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Court : Rajasthan

Decided On : Apr-25-1951

Reported in : AIR1951Raj158

Judge : Wanchoo, C.J. and; Bapna, J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 526 and 526(8); Code of Criminal Procedure (CrPC) (Amendment) Act, 1923 - Sections 526(8)

Appeal No. : Criminal Transfer Appln. No. 9 of 1951

Appellant : Nathu Ram

Respondent : The State

Advocate for Pet/Ap. : Utsava Lal Gupta, Adv.

Disposition : Application dismissed

Judgement :

Wanchoo, C.J.

1. This is an application by Nathu Ram for transfer of a criminal case from the court of the Sub Divisional Magistrate, Bali, to some other court in the same district. The matter came up before one of us on 2-2-1951. It appears that the applicant had not applied to the District Magistrate under Section 528, Criminal P. C, & came direct to this court for transfer under Section 526 of the same Code.

Learned counsel urged that the applicant was entitled to come direct to this court under Section 526, & relied on two cases in support of his submission. Therefore, the point was referred to a Division Bench for disposal, & has thus come before us.

2. It is not denied that before the amendment of Section 526 by the addition of Sub-section (8) in 1923, the practice in all the High Courts in India was that an application under Section 526 was not entertained unless the applicant had first moved the District Magistrate under Section 526 or wanted a transfer outside the district. The reason for this practice is not difficult to see. If a party wants transfer only from one Magistrate to another in the same district, he has got the District Magistrate at hand, & should apply to him. It is generally accepted that such applications of transfer would be expeditiously disposed of, & that in many cases it would not be necessary to come to the High Court at all. It is only where the District Magistrate dismisses the application under Section 528, that it would become necessary for the party to come to the High Court. It was on this basis that the High Courts uniformly insisted before 1923 that a party must first apply to the District Magistrate under Section 528 before coming to the High Court.

3. Learned counsel, however, argues that after the introduction of Sub-section (8) in Section 526, the law must be deemed to have been changed, & the party given the right to come direct to the High Court for transfer. Section 526(8) reads as follows:

'If in any inquiry under Chap. VIII or Chap. XVIII or any trial, any party interested intimates to the court at any stage before the defence closes its case that he intends to make an application under this section, the court shall, upon his executing, if so required, a bond without sureties, of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made & an order to be obtained thereon:

'Provided that nothing herein contained shall require the court to adjourn the case upon a second or subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of several

accused, upon a subsequent intimation by any other accused.'

4. As we read this sub-section, it provides in our opinion, a safe-guard for the person wanting a transfer against disposal of his case before he has been able to apply to the High Court. There is nothing in this section which should change the law & practice, which was prevalent in all the High Courts before this sub-section was introduced in the Code. Learned counsel relied on two cases in this connection. The first case is 'Nathoomal v. Emperor', A.I.R. (13) 1926 Sind 137. It was held in that case that it was unnecessary that an application should be made in the first instance to the District Magistrate under Section 528, Criminal P C. The reason that was given in support of this view was that Section 528 did not provide for a compulsory adjournment of the trial, while Section 526 (8) rendered an adjournment imperative. It was also held that there was nothing in the Statute which rendered it necessary to move the District Magistrate in the first instance, & that if the High Court could not be moved until an order was obtained from the District Magistrate, the trial would be unnecessarily delayed. The main reason, therefore, that led the learned Judges to come to the view that the party could apply direct to the High Court under Section 526 was that trial would be unnecessarily delayed. It seems to us that if the party were to apply to the District Magistrate in the first instance & get a transfer from him, he would get relief much quicker than if he came to the High Court. Further, even if the District Magistrate dismissed his application, there would generally be an explanation of the Magistrate or an affidavit of the other side already on the record and the case would be likely to be disposed of much more speedily by the High Court as well.

5. The next case is a Full Bench decision of the Bombay High Court, In re P. D. Shamdasani (No. 2), A.I.R. (17) 1930 Bom. 480. It was recognised in this case that the practice in the Bombay High Court also was that the party should first apply to the District Magistrate or the Chief Presidency Magistrate for transfer before coming to the High Court, & a reference in this connection may be made to the case 'in re Fonseca, 6 Bom. L. R. 480. But the learned Judges came to the conclusion that in view of the introduction of Sub-section (8), Section 526, in 1923, the position in law had changed. With all respects, we cannot see how a provision, providing for adjournment would make a difference in the practice that was

prevailing in all the High Courts before 1923, & was accepted as the correct law. The reasons, in this case, were also somewhat similar to the reasons given by the learned Judicial Commissioners of Sind. In the first place, it was said that there was nothing in Section 526 to bar a person coming direct to the High Court. This can be met by a counter argument that there is nothing in that section which says that the party has a right to come direct to the High Court. Another reason that was given was that there might be delay if the party had to apply first to the District, Magistrate & then to the High Court. We have already dealt with this aspect of the matter in dealing with the Sind case.

6. We may further point out that in the Bombay case, the order; which was taken to the High Court in revision, was obviously incorrect. The party in that case had applied for time under Section 526, Criminal P. C, & the Magistrate gave him only a few hours asking him to go & apply to the Chief Presidency Magistrate. Marten, C. J., after giving reasons which we have already mentioned, eventually observed as follows:

'But, however, that may be, it is we think reasonably clear that in the present case the learned Magistrate's order was not strictly correct in point of law if the accused desired to go to the High Court direct'.

So the real matter before the Full Bench was whether that particular order was justified & whether the time granted by the court was sufficient for the purpose of applying to the High Court for transfer.

7. It has been argued by the learned counsel that if a party had to apply to a District Magistrate first before coming to the High Court, he would be giving a wrong reason in the application under Section 526 Sub-section (8), by stating that he wanted to apply to the High Court for transfer. We do not think that, this should create any difficulty. Once the law is clear that a party has to apply to the District Magistrate before applying to the High Court under Section 526, we see no difficulty in his applying under Section 526, Sub-section (8) & intimating to the court that he would apply to the High Court, for his intention obviously is that if he fails to get a transfer from the District Magistrate, he would apply to the High Court. All that is necessary is that the Magistrate should always take into account

that the party has to apply first to the District Magistrate, & then to the High Court for transfer, & give him a reasonably sufficient time for this purpose. We may add that if a party feels that he must be very accurate in his prayer in the application under Section 526 (8), he may follow the language used in the case of 'Bhagwat v. Emperor' A.I.R. (29) 1942 Oudh 429, where the party intimated to the court that he would put in an application for transfer of the case before the District Magistrate & in case of necessity in the Chief Court & so the proceedings might be adjourned. It was held by the Chief Court that such an application was an intimation that the party intended to apply to the Chief Court for transfer & that the Magistrate was bound to adjourn the case on such an application. We, therefore, see no difficulty in holding that the introduction of Sub-section (8) in 1923 has made no difference in the position, & that the party applying for transfer under Section 526 must, in the first instance, go to the District Magistrate. It should, however, be clear that this applies only to those cases which are pending in courts subordinate to the District Magistrate

8. We may refer to two other cases, which seem to hold slightly different from what we have said above. The first of these cases is 'Kishore Rai v. Emperor, A.I.R. (15) 1928 All 753. The learned Judge pointed out that there was some misapprehension at the Bar as regards the provisions of Section 526, Sub-section (8). The misapprehension appeared to have been that a party could get time twice, under that sub-section, once for applying to the District Magistrate, & then for applying to the High Court. This case only points out that this is wrong, & that a party can get time only once for applying to the High Court, & cannot get adjournment for applying to the District Magistrate under Section 528. This case, however, does not touch the point which we are deciding, & in any case, the difficulty as to the sufficiency of time can always be get over in the manner suggested by us above.

9. The next case is 'Janu v. Emperor', A. I R. (31) 1944 Oudh 7. In this case the facts were that a party applied under Section 586, Sub-section (8), to the court, & was given 10 days' time to apply to the Chief Court for transfer. He applied to the District Magistrate, & his application for transfer was dismissed. By this time the ten days' period allowed to him had expired. He then applied a second time for

adjournment under Section 526, & the Magistrate refused to give that adjournment. It was then held that he was not entitled as of right to a second adjournment, & the Magistrate was right in carrying on the case. It may be mentioned that after the refusal, the party did not apply to the Chief Court for transfer. This case is similar to 'Kishore Rai v. Emperor' A.I.R. (15) 1928 All. 753 inasmuch as the party had applied for time a second time. The learned Judge, when dealing with the criminal revision from conviction, was right in saying that the party had no such right to get time a second time. But this case, in our opinion, is no authority for the proposition that a party can come direct to the High Court under Section 526. We have already pointed out that the difficulty of sufficiency of time can always be got over by the Magistrate's giving reasonable time to a party for applying first to the District Magistrate & then to the High Court. We are, therefore, of opinion that the applicant should, in this case, first apply to the District Magistrate for transfer.

10. We are now told that the Magistrate in question has been transferred from Bali, & the case is no longer in his court. Under these circumstances, there is no force in this application, & it is hereby dismissed.

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