

CHAPTER 26

Transfer of Cases

Part A GENERAL

1. Power of High Court re-transfer of cases—Under Section 526, Criminal Procedure Code [See Section 407 of new Code], the High Court has power to transfer any case from one Court, subordinate to it to another on any of the grounds specified therein. This power of transfer extends to all classes of cases. In view of the amendments made in Sections 526 and 528 of the Code [See Sections 408-412 of *new* Code] by Act No. 26 of 1955 no application shall now lie to the High Court for the transfer of a case from one Court to another Court in the same Sessions division unless an application for such transfer has been made to the Sessions Judge and has been rejected by him.

2. Power of transfer of Sessions Judge and District Magistrate—Under Section 528(2) of the Code [Sections 410(1) and 411(b) of new Code], a District Magistrate also has general power to withdraw any case from any subordinate Magistrate and either try it himself or refer it for trial to another subordinate Magistrate. The new sub-section (1C) enables any Sessions Judge to transfer a case from one Criminal Court to another Criminal Court in the same Sessions division when an application has been made to him in this behalf and when he is of the opinion that it is expedient for the ends of justice to do so. It may be noticed that in sub-section (1C) the words used is ‘Court’ and in sub-section (2) the word used is ‘Magistrate’.

3. Section 528(5) of the Code [See Section 412 of new Code] requires that a Magistrate making an order under the section shall record in writing his reasons for making the same. This applies to all cases whether the order of transfer is made as a result of application or on the Magistrate’s own motion or on administrative grounds.

Note—In districts in which the experiment of separation of the Judiciary from the Executive is being tried, the work of transfer of cases from one Judicial Court to another is to be performed by the Additional District Magistrate. (*Punjab Government Letter No. 9062-G (C)-54/35339, dated the 8th December 1954*).

4. Cases triable in more than one district Forum to be determined with regard to public convenience—The necessity for transfer of a case may arise purely on grounds of jurisdiction or in the ends of justice. As regards the former, Sections 179 to 183 of the Code should be consulted when a case is to be instituted in Court. In carrying out the provisions of these sections, cases which are triable in more than one district should not be transferred unnecessarily from one district to another. A Magistrate or Court should act under these sections solely with reference to the public convenience. Ordinarily, the proper district for the enquiry into, and trial of, offences falling under those section would be the district in which the witnesses could, with the least inconvenience, attend.

5. Procedure when a Magistrate thinks the case should be tried in another district—If a Magistrate is of opinion that it would be more convenient if an enquiry or trial were held in

another district he should at once address the District Magistrate.

If the District Magistrate considers the transfer of the case to another district desirable, he will forward the paper to the District Magistrate of the latter district. If the District Magistrate so addressed concurs; the case should be transferred to that district accordingly. If he dissents, the Magistrate should either proceed with the enquiry, or refer the question to the High Court, which will, under the provisions of Section 185 of the Code of Criminal Procedure [*See* Section 186 of new Code], decide in what district the enquiry or trial should be held.

6. Reasons to be given for proposal to transfer—When a transfer is proposed by any Magistrate his proposal should always be accompanied by a short statement of the case and of the reasons for making the proposal.

7. Common grounds on which applications for transfer are made—Applications for transfer of criminal cases are frequently made by accused persons on the allegation that such transfer is necessary in the interest of justice. The most common grounds on which such applications for transfer are made are (a) that the Judge or Magistrate is personally interested in the case, or (b) that he is connected with one or the other party to the case by relationship, friendship, etc., and is therefore, likely to be partial, or (c) that he has already formed or expressed an opinion on the subject matter of the enquiry or trial, or (d) that he has conducted himself in such a manner that no fair or impartial enquiry or trial can be expected from him.

8. Remarks on those grounds. Cases of local bodies with which Magistrate is connected—As regards (a), the provisions of Section 556 of the Code [*See* Section 479 of new Code] which prohibit a Judge or Magistrate from trying certain cases without the permission of the Appellate Court should be carefully borne in mind. The section is founded on the maxim that no man can be judge of his own cause or give judgment concerning his own rights. The general rule as to disqualification is, that a person who, by reason of his interest, pecuniary or personal, is likely to have a bias in the matter of the prosecution, ought not to sit as a judge in the case. The interest, however, must be a substantial interest giving rise to a real bias, and not merely to the possibility of a bias. The question frequently arises as to whether the connection of a Magistrate with a local body disqualifies him from trying a case to which that body is a party. This must be decided on the facts of each case. The mere fact, for instance, that a Magistrate is a member of a Municipal Committee does not necessarily, and of itself, disqualify him from trying cases in which a breach of a bye-law is charged. Still, there may be circumstances connected with the Magistrate being also a Municipal Commissioner, which may disqualify him from acting as judge in a case arising under a bye-law. Where such circumstances exist, it is desirable that the Magistrate should obtain from exercising jurisdiction, and steps should be taken to have the case transferred to a Magistrate whose qualification is unquestionable. The following are further illustrations of the rule. The fact of a Magistrate having joined in the passing of a bye-law or of a resolution, which in general terms proposes to give effect to the provisions of a bye-law, would not of itself ordinarily disqualify him from trying cases instituted under the bye-law or resolution, as there would be no reason to suppose that the Magistrate had any real bias in the matter. Where, however, a resolution of the nature described above is to be resisted on the ground that the Committee had no power to pass such a resolution, the case would at once become different. In this case the Magistrate would, if he tried the case have, to decide judicially a matter which he had already prejudged as a member of the Committee, and hence would, to a certain extent, be a judge in his own cause, and, as such disqualified. So, also, a Magistrate who has taken part in Municipal proceedings affecting the rights of an individual, or directing the institution of a

prosecution or set of prosecutions, might be supposed to have a personal interest in the matter such as would be likely to bias his judgment, and render it improper for him to act as Judge.

9. Connection of the Magistrate with a party—In cases where the Judge or Magistrate happens to be connected with one or the other party by relationship, friendship, etc., it is advisable for him to move the proper authority at once to transfer the case to some other Court; for however straight forward and impartial he may be, there is always the danger of his actions being regarded with suspicion and misinterpreted. An immediate transfer of the case would avoid the possibility of an application for transfer being made at a later stage and consequent delay in the disposal of the case.

10. Cases in which Magistrate has already expressed his opinion—The same course would be advisable in cases in which the Judge or Magistrate has already formed and expressed a definite opinion on the material issues requiring decisions, against the accused concerned.

11. Cases wherein a party apprehends that he will not have a fair trial—As regards the last category, the Presiding Officers of Courts should carefully bear in mind that it is their duty not only to be thoroughly impartial, but to conduct themselves in such a manner as not to give rise to any reasonable apprehension in the mind of an accused person that he will not have a fair and impartial enquiry or trial. In dealing with an application for transfer the Court has to consider not merely the question whether there has been any real bias in the mind of the presiding Judge against the applicant. But also the further question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial. As observed by Lush J. in *Serjeant v. Dale* [(1877) 2 Q. B.D. 558] “the law has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust, of the tribunal, are so to promote the feeling of confidence in the administration of justice which is essential to social order and security.” (*vide* I.L.R. 3 Lah. 443 and I.L.R. 6 Lah. 396).

COMMENTS

It is of paramount importance that persons arraigned before the Courts should have confidence in the impartiality of those Courts, and if a person has a reasonable cause to apprehend that the Court before whom he is being tried is not completely free from bias a transfer should be directed. *Sardari Lal vs. The Crown*, (1922) I.L.R. Lah. 443. (See also *Bans Gopal vs. Emperor*, (1914) 24 Indian Cases 951, *Kali Charan vs. Emperor*, (1906) I.L.R. 33 Cal. 1183, *Machal vs. Martu*, (1913) 22 Indian Cases 980, *Emperor vs. Abdul Latif*, (1904) I.L.R. 26 All. 536, *Srilal Chamaria vs. Emperor*, (1918) 45 Indian Cases 680, and *Rang Bahadur Singh vs. Kariman*, (1921) Cr. L. J. 708.)

In dealing with an application for transfer the Court considers not merely whether there has been any real bias in the mind of the presiding Judge against the applicant, but whether incidents may not have happened which, though they may be susceptible of explanation, are nevertheless such as are calculated to create in the mind of the applicant a justifiable apprehension that he would not have an impartial trial. *Amar Singh vs. Sadhu Singh*, (1925) I.L.R. VI Lah. 396.

12. [1]

13. Affidavit Notice to opposite party. Check on frivolous applications—Applications for transfer whether to the District Magistrate or the Sessions Judge or the High Court should always be supported by affidavits in support of the grounds of transfer. Except under the circumstances mentioned in Section 526 (9) [*See* Section 40 of new Code] it would now be obligatory to stay

¹ Rule 12 deleted vide Notification No.182/Rules/DHC dated 09.03.2015

proceedings and adjourn the hearing for the purpose of enabling a party to make an application for the transfer of a case, whether it lies to the High Court under Section 528 [See Sections 408-412 of new Code]. Notice to the opposite party is not obligatory under Section 528 but is advisable except when the application appears on the face of it to be frivolous and is summarily rejected. District Magistrates and Sessions Judges should carefully inquire into the grounds on which the application is based and deal with the same *seriatim* in their order. This will serve as a check on frivolous applications for transfer which are at times made merely to delay the case and defeat the ends of justice.

14. Only one adjournment claimed for making transfer applications—Attention is drawn to the changes made by the Code of Criminal Procedure (Amendment) Acts, XXI of 1932 and No. 26 of 1955 in Section 526 of the Code. The main object of the changes is to put a check on the abuse of power by the accused by repeatedly notifying his intention to apply for transfer. Under the amended law only one compulsory adjournment for an application to the same Court has been provided. The Court is not bound to adjourn on subsequent intimation by the same party for an application intended to be made to the same Court or even on the first intimation by an accused, when one of the several accused has already obtained an adjournment. Sub-section (10) provides for an adjournment during appeal. The Court can call upon the party intimating its intention to apply for transfer to execute a bond that he will make the application within the time fixed by the Court.

15. *De novo* trial not necessary after the case is transferred—When a case is transferred from one Court to another the provisions of Section 350 of the Code [See Section 326 of new Code], as recently amended shall apply and a *de novo* trial would not be necessary. The Court may however permit such further examination, cross-examination or re-examination of witness(es) whose evidence has already been recorded, as may in its opinion be necessary in the interests of justice and the Court may resubmit such witness(es) for the purpose.

16. Sessions Judge may transfer a case to his Additional Sessions Judge—A Sessions Judge may, with due regard to convenience, transfer a case under Section 526 of the Code of Criminal Procedure to a Judge in another district when that Judge is acting as an *ex-officio* additional Sessions Judge of the district from which the case is to be transferred. In such cases no reference to High Court is necessary except when any difficulty is experienced in making transfers.

Part B RECORDS IN TRANSFER CASES

1. Separate record for transfer cases—Applications for transfer of criminal cases and the proceedings therein should form files separate from the record of the main case sought to be transferred and the records of such transfer applications should be separately consigned to the Recent Room. The original order on the transfer application should be kept on the record of the transfer proceedings and a copy of this order should be sent to the Court concerned.

2. Register—Such applications should be entered in the Register of Applications for transfer of Criminal Cases (Criminal Register No XX) and not in the Register of Miscellaneous Applications.

3. Transfers on administrative grounds. No record necessary—Cases transferred by a Court of its own motion or on administrative grounds should not be entered in any

register and it is unnecessary to keep any statement of cases so transferred. It is not necessary in such cases to make any separate record of the transfer proceedings and the original order of transfer, instead of a copy, may be sent to the Court concerned.

