

Gurcharan Das Chadha

Vs

State of Rajasthan

Transfer Petition No. 7 of 1965

(CJI P. B. Gajendragadkar, M. Hidayatullah, V. Ramaswami - I JJ)

24.11.1965

JUDGMENT

HIDAYATULLAH, J. -

This is a petition under s. 527 of the Code of Criminal Procedure for the transfer of a criminal case (No. 2 of 1964 - State v. Gurcharan Dass Chadha I.P.S.) which is pending in the Court or the Special Judge, Bharatpur, Rajasthan to another criminal court of equal or superior jurisdiction subordinate to a High Court other than the High Court of Rajasthan. The petitioner is the accused in that case and he is being tried under ss. 120B/161, Indian Penal Code and s. 5(1)(a)(d) and 5(2) of the Prevention of Corruption Act.

The petitioner is a member of an All India Service and his prosecution has been sanctioned by the Government of India. In December, 1962, he was serving as Superintendent of Police and was selected to be Commandant of 8th Battallion of Rajasthan Armed Constabulary. He avers that he took over as Commandant on January 7, 1963 but was placed under suspension the same day and a case was registered on January 12, 1963 which has resulted in the present prosecution against him. The petitioner apprehends for reasons to be stated presently that he is not likely to get a fair, just and impartial trial in the State of Rajasthan owing to the hostility and influence of the then Law Minister who was also Minister incharge of Home Department of the State, the Additional Inspector General of Police, Anti-Corruption, and the Deputy Inspector General of Police, Ajmer Range, Jaipur. In support of his petition he has referred to many incidents and filed many documents. He has sworn an affidavit that he entertains an apprehension that these persons would interfere with the trial of the case in the State of Rajasthan and that a transfer of the case outside the State is in the interest of justice.

The State Government has opposed the application strenuously and has questioned the jurisdiction of this Court to transfer under the powers conferred on it by s. 527 Code of Criminal Procedure a case made over by the Government of the State of Rajasthan for trial to a Special Judge under the Criminal Law Amendment Act, 1952 (Act 46 of 1962). In addition, the State Government joins issue on the facts alleged and the merits of the claim for the transfer of the case.

While this petition was pending the State Government served the petitioner with a notice and a charge-sheet to show cause why he should not be proceeded against for breach of Rule No. 8 of the All India Services (Conduct) Rules, 1954, because he had communicated "directly/indirectly official documents and information to Government servants/other persons to whom he was not authorised to communicate such documents/information" as indicated and detailed in a statement of allegations accompanying the notice and the charge. The State Government has appended to this charge two

appendices giving details of 31 and 16 documents respectively, which were said to have been so communicated by the petitioner to his counsel Messrs. R. K. Rastogi and D. P. Gupta, Advocates of Jodhpur and others named as "non-petitioners" in a writ petition which he had filed in the High Court of Rajasthan (No. 794 of 1964) and which he subsequently withdrew on December 23, 1964 before taking action to file the present petition. The notice, the charge and the statement of allegations accompanying them were signed by Mr. Vishnu Dutt Sharma, Special Secretary to Government. On receiving this charge, the petitioner moved another petition in this Court for taking action against Mr. Sharma and the Government of Rajasthan for contempt of this Court. At an earlier hearing, where we were considering the petition for transfer, the other petition was brought to our notice and we were about to order issuance of notices to the contemnors but the Advocate General of the Government of Rajasthan took notice of the petition and offered to take action in respect thereof. As a result the State of Rajasthan through the Chief Secretary to the Government and Mr. Sharma separately filed their replies to the second petition and attempted justification. Mr. Sharma abjured knowledge of the contents of the petition for transfer and denied any malice, ill-will or grudge, pleading good faith. The matter would have received serious attention from us but for the fact that at the next hearing the plea for justification was abandoned and an unconditional apology was entered on behalf of the State Government as well as Mr. Sharma. The latter was present in Court and expressed regret for what had happened. We accepted the apology and do not, therefore, feel called upon to consider the plea of justification which, in any event, is not a plea heard in bar when contempt is clear and manifest. There could be no question in the present case that by charging the petitioner with proceedings of a different kind there was, if not direct, at least indirect pressure brought upon him in the prosecution of his petition for transfer. Of this we would have taken serious note because it was likely to have hampered the petitioner in prosecuting his petition freely before this Court and would have resulted in obstruction of administration of Justice. If the petitioner was guilty of any lapse under the Services (Conduct) Rules or even guilty of an offense the action to which he would be otherwise subject could wait till the present proceedings had terminated and there was really no reason to hurry with a charge against the petitioner which charge would have put him under duress of some kind. Such a course of action is to be deprecated and we are glad to note that the Government of Rajasthan and the Secretary concerned have seen the matter in this light and have made amends by proper contrition. We do not feel called upon to say more than this on the petition for contempt which shall be filed.

We shall now take up the objection that this Court lacks jurisdiction to transfer the case pending before the special Judge, Bharatpur. This objection goes to the root of the matter. Questions of inherent jurisdiction must always be decided before the merits are considered because to dismiss the petition after consideration of merits itself involves an assumption of jurisdiction. We must accordingly consider the objection even though we are satisfied that the petition must fail on merits.

The power which the petitioner is invoking flows from s. 527 of the Code of Criminal Procedure. The first two sub-sections of that section are material here and they read :

"527. Power of Supreme Court to transfer cases and appeals. -

(1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior Jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion which shall, except when the applicant is the Attorney-General of India or the Advocate General, be supported by affidavit or affirmation.

....."

It is conceded by the Advocate General that the power to transfer criminal cases as laid down in the section is ordinarily available but he contends that a case assigned by the State Government under the Criminal Law Amendment Act, 1952 to a special Judge cannot be transferred at all because under the terms of that Act, which is a self-contained special law, such a case must be tried by the special Judge designate only. The argument is extremely plausible but does not bear close scrutiny. To understand the argument and how it is refuted certain provisions of the Act may be seen. The first section of the Act gives the short title of the Act. Sections 2 and 3 of the Act introduce changes in the Indian Penal Code by increasing the punishment in s. 165 and by inserting s. 165A which provides for punishment for abetment of offences defined in ss. 161 and 165. Sections 4 and 5 of the Act make some amendments in s. 164 of the Indian Penal Code and s. 337 of the Code of Criminal Procedure. These four sections have been repealed by the Repealing and Amending Act, 1957 as they were no longer necessary. The sections which we have to consider are ss. 6, 7 and 8 of the Act. Section 6 confers power on the State Government to appoint special Judges for the trial of certain offences. The parts relevant to our purpose read :

"6. Power to appoint special judges.

(1) The State Government may, by notification in the official Gazette, appoint as many special Judges as may be necessary for such area, or areas as may be specified in the notification to try the following offences, namely :-

(a) an offence punishable under section 161, section 162, section 163, section 164, section 165, or section 165-A of the Indian Penal Code (Act XLV of 1860), or sub-section (2) of section 5 of the Prevention of Corruption Act, 1947 (II of 1947);

(b) Any conspiracy to commit or any attempt to commit or any abetment of any of the offences specified in clause (a).

....."

Section 7 next provides what cases shall be tried by special Judges. The first two sub-sections read :

"7. Cases triable by special Judges.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1898 (Act V of 1898) or in any other law the offences specified in sub-section (1) of section 6 shall be triable by special Judges only.

(2) Every offence specified in sub-section (1) of section 6 shall be tried by the special Judge for the area within which it was committed, or where there are more special Judges than one for such area, by such one of them as may be specified in this behalf by the State Government."

The procedure which the special Judge has to follow is laid down in s. 8(1) and by sub-section (2) of the same section certain powers are conferred on the special Judge. Sub-section (3) then provides :

"8. Procedure and Powers of Special Judges.

(1)

(2)

(3) Save as provided in sub-section (1) or sub-section (2), the provisions of the Code of Criminal Procedure, 1898, shall so far as they are not inconsistent with this Act, apply to the proceedings before a special Judge; and for the purposes of the said provisions, the Court of the Special Judge shall be deemed to be a Court of Session trying cases without a jury or without the aid of assessors and the person conducting a prosecution before a special Judge shall be deemed to be a public prosecutor.

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There is no need to refer to other provisions of the Act which do not bear upon this matter.

The Advocate General, Rajasthan in opposing the petition relies principally on the provisions of s. 7(1) and (2) and contends that the two sub-sections create two restriction which must be read together. The first is that offences specified in s. 6(1) can be tried by special Judges only. The second is that every such offence shall be tried by the special Judge for the area within which it is committed and if there are more special Judges in that area, by the special Judge chosen by Government. These two conditions, being statutory, it is submitted no order can be made under s. 527 because on transfer, even if a special Judge is entrusted with the case, the second condition is bound to be broken.

No doubt sub-section (1) of s. 7 lays down that the trial of an offence specified in sub-section (1) of s. 6 must be by a special Judge only but that condition can be fully met by transferring the case to another special Judge. Indeed section 527 itself contemplates that the transfer should be to a court of equal or superior jurisdiction and we presume that there are special Judges in every State in India. The selection of a special Judge causes no difficulty. It is the second condition which is really pleaded in bar. The provision of sub-section (2) of s. 7 is that an offence shall be tried by the special Judge for the area within which it is committed.

This condition, if literally understood would lead to the conclusion that a case once made over to a special Judge in an area where there is no other special Judge, cannot be transferred at all. This could hardly have been intended. If this were so, the power to transfer a case intra-state under s. 526 of the Code of Criminal Procedure, on a parity of reasoning, must also be lacking. But this Court in *Ramchandra Prasad v State of Bihar* ([1962] 2 S.C.R. 50.) upheld the transfer of a case by the High Court which took it to a special Judge who had no jurisdiction in the area where the offence was committed. In holding that the transfer was valid this Court relied upon the third sub-section of s. 8 of the Act. That sub-section preserves the application of any provision of the Code of Criminal Procedure if it is not inconsistent with the Act, save as provided in the first two sub-sections of that section. The question, therefore, resolves itself to this : is there an inconsistency between s. 527 of the Code and the second sub-section of s. 7 ? The answer is that there is none Apparently this Court

in the earlier case found no inconsistency and the reasons appear to be these : The condition that an offence specified in s. 6(2) shall be tried by a special Judge for the area within which it is committed merely specifies which of several special Judges appointed in the State by the State Government shall try it. The provision is analogous to others under which the jurisdiction of Magistrates and Sessions Judges is determined on a territorial basis. Enactments in the Code of Criminal Procedure intended to confer territorial jurisdiction upon courts and Presiding Officers have never been held to stand in the way of transfer of criminal cases outside those areas of territorial jurisdiction. The order of transfer when it is made under the powers given by the Code invests another officer with jurisdiction although ordinarily he would lack territorial jurisdiction to try the case. The order of this Court, therefore, which transfer a case from one special Judge subordinate to one High Court to another special Judge subordinate to another High Court creates jurisdiction in the letter in much the same way as the transfer by the High Court from one Sessions Judge in a Session Division to another Sessions Judge in another Session Division.

There is no comparison between the first sub-section and the second sub-section of s. 7. The condition in the second sub-section of s. 7 is not of the same character as the condition in the first sub-section. The first sub-section creates a condition which is a sine qua non for the trial of certain offences. That condition is that the trial must be before a special Judge. The second sub-section distributes the work between special Judges and lays emphasis on the fact that trial must be before a special Judge appointed for the area in which the offence is committed. This second condition is on a par with the distribution of work territorially between different Sessions Judges and Magistrates. An order of transfer, by the very nature of things must, some times, result in taking the case out of the territory and the provisions of the Code which are preserved by the third sub-section of s. 8 must supervene to enable this to be done and the second sub-section of s. 7 must yield. We do not consider that this creates any inconsistency because the territorial jurisdiction created by the second sub-section of s. 7 operates in a different sphere and under different circumstances. Inconsistency can only be found if two provisions of law apply in identical circumstances and create contradictions. Such a situation does not arise when either this Court or the High Court exercises its powers of transfer. We are accordingly of the opinion that the Supreme Court in exercise of its jurisdiction and power under s. 527 of the Code of Criminal Procedure can transfer a case from a special Judge subordinate to one High Court to another special Judge subordinate to another High Court.

This brings us to the question of the merits of the petition. The petitioner is being prosecuted for offences under s. 120B/161 of the Indian Penal Code and s. 5(1)(a)(d) and 5(2) of the Prevention of Corruption Act. His apprehension is that the case against him is the result of the machination of two Police Officers and one Mr. Mathura Dass Mathur who was the Home Minister in 1962. He also alleges hostility on the part of the State Government. He has given instances which in his opinion prove that the above two officers, the Home Minister and the State Government are hostile to him. In relation to the State Government he has alleged that when he was appointed Commandant of the 8th Battallion of Rajasthan Armed Constabulary the State Government down-graded his post, otherwise he would have received a higher starting pay. He also alleges that his suspension and prosecution were made to coincide with his assumption of new duties so that he might not be able to join his new post.

With regard to the Home Minister the petitioner has given five instances in which he apparently crossed the minister's path and gave him room for annoyance. In regard to the two Police Officers he has averred that the Deputy Inspector General of Police, Ajmer Range (Hanuman Prasad Sharma) and he had some differences on three occasions. He has also given similar instances of

hostility towards him entertained by Sultan Singh, Deputy Inspector General of Police. On the basis of these he says that he entertains an apprehension that he will not receive justice in the State of Rajasthan. The law with regard to transfer of cases is well-settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the State of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension.

Applying these principles it may be said that there is a possibility that the petitioner entertains an apprehension that certain persons are hostile to him but his apprehension that he will not receive justice in the State of Rajasthan is not in our opinion reasonable. All the facts which he has narrated bear upon past events in his official life. Nothing has been said which will show that there is in any manner an interference direct or indirect with the investigation of the offences alleged against him or the trial of the case before the special Judge, Bharatpur. A general feeling that some persons are hostile to the petitioner is not sufficient. There must be material from which it can be inferred that the persons who are so hostile are interfering or are likely to interfere either directly or indirectly with the course of justice. Of this there is no trace either in his petition or in the arguments which were advanced before us. Nor does the petitioner allege anything against the special Judge who is trying the case. In this view of the matter we decline to order transfer of the case from the special judge, Bharatpur. The petition accordingly fails and will be dismissed.

Petition dismissed.

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