

Sri Krishna vs Baijnath And Ors. on 10 February, 1953

Equivalent citations: AIR1953ALL698, AIR 1953 ALLAHABAD 698

ORDER

Desai, J.

1. This is an application for transfer of a case pending against the opposite party under Section 302, Penal Code in the Court of the 2nd Additional Sessions Judge, Bareilly.
2. The opposite party is said to have committed the murder of Raghunandan Prasad, who was the brother of the applicant.
3. The applicant wrote out the first information report of the occurrence and sent it to the police station with Raghunandan Prasad. Raghu-nandan Prasad was conscious when he reached the police station. The police investigated the matter and prosecuted the opposite party under Section 302, Penal Code.
4. The applicant wants the case to be transferred to another Court on the ground that he does not expect a fair and impartial trial in the Court of the learned Additional Sessions Judge.

When the application came up for hearing first, I was informed by the State counsel that he had no instruction either to support or to oppose it. The hearing was adjourned and when it came up again, the State Counsel informed me that he had received instructions to support it. It appears from the opposite party's affidavit that in the interval the applicant had managed to get a telegram sent by the District Magistrate to the State counsel to support it.

5. It is laid down in Section 526 (3), Criminal P. C. that a High Court may transfer a case "either on the report of the lower Court, or on the application of a party interested, or on its own initiative."

It is laid down in Section 526 (8) that if "any party interested intimates to the court that he intends to make an application under this section, the Court shall adjourn the case."

Section 526 is the only provision under which this Court can transfer a case. The first question that arises is whether the applicant is "a party Interested"; if he is not, this Court cannot act on his application. The word "party" is not defined in the Code of Criminal Procedure. When it is used with reference to a proceeding in a Court, its primary meaning is a litigant. It means a person who has a part to play in the proceeding. In the absence of anything to the contrary in the context, the primary meaning of a word should be adopted. Wharton defines "parties" as "persons jointly concerned in any deed or act; litigants". If the word is used with reference to an agreement or a deed, the word

means those persons who are jointly concerned in the agreement or the deed. If an application for transfer is dismissed, on the ground of its being frivolous or vexatious, the High Court is empowered by Section 526 (6-A) to order the applicant to pay compensation to "any person who has opposed the application."

6. In 'Emperor v. Kanver Sen', A. I. R. 1930 All. 206 (P. B.) (A) it was argued on behalf of the applicant whose application had been dismissed as frivolous or vexatious, that the word "person" did not include Government, and that Government were not entitled to compensation even though they had opposed the application. It was conceded on behalf of the applicant that the words "a party interested" were wide enough to include the Crown or Government. A Full Bench of this Court held that the word "person" has a wider import than the words "a party interested" in Sub-section (3). It was pointed out by the Full Bench that in a criminal case the Crown is a necessary party in view of the immediateness of the public interest involved, that individual interests are not allowed to predominate as in a civil matter, and that public interest balances or in some case even out-weighs the private. It is clear from this decision that "a person interested" is not necessarily "a party interested". "A party interested" is "a person interested" but the converse is not always true. In the face of this ruling it is not open to me to say that "a party interested" means "a person interested".

Under a certain statute "any party requiring" any act to be done by a Judge of a county Court may apply to any superior Court for a writ of mandamus against the County Court; in the --'Queen v. The Registrar of the Greenwich County Court', (1885) 15 Q. B. D. 54 (B) Brett, M. R. held that the word "party" means the litigants in the Court. Under another statute a person desiring to appeal from an order of licensing Justices must give notice of appeal to "the other party". In -- 'Boulter v. The Justices of Kent', (1897) A. C. 556 (C) the Licensing Justices rejected the application for license which was opposed by a member of the public. The House of Lords held that the objector was not a party. Lord Harschell observed on page 569 :

"Persons objecting to the grant of a license are not, I think, parties to the proceedings on the application in any proper sense of the term. The question is not one inter partes at all".

Earlier his Lordship had said at page 568 :

"Where proceedings are taken by way of information or complaint, there are always two parties -- the person initiating the proceedings, and the person against whom the proceedings are taken."

In the Chancery Amendment Act, 1852, (15 and 16 Vict. c. 1386), the word "party" was used sometimes to mean "a person", but was pointed out by Jessel M. R. in -- 'Re Quartz Hill etc. Co.; Ex Parte Young', (1832) 21 Ch. D 642 (D), that the proper sense of the word is different. Section 14 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126) enabled the Court at the request of either party to dispose of the claims of the parties against the goods taken in execution and the word "parties" was interpreted to mean the person who claimed title to the goods; see -- 'Smith v. Darlow', (1884) 26 Ch. D. 605 (E). In that case the Sherrif, though he had put the Court in motion by

bringing in an inter-pleader suit was held to be not a party. Under the Metropolis Water Act, 1871, water companies were empowered to make regulations for the prevention of undue consumption of water and those regulations, after publication in the prescribed manner, were made binding on "all parties". Those words were held to mean that only the consumers of the water but also all other bodies or persons interested in the matter such as the street authorities or those charged with the duty of putting out fire; vide -- 'the East London Waters Co. v. The Vestry of Saint Mathew', (1886) 17 Q. B. D. 475 (F). There the word was interpreted to mean other persons because it was used with reference to a regulation and not with reference to proceedings in Court.

7. In a criminal case initiated on complaint, the complainant may be said to be a party, though the authorities are not unanimous. In the leading case on the point, -- *Jamuna Kantha v. Rudra Kumar*', AIR 1920 Pat 836 (G), Mullick J. was of the opinion that "strictly speaking, the Court does not recognise a private prosecutor who is a complainant, as a party to the case". In his opinion, though every private person has a right to set criminal law in motion, his control over the prosecution is not unlimited. The Crown is in theory the prosecutor for all offences and the individual person can only assist the Crown for the purpose of collecting evidence and bring the offender to justice. According to him, the parties to a criminal case are the persons who have the right to be heard, i. e. persons who have the right to control the proceedings, e. g. the Crown, the accused and parties engaged in conducting certain proceedings of a quasi-civil nature. Under the Code of Criminal Procedure existing then, an exception was made to the general rule and the complainant was treated as a party interested, but Mullick J. held that a person, who had received injuries during the commission of a crime and had made a report to the police, was not a complainant and not a party interested. *Jwala Pra-sad, J.* was of a contrary opinion. He conceded that though a private person can commence a criminal prosecution "the prosecution is always at the suit of the Crown -- '*Burdett v.*

Abbot', (1811) 14 East 1 (H), but held that a person, who lodges a report with the police, is a complainant and can apply for transfer under Section 526, Criminal P. C. It is unnecessary to go into the question whether a complainant is a party or not, because the word "complainant" no longer finds place in Section 526. *Jwala Prasad, J.* was further of the opinion that a person who lodges a report with the police is a party interested because he is interested in the result of the case and consequently in a fair and impartial trial and has to bear the consequences of the result in -- '*Gulam Rasul v. Emperor*', A. I. R. 1941 Lah 299 (I) the complainant was held to be a party. In -- '*Bagh Ali v. Mohd Din*', A. I. R. 1926 Lah. 156 (J) a criminal case was transferred at the instance of the complainant.

8. In a case prosecuted by the State, the State is certainly a party. The accused also is certainly a party; he is the other party. The question is whether the person who gave information about the crime to the police and moved them to investigate and prosecute the accused, or who was injured during the commission of the crime is related to the injured is a party. Having regard to the primary meaning of the word, I cannot consider him to be a party. He may be interested in the prosecution, and its result, but that by itself would not convert him into a party to the case. In order to have the right to apply for transfer, the applicant must possess two qualifications, one of being a party and the other of having interest. Mere possession of interest will not do. In other words, merely on account of his possessing interest he will not be "a party interested". His position in the case may

simply be that of a witness but a witness is not a party. In a majority of cases it has been held that a person who lodges a report with the police is a party but with great respect to the learned Judges, 1 disagree. I prefer to follow -- 'In Re : J. Gan-non', 5 Bom. L. R. 869 (K). There a complaint was filed by Gannon, but subsequently the prosecution was taken away from his control and was conducted by the Crown and it was held by Chandavarkar and Aston, JJ. that Gannon could not apply for transfer of the case because he was no longer a party._ Though the status of Gannon was more than that of a mere informant, and he had interest in the result of the case, he was held to be not a party.

9. It stands to reason that if the legislature had intended to give the right of applying for transfer to every person interested, there was nothing to prevent it from using the words "a person interested" instead of the words "a party interested". When the legislature deliberately chose the word "party", it would not be right to hold that it means nothing but a person. -- 'Emperor v. Bhik Chand', AIR 1926 All 307 (L), -- 'Raja-gopal Rao v. Narayana Reddy', AIR 1929 Mad 844 (M)', 'In re Abdul Naseer', AIR 1937 All 664 (N), -- 'Om Radhe v. Emperor', AIR 1939 Sind 238 (O), -- 'Sheodhari Rai v. Jhingur Rai', AIR 1925 Pat 818 (P), and -- 'AIR 1926 Lah 156 (J), the meaning of the word "party" was not discussed and in some of them, particularly 'In re Abdul Naseer' (N), the word "person" was treated as if the word were "party". In 'Bhik Chand's Case, (L)', the applicant for transfer was himself the complainant and therefore the decision in that case is of no help in the instant case. In 'Bagh Ali's case, (J)', it was only by way of obiter that the husband of a woman said to have been abducted was held to be a party interested in the case under Section 366, Penal Code. The learned Judge simply followed the view of Jwala Prasad, J. in the case of 'Jamuna Kantha Rai', (G). The real question there was whether the order of a District Magistrate transferring the case was legal or not; it was held to be legal and therefore the re-transfer at the instance of the husband was refused. Really therefore the question whether he had a right to apply for transfer or not did not arise. In 'Om Radhe's case, (O)', Davis, J. C. said that the word "party" includes an informant under Section 107, Criminal P. C. He, however, found that the applicant was not the informant and that an inspector of police was the real informant. It is not clear whether the learned Judicial Commissioner used the word "informant" to mean the complainant or the person who lodges the information with the police. As the matter related to a proceeding under Section 107, Criminal P. C., in which there is nothing like investigation by the police, it seems to me that the word was used to mean the complainant. If so, that case is no authority for the proposition that one who makes a report of an occurrence at the police station, is a party interested.

10. An injured person was held to be a party interested in -- 'Emperor v. Dhana', AIR 1938 Lah 569 (Q); Abdul Rashid, J. was inclined to treat him as a complainant. In -- 'Brahmdutt v. State', AIR 1950 All 483 (R), Ragnubar Dayal, J. said that a third person may be an interested party; that was by no means a decision by him that he was. The question really did not arise before my learned brother; what he had to decide was whether a third person had a right to oppose the transfer of a case by the District Magistrate. A person at whose instance a Court lodges a complaint for the offence of Section 193, Penal Code is not a party interested; see -- 'Ram Sarup v. Mahomed Mehr Dil Khan'. AIR 1930 Lah 873 (S). The Court is really the complainant. The position of that person is not materially different from the position of a person who makes a report to the police. Just as the Court files a complaint and the accused is prosecuted so also do the police file a report and the accused is prosecuted. Just as the police are moved by the person lodging the report so also is the Court moved

by the person against whom false evidence is given. If that person is held to be not a party interested, the person making a report to the police also is not a party interested. In -- 'Sardar Shah v. Gurdit Singh', AIR 1934 Lah 612 (T), and -- 'Sir Rajendra Narain v. Bhagaban Mahapatra', AIR 1947 Pat 166 (U), the maker of a first information report was held to be a party. In Sardar Shah's case, (T)'. Agha Haider, J. relied upon the cases of 'Jamuna Kantha Rai, (G)', Bagh Ali (J) and Bhikchand (L). In the case of 'Sir Rajendra Narain, (U)', he was held to be a party interested "in the special circumstances of the case". Therefore not much assistance is to be had from those cases.

11. In the case of 'Jamuna Kantha Rai, (G)', Jwala Prasad, J., stated that where there is a conflict between the public prosecutor and the private prosecutor in the matter of transfer of the case the right of the former as representing the Crown could naturally prevail and that whatever right the latter may have by virtue of his having commenced the prosecution, it is subordinated to that of the Crown and that when the Crown is opposing the transfer and does not apprehend any unfairness in the trial, the latter's application cannot be entertained. Either this statement is quoted with approval, or similar language is used, in the cases of 'Bhag Ali. (J)', 'Rajagopal, (M)', 'Abdul Naseer, (N)', and 'Dhana, (Q)'. In the cases of 'Bhik Chand, (L)', 'Sardar Shah, (T)', and 'Ghulam Rasul, (I)', an application for transfer of a Crown case at the instance of the person who had made the first information report was refused on the ground that there existed no exceptionally strong reason. The application was refused on the ground that it was opposed by the Public Prosecutor in the cases of 'Jamuna Kantha Rai, (G)', 'Abdul Naseer, (N)', 'Rajagopal, (M)', and 'Dhana, (Q)'. In the case of 'Abdul Naseer, (N)', Ganga Nath, J. did not go into the merits of the application at all. In 'Dhana's case, (Q)', the opposition of the Public Prosecutor was taken to prove that there was no apprehension of a fair and impartial trial. In the case of 'Sheodhari Rai, (P)', the application was granted, the Public Prosecutor not opposing. In the cases of 'Sardar Shah, (T)', and 'Sir Rajendra Narain, (U)', it was allowed even though opposed by the Public Prosecutor.

12. The law is not very clearly stated in some of these decisions and sometimes one is left in doubt whether the application for transfer was refused on the ground that it could not be entertained or on the ground that it had no merits. Sometimes the distinction between the maintainability of an application and its merits was not kept in mind. If a person who makes a report to the police is held to be a party interested he has a right to apply for transfer and his application must be granted, notwithstanding the Public Prosecutor's opposition, if he satisfied the Court that a fair and impartial trial cannot be held. If his application is to be dismissed it must be on the ground that there is no such apprehension and not merely on the ground that it is opposed by the Public Prosecutor. Surely an application by a party who has a right to make it cannot be rejected merely on the ground of the Public Prosecutor's opposition even if the Court is satisfied that a fair and impartial trial cannot be held. There is no warrant for dividing parties interested into two classes, one of superior parties interested or parties interested having a superior interest and the other of inferior parties interested or parties interested having an inferior right. The law makes no distinction between one party interested and another; if any party interested satisfied that there is a reasonable apprehension that a fair and impartial trial cannot be had in the court, he is entitled to have the case transferred and no question arises whether his right is subordinate to that of the Public Prosecutor or not. If the Public Prosecutor opposes his application, that is a fact to be taken into consideration in deciding whether there is a reasonable apprehension or not; it has no greater effect. If an application is dismissed,

without the merits being gone into, on the sole ground that it is opposed by the Public Prosecutor, it is nothing but laying down that the applicant had no right to apply, in other words, that he is not a party interested. I am not sure if in some of the decisions this was not the real reason, though the ostensible reason was that the application was opposed by the Public Prosecutor.

13. The word 'party' has been used in several other provisions in the Code. In Section 145(1) a Magistrate is required to make an order 'requiring the parties concerned' in the dispute; there the word 'parties' must necessarily mean persons. As so far there have been no proceedings in Court, it cannot possibly mean litigants in the Court. The word 'parties' goes with the word 'dispute'. The use of the words 'persons interested' in Section 145(5) shows that the legislature distinguishes between 'party interested' and 'person interested'. At the stage when that provision becomes applicable, proceedings have already commenced before the Magistrate and there are parties before him; the words 'any other person interested' are used with reference to persons other than the actual parties. Section 440 is to the effect that no party has any right to be heard before a revision Court; the word cannot mean anybody but the litigants before the Court. Section 556 prohibits a Judge or a Magistrate from trying any case in which 'he is a party or personally interested'; this provision clearly makes a distinction between 'party' and 'person interested'. The word 'party' is not used in the sense 'a person interested'. A case may be transferred under Section 526(1)(d) on the ground that the transfer will tend to the general convenience of the 'parties or witnesses'. This provision distinguishes between 'parties' and 'witnesses'; a witness is not considered to be a party. The status of a person who has been injured during the commission of a crime or who makes a report about it to the police is that of a witness only, unless he is the actual complainant before the Court. If a person merely on account of his interest becomes a party, the word 'interested' in the phrase 'party interested' would become redundant. That word is used because all parties are not necessarily interested in having the case transferred as the ground on which transfer is sought may not apply to all the parties arrayed on the same side.

14. I, therefore, hold that a person who makes a report, or is injured on account of the commission of the crime or is related to the person injured or killed, does not thereby become 'a party interested' within the meaning of Section 526(3). The applicant has, therefore, no right to apply for transfer and this Court cannot go into the merits. No enquiry into the alleged apprehension of fair and impartial trial can be made at all. His apprehension cannot be taken notice of by the Court.

15. The application is, therefore, dismissed.