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Court : Guwahati

Decided On : May-23-1961

Judge : T.N.R. Tirumalpad, J.C.

Appellant : Anil Kumar Das

Respondent : Sukumar De

Judgement :

T.N.R. Tirumalpad, J.C.

1. This is an application under Section 526 Cri.P.C. for transfer of the criminal case C.R. No. 242 of 1960 from the file of Sri P.K. Roy, Magistrate to some other Magistrate. The petitioner's application to the Sessions Judge under Section 528 was rejected by him.

2. The petitioner was the accused in the said criminal case. When the case was taken up for hearing on 31.8.1960 the respondent-complainant was present with 6 P.Ws and he wanted to cite two more P.Ws not mentioned in the complaint. The petitioner stated that if further P.Ws were being permitted, he would like to have the evidence of all the P.Ws together. But the Court ordered that the P.Ws present may be examined first and an opportunity will be given for citing fresh P.Ws later. Thereupon the petitioner submitted a petition that all the P.Ws should be examined on the same day as otherwise he would be prejudiced. But the Court rejected the prayer.

3. Thereupon the petitioner intimated the Court that he would move a petition for transfer of the case under Section 526 Cri.P.C. The Magistrate passed an order that he was ready to adjournment for moving the transfer, but that as the complainant has spent a lot of money in securing the presence of the P.Ws he should be compensated and he made a conditional order of adjournment stating that the petitioner should pay adjournment costs of Rs. 17/- then and there, foiling which the prayer for adjournment would stand rejected and P.Ws would be examined. The petitioner then paid the adjournment costs and the case was adjourned to 26.10.1960.

4. On 26.10.1960 the complainant was present with 5 P.Ws. The petitioner was not present. An application' was moved on his behalf stating that he being a Census Supervisor was very busy. Another petition was also forwarded through his superior officer Mr. Mukherjee who was also a Magistrate at Udaipur to the same effect. But the Magistrate passed an order that though Census work must get priority, it did not mean that the petitioner should be exonerated from appearance in the criminal court to meet the charge against him and further that the petitoiner was aware of his engagement beforehand and should have applied at least a week beforehand for adjournment. He therefore rejected the prayer for adjournment as not bona fide and he ordered the cancellation of the bail bond and issued warrant of arrest against the petitioner.

5. The petitioner had already moved the Sessions Court for transfer of the case and the Sessions Judge had stayed further proceedings by his order dated 25.10.1960. In his present petition, the petitioner states that it was orally intimated to the Court that an application for transfer has been filed in the Sessions Court and that the proceedings had been stayed, but that this was disregarded by the Magistrate in refusing the adjournment and in cancelling the bail bond and ordering his arrest. He therefore apprehends that he would not get a fair and impartial trial before this Magistrate.

6. Now the first thing we see in this case is that on the date the petitioner informed the Magistrate's Court that he would apply for a transfer of the case there were really no grounds which would justify a transfer. What was contended before me

was that the conduct of the Magistrate in making the payment of costs a condition precedent to the adjournment of the case on 31.8.1960 as well as in refusing adjournment, and in cancelling the bail bond and ordering of his arrest on 26.10.1960 after the Magistrate was orally informed that the Sessions Judge had stayed the proceedings clearly proved that the Magistrate was prejudiced against him and that he would not get as fair and impartial trial and that, a transfer was therefore clearly necessary. The question will therefore arise whether the petitioner can make vise of things which transpired after he intimated to the Court that he would apply for transfer or whether he has to show that at the time when he intimated, to the Magistrate that he will apply for transfer there were really grounds to show that the petitioner would not get a fair and impartial trial.

7. It has happened in this case that the very intimation to the Magistrate by the petitioner that he will move for a transfer has irritated this Magistrate as is clear from his subsequent conduct in making payment of costs then and there a condition precedent to the adjournment an his subsequent refusal of adjournment, cancellation of the petitioner's bail and ordering of his arrest. Nothing was pointed out to me in this case to show that the Magistrate displayed any bias in favour of the respondent or against the petitioner before the petitioner intimated that he would move for a transfer. Thus it is clear that there! were no grounds at all for a transfer at that time. No such ground was also alleged in the petition before me.

8. Reading Section 526, Cri.P.C. it is however clear that the petitioner can show even from matters which transpired in the Magistrate's Court at any time before he moved the High Court to show that he would not get a fair and impartial trial. In the decision Dayawanti v. Bitanand AIR 1929 Lah 702 one of the grounds for transfer was the order for payment of costs of Rs. 100/- for adjourning the case when it was intimated to the Court that the complainant would apply for a transfer. In another decision Mt. Lalan v. Emperor 38 Cri LJ 387 : AIR 1937 Pesh 20, the Magistrate ordered the cancellation of bail of the accused because he intimated his intention to apply for transfer and this was held to be a sufficient ground for transfer. Thus it is clear that what transpired in Court subsequent to the intimation by a party to the Court that he intended to apply for transfer can also be made use of to show that the party apprehended that he would not get a fair and impartial

trial.

It often happens that Magistrates feel irritated when a party makes clear his intention to apply for transfer from the Court. But Magistrates must realise that it is a statutory right given under Section 528(8) to a party and that they should not by their conduct display any irritation when a party exercises his statutory right. If a Magistrate shows such irritation in his orders, it will be a good ground for transfer as there is every likelihood of the subsequent trial before him being not impartial and in any case the party will have reasonable apprehension for such a fear.

9. The order of the Magistrate directing the petitioner to pay costs then and there as a condition precedent for the adjournment is certainly against the provisions of Section 526(8). The Magistrate is bound to adjourn the case when it is intimated to him by a party that he was going to apply for transfer. The words used in the section are 'the Court shall adjourn the case.

The Magistrate has therefore no further discretion in the matter and he cannot make a conditional order of adjournment. Nor can he say that on failure to pay the costs, the case shall go on as he has stated in the present case. The following two decisions Salek Chand v. Emperor 38 Cr LJ 142 : AIR 1936 All 851 and 38 Cri LJ 387: AIR 1937 Pesh 20 lay down that such conditional orders are bad.

10. I would even go further and say that a Magnate cannot order payment of costs at all for an adjournment made under Section 526(8). Order for costs is permissible when an adjournment becomes necessary or advisable under Section 344(1A) Cri.P.C. It is true that the explanations under Sub-sections (8) and (9) of Section 526 states that nothing contained in the two sub-sections restricts the powers of a Court under Section 344. But Section 344 will apply only in a case where the Magistrate proceeds under that section for adjournment. An adjournment under Section 344 is due to the absence of a witness or any other reasonable cause. It will not apply when an adjournment has to be made by the Magistrate under Section 528(8) without any volition in the matter.

11. There are other matters besides adjournment provided for under Section 344 like remanding the accused to custody etc. It is only such powers of the Magistrate

which can be said to be not restricted. It has been held in the decisions AIR 1929 Lah 702, Sorabi M. Shroff v. Erachshaw B. Katrak AIR 1932 Bom 470, In re T.V. Venkatarama Chetti AIR 1942 Mad 178 that such order for costs while complying with the prayer for adjournment was illegal. In the decision AIR 1929 Lah 702 it has even been held that such an order for costs could not but create the unfortunate impression in the mind of the petitioner that the Magistrate was prejudiced against her and it was held that the1 order for costs will itself be a ground for transfer.

12. The only decision to the contrary which I have been able to find is Ram Rakshpal v. Ram Nath 39 Cri LJ 352 : AIR 1938 All 112 wherein Allsop, J. held that though a Court cannot make an order for costs as a condition precedent to the adjournment, it can direct a party under Section 344 to pay costs to the opposite party. I must express my respectful disagreement with this decision. All the other decisions cited above take the contrary view. An order for payment of costs for an adjournment under Section 526(8) would itself smack of the Magistrate being prejudiced against the party. There is provision in Section 526(6)(A) for the High Court to provide for compensation to the opposite party up to sum of Rs. 250/- if an application for transfer is filed frivolously or vexatiously. Thus it is only the High Court which can decide whether such an application was frivolous or vexatious and the Magistrate should not by ordering costs prejudge the issue. All that the Magistrate can do under Section 526(8) is to direct the party intimating his intention to apply for transfer to execute a bond for an amount not exceeding Rs. 200/- that he will make the application within a reasonable time to b fixed by the Court. In our present case no such bond appears to have been taken by the Magistrate from the petitioner.

13. Thus it is clear in this case that the Magistrate in directing immediate payment of, costs as a condition precedent to the adjournment has displayed bias against the petitioner and in any case has caused reasonable apprehension in his mind that he will not get a fair and impartial trial. His conduct in refusing the adjournment, in cancelling the bail bond of the petitioner and in ordering his arrest on 26.10.1960 after the petitioner had filed his application for transfer in the Sessions Court and the Sessions Court had stayed the proceedings again shows

his bias, I have no reason to disbelieve the statement of the petitioner that the Magistrate was orally intimated that the proceedings have been stayed, as I find from the records of the Sessions Court that the proceedings before the Magistrate had actually been stayed by the Sessions Court on 25.10.1960, the day before the hearing before the Magistrate.

14. The petition is, therefore, allowed and the crimnal case is transferred from the file of the Magistrate Shrf P.K. Roy to the file of the S.D.O., Udaipur.

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