

SWAATI NIRKHI & ORS.

v.

STATE (NCT OF DELHI) & ORS.

(Transfer Petition (Crl.) No. 262 of 2018)

MARCH 09, 2021

[ASHOK BHUSHAN AND INDU MALHOTRA, JJ.]

Code of Criminal Procedure, 1973 – ss.406, 177 – Trial pending in Delhi – Transfer petition seeking transfer to Prayagraj, U.P. – Allowed ex-parte – Complainant filed application for recall thereof – Dismissed – Review Petition – Allowed, ex-parte order recalled – Complainant impleaded as respondent no.4 in the transfer petition – De-novo hearing – Held: In a criminal case, the place of inquiry and trial has to be by the Court within whose local jurisdiction, the crime was allegedly committed as provided by s.177 – In the present case, cause of action as per the averments in the FIR are alleged to have arisen in New Delhi, where the matrimonial home of the Petitioner is situated – A criminal case ought to be inquired and tried ordinarily where the cause of action has accrued – Further, most of the prosecution witnesses are situated in Delhi – 12 official witnesses are serving in New Delhi – If the transfer petition is allowed, they would be required to travel from New Delhi to Prayagraj causing hinderance in performing their official duties – Transfer petition dismissed – Penal Code, 1860 – s.389 r/w s.34.

Dismissing the transfer petition, the Court

Held: 1.1 In a criminal case, the place of inquiry and trial has to be by the Court within whose local jurisdiction, the crime was allegedly committed as provided by Section 177 of Cr.P.C. The cause of action as per the averments in the FIR are alleged to have arisen in New Delhi, where the matrimonial home of the Petitioner is situated. A criminal case ought to be inquired and tried ordinarily where the cause of action has accrued. In the present case, most of the prosecution witnesses are situated in Delhi. 12 official witnesses are serving in New Delhi. If the Transfer Petition is allowed, they would be required to travel from New Delhi to Allahabad (Prayagraj), which would cause

- A hinderance in performing their official duties. The Transfer Petition is dismissed. The proceedings arising out of FIR No. 39 of 2016 which were transferred to the Court of Metropolitan Magistrate at Allahabad (Prayagraj), Uttar Pradesh are directed to be transferred back to the Court of Metropolitan Magistrate 461 North West, Rohini Courts, New Delhi. [Paras 14-16, 19]
- B [911-A, B-C; 913-B-C; 914-C-D]
- C *Ramesh v. State of T.N.* (2005) 3 SCC 507 : [2005] 2 SCR 493; *Manish Ratan v. State of M.P.* (2007) 1 SCC 262; [2006] 8 Suppl. SCR 226; *Bhura Ram v. State of Rajasthan* (2008) 11 SCC 103; *Rajiv Modi v. Sanjay Jain* (2009) 13 SCC 241 : [2009] 11 SCR 34; *Sunita Kumari Kashyap v. State of Bihar* (2011) 11 SCC 301; *Amarendu Jyoti vs. State of Chattisgarh* (2014) 12 SCC 362 : [2014] 13 SCR 1079; *Babita Lila and Ors. vs. Union of India (UOI)* (2016) 9 SCC 647 : [2016] 7 SCR 604; *Rupali Devi vs. State of Uttar Pradesh and Ors.* (2019) 5 SCC 384 : [2019] 6 SCR 577 ; *Rhea Chakraborty vs. State of Bihar and Ors.* 2020 SCC OnLine SC 654; *Abraham Ajith v. Inspector of Police* (2004) 8 SCC 100 : [2004] 3 Suppl. SCR 604 ; *Harita Sunil Parab v. State (NCT of Delhi)* (2018) 6 SCC 358 : [2018] 3 SCR 732 – relied on.
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- E

Case Law Reference

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|---|-------------------------|-----------|---------|
| | [2005] 2 SCR 493 | relied on | Para 15 |
| | [2006] 8 Suppl. SCR 226 | relied on | Para 15 |
| F | (2008) 11 SCC 103 | relied on | Para 15 |
| | [2009] 11 SCR 34 | relied on | Para 15 |
| | (2011) 11 SCC 301 | relied on | Para 15 |
| G | [2014] 13 SCR 1079 | relied on | Para 15 |
| | [2016] 7 SCR 604 | relied on | Para 15 |
| | [2019] 6 SCR 577 | relied on | Para 15 |
| | [2004] 3 Suppl. SCR 604 | relied on | Para 15 |
| H | [2018] 3 SCR 732 | relied on | Para 15 |

CRIMINAL ORIGINAL JURISDICTION: Transfer Petition (CrI.) No. 262 of 2018. A

Petitions Filed Under Section 406 of Cr.P.C. for Transfer of Criminal Case No. 0003483 of 2017 arising out of FIR No. 39 of 2016 dated 07.01.2016.

Rahul Shyam Bhandari, Adv. for the Petitioners B

Kaustubh Shukla, Adv. for the respondents.

Respondent-in-person

The Judgment of the Court was delivered by

INDU MALHOTRA, J. C

1. The present Transfer Petition has been filed by the Petitioner under Section 406 Cr.P.C. seeking transfer of Criminal Case No. 3483 of 2017 titled as State v. Swaati Nirkhi & Ors. (arising out of FIR No. 39/2016) from the Court of Metropolitan Magistrate 461 North West, Rohini Courts, New Delhi to the Court of Metropolitan Magistrate at Allahabad (Prayagraj), Uttar Pradesh. D

2. The Respondent No.4 herein/Complainant filed FIR No. 39 on 7.1.2016 before the Police Station, Mangol Puri under Section 389 read with 34 IPC against 4 accused viz. Mr. Mohan Shrivastava, Ms. Swaati Saxena, Sanjay Saxena, Shashank Saxena wherein it was stated that his nephew Ashish Khare was married to Ms. Swaati Nirkhi (Petitioner No.1 in the Transfer Petition) on 19th April 2015 in Delhi. That on 7.8.2015, Swaati Nirkhi left for her parental home in Allahabad, and did not return thereafter, even though she was requested to come back by the family. On 25.11.2015, the Complainant received a message from one Mohan Srivastava alias Akahauri Onkar Nath (Respondent No.2 in the T.P) that Ms. Swaati Nirkhi would not like to come back to Delhi, and the matter could be settled by paying Rs. 5 crores. On 25.11.2015, 3 persons visited the house of the Complainant, and left a message with his driver and domestic help that the Complainant must pay Rs. 5 Crore to Mohan Srivastava. E F

On 6.12.2015, the Complainant stated that it was learnt from the newspaper reports and T.V. media report that Ms. Swaati Nirkhi had falsely alleged that she was gang raped on 4.11.2015 at 9 p.m. in the house of the Respondent No.4, by Respondent No.4 and his nephews- Abhishek and Ashish, with the assistance of his wife- Smt. Heema Khare. It was also stated that he had received messages to pay Rs. 5 Crore G H

- A otherwise he would be arrested on the ground of gang rape. On 7.1.2016, at 11.13 a.m. he received a call from a person who identified himself as Mohan Srivastava to pay payment of Rs. 5 crore urgently. The 1st instalment could be paid to Swaati Nirkhi, Shashank Saxena and Sanjay Saxena at Delhi in 2 days of Rs. 2.5 Crore. The Complainant has submitted that he was warned not to get in touch with the police, otherwise he
- B would be required to face dire consequences. The complainant stated that he had kept the SHO informed of the subject matter since 10.12.2015 through his Complaints. He stated that his driver Sushil Kumar had informed him of the plan of Mohan Srivastava, Swaati Nirkhi, Sanjay Saxena and Shashank Saxena to get the entire family arrested, and then
- C occupy his property worth 10 to 15 crore. It was further alleged that the Accused had sought to allure the driver of Respondent No.4 by offering a flat to him.

It was requested that a criminal case be registered against Mr. Mohan Srivastava, Ms. Swaati Nirkhi, Mr. Sanjay Saxena and Shashank Saxena.

- D 3. Pursuant to the registration of the FIR, a Charge Sheet was filed on 29.6.2017 in the Court of Metropolitan Magistrate, Rohini Court, Delhi against Accused No.1- Swaati Nirkhi, Accused No.2- Sanjay Saxena, Accused No.3- Shashank Saxena, Accused No.4- Mohan Srivastava @Akahauri Onkar Nath, and Accused No.5- Jugal Kishore
- E Yadav under Section 389, 419, 506, 120B and 34 IPC. A list of 23 witnesses was mentioned in the Charge Sheet, out of which 16 were official witnesses, and 7 were non-official witnesses.

4. On 28.11.2017, the Metropolitan Magistrate, 461, Rohini Court, Delhi took cognisance, and issued summons to the Accused persons.

- F 5. In the meanwhile, the Accused Ms. Swaati Nirkhi, Mr. Sanjay Saxena and Shashank Saxena filed the present Transfer Petition (Crl.) No.262 of 2018 before this Court, praying that the trial of Criminal No. 3483 of 2017 titled as State v. Swaati Nirkhi and Ors. arising out of FIR No. 39/2016 pending before the Court of the Metropolitan Magistrate, North West, Rohini Courts, New Delhi be transferred to the Ld.
- G Metropolitan Magistrate at Allahabad (Prayagraj) U.P.

- H 6. This Court vide *ex-parte* Order dated 18.5.2018 allowed the Transfer Petition and directed that the criminal proceedings in the aforementioned case shall stand transferred to the Court of Metropolitan Magistrate at Allahabad, U.P from the Court of Metropolitan Magistrate, 461, Rohini Court, Delhi.

Since the Order was being passed *ex-parte*, it was left open to the Respondents to approach this Court, if they were aggrieved by the same. A

7. The Complainant in the FIR i.e. Respondent No.4 in the Transfer Petition filed M.A. No. 1589 of 2018 praying for recall of the Order dated. 18.5.2018 passed by this Court in T.P. No (Crl.) 262 of 2018. B

The said M.A was dismissed vide Order dated. 5.6.2018.

8. The Respondent No.4 then filed Review Petition (Crl.) No. 671 of 2018 praying for Review of the Orders dated 18.5.2018 and 5.6.2018 passed by this Court. C

This Court issued Notice in the Review Petition vide Order dated 24.10.2018, and ordered hearing in open Court.

9. After hearing the parties at length, this Court vide detailed Judgment dated 28.1.2021 allowed the Review Petition, and recalled the Order dated 18.5.2018. It was directed that the Review Petitioner/ Complainant be impleaded as Respondent No.4 in the Transfer Petition. The Transfer Petition was then taken up for *de novo* hearing. D

10. We have heard the Counsel for the parties at length, and perused the affidavits filed.

The Petitioners have inter alia submitted that the Transfer Petition ought to be allowed since there are 9 cases pending between the parties in Allahabad, out of which 6 cases have been filed by the Respondent No.4, and 3 cases have been filed by the Petitioner No.1. Since the Respondent No.4 was prosecuting the 6 cases filed by him in Allahabad, and that no inconvenience would be caused if the proceedings arising out of the FIR in the present case, were tried by the Court of the Metropolitan Magistrate at Allahabad. E F

It was further submitted that if the Petitioners were compelled to defend themselves in the proceedings at Delhi, it would be financially burdensome on them. However, while the Complainant and his family members who are a well to do family, would not be subject to any hardship or inconvenience. G

It was further submitted that the Petitioner No.1, due to the physical and mental assault and harassment suffered by her, was not able to work and earn her livelihood. Furthermore, her father i.e. Petitioner No.2 is a senior citizen suffering from various ailments and diseases. H

A In these circumstances it was pleaded that the proceedings in the criminal case may not be transferred back from Allahabad to Delhi.

11. Respondent No.2 who has been named as co-accused in the FIR, has supported the case of the Petitioners. It has been submitted that he is discharging a public function as Deputy Mayor in Gaya, Bihar.
B It would be inconvenient for him to undertake such a long journey from Gaya to Delhi, as it would impinge on his time to discharge his public functions.

12. Respondent No.3 has submitted that he was not named in the FIR, but was added in the Charge Sheet as an accused on the basis of hearsay evidence. The prosecution of the case in Allahabad would be convenient for him to defend the baseless allegations made by Respondent No.4 against him.
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13. The Transfer Petition was seriously opposed by Respondent No.4 on the ground that the allegations mentioned in the present FIR related to incidents which had occurred in New Delhi. Since no cause of action had taken place in Allahabad, the proceedings must be tried by the Court of competent jurisdiction in New Delhi.
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It was further submitted that out of the 23 witnesses, 12 official witnesses are situated in New Delhi. If the case is transferred out of Delhi, it would impinge upon their official work, since they would be required to travel to Allahabad in these proceedings.
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With respect to the cases filed by the present Petitioner in Allahabad, no incriminating material has been found against the Respondent No.4 in the FIRs instituted in State of U.P., even after being investigated several times by the Allahabad Police, Crime Branch Allahabad, and DSP Level Gazetted Lady Police Officer. It was further submitted that the Petitioner No.1 herself had instituted 13 cases in Courts in Delhi, Allahabad and before this Court, which she has prosecuted without expressing any difficulty, and there is no reason why an exception should be made in the present case.
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It was further submitted that the Petitioners in the T.P have not appeared before the Metropolitan Magistrate, Allahabad in 36 hearings from 9.7.2018 to 7.12.2020, even after the case was transferred to Allahabad (Prayagraj). The Transfer Petition was only a ruse to stall the proceedings in the present case.
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14. In a criminal case, the place of inquiry and trial has to be by the Court within whose local jurisdiction, the crime was allegedly committed as provided by Section 177 of Cr.P.C. A

“177. Ordinary place of inquiry and trial. Every offence shall ordinarily be inquired into and tried by a Court within whose local jurisdiction it was committed.” B

15. The cause of action as per the averments in the FIR are alleged to have arisen in New Delhi, where the matrimonial home of the Petitioner is situated.

This court has consistently held that a criminal case ought to be inquired and tried ordinarily where the cause of action has accrued¹ C

In *Abraham Ajith v. Inspector of Police*², this Court held that :

“12. The crucial question is whether any part of the cause of action arose within the jurisdiction of the court concerned. In terms of Section 177 of the Code, it is the place where the offence was committed. In essence it is the cause of action for initiation of the proceedings against the accused. D

13. While in civil cases, normally the expression “cause of action” is used, in criminal cases as stated in Section 177 of the Code, reference is to the local jurisdiction where the offence is committed. These variations in etymological expression do not really make the position different. The expression “cause of action” is, therefore, not a stranger to criminal cases. E

14. It is settled law that cause of action consists of a bundle of facts, which give cause to enforce the legal inquiry for redress in a court of law. In other words, it is a bundle of facts, which taken with the law applicable to them, gives the allegedly affected party a right to claim relief against the opponent. It must include F

¹ Ramesh v. State of T.N., (2005) 3 SCC 507,
Manish Ratan v. State of M.P (2007) 1 SCC 262
Bhura Ram v. State of Rajasthan, (2008) 11 SCC 103 G
Rajiv Modi v. Sanjay Jain, (2009) 13 SCC 241
Sunita Kumari Kashyap v. State of Bihar, (2011) 11 SCC 301
Amarendu Jyoti vs. State of Chattisgarh (2014) 12 SCC 362
Babita Lila and Ors. vs. Union of India (UOI) (2016) 9 SCC 647
Rupali Devi vs. State of Uttar Pradesh and Ors. (2019) 5 SCC 384
Rhea Chakraborty vs. State of Bihar and Ors. 2020 SCC OnLine SC 654
² (2004) 8 SCC 100 H

A some act done by the latter since in the absence of such an act no cause of action would possibly accrue or would arise.

15. The expression “cause of action” has acquired a judicially settled meaning. In the restricted sense cause of action means the circumstances forming the infraction of the right or the immediate occasion for the action. In the wider sense, it means the necessary conditions for the maintenance of the proceeding including not only the alleged infraction, but also the infraction coupled with the right itself. Compendiously, the expression means every fact, which it would be necessary for the complainant to prove, if traversed, in order to support his right or grievance to the judgment of the court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove such fact, comprises in “cause of action”.

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16. The expression “cause of action” has sometimes been employed to convey the restricted idea of facts or circumstances which constitute either the infringement or the basis of a right and no more. In a wider and more comprehensive sense, it has been used to denote the whole bundle of material facts.

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17. The expression “cause of action” is generally understood to mean a situation or state of facts that entitles a party to maintain an action in a court or a tribunal; a group of operative facts giving rise to one or more bases for sitting; a factual situation that entitles one person to obtain a remedy in court from another person. In *Black’s Law Dictionary* a “cause of action” is stated to be the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact, which, if traversed, the plaintiff must prove in order to obtain judgment. In *Words and Phrases* (4th Edn.), the meaning attributed to the phrase “cause of action” in common legal parlance is existence of those facts, which give a party a right to judicial interference on his behalf.

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18. In *Halsbury’s Laws of England* (4th Edn.) it has been stated as follows:

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 “ ‘Cause of action’ has been defined as meaning simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. The phrase has been held from earliest time to include every fact which is

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material to be proved to entitle the plaintiff to succeed, and every fact which a defendant would have a right to traverse. ‘Cause of action’ has also been taken to mean that a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject-matter of grievance founding the action, not merely the technical cause of action.”

16. In the present case, we find that most of the prosecution witnesses are situated in Delhi. That 12 official witnesses are serving in New Delhi. If the Transfer Petition is allowed, they would be required to travel from New Delhi to Allahabad (Prayagraj), which would cause hinderance in performing their official duties.

17. The alleged apprehension of the Petitioners and Respondent No.2 and 3 do not constitute any exceptional circumstances for transferring the criminal case from Delhi to Allahabad (Prayagraj).

A three judge bench of this Court in *Harita Sunil Parab v. State (NCT of Delhi)*³, held that :

“8. 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. The charge-sheet in FIR No. 351 of 2016 reveals that of the 40 witnesses, the petitioner alone is from Mumbai, two are from Ghaziabad, and one is from Noida. The charge-sheet of FIR No. 1742 of 2016 is not on record. A reasonable presumption can be drawn that the position would be similar in the same also.

³ (2018) 6 SCC 358

A **9.** In *Mrudul M. Damle v. CBI* [*Mrudul M. Damle v. CBI*⁴], 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 and all of which ultimately causes the trial to linger on for years.”

B 18. The counsel for the Petitioner at the conclusion of hearing in the present transfer petition made a prayer for continuation of Interim Bail from arrest, which was granted by the High Court of Allahabad pursuant to the Order passed in the Transfer Petition.

C It would be open for the Petitioner to move the appropriate Court in New Delhi for interim relief after the proceedings are transferred.

 19. In view of the discussion above, the Transfer Petition is dismissed.

D The proceedings arising out of FIR No. 39 of 2016 which were transferred to the Court of Metropolitan Magistrate at Allahabad (Prayagraj), Uttar Pradesh are directed to be transferred back to the Court of Metropolitan Magistrate 461 North West, Rohini Courts, New Delhi.

E 20. The Registry is directed to transmit a copy of this Order to the Courts of the Metropolitan Magistrate at Allahabad (Prayagraj), Uttar Pradesh and the Metropolitan Magistrate 461 North West, Rohini Courts, New Delhi.

F Parties are directed to appear before Court of Metropolitan Magistrate 461 North West, Rohini Courts, New Delhi on 15th April, 2021.

 There will be no Order as to costs.

 Pending Applications, if any, are accordingly disposed of.

Divya Pandey

Petition dismissed.

⁴ (2012) 5 SCC 706