

Court No. - 59

Case :- TRANSFER APPLICATION (CRIMINAL) No. - 317 of 2019

Applicant :- Devi Prasad

Opposite Party :- State Of U.P. And Anr.

Counsel for Applicant :- Krishna Kant Tiwari, Ashok Kumar Mishra

Counsel for Opposite Party :- G.A., Sheetala Prasad Pandey

Hon'ble Rajeev Misra, J.

1. Heard Mr. Ashok Kumar Mishra, learned counsel for applicant, learned A.G.A. representing opposite party no.1 and Mr. Sheetala Prasad Pandey, learned counsel appearing on behalf of opposite party no.2.

2. This transfer application has been filed by applicant-Devi Prasad seeking transfer of S.T. No. 177 of 2018 (Bhawani Prasad Bhatt & others) arising out of Case Crime No. 185 of 2018, under Sections 147, 148, 149, 302, 120B, 34 I.P.C., Police Station-Bhakhira, District-Sant Kabir Nagar pending in the Court of Additional District and Sessions Judge/FTC.-I, Sant Kabir Nagar to any other Court on account of the fact that the applicant has prejudice with the Court at Sant Kabir Nagar.

3. In paragraphs 15, 16 and 17 of the affidavit, the applicant has pleaded that he has prejudice with the Court at Sant Kabir Nagar by submitting that opposite party no.2 Surendra Kumar Dwivedi is a practicing lawyer. On account of aforesaid, applicant is unable to get proper legal assistance.

4. The averments made in paragraphs 15, 16 and 17 of the affidavit filed in support of the transfer application have been replied in paragraph 11 of the counter affidavit filed by opposite party no.2. But, there is no denial of the fact that opposite party no.2 is a practicing advocate at District Sant Kabir Nagar. Learned counsel for applicant has invited the attention of the Court to judgement of the Court in *Mohammad Ajmal Kasab @ Abu Mujahid Vs. State of Maharashtra reported in (2012) 9 SCC 1*, wherein following

has been observed in paragraph 434,484,487 and 488. For ready same are reproduced herein under:-

"434. Dealing with the right to legal assistance, Mr. Subramaniam submitted that the right to legal aid and the stage when the right comes into effect are to be found in Article 22(1) of the Constitution, which states that "no person who is arrested ... shall be denied the right to consult, and to be defended by, a legal practitioner of his choice". According to Mr. Subramaniam, Article 22(1) has thus two significant facets:

- i) The enablement of an arrested person to consult a legal practitioner of his choice;*
- ii) The right of an arrested person to be represented by a legal practitioner of his choice.*

484. We, therefore, have no hesitation in holding that the right to access to legal aid, to consult and to be defended by a legal practitioner, arises when a person arrested in connection with a cognizable offence is first produced before a magistrate. We, accordingly, hold that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced. We, accordingly, direct all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

487. Every accused unrepresented by a lawyer has to be provided a lawyer at the commencement of the trial, engaged to represent him during the entire course of the trial. Even if the accused does not ask for a lawyer or he remains silent, it is the Constitutional duty of the court to provide him with a lawyer before commencing the trial. Unless the accused voluntarily makes an informed decision and tells the court, in clear and unambiguous

words, that he does not want the assistance of any lawyer and would rather defend himself personally, the obligation to provide him with a lawyer at the commencement of the trial is absolute, and failure to do so would vitiate the trial and the resultant conviction and sentence, if any, given to the accused (see Suk Das v. UT of Arunachal Pradesh[95]).

488. But the failure to provide a lawyer to the accused at the pre-trial stage may not have the same consequence of vitiating the trial. It may have other consequences like making the delinquent magistrate liable to disciplinary proceedings, or giving the accused a right to claim compensation against the State for failing to provide him legal aid. But it would not vitiate the trial unless it is shown that failure to provide legal assistance at the pre-trial stage had resulted in some material prejudice to the accused in the course of the trial. That would have to be judged on the facts of each case."

5. The right to have proper legal assistance by an accused is now recognized as an established legal right. Since the opposite party no.2 is a practicing advocate at District-Sant Kabir Nagar and Basti therefore the apprehension expressed by applicant that he is unable to get proper legal assistance is found to well founded. Applicant has brought on record the evidence by way of annexures to show that counsels who had put in appearance on his behalf have subsequently withdrawn. Same is on record as annexures 5 and 6 to the affidavit. Further charges have been framed and therefore the direction made by apex court as noted above are clearly attached in the present case.

6. Justice should not only be done but also seen to be done. In view of this legal principle as well as fact and proposition of law as noted above, present transfer application succeeds and is liable to be allowed. Accordingly, same is allowed.

7. S.T. No. 177 of 2018 (Bhawani Prasad Bhatt & others) arising out of Case Crime No. 185 of 2018, under Sections 147, 148, 149, 302, 120B,34

I.P.C., Police Station-Bhakhira, District-Sant Kabir Nagar pending in the Court of Additional District and Sessions Judge/FTC.-I, Sant Kabir Nagar is transferred to District Court Gorakhpur.

8. Parties shall stand appear on 07.12.2020 before Sessions Judge, Gorakhpur.

Order Date :- 2.11.2020

YK