

TRANSFER OF CRIMINAL MATTERS: IS IT ENSURING FAIR TRIAL?

Abstract

Transfer of a case for trial is often carried out with a view to ensure a fair trial. Whether mere transfer of a case can fully ensure that the “ends of justice are met”. This paper is an attempt to answer this question by studying the end results of various cases where the Supreme Court has accepted or rejected the plea of transfer. Though the transfer of case is a positive step for ensuring the ends of justice but such transfer may still not be enough to ensure public confidence in the trial. As many as eleven cases decided by various courts have been intensively analysed, this paper presents a different picture where the usual complexities of a trial like delay, intimidation to witnesses, witnesses turning hostile *etc.* were present. The paper concludes that mere transfer can only increase the chances of fair prosecution and justice but does not guarantee the same.

I Introduction

A FREE and fair trial is an important facet of article 21 of the Indian Constitution even as it forms the foundation of criminal jurisprudence.¹ Fairness of a trial can only be ensured if the process from investigation to conviction is not tainted with bias for or against the accused or the victim. The nature of the criminal justice system in India is such that the involvement of executive in the investigation and prosecution process paves the way for bias in the trial proceedings. The prosecutor, in most of the trials, is a government servant appointed by the local state government.² In criminal trials involving individuals from the ruling government or having a say in the ruling government, there emerges a high probability of bias in the investigation and prosecution of the case, thereby making a mockery of justice. In such cases, the chances of evidence being tampered with, and witnesses being intimidated and put in danger are extremely high. This demands that for fair adjudication an independent trial must be conducted in an environment which is free from such abuses and excesses. Section 406 and 407 of the Code of Criminal Procedure, 1973(CrPC) provides one such remedy which can be effectively used to ensure a free and fair trial. Both the sections provide for the transfer of a criminal matter from one trial court to another. High courts under section 407 can transfer matter from one district to another within their jurisdiction. On the other hand, section 406 empowers Supreme Court to transfer a

1 *K. Anbazagam v. Superintendent of Police*, AIR 2004 SC 524.

2 Code of Criminal Procedure, 1973, s. 24.

criminal matter from one trial court subordinate to a high court to another under a different high court.

Recently, on February 7, 2019 the Supreme Court of India decided to transfer the *Muzaffarpur shelter home* sexual abuse case to a Prevention of Children from Sexual Offences (POCSO) court in Saket, Delhi from Muzaffarpur, Bihar under this section.³ The prime accused in the case had close relations with an ex-cabinet minister who had resigned because of this controversy. When the order of transfer of trial from one state to another is given in such cases, the prima facie reaction is of relief as it is presumed that the transfer would result in a fairer decision. If the trial would have continued in the court which originally had the jurisdiction, the public would not have been confident in the fairness of such a trial as the case involved an accused who had an influence on the state machinery. This would have been a clear failure of the principle of natural justice which enshrines that “justice must not only be done but also seen to be done” therefore making such a transfer necessary.

The court makes such transfer when it is expedient for the ends of justice.⁴ But the concept of justice is not limited to the trial proceeding only; it rests on a fair investigation as well as prosecution too. This, in effect, raises the question of sufficiency of a mere transfer of criminal proceeding to a different jurisdiction given that the evidence on the basis of which the trial is to be conducted is collected by police and the prosecution is conducted by individuals who are under political control.

This article is an attempt to answer this question by studying the end results of various cases where the Supreme Court has accepted or rejected the plea of transfer. In this study, the author has only focused on cases transferred at the trial level *i.e.*, from one district to another under different high court. The author in the proceeding parts has first discussed the legal provisions and various factors based upon which the Supreme Court orders transfer of cases. Subsequently, the author has analyzed cases related to wrongs by police, corruption and other such cases where the Supreme Court considered the plea of transfer. In the fourth part, the author has made an overall analysis of end result of the cases studied and has suggested other factors for the courts to consider while accepting or rejecting the plea of transfer in a criminal case.

II Power to transfer cases: An overview of the legal provisions

The section 406 of the CrPC is the principle provision which empowers the Supreme Court to transfer a case from one trial court to another falling under jurisdiction of a different high court and also a case from one high court to another high court. The latter power is also provided under article 139A (2) of the Indian Constitution through which the Supreme Court can transfer case from one high court to another. Since,

3 *Nivedita Jha v. State of Bihar*, 2019(6) SCJ 605.

4 *Supra* note 2, s. 406.

Jammu and Kashmir does not come under the ambit of Indian Code of Criminal Procedure; the Supreme Court can still transfer a case out of Jammu and Kashmir to another state but only under article 142 of the Indian Constitution.⁵ Further section 407 of Cr PC gives power to high court to transfer a matter to a different court under its own jurisdiction. As has been already stated the author in this article has only focused on the power of Supreme Court to transfer cases at the trial level under section 406 of Cr PC and article 142 of the Indian constitution in case of Jammu and Kashmir.

Section 406 specifies that the power to transfer is to be exercised when it is 'expedient for the ends of justice'. This phrase provides very wide power to the Supreme Court on the basis of which the court can transfer a case. The most important factors which are considered while transferring the matter are the undermining public confidence in the trial⁶ and to prevent miscarriage of justice.⁷ Communal factors,⁸ lack of interest of public prosecutor because of change in government,⁹ residence of the majority witnesses¹⁰ and several other factors have also been considered by the court while deciding on a transfer of a particular case. The court in *Nabar Singh Yadav v. Union of India*,¹¹ laid down broad factors to determine the transfer like, the state machinery and prosecution "*working hand in glove with the accused*", probability of physical harm to the witness or the complainant, inconvenience burdened by the parties, communally surcharged atmosphere, and the involvement of hostile individuals in the case.¹²

The apprehensions while requesting the transfer citing the above mentioned factors have to be real and substantial which are ascertained by examining the surrounding circumstances of the matter. The facts of some cases maybe of such nature that regardless of the possibility of bias, a reasonable apprehension of the same becomes a ground for transfer.¹³

It is pertinent to mention that the transfer process itself can cause a lot of inconvenience to witnesses, victim, accused and the state. All of them would on transfer have to travel to the place where transfer is ordered when required, costing time and money for all the interested parties. The state from which the transfer is made has to bear the cost for all such expenses along with the fee of special prosecutor appointed in the

5 *Anita Khushwaha v. Pushap Sudan*, AIR 2016 SC 3506.

6 *Abdul Nazar Madani v. State of Tamil Nadu* 2000 CrLJ 3480.

7 *K. Anbhazagam v. Superintendent of Police*, AIR 2004 SC 524.

8 *G.X. Francis v. Banke Bihari Singh*, AIR 1958 SC 309.

9 *Supra* note 7.

10 *A.K.K. Nambiar v. Deshraj, District Superintendent of Police*, AIR 1973 SC 203.

11 (2011) 1 SCC 307.

12 (2011) 1 SCC 307.

13 *Gurcharan Das Chadha v. State of Rajasthan*, AIR 1966 SC 1418.

transferee court. The court bears in mind the convenience of parties while transferring the matter to another place¹⁴ as it did in a case by transferring the matter to a place where the majority of the witnesses resided.¹⁵

Since the interest of both the victim and the accused can be at jeopardy in an unfair trial a question arises as to who can claim transfer under this section. Section 406 (2) states that the transfer can be ordered on the application of either attorney general or of a party interested in the matter meaning the transfer can be requested by both accused as well as victim (or family). But the term party interested has a wider connotation and it include several other individuals except the victim and the accused. The party interested can be opposition leaders also, when the case is against a leader of the ruling government.¹⁶ At several instances the CBI has also requested transfer of case when it is conducting investigation in that matter.

III A study of supreme court cases

The phrase “ends of justice” has a wide meaning and the court has also developed nuanced interpretation of it in different cases. In this section the author has studied different types of cases where the Supreme Court has heard the transfer petition and has accepted or rejected the same. The section firstly deal with two broad categories *i.e.*, cases of wrongs done by police and also the cases of corruption. Further certain other cases have been dealt under the miscellaneous sub-section. The author has critically analyzed the decision of the Supreme Court and analyzed the final decision of that case.

Wrongs by police

The *Hashimpura massacre* occurred in the year 1987 in Hashimpura, Uttar Pradesh which lead to death of 42 Muslim men. The case was originally tried by the Ghaziabad District Court after the charge sheet was filed by the CB-CID (Crime Branch-Crime Investigation Department) in the year 1996. Following which the district court had issued as many as 23 warrants against the accused to no avail. There was delay in initiation of the trial and further the trial process may not have seemed fair as higher officers of the same force could have been implicated in the case. The Supreme Court in 2002 ordered the case of Hashimpura to be transferred to Tis Hazari Court in Delhi the interest of justice considering the various wrongs that had happened in the trial process. The High Court of Delhi in 2017 convicted 16 Provincial Armed Constabulary (PAC) personals, awarding them life sentences.

The second case is regarding the fake *encounter of Sobrabuddin* and his wife which occurred in the State of Gujarat in 2005 implicating several senior police officers and politicians of the then ruling state government. CBI petitioned the Supreme Court to transfer

14 *Abdul Nazar Madani v. State of T.N* (2000) 6 SCC 204.

15 *Mrudul M. Damle v. C. B.I.*, New Delhi: MANU/SC/0428/2012.

16 *K. Anbhazagam v. Superintendent of Police*, AIR 2004 SC 524.

the case. In this case the charge sheet filed by the police and the subsequent allocation of case to session's judge were done in a very hurried manner. CBI in the transfer petition had made allegations against one of the accused Amit Shah for running extortion racket in the state and he was also the then Home Minister of the state. On the petition of CBI, Supreme Court in 2012 transferred the case to a special CBI court in Mumbai stating that the transfer was being made to save the trial from undue stress and to avoid any possible misgivings in the minds of ordinary people.¹⁷ The court stated in clear terms that the decision was not a reflection on the competence or impartiality of state judiciary. The Mumbai CBI Court acquitted all the accused for lack of evidence in 2018.

In another encounter case in Uttarakhand,¹⁸ the CBI requested Supreme Court to transfer the matter for the reason that there was involvement of police officials in the case and several of the witnesses were being intimidated.¹⁹ Supreme Court in 2011 transferred this case to CBI court in Delhi from Dehradun.²⁰ The High Court of Delhi in 2018 sentenced seven accused police officials to life sentence and acquitted 10 other police officials who were convicted by the trial court.

Further in the *Bilkis Bano* case,²¹ a mob in post Godhra riots of 2002 killed 14 members of the family of Bilkis Bano and also had raped her. Her case was closed for lack of evidence by the magistrate in 2003 as police had cited several inconsistencies in her statement. After which with the help of National Human Rights Commission she was able to secure a CBI inquiry into the matter by an order of the Supreme Court. During that time she had to change her residence 20 times in two year because of various life threats. In 2004, Supreme Court transferred the *Bilkis Bano's* case to a special court in Mumbai.²² The High Court of Bombay in this case convicted the main accused as well as the police officials and doctors who were charged for tampering with the evidence.

In all of these cases there is either injustice because of police brutality or denial of justice because of involvement of police. In three out of these four cases the investigation was conducted by the CBI. In only one case *i.e.*, *Sohrabuddin* case the trial in Mumbai CBI court did not result in conviction as 92 out of 210 witnesses had turned hostile. It can be because of two reasons, one being that the previous statements

17 *CBI v. Amitbhai Shah*, Crimlnl appeal No. 1503 of 2012.

18 *7 Policemen Given Life Sentence In Dehradun Fake Encounter Case, 10 Freed*. Retrieved Feb. 25, 2019, Available at: <https://www.ndtv.com/india-news/7-cops-given-life-sentence-in-dehradun-fake-encounter-case-10-freed-1809280> (last visited on June 30, 2019).

19 *Ravinder Pal Singh v. Santosh Kumar* (2011) 4 SCC 746.

20 *Ibid.*

21 *Bilkis Bano Case: Supreme Court Questions Gujarat on Punishment for Guilty Cops, Doctors* (Oct. 23, 2017). Available at: Feb 25, 2019, from the wire: <https://thewire.in/communalism/bilkis-bano-case-timeline> (last visited on June 30, 2019).

22 *Bilkis Yakub Rasool v. Central Bureau of Investigation* (2010) 15 SCC 421.

made by the witnesses were not correct or because the witnesses were being pressurized to change their statements. The public confidence in such case of hostility of witnesses cannot be ensured simply by transfer of the case to another state. What is necessary along with such transfer is proper protection of witnesses as the matter involved several police officials as well as the former Home Minister of the Gujarat who is currently the Home Minister in the Union Government.

Corruption and impropriety

In *Jayalalitha Disproportionate Assets case* along with Jayalalitha, two others were charged under section 120-B of IPC and section 13(2) and 13(1) (e) of Prevention of Corruption Act, 1988 for accumulation of wealth disproportionate to their actual source of income. In the transfer petition it was mentioned that certain anomalies have emerged in the case. Several of the witnesses were changing their statements and the public prosecutor was not undertaking any effort to inquire if the witnesses were being pressurized. All of this was happening in the light of the change of the government as the party headed by the accused had come to power in the year 2001.²³ This case was transferred to Bangalore by the Supreme Court in 2013 after which the accused were convicted by trial court and also the Supreme Court in 2017.

In the *Ghaziabad Provident Fund scam*,²⁴ the CBI had charge sheeted several retired judges of High Court of Allahabad and Ghaziabad District Court. The case was being dealt by the Ghaziabad District Court itself. All these persons were previously working in the same court. The trial judge of Ghaziabad District Court dealing with this case had in past associated with the accused judges but the Supreme Court refused to transfer this matter to a court in Delhi on this ground.²⁵ The case has not been concluded as of now.

In another case *Prakash Singh Badal* and his son were charged under various sections of Prevention of Corruption Act, 1988 and IPC. The petitioner in their transfer petition had contended that the accused after coming to power in the state government were influencing the prosecution and witnesses related to the case. Certain witnesses were declared hostile by the prosecutor which the petitioner alleged was being done under the pressure of the new government. The Supreme Court dismissed the transfer petition filed by Amrinder Singh to transfer this case on the grounds that the trial was on last stages and great inconvenience will be caused to all the parties concerned.²⁶ The court

23 *K. Anbhazagam v. Superintendent of Police*, AIR 2004 SC 524.

24 PTI. (2013, November 27). *Multi-crore PF Scam: CBI court frames charges against 6 retired judges*. Retrieved February 25, 2019, from India Today: Available at: <https://www.indiatoday.in/india/north/story/pf-scam-cbi-court-frames-charges-against-6-retired-judges-218890-2013-11-27> (last visited on June 20, 2019).

25 *Nabar Singh Yadav v. Union of India* (2011) 1 SCC 307.

26 *Amrinder Singh v. Prakash Singh Badal* (2009) 6 SCC 260.

found no reason to believe that the trial judge would not be able to deal with the case objectively and address any wrong being committed during the trial. The argument of prosecution and state machinery working together was rejected by the court as there was no reasonable apprehension of the same. Later in the year 2010, the trial court in the matter acquitted both the accused.

In these three cases the accused who were charged for corruption were holding the position of power in the state machinery at that time or were previously holding such power (judges in case of *Ghaziabad PF scam*). The position of power generally gives a position to influence decisions in cases of such nature involving political leaders and judges and further raises a doubt in the trial process if not conducted in an environment outside the influence of such people.

The Supreme Court in both the *Prakash Singh Badal* and *Ghaziabad PF scam* case refused to transfer the matter to different states unlike in *Jayalitha* case. The court in *Ghaziabad PF scam* case failed to take into consideration that the past association still raised a reasonable apprehension in the mind of common public about the sanctity of the trial. In 2015, Advocate Prashant Bhushan in his letter addressed to the Chief Justice of High Court of Allahabad alleged an attempt to save the accused judges by the presiding CBI judge and the High Court of Allahabad. Further he requested the transfer of the CBI Court judge dealing with the case.²⁷

Similarly in the *Prakash Singh Badal* case,²⁸ the court failed to take into account that the accused were holding the highest executive authority in the state. It is pertinent to mention that in a situation like this the pressure on the judge dealing with such cases is high and there is at least a psychological influence on him which can taint his decision making capabilities. It would have been more appropriate to transfer the matter to serve the purpose of justice even if the matter was at the last stage of trial. In the *Jayalitha* case, the court had transferred the matter to Bangalore when there was change in the government and the situation was similar in the *Prakash Singh Badal* case as well, but the request in the latter was rejected simply because the trial was at the ending stage and it would have caused inconvenience to the concerned parties.

In both *Prakash Singh Badal* and *Ghaziabad PF scam* case the court failed to realize that despite the capabilities of the judges to deal with the case in a fair manner, the public will always doubt the final decision as the accused presently or in past were holding powerful positions and were capable to influence the decision of the trial

27 *Prashant Bhushan writes to Allahabad CJ and CJI Dattu seeking intervention in Ghaziabad PF Scam Case*; (2015, October 26). Available at, *livelaw*: <https://www.livelaw.in/prshant-bhushan-writes-to-allahabad-cj-and-cji-seeking-intervention-in-ghaziabad-pf-scam-case-read-the-letter/> (last visited on June 20, 2019).

28 *Supra* note 26.

court. This leads to the failure of the facet of natural justice that “justice must be seen to be done”.

Miscellaneous cases

In *Kathua rape* case, an 8 year old girl was raped and murdered.²⁹ Later in the charge sheet filed by the police it was stated that the motive of the rape was to dislodge the Muslim Bakarwal community from the area. Many of the lawyers from Kathua Bar Association protested the filing of the charge sheet and demanded a CBI inquiry into the matter. Other protests supporting the alleged rapists also emerged. The case was transferred to Pathankot Session Court in Punjab and was ordered to be fast tracked.³⁰ The order was made in May 2018, and ultimately six of the seven accused were convicted for the offence. The decision of the Supreme Court was necessary to provide effective prosecution free from public pressure which would not have been possible in the same district as even the Bar association was opposing the trial of the accused.³¹

In Ujjain, Madhya Pradesh, a professor was beaten to death³² in 2006 by the members of Akhil Bharatiya Vidhyarthi Parishad. At the trial stage, several of the witnesses turned hostile; allegedly due to coercion and threat. Several of the witnesses present at the time of the violence were police officers. The trial was transferred to Nagpur, but the six accused were acquitted nonetheless and the family of the victim made no further appeal in the matter. Even in the new trial the witnesses had turned hostile. A notable factor here is that the ruling government in Madhya Pradesh at the time of the crime and on the conclusion of the trial was same. Since the police officials who had turned hostile were key witnesses and the accused were from a group which had close associations with the ruling party, the trial even in another state could have been easily influenced since the police officials are under the executive branch of the state.

In another case in 2004 *Jayendra Saraswati Swamigal* filed transfer petition in the Supreme Court citing that the Tamil Nadu state government was creating hurdles and preventing him from ensuring effective defense in a case where he was arrested. Many of the

29 *Kathua rape victim was sexually assaulted, died of asphyxia: Doctors tell court*, Available at: Hindustan Times: <https://www.hindustantimes.com/india-news/kathua-rape-victim-was-sexually-assaulted-died-of-asphyxia-doctors-tell-court/story-4nOgLfG4v65R6ZAPJA93UI.html>. (last visited on June 20, 2019).

30 *Mohd. Akhtar v. State of J&K* 2018(9) SCALE 181.

31 *Kathua rape case: Jammu Bar Association calls for protest on Wednesday*. (2018, April 11). Available at: Feb 26, 2019, from Business Standard: https://www.business-standard.com/article/current-affairs/kathua-rape-case-jammu-bar-association-calls-for-protest-on-thursday-118041100455_1.html. (last visited on June 20, 2019).

32 *Two ABVP leaders arrested for Ujjain professor's murder*. (2006, Aug 31). Available at: Feb 25, 2019, from outlookindia: <https://www.outlookindia.com/newswire/story/two-abvp-leaders-arrested-for-ujjain-professors-murder/411432> (last visited on June 25, 2019).

journalists and leaders were arrested for opposing the arrest of the accused in this case. The case was transferred to Pondicherry by Supreme Court accepting the argument of interference of the state machinery in prosecution of the case. Finally in the year 2013 Jayendra Saraswati was acquitted of all the charges in 2013 by the Pondicherry trial court.

In a case regarding the prosecution of *Raghuraj Pratap Singh (alias Raja Bhayia)*, the accused was charged with the provisions of Prevention of Terrorism Act, 2002 and the state government was doing efforts to withdraw the same. One witness was killed already and other witnesses were afraid to speak against the accused all of which showed the non-seriousness of the state making a valid case for transfer. Moreover the accused was a minister in the state government which led the Supreme Court to decide that the matter be transferred to another court in Madhya Pradesh.³³

IV Analysis and suggestions

A total of 11 cases have been analyzed by the author in this paper. In 10 of these cases there is some form of adverse involvement of state machinery like that of police, ruling government, prosecution or even retired judicial officers. From these 11 cases, transfer was granted in nine of them. Out of these nine cases, seven have been concluded and the end result of five of these cases was in favor of the party which requested the transfer. In two of the cases the plea of transfer was rejected *i.e.*, in *Prakash Singh Badal* case and *Ghaziabad PF scam* case. The *Prakash Singh Badal* case resulted in acquittal of the accused. *Ghaziabad PF case* is still pending, but the author asserts that for ensuring public confidence in the trial and in the interest of justice the matter must have had been transferred to another court. Even the *Prakash Singh Badal* case which was at the end stage should have been transferred to another court as the accused were from ruling government which also causes damage to the public confidence in such trials. But the court stated that the transfer would have caused inconvenience to all the parties concerned in the matter including the witnesses. It can be seen in the case of Jayendra Saraswati, as to how state could misuse its power against a particular individual by controlling the prosecution and further arresting people for opposing its view. The case was rightly transferred by the Supreme Court.

Witness intimidation

In seven of the eleven cases discussed above, there is some form of an allegation of witness intimidation. Either the witnesses were turning hostile, changing statements or were being recalled twice for statement for no specific reason. In the *Raja Bhayia* case, a witness was allegedly killed by the accused. In all of these seven cases where witness intimidation was alleged the accused were in a position of power or they were

33 *S.N. Shukla v. State of U.P.* (2006) 1 SCC CrI. 366.

connected to the political party ruling in that state which makes the witness intimidation a possibility. Out of these seven cases, the transfer was ordered in six of them and conviction was ensured in only three of them. Two of these cases resulted in acquittal. One other case which was not transferred also resulted in acquittal. The case concerning Raja Bhayia was withdrawn by the state government.

An important consideration which the court can keep in mind while deciding the transfer of a case is the power relationship shared by the state with the accused as well as by the witnesses/victim with the accused. Then the court must ascertain whether the relationship between these two which can be adverse or beneficial, leads to apprehension of an unfair trial because of a possibility of influence. And if it does the court must consider transferring the matter to another state. Except that the court may take further actions like witness protection, ordering an independent probe or any other such measures for ensuring public confidence in the trial and non-partial decision making.

V Conclusion

Answering the question raised by the author in the beginning it is asserted that mere transfer of case cannot fully ensure that the “ends of justice are met”. Though the transfer of case is a positive step for ensuring the ends of justice but such transfer may still not be enough to ensure public confidence in the trial. The case of Hashimpura was transferred considering the inaction of the state machinery in the year 2002 and the High Court of Delhi convicted the accused only in 2018 *i.e.*, after 16 years of the transfer and 31 years of the incident which raises serious questions on the criminal justice system in India. Further in case of death of professor in Madhya Pradesh and encounter of Sohrabuddin, the witnesses had turned hostile and there were several allegations of intimidation which were reported.³⁴ Witnesses form an important component of a trial and if they are not given surety of protection in the cases involving powerful accused, then such transfer may also not result in a fair adjudication even if investigation is done by a body like CBI. It can be concluded that mere transfer can only increase the chances of fair prosecution and justice but does not guarantee the same.

G. S. Bajpai*

34 *Sohrabuddin Case: Key Witness Azam Khan Alleges Torture, Prays for Fresh Testimony*. Available at: Newsclick: <https://www.newsclick.in/sohrabuddin-case-key-witness-azam-khan-alleges-torture-prays-fresh-testimony> (last visited on June 30, 2019).

* Professor National Law University Delhi. The author acknowledges the contribution of Gursimran Singh, Lovely Professional University and an intern at Centre for Criminology and Victimology, NLU Delhi