Usmangani Adambhai Vahora vs State Of Gujarat & Anr on 8 January, 2016

Equivalent citations: AIR 2016 SUPREME COURT 336, 2016 (3) SCC 370, AIR 2016 SC (CRIMINAL) 375, (2016) 1 BOMCR(CRI) 549, 2016 CALCRILR 3 25, (2016) 3 GUJ LR 1959, (2016) 1 SCALE 228, (2016) 93 ALLCRIC 459, (2016) 1 RECCRIR 731, (2016) 2 RAJ LW 1321, (2016) 1 JLJR 470, (2016) 1 CURCRIR 140, 2016 CRILR(SC MAH GUJ) 49, 2016 CRILR(SC&MP) 49, (2016) 121 CUT LT 591, (2016) 2 MADLW(CRI) 451, (2016) 1 ALLCRILR 659, (2016) 1 UC 198, (2016) 1 MAD LJ(CRI) 379, (2016) 1 CRILR(RAJ) 49, (2016) 158 ALLINDCAS 38 (SC), (2016) 63 OCR 589, (2016) 1 ALLCRIR 339, (2016) 2 PAT LJR 72, (2016) 2 CALLT 119, 2016 (2) SCC (CRI) 110, 2016 (1) KLT SN 127 (SC)

Author: Dipak Misra

Bench: Prafulla C. Pant, Dipak Misra

Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1592-1593 of 2015
(@ S.L.P. (Criminal) Nos. 9374-9375 of 2015)

Usmangani Adambhai Vahora …Appellant

Versus

State of Gujarat & Anr. …Respondents

J U D G M E N T

Dipak Misra, J.

The seminal issue that has emerged for consideration in these appeals is whether the High Court in exercise of jurisdiction under Article 227 of the Constitution of India is justified in quashing the order dated 14.08.2015 passed by the Principal Sessions Judge, Kheda at Nadiad in Criminal Miscellaneous Application No. 545 of 2015 arising from the Sessions Case No. 291 of 2003 instituted

for the offences punishable under Sections 147, 148, 149, 364A, 120B, 447, 342 and 506(2) of the Indian Penal Code (IPC) and further directing the learned Principal Sessions Judge to transfer the Sessions Case to any other court of the learned Additional Sessions Judge in the same Sessions Division from the court of the 3rd Additional Sessions Judge, Kheda.

2. Be it stated at the beginning, the High Court has posed two questions – one of which pertains to exercise of power under sub-section (1) of Section 408 of the Code of Criminal Procedure, 1973 (CrPC) by the Sessions Judge to transfer a case from one Additional Sessions Judge to any other Additional Sessions Judge in his Sessions Division after commencement of the trial, and the other, whether the case deserves to be transferred. Answering the first issue, the High Court has opined that the transfer petition preferred under Section 408 CrPC before the learned Principal Sessions Judge is maintainable. The view expressed by the High Court on this score appears to be correct and hence, we affirm the same. The principal issue warranting delineation is the justification for allowing application for transfer from the court where the trial was pending to the court of another learned Additional Sessions Judge.

3. The facts which are essential to be stated are that the 2nd respondent faced trial for the offences mentioned hereinbefore in Sessions Case No. 291 of 2003. After examination of 18 prosecution witnesses, the informant preferred an application under Section 319 CrPC for arraigning one Natubhai Maganbhai Edanwala as an accused in the sessions case. The said application was rejected by the learned trial judge vide order dated 18.05.2006. Aggrieved by the aforesaid rejection, the informant preferred Special Criminal Application No. 1444 of 2006 before the High Court which vide order dated 02.12.2011 rejected the same. The said order was assailed before this Court in Special Leave Petition (Criminal) No. 17262 of 2012 which was dismissed on 11.01.2013 with the observation that it would be open to the informant to file an appropriate application under Section 319 CrPC, if at the end of the examination of all the witnesses, some material is found to connect the person sought to be arraigned as an accused in the alleged crime. As the factual matrix would exposit, the informant filed another application under Section 319 CrPC after the examination of the prosecution witnesses Nos. 19 to 23 and the application was allowed. The newly arraigned accused preferred Special Criminal Application No. 1731 of 2013 before the High Court challenging the said order, and the High Court had stayed the same.

4. As the factual score would undrape on 31.07.2015 when the sessions trial was fixed before the learned 3rd Additional Sessions Judge, Kheda at Nadiad, as alleged, the second respondent was standing in the parking area meant for the four wheelers and at that time he could overhear certain conversation between the informant and his son that the trial would be surely taken up for hearing from the next date onwards and all the accused persons would definitely be convicted. As further alleged, the Presiding Officer said something regarding the trial which the accused correlated with the conversation he had overheard between the informant and his son. Under such circumstances, he filed Criminal Miscellaneous Application No. 545 of 2015 under Section 408 CrPC before the Principal Sessions Judge, Kheda for transfer of the sessions case to any other court in the same Sessions Division. The learned Principal Sessions Judges called for the remarks of the concerned Presiding Officer and, after taking into consideration the remarks and adverting to the position of law, rejected the application. The learned Principal Sessions Judge while rejecting the application

had observed that once the trial commenced, he had no jurisdiction to transfer the case in exercise of the power under Section 408 CrPC. As has been stated earlier, the High Court had unsettled the said view and we have no hesitation to say correctly so.

5. The High Court, as has been indicated earlier, has referred to the conversation between the parties and the impression of the accused. After narrating the same, the High Court has observed that the accused-petitioner definitely is in dilemma and whether to term his apprehension as reasonable or not, the result of the reaction of a hypersensitive mind is the question. Thereafter, the High Court has proceeded to observe that the learned trial Judge had not examined any witness; that all witnesses examined so far were examined by his predecessor in office; that the Presiding Officer himself had also not indicated his disinclination to hear the matter, and that apart, he had offered quite a stiff resistance to the plea of transfer as the same is revealed from his remarks forwarded to the Principal Sessions Judge. After so stating, the learned single Judge has held thus:-

> "...I am sure that the present Additional Sessions Judge would have acted in a true sense of a Judicial Officer. But nevertheless, to ensure that justice is not only done, but also seems to be done and in the peculiar facts of the case, I feel that it will be appropriate if the Principal Sessions Judge transfers the case to any other Additional Sessions Judge in the same Sessions Division. I make it abundantly clear that the transfer shall not be construed as casting any aspersions on the learned Additional Sessions Judge."

6. On a careful scrutiny of the order passed by the High Court, it is not clear whether the High Court has been convinced that the accused has any real apprehension or bias against the trial judge. However, the observations of the learned single Judge, as it seems to us, is fundamentally based on apprehension and to justify the same, he has referred to the remarks offered by the learned Additional Sessions Judge to the Sessions Judge when explanation was called for. First, we shall refer to the issue of apprehension. The apprehension is based on some kind of conversation between the informant and another that the accused persons shall be convicted. There is also an assertion that the trial judge is a convicting Judge and that is why, the High Court has observed that he is in dilemma.

7. So far as apprehension is concerned, it has to be one which would establish that justice will not be done. In this context, we may profitably refer to a passage from a three-Judge Bench decision in Gurcharan Dass Chadha v. State of Rajasthan[1], wherein it has been held:-

> "... The law with regard to transfer of cases is well-settled. A case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. A petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice.

> The Court has further to see whether the apprehension is reasonable or not. To judge of the reasonableness of the apprehension the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

8. This Court in Abdul Nazar Madani v. State of T.N.[2] has ruled that:-

> "...The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any court or even at any place, the appropriate court may transfer the case to another court where it feels that holding of fair and proper trial is conducive. No universal or hard-and-fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached 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."

9. In Captain Amarinder Singh v. Parkash Singh Badal and others[3], while dealing with an application for transfer petition preferred under Section 406 CrPC, a three-Judge Bench has opined that for transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It has also been observed therein that mere an allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. It is also required on the part of the Court to see whether the apprehension alleged is reasonable or not, for the apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension. In the said context, the Court has held thus:-

> "19. Assurance of a fair trial is the first imperative of the dispensation of justice. The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that the public confidence in the fairness of a trial would be seriously undermined, the aggrieved party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 CrPC.
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> 20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one."

10. In Lalu Prasad alias Lalu Prasad Yadav v. State of Jharkhand[4], the Court, repelling the submission that because some of the distantly related members were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, we think it appropriate to reproduce the following passage:-

> "Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-à-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."

11. The aforesaid passage, as we perceive, clearly lays emphasis on sustenance of majesty of law by all concerned. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice. [See : Nahar Singh Yadav and another v. Union of India and others[5]].

12. In the instant case, we are disposed to think that apprehension that has been stated is absolutely mercurial and cannot remotely be stated to be reasonable. The learned single Judge has taken an exception to the remarks given by the learned trial judge and also opined about non-examination of any witness by him. As far as the first aspect is concerned, no exception can be taken to it. The learned Sessions Judge, while hearing the application for transfer of the case, called for remarks of the learned trial judge, and in such a situation, he is required to give a reply and that he has done. He is not expected to accept the allegations made as regards his conduct and more so while nothing has been brought on record to substantiate the same. The High Court could not have deduced that he should have declined to conduct the trial. This kind of observation is absolute impermissible in law, for there is no acceptable reason on the part of the learned trial judge to show his disinclination. Solely because an accused has filed an application for transfer, he is not required to express his disinclination. He is required under law to do his duty. He has to perform his duty and not to succumb to the pressure put by the accused by making callous allegations. He is not expected to show unnecessary sensitivity to such allegations and recuse himself from the case. If this can be the foundation to transfer a case, it will bring anarchy in the adjudicatory process. The unscrupulous litigants will indulge themselves in court haunting. If they are allowed such room, they do not have to face the trial before a court in which they do not feel comfortable. The High Court has gravely erred in this regard. So far as the non-examination of the witnesses is concerned, as the factual score

would uncurtain, the matter had travelled to the High Court in revision assailing the order passed under Section 319 CrPC. Be that as it may, the High Court has not adverted to the issue who was seeking adjournment and what was the role of the learned trial judge. Grant of adjournment could have been dealt with by the High Court in a different manner. It has to be borne in mind that a judge who discharges his duty is bound to commit errors. The same have to be rectified. The accused has never moved the superior court seeking its intervention for speedy trial. The High Court has innovated a new kind of approach to transfer the case. The High Court should have kept in view the principles stated in K.P. Tiwari v. State of M.P.[6] which are to the following effect:-

> "... It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks—more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive."

13. Thus analysed, we are unable to sustain the order of transfer passed by the High Court. Consequently, the appeals are allowed in part. The finding recorded as regards the jurisdiction of the learned Sessions Judge is sustained, and as far as the direction to the Principal Sessions Judge to transfer the case from the 3rd Additional Sessions Judge to some other court being vulnerable and wholly unsustainable is set aside. The learned trial judge shall proceed with the trial and dispose of the same within six months.

.....J. [Dipak Misra] .....J. [Prafulla C. Pant] NEW DELHI JANUARY 8, 2016

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[1] AIR 1966 SC 1418
[2] (2000) 6 SCC 204
[3] (2009) 6 SCC 260
[4] (2013) 8 SCC 593
[5] (2011) 1 SCC 307
[6] 1994 Supp. (1) SCC 540
