

M. Mohan Shet and Others Vs. the State of Karnataka and Others

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Court : Karnataka

Decided On : Aug-14-1991

Reported in : 1992CriLJ1403; ILR1991KAR4347

Judge : N.Y. Hanumanthappa, J.

Appeal No. : Criminal Petition No. 613 of 1991

Appellant : M. Mohan Shet and Others

Respondent : The State of Karnataka and Others

Advocate for Def. : B.V. Acharya and ;Sri B.L. Acharya, Adv.

Advocate for Pet/Ap. : Sri A.B. Patil and ;Sri G.G. Changeshetty, Adv.

Judgement :

ORDER

1. This application is filed under section 407 of the Code of Criminal Procedure seeking transfer of the complaint filed by the second respondent herein before the J.M.F.C. Bhatkal, North Kanara District, to any other Magistrate Court of either Shimoga District or Bangalore District. A few facts and circumstances which led the petitioners to approach this Court under section 407, Cr.P.C. are as follows :

2. The case of the petitioners is that they are the residents of Bangalore city. Respondent-2 file a private complaint under section 200, Cr.P.C., before the

J.M.F.C. Bhatkal against these petitioners for an offence punishable under section 500, I.P.C. alleging that the petitioners have made a defamatory statement by publishing an article in a newspaper called 'Daivajna Vani' which relates to the affairs of religious trust, namely, 'Daivajna Brahmin Guru Peetha Samathapana Trust, Bangalore'. On the allegations made in the complaint, the Judicial Magistrate First Class, Bhatkal, took cognizance and then ordered to issue process to the petitioners herein P.C. No. 12 of 1989 which later came to be numbered as C.C. No. 1777 of 1989. Pursuant to the process issued, it is clear from the order sheet maintained by the J.M.F.C. Bhatkal that A. 4 appeared and later he had engaged an Advocate by name Sri S. S. Kolkebail, a member of Kundapur Bar. These petitioners filed a Criminal Revision Petition in Cr.R.P. 343/89 alleging that in the absence of any prima facie case the Magistrate has chosen to issue process to the petitioners. The said Criminal Revision Petition was dismissed by this Court on 26-2-1991.

3. On 22-7-1991 petitioners have filed this application under section 407, Cr.P.C., within 25 days from the date of their earlier case filed in Cr.R.P. 343/89 which was rejected on 26-2-1991, with a request to transfer the case, namely, CC No. 1777-89 on the file of the J.M.F.C. Bhatkal to some other Magistrate Courts of either Shimoga District or Bangalore District for the following reasons : (1) If the complaint is to be tried at Bhatkal Court itself, the petitioners apprehend that they may not get fair and impartial enquiry; (2) In spite of their best efforts they were unable to get the services of the Advocates as Bhatkal Bar consisted of only three Advocates. Out of three, one is already appearing for respondent-2 and other two are neither active practitioner nor accepted petitioner's brief to appear on their behalf in the said Court. Out of three, the Advocate who is appearing for respondent-2 is none other than the son of the President of the Trust in question. In spite of such a failure to secure services of an Advocate, the trial Court is in hurry to proceed with the case. Thus, it is expedient in the interest of justice to transfer the case from Bhatkal to some other Court as mentioned earlier.

4. In support of the above contentions, Sri A. B. Patil, learned Counsel for the petitioners, relied upon some of the decisions which according to him are applicable to the case in question and thus the petitioners' request for transfer of

the case is just and reasonable one. The first decision which Mr. Patil wanted to rely upon is the rendered by the Oudh High Court, reported in *Lalta v. Zahoor Ahmad*, wherein it is said :

'Where no practitioner in a district ordinarily employed in criminal cases is willing to act for the accused, it is a good ground for transfer of the case to another District.'

The second decision which Mr. Patil relies upon is the one reported in 1970 Cri LJ 806 (*Punyananda Avadhut v. State*), : AIR1970 Cal241 . While dealing about the grounds of transfer which shall be expedient for the ends of justice, it is observed as follows (at page 808 of Cri LJ) :

'We find that the enquiry before the committing Magistrate at Purulia was conducted by the Public Prosecutor of Bankura who was appointed by the State Government to conduct this prosecution at Purulia. We find, however, that after the commitment was made the Public Prosecutor, Bankura, is no longer available for conducting the prosecution before the Sessions Judge and Mr. Banerjee, the learned Deputy Legal Remembrancer, informs us that the State has engaged one Assistant Public Prosecutor from Asansol to conduct the case before the Sessions Judge, Purulia. It thus appears that no Public Prosecutor will be available at Purulia for conducting this prosecution. Furthermore, we find that one of the accused persons, who was the local Block Development Officer at the time of the incident and against whom serious allegations have been made, is now a Sub-Deputy Collector posted at Purulia, Sadar. True, the case is to be heard by the Sessions Judge with whom the said accused person has nothing to do. But the prosecution witnesses will be the people of the locality where the accused was the Block Development Officer at the relevant time and he is still an officer at Purulia where the trial is to be held. We feel that it would be expedient for the ends of justice that the trial should be held elsewhere than at Purulia. Mr. Mukherjee no doubt tells us that the accused persons will be much prejudiced in view of the fact that they have engaged their lawyers who have been paid their fees. That is certainly of some consideration. But then, for the other reasons which we have said, we feel that even if that means some inconvenience to the accused persons the trial should be held elsewhere. We hold, therefore, that it is expedient for the

ends of Justice that this case should be transferred for trial from the district of Purulia.'

The third decision is the one reported in 1972 Criminal LJ 434 (In re S. R. Narasimlu). While dealing about scope of Section 526 of Cr.P.C. 1898 (old), the Court held that 'a non-availability of services of an advocate to defend the case is a good ground for transfer of the case of another District.' The relevant discussions is at paragraphs 8 and 9, which read as follows :

'The learned counsel Sri Madhava Rao appearing for the petitioner submits that in view of the fact that the petitioner finds it exceedingly difficult to secure the services of any advocate to defend his case this Court may consider the desirability of granting the prayer in the transfer petition. He drew my attention to a decision of *Lalta v. Zahoor Ahmad* for the position that where no practitioners in a district ordinarily employed in criminal cases is willing to act for the accused, it is a good ground for transfer of the case to another district. Reliance was also placed by the learned counsel appearing for the petitioner on a decision in *Bagomal v. Noor Nabikhan*, AIR 1935 Sind 195 : (36 Cri LJ 1480). Where the accused happened to be a tapedar who was accused of having attempted to bribe the Collector and the Magistrate of the District happened to be a complainant, the case at the request of the accused was transferred to another District Magistrate.

'The petitioner categorically states that he could not secure the services of any advocate at Karimnagar to defend him and that he entertains a reasonable apprehension as regards the fair treatment of his case from the hands of the learned Munsiff Magistrate. I am not convinced with the latter ground but, so far as the former ground is concerned, this is a fit case where I find that having regard to the object of criminal jurisprudence unless the accused is satisfied that he is defended properly the proceeding should not be allowed to proceed and in this case the accused swears to an affidavit to the effect that he found exceedingly difficult to get an advocate to defend his case and that he approached several advocates but nobody was taking up his case in order to defend him. In view of that the very object and purpose of criminal jurisprudence will be defeated or frustrated if the accused is compelled to proceed in the absence of proper

defence.' The last authority is the one which Sri A. B. Patil likes to rely upon is the decision of this Court rendered in the case of the Bharamarambika alias Ambakka v. State of Mysore, reported in 1972 (2) Mys LJ 199 : (1973 Cri LJ 114). While dealing about the scope of Sections 526 and 528 of the Cr.P.C., this Court held as follows (at page 115 of Cri LJ) :

'Sessions Judges, while exercising their powers under S. 528(1)(1-C) of the Cr.P.C. will have to bear in mind the grounds mentioned in S. 526(1), Cr.P.C. The grounds mentioned in S. 526(1) are not exhaustive. The power vested in Sessions Judge under S. 528(1)(1-C) is very wide. Though particular circumstances found in a criminal case may not fall within any one of the grounds mentioned in S. 526(1), a Sessions Judge has ample powers to transfer such a case from one Criminal Court to another Criminal Court in his division provided he is of opinion that it is expedient for the ends of justice that such an order of transfer should be made.

The view that inconvenience of the complainant or even her witnesses is not a good ground to grant the prayer for transfer made by her is not correct in law.'

5. Sri A. B. Patil submits that in case the matter is transferred from the J.M.F.C. Bhatkal to either of Shimoga or Bangalore District, his client would even undertake to pay necessary expenses of to and fro and their stay on the date of hearing. For the reasons given above, Mr. Patil submits that this is a fit case where CC No. 1777/89 on the file of the J.M.F.C. Bhatkal be transferred to another place as mentioned earlier.

6. As an answer to these contentions, Sri B. V. Acharya, learned Counsel for respondent-2, submits that it is not a fit case where a transfer has to be given merely because a request has been made by the petitioners in the absence of any specific allegation against the Presiding Officer doubting that officer's integrity. According to Sri B. V. Acharya, the transfer now sought for is on two grounds, namely, (1) since the petitioners are not getting services of a lawyer at Bhatkal and if the proceedings are to be tried by the said Court, the petitioners may not get fair and impartial enquiry; (2) since the complaint is of old one the Court may dispose of the case at any time. Thus, in view of the urgency pleaded it is expedient in the ends of justice to see that the case is transferred from Bhatkal. According to him,

the present application is not a bona fide one. The main intention of the petitioners is to drag on the proceedings and thus to harass the second respondent. According to him, on an earlier occasion a petition under S. 482 was filed by these petitioners before this Court in Cr.R.P. 343/89 seeking to cancel the proceedings initiated. However, the same came to be rejected by this Court by its order dated 26-2-1991. Within 25 days from the date of the earlier order, the petitioners have approached this Court with the present application for transfer. This according to Mr. Acharya is nothing but a trick played by the petitioners to see, let come what may, that the petitioners shall not appear before the J.M.F.C. Bhatkal.

7. In support of his contentions, Sri Acharya, learned Counsel for respondent 2, relies upon a decision of the Supreme Court in the case of Mrs. Maneka Sanjay Gandhi v. Miss Rani Jethmalani reported in : 1979 CriLJ458 . The Supreme Court has held as follows (para 1) (of Cri LJ) :

'Mrs. Maneka Gandhi, editor of a monthly and daughter-in-law of the former Prime Minister, was prosecuted in Bombay for defamation by the daughter of a leading advocate and member of Parliament. During the course of the prosecution, a petition was made for transfer to the case from Bombay to Delhi and a string of grounds (such as substantial prejudice, non-availability of competent legal service and absence of congenial atmosphere for a fair and impartial trial) had been set out to validate the prayer.

Held in the facts and circumstances of the case that the transfer could not be allowed on the grounds alleged.

(Para 2)

Assurances 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 hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad

and vary from case to case. The grounds for the transfer have to be tested on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weight the circumstances.

(Para 3)

One of the common circumstances alleged in applications for transfer is the avoidance of substantial prejudice to a party or witnesses on account of logistics or like factors, especially when an alternative venue will not seriously handicap the complainant and will mitigate the serious difficulties of the accused. In the instant case the petitioner claims that both the parties reside in Delhi and some formal witnesses belong to Delhi; but the meat of the matter, in a case of defamation, is something different. The main witnesses are those who speak to having read the offending matter and other relevant circumstance flowing therefrom. they belong to Bombay in this case and the suggestion of the petitioner that Delhi readers may be substitute witnesses and the complainant may content herself with examining such persons is too presumptuous for serious consideration.

(Para 4)

It was suggested that the services of an efficient advocate may not be easy to procure to defend the accused petitioner. It is difficult to believe that a person of the position of the petitioner is unable to engage a lawyer to defend her.

(Para 4)

A more serious ground is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. If this vice is peculiar to a particular place and is persistent, the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire

region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer.'

8. The second authority which Sri B. V. Acharya likes to rely upon is the one decided by the Supreme Court in the case of Baljit Singh v. State of J & K reported in : 1982 CriLJ1944 , wherein it is held at para 1 as follows :

'A case under Ss. 302 and 392 of the Indian Penal Code has been transferred from Jammu to Srinagar by the high Court through the impugned order on the sole ground that most of the witnesses who belong to Jammu have already been examined by the trial court and that only witnesses from Kashmir division or Delhi remain to be examined. We feel that in the circumstances of the case that is not at all a proper approach to the matter specially when another application for transfer of the case had already been rejected by the same Hon'ble Judge of the High Court, although even at that stage the same ground for the transfer was put forward before him. Nor do we find that it would be a correct principle to apply to the transfer of criminal cases that they should be heard at the place from where a large number of witnesses are to be examined. The normal course of things should not have been lightly interfered with and the case should have been allowed to be tried by the court which had territorial jurisdiction. Accepting the appeal, therefore, we set aside the impugned order and direct that the case shall continue to be tried at Jammu by the court which has dealt with it so far.'

The last decision which Mr. Acharya likes to rely upon is the case of Smt. Sharab Chhonzam v. Smt. Suraj Mani, reported in 1973 (2) Cri LJ 1017. At para 5 it is held as follows (at page 1018 Cri LJ) :

'It is conceded that all the prosecution witnesses have already been examined. Therefore, it would hardly be a reason for transfer of the case from Pooh to Kalpa. If a Court of Magistrate has been established at Pooh, it would not be proper to ask for transfer, simply on the ground that no lawyer is practising at Pooh, or, that witnesses have to travel some distance for reaching the headquarters at Pooh. After all, what for the Court of Magistrate is established there if no trial can be permitted to be held at that place.'

9. In support of his stand that actually Advocates are available at Bhatkal and Advocates of neighboring Bars are also attending the J.M.F.C. Court at Bhatkal, today Sri Acharya has filed an affidavit of the son of respondent-2, who is also an Advocate, to the effect that it is not three Advocates but six Advocates are available at Bhatkal. Advocates from other places also attend Bhatkal Court. The entire affidavit is extracted hereunder :

'I, R. G. Kolle s/o Sri Gajanana Kolle, Advocate, aged about 39 years; resident of Bhatkal, now come to Bangalore, do hereby solemnly affirm and state as follows :

I am the son of the 2nd respondent in the above petition and I know the facts of the case.

The averments in the transfer petition that there are only 3 Advocates practising at Bhatkal is not correct. There are 6 Advocates who are having chambers in Bhatkal. The allegation that the lawyers at Bhatkal were not willing to appear for the accuse is not correct. The allegations in this behalf are deliberately left vague. Even the names of the Advocates whom the petitioners approached are not mentioned.

Though it is true that I was the President of the Advocates' Association, Bhatkal earlier, at present I am not the President of the Advocates' Association. Sri N. N. Nayak, Advocate, Bhatkal was elected as President of the Association on 27-5-1991 and since then he is the President of the Advocates' Association, Bhatkal.

The allegation that the petitioners approached lawyers at Honavar and that they could not get any Advocates there cannot be true. There are as many 35 Advocates practising in Honavar and at least 7 or 8 of them regularly attend the Court only at Bhatkal. Here again, the averments made are deliberately left vague.

The petitioner have engaged Sri S. S. Kolkebail, a very senior Advocate from Kundapur who has been regularly appearing for them in the case, Kundapur is just 55 Kms away from Bhatkal and many lawyers from Kundapur regularly attend Court at Bhatkal. Sri. S. S. Kolkebail himself has been appearing in other cases at Bhatkal. Hence, the averment that the Advocate is from Koteswar and that the

said Advocate has expressed his inability to appear cannot be true.

The distance from Bhatkal to Karwar is 125 Kms. and not 180 kms., as mentioned in the petition. Similarly the allegation that Shimoga is situated at a distance of 80 kms. from Bhatkal is totally incorrect. The distance from Bhatkal to Shimoga is not less than 215 Kms.

The petitioner are responsible for publication of imputations to defame the 2nd respondent and the allegations pertain to construction of a Muth building at Karki in Honavar taluk. The publication in question is widely circulated in Bhatkal and the offence was committed with a view to defame him in the eyes of the residents of Bhatkal where he resides as also persons of their community outside.

It is submitted that there is absolutely no ground made out for transfer of the case.'

For these reasons, Sri Acharya submits that the petition be dismissed.

10. After hearing both sides, now the points that arise for consideration are :

1) Whether allegation made by the petitioner that if the case is tried at Bhatkal they may not get fair and impartial enquiry is sustainable Or

2) Whether non-availability of Advocates is a circumstances, that transfer of case from Bhatkal to some other place i.e., either to Shimoga or Bangalore District, expedient in the ends of justice

11. In order to know when transfer of a case from one Court to another be given effect to under the Code of Criminal Procedure, it is proper to extract hereunder Section 407, of Cr.P.C., which reads as follows :

'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 of 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 a copy of the grounds on which it is made; and no order shall be made on 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 interest of justice, order that, pending the disposal of the application, the proceeding 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 circumstance 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.'

Section 407, Cr.P.C. of 1973 is identical to S. 526, Cr.P.C. 1898. A reading of Section 407, Cr.P.C. makes it clear that this Court can pass an order whenever it appears that a fair and impartial inquiry or trial cannot be had in a particular Court or transfer of a case is expedient for the ends of justice. When it is established that a party may not get a fair and impartial inquiry or trial or circumstances are of such nature which are convinced the Court that transferring of a case is inevitable or expedient in the ends of justice the Court can pass such an order. But in the case on hand, from the material now produced, it is clear that Advocates are available at Bhatkal. It is also clear that it is not the members of Bhatkal Bar alone are

attending the J.M.F.C. Court at Bhatkal but Advocates of neighboring Bars are attending the said Court. Non-availability of services of Advocates is one thing, but non-availability of a particular Advocate is something else.

12. While interpreting scope of Section 526, Cr.P.C. of 1898, about reasonable apprehension of failure of justice, this Court in the case of B. N. Kuttappa v. State of Coorg, reported in AIR 1956 Mysore 38 : (1958 Cri LJ 628) held as follows (at page 629 (of Cri LJ) :

'It appears to me that there is no substance in any of the grounds urged by the petitioner for the transfer of the two cases in question. The basis of applications under S. 526, Criminal P.C. for transfer of criminal cases is, and must be, that the accused must have reasonable apprehension that he will not have a fair trial. The person who wants a transfer of the case must show good grounds for believing that he will not have a fair trial in the Court in which his case is pending. In the absence of such grounds, it is not proper to transfer the case from the case from the file of that Court.

Before ordering the transfer of a case, the Court must be satisfied on this fact. No doubt, the importance of the principle that confidence in the administration of justice is an essential element of good government and that reasonable apprehensions of failure of justice in the mind of the accused should be taken into consideration in dealing with such applications cannot be ignored. But at the same time, we will have to remember that the apprehension entertained by an accused must be such as a reasonable person placed in that situation would entertain. Mere fanciful apprehension on the part of an accused cannot be a ground for transfer of a criminal case.'

13. In the case of Mrs. Maneka Sanjay Gandhi, : 1979 CriLJ458 , the question that cropped up therein for consideration was almost similar to the one now cropped up. The Supreme Court held that non-availability of competent legal service, and absence of congenial atmosphere for a fair and impartial trial not a sufficient ground to transfer.

14. It is true if Advocates are not available definitely it will result in causing denial of fair opportunity to get justice. But in the instant case, as explained above, there are Advocates other than the one appearing for the complainant. Also Advocates are attending the said Court coming from the neighbouring Bar Associations. If the petitioners are really serious in conducting the case they can approach them and avail of their services. Merely because an Advocate of their choice is not available that itself is not sufficient to say that a party may not get a fair and impartial inquiry or trial or it also cannot be said that non-availability of service of such desired lawyer necessitated the transfer of a case for the ends of justice. Apart from these principles on facts also this Court has to consider whether petitioners made out a prima facie case for transfer. If the affidavit filed by the son of the second respondent is read, the conclusion will be that intention of the petitioners is to see that somehow they shall not appear before the J.M.F.C., Bhatkal and the reasons which they have given are neither convincing nor reasonable.

15. The offer made by the petitioner is that if the case is transferred to some other Court at Shimoga or Bangalore District, the expenses will be borne by them, cannot be a ground to transfer. Thus, neither the grounds made out nor the authorities relied upon by the petitioners seeking for transfer of the case are either tenable or applicable. Hence, there are no good grounds to pass an order transferring the case from Bhatkal to Shimoga or Bangalore District.

16. Hence, this petition is dismissed.

17. Petition dismissed.