

(1971) 08 SHI CK 0004
In the High Court Of Himachal Pradesh

Harsarup Dass

APPELLANT

Vs

Phul Chand and Others

RESPONDENT

Date of Decision : 18-08-1971

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1898 (CrPC) — Section 526, 561A

Citation : (1972) CriLJ 83

Hon'ble Judges : D.B. Lal, J

Bench : Single Bench

Judgement

D.B. Lal, J.—This is an application u/s 526 of the Criminal Procedure Code and the prayer is for the transfer of proceedings from the Court of the Sub-Divisional Magistrate, Nalagarh. to any other competent Court outside Simla District. Harsarup Dass is the applicant and he has alleged that his wife Srimati Rukmani Devi lumped into a well on the night on 9th June. 1971 as she committed suicide. The first postmortem examination on the body was performed on 10-6-71. There was a stir in the town and processions were organised. There was demonstration against the applicant who was suspected to be a murderer. As a result to all that, the District Medical Officer was summoned from Simla and he performed another post mortem examination on 11-6-71. The Police was investigating the case, but the District Magistrate Simla, chose to entrust the enquiry to the Sub-Divisional Magistrate. Kandaghat, u/s 176. Criminal Procedure Code, This Magistrate reached Nalagarh on 24-6-71 and did local inspection on 27-6-71. Thereafter he fixed 5-7-71 as the date for evidence. The case was again adjourned to 9-7-71. The learned Magistrate made an order that lawyers should not appear on behalf of parties. This he presumably did to safeguard the law and order situation. The respondents 1 to 6. who are residents of Nalagarh, went in revision before the District Magistrate, Simla, and on 14-7-71 the District Magistrate. Simla, observing that the Sub-Divisional Magistrate Nala-Barh who was on leave had by then returned from leave, entrusted the enquiry to him. Against that order of the District Magistrate, Simla this transfer application u/s

526. Criminal Procedure Code, has been preferred by the applicant Harsarup Dass.

2. It is alleged in the application that before ordering for transfer, the District Magistrate did not issue a notice to the applicant to contest the transfer application. It is further contended that the comments of the Sub-Divisional Magistrate, Kandaghat, were not asked for. The S. D. M. Nalagarh before whom the proceeding was taken UP on 18-7-71 granted the applicant a very short time for filing revision. The S. D. M. Nalagarh did not permit the applicant to cross-examine the witnesses upon their previous statements which they made before the Police. The applicant wanted to go in revision against that order, but instead he filed the present transfer application because, according to him, the Sessions Judge, Simla, was not available in his Court so that the petition could be filed before him.

According to applicant, the atmosphere at Nalagarh was disturbed and he would not get a fair and impartial enquiry at that place. The applicant and his witnesses are being threatened and the applicant's counsel whom he had summoned from Ruper because the local counsel have all been engaged by the respondents. is also being threatened by the respondents. The S. D. M. Nalagarh may be a witness in the trial. For these reasons. the transfer of the enquiry has been solicited to any Court outside Simla District. The respondents 1 to 6 have contested the application and their allegations are, that the atmosphere how at Nalagarh is calm and quiet. The public wanted a fair and impartial investigation. The Police was attempting the hush-up the matter. Since a Magisterial enquiry u/s 176. Criminal Procedure Code has been set up. there is no reason why it should not proceed in a peaceful atmosphere. It is then asserted that the application u/s 526. Criminal Procedure Code is not maintainable and no order of transfer need be made under Article 227 of the Constitution or u/s 561-A of the Criminal Procedure Code.

3. It has been urged, rather strenuously, by the learned, counsel for the respondents 1 to 6 that the Magistrate holding enquiry u/s 176. Criminal Procedure Code, cannot be construed to be a Criminal Court so as to attract the provisions of Section 526 of that Code. It is then required to ascertain what are the essential features to constitute a Court as distinguished from any other authority.

The case which comes very near the present one is reported in AIR 1958 Pun 141 Piara Singh v. The State. Their Lordships were considering whether a magistrate holding enquiry u/s 176 of the Code, can be considered a Court for purposes of Section 3 of the Contempt of Courts Act. In that connection, they considered the Supreme Court judgment reported in Brajnandan Sinha Vs. Jyoti Narain, and imported the following observations:

In every Court, there must be at least three constituent parts - the actor, reus and judex; the actor or plaintiff, who complains of an injury done : the reus. or

defendant, who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, and to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy.

Applying this test to the Magistrate holding the enquiry u/s 176. we find that none of these tests hold good. When a Magistrate holds an enquiry u/s 176. there is no allegation of any offence having been committed. There is no dispute between two parties and there is no question of his giving a decision or adjudicating any point in issue. His object in holding the enquiry is merely to elucidate the facts of a violent or unnatural death before there is any reasonable suspicion of the commission of any offence, and that when such grounds do exist, the enquiry comes under other portions of the Code. The Magistrate's determination, if he chooses to make one, lacks finality and authoritativeness and is neither binding nor conclusive. He has no jurisdiction to deliver, or power to enforce, a judgment. It was pointed out that as defined in Clause (1) (k) of Section 4 of the Code, this would be an enquiry conducted by a Magistrate and as defined in Clause (1) (m) of the said section, it would be a judicial proceeding because evidence is or may be legally taken on oath. Be that as it may, it can by no stretch of imagination be considered as a proceeding before a Court. It is at best a proceeding before a Magistrate acting in his executive or administrative capacity, for the grant of power to hold an enquiry u/s 176 is incidental to an executive or administrative function. It has nothing to do with the exercise of judicial power. The Magistrate is not even required to arrive at a finding or to make a report. It is therefore, abundantly clear that the Magistrate does not function as a Criminal Court while holding enquiry u/s 176 of the Code.

In *Piara Singh Vs. The State and Another*, the magistrate was not considered a Court for the purpose of Contempt of Courts Act. Their Lordships in that case further considered *Piara Singh Vs. The State and Another*, as to whether the proceedings could be transferred u/s 628 of the Code. As they found manifestly that the Magistrate was not a Court, that was one of the grounds for refusing the transfer. In *P. Rajangam, Sub-Inspector of Police and Others Vs. State of Madras and Others*, the proceedings before a Magistrate u/s 176 of the Code were considered purely executive and administrative and it was held that the Magistrate functions in a purely recommendatory character and he does not dispose of the rights of parties and as such even Article 226 of the Constitution was not invoked for quashing the proceedings.

The learned Counsel for the applicant relied upon three cases : In *Re: Laxminarayan Timmanna Karki*, and In *re Veerappan* AIR 1944 Mad 37 . The Bombay case as well as the Madras case (supra) deal with Section 435 of the Code and for the purpose of revisional jurisdiction. it was held that the enquiry u/s 176 of the Code could be considered to be an enquiry by a Court. The revisional jurisdiction u/s 435 is obviously of a different character to set right proceedings on grounds of correctness, legality or propriety, and to that extent it

may be stated that the Sessions Judge or the High Court would exercise jurisdiction of correcting such Proceedings. The question of transfer from one Court to another is, based on an entirely different footing. Here we do not set right any proceeding pending in a Court on around of correctness, legality or propriety, but we transfer the case from one Court to another entirely based upon the apprehensions of the accused who does not expect a fair and impartial trial. It may be that the Court from where the transfer is sought to be obtained may not be suffering from a bias against the accused, still reasonable apprehensions in the mind of the accused turn the scales in his favour. Therefore, these two authorities will not be of any help to the applicant. The Rangoon case. AIR 1940 Rang 68 (supra) has not been followed in Piara Singh Vs. The State and Another, and I am inclined to agree with the Punjab view, being more consistent with the scheme of the Code.

4. It can therefore, be concluded that the Magistrate holding this enquiry was not a Court and as such Section 526 of the Code would not be applicable.

5. The learned Counsel then proceeded to invoke the aid of Article 227 of the Constitution as well as Section 561. A of the Criminal Procedure Code. It is in this context that we have to find out the exact grounds on which this transfer is asked for. The circumstances under which this application has been filed do not appear to be straight. The applicant took time from the Court for filing a revision petition. He came to Simla and instead of filing a revision petition u/s 435 Criminal Procedure Code, he filed this transfer application. The learned Counsel states that such a revision petition has now been filed before the Sessions Judge. Apart from this, on 18-7-71 the applicant did participate in the enquiry and cross-examined witnesses. When he was prohibited by the learned Magistrate from putting questions by way of cross-examination on the previous statement of witnesses that he thought proper to make a request for adjournment so as to enable him to file a revision petition. As I have stated before, instead of that, he filed this transfer application for which no indication was given to the learned Magistrate.

In order to appreciate the case of the applicant . so as to invoke the power of superintendence conferred under Article 227. or so as to ask the Court to exercise its inherent jurisdiction u/s 651-A of the Code, it is very essential to know the legal status of the applicant as well as the impact on his interest in this enquiry. He is not an accused in this case. He is not even a suspect, as no proceeding is being initiated against him as suspect in any cognizable offence. He can. thus, be treated as one of the members of the public with the additional advantage that he is husband of the deceased. He should be as much interested in knowing the result of the enquiry as any member of the public can be. He is. no doubt, canvassing a definite case of suicide but that should not mean to suggest that he is not interested in the murder if it has been committed by any person. As husband to the deceased, he should be interested in bringing to book the actual culprit if at all an offence is proved. Therefore, he should wait for the

enquiry and his interest cannot be considered to be extraordinary so that any exceptional treatment should be given to him. His interest is confined only to this that he should be permitted to canvass his view-point in case the Magistrate chooses to call him for evidence. It may be that the Magistrate is satisfied with some other evidence and does not even call him for a statement. He has not even a right of producing his witnesses before the Magistrate. The enquiry u/s 176 is a pure executive action of the Magistrate and it is he who has to find out as to what sources he would tap for evidence. The applicant cannot compel the Magistrate to record his statement or the statement of his witnesses. With this thin interest in the enquiry, it is difficult to sustain the plea that by exercising the power of superintendence under Article 227 or by invoking the inherent jurisdiction u/s 561-A the enquiry should be transferred to any other Magistrate.

It has been stated that there were sufficient stir, demonstrations, processions and "hartals" and that would have influenced the mind of the Magistrate. In fact, all this agitation was resorted to. because of a lurking suspicion against the police investigation. When the District Magistrate assumed the responsibility and ordered an enquiry instead of or in addition to the police investigation, that must have inspired confidence of the agitators.... The District Magistrate has replied that the agitation was directed against the police investigation. The Superintendent of Police, Simla, has also written in his report dated 31-7-71 that the applicant himself stated before the authorities that he does not apprehend any danger from any quarter because a magisterial enquiry has been set up. Therefore, all evidence regarding previous agitation is not material. It has been contended that the applicant engaged a counsel from Rupar and there were slogans against him. The motor-cycle of such counsel was punctured by somebody. These acts, if at all committed, were also directed against the police investigation. The stage is now over and the purpose of such an agitation has been fulfilled. The Magisterial enquiry has been ordered and the applicant himself participated in such enquiry peacefully upto a certain stage.

6. It is stated that the District Magistrate did not issue a notice to the applicant before transferring the case to Sub-Divisional Magistrate, Nalagarh. Such a notice was not even necessary u/s 528 of the Code, if the District Magistrate can be stated to have exercised his jurisdiction under that section. Otherwise the District Magistrate also passed a purely executive order which is clearly, more than enough from the contents of his order. He has written that the enquiry was entrusted to the Kandaghat Magistrate because the Magistrate at Nalagarh had gone on leave. When the said Magistrate" returned from leave. the enquiry has been entrusted to him. This is again an administrative order which cannot be called into question. The witnesses belong to Nalagarh and the Magistrate at Nalagarh will have facility to summon such witnesses. It is then stated that the comments of the S. D. M. Kandaghat were not obtained before the order was made for transfer, This was not required under law, as the District : Magistrate could pass the administrative order, which was not a judicial order. Then it is stated that the Nalagarh Magistrate did not permit cross-examination by the

applicant of the witnesses and that he gave a very short time for filing a revision petition. These are hardly material grounds for asking for transfer under Article 227 of Section 561-A. It is then said that the Nalagarh Magistrate might stand as a witness in the case; This is pre-judging the issues. We do not know whether a case would even be set UP against the applicant.

7. An interesting argument arose as to the powers and duties of the Advocate-General who represented respondent No. 1. The respondents 7 to 9 in the application are : the District Magistrate Simla and the two Magistrates of Kandaghat and Nalasarh. The reply filed by the Respondents 1 to 6 is signed by Shri Bakshi Sita Ram who is the Advocate-General. Just above the signatures of the Advocate-General, it is noted that the reply is filed on behalf of respondents 1 to 9. From this, it was inferred that the learned Advocate-General represented the Respondents 7 to 9 and since in the application it was pleaded that the applicant was a murderer of his wife it has stated that the official respondents should be taken to have made up their minds and as such the enquiry is to be transferred from their jurisdiction. The learned Advocate-General frankly stated that he did not notice that he was signing on behalf of the Respondents 7 to 9 as well. According to him, that was a typing mistake. He produced from the record a power of attorney which he filed on behalf of Respondent No. 1 alone. The learned Counsel for the applicant, however, contended that the learned Advocate-General was putting in appearance on behalf of the official respondents, and it was at his instance that the application was listed at an early date for hearing. It does not appear necessary to enter into this controversy as to whether the learned Advocate-General represented the official respondents, even though he did not file a power of attorney or a memo of appearance on their behalf. The District Magistrate. Simla, has filed his reply and he has nowhere stated in a similar strain against the applicant, as the other respondents have done. A similar reply can be expected from the Magistrate-respondents. It may, therefore, be stated that the official respondents did not subscribe to the pleas which have been taken on behalf of respondents 1 to 6 who are also represented by another counsel. It may be a matter of scrutiny, as to whether the learned Advocate-General could represent respondent No. 1 whose interest might or might not be in favour of the State Government. However. I leave the Controversy at that stage. The reply filed by the District Magistrate which is in fact addressed to the Advocate-General, gives an inkling to the pleas of the official respondents. I am not satisfied, in these circumstances, that sufficient grounds are made out for an order of transfer under Article 227 or Section 561-A.

8. The application is. therefore, dismissed- No order is made as to costs.