

Power Of Sessions Judge U/S 409 CrPC To Recall Case Cannot Be Exercised Once Trial Has Commenced Before ASJ: J&K&L High Court

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HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT SRINAGAR

MD. AKRAM CHOWDHARY; J.

Trp(Crl) 42/2022; 11.11.2022

Mehboob ul Hussain versus Jhasra Parvaiz & Anr.

Petitioner(s) through: Mr. Z.A.Qureshi, Sr. Advocate with Ms. Raziya Amin, Advocate.

Respondent(s) through: Mr. Hazim Qureshi, Advocate.

J U D G M E N T

1. Petitioner, through the medium of this petition seeks transfer of two cases, **(i) Jhasra Parvaiz Vs. Mehboob ul Hussain Qadri & Anr.**, and **(ii) Mehboob ul Hussain Qadri & Anr. Vs. Jhasra Parvaiz** from the court of learned Principal District & Sessions Judge Srinagar to any other court of competent jurisdiction at Srinagar.
2. It has been asserted that a complaint was filed by respondent No.1 in terms of Section 12 of the Protection of Women from Domestic Violence Act 2005 (for short 'D.V.Act') before the court of learned Judicial Magistrate (2nd Additional Munsiff) Srinagar, who vide order dated 25.07.2022, directed the petitioner herein to pay maintenance of Rs.15,000/- per month to respondent No.1 herein.
3. It has been further pleaded that being aggrieved of this order petitioner herein filed an appeal under Section 29 of D.V.Act before the court of learned Principal District & Sessions Judge Srinagar, which was transferred to the court of learned 2nd Additional District Judge Srinagar for adjudication; that respondent No.1 also aggrieved of the same order dated 25.07.2022 passed by learned Magistrate filed an appeal under Section 29 of D.V.Act, against the petitioner and Mrs. Tahira Begum, who was arrayed as proforma respondent, before the court of learned Principal Sessions Judge Srinagar, which was retained by him in his own court; that the learned Principal Sessions Judge Srinagar also recalled the appeal assigned to the court of learned 2nd Additional Sessions Judge, though learned Sessions Judge, after issuance of notice by the other Sessions court, had no jurisdiction and authority to recall the case to his court.
4. It has been alleged that the court of learned Principal Sessions Judge Srinagar, despite application, did not issue certified copy of the order dated 01.10.2022 to the petitioner who was informed by an official of the court that the file was lying in the chambers of the learned Judge; that the petitioner did not appear before the Sessions court on 10.10.2022, as the case was not shown listed in the Cause List. That on 19.10.2022 the petitioner's counsel came to know that the matter had also been listed on 17.10.2022 and had been reserved for judgment without hearing the petitioner in both the appeals; that the petitioner moved an application on 18.10.2022 before the court praying therein that the petitioner be allowed to argue the matter i.e. both appeals but the court did not consider this application at all.
5. It was further pleaded that due to not listing the matter on 10.10.2022 a doubt and the way proceedings were conducted from day one, the petitioner got apprehensions, in his mind that he will not get fair trial, as such, he moved this application for transfer of appeals from the Sessions court to any other court of competent jurisdiction.

6. Pursuant to notice, the contesting respondent No.1 filed objections to this petition, asserting therein that the petitioner has filed this petition to escape his liability, which the law of land has imposed upon him, as he, despite orders of paying maintenance and despite filing of execution application, has not liquidated the maintenance arrears; that the trial court was not taking enough steps for liquidation of maintenance which has accumulated to about ₹1.30 lacs, as such, the appellate court had started coercive steps for liquidation of the amount and this being the only reason the instant application has been filed; that, the cases cannot be transferred from one court to another as per the convenience of the petitioner, who is reluctant to obey the court orders; that, the petitioner has filed false, frivolous and vexatious petition with unclean hands concealing the material facts, as such, is not entitled to any relief, claimed by him. The application for transfer is further opposed on the ground that the transfer of the case shall shake the trust and confidence in the courts, as the cases cannot be transferred at the drop of the hat. It has been further contended that the learned Principal Sessions Judge, being the administrative head, is competent to withdraw the case from any court to try the same himself or assign to some other court to ensure that no conflicting judgments are passed in two appeals arising out of the same order and finally it was prayed to reject the plea of the petitioner for transfer of the case from the appellate court to any other court.

7. Heard and considered.

8. Mr. Z.A.Qureshi, learned senior counsel appearing for the petitioner, argued that from the conduct of the case by the appellate court, firstly, by taking up the case without showing in the Cause List and passing orders when the matter had not been heard and, secondly, that the appeal before another Sessions Court was recalled, despite the fact that the court had already issued notice in the matter, to which the learned Principal Sessions Judge was not competent, have given the impression to the petitioner that he shall not get fair trial of the case before that court. He has further argued that the appellate court vide order dated 28.10.2022 had passed the order that in case the petitioner herein does not liquidate 75% of the arrears of the maintenance granted by the trial court, his appeal shall be deemed to have been dismissed. Mr. Qureshi further submits that this order shows that the appellate court is not impartial and fair, as it had made up its mind to dismiss the appeal of the petitioner without being heard, only on the condition that in case he does not pay 75% of arrears of maintenance granted by the trial court. He has argued that though the transfer petitions are not to be allowed, as a matter of course but here is the case where indulgence of this Court is required so that there is no miscarriage of justice and submitted that the petition be allowed.

9. Mr. Hazim Qureshi, learned counsel for respondent No.1, on the other hand, vehemently, argued that respondent No.1, who is aggrieved person in terms of D.V.Act, had initially approached the court of Forest Magistrate with her complaint, however, this complaint was transferred from the court of learned Forest Magistrate to the court of learned 2nd Additional Munsiff at her instance by the learned Chief Judicial Magistrate Srinagar vide his order dated 07.06.2022. He further argued that the trial court had ordered the maintenance of ₹15,000/- per month and aggrieved of that order, both the parties preferred appeals, one appeal was assigned to the court of learned 2nd Additional Sessions Judge Srinagar by the learned Principal Sessions Judge Srinagar, whereas the appeal filed by respondent No.1 herein was retained in his own court. He has further argued that the petitioner offers to pay only ₹30,000/- to liquidate arrears, which have accumulated to ₹1.30 lacs. Learned counsel further argued that the application for transfer

is misconceived, as no good ground has been shown to set-up that the petitioner had lost confidence in the appellate court and submits that the application be rejected.

10. Since the two cross appeals were filed by the contesting parties against the order passed by the learned trial Magistrate, both are required to be heard by the same court, so as to, avoid conflicting judgments.

11. Now the question to be decided by this Court is as to whether the learned Principal Sessions Judge, once assigning the case to the court of learned Additional Sessions Judge, when the notice had already been issued in the matter, is competent or having jurisdiction, to withdraw the case from that court. Section **409 Cr.PC of 1973** is relevant in the case, which is reproduced hereunder:-

“409. Withdrawal of cases and appeals by Sessions Judges:

(1) A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to, any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(3) Where a Sessions Judge withdraws or recalls a case or appeal under sub- section (1) or sub- section (2), he may either try the case in his own court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.”

12. In a detailed judgment of our own High Court, it has been expressly held that in view of Section 528 of J&K Cr. PC, now has since been repealed due to reorganization of the State of J&K and is akin to Section 409 of Central Cr.PC extended to the UTs of J&K and Ladakh, the Sessions Judge is devoid of power to recall those cases of which trial or hearing has began before the court of Additional Sessions Judge. Following observations have been made by this Court in a case titled '**Raghunandan Bakshi & Anr. Vs. Bidi Chand** reported as **1997 KLJ 98**':-

“...Recalling of the case by the Sessions Judge has been authorised under the provisions of [Section 528 Cr. P.C.](#) from the Court of Additional Sessions Judge only in case of trial of cases or in respect of appeals, but before such trial begins or hearing of the appeal begins. In case the learned Additional Sessions Judge starts with the trial of the case or hearing of the appeal, the Sessions Judge is devoid of the power of recalling those cases i.e. trial case and appeal case before him. In view of such clear intention of the Legislature expressed in the provisions of law any other liberal interpretation will run contrary to the scheme [of the Code](#) and the spirit of law.”

Here in this case, the hearing in the appeal starts with the issuance of notice before the 2nd Additional Sessions Judge Srinagar, therefore, learned Principal Sessions Judge Srinagar was not having any power or jurisdiction to withdraw or recall the appeal assigned to the court of learned 2nd Additional Sessions Judge Srinagar, therefore, recalling of the order which has been made the basis for transfer of this case, in the considered opinion of this Court has been passed without jurisdiction by the learned Principal Sessions Judge Srinagar.

13. Hon'ble Supreme Court in case reported as **2008 (3) SCC 659** titled **Kulwinder Kaur alias Kulwinder Vs. Kandi Friends Education Trust & Ors.**, while deciding the matter for civil case had laid down following principles for transfer of the cases in Para 23, which for ready reference is extracted as follows:-

“23. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to plaintiff or defendant or witnesses; convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit; issues raised by the parties; reasonable apprehension in the mind of the litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; “interest of justice” demanding for transfer of suit, appeal or other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceeding. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the Court feels that the plaintiff or the defendant is not likely to have a “fair trial” in the Court from which he seeks to transfer a case, it is not only the **power**, but the duty of the Court to make such order.”

14. On perusal of interim order dated 28.10.2022, passed in appeal titled *Jhasra Parvaiz Vs. Mehboob ul Hussain*, it transpires that the appellate court has passed a conditional order that in case respondent (Mehboob ul Hussain) does not pay 75% of the maintenance arrears by next date of hearing i.e., 07.11.2022, his appeal i.e., *Mehboob ul Hussain Vs. Jhasra Parvaiz* shall be deemed to have been dismissed.

15. Learned Principal Sessions Judge of a district, has no jurisdiction to withdraw/recall a case, in which trial/hearing has commenced before an Additional Sessions Judge as provided in Sub Section (2) of Section 409 of Cr. PC. The developments of recalling the appeal filed by the petitioner herein, after its hearing had began in the court of 2nd Additional Sessions Judge Srinagar, is, thus, without jurisdiction and passing of the order dated 28.10.2022, whereby the petitioner herein had been caveated for dismissal of his appeal, in case 75% of maintenance arrears is not cleared by next date of hearing i.e., 07.11.2022 have created a reasonable apprehension in the mind of the petitioner that he might not get justice. The apprehension of the petitioner, in the facts and circumstances of the case, cannot be stated to be imaginary in his mind. Justice should not only be done but should be seen to have been done.

16. For the foregoing reasons and the observations made hereinabove the transfer petition is allowed and both the cases titled **(i) *Jhasra Parvaiz Vs. Mehboob ul Hussain Qadri & Anr.***, and **(ii) *Mehboob ul Hussain Qadri & Anr. Vs. Jhasra Parvaiz*** are ordered to be transferred from the court of learned Principal Sessions Judge Srinagar to the court of learned 2nd Additional Sessions Judge Srinagar for disposal in accordance with law. The parties are directed to cause their appearance before the transferee court on 21.11.2022.

17. This Court did not ask for the comments of the Appellate court, since there were no allegations against the Presiding Officer, who is an officer of impeccable integrity. Granting of this application shall not be any reflections of the said officer.

18. Copy of this order be forwarded to both the courts below for information and compliance.

19. Disposed of.