

(2008) 01 DEL CK 0155
In the Delhi High Court
Case No : Criminal M.C. 6838 of 2006

Kuldeep Singh @ Bitta

APPELLANT

Vs

State

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Citation : (2008) 01 DEL CK 0155

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : N. Hariharan, for the Appellant; Pawan Behl, APP and Tilak Raj, for the Respondent

Final Decision : Allowed

Judgement

S. Muralidhar, J.—This petition u/s 482 of the Code of Criminal Procedure (CrPC) challenges an order dated 11th September 2006 passed by the Additional Sessions Judge (ASJ), Judge-In-charge, Rohini Courts directing that the criminal case (titled State v. Kuldeep Singh alias Bitta) in FIR No. 196 of 1995 registered at P.S. Saraswati Vihar under Sections 506/109/34 IPC read with Sections 25 and 27 of the Arms Act should be transferred to the Court of Mr. Narender Kumar, ASJ, Fast Track, Rohini for disposal along with the criminal case in FIR No. 227/1991 (titled State v. Harish and Ors.) under Sections 302/120B/34 registered at PS Saraswati Vihar.

2. The principal grievance of the petitioner, as submitted by his learned counsel Mr. Hariharan, is that the impugned order transfers the case involving him, and triable by the Metropolitan Magistrate (MM), to a superior court, viz., the Fast Track Court and clubs it with an earlier case arising out of different FIR in which he is not an accused and which is triable exclusively by the Sessions Court. This effectively takes away a right of appeal as far as the petitioner is concerned. It is further submitted that such an order could not have been passed without affording the petitioner, who is prejudiced, without affording him an opportunity of being heard.

3. The petitioner Mr. Kuldeep Singh is an accused in the criminal case in FIR No. 196 of 1995. This FIR was registered in relation to an incident alleged to have taken place on 2nd April 1995 in which the complainant Mr. Tilak Raj Kohli is said to have been threatened with a knife by co-accused Mr. Devender Kumar alias Kala. The relevant portion of FIR No. 196 of 1995 in which the petitioner's name figures reads as under:

When I reached the crossing of Raja park and Railway Colony, Devender @ Kala stopped me and threatened me while having a open buttandar knife in his hand, in case you pursue your son's murder case or depose against us in the court, you will meet the same fate as your son. Once before when I had gone to the court for paervi of the case, Bitta asked Devender to finish me before the next date of hearing and he would ensure nothing happens to Devender. I because of some reason told Devender with folded hands that I would not come for paervi of the case in future and I have come after saving my life. Devender has gone towards the Railway Colony and is wearing a blue colour track suit.

4. The earlier FIR No. 227 of 1991 concerned an incident of murder of the son of Mr. Tilak Raj Kohli on 7th June 1991. The charge sheet filed in the court in the said case after investigation showed the present petitioner Mr. Kuldeep alias Bitta in Column 2. In other words, the petitioner herein was not sent up for trial in that case for want of evidence. The trial of the said case is yet to be concluded.

5. Pursuant to an order by this Court, the learned ASJ, Fast Track Court has submitted a report dated 19th September 2007 explaining the reasons for the delay in completing the trial in FIR 227 of 1991. It appears that on several dates the complainant in FIR No. 196 of 1995, Mr. Tilak Raj Kohli, sought adjournments and his examination as PW 5 has remained inconclusive. It may be noticed that the trial of the case in FIR No. 196 of 1995 has also not made much progress in the court of the learned MM.

6. Elaborating his submissions, Mr. Hariharan, learned counsel for the petitioner submits that the impugned order is without jurisdiction. The power u/s 408 CrPC which permits the Sessions Judge to transfer cases and appeals can, according to him, be exercised only when it is expedient for the ends of justice and that the said power cannot be exercised in a manner that would take away the right of appeal of any party as a result of such transfer. In other words, by transferring of case which is triable by the court of the MM to the court of ASJ, the right of appeal of the accused has been taken away. Secondly, it is submitted that in any event the impugned order could not have been passed merely on the application of the complainant, Mr. Tilak Raj Kohli, and the consent of the prosecution, without notice to the party prejudicially affected which, in this instance, would be the petitioner.

7. In response to the above submission, Mr. Pawan Behl, learned APP appearing for the State, does not contest the proposition that the order transferring the criminal case involving the accused in a manner prejudicial to the accused could

not have been passed without notice to the accused. He also does not dispute the fact that by transferring the criminal case arising out of FIR No. 196 of 1995 triable by the court of the MM to the superior court, viz., the court of the ASJ, the accused would indeed lose a right of appeal.

8. The complainant Mr. Tilak Raj Kohli has been heard in person. He is, not surprisingly, anguished that the trial in the two cases are not progressing as quickly as they should. In his understanding, the present petitioner ought to have been sent up for trial in the earlier FIR No. 227 of 1991. He explains that could not appear regularly as a prosecution witness PW 5 in that trial because of his ill-health. He also is aggrieved by the lack of progress in the trial of the subsequent criminal case in FIR No. 196 of 1995. This is perhaps what persuaded him to request the Judge-in-Charge, Rohini Courts, to transfer the latter case also to the Fast Track Court for a joint trial with the case in the earlier FIR No. 227 of 1991. He insists that both these cases are connected and Therefore the impugned order ought not to be interfered with. He places reliance on the judgment of the Supreme Court in *Sudhir v. State of M.P.* 2001 (1) RCR (Cri) 743 and of the Karnataka High Court in *Mohd. Azamathulla alias Azzu v. State of Karnataka* 2003 (3) RCR (Cri) 795.

9. In order to understand the scope of the power of transfer vested in the Sessions Judge, a reference may be made to Section 408 CrPC which reads as under:

408. Power of Sessions Judge to transfer cases. (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.

10. Apart from the above provision, the Sessions Judge has the power u/s 409 to withdraw any case or appeal which has been made over by him to any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to such Sessions Judge. Clearly Section 409 does not apply in the facts of the present case as the criminal case arising out of FIR No. 196 of 1995 was allocated administratively to the court of the learned MM as per the jurisdiction of the latter. As regards the Section 408 there can be no manner of doubt that the power of transferring cases from one court to another court in his Sessions division can be exercised by a Sessions Judge only if it is expedient for the ends of justice. Sub-section (2)

of Section 408 permits the Sessions Judge to pass an order of transfer in terms of Sub-section (1) either on the report of the lower court, or on the application of the party interested or on his own initiative. The impugned order of transfer was passed on the application of the complainant. It was not activated by either the report of the lower court, or by the ASJ suo motu. It was also not at the instance of the possible interested parties, viz., the prosecution or the accused. Thus it cannot be said that the exercise of the power was in the manner contemplated in Sub-section (2) of Section 408.

11. Even if the complainant could be said to be a party interested and could have made such an application u/s 408, the requirement of hearing the party likely to be prejudicially affected by the passing of an order of transfer has to be read as being implied in the provision. The running theme of the CrPC is the cardinal rule of natural justice, viz., that no order prejudicial to the accused order should be passed by a court without affording such accused an opportunity of being heard. While it is possible to argue that for an order passed in the absence of the accused to be held invalid, such accused must demonstrate that he has been prejudiced as a result thereof, in the case on hand it is clear from the facts that the impugned order is indeed prejudicial to the accused. Clearly, as a result of the transfer of the case pending trial before the MM to the Fast Track Court, which is a superior court, the accused will lose a valuable right of appeal. Therefore, this court has no hesitation in holding that inasmuch as the impugned order is prejudicial to the petitioner accused, and has admittedly been passed without affording him an opportunity of being heard, it violates natural justice which is an implied statutory requirement of Section 408.

12. This is also the factor that distinguishes the judgment of the Karnataka High Court in Mohd. Azamathulla in its application to the present case. There the question that arose was whether the administrative order passed by the High Court transferring a case from the Sessions Judge, Bangalore to the Fast Track Court by means of a notification, was bad in law since the accused was not afforded an opportunity of being heard before such administrative order was passed. The High Court was of the view that since it was expedient in the interests of justice for the quick disposal of cases, and since no prejudice was caused to the accused as a result of such transfer, the order of transfer of the case could not be held to be bad in law. That the impugned order in the present case is prejudicial to the petitioner is evident from what has been discussed before. Therefore the decision in Mohd. Azamathulla has no application here.

13. The decision of the Supreme Court in Sudhir v. State of M.P. only holds that two criminal cases relating to the same incident can be heard and disposed of by the same court. As the narration of facts in the first paragraph of that judgment shows, both the cases there were triable exclusively by the Sessions Court. This by itself distinguishes the said decision in its application to the facts of the present case. Much as the complainant would want to view both criminal cases here as being connected, the fact remains that the latter case is in relation to a

separate incident at a later point in time. Further, the impugned order transfers the criminal case triable by the MM to the court of the ASJ (the Fast Track Court) for trial along with a case triable exclusively by the ASJ. It thus transfers the case from one criminal court, viz., the court of the MM, to a superior criminal court viz., the court of the ASJ to which an appeal from the court of the MM would normally lie. Effectively, Therefore, this deprives the petitioner of a right of appeal. Clearly this is beyond the scope of the power vested in the Sessions Judge u/s 408. In other words, the power of transfer in Section 408 cannot be invoked by a Sessions Judge to transfer a case from one criminal court to a superior criminal court, where it will result in the denial of the right of appeal to either party. Such an order can hardly be said to be expedient for the ends of justice. Thus the impugned order is contrary to Section 408 even on this score.

14. It may be recalled that the Supreme Court in A.R. Antulay Vs. R.S. Nayak and Another, invalidated its own order which had directed the transfer of a criminal case from the court of the Special Judge under the Prevention of Corruption Act 1947 to the original criminal jurisdiction of the High Court. It was held that such an order could not have been passed even in exercise of the powers under Article 142. Later in Supreme Court Bar Association Vs. Union of India and Another, the inherent limitations of the power to do complete justice under Article 142 was further explained as not extending to passing an order contrary to an express statutory provision. On this analogy, it can safely be concluded that the power vested in the Sessions Judge u/s 408 is even more limited and certainly does not extend to transferring a criminal case from one court to a superior court, where it will result in the denial of the right of appeal to either party. The impugned order dated 11th September 2006 passed by the Judge-In-charge, Rohini Courts is for the above reasons unsustainable in law.

15. As already noticed, the trial of the criminal case in FIR No. 196 of 1995 has been pending for over 12 years. The complainant is justified in making a grievance about the trial not yet concluding in the said case. A direction is issued to the MM to whom the case is likely to be transferred by virtue of the present decision to make every effort to complete the trial and pronounce judgment as expeditiously as possible and in any event not later than 31st May, 2008.

16. With the above directions the petition is allowed and the impugned order dated 11th September 2006 passed by the learned Judge-in-Charge Rohini Courts is set aside.

17. A certified copy of this order be sent to the Judge-in-charge, Rohini Courts for restoring the criminal case in FIR No. 196 of 1995 to the Court of learned MM for trial in accordance with law and for compliance with the direction in para 15 of this judgment.