

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPLICATION NO.1662 OF 2021

AJAY VASANT SOLUNKE AND OTHERS
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER

...
Advocate for Applicants : Ms. Madhaveshwari Mhase
APP for Respondents: Mr. R.D. Sanap

...
CORAM : MANGESH S. PATIL, J.

DATE : 04.08.2021

PER COURT :

I have heard the learned advocate for the applicant.

2. The husband of the respondent No.2 and his relatives are invoking the powers of this Court under Section 407 of the Code of Criminal Procedure for transferring a prosecution launched by her under Section 498A etc. of the Indian Penal Code being Regular Criminal Case No.359/2021 pending on the file of learned Magistrate at Osmanabad to the Court of Magistrate at Nilanga.

3. The learned advocate Ms. Mhase for the applicants would submit that no part of cause of action has accrued at Osmanabad so that the Magistrate at Osmanabad would have jurisdiction to conduct the trial. The place of jurisdiction as is to be determined under Section 177 of the Code of Criminal Procedure would be the court of Magistrate at Nilanga. In similar set of facts and circumstances in the matter of **Shantabai Dhondiram Rathod and Ors. V/s. Savita W/o Anand Rathod and Ors.; 2018 DGLS (Bom.) 587** this Court had transferred a proceeding to the jurisdictional Magistrate by referring to the self same provision contained in Section 177 of the Code of Criminal Procedure while exercising power under Section 407 of that Code. The learned advocate, therefore, submits that it is a fit case to transfer the

proceeding from Osmanabad to Nilanga as is held in this Judgment.

4. I have carefully considered the submission of the learned advocate as also perused the decision in the case of **Shantabai Dhondiram Rathod** (supra).

5. At the outset, one needs to remind ourselves that the applicants are invoking the powers of this Court to transfer a proceeding from one Magistrate to another by invoking the powers under Section 407 of the Code of Criminal Procedure. It lays down following grounds for transfer :

407. 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 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 under section 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 under section 197.*

6. As can be appreciated, want of jurisdiction of the Magistrate currently trying the case is not a ground contemplated under Section 407(1) for transferring a proceeding. This is what precisely is the matter in issue in hand. The issue has not been dealt with and decided in the case of **Shantabai Dhondiram Rathod** (supra) and with respect that decision cannot be followed as a precedent.

7. It is quite apparent that the applicants are trying to question the

jurisdiction of the Magistrate at Osmanabad to conduct the trial. That may provide them with a legitimate ground to be agitated before the concerned Magistrate. However, the fact remains that want of jurisdiction of the Magistrate cannot be a ground to transfer a proceeding by resorting to the provision of Section 407 of the Code of Criminal Procedure.

8. In a way, the applicants are indirectly seeking an observation of and conclusion by this Court that the Magistrate at Osmanabad does not have jurisdiction under Section 177 of the Code of Criminal Procedure. The purport and scope of an enquiry under Section 407 of the Code of Criminal Procedure is not to decide such jurisdictional issues. The applicants may have their own rights and remedies to question the jurisdiction of the Magistrate at Osmanabad. However, this Court cannot go into that arena indirectly in this proceeding under Section 407 of the Code of Criminal Procedure.

9. The Application is devoid of any ground under Section 407 of the Code of Criminal Procedure.

10. The Criminal Application is dismissed *in limine*.

(MANGESH S. PATIL, J.)