

POWER OF SUPREME COURT TO TRANSFER CASES AND APPEALS

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ABSTRACT

Section 406 deals with the power of Supreme Court to transfer cases. This power is exercised for fair trial because assurance of a fair trial is the first and foremost imperative of the dispensation of Justice and the central criterion for the court to exercise power of transfer.¹ The question whether the party's apprehension that justice will not be done is a reasonable one is an objective, not subjective question. His mere allegation will not suffice; on the other hand, he need not demonstrate that Justice will inevitably fail. He is entitled to transfer if he shows circumstances, from which it appears to the court that his apprehension is reasonable. For any reputable system of administration of justice should not only be done, it must also appear to have been done.² The Code of Criminal Procedure, clothes Supreme Court with power under Section 406 to transfer a case or appeal from one High Court or a court subordinate to one High court to another High court or to a court subordinate thereto.

KEYWORDS Transfer cases- Supreme court- fair trial- apprehension- reasonable- prevent- miscarriage of justice.

INTRODUCTION

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.³ The Supreme court has been given under this section very wide discretionary power to transfer cases and appeals 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. The Supreme Court can exercise the power whenever it considers it expedient to do so for the ends of justice.⁴ The power shall be exercised if there is a reasonable apprehension on the part of a party to the case that justice will not be done. The apprehension must not only be entertained but must appear to the court to be a reasonable apprehension.⁵ The Court is being identified by justices as well as people as the "last resort for the oppressed and the bewildered."

AIM OF THE STUDY

The aim of this paper is to study the concept of justice for poor and to analyse the powers of supreme court to transfer cases and appeals.

RESEARCH QUESTION

WHETHER MERE APPREHENSION IS REASONABLE TO TRANSFER A CRIMINAL CASE UNDER SECTION 406 OF CRIMINAL PROCEDURE CODE?

³ Gurcharan Dass Chadha v. State of Rajasthan AIR 1966 SC 1418

⁴ Ayyannar Agencies v. Sri Vishnu Cement Ltd., (2000) 10 SCC 596 : 2001 SCC (Cri) 1511 : 2000 Cri LJ 2472.

⁵ Gurcharan Dass Chadha v. State of Rajasthan, 1966 Cri LJ 1071, 1076.

OBJECTIVES

- To study about independent and impartial trial
- To understand the concept of Fair trial
- To identify any possible misuse.
- To analyze the power of transfer of cases.
- To analyze suomotu transfer of cases

HYPOTHESIS

NULL HYPOTHESIS- Mere allegation of apprehension is not sufficient to transfer cases and appeals.

ALTERNATE HYPOTHESIS- Mere allegation of apprehension is sufficient to transfer cases and appeals.

RESEARCH METHODOLOGY

Only secondary sources have been referred for this study. The primary sources include interviews with the people were not possible. Secondary sources include books related to Criminal Procedure Code, Constitutional law and research articles on the transfer of cases. Ample websites and blogs have also been referred for this study. This paper was completed through descriptive methodology.

SECTION 406 CR. P. C 1973 – POWER OF SUPREME COURT TO TRANSFER CASES AND APPEALS

The Supreme Court is vested with the widest discretionary power to make any such order to transfer any specific case or appeal or any matter lying pending before one high court to another high court to meet up the end of justice and satisfy the principle of fair justice. The application to transfer such case from one High court to another high court would be moved by any person who is under apprehension of any unfair action or he may not find proper justice for him or Attorney General of India. The provision made under section 406 of Cr. P. C majorly relies upon the discretion of the Supreme Court. The applicant is not under any obligation to establish conclusively that in absence of this transfer the interest of justice regarding him would fail. The applicant will have to reasonably substantiate his contentions

regarding the application. The Supreme Court is not only vested with the authority to transfer files from one High court to another High Court. The Supreme Court also has authority to transfer any case from one court to another court which is in subordination to the Supreme Court. Any objection if arose by the court under which the matter is lying pending. Although the trial court may ensure the Supreme Court about maintaining the principle of fair and equity, but the Supreme Court would take all reasonable measure to transfer that case to some other court which may be either to the court of same competence or may be court lower or higher competence. Section 406 contemplates transfer of proceedings. It does not clothe the court with the power to transfer investigation from one police station to another, simply because the first information report or remand report is forwarded to a court.⁶ The power shall be exercised if there is a reasonable apprehension on the part of a party to the case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail.⁷ Convenience of parties and witness may be a relevant factor to be considered for transferring a case.⁸ It is always open to a party to bring to the notice of the appropriate court if and when there is a good ground to support and apprehension that he cannot have a fair trial.⁹ Where the local atmosphere is not conducive to a fair and impartial trial, where a case is between persons belonging to two different communities and there is a serious communal tension in the locality as between the two communities.¹⁰ The applicant claimed that he would not be able to engage a counsel in the court where the case was pending against him. District Bar Association submitted the affidavit before the court assuring that the defence counsel would be available from among the members of the Bar Association. Therefore, the Supreme Court dismissed the prayer for transfer.¹¹ Transfer petition may be entertained to alleviate the hardship of all the parties. Permission may also be granted to the accused for being present in the court through his/her counsel.¹² The Supreme Court cannot transfer a contempt proceeding pending before the High Court.¹³ Section 406 of Criminal Procedure code does not clothe the Supreme Court with the power to transfer investigation from one police station to another simply because first information report is forwarded to a court. The power is

⁶ CODE OF CRIMINAL PROCEDURE by B.B.MITRA- Kamal Law House- 20th edition- 2003. Pg. 1617.

⁷ R.V.Kelkar's CRIMINAL PROCEDURE by K.N.Chandrasekharan Pillai- Eastern Book Company- 6th edition- 2014- pg. 723.

⁸ Justice P.S.Narayana's Pleading & Practice- Asia Law House- 7th edition- 2012. Pg. 199.

⁹ A.K.K. Nambiar v. Desraj, AIR 1973 SC 203.

¹⁰ G.X.Francis V. Banke Bihari Singh, AIR 1958 SC 309; 1958 CrLJ 569.

¹¹ Vishwanath Gupta v. State of U.P., (2007) 11 SCC 640.

¹² Kanta Ram v. Savitri Devi (2001) 10 SCC 32.

¹³ Sukdev v. Teja Singh AIR 1954 SC 186 : 1954 SCR 454 : 1954 CrLJ 460.

limited.¹⁴ The Supreme Court is given with very wide discretionary power to transfer cases and appeals from one High Court to another High Court or from Criminal Court subordinate to one High Court. Whenever, it is expedient to do so, it can do for ends of justice.¹⁵ The Apex Court held that an order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The court said power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial and there has to be a real apprehension that there would be miscarriage of justice.¹⁶

The Supreme Court can be moved under section 406 only on the application of the Attorney-General of India, or of an interested party, and such an application should always be made in the form of a motion. Except when the applicant is the Attorney-General of India or the Advocate-General of a State, the motion must be supported by an affidavit or affirmation. The normal practice of the Supreme Court is to act on such affidavits, but if one party omits to make an affidavit in reply, the affidavit of the other party, which remains uncontroverted, can be acted upon.¹⁷ It is also provided that if such an application is dismissed, and the Supreme Court is of the opinion that it was frivolous or vexatious, it may order the applicant to pay to any person who had opposed the application, such compensation not exceeding Rs. 1,000, as the Court may consider appropriate in the circumstances of the case. It may be noted that the central criterion for directing a transfer is not the hyper-sensitivity or relative convenience of a party. Something more substantial more compelling, more imperiling from the point of view of public justice is necessary for directing a transfer.¹⁸ It was held in a case that it is impermissible for a High court to transfer a case from one of its subordinate court to another court in other State.¹⁹ A case is transferred when there is a very 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.²⁰ The Supreme Court has held that where the Magistrate himself files an affidavit strongly opposing the transfer sought from his Court, it is clearly expedient for the ends of justice to transfer the case, without even

¹⁴ Gaur KD, Criminal law- Cases and Materials, 8th edition, Lexis Nexis, 2015. Pg. 39.

¹⁵ Paranjape Nv, Crime and Punishment, Trends & Reflections, Lexis Nexis, 2015- pg. 300.

¹⁶ Usmangani Adambhai Vahora v. State of Gujarat & Anr. CRIMINAL APPEAL NOS. 1592-1593 of 2015

¹⁷ Hazara Singh, — A.I.R. 1905 S.C. 720

¹⁸ Abdul Nazar Madani v. State of T.N., (2000) 6 SCC 204 : 2000 SCC (Cri) 1048 : 2000 Cri LJ 3480.

¹⁹ Pal Singh v. CBI (2005) 12 SCC 329: (2006) I SCC (Cri) 570.

²⁰ BATUK LAL'S COMMENTARY ON THE CODE OF CRIMINAL PROCEDURE 1973, 5th edition- Orient Publishing Company- Volume 2- 2010. Pg. 2297.

considering the merits of the contentions of the Petitioner asking for such transfer. This is so, because in such a case, all the essential attributes of a fair and impartial trial are put in jeopardy.²¹ Likewise, it has been held that a transfer application should be allowed where the circumstances brought on record show every likelihood of physical harm being caused to the Petitioner.²² It is also to be noted that S. 406 contemplates transfer of proceedings from one Court to another. It does not empower the Court to transfer the investigations from one Police Station to another. If the accused is asked to appear in a far-off Court during the investigatory stage, he can move the Court for appropriate orders.²³

THE GROUNDS ON WHICH THE CASES CAN BE TRANSFERRED

The following are the grounds on which a case could be transferred from one court to another court.

1. To meet the ends of justice :- It is the utmost duty of the court to take all such measures to meet up the ends of justice and to pronounce the judgment which should also send a good message in the society that justice was not only done it was done with an impact that it appears that justice is done. The court is the most trusted and sacred institution. And every person holds a very high relative position and respect for court and its decisions. So the courts have extra moral obligation to keep the spirit of trust and confidence alive within this machinery. This ground to meet the ends of justice have a wide connotations it could be easily understood that this authority would have high degrees of discretionary powers. Which could be used in accordance with the factual quantum to provide justice to all the subject litigants. The factual matrix of every trial whether civil or criminal proceedings is quite different so in order to ascertain a pre-managed situation for dealing may not ensure a fair trial or may even end up causing irreparable loss to the interest of the litigants. Therefore the court has been vested with such discretionary authority to determine such question regarding transfer of court.
2. As per the inquiry report of any superior judicial officer such as any Chief judicial magistrate or any sessions judge the trial must not be conducted by a particular

²¹ Kaushalya Devi v. Mool Raj, – 1964 Cr. L.J. 233

²² Sesamma Philip,—A.I.R. 1973 S.C. 875

²³ Ram Chander, — A.I.R. 1978 S.C. 475

magistrate or any other officer such a report shall also be deemed to be a valid ground for such transfer of a case from one court to another.

3. The trial court deems it fit to be transferred from its purview or the determination of the trial may involve such substantial question of law. Determining substantial question of law far above its jurisdiction would render the complete trial fruitless.
4. The court have a limited jurisdiction over the subject matter of the dispute in such limited or shared juridical issue the court trying the matter will have a liberty to transfer the case to the court which have competent jurisdiction to try that matter conclusively so that the complete trial could not be failed because of lack of complete jurisdiction.
5. Mutual collision between the party and other judicial officer. The possibility of corruption is no stranger to the judicial fraternity. in such cases to avoid the failure of interest of the actual aggrieved party between the litigants the court provides reasonable opportunity to the party which may have such apprehension.
6. The judicial officer being engaged or involved in the litigation by some or the other. In such scenario the litigant parties have complete freedom to approach the authorities for avoiding any collision of interest when capitalized through any characterized persons.
7. The judicial officer may be made as witness. If any judicial person has been made as a witness to any trial this surfaces the end of the ability of that person to conduct the trial. Such actions may append breach of ordinary prudence of fair trial and may impeach the interest of justice.
8. When the court or any judicial authority is working in contravention to the principles of natural justice. Any if such breach when reported to the authority continues to happen the aggrieved party would be free to take shelter for preferring transfer of case.
9. Any mutual disturbance or unethical relationship between the lawyer or the judicial officer may also prefer an application of transfer of case from one court to another.

POWER OF SUPREME COURT TO TRANSFER CASES

The solitary ground that safety of the complainant would be in jeopardy if the case is not transferred is a nebulous ground for transferring the case and hence transfer cannot be granted. Under Section 406 of the Code, the Supreme Court will transfer a case if there is a reasonable apprehension on the part of a party to a case that justice will not be done. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjecture and surmises. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioner alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused the witnesses and larger interest of the society;²⁴. The Supreme Court has given it the widest interpretation to also include a political opponent to be an interested party. The Supreme Court allowed the petition and transferred the cases from Chennai to Bangalore and held that to secure the ends of justice and a fair trial it can be said that a political opponent who is 'vitaly interested in the administration of justice in the State' comes within the meaning of 'party interested' as stated in Section 406(2). "Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."²⁵ Once it is brought to the notice of the court that transfer application has been moved, it must stay the proceedings and wait for the decision on the transfer application.²⁶ An application moved by the accused seeking time to move transfer application if malafide and moved with intent to delay the disposal of the case should be rejected.²⁷

²⁴ Monica v. state of Rajasthan ,AIR 2010 SC 103

²⁵ K. Anbazhagan vs. Superintendent of Police (2004) 3 SCC 767

²⁶ Lallu Prasad Vs. Lakshmi Narain, 2006 (5) ALJ (NOC) 1041 (All).

²⁷ Anil Kumar Vs. State of UP, 2014 (86) ACC 805 (All).

Since this is a discretionary power, it may be instructive to refer to the following observations made in the matter reported as *Maneka Sanjay Gandhi v. Rani Jethmalani*²⁸, (V.R. Krishna Iyer, J. at Paras. 2 and 5): Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant environment, is necessitous if the court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of the court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. ..."

²⁸ (1979) 4 SCC 167

The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. However, no universal or hard and- fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition.²⁹ The Supreme Court held that the apprehension entertained by the party must be a reasonable one and the case cannot be transferred on a mere allegation that there is apprehension that justice will not be done.³⁰ In *Captain Amarinder Singh v. Parkash Singh Badal and others*³¹, while dealing with an application for transfer petition preferred under Section 406 CrPC, a three-Judge Bench has opined that for transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It has also been observed therein that mere an allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. It is also required on the part of the Court to see whether the apprehension alleged is reasonable or not, for the apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension. In the said context, the Court has held thus:- Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and

²⁹ Abdul Nazar Madani Vs. State of T.N. {(2000) 6 SCC 204}

³⁰ Jayendra Saraswathy Swamigal (II) Vs. State of T.N. {(2005) 8 SCC 771}

³¹ (2009) 6 SCC 260

the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one.

In *Lalu Prasad alias Lalu Prasad Yadav v. State of Jharkhand*³², the Court, repelling the submission that because some of the distantly related members were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, we think it appropriate to reproduce the following passage:-

“Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-à-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent.”

The apprehension of not getting a fair and impartial enquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. No universal or hard and fast rule can be prescribed for deciding a transfer petition, which will always have to be decided on the facts of each case. Convenience of a party may be one of the relevant considerations but cannot override all other considerations such as the availability of witnesses exclusively at the original place, making it virtually impossible to continue with the trial at the place of transfer, and progress of which would naturally be impeded for that reason at the transferred place of trial. The convenience of the parties does not mean the convenience of the petitioner alone who approaches the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society. It was noticed that early conclusion of the trial becomes much more difficult involving more expenses for the prosecution by it having to bear travelling expenses of official and non-official witnesses

³² (2013) 8 SCC 593

and all of which ultimately causes the trial to linger on for years. In our view, at this stage, the apprehensions voiced by the petitioner of possible harm to her at Delhi is too nebulous a ground for transfer. On her own pleadings, the petitioner has been travelling from Mumbai to Delhi since long for professional reasons.³³ Supreme Court will transfer a case from one State to another State only if there is a reasonable apprehension on the part of a party to a case that justice will not be done. Mere apprehension that the accused are influential may not be sufficient to transfer the case. Moreover, extraordinary power of constitutional courts in directing CBI to conduct investigation in a case must be exercised rarely in exceptional circumstances, especially, when there is lack of confidence in investigating agency or in national interest and for doing complete justice in the matter.³⁴

In *Parminder Kaur vs. State of U.P.*³⁵, it was observed:

The petitioner is a person of means and it will not be difficult for her to attend the hearing of the criminal cases pending in the Court of Chief Judicial Magistrate, Rampur. The comparative inconvenience of the litigant parties are not the only criterion for transferring the cases from one State to another State, but the Court has to visualize the comparative inconvenience and hardships likely to be caused to the witnesses besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses who will have to travel by train from Rampur to Delhi or Chandigarh, as the case may be, for attending the court proceedings if the cases are ordered to be transferred to transferee court.

Litigants cannot be permitted 'choice' of 'forum' and every attempt at "forum shopping" must be crushed with a heavy hand :

No lawyer or litigant can be permitted to browbeat the Court or malign the Presiding Officer with a view to get a favorable order. Judges shall not be able to perform their duties freely and fairly if such activities were permitted and in the result administration of justice would become a casualty and Rule of Law would receive a setback. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot be allowed to terrorize or intimidate Judges with a view to secure orders which they want. This is basic and fundamental and no civilised system of administration of justice can permit it. A

³³ Mrudul M. Damle & Anr. vs. Central Bureau of Investigation, New Delhi, 2012 (5) SCC 706

³⁴ Sujatha Ravi Kiran v. State of Kerala, (2016) 7 SCC 597

³⁵ (2007) 15 SCC 307

litigant cannot be permitted 'choice' of the 'forum' and every attempt at "forum shopping" must be crushed with a heavy hand. At the same time, it is of utmost importance to remember that Judges must act as impartial referees and decide cases objectively, uninfluenced by any personal bias or prejudice. A Judge should not allow his judicial position to be compromised at any cost. This is essential for maintaining the integrity of the institution and public confidence in it. The credibility of this institution rests on the fairness and impartiality of the Judges at all levels. It is the principle of highest importance, for the proper administration of justice, that judicial powers must be exercised impartially and within the bounds of law. It must always be remembered that justice must not only be done but it must also be seen to be done.³⁶

No objection or consent of opposite party not a ground for Transfer of a case:

A change of court is not allowable merely because the other side too has no objection for such change. Or else, it would mean that when both parties combined together they can avoid a court and get a court of their own choice. Court is not disposed to give such an option to the parties.³⁷

Transfer cannot be made to Inferior Court

It must be born in mind that when a case is transferred to a court which has jurisdiction either equal or superior to the one before which the case was pending. It cannot be transferred to a court which is inferior in jurisdiction.³⁸

Transferee Court not to proceed de novo:

Where original suit was transferred to the court having pecuniary jurisdiction, it has been held by the Hon'ble Supreme Court that it was not necessary for the transferee court to proceed de novo. Transferee court would be fully competent to proceed from the stage till which proceedings in the earlier court were held.

³⁶ M/s. Chetak Construction Ltd Vs. Om Prakash & Others, AIR 1998 SC 1855 (paras 19 & 20)

³⁷ Mahabir Prasad Singh Vs. M/s. Jacks Aviation Pvt. Ltd., AIR 1999 SC 287

³⁸ The CODE OF CRIMINAL PROCEDURE by BATUK LAL- Central Law Agency- 1st edition – 2008- pg. 552.

Refusal of transfer of Ghaziabad GPF scam case involving judicial officers to Delhi:

Turning down the transfer application of the CBI under section 406 CrPC, the supreme court has held that power of transferring case u/s 406 CRPC should be sparingly and with great circumspection exercised and merely because the accused persons in Ghaziabad PF scam are judicial officers of the state of UP, it cannot be a ground for transferring the case from Ghaziabad to Delhi where subordinate judiciary is already heavily burdened.³⁹ "When there is apprehension in the mind of any party that he will not get justice from a particular presiding officer of the court and the presiding officer is in the knowledge of the transfer application having been moved, he must not decide the case and should wait for orders on the transfer application. It will be in the interest of justice to transfer the case to other court."⁴⁰

TRANSFER OF CASES UNDER CONSTITUTION OF INDIA

The Constitution Bench of the Supreme Court has held that Supreme Court can, by invoking Article 32, 136 and 142 of the Constitution is empowered to transfer a case from a Court in the State of Jammu and Kashmir to a Court outside the State or vice versa. And the court observed that Access to justice is guaranteed to citizens by Article 14 and Article 21 of the Constitution of India. "There is no prohibition against use of power under Article 142 to direct transfer of cases from a Court in the State of Jammu and Kashmir to a Court outside the State or vice versa. All that can be said is that there is no enabling provision because of the reasons which we have indicated earlier. The absence of an enabling provision, however, cannot be construed as a prohibition against transfer of cases to or from the State of Jammu and Kashmir. At any rate, a prohibition simpliciter is not enough. What is equally important is to see whether there is any fundamental principle of public policy underlying any such prohibition. No such prohibition or any public policy can be seen in the cases at hand much less a public policy based on any fundamental principle. The extraordinary power available to this Court under Article 142 of the Constitution can, therefore, be usefully invoked in a situation where the Court is satisfied that denial of an order of transfer from or to the Court in the State of Jammu and Kashmir will deny the citizen his/her right of access to justice. The provisions of Articles 32, 136 and 142 are, therefore, wide enough to empower this Court to direct such transfer in appropriate situations, no matter Central Code of Civil and Criminal Procedures do not extend to the State nor do the State Codes of Civil and Criminal Procedure

³⁹ Nahar Singh Yadav Vs. union of India, 2011 CrLJ 997 (SC).

⁴⁰ Ram Narayana Vs. Rakesh Tandon, 2006 (63) ALR 47 (All).

contain any provision that empowers this court to transfer cases.”⁴¹ Bombay High Court in *Vibhuti Amarnath Agrawal v State of Maharashtra* had held that for admission to law colleges in Maharashtra, consent/approval from Bar Council of India (BCI) was not required and that the admission process must be completed within the time schedule as fixed by the concerned University, the Supreme Court has declined to transfer the case to itself under Article 139A of the Constitution.

Constitution of India — Arts. 139-A, 136 and 226 — Transfer of writ proceedings to Supreme Court:

In this case transfer petitions were dismissed on the ground that issue involved were pending consideration in a civil appeal in Supreme Court. Decision of Supreme Court can be brought to notice of High Court once civil appeal decided by Supreme Court and parties in meantime can request High Court to defer proceedings in pending writ petitions.⁴²

Constitution of India — Arts. 226, 136 and 32 — Transfer of investigation: Commencement of trial and examination of some witnesses, cannot be an absolute impediment for exercising power of constitutional courts to direct further investigation or de novo or fresh investigation or reinvestigation by some other investigating agency. Such power is meant to ensure fair and just investigation.⁴³

POWERS OF SESSIONS JUDGE TO TRANSFER CASES UNDER SECTION 408

Seeking transfer at the drop of a hat is inconceivable. Order of transfer is not to be passed as matter of routine or merely because an interested party has expressed some apprehension about proper conduct of trial. Power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to trial. There has to be a real apprehension that there would be miscarriage of justice.⁴⁴

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966

Article 2 (3) Each State Party to the present Covenant undertakes:

⁴¹ ANITA KUSHWAHA v. PUSHAP SUDAN TRANSFER PETITION (C) NO. 1343 OF 2008

⁴² Commr. of Service Tax (Appeals 1) v. Sri Selvaganapathy & Co., (2018) 4 SCC 578

⁴³ Dharam Pal v. State of Haryana, (2016) 4 SCC 160

⁴⁴ Usmangani Adambhai Vahora v. State of Gujarat, (2016) 3 SCC 370

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

SIMILAR PROVISIONS UNDER CONSTITUTION OF PAKISTAN

Article: 186A Power of Supreme Court to transfer cases (Constitution of Pakistan, 1973)186A. Power of Supreme Court to transfer cases.-The Supreme Court may, if it considers it expedient to do so in the interest of justice, transfer any case, appeal or other proceedings pending before any High Court to any other High Court.

CONCLUSION

The transfer of case from one court to another may not change the nature of the trial or the relief nor does it change the subject position but with the addition of such provisions the legislature and the judiciary impart a huge impression on the subject about the principle of equity and good conscience. Transfer of cases from one court to another would also ensure that the litigant parties are assured to the justice done to them. The question whether the party's apprehension that justice will not be done is a reasonable one is an objective, not subjective question. His mere allegation will not suffice; on the other hand, he need not demonstrate that Justice will inevitably fail. He is entitled to transfer if he shows circumstances, from which it appears to the court that his apprehension is reasonable. For any reputable system of administration of justice should not only be done, it must also appear to have been done. Mere allegation of apprehension is not sufficient to transfer cases and appeals.

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