

BOMBAY HIGH COURT

Lakshman Chavji Narangikar

Vs

Emperor

(Madgavkar and Patkar, J.J. Murphy,C.J.)

03.03.1931

JUDGMENT

Madgavkar, J.

1. This application raises a question of some importance under Section 526 of the Code of Criminal Procedure. On September 25, 1930, a disturbance took place at Chirner, thirteen miles from Panvel, forty-seven accused were sent up before the Magistrate, and on January 31, 1931, were committed by him for trial before the Sessions Court of Thana under Sections 120B(1), 147, 148, 149, 224, 302, 332, 379, and 395 of the Indian Penal Code. The trial would have taken place at Thana with a jury.

2. On February 12, 1931, the following notification, No. 8252-2 dated February 5, 1931, was published in the Bombay Government Gazette-Under Section 193(2) of the Code of Criminal Procedure, 1898 (V of 1898), the Governor in Council is pleased to direct that Mr. N.R. Gundil, LL.B., Assistant Judge and Additional Sessions Judge, Thana, shall try the case known as the Chirner Riot Case, which has been committed to the Sessions by Mr. R.R. Sonalkar, a Magistrate of the First Class in the district of Kolaba, and under Section 9(2) of the said Code he is further pleased to direct that Mr. Gundil shall hold his Court for the trial of the said case at Alibag.

3. A trial at Alibag would be with assessors.

4. The accused apply to this Court for a transfer of the case. The original application was dated February 11, and asked that the trial should take place at Thana. But the application as amended is to transfer the case from the Court of Mr. Gundil, Additional Sessions Judge holding his Court for the trial of this case at Alibag, to the Court of Session sitting at Thana.

5. Three points are taken for the petitioners, firstly, that the notification in question, at least in regard to the second part, is ultra vires, secondly, that in any case this Court has jurisdiction under Section 526 of the Criminal Procedure Code, and thirdly, particularly on the ground of

convenience and to a certain extent even by reason of the right of trial by jury at Thana, the case should be transferred.

6. The contentions for the Crown, as presented by the learned Advocate General, are shortly as follows:-

Firstly, the order in question is an administrative order, not open to modification by this Court, secondly, the venue and the question of jury or assessors are matters not for this Court but for the Local Government under Section 9(2) and Section 269, thirdly, as in this application the petitioners do not object to Mr. Gundil trying the case, Section 526 has no application, as the case still remains and is asked to be retained in the Sessions Court of Thana, so that we are indirectly asked to order Mr. Gundil to sit at Thana and try the case with a jury and we have no power to do so, and lastly, on the merits there is no greater inconvenience at Alibag than at Thana. It was also suggested that an order of this Court might be rendered infructuous if the Local Government chose now to issue a further notification.

7. As to the preliminary point, particularly of administrative powers and this last ground, it is to be observed that the term 'administrative order' is one, not known to law, British or Indian. Unlike France, with its *droit administratif* (administrative law) and its *Conseil d'Etat* (State Council) to administer it, administrative laws and administrative Courts find no place in the constitution of Great Britain or of India. The powers of the Local Government like the rights of other corporations and bodies can only be derived from the law and extend no further than what the ordinary law permits. The Executive Government, Local or Imperial, is as subject to the law, and their acts and orders are not less open to test in the Courts than those of the humblest citizen. Therefore no special sanctity or legality attaches to the notification as falling within the category of 'administrative orders'.

8. In regard to possible action by Government in the future, treating the matter not as a hint, much less as a threat, but as an argument, for consideration on the merits, pure and simple, it fails, in my opinion, on three grounds. Firstly, every case must be decided on the record as it stands, and not on the record as it might stand by reason of some possible future action by either party. Secondly, the scheme of the Code clearly demarcates the respective powers and functions and is intended to prevent any possible conflict between the action of the Local Government and of this Court, express provision being made, where necessary, to avoid such conflict as in Section 526, Sub-section (7), and in Section 178. Thirdly, though I do not wish to stress this ground, a transfer by us to this Court itself under Section 526, Sub-section. (1)(e)(iii) would not be open to interference by the Local Government,

9. Under the scheme of the Criminal Procedure Code the general framework of the administration of justice, such as the division of the province into sessions divisions and their boundaries and places of sitting, the appointment of Sessions Judges and the classification of offences into those triable with a jury and those triable with assessors, is left under Sections 7-9 and Section 269 to the Local Government. But within this framework this Court has under the Government of India Act and the Letters Patent the widest possible responsibility and the superintendence of the Courts and powers of transfer under Section 526 for the ends of justice and for the convenience of the parties and the like in any particular case; and such a transfer of any particular case from one Court or Judge to another within this framework as fixed by the Local Government for the general administration of justice is a matter to be decided by this Court and not by the Local Government, If this scheme and this demarcation are correct, an argument from generalities that the greater includes the less or that a class of cases includes any particular case is beside the point, since it "obliterates the division of functions and of powers, creates confusion and might lead to a conflict, which it must be the aim of the Code to avoid. This Court cannot alter the regular place of sitting of any Sessions Court, from the place directed by the Local Government under Section 9. But it can, and repeatedly does, under Section 526, change the venue of trial of any case from any one of these places to another, both notified under Section 9, though it cannot to a third, not so notified and directed by itself. And it was. in fact, very fairly conceded by the learned Advocate General at the close of his argument that this Court had power under Section 526-the present notification notwithstanding-to direct a transfer of the case to another Court of Session such as Surat or Ratnagiri, and that we also had power to transfer a case from the Sessions Judge of Thana who sits at Thana to the Additional Sessions Judge sitting at Thana or Ali-bag, or vice versa. The fact, therefore, that in any particular case the exercise of our power of transfer might result in a change of venue and incidentally from assessors to jury or vice versa is no argument whatever, in my opinion, against the present petition.

10. In this regard, the language of the relevant sections, such as Sections 9(2) and 297 and 298, is conclusive. Under Section 9(2), headed "Courts and Offices outside the Presidency-towns", the Local Government may, by general or special order in the official Gazette, direct at what place or places the Court of Session (not any persona designata) shall hold its sitting. Again in Section 193(2), under the head "Conditions requisite for the Institution of Proceedings", the only condition requisite under (1) for a trial before a Sessions Judge is commitment, and under (2) the further conditions requisite for trials before Additional Sessions Judges and Assistant Sessions Judges are directions by the Local Government by general or special order, or by the Sessions Judge. The word "only" in Section 193(2) would show, along with the heading above, that the clause is intended not so much to extend the power of transfer of the Local Government as to limit the powers of the Additional and the Assistant Sessions Judge to try such cases alone as the

Local Government or the Sessions Judge empowers them to do. It is true that by themselves the words "special order" could perhaps, on the strict and literal meaning, be construed in both sections as meaning "in any particular case". But reading the sections in their context this was not, in my opinion, the intention of the Legislature either under Section 9(2) or Section 193(2). These sections, like Section 267 regarding trial by jury or assessors in cases or classes of cases, contemplate general directions for the convenience of the people and the administration of justice and special orders where such general orders have to be modified by reason of circumstances, affecting the population such as plague, flood, disturbances and the like. Whatever its powers under Section 178, neither by Section 9 nor by Section 193 did the Legislature, in my opinion, intend that the Local Government should interfere with the ordinary course of justice in a particular case or transfer a particular case from a particular Judge to another particular Judge, And the notification, therefore, even if it is within the letter of these sections, violates their spirit. And, in any case, it is not, like a direction under Section 197, exempted from our power under Section 526.

11. There is one further flaw in the notification, viz., that it directs not a Court, nor even an officer as such, to hold his sitting at Ali-bag, but Mr. Gundil as a persona designata. I do not propose to express a definite opinion whether such a flaw does or does not necessarily vitiate the whole notification, and cause it to be ultra vires, as, in any case, I propose to consider the petition on the merits. I reserve, therefore, my opinion on the question of the validity of the present notification, but assume for the purpose of this application that it is valid.

12. As to our powers under Section 526, the convenience of parties needs no definition. The "ends of justice", as I have pointed out in the case of Evans, In re (1926) I.L.R. 50 Bom. 741, s.o. 28 Bom L.R. 1043, is a term impossible to define. If I may be permitted to quote from that case (p. 749):-What then are the 'ends of justice'? To the particular result in any particular case justice is indifferent. The end of justice is no more conviction than acquittal. It is justice, by the ascertainment of the truth as to the facts on a balance of evidence on each side. If so, do the ends of justice require, or do they not, that the accused person from the moment of his arrest should have reasonable access to his legal advisers; or does it suffice that this access should commence under the Prisons Act (IX of 1894) from the time when the exclusive Police custody has ceased? To this question, the answer is, in my opinion, clear. If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely, and fairly, before the Court. This necessarily involves preparation. Such preparation is far more effective from the point of view of justice, if it is made with the aid of skilled legal advice- advice so valuable that in the gravest of criminal trials, when life or death hangs in the balance, the very State, which undertakes the prosecution of the prisoner, also provides him, if poor, with such legal assistance.

13. To this I might add two other considerations, second only in importance to this for the ends of justice. Confidence in the Court administering justice on the part of both parties and of the public is also a vital element in the administration of justice, so much so that a reasonable apprehension, tantamount to lack of confidence, has been held by the Courts to render a transfer advisable. A special Judge or a special venue directed by the Local Government is apt or at least is capable of being used to destroy this confidence, and except where the supreme need of justice is clearly such as to override these considerations, the ordinary course of justice is best left untouched.

14. In the present case on the question of convenience, without entering into details as to the comparative salubrity of the jail or lock-up at Thana with the jail or lock-up called the Hirakot at Alibag, it seems to me clear that for the last fifty years the Local Government themselves have always recognized the superior convenience of Thana as against Alibag to parties and witnesses from the Panvel and Karjat talukas in the case of Sessions trials and important civil suits over five thousand rupees. This is clear from the fact that even when in the other talukas of the Kolaba District formerly the District Magistrates of Kolaba, empowered as Additional Sessions Judge in the rains-as now the Sessions Court by any of its Judges in (SIC) months-were directed to hold a sitting at Alibag, the two talukas of Panvel and Karjat have for nearly fifty years been excluded, and the Sessions cases from these two talukas have all along been tried at Thana; and even when for a year or so in 1920 a First Class Subordinate Judge's Court was established at Alibag, suitors from Panvel and Karjat were expressly allowed to retain their right of litigation at Thana,

15. From the particular affidavits in this case it appears that there is a daily motor-service from Chirner to Panvel and another from Panvel to Thana. There is no service between Chirner and Alibag; and though the distance-as the crow flies-is undoubtedly shorter, there is only a track from Chirner to a village called Avre, according to the petitioners a' foot-track, according to the arguments for the Crown possible also to bullock-carts. Then there is a wide creek with a ferry over which passage depends upon stray boats on to Rewas and thence by motor car to Alibag. The affidavits both in quantity and quality for the petitioners are, in my opinion, stronger and fortify the general conclusion I have already stated that the general public convenience of trials civil and criminal from Panvel is at Thana and not at Alibag. It is not alleged by Government that there is any particular inconvenience of the present trial at Thana so as to prejudice them or any particular convenience at Alibag. The utmost contention for the Crown is that Alibag is not less convenient to themselves and to the petitioners than Thana. That contention, for the reasons stated above, in my opinion, fails.

16. The petitioners have already engaged pleaders from Bombay and Thana as well as some from Panvel to defend them before the Magistrate. The witnesses for the Crown number over a hundred and those for the defence over two hundred. The Sessions trial will probably last two or

three months. A trial at Alibag would compel advocates from Thana and Bombay to live there throughout while one in Thana makes it possible for the accused to engage counsel to come up daily from Bombay. For the purpose of legal defense, Alibag is practically a taluka headquarters, while Thana is an important judicial centre with easy access to Bombay. It is no reflection on the Bar at Alibag to hold that the defence would have far greater facilities by a trial at Thana. How important an element such legal assistance is for the ends of justice I have already stated in my judgment in *Evans, In re* (1926) I.L.R. 50 Bom. 741, s.c. 28 Bom. L.R. 1043. The Government can easily afford special fees to spend on counsel at Alibag. But not so the accused petitioners who may not be able to afford the prohibitive fees necessary to induce advocates or counsel from Bombay or Thana to leave their work there and remain in Alibag for two or three months. This point, therefore, is in favour of the petitioners.

17. On the second point as to trial by jury, it has always been held by all the Courts, as for instance, by this Court in *King-Emperor v. Parbhushankar* (1901) I.L.R. 28 Bom. 680, s.c. 3 Bom. L.R. 278, that "the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury." To this opinion from so high an authority as the late Sir Lawrence Jenkins and the similar remarks of Mr. Justice Chandavarkar to the same effect at page 694, it is needless to add. Particularly, in a case of this gravity involving life or death to the accused, it is impossible, in my opinion, for this Court to ignore the consideration that in the present case the accused rightly or wrongly attach appreciable value to this right of trial, and if so, this element also is in favour of the petition the more that there is no allegation or affidavit for Government against a jury at Thana or in favour of assessors at Alibag.

18. With the general argument that by an order such as the one proposed we should be indirectly defeating the intentions of the Legislature by encroaching on the province of the Local Government if the venue of the trial were changed I have already dealt. The Legislature contemplates general directions by the Local Government in regard to places where the Courts of Session should sit with modifications by special orders for public contingencies. The Local Government have similar powers in cases and classes of cases to decide by notification once for all until modified whether such trials generally shall be with the aid of assessors or of a jury. And the fact that the exercise of our powers of transfer on the merits of a particular case, whether for the convenience of parties and witnesses or for the ends of justice, might result in a change of place of trial or in a change from jury to assessors or vice versa, is in no way repugnant to the intentions of the Legislature, as expressed in Section 9 and Section 193(2), or in regard to the particular notification. The only exception to our powers under Section 526 in a particular case is that laid down in Sub-section (7), viz., where under Section 197(2) the Local Government has specified the officer or the Court or both by whom a Judge may be tried. Such a direction by the

Local Government is not open to transfer by this Court. Even where a Local Government has specified a Sessions Division under Section 178 for the trial of cases or classes of cases, which it can only do where there has been no previous order of this Court under Section 526, such a specific direction still remains subject to our powers under Section 526 of subsequent transfer on proper cause shown. A transfer in many cases involves a change of venue. No statute or decision is cited to show that such a consequence or a change from jury to assessors or vice versa is a bar to our powers under Section 526.

19. But even assuming that the petitioners attach greater value to a jury than to the point of convenience, if they satisfy us on the latter point, their table of comparative values, real or professed, should not affect our decision, more particularly if they succeed, as in my opinion, they do, on both points.

20. For these reasons I would hold that even if the notification in question is *intra vires*, we have power under Section 526 to transfer the trial under Clause (1)(d) and Clause (e) Sub-clause (ii) from Mr. Gundil sitting at Alibag, which is a Court subordinate to our authority, to the Court of the Sessions Judge at Thana, which is also such a criminal Court of equal jurisdiction, and that the petitioners have shown that such an order will tend to the general convenience of parties and of witnesses.

21. As to the form of the order, the fact that the petitioners while they ask for a trial at Thana are indifferent whether they are tried by Mr. Gundil or any other officer presents, in my opinion, no difficulty. There is a permanent Sessions Court and Judge at Thana.

22. I would accordingly allow the application and transfer the trial of the case from Mr. Gundil sitting as Additional Sessions Judge at Alibag to the Court of the Sessions Judge at Thana.

Patkar, J.

23. This is an application for transfer made by forty-seven accused who are committed to the Court of Session at Thana by the committing Magistrate for offences under Sections 120 B(1), 147, 148, 149, 224, 302, 332, 379, and 395 of the Indian Penal Code.

24. After the commitment of the case by the Magistrate to the Court of Session at Thana, the Local Government by Government Notification No. 8252/2 dated February 5, 1931, under Section 193(2) of the Code of Criminal Procedure, directed Mr. N. R. Gundil, Assistant Judge and Additional Sessions Judge, Thana, to try the case known as the Chirner Riot Case committed to the Court of Session at Thana, and under Section 9(2) of the same Code directed that Mr. Gundil should hold his Court for the trial of the said case at Alibag.

25. The accused have made this application on the ground that the action of the Local Government is illegal and ultra vires, and, secondly, that the case should not be tried at Alibag on the ground of inconvenience, and on the ground that the transfer is expedient for the ends of justice.

26. The first question arising in this application is whether the order of the Local Government is illegal and ultra vires. Under Section 7 of the Criminal Procedure Code, every province shall be a sessions division, and every sessions division, for the purposes of this Code, shall be a district or consist of districts. The Thana sessions division consists of two districts, the district of Thana and the district of Kolaba. Under Section 9, Sub-section (1), the Local Government shall establish a Court of Session for every sessions division and appoint a Judge for such Court, and under Sub-section (3), the Local Government may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. Under Section 193, Sub-section (1), of the Criminal Procedure Code, except as otherwise expressly provided, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf. Under Sub-section (2), the Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government, by general or special order; may direct them to try or as the Sessions Judge of the division, by general or special order, may make over to them for trial. Under 193, Sub-section (2), the Local Government had power by special order to direct the Additional Sessions Judge, Mr. Gundil, to try this particular case. Under Section 9, Sub-section (2), of the Criminal Procedure Code, the Local Government may, by general or special order, in the official Gazette, direct at what place or places the Court of Session shall hold its sittings, but until such order is made, the Court of Session shall hold its sittings as heretofore.

27. It is contended on behalf of the accused that the Local Government has already issued a notification directing the Court of Session to be held at Alibag in certain months commencing on dates to be fixed by the Sessions Judge of Thana, and that the notification dated February 5, 1931, does not direct any new place where the Court of Session should hold its sitting, and further that the notification does not order the Court of Session to hold its sitting at Alibag, but has directed a particular Additional Sessions Judge to hold the sitting of his Court at Alibag. Under Section 193(2) the Local Government had power to direct Mr. Gundil, the Additional Sessions Judge, to try this particular case. The previous orders of the Local Government were general orders under Section 9(2), and there is nothing in Section 9(2) to prevent a special order being passed directing at what place a Court of Session should hold its sitting. If by reason of an outbreak of plague or any other cause it becomes necessary or expedient that a Court of Session should hold its sitting in respect of all the cases at a different place or should try a particular case at a particular place, the words of Section 9(2) are wide enough to cover such an order. An order

passed under Section 9(2) is an administrative order passed by the Local Government, and the special order of the Local Government in the present case directing the Additional Sessions Judge to try this particular case at Alibag does not appear to contravene the provisions of Section 9(2). Under Section 20 of the Indian Penal Code a "Court of Justice" denotes a Judge empowered by law to act judicially alone, and Mr. Gundil having been empowered by the Local Government to try this case could by a special order be directed to hold the sitting of his Court at Alibag.

28. I therefore, think that the order of Government passed under Section 193(2) and Section 9(2) is not illegal and ultra vires.

29. It is next contended on behalf of the accused that on the ground of convenience and for the ends of justice the case should be transferred from the Court of Mr. Gundil holding his sitting at Alibag to the Sessions Judge at Thana. It is urged on behalf of the Crown that the High Court has no power to transfer the case from Mr. Gundil holding his Court at Alibag to the Sessions Court at Thana on the ground that the case was committed by the Magistrate to the Court of Session at Thana, and Mr. Gundil was authorised by the Local Government to try this case under

30. Section 193(2), and the Additional Sessions Judge is exercising his jurisdiction as a Sessions Court at Thana, and the case cannot, therefore, be transferred to the same Court, namely, the Sessions Court at Thana. The application as originally drafted, contained a prayer that the case should be transferred from Alibag to Thana, and it is contended on behalf of the Crown that the High Court has no jurisdiction to fix the place of the sitting of the Court, and that the Local Government alone has the power to fix the place of the sitting of the Court under Section 9(2) of the Criminal Procedure Code.

31. Under Section 526 of the Criminal Procedure Code, the High Court has power to order a particular case to be transferred from a criminal Court subordinate to its authority to any other criminal Court of equal or superior jurisdiction. Under Section 9 the Court of Session has to be established by the Local Government and it has to appoint a Judge of such Court, and it may appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. The Additional Sessions Judges and Assistant Sessions Judges exercising jurisdiction in the Sessions Courts would, therefore, be exercising jurisdiction as Courts of Session. The application as now amended contains a prayer for the transfer of the case from the Court of the Additional Sessions Judge holding his Court at Alibag to the Sessions Judge at Thana.

32. The question in the present case is whether the Additional Sessions Judge who has been appointed to try the case is the same Court as the Court of Sessions Judge at Thana. The Additional Sessions Judge can try such cases under Section 193(2) as the Sessions Judge of the

division, by general or special order, make over to him for trial, and under Section 438(2) an Additional Session Judge shall have and may exercise all powers of a Sessions Judge under Chapter XXXII in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge. It is, therefore, clear that the Additional Sessions Judge exercising jurisdiction is a different Court from the Sessions Judge who transfers the case to him for trial. Similarly an Assistant Sessions Judge empowered to pass any sentence authorised by law under Section 31(3) exercises jurisdiction as a Sessions Court, but a person convicted by an Assistant Sessions Judge on whom a sentence of imprisonment not exceeding four years has been passed may appeal to the Court of Session. In such cases the Assistant Sessions Judge though exercising jurisdiction as a Sessions Court is a different Court to that of the Court of Session to which an appeal from his decision lies. I think, therefore, that the Additional Sessions Judge and the Assistant Sessions Judge appointed under Section 9(8), though exercising jurisdiction as a Sessions Court, are, while exercising their functions in respect of particular cases which have been made over to them, different Courts to the Sessions Judge who has been appointed under Section 9(1) of the Code of Criminal Procedure.

33. Apart, however, from the general consideration of the provisions of the Criminal Procedure Code, Mr. Gundil has been specially appointed by name as the person to try this particular case at Alibag. The appointment, therefore, is by name and not in virtue of an office, and it is (SIC) whether in case Mr. Gundil ceases to exercise his powers as Assistant or Additional Sessions Judge, his successor can be determined by the Sessions Judge under Section 559(8) of the Code. Further, if the Sessions Judge after deciding a sessions case by reason of transfer or any other cause ceases to exercise his jurisdiction as a Sessions Judge in any particular sessions subdivision, his successor in office as Sessions Judge alone would be entitled to make a complaint under Section 195 of the Criminal Procedure Code in respect of any offence committed in relation to the proceedings before the Sessions Judge, and it is doubtful whether an Additional Sessions Judge will have the power to make a complaint with regard to an offence committed in the proceedings conducted before the Sessions Judge who has ceased to exercise his powers in the same sessions division.

34. If the contention of the learned Advocate General in support of the validity of the Government notification that the words "Court of Session" in Section 9(2) signify an individual Judge of such a Court and not necessarily all the Judges of such Court be accepted as correct, the criminal Court in Section 526 of the Code would mean an individual Judge of the Court, and there can be transfer from an individual Judge of a Court to another Judge of the same Court, both being criminal Courts subordinate to the High Court. "Court" under Section 3 of the Indian Evidence Act includes all Judges and Magistrates and all persons except arbitrators legally authorized to take evidence. "Criminal Court", under Section 4 of the old Criminal Procedure

Code, Act X of 1872, means and includes every Judge or Magistrate or body of Judges or Magistrates inquiring into or trying any criminal case or engaged in any judicial proceeding. Under Section 17, Sub-section (3), all Assistant Judges are subordinate to the Sessions Judge in whose Court they exercise jurisdiction. An Additional Sessions Judge exercises jurisdiction of a Sessions Court when empowered under Section 193(2) and Section 438(2) of the Criminal Procedure Code. The Assistant Sessions Judge, the Additional Sessions Judge, and the Sessions Judge exercise co-ordinate or equal jurisdiction of a Sessions Court within the limits of the authority conferred on them by the Code, and are nevertheless different Courts each subordinate to the High Court.

35. I think, therefore, that an Additional Sessions Judge exercising jurisdiction as a Sessions Judge under the Criminal Procedure Code is a Court subordinate to the High Court, and is also a Court different from the Sessions Judge of the sessions division, who, when exercising functions as a Sessions Judge, is also a Court subordinate to the High Court. I think, therefore, that the High Court has power to transfer the case from the Court of Additional Sessions Judge, Mr. Gundil, to the Court of the Sessions Judge at Thana.

36. The order passed by the Local Government under Section 9(2) is not a bar to an order of transfer by the High Court under Section 526. Under Section 526(7), an order under Section 197 of the Criminal Procedure Code will not be affected by any order under Section 526. Any order under Section 9(2) is not saved by any of the provisions of Section 526 of the Criminal Procedure Code.

37. The next question is whether there are sufficient grounds for transfer of the case. The application is based on the ground of general convenience of the accused and their witnesses. Several affidavits have been filed in the case in support of the contention that a transfer from the Court of Mr. Gundil at Alibag to the Sessions Court at Thana will tend to the general convenience of the accused and their witnesses. According to the accused, along the road from Chirner to Panvel, which is a distance of thirteen miles, there is motor service, and there is also motor service from Panvel to Thana, a distance of twenty miles. It is further contended that the accused have engaged pleaders from Panvel, Thana and Bombay, and it would be inconvenient for them to attend at Alibag the Sessions case which is likely to last for nearly three months. 118 witnesses are to be examined on behalf of the prosecution and about 225 for the defence. On the other hand, it is contended on behalf of the Crown that Chirner is about five miles from Avre, and after crossing the creek one can go to Rewas and from Rewas to Alibag. There is a conflict of evidence as to whether there is any cart-road from Chirner to Avre, and as to whether boats are available at Avre to cross the creek and reach Rewas. On behalf of the accused it is stated that the usual practice of going to Alibag from Chirner is first to go to Karanja, a distance of eighteen

miles from Chirner by cart-road, and then to cross the creek from Karanja to Re was, and there is difficulty of securing motors which run from Rewas to Alibag between 9 and 10 a. m. It is further contended on behalf of the accused that the accommodation in the jail for the accused is insufficient, and that there would be scant accommodation for the relatives of the accused and their pleaders, and there is want of a good library. Making due allowance for exaggeration in the affidavits filed on behalf of the accused and on consideration of the conflicting affidavits made in the case, it appears to me that the balance of convenience is in favour of the accused, and that it would tend to the general convenience of the accused if the transfer is ordered from the Court of the Additional Sessions Judge holding his sittings at Alibag to the Sessions Judge at Thana. It is not suggested on behalf of the Crown that the trial at Alibag is more convenient to the prosecution.

38. It is further contended on behalf of the accused that if the trial is held at Alibag, they will lose the valuable right of trial by jury, whereas if the trial is held at Thana they will secure the right of trial by jury, as the Sessions trial at Thana will be by jury and the trial at Alibag will be with the aid of assessors, According to the view of Sir Lawrence Jenkins in the Full Bench decision in the case of *King-Emperor v. Parbhushankar*¹, F.B. the scheme of the Code shows that in the view of the Legislature it is less advantageous to an accused to be tried with the aid of assessors than by a jury.

39. It further appears that though a First Class Subordinate Judge was appointed at Alibag for one year by Notification No. 5240 dated June 9, 1920, the talukas of Panvel and Karjat were excluded from his special jurisdiction, and though the District Magistrate of Kolaba was appointed as an Additional Sessions Judge in the Thana Sessions Division in particular months and was directed to try cases committed for trial by the Magistrates in the Kolaba District, by notification No. 2153 dated April 21, 1903, the operation of that notification was withdrawn so far as the talukas of Karjat and Panvel were concerned by a subsequent Notification No. 473, dated January 30, 1905.

40. I think, therefore, that on the ground of convenience and on the ground that an order for transfer is expedient for the ends of justice, I would transfer the case under Section 526 from the Court of the Additional Sessions Judge, Mr. Gundil, holding his sitting at Alibag, to the Court of the Sessions Judge at Thana. Though the High Court may not have the power under Section 526 of the Criminal Procedure Code to order any particular trial to be held at any particular place, the High Court has the power to decide that a particular place of sittings of any Court is inconvenient, and that an order of transfer from a Court sitting at a particular place to another Court sitting at a different place will tend to the general convenience of the accused and their witnesses, and if the High Court comes to the conclusion that a transfer is necessary, a change of

place is inevitable. It is unnecessary in this case to go into the question of the powers of the High Court under Clause 29 of the Letters Patent and Section 107 of the Government of India Act. Under Section 526 of the Criminal Procedure Code the High Court has the power to transfer a case from a criminal Court subordinate to its authority to any other criminal Court of equal or superior jurisdiction.

41. I think, therefore, that the present case pending before Mr. Gundil, Additional Sessions Judge holding his Court at Alibag, should be transferred to the Court of the Sessions Judge at Thana.

Murphy, J.

42. The applicants have been committed to the Sessions Court of Thana on charges of rioting and murder, and the case has some political significance, as it arose out of the Satya-graha movement in connection with the breaking of forest laws at Chirner, in the Panvel taluka of the Thana District, The trial will be a heavy one, for we are told there are 118 prosecution and 225 defence witnesses, and the Local Government has made an order, directing that it shall be held by Mr. Gundil, Additional Sessions Judge of Thana, and that he should hold it at Alibag. This order was issued on February 5, 1931.

43. The application, which was in the first instance for a direction to Mr. Gundil to hold his trial at Thana, is opposed by the Advocate General for the Crown. At the end of the hearing the terms of the application were amended, and the final request was for a transfer of the case to the Sessions Court of Thana, sitting at Thana. The grounds set out in the application are three-fold, being-

(1) that the order under Section 9(2) of the Code of Criminal Procedure directing Mr. Gundil to hold the trial at Alibag is illegal, and (2) under Section 526 (1)(d), that a trial at Thana will tend to the general convenience of the parties and witnesses, and finally, (3) under Section 526 (1)(e) that such an order is expedient for the ends of justice.

44. The points arise out of the following circumstances-

45. The Sessions Division of Thana includes two revenue districts, those of Thana and Kolaba. The present arrangements under Section 9(2) are, that cases coming from Thana District and the Karjat and Panvel Talukas of the Kolaba District, are tried at Thana, and those from the remaining talukas of the Kolaba District at Alibag.

46. The present orders as to the mode of trial are that the Judges of the sessions division sit with a jury at Thana, and with assessors at Alibag. Chirner is in the Panvel Taluka, and the order directing Mr. Gundil to hold this trial at Alibag is a special one. The only section of the Code

prescribing the place of trial within a sessions division is Section 9(2). It provides that the place or places shall be indicated by general or special order by the Local Government. The word "special" must include an order relating to a class of cases for trial, and on the principle that the greater necessarily connotes the lesser, cannot be held to stop short prior to the limit of a single case.

47. I agree with my learned brethren in thinking that the order of the 5th February last was one within the competence of the Local Government to make, and that it is valid.

48. The next consideration is whether we have any authority to vary it by directing Mr. Gundil to hold this trial at Thana as requested.

49. This was the prayer made originally in the application which stated in terms that applicants had no objection to the Judge appointed to try them, but only to the place at which he was directed to do so by the Government.

50. I think it is clear that no such order can be made. There is no provision of the Criminal Procedure Code authorising this Court to direct that a trial shall be held at a particular place, and Section 526 covers only cases of transfer from one Court to another, though a transfer from one Court to another may, of course, involve a change of the place of sitting. Sub-section (1) of the section is in terms that the High Court may order-(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 criminal Court of equal or superior jurisdiction. This view has been placed before us by the learned Advocate General, and on the language of the section, it is clearly correct; and I believe we have no power to direct Mr. Gundil, as Additional Sessions Judge, to sit at Thana to try this case.

51. But the application has been allowed to be amended, and the second and third points really arise on the amendment. The amendment is not, I think, happily worded, and as it stands is really meaningless. It is, that the case should be transferred to " the Sessions Court at Thana sitting at Thana." But the Sessions Court is the sessions division of Thana and the case has already been committed to that Court and is fixed for trial by one of the two Judges who compose it. The intention really is that it should be transferred to the Court of Mr. Sanjana, the Sessions Judge, he being the only other Court- left after eliminating the Additional Sessions Judge Mr. Gundil -to try it, in that sessions division. Here again, I think, Mr. Coyajee is asking us to do something we are not empowered to do. If we have no power under Section 526 to direct Mr. Gundil to hold this trial at Thana, it follows that I must hold that we could make no such order in the case of Mr. Sanjana; though doubtless, in the absence of a special order to him by the Local Government, under Section 9(2) he would sit at Thana for the trial, while if such an order is made, he would sit

in accordance with its terms and if it so directed, at Alibag, despite the transfer suggested to us to his Court, on which I think we cannot put the limitation as to the place of trial prayed for.

52. It will be convenient at this point to discuss the application so far as it is made under Section 526 (1)(e). The reason for a transfer most strenuously urged before us, and the real reason of the application, as is clear from its terms and the affidavits in support, is that applicants will be tried by a Judge and jury at Thana, while at Alibag the trial will be with the aid of assessors. The argument is that a trial by jury will be expedient for the ends of justice under this sub-clause of the section.

53. The Criminal Procedure Code provides for two varieties of trial in the Sessions Court, and the authority to decide which kind shall prevail in a particular Court, that is sessions division, or part of a sessions division, or part of it, is given by Section 269 to the Local Government and is to be declared by notification in the Local Government Gazette with the previous sanction of the Governor General in Council. There are accordingly sessions divisions in which all offences are triable by jury, others in which some classes of offences are so to be tried, and still others, such as the Thana Sessions Divisions, in part of which trial by jury is the rule, and in another part of which trials are with assessors. It has been held in the case reported in *Queen-Empress v. Ganapathi Vannianar* (1900) I.L.R 23 Mad. 632 that the right of a trial by jury is one attaching to a place, or to class of offences in that place, and not to a person, and that the words "particular class of cases" do not necessarily mean offences as classified in the Indian Penal Code, but would cover many other classifications which might be made. In the Madras case the classification being considered was a special one, and in this one an order might conceivably be made to cover it by the description of the case as "arising out of the movement to break the forest laws in the Panvel Taluka." The relevance of the point and the ruling is that by the Criminal Procedure Code the discretion to direct where a particular Sessions Court shall sit is under Section 9(2) left to the Local Government, and the further question of whether it shall try cases with a jury, or sit with assessors, is also one for the Local Government, with the previous sanction of the Governor General in Council, to determine. This being so plainly the case, I think, the choice is one outside the scope of our discretion, having been left to another authority by the Statute, and that it is not possible for us to hold that the fact that trial is by jury at Thana comes within the terms of Section 526 (1)(e), on the ground that it is expedient for the ends of justice to have such a trial. In fact, I think, the Legislature never intended that this Court should have such a discretion, and that it is not for us to say that one form of trial is more expedient for the ends of justice than another, which is equally legal.

54. The only possible ground remaining for a transfer appears to me to be the one under Section 528 (1)(d), the general convenience of the parties and witnesses.

55. Applicants' case is that the facts fall within this clause, and the Crown's that they do not.

56. The arguments under this clause are again three-fold, being greater ease of access from Chirner to Thana, better accommodation at Thana for accused, witnesses and accused's friends, and greater facilities for legal aid at that place. Better accommodation for accused is a question for Government, and there are jails both at Thana and Alibag. Accommodation for accused's friends we can hardly consider, as they are neither parties nor witnesses. In fact, both Thana and Alibag are towns and the head-quarters of districts, always frequented by people having business in the Courts and otherwise, and though Thana is the larger town, it can hardly be seriously argued that the comparatively small number connected with this case who will require lodgings, cannot be suited in Alibag.

57. Chirner is thirteen miles by cross-country road from Panvel, which is twenty miles by main road from Thana. It is five miles by cart track to Avre, where a creek is crossed in boats, to Rewas from where there is a road fifteen miles long to Alibag. As the crow flies, it is nearer Alibag. The argument is that owing to the need of crossing the creek, it is easier and quicker to go from Chirner to Thana than it is to Alibag. This is denied by the Crown. The affidavits in support of applicants' contention exaggerate the difficulties, for in the fair season there is no difficulty in crossing the creek. Moreover, we are told, the witnesses are to be called in batches and will be allowed to go when examined and they will therefore only have to go to Alibag or Thana once.

58. I think there is no real preponderance of convenience either way.

59. The argument as to greater facilities for legal aid appears to me no stronger. Sessions cases are tried regularly at Alibag, where there is also a Sub-Judge's Court, and there is a local bar and we are told a law library. If outside lawyers are to be detained for the defence, they will have to attend throughout and whether they do so at Thana or at Alibag can make little difference, though if residents of Thana or Bombay that place would of course suit them better, but it is a question of who is retained and we do not know who is. Alibag has a daily steamer service to Bombay, and there is also a road route available. My view of the case is that we can make no order in the terms of the original application and that similarly we cannot properly make one on the grounds stated in Section 526 (1)(e) of the Code; but that we could make an order transferring the case to the Court of Mr. Sanjana by name, or to his Court as Sessions Judge, had a real case of hardship under Section 526 (1)(d) been made out, which, I think, on the merits, it has not been. But to my mind there is a real difficulty even here. There is no objection to a trial by Mr., Gundil, and as shown by the application and the affidavits, the objection is really to his sitting at Alibag with assessors, and the alternative prayer was only made because of the legal difficulty. The intention of the Legislature seems to me, for reasons already given, to have been

that the place of trial and the form it should take, whether it should be by jury or with the aid of assessors, should rest with Government, and not with the High Court; and this appears to me to be shown conclusively by the provisions of the Code, which even after such an order of transfer is made, leave it open to the Local Government to notify the place of sitting of the Sessions Judge, as it did that of the Additional Sessions Judge, or even on the conditions set out in Section 269, to provide that this particular trial shall be held with the aid of assessors at Thana.

60. Though I do so with regret, and much hesitation and diffidence, I feel I cannot concur in the order proposed by my learned brethren. In my opinion, the application should be dismissed.

Cases Referred.

1(1901) I.L.R. 25 Bom. 680, 688, s.c. 3 Bom. L.R. 278 F.B