

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

BEFORE:

The Hon'ble **JUSTICE UDAY KUMAR**

CRR 3941 of 2022

**Subham Roy Choudhury
-Vs-
The State of West Bengal & Anr.**

For the Petitioner : Mr. Ajoy Roy Choudhury, Adv.

For the State : Mr. Navanil Dey, Adv.

Heard on: 23.02.2024.

Judgment on: 17.05.2024.

UDAY KUMAR, J.: –

1. The petitioner filed an application under Section 407 (1) of the Code of Criminal Procedure, 1973, (hereinafter referred to as 'Cr.P.C.') for withdrawal or transfer of Miscellaneous Case No.515 of 2016 from Ld. Judicial Magistrate 2nd Court, Barrackpore (hereinafter referred to as 'Ld. Trial Court') to any court of Ld. Magistrate at Bidhannagar complex or to dispose it of and to stay its further proceedings and to set aside the order dated 14.10.2022 passed in CMC No.11 of 2022 by Ld. Chief Judicial Magistrate North 24 Paraganas at Barasat. (Hereinafter referred to as 'Ld. C.J.M.').

2. Brief facts of the case necessary to be noted for deciding this criminal revision are that the petitioner Subham Roy Choudhury and Opposite Party No. 2 Sreejoyee Chakraborty (hereinafter referred to as 'O.P.2') are husband

and wife. Their marriage was solemnized on 22nd February, 2016, as per Hindu Rites and Rituals and Sreejoyee stayed together at her matrimonial home i.e., at 50/1/4B, Raja Rammohan Ray Road, P.S- Haridevpur. Dist- South 24 Parganas, for five days, when she returned to her father's house for some medical tests. Thereafter, the petitioner came to know that his wife has been suffering from a disease '**post splenectomy ITP relapsed**' for nine years. It was an advanced stage of cancer.

3. Being shocked by this information, petitioner filed a suit for decree of nullity of his marriage on the ground that his wife had concealed and suppressed the material fact of her illness from him prior to the marriage. Had he been informed earlier; he could never have given his consent for marriage to her. Since, his consent was taken fraudulently, he sought his marriage to be declared null and void. Accordingly, MAT Suit No.42 of 2016 was started and had been pending before the Additional District Judge, 5th Court at Alipore, North 24 Parganas for disposal.

4. The notice of the said MAT suit No.42 of 2016 case, was served to the O.P. 2/wife. After getting the notice, she filed a maintenance case, being number M-515 of 2016, to claim maintenance from her husband/the petitioner, which is pending before the Learned Judicial Magistrate, 2nd court, Barrackpore.

5. The Petitioner/husband appeared in the maintenance proceeding and filed an application under Section 340 of the Cr.P.C read with Sections 195, 191 & 193 of Indian Penal Code, 1860, which was rejected by Learned Judicial Magistrate, 2nd court Barrackpore on 01.08.2018.

6. The petitioner challenged the said order of rejection before this Court in CRR No.2303 of 2019, wherein Hon'ble Co-ordinate Bench set aside the impugned order of Learned Judicial Magistrate, 2nd court Barrackpore, dated

01.08.2018 vide his order dated 12.04.2021 and directed Learned Judicial Magistrate, 2nd court Barrackpore to take up the maintenance proceeding being case number Miscellaneous 515 of 2016 along with the application filed by petitioner under Section 340 of the Cr.P.C.

7. Prior to passing of this direction, Ld. Trial Court had already granted interim maintenance to the O.P.2/wife in Miscellaneous 515 of 2016, vide his order dated 05.09.2019, but the petitioner did not pay maintenance in compliance of the said order. Consequently, the O.P.2/wife initiated an execution proceeding against petitioner being Miscellaneous Execution Case number 67 of 2022, but the petitioner preferred a revision being CRR 1832 of 2022, for quashing or setting aside or stay of the execution proceedings being M. Ex. 67 of 2022 arising out of the maintenance case being number M. 515/2016, till the disposal of perjury case filed by petitioner under Section 340 of Cr.P.C. as directed by the Hon'ble Court in C.R.R 2303 of 2019 dated 12-04-2021.

8. The Co-ordinate Bench observed that under no circumstances, the trial of M. Case 515 /2016 be further stalled and the same should be taken to its logical conclusion within a reasonable period of time and completed within a year from the date of communication of this order to Ld. Trial Court and further observed that no interference would be called for vide his order dated 28-07-2023.

9. In the meantime, the petitioner had moved an application under Section 410 of the Cr.P.C before the court of Learned Chief Judicial Magistrate, Barasat, North 24 Parganas, for transfer of the M. Ex. No.67 of 2022 along with M. Case No.515 of 2016 after the withdrawal of the same from the Ld. Trial Court to any other Court. Upon the said petition C.M.C No.11 of 2022

was started. Learned Chief Judicial Magistrate, Barasat, rejected the said prayer by his order dated 14-10-2022. It was ordered that

“Hence, the petitioner herein has taken the recourses of this Court and filed an application under section 407 of Cr. P.C before this Court, with a prayer to set aside the impugned order dated 14.10.2022 and withdraw the said petition being case number M. 515 of 2016 along with related issues pending before the second court of Ld. Judicial Magistrate, Barrackpore and to dispose of /or transfer the said case to any other Court of competent jurisdiction for disposal, inter-alia, on the ground that the petitioner is in apprehension of injustice and by making allegations it is stated that the Ld. Trial Court has not expedited the M. Case 515 of 2016 in view of proceeding initiated by the petitioner herein through an application under section 340 of Cr.P.C as per direction of Hon’ble Court and the same time Learned Trial Court has unnecessarily speed up the execution proceeding started against the petitioner herein.”

10. Being aggrieved by the said order of Ld. C.J.M, the petitioner filed this application before this court to pass order of transfer of the Miscellaneous 515 of 2016 and Miscellaneous Execution No.67 of 2022 from the Trial Court to any other court of Magistrate at Bidhannagar Court Complex, by exercising his power empowered under section 407 of Cr.P.C.

11. Mr. Ajoy Roy Choudhury, Learned Advocate for the petitioner has contended that Ld. Trial Court has made some unlawful, untrue and unrealistic statements against the petitioner in pending Court proceedings as appeared from the order dated 08.07.22, which had shaken the faith and confidence of petitioner, as to get just, fair and proper justice from Trial Court.

12. It was further contended that despite the direction of the Hon'ble High Court given in C.R.R 2303 of 2019 on 12-04-2021, the Ld. Trial Court did not initiate any proceedings under Section 340 of the Cr P.C, rather a notice for hearing of the execution petition being case number M. Ex. 67 of 2022 arising out of maintenance petition being case number Miscellaneous 515 of 2016, was sent upon him. The said execution proceeding was itself, the subject matter of the perjury proceeding initiated under Section 340 on the prayer of the petitioner. Therefore, this execution proceeding amounted to the abuse of the process of the Court, and hence was not maintainable.

13. Ld. Counsel further contended that the Ld. Trial Court ordered the petitioner to pay the maintenance amount to O.P.2 in Miscellaneous Execution 67 of 2022, by ignoring the written objection of the petitioner filed therein.

14. He further contended that the petitioner apprehended that he would not get proper and fair justice from Ld. Trial Court, so he preferred this application under Section 407 of the Cr.P.C, for the withdrawal and transfer of his case to any other court of Ld. Magistrate at the Bidhannagar Court Complex, within the same sessions division by exercising the power.

15. On the other hand, Mr. Navanil Dey, learned Advocate for the State contended that the petitioner prayer for quashing of the execution proceeding in C.R.R number 1832 of 2022 had already been dismissed by this Court on 28-07-23. It was urged that there had been no good ground for transfer and if the petitioner had any grievances against any order passed by Ld. Trial Court, he might take appropriate steps in accordance with law.

16. It was further urged that this application for prayer of transfer was a mere ruse for delaying the proceeding, to escape from compliance of the order of the Ld. Trial Court. It was also pleaded that the cases should not be transferred

merely on the ground of unsubstantiated allegations. He further contended that the petitioner had approached the Hon'ble Court for quashing the execution proceeding, but the same had already been dismissed.

17. Ld. Counsel also contended that this petition was not maintainable as it had not been filed in compliance of the provision of Section 407 (2) of the Cr.P.C. Therefore, it was deserved to be dismissed summarily.

18. Heard the rival contentions of both sides. The seminal issue is whether the petitioner has substantiated the ground for which his prayer to transfer the case/cases from Ld. Trial Court may be allowed.

19. Indubitably, the petitioner sought relief under Section 407 of the Cr. P.C. It reads as under: -

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 held in any Criminal Court subordinate thereto, or

(b) that some question of law or unusual difficulty is likely to arise, or

(c) that an order under this Section is required by any provision or this Code, or will tend to the general convenience of the parties or witnesses, or its expedient for the ends of justice.”

20. In the present case, the petitioner has sought for the trial of the maintenance case and associated execution case to be held in another court of competent jurisdiction, as he apprehends injustice from the Trial court. The apprehension of the petitioner to not get fair and complete justice from the trial court is the main point for the prayer of the transfer of this case under Section 407 of the Cr.P.C.

21. In ***Abdul Nazar Madani vs State of T.N*** reported in **(2000) 6 SCC 204**, the Hon'ble Apex Court has ruled that apprehension of not getting a fair and impartial enquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises.

22. In ***Umesh Kumar Sharma vs. state of Uttarakhand*** reported in **AIR 2020 SC 5488**, it has been held that: -

“Only when fair justice is in peril, a plea for transfer might be considered. The Court, however, will have to be fully satisfied that in impartial trial is not possible. Equally important is to verify that the apprehension of not getting a level playing field, is based on some credible material and not just conjectures and surmises.”

23. In ***Maneka Sanjay Gandhi vs. Rani Jethmalani*** reported in **(1979) 4 SCC 167**, it was held that,

“assurance of a fair trial is the first imperative of the dispensation of justice, and the central criterion for the Court to consider, when a motion for transfer is made, is not the hyper sensitivity or relative convenience of a party or easy availability of legal services of like mini grievances. Something more substantial, more compelling, more imperiling from the point of view of public justice and its attendant environment is necessitous, if the Court is to exercise to its power of transfer.”

24. Obviously, the petitioner had prayed for transfer of his case as he was dissatisfied with some orders and remarks of the Ld. Trial Judge passed in the pending maintenance case. In fact, there are proper recourses provided in law against the such orders but petitioner filed this petition under Section 407 of Cr.P.C directly to this court without taking any recourse of the said available provisions of the law. As such the grounds stated therein may not be considered as a cogent ground for transfer of a case. The order to expedite a

proceeding and fixing of responsibility upon parties cannot be considered as biasness of the court towards petitioner, a necessary requirement for the transfer of cases under section 407 of the Cr.P.C.

25. Moreover, a mere allegation of apprehension of a party that he will not get justice in a case, does not suffice. The court has to further see whether the apprehension is reasonable or not. Cases should not be transferred as a matter of routine or merely because a party had expressed some apprehension. The power of transfer has to be exercised consciously and in an exceptional situation, when it becomes necessary. In the instant case, nothing is discernible that the Trial Court had been in any way influenced by extraneous consideration and that he did not act in reasonable manner so as to raise a doubt about the credibility of the trial.

26. Therefore, this Court is persuaded to think that the apprehensions are absolutely mercurial in nature and cannot be considered as reasonable even remotely. The grounds as mentioned above cannot be considered to transfer of case/cases as the petitioner failed to create apprehension in the mind of the Court that it would be reasonable to create apprehension to deny justice to the petitioner or biasness on the part of the Trial Court. From what has been discussed above, it is found that the ground for seeking transfer of the case/cases does not deserve consideration at all. It is found that petitioner has not been able to make out a case of biasness and prejudice on the part of the Trial Court to raise a very real and plausible ground for transferring the trial pending before the trial Court. Therefore, this Court is of the opinion that the apprehension of the petitioner that they may likely to be deprived of a fair and impartial justice in the case from the Ld. Trial Court is nothing but imaginary and unreasonable.

27. It appears from the aforesaid materials that the petitioner has prayed for transfer of the maintenance case from one court to the other court of competent jurisdiction, within same Sessions Division before learned Chief Judicial Magistrate, under Section 410 Cr.P.C. but the same the order of rejection of petition was not challenged under Section 408 of the Cr.P.C, before the Sessions Judge, but directly filed this application before this court under section 407 of Cr.P.C. Now the pertinent question arose that whether remedy to transfer the case/cases as sought for under section 407 of Cr.P.C. is available, without disposal of any application by learned Sessions Judge in this regard. on this issue, the law is very clearly laid down under Section 407 (2) of the Cr.P.C, which runs as follows: -

407- Power of High Court to transfer cases and appeals: (1)XXXX

(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.

It clearly provides that an application under Section 407 of the Cr.P.C, is maintainable only after the rejection of prayer under Section 408 of Cr.P.C to be filed before the court of Ld. Sessions Judge for transfer of a case in same Sessions Division.

28. It is fact that the petitioner did not file his application under Section 408 of the Cr.P.C before the Sessions Judge. As such the present application is not entertainable in the light of proviso to Section 407(2) of the Cr.P.C. The

petitioner is not only seeking transfer of the trial, he has challenged the order passed under Section 410 of the Cr.P.C by Ld. C.J.M., Barasat, whereby his prayer to transfer the case has been rejected.

29. Therefore, I hold that this application under Section 407 of the Cr.P.C, is not maintainable in its present form.

30. Considering the aforesaid facts and circumstances, I do not find any justification to allow the prayer for transfer of these cases, as prayed for. As such the instant petition, as made under Section 407 of the Cr.P.C, is liable to be dismissed, in view of above discussion.

31. Accordingly, the instant petition being CRR No.3941 of 2022, is hereby dismissed on merit for aforesaid reasons. There shall be no order as to the cost.

32. The application, if any, is stands disposed of.

33. Interim order, if any, is also stands vacated.

34. The parties would appear before the Ld. Trial Court on next date. The Ld. Trial Court would endeavor to decide the case at the earliest.

35. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Uday Kumar, J.)