

(1990) 09 GUJ CK 0001

In the Gujarat High Court

Case No : Misc. Criminal Application No. 2711 of 1988

The State of Gujarat

APPELLANT

Vs

Ratilal Uttamchand Morabia

RESPONDENT

Date of Decision : 03-09-1990

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 397, 406, 407, 408

Citation : (1992) CriLJ 9 : (1991) 1 GLR 50

Hon'ble Judges : S.D. Dave, J

Bench : Single Bench

Advocate : K.T. Dave, app, for the Appellant; J.G. Shah, for the Respondent

Final Decision : Allowed

Judgement

S.D. Dave, J.—This Criminal Application has been directed against the orders pronounced by the learned Sessions Judge, Kachchh at Bhuj in Criminal Miscellaneous Application No. 193 of 1988 dated 24-11-1988, staying the further proceedings of the Criminal Case No. 12 of 1988 pending on the file of the learned Sub Divisional Magistrate, Anjar-Kachchh.

2. The present petitioners are the Original Opponents while the present Opponent is the Original Petitioner.

3. The facts and circumstances under which the present Criminal Application arises may be noticed thus :--

One Ratilal Morabia, who figures as the Opponent in the present proceedings was the opponent in the proceedings before the learned Sub Divisional Magistrate, Anjar-Kachchh in Criminal Case No. 12 of 1988. He had moved the application for transfer before the learned Sessions Judge, Kachchh-Bhuj, which was registered as Criminal Miscellaneous Application No. 193 of 1988. It appears that certain remarks were called from the learned Sub Divisional Magistrate, Anjar vide Ex. 7, but instead of submitting the remarks therein, the learned Sub Divisional Magistrate, had stated that the application for transfer was not

maintainable and could not have been heard by the learned Sessions Judge. Ultimately, the application at Ex. 4 for staying of the further proceedings was submitted on behalf of the present Opponent. The above said application came to be allowed by the orders dated 24-11-1988, pronounced by the learned Sessions Judge, Kachchh-Bhuj. Being aggrieved and dissatisfied with the above said orders, that the present Criminal Application has been filed by the Petitioners.

4-5. Mr. K. T. Dave, the learned APP appears on behalf of the petitioners while the opponent has been represented by the learned Advocate Mr. J.G. Shah.

6. Mr. Dave, the learned APP, who appears on behalf of the petitioners, has contended that the learned Sessions Judge had no jurisdiction to transfer a matter which was pending before the learned Sub-Divisional Magistrate and, therefore, he could not have passed the orders below Application Ex. 4, in the above said proceedings.

7. Detailing his broad submission Mr. Dave has urged that in the same Chapter XXXI of the Code of Criminal Procedure 1973, there are the provisions for the transfer of Criminal Matters by the Supreme Court, by the High Court, by the Sessions Judge and by the District Magistrate or Sub Divisional Magistrate. Mr. Dave has urged that looking to the provision contained u/s 411 of the Code of 1973, the learned Sessions Judge, has no jurisdiction to entertain, hear and decide the transfer application filed u/s 408 of the Code of 1973, for obtaining the orders of transfer in respect of the matter, which is pending on the file by the Sub-Divisional Magistrate. Mr. Dave has, therefore, urged that the learned Sessions Judge was at an error in entertaining the proceedings for transfer and ultimately in passing the orders of staying further proceedings before the learned Sub-Divisional Magistrate. Mr. Dave, therefore, has urged that the present Criminal Application deserved to be allowed and the orders pronounced by the learned Sessions Judge require to be quashed and set aside.

8. But Mr. J. G. Shah, the learned Advocate, who appears on behalf of the Opponent, has contended that there are two provisions in the Code of 1973, i.e. Section 408 and Section 411 and that they provide for concurrent jurisdiction of the Sessions Judge and District Magistrate and that it is for the party concerned to make a choice and to prefer a particular forum. Mr Shah has also contended that merely because Section 411 of the Code of 1973 exists in Chapter XXXI of the Code, it cannot be said that the jurisdiction of the Sessions Judge u/s 408 of the Code of 1973, has been excluded. Mr. Shah, therefore, has urged that this being a case of concurrent jurisdiction, the opponent was entitled to choose a forum and that when he has chosen a particular forum i.e. the Court of Sessions Judge at Kachchh-Bhuj, it cannot be said that the above said forum has no jurisdiction to entertain, hear and decide the transfer application submitted by the Opponent. Mr. Shah, therefore, has urged that as no error has been committed by the learned Sessions Judge, the present Criminal Application deserves to be dismissed.

9. It is true that, there is a separate and independent Chapter for the transfer of Criminal Cases i.e. Chapter XXXI in the Code of Criminal Procedure 1973. Section 406 of the Code deals with the power of the Supreme Court to transfer cases and appeals. Section 407 speaks of the power of the High Court to transfer cases and appeals. Section 408 of the Code speaks of the power of the Sessions Judge, to transfer cases and appeals. But there is a specific provision i.e. Section 411 in the Code of Criminal Procedure 1973, which is in respect of making over or withdrawal of cases by Executive Magistrate. It is indeed true that both the above said sections i.e. Section 408 and Section 411 of the Code of Criminal Procedure 1973 find their place in the same Chapter i.e. Chapter No. XXXI of the Code. It is also indeed true that the above said two provisions are situated in proximate neighbourhood. But merely because of the above said position, it cannot be said that they are granting concurrent jurisdiction and powers to the Sessions Judge and to the District Magistrate for transferring the cases pending on the file of the Sub-Divisional Magistrate. Section 408 and Section 411, cannot be said to be granting concurrent jurisdiction to the Sessions Judge for transferring the matters pending on the file of the Sub-Divisional Magistrate. Mr. Shah has tried to take analogy from the provision contained u/s 439 and Section 397 of the Code of Criminal Procedure 1973. Firstly, taking the provision contained u/s 439 of the Code of 1973, it becomes clear that it speaks of the special power of the High Court or Court of Sessions Judge regarding granting of the Bail. The very caption of the section would go to show that special powers have been concurrently granted on the High Court and the Court of Sessions Judge regarding the granting of the bail.

10. Going to the provision contained u/s 397 of the Code of Criminal Procedure 1973 also, it appears that the power of calling for the records to exercise powers of revision have been bestowed upon both the High Court or Sessions Judge. Therefore, a bare reference to the text of the above said provision would go to show that by using the word "or" concurrent jurisdiction has been bestowed upon the High Court and the Court of Sessions. But this is not so, so far as the provision contained u/s 408 and Section 411 of the Code of Criminal Procedure 1973 are concerned. It requires to be appreciated pertinently that both the provisions are separate and they provide for separate forum for the transfer of the cases and appeals pending before the Criminal Courts and pending on the file of the Sub-Divisional Magistrate or Executive Magistrate. In view of this position, the analogy cannot be derived from the provision contained under Sections 439 and 397 of the Code of Criminal Procedure 1973.

11. Thus the propogation made by Mr. Shah on the analogy of Sections 439 and 397 of the Code though appears to be attractive on the outer appearance, seems not to be genuine when screened under a close scrutiny. Mr. Shah has urged that the presence of Section 411 does not by necessary implication exclude the provisions contained u/s 408 of the Code of 1973. But this argument, as advanced by Mr. Shah also cannot be accepted, regard being had to the fact that by two separate sections, separate forums have been prescribed for the transfer

of the cases. At the cost of the repetition, one would like to make it abundantly clear that the provisions contained u/s 408 of the Code of 1973, are related to the power of the Sessions Judge to transfer the cases and appeals while the provisions contained u/s 411 of the Code of 1973, are concerned with the power of making over or of withdrawal of the cases by the Executive Magistrate. It is, therefore, clear that both the above said sections exist simultaneously in the same Chapter of the Statute relating to the transfer of matters. It cannot be accepted that in any way Section 411 is being guided or controlled by the provision contained in Section 408 of the Code of 1973. In view of this provision, the contention raised by Mr. Shah cannot be accepted and the same deserves to be discarded.

12. With a view to buttress the viewpoint sought to be canvassed before me, Mr. Shah has also tried to take shelter under the provision contained in Section 6 of the Code of 1973, which classifies the Criminal Courts. It is indeed true that the Court of the Executive Magistrate would be Criminal Court but merely because the Court of the Executive Magistrate happens to be a Criminal Court u/s 6 of the Code of 1973, it cannot be stated that u/s 408 of the Code of Criminal Procedure 1973, the Sessions Judge has got power of transfer of a matter pending on the file of the Sub-Divisional Magistrate.

13. Reference also requires to be made to the Bombay High Court decision in Ramchandra Nagoji Kandam Vs. State of Maharashtra, . In this decision, while considering the provision contained u/s 145 and Section 435 of the Code of Criminal Procedure 1898, Mr. Justice Chitale of the Bombay High Court had taken the view that the Sub-Divisional Magistrate acting u/s 145 of the old Code is not an inferior criminal court as contemplated by Section 435(1) of the old Code. It is also further laid down that the revision against the order of such a Magistrate who is an Executive Magistrate lies to the District Magistrate and not to the Sessions Judge. It is indeed true that the facts were slightly different and the case pertained to the provision contained u/s 145 of the old Code. But the fact remains that the learned single Judge of the Bombay High Court had taken a view that Sub-Divisional Magistrate, acting u/s 145, is not an inferior criminal court as contemplated by Section 435(1) of the old Code.

14. Looking to the above said position also, it becomes clear that the above said contention raised by Mr. Shah on the basis of the classification of the Criminal Courts as contemplated u/s 6 of the Code of 1973, would not assist him in his submission in the instant case.

15. It, therefore, becomes clear that as there are two separate, distinct and independent provisions for the transfer contained in Chapter XXXI of the Code of Criminal Procedure 1973, the Sessions Judge or the Sessions Court would not be competent to transfer matter pending on the file of the Sub-Divisional Magistrate. It is also unequivocally clear that such power of transfer can be exercised only by the District Magistrate as contemplated u/s 411 of the Code of Criminal Procedure 1973. It, therefore, becomes clear that the learned Sessions

Judge, Kachchh-Bhuj, had no jurisdiction to entertain and decide the application for transfer of the proceedings pending on the file of the learned Sub-Divisional Magistrate. In view of this position, the learned Sessions Judge was also not authorised to pass or pronounce any interim orders staying further proceedings. It is, therefore, clear that the learned Sessions Judge, Kachchh-Bhuj had erred in the impugned orders which are being challenged by filing the present Criminal Application.

16. In view of what has been stated above, the present Criminal Miscellaneous Application deserves to be allowed and the orders under challenge require to be quashed and set aside. Accordingly, the present Criminal Application is allowed and the orders under challenge i.e. the orders pronounced by the learned Sessions Judge, Kachchh-Bhuj, below application Ex. 4 in Criminal Miscellaneous Application No. 193 of 1988, are hereby set aside. Rule is discharged accordingly.