

## Nem Chand vs The State on 7 August, 1952

**Equivalent citations: AIR1953ALL99, AIR 1953 ALLAHABAD 99**

**Author: V. Bhargava**

**Bench: V. Bhargava**

### JUDGMENT

Y. Bhargava, J.

1. This is an application for transfer of a case pending in the Court of Sri Girja Shanker Misra, Special Magistrate, first Class, Lucknow. Under a notification issued by the U.P. Government powers of a Magistrate of the first class were conferred upon Sri Girja Shanker Misra to try or commit cases investigated by the Government of India Special Police Establishment throughout Uttar Pradesh for so long as he held the office of the Special Magistrate.

2. The case against Nem Chand applicant was investigated by the Government of India Special Police Establishment and consequently it came up for trial before the learned Special Magistrate. The transfer is sought mainly on two grounds. One ground is that it is highly inconvenient and expensive to the applicant to be tried in Lucknow when he resides in the District of Sharaapur and all his defence witnesses also come from Saharanpur. It is said that the balance of convenience would be in favour of having the case tried at Saharanpur, because there are only six prosecution witnesses, four of whom come from Saharanpur and the neighbouring district of Dehra Dun; whereas all the sixteen defence witnesses come from the district of Saharanpur. The second ground taken is that the same learned Magistrate has already decided another case against the applicant and the evidence in this case as well as in that case is similar, if not exactly identical, and the same considerations of fact and law are involved so that the accused apprehends that the learned Magistrate may not be able to give an unbiased consideration to the matters coming up before him in this case.

3. When this application came up for arguments, we had to consider a preliminary question of law on account of which this application was referred to a Bench for decision. Some doubt arose as to the question whether this application for transfer could be heard by Judges sitting at Lucknow. The main facts which have to be considered in this connection are that the case which is pending before the learned Special Magistrate relates to all acts which were committed in Saharanpur district, so that the offence which is the subject-matter of the charge to be tried by the Special Magistrate was committed in the district of Saharanpur. Under the first proviso to Clause 14 of the U.P. High Courts (Amalgamation) Order 1948, the Judges of the High Court at Allahabad are to sit at Lucknow in order to exercise, in respect of cases arising in such areas in Oudh as the Chief Justice may direct,

the jurisdiction and power for the time being vested in the new High Court. It was contended that the case which was pending before the Special Magistrate did not arise from any area in Oudh and consequently the Judges sitting at Lucknow could not exercise the jurisdiction of transferring the case from his Court.

This argument, in our opinion, proceeds on a misunderstanding of the words "in respect of cases-arising in such areas in Oudh" used in the proviso to Clause 14, U.P. High Courts (Amalgamation) Order, 1948. The word 'cases' there refers to the, cases which come up for decision before the High Court and not to the cases pending in lower Courts which may have given rise to the cases coming up before this Court. At present, the case we are dealing with is a Criminal Miscellaneous Case for transfer of another case that is pending in the Court of the Special Magistrate at Lucknow. This Miscellaneous case of transfer, there can be no doubt, arises out of proceedings which are going on at Lucknow in the Court of the Special Magistrate. The case for transfer is, therefore, a case which has arisen in Lucknow and consequently it is quite clear that, under the proviso, referred to above, this Bench sitting at Lucknow can exercise the jurisdiction and power for the time being vested in the Allahabad High Court in respect of it.

4. We may make it clear that we refrain from going into the question as to whether the Benches of this Court sitting at Lucknow would or would not have jurisdiction to decide the case which is pending before the learned Special Judge itself, because that is a question which is not before us and we do not express any opinion on that question. All we are called upon to decide is whether this application for transfer can be decided by the Bench at Lucknow. The transfer application is a case by itself and that transfer application has certainly arisen out of proceedings going on at Lucknow, so that it is a case arising in such area in Avadh as is within the jurisdiction of the Lucknow Bench according to the directions of the Chief Justice under the provisions of that proviso. There can, therefore, be no doubt at all that the Bench at Lucknow has powers to pass orders on this application for transfer. We may mention that the view which we are taking today was also taken by a learned Single Judge sitting at Allahabad in *State v. Hala Ram*, 1950 ALL. L.J. 403.

5. Once it is held that, under the proviso to Clause 14, U.P. High Courts (Amalgamation) Order 1948, this Bench has jurisdiction to deal with the case, it can exercise all the powers which are, for the time being, vested in the Allahabad High Court in respect of this case. Under Section 526, Criminal P.C., when a transfer application is presented, the High Court has the power to transfer a case from any Court subordinate to it to any other Court subordinate to it. That power can now be exercised by this Bench, and consequently in ordering transfer this Bench can direct that the case be tried by any Court subordinate to the Allahabad High Court whether that Court is situate in Oudh or anywhere else in Uttar Pradesh.

6. On merits we need only consider one of the grounds that has been urged for the transfer of this case, and that is the second ground which has been mentioned by us above.

7. The applicant filed an affidavit alleging that the evidence in the case which he seeks to be transferred and which is pending before the learned Special Magistrate is similar to, if not identical with, the evidence in another case which has already been decided by the Magistrate and that the

same considerations of fact and law are involved in the two cases. This allegation has not been controverted on behalf of the State. An affidavit was filed on behalf of the State, but on this particular point that affidavit is silent. Besides this that affidavit is completely useless as all the facts averred in it have been verified by the deponent as being true to his belief. This Court cannot take into consideration what the deponent may believe. The affidavit should have been verified either on personal knowledge or on information derived from inspection of records. In case this deponent could not do it, it should have been sworn by a person who could do so. We have, therefore, to proceed on the assumption that the allegations made by the applicant are correct, so that the Magistrate is going to be called upon to decide a case in which the evidence and the considerations of fact and law are going to be similar to or identical with the evidence and the considerations of fact in a case already decided by him. In such circumstances, the applicant can have a reasonable apprehension that the evidence and the questions of fact may not possibly be considered afresh by the learned Magistrate uninfluenced by his previous decision and consequently it is desirable that the case should be transferred from his Court. Once it is transferred from his Court, it will be convenient for all the parties that it should be tried by a competent Magistrate at Saharanpur.

8. We, therefore, allow this application for transfer, withdraw the case from the Court of the learned Special Magistrate, Lucknow, and direct that it be sent to the District Magistrate of Saharanpur, who will either try it himself or send it for trial to some other Magistrate subordinate to him who may be competent to try it.