtue of clause (iii) of Section 407 (1)(c) Cr.P.C., which deals with a different mode. The word, ""committal"" used in clause (iii) of

Section 407 (1)(c) Cr.P.C. should be read in conjunction with the procedure laid down in Section 209 Cr.P.C. with regards to the committal of a

criminal case, which is exclusively triable by a Court of Session, by a Judicial Magistrate of First Class to the Court of Session. When Section 407

deals not only with the power of High Court to transfer a criminal case from one criminal court to another criminal court subject to the question of

jurisdiction to entertain the matter but it also deals with the power to order for committing a criminal case to the Court of Session, it is not

appropriate to confine its power only to the question of committal restricting the amplitude of the Section to that extent only. If that is the case the

provisions incorporated in the section about the power to transfer a criminal case would become redundant.

10. In fact in the decision cited by learned counsel for the petitioners in C.H. Abdul Salam v. Sameera (supra), it was observed as follows.

Section 407(1)(iii) of Cr.P.C. 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 Cr.P.C. 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 Subsections (3) to (7) and (9) of Section 407 were made applicable to Sessions Court. However, the question arising for

considering 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 Cr.P.C. 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 Vs. State of Kerala, Radhey Shyam and Another Vs. State of U.P., and Manindra Kumar Vs. The

State of Rajasthan and Another, Section 408(1) of Cr.P.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 Cr.P.C. 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 Cr.P.C. Therefore, we are in perfect agreement with the decision of the learned

Single Judge of this Court in State of Kerala Vs. Annamma, we are unable to agree with the decision in Santhosh @ Appachan Vs. State of

Kerala and Others, However, we are of the view that the ideal procedure is to file an application before the Magistrate itself by the Public

Prosecutor or by the aggrieved party requesting the Magistrate to commit the case u/s 323 of Cr.P.C. to the Sessions Court where the connected

case is pending. If the case is not committed by the Magistrate and the aggrieved party files a petition before the Sessions Court for transfer even

though Sessions Court has no power to transfer it can dispose of the Transfer Application directing the Magistrate to consider the request to

commit the same to the Sessions Court where the connected case is pending. But the aggrieved party can apply to this Court u/s 407(1)(iii) of

Cr.P.C. for directing the Magistrate Court to commit a case for trial to the Court of Sessions along with connected cases.

11. On the analysis of the scope of Sections 209, 407 and 408 Cr.P.C., I am unable to agree with the observations made that Section 408(1)

Cr.P.C. only gives power to a Sessions Judge to transfer a case pending in one criminal court to another criminal court in his Sessions Division, but

it does not give power to the Sessions Court to call for a case to that Court from the Court of Judicial Magistrate of First Class without formal

committal, because the committal of a case from a Court of Judicial Magistrate of First Class to a Court of Session u/s 209 Cr.P.C. or u/s 407(1)

(c)(iii) Cr.P.C., cannot be equated with power of transfer as enshrined in Section 408(1) Cr.P.C. Consequently, I am also unable to agree with the

observation that the ideal procedure is to file application before the Magistrate itself by the Public Prosecutor or by the aggrieved party requesting

the Magistrate to commit the case u/s 323 Cr.P.C. to the Court of Sessions where the connected case is pending. Consequently the observation

made that if the case is not committed by the Magistrate and the aggrieved party file an application before the Court of Sessions for transfer, even

though the Sessions Court has no power to transfer, it can dispose of the transfer application directing the Magistrate to consider the request to

commit the same to the Sessions Court where the connected case is pending is also not acceptable. In my considered opinion, these observations

are quite contradictory to the provisions of Section 408 Cr.P.C., which empowers the Sessions Judge to transfer a criminal case from one criminal

court to another criminal court, which got superior jurisdiction, within his Sessions Division.

12. Therefore, for the reasons discussed above, the plea of the learned counsel for the accused is not tenable as I see no infirmity in the order

passed by the Sessions Court. Ultimately, the petition is liable to be dismissed. The Transfer Criminal Petition is, accordingly, dismissed.