
(1948) 08 PAT CK 0011
In the Patna High Court

Raghu Singh and Others

APPELLANT

Vs

Bhairo Prasad Trigunait and Others

RESPONDENT

Date of Decision : 03-08-1948

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 526(1)
Penal Code, 1860 (IPC) — Section 143

Citation : AIR 1949 Patna 105

Hon'ble Judges : Das, J

Bench : Division Bench

Judgement

Das, J.—This is an application for transfer of a case pending against the petitioners in the Court of Mr. S.N. Chakravarty, a Magistrate exercising first class powers at Giridih. The stage which the case has reached is that the evidence of both parties has closed, arguments have been heard and the only thing that remains to be done is to pass orders in it. The principal question of law which has been raised is if this Court can transfer the case at this stage under the provisions of Section 526(1), Criminal P.C.

2. It is necessary to state the facts out of which the question has arisen. There is a tank called Kaiyoktar Ahar which, it is stated, has been the subject of a long standing dispute between the petitioners on one side and the opposite party, Nos. 1 and 2, on the other. Opposite party Nos. 1 and 2 alleged that they had taken settlement of the tank from the landlord, Mahant of Khuti. Their further allegation was that on 28th May 1947, the petitioners along with others committed theft of fish from the aforesaid tank. A first information was lodged by opposite party No. 1 about this occurrence, and the local police submitted a charge-sheet for offence, under Sections 143 and 879, Penal Code, against the petitioners. The learned Sub Divisional Magistrate took cognizance of the case against the petitioners and made it over to Mr. S.N. Sinha, a Magistrate exercising first class powers, for trial. Mr. S.N. Sinha examined witnesses, framed charges against the petitioners on 5th August 1947, and adjourned the case till 13th. September 1947. The case was again adjourned till 6th October 1947, on

which day the prosecution witnesses were cross-examined and discharged, and the petitioners were examined. The next date fixed was 6th November 1917, on which date a further adjournment till 27th November 1947, was given for examination of defence witnesses. In the meantime Mr. S.N. Sinhri, was transferred and the case was made over to Mr. S.N. Chakravarty, the present Magistrate before whom the case is pending, on 17th January 1948. The petitioners at first wanted a trial de novo, but subsequently waived their right to such a trial. On 9th April 1948, Mr. Chakravarty examined some defence witnesses. It is stated that he also heard arguments, though there is no note to that effect in the order-sheet. He fixed 16th April 1948, for orders. On that date the Magistrate was absent, having gone to some other place in connection with his other duties. On 16th April 1948, the petitioners came to know that the learned trying Magistrate had enquired into a petition which the opposite party No. 1 had sent to the Prime Minister of Bihar, in which several allegations were made against the petitioners including the allegation that they had committed theft of fish from the tank in question in May 1947. I have had the advantage of seeing that petition as also the enquiry report submitted by the learned trying Magistrate in connection with that petition. The petition as also the enquiry report are parts of the record of a proceeding u/s 107, Criminal P.C. instituted against the petitioners, which is pending before the learned Munsif-Magistrate of Giridih. The enquiry report shows that the learned Magistrate had enquired into the matter locally on 23rd March 1948. I quote below some extracts from the report in order to show what opinion the trying Magistrate had formed as a result of the enquiry:

One Sona Ram Mahto of Potso who was a witness for the petitioner in a criminal case told me that as he had deposed for the petitioner, he had been assaulted by Tulsi Singh and Jagdish Ojha. Some of the witnesses of other villages, viz., Chaukidar Peari Mahto 61 Posto, Mitan Mahto of Barkitengra, Jamadar Chaudhury of Argaro, who is the Jeth Baiyat of the village, Chiru Mian of Surhi and Jhari Singh of Barkitengra told me that all that the Trigunait has narrated in his petition is correct, and that they know about the looting away of fish from the petitioner's tank and also about the forcible cutting away of paddy by the men of the Mahant.

I also made enquiry about this from the Sub-Inspector of police, Nawadib. As he is new to the Police Station, I questioned the Assistant Sub-Inspector, and I was informed that the petitioner's allegations were more or less correct.

3. It would appear from the said extracts that the learned trying Magistrate had not only taken the statements of one Sona Ram, who was also examined in the criminal case pending before the trying Magistrate, behind the back of the petitioners, but had also examined other people about the same occurrence, namely, the alleged removal of fish from the tank in question, which was sub judice before him. He had examined those persons in the absence of the petitioners, who have had no opportunity of testing the correctness of their

testimony. That was not all but the learned Magistrate expressed his opinion that the story of the looting away of fish was true. The report which the learned Magistrate submitted was dated 28th March 1948, that is, at a time when a criminal case about the same subject was pending before him. It was on the basis of the report of the learned Magistrate that the proceeding u/s 107, Criminal P.C., was instituted against the petitioners.

4. When the petitioners came to know of these facts on 16th April 1948, they obtained copies of the relevant documents, and on 19th April 1948, moved the Sub-divisional Magistrate for a transfer of the case from the file of Mr. S.N. Chakravarty on the main ground, amongst others, that he had already expressed his opinion about the case, which opinion was based on evidence given during the local inquiry behind the back of the petitioners. The learned Sub-divisional Magistrate did not transfer the case. The petitioners then made an application under Sub-section (8) of Section 526, Criminal P.C. in the Court of the trying Magistrate. The learned trying Magistrate considered this application on 20th April 1948, and held that inasmuch as the application had been made after the defence had closed its case, it was not maintainable. He rejected the petition for adjournment, but gave some time to the petitioners to move this Court. This Court was moved, and a stay order was obtained. The case is now stayed pending the order of this Court on the application for transfer.

5. There can be no doubt that on merits this application for transfer ought to be allowed. The learned Magistrate before whom the case was pending had no business to hold a local enquiry behind the back of the petitioners, examine witnesses in the course of the enquiry and express an opinion regarding the very case which was sub judice before him. Such action on the part of the trying Magistrate was certainly reprehensible, and is likely to render the trial of the case into a farce. The principle on which this Court acts in matters of this kind has been laid down more than once. The principle was laid down in a very early English case, the case of *Serjeant v. Dale* (1877) 2 Q.B.D. 558 where Lush, J. had expressed the principle as follows:

The law has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security.

6. The same principle was again emphasised by Stone C.J. in *Usman Haroon v. Emperor* AIR 1947 Bom 409 where the learned Chief Justice observed that Section 526 was not exhaustive, and apart from the susceptibilities of the accused, if circumstances existed or events had happened, which were calculated to create in the mind of the accused the reasonable apprehension that he would not be fairly treated at his trial, a transfer of the case should be made. In the case before me the learned trying Magistrate has transgressed some of the basic principles of a criminal trial. While the case was sub judice before him, he held a

local enquiry in which he examined witnesses behind the back of one of the parties with regard to the same subject-matter, expressed his opinion about one of the witnesses examined in Court and further expressed his opinion about the very matter which was pending decision before him. I have not the least hesitation in saying that it was the clear duty of the trying Magistrate to tell the Sub-divisional Magistrate, when the petition addressed to the Prime Minister was sent to him, that he was not competent to hold the enquiry, as one of the allegations made in the petition was the subject-matter of a criminal case pending before him. That should have been the proper attitude and duty of the learned trying Magistrate.

7. On behalf of the opposite party it has been contended that this Court has no jurisdiction to transfer the case at this stage when the "trial," as that expression is understood in the Code of Criminal Procedure, has already concluded. This brings me to a consideration of the principal question of law involved in this case. Though learned Counsel for the opposite party has cited a number of decisions before me, in my opinion there is no decision which is directly in point. The decisions which have been cited before me relate either to Section 528 or to Sub-section (8) of Section 526, Criminal P.C. I may observe here that Sub-section (8) of Section 526 makes it obligatory on the Court trying the case to grant an adjournment in certain circumstances and if certain conditions are fulfilled. That Sub-section does not deal with the powers of this Court in making an order of transfer. That is dealt with in Sub-section (1) of Section 526. Sub-section (1) of Section 526 begins with the significant words "Whenever it is made to appear to the High Court etc," and then proceeds to mention certain grounds, under Clauses (a) to (e), on which this Court may pass certain orders, which are mentioned in Clauses (i) to (iv). The effect of Clauses (e) and (ii), as I understand them, is that "whenever it is made to appear to this Court that such an order is expedient for the ends of justice, this Court may order that a particular case be transferred from a criminal Court subordinate to its authority to any other such criminal Court of equal or superior jurisdiction. The operative part of Clause (ii) does not refer to an "enquiry" or "trial": it mentions a "case". The opening word of the Sub-section is "whenever". Therefore, with regard to the exercise of the power by this Court under Clauses (e) and (ii) of Sub-section (1) of Section 526, no question as to the meaning of the word "trial" in its narrow or restricted sense arises, and the exercise of the powers does not depend on the termination or otherwise of the trial in that restricted sense. If the "case" is still pending and this Court considers that an order of transfer is expedient for the ends of justice, then this Court, has, in my opinion, full power to transfer the case, irrespective of whether the trial in the restricted sense, such as is contemplated in Section 866 or Section 497(4) of the Code, has terminated or not. This seems to me to be the effect of the use of the word "whenever" in Sub-section (1) and of the word "case" in Clause (ii). The powers given u/s 526(1) are large and wide powers, and I do not think there is any such limitation as is contended for by learned Counsel for the opposite party. The position with

regard to Sub-Section (8) of Section 526 may be different: that sub-section deals with the right of one of the parties to make an application for adjournment and the duty of the trying Court to grant an adjournment if certain conditions are fulfilled. The use of the word "trial", or of the words "at any stage before the defence closes its case" in that Sub-section cannot, in my opinion, impose any limitation on the power of this Court to make an order of transfer for the ends of justice. The limitations imposed by Sub-section (8) are limitations on the right of the parties to make an application for an adjournment and the power of the Court to grant an adjournment: it does not impose any limitation on the power of this Court to make an order of transfer, which is dealt with under Sub-section (1) of the section. I may also refer to Sub-section (3) which says that this Court may act either on the report of the lower Court, or on the application of a party interested or on its own initiative. This shows that the Legislature intended to give wide and large powers to this Court in this matter.

8. I now turn to some of the decisions relied on by learned Counsel for the opposite party. I take the Madras High Court first. In the case of *Public Prosecutor Madras v. Chockalinga Ambalam* AIR 1929 Mad. 201 the principal question was whether the Magistrate acted in violation of Section 526(8), Criminal P.C., in refusing to adjourn a case when the accused intimated his intention of making an application to the High Court for transfer of a case in which nothing remained to be done except pronouncing judgment. I may observe here that the decision was given with reference to Sub-section (8) as it stood before the amendments of 1932. It was held that the pronouncing of judgment was no part of the trial and hence an application for transfer made after the case was closed but before the pronouncing of judgment was not made in the course of the trial. This decision was followed in *Re Bhogale China Somayya* AIR 1933 Mad 251: 34 Cri L.J. 117 which was a case of an application for a de novo trial after the Magistrate who heard the case had signed the judgment, the judgment being pronounced by his successor in office. In *Murugappa Theven v. Emperor* A.I.R.1936 Mad. 163 the point for consideration was the power of the District Magistrate to transfer a case u/s 528(2), Criminal P.C. That Sub-section clearly refers to an enquiry or trial, and it was held that the District Magistrate could not transfer a case in which the trial had already concluded, though judgment was not pronounced. The decision must be understood with reference to the terms of Section 528, Criminal P.C. I may incidentally observe that while referring to this decision their Lordships of the Allahabad High Court in *Naresh Kumar Vs. Prakash Narain Awasthi and Others*, had stated that the decision referred to the construction of the words "enquiry" or "trial" used in Section 526(1)(a) of the Code of 1898. This was apparently a mistake. The decision in *Murugappa Theven v. Emperor* AIR 1936 Mad. 163 really related to Section 628(2), Criminal P.C. and not to Section 526(1) of the Code.

9. In the Calcutta High Court in the case of *Neamat Sha Vs. Hanuman Buksha Agarwalla*, Sub-Section (8) of Section 826, as it stood before the amendments of 1932, was severely criticised and the various anomalies resulting from the Sub-

section were pointed out. With those anomalies we are not at present concerned. With reference to Chockalinga's AIR 1929 Mad. 201 it was observed as follows:

In Chockalinga's case AIR 1929 Mad. 201 upon which the Magistrate in the present case relied, the Judge had to admit that the arguments were part of the trial, and in spite of the fact that "trial" means something else in the section to which he refers, we are satisfied that in Section 526, its meaning must be held to include the judgment also. Bearing in mind the wide objects of that section, it might well be that the necessity for transfer might not be disclosed until the Magistrate was in course of delivering his judgment.

With due respect I must say that these observations are very pertinent. In the case before me also the petitioners came to know of what the Magistrate had done only on 16th April 1948. Obviously, they could not make any application for transfer before that date. It may be assumed that if they had known earlier what the Magistrate had done in connection with the local enquiry, they would have made an application for transfer before the defence had closed its case. The expression "trial" came to be considered in another connection in a Pull Bench decision of the Calcutta High Court, *Centax (India) Ltd. Vs. Vinmar Impex Inc. and Others*, . Mukerji J. referred to the various definitions of the expression and then said as follows:

It is this idea of the determination of the guilt or innocence of the person who is tried that forms the fundamental conception of the trial that is held in respect of him. When, therefore, some competent authority directs that an accused person shall be tried, the trial that is to take place can end only in one or other of the recognised forms in which the trial can terminate; under the Code of Criminal Procedure such forms are conviction, acquittal, discharge, i.e., finding him guilty or not guilty or finding that there is no case against him or that the charge is groundless.

The same question came to be considered in the Allahabad High Court with reference to the filing of an appeal against the decision of a Judge who was an Assistant Sessions Judge while trying the case, but an Additional Sessions Judge when pronouncing judgment: *Bakshi Ram and Others Vs. Emperor* . Their Lordships went into the various provisions of the Code of 1898, particularly Sections 866, 497, 268 and 309 of the Code, and came to the conclusion that the word "trial" in the Code of Criminal Procedure as amended by Article XVIII [18] of 1923 was used in a restricted sense and did not include the pronouncing of judgment. They referred to the definition of the word "trial" in the Code of Criminal Procedure of 1872 which definition included the punishment of the offender. My attention has also been drawn to a decision of the Privy Council in AIR 1933 218 (Privy Council) . Their Lordships were dealing with a case from Nigeria where the learned Judge had made some alteration in the sentence in Chamber in the absence of the accused person. Their Lordships observed as follows:

It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence.

As far as the pronouncement of judgment is concerned, the matter is dealt with in India u/s 866 of the Code which specifically says that judgment shall be pronounced either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders. There can be no doubt that the word "trial" has been given a restricted meaning in some of the sections of the Code of 1898, such as Sections 366, 497(4). Whether the same restricted meaning should be given in other sections as well is a question on which there has been and is likely to be some difference of opinion. Only one decision of this Court has been brought to my notice, *Ishar Singh v. Shama Dushad* A.I.R.1937 Pat. 181, in which certain observations, expressly of the nature of obiter dicta, were made, with reference to the expression "before the defence closes its case" occurring in Sub-section (8) of Section 526. The observations were:

The learned Magistrate has invited this Court to express its opinion whether an application for adjournment u/s 526 is entertainable, after the defence witnesses have been examined but before the close of the argument. I do not think I am called upon to decide this point in this case as it does not arise; any expression of my opinion will be purely obiter dictum. It may, however, be said with some justification that if the defence argument has not concluded, the defence case has not been closed. I am not prepared to say that there cannot be a case in which the accused cannot justly say that the Court became prejudiced during the hearing of the argument.

10. In deference to the arguments advanced by the learned Counsel for the opposite party I have briefly discussed the decisions relied on by him. At the risk of repetition I must point out that those decisions are not directly in point and do not bear upon the question before me, namely, the power of this Court to make an order of transfer u/s 526(1) of the Code. Those decisions deal either with Sub-section (8) of Section 526 some before the amendments of 1932, "or Section 528, with particular reference to the use of the expression "trial". The power to make an order of transfer given to this Court u/s 526(1) is not dealt with in those decisions. I may point out that, even on its strict terms, Section 526(1) gives this Court power to make an order of transfer of a case which is still pending, whenever it appears to this Court that such an order is expedient for the ends of justice. The limitations mentioned in sub Section (8) have no reference to the power of this Court; they have reference to the party making an application for adjournment and the duty of the trying Court to grant an adjournment. If Section 526 is not exhaustive, as has been held in some cases, there can be no limitation on the power of this Court to pass a transfer order for the ends of justice. Suppose it is held that this Court has no power of transferring a case at the stage which the case before me has reached, what is

the result? The learned Magistrate will pronounce judgment and if he convicts the accused persons, as he is likely to do in view of the opinion expressed by him in his enquiry report, the conviction is bound to be set aside by the appellate Court on the ground that the learned Magistrate had formed his opinion on extra judicial knowledge. I do not think that a Code of Procedure should be so interpreted as to lead to an absurd result: after all, a procedure Code is meant to advance justice and not to retard it.

11. As a result of all the considerations mentioned above, I have come to the conclusion that this is a fit case in which the application for transfer should be allowed, and this Court has power to make the order of transfer. Instead of filing a separate application with reference to the proceeding u/s 107, Criminal P. C, the petitioners have in this application asked for quashing that proceeding as well. I see no grounds for quashing that proceeding which is pending before another Magistrate, viz., the Munsif-Magistrate, who has not expressed any opinion in the case. Before parting with this case, I should like to observe that this case illustrates the undesirability of making local enquiries, on petitions filed before a Minister or other high officer entrusted with executive duties, as respects allegations which are being judicially investigated. Much of the undesirable consequences which have resulted from the enquiry in this case could have been avoided, if the law were allowed to take its usual course.

12. In the result, I would allow this application, and transfer the case pending against the petitioners in the file of Mr. S.N. Chakravarty to the Munsif Magistrate of Giridih who will deal with both the cases against the petitioners. It would be open to the learned Munsif-Magistrate, if he thinks fit, to deliver judgment in both the cases at one and the same time. To avoid any further complication I must make it clear that the two cases should be tried quite separately, though the Magistrate may deliver judgment at one and the same time.

13. The rule is accordingly made absolute,