
(2017) 05 KL CK 0001

In the High Court Of Kerala

Case No : Transfer Appeal (Criminal) No. 1 of 2016 in Tr. P. (Crl.) 3 of 2016

Babu

APPELLANT

Vs

Kunjumol Nandiyathayil

RESPONDENT

Date of Decision : 25-05-2017

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 177, Section 397, Section 401,
Section 407, Section 407(2), Section 5(ii)
Kerala High Court Act, 1958 — Section 5(2)

Citation : (2017) 2 KerLJ 964 : (2017) 3 RCRCriminal 344

Hon'ble Judges : C.K. Abdul Rehman, A. Hariprasad and V. Shircy, JJ.

Bench : Full Bench

Advocate : Sri. Rajit, Advocate, for the Appellant; S.U. Nazar, Public Prosecutor,
Sri. P.S. Sreedharan Pillai, C.P. Udayabhanu, Advocates, for the Respondents

Final Decision : Dismissed

Judgement

A. Hariprasad, J.—Following legal conundrums crop up for adjudication in this appeal :

"Whether an appeal could be maintained under Section 5(i) of the Kerala High Court Act, 1958 (in short, the Act) against an order passed by a Single Judge under Section 407 of the Code of Criminal Procedure, 1973 (in short, Cr.P.C.) either allowing or refusing to transfer a case or appeal from one criminal court to another criminal court in the same Sessions division? Parenthetically, does the High Court exercise original jurisdiction while dealing with a case under Section 407 Cr.P.C. also arises for consideration."

2. This matter comes up before us on a reference by a Division Bench. The Division Bench was of the view that some observations in Balan v. Sivagiri Sree Narayana Dharma Sanghom Trust [2005 (4) KLT 865] rendered by a Full Bench run contrary to the law laid down by a Division Bench in S. Narayanaswami v. Padma [1972 KLT 7] touching on the issue.

3. Short facts relevant for disposal of the case can be summarized thus: Appellant is the 4th accused in a Sessions case. The appellant, along with other accused, stood charge-sheeted for grave offences, including murder. Victim's mother approached this Court with a petition under Section 407 Cr.P.C. for transferring the case from one Additional Sessions Court to another in the same Sessions division. It was contended that after examining 45 witnesses, the learned Additional Sessions Judge, who started the trial, had been transferred to another Court in the same Station, and posted as the First Additional Sessions Judge. 46th witness for the prosecution was examined before the original Court, then presided over by another Judge. Mother of the victim approached this Court requesting transfer of the case to the First Additional Sessions Court, where the judicial officer, who recorded major portion of the evidence, was presiding. Considering nature of the case and other factual and legal aspects, a learned Single Judge of this Court allowed the petition. This appeal is preferred against that order.

4. We heard the learned counsel appearing for the appellant and the learned Public Prosecutor. Both sides submitted that the matter has become infructuous as trial of the case had been completed and judgment had been pronounced by the transferee court as there was no stay of the proceedings. However, we are obliged to answer the reference for concluding the legal issue. Hence, we elaborately considered the points involved in the reference order.

5. For clarity of thought and expression, we deem it appropriate to have a close look at the relevant statutory provisions touching on the issues involved.

6. We shall deal with Section 5 of the Act, which is primarily relevant for entertaining an appeal from a judgment or order of a Single Judge. It reads as follows:

"Appeal from judgment or order of Single Judge- An appeal shall lie to a Bench of two Judges from-

- (i) a judgment or order of a Single Judge in the exercise of original jurisdiction; or
- (ii) a judgment of a Single Judge in the exercise of appellate jurisdiction in respect of decree or order made in the exercise of original jurisdiction by Subordinate Court.

7. It is pertinent to note that Section 5(ii) of the Act has no application to the facts of this case. On a close scrutiny of Section 5(ii) of the Act, it can be seen that it specifically deals with a judgment of a Single Judge in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of original jurisdiction by any Subordinate Court. Therefore, two things are crystal clear from this provision. Firstly, what is contemplated under Section 5(ii) of the Act is a judgment of a Single Judge passed in the exercise of appellate jurisdiction. Secondly, it should be in respect of a decree or order made in the exercise of original jurisdiction by a Subordinate Court. A Division Bench of this

Court in *Manual v. Revenue Inspector* [1968 KLT 485] has interpreted Section 5(ii) of the Act in lucid terms. It was observed that, from the context, it would appear that the word "order" in Section 5(ii) of the Act was intended to include only an order passed in a suit or civil proceeding. The Bench noticed the collocation of words "decree or order" lending support to this construction. However, there is no case for the appellant herein that Section 5(ii) of the Act will anyway help him to advance a favourable argument. Stated differently, the thrust is on Section 5(i) of the Act to canvas a position that an appeal can be maintained against an order passed by a learned Single Judge in a proceeding under Section 407 Cr.P.C.

8. Now, we shall refer to Section 5(i) of the Act. It says that an appeal shall lie to a Bench of two Judges from a judgment or order of a Single Judge in the exercise of original jurisdiction. The question then falls for decision is whether the order passed by a learned Single Judge under Section 407 Cr.P.C. is in exercise of original jurisdiction.

9. Supreme Court in many pronouncements, including *Ujjam Bai v. State of U.P.* [AIR 1962 SC 1621], has held that "jurisdiction" means authority to decide. This fundamental proposition is unchallengeable.

10. In order to grasp the full implication of the concept "original jurisdiction", we may refer to the observations in *Black's Law Dictionary* (8th Edition, page 869). Original jurisdiction is defined to be a Court's power to hear and decide a matter before any other Court can review the matter. In contradistinction to the expression "appellate jurisdiction", which is the power of a Court to review and revise a lower court's decision, the expression "original jurisdiction" shall be understood as one where the cause of action is brought for the first time. *Black's Law Dictionary* defines "cause of action" as a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.

11. *Words and Phrases* (Permanent Edition) Volume 30 at page 520 enunciates the following proposition regarding original jurisdiction:

"Original jurisdiction" as contradistinguished from "appellate jurisdiction" is the right to hear a cause and to make an original determination of the issues from the evidence as submitted directly by the witnesses, or of the law as presented, uninfluenced or limited by any prior determination or the action of any other court juridically determining the same controversy. *State v. Johnson*, 114 P.2d 1034, 1036, 1037, 100 Utah 316."

12. *American Jurisprudence* (20 Am Jur 2d" Note - 98 Generally; original and appellate jurisdiction) elaborates on the classifications on jurisdiction and enunciates the following principles:

"Original jurisdiction is the jurisdiction conferred on or inherent in a court in the first instance. It is to be distinguished from appellate jurisdiction, which is the

jurisdiction of a superior court to review the final judgment, order, or decree of an inferior court on the record made in the inferior tribunal, and to affirm, reverse, or modify such decision, judgment or decree. A particular court may, of course, have both original and appellate jurisdiction. Where a case is tried anew on appeal, it is said that the appellate functions cease when the case has been transferred pursuant to the prescribed appellate procedure and brought within the jurisdiction of the upper court for trial, and that the trial of the case by the upper court does not involve the exercise of that court's appellate jurisdiction, but involves the exercise of its original jurisdiction."

13. Advanced Law Lexicon by learned author P. Ramanatha Aiyar states the following proposition:

"Original jurisdiction. The phrase "original jurisdiction" means jurisdiction to entertain cases in the first instance, as distinguished from appellate jurisdiction.

The authority of a Court to hear a case in the first instance or for the first time; the authority to hear a case possessed by a trial court.

The jurisdiction of first instance; the authority of a Court to take cognizance of a controversy at the inception of legal proceedings thereon."

14. It is trite that a right to appeal is neither a common law right nor an inherent right. It is a creation of the relevant statute. The appellate jurisdiction confers on a Court the power to take cognizance of a case removed to it from the decision of an inferior court. Ordinarily, appellate jurisdiction involves a hearing of law as well as fact and is invoked by an aggrieved person (*Sri Raja Lakshmi Dyeing Works v. Rangaswamy* [(1980) 4 SCC 259]). The Supreme Court in *Tirupati Balaji Developers (P.) Ltd. v. State of Bihar* [(2004) 5 SCC 1] held that the appellate jurisdiction means the power of a superior Court to review the decision of an inferior Court.

15. Ordinarily, revisional jurisdiction is analogous to a power of superintendence and sometimes exercised even without it being invoked by a party. Well settled proposition is that conferment of revisional jurisdiction is generally for the purpose of keeping the Tribunals, subordinate to the revisional Tribunal, within the bounds of their authority and to make them act according to well defined principles of justice. Revisional powers, in the context of Cr.P.C., as discernible from Sections 397 and 401, will include the power to examine the regularity of any proceedings of an inferior court, apart from the power to examine the correctness, legality or propriety of any finding, sentence or order.

16. Having understood the concepts as above, we are of the considered opinion that jurisdiction exercised by a Single Judge, while handling a proceeding under Section 407 Cr.P.C. can never be an original jurisdiction. We shall amplify the reasons therefor. For better understanding the issue, we shall extract Section 407 Cr.P.C.:

"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 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 a copy of the grounds on which it is made; and no order shall be made on 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 of 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 under section 309.

(7) Where an application for an order under subsection (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 under section 197."

17. A careful reading of the provision will show that the High Court has power to order a particular case or appeal be transferred for the purpose of trial or hearing, as the case may be. The power can be exercised in three ways, namely,

"(1). The High Court can act suo motu.

(2). The High Court can act on application of the lower court, or

(3). The High Court can act on application of a party."

18. The conditions to be satisfied for invoking the powers are :

"a. A fair and impartial inquiry or trial cannot be held otherwise.

b. Some question of law of unusual difficulty is likely to arise.

c. An order under this Section is required by any provision of Cr.P.C.

d. It will tend to the general convenience of the parties or witnesses.

e. It is expedient for the ends of justice."

19. It is further clear from the Section that the High Court alone has the jurisdiction to transfer a case by invoking this provision. It is competent to pass any of the following orders:

"(i) that any offence be enquired into or tried by a court otherwise competent, though not empowered under Sections 177 to 185 Cr.P.C.

(ii) that any case or appeal be transferred from a subordinate criminal court to any other such criminal court of equal or superior jurisdiction.

(iii) that any case be committed to a court of Sessions

(iv) that any case or appeal be transferred to and tried before the High Court itself."

20. Proviso to sub section (2) of Section 407 Cr.P.C. is profoundly relevant for our purpose. It says that no application shall lie under the said provision 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 very much evident that this is an inviolable condition for approaching the High Court for getting transfer of a case from one criminal court to another criminal court in the same Sessions Division by invoking the provisions in Section 407 Cr.P.C. However, the embargo in the proviso does not operate, if the transfer requested for is from one criminal court in a Sessions division to another criminal court in another Sessions division. Obviously, such an application can be filed only in the High Court because a Sessions Judge has no power to transfer a case to a court outside his Sessions division.

21. On a careful reading of Section 407 Cr.P.C., it will be evident that the purpose of transferring a criminal case from one court to another, whether it be intra Sessions division or inter Sessions division, is to achieve a fair and impartial enquiry or trial or to handle some question of law of unusual difficulty or for meeting the general convenience of the parties or witnesses and the like. The High Court, notwithstanding the jurisdictional restrictions imposed by Sections 177 to 185 Cr.P.C., has the power to transfer a case from one court to another for enabling a fair trial in all respects and thereby to do complete justice in a given case.

22. Salient feature of the power, exercisable under Section 407 Cr.P.C., is that by invoking it no cause could be decided by the High Court. In other words, what is granted or declined under Section 407 Cr.P.C. is only the choice of forum. We have already mentioned what is the nature and character of original jurisdiction in respect of a cause brought before a Court. The High Court, while exercising its power under Section 407 Cr.P.C., does not adjudicate any cause; it simply specifies a forum for fair trial.

23. Judicial opinion consistently formed is that before an application can be filed under Section 407 Cr.P.C. for effecting transfer of a case from one criminal court to another criminal court in the same Sessions division, its rejection by the Sessions Judge is a pre-condition. We also share the same view, as the plain meaning of the Section does not give any chance to have a different interpretation. We notice the stark distinctions between the powers conferred on the High Court under Section 24 of the Code of Civil Procedure, 1908 (in short, the Code) and Section 407 Cr.P.C. We shall deal with that aspect later while referring to Balan's case (supra).

24. Facts in Narayanawami's case (supra) are not similar to that in our case. That was a case where an appeal was attempted to be filed against an order

passed by a learned Single Judge, dismissing an application for transferring a criminal case from one court in a particular Sessions division to another criminal court in another Sessions division. Play of Section 5(i) of the Act was considered by the learned Judges and on noticing the distinction between an order passed in the exercise of original jurisdiction and an order in the nature of an original order, passed in the exercise of appellate jurisdiction, it held thus:

"For the purpose of this case, it is enough to hold that the power of the High Court to transfer a case from the file of one magistrate to the file of another is not a power exercised by the High Court in its original jurisdiction, even if it may be (here also, we do not definitely say it is) a power in the nature of an original power exercised by a High Court in its appellate or revisional jurisdiction."

25. Learned counsel for the appellant relied on some observations in Balan's case. The questions of law referred to the Full Bench for decision in Balan's case are as follows:

(i) Whether an appeal will lie against the order of a single Judge passed under Section 24 of the Code of Civil Procedure?

(ii) When such proceedings are under consideration can the learned single Judge pass interim orders?

(iii) If interim orders are passed by the single Judge, whether appeals to the Division Bench can be filed from such interim orders?"

26. It was a case in which the power vested in the High Court under Section 24 of the Code was specifically considered. Full Bench in Balan's case, in the course of discussion, at paragraph 10, considered the ratio in Narayanaswami's case. However, the Full Bench was neither called upon to consider the correctness of the ratio in Narayanaswami's case nor was that exercise required for adjudication of the case placed before it. Therefore, the principle of law in Narayana Swami's case remains unaffected by the pronouncement in Balan's case, as Narayanaswami's case was only casually referred to in Balan's case along with many other precedents.

27. Section 24 of the Code deals with general power of the High Court and the District Court to transfer and withdraw any suit, appeal or other proceeding. A provision similar to the Proviso to sub section (2) of Section 407 Cr.P.C. is absent in Section 24 of the Code. The conditions for invoking power under Section 24 of the Code is much simpler than those under Section 407 Cr.P.C. and the latter provision is wider in scope and amplitude than Section 24 of the Code. Sub section (7) of Section 407 Cr.P.C. is one such instance to be pointed out. Whatever that be, we need not embark on a comparative study of the said provisions. We affirmatively hold that the ratio in Balan's case has no impact either on the law declared in Narayanaswami's case or on the questions referred to this Bench for consideration.

28. Subsequent to the reference order, another Division Bench in Sreejith v.

State of Kerala [2016 (3) KHC 98] had occasion to consider an identical question. The issue raised before the Division Bench was whether an appeal could be maintained in terms of Section 5(i) of the Act against an order of a Single Judge, dismissing a petition filed under Section 407 Cr.P.C. seeking transfer of a criminal case pending before a Magistrate's Court to another Magistrate's Court in a different Sessions division. After surveying the decisions on the point, the Division Bench observed that power exercised by a Single Judge while refusing to transfer a case from one Magistrate's Court to another Magistrate's Court under Section 407 Cr.P.C. cannot be challenged in appeal under Section 5(i) of the Act. On taking such a view, the Division Bench found that the appeal was incompetent.

29. Facts in Sreejith's case would show that the request originally made by a party was to transfer a case from one Magistrate's Court in a particular Sessions division to another court in another Sessions division. Implication of the Proviso to sub section (2) of Section 407 Cr.P.C. was not specifically considered in Sreejith's case. Perhaps it might have been consciously avoided in the facts and circumstances of the case.

30. Next aspect arising for consideration is regarding the nature and extent of power exercised by High Court under Section 407 Cr.P.C. Whether the power exercised by High Court under Section 407 Cr.P.C. is an administrative power or a judicial power is no more res integra. The Supreme Court in *Ranbir Yadav v. State of Bihar* [1995 (4) SCC 392] has clearly held that the power exercised by High Court under Section 407 Cr.P.C. is judicial power and not administrative power. It is a well known principle that the High Court under Article 227 of the Constitution of India exercises power of superintendence over the courts and tribunals throughout the territories in relation to which the High Court exercises its jurisdiction. It is also trite that this power of superintendence entitles the High Court to pass orders for administrative exigency and expediency. There is a clear cut distinction between the exercise of administrative powers under Article 227 of the Constitution and the exercise of judicial powers under Section 407 Cr.P.C.

31. Apex Court in *Kamalesh Kumar v. State of Jharkhand*, [2013 (15) SCC 460] has again considered the nature of power under Section 407 Cr.P.C. in a different context. The Court observed thus:

"The High Court does have the power to transfer the cases and appeals under Section 407 Cr.P.C. which is essentially a judicial power. Section 407 (1) (c) Cr.P.C. lays down that, where it will tend to the general convenience of the parties or witnesses, or where it was expedient for the ends of justice, the High Court could transfer such a case for trial to a Court of Session. That does not mean that the High Court cannot transfer cases by exercising its administrative power of superintendence which is available to it under Article 227 of the Constitution of India."

Hence, the proposition that power vested in the High Court by virtue of Section

407 Cr.P.C. is a judicial power is indubitable. Besides, the Supreme Court has expanded the fundamental right guaranteed under Article 21 of the Constitution by proclaiming that a right to fair and speedy trial is a non-negotiable right and also a facet of life and personal liberty. We do not intend to burden this judgment by citing a cartload of precedents as the above statement of law is unassailable. On understanding the object, purpose and scope of the power under Section 407 Cr.P.C. as mentioned above, we are of the definite view that this is yet another reason to hold that said power is a judicial power and not an administrative power.

32. Instances of original jurisdiction exercised by the High Court are writ proceedings under Article 226 of the Constitution, election petitions under the Representation of People Act, 1951, etc. We make it clear that the list is not exhaustive.

33. After having understood the principle that the High Court under Section 407 Cr.P.C. exercises a judicial power, it has to be borne in mind that exercise of such power can be either in the form of appellate jurisdiction or revisional jurisdiction, as the case may be. It can never be an original jurisdiction, as the concept itself is different because there is no adjudication of a cause in a proceeding under Section 407 Cr.P.C. Foregone discussions strongly prompt us to approve the view in Narayanaswami's case, that power vested in the High Court by virtue of Section 407 Cr.P.C. is in the nature of original power, exercised by the High Court in its appellate or revisional jurisdiction. When a proceeding is initiated before the High Court under Section 407 Cr.P.C. complaining that the Sessions Judge has either allowed or refused to transfer a case from one criminal court to another in the same Sessions division, the High Court, while deciding the matter, exercises an original power in its appellate jurisdiction. However, in a proceeding, brought before the High Court, where the request is for transfer of a criminal case from one criminal court to another in a different Sessions division, the High Court is called upon to exercise innate original power emanating from its revisional jurisdiction available for examining the regularity of the proceedings. Therefore, there cannot be any doubt that an order passed by a Single Judge under Section 407 Cr.P.C., either allowing or refusing to transfer a case from one criminal court to another in the same Sessions division, cannot be said to be one passed in the exercise of original jurisdiction.

34. The same principle applies in respect of a case where the request made before the High Court for the first time is to transfer a criminal case from one Sessions division to another Sessions division. Notwithstanding the absence of a provision similar to the Proviso to sub section (2) of Section 407 Cr.P.C., nature of the power vested in the High Court under Section 407 Cr.P.C. can never be an original jurisdiction for the reason mentioned above. In such cases the High Court exercises its power under Section 407 Cr.P.C. as an original power stemming from the revisional jurisdiction.

35. Hence we hold that whether the request in a petition under Section 407

Cr.P.C. is to transfer a criminal case from one court to another, either intra Sessions division or inter Sessions division, the power exercised by this Court is an original power emanating from the appellate or revisional jurisdiction as the case may be. Hence, no appeal can be maintained under Section 5(i) of the Act under any of the circumstances.

36. In the result, the reference is answered as above and we dismiss the appeal as it has become infructuous.

37. All pending interlocutory applications will stand dismissed.