

Nahar Singh Yadav & Anr vs Union Of India & Ors on 19 November, 2010

Equivalent citations: AIR 2011 SUPREME COURT 1549, 2011 (1) SCC 307, 2011 AIR SCW 325, AIR 2011 SC (CRIMINAL) 44, 2011 (1) SCC(CRI) 39, 2010 (12) SCALE 199, (2011) 1 KER LT 6, 2011 (1) CALCRILR 56, (2011) 2 MH LJ (CRI) 93, (2011) 1 JCR 45 (SC), (2010) 96 ALLINDCAS 1 (SC), 2011 (1) KER LJ 11 NOC, (2010) 12 SCALE 199, (2010) 71 ALLCRIC 940, (2011) 1 CURCRIR 63, (2010) 4 DLT(CRL) 879, (2011) 1 UC 94, (2011) 2 CGLJ 123, (2011) 48 OCR 105, (2011) 1 RECCRIR 120, (2011) 2 KCCR 845

Author: D.K. Jain

Bench: G.S. Singhvi, V.S. Sirpurkar, D.K. Jain

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) No. 12981 OF 2008

NAHAR SINGH YADAV & ANR.

--

PETITIONERS

VERSUS

UNION OF INDIA & ORS.

--

RESPONDENTS

ORDER

D.K. JAIN, J.:

1. The short question raised by the Central Bureau of Investigation (for short "the CBI"), Anti Corruption Branch, Ghaziabad in their affidavit dated 15th July 2010, for our consideration is whether or not the trial arising out of the chargesheet filed by the CBI in Case RC-

1(A)/2008/CBI/ACB/Ghaziabad and the local police, Ghaziabad in Case Crime No.152/2008 PS Kavi Nagar, Ghaziabad deserves to be transferred from the Court of Special Judge, CBI at Ghaziabad

to some other court of competent jurisdiction, preferably at Delhi under the jurisdiction of the High Court of Delhi, with a direction to the Trial Court to conduct the trial of the case on a day to day basis, and to complete it within a period of two years.

2. Since the case, commonly known as "the Ghaziabad P.F. Scam", giving rise to the afore-stated prayer, involves violation of the standards of judicial behaviour, which is expected to be of the highest order, be it on or off the Bench, we feel concerned by the alleged events and have given our anxious consideration to the issue raised. In order to appreciate the controversy, a few material facts may be noticed. These are:

Pursuant to and in furtherance of the findings of the Vigilance Department of the High Court of Judicature at Allahabad and subsequent authorisation given by the High Court, Case Crime No.152/2008 under Sections 409, 420, 467, 468, 471, 477-A, 120-B of the Indian Penal Code, 1860 (for short "the IPC") and Sections 8, 9, 13(2) read with Sections 13(1)(d) and 14 of the Prevention of Corruption Act, 1988 (for short "the Act") was registered at PS Kavi Nagar, Ghaziabad on the written complaint of Smt. Rama Jain, Special Judge and Vigilance Officer, District Court, Ghaziabad on 15th February 2008 against one late Ashutosh Asthana, the then Central Nazir, District Court, Ghaziabad and 82 other accused persons which included 13 Class-III employees, 30 Class-IV employees of District Court, Ghaziabad and 39 outsiders. It was alleged that late Ashutosh Asthana in collusion with other accused named in the FIR fraudulently withdrew huge sums of money in the name of GPF of Class-IV employees of District Court, Ghaziabad.

Subsequently, the present special leave petition was filed with a request to transfer the investigation of Case Crime No.152 of 2008, PS Kavi Nagar, Ghaziabad to the CBI. During pendency of the proceedings, Government of Uttar Pradesh issued a Notification dated 10th September 2008, under Section 6 of the Delhi Special Police Establishment Act, 1946 (for short "the DSPE Act") for the transfer of above mentioned case to the CBI, which was also placed before this Court for consideration. Vide order dated 23rd September 2008, this Court transferred the investigation in the said case to CBI, inter alia, observing that "It is made clear that though we have directed the matters to be listed after three months, the CBI, shall be free to file the final report or chargesheet, as the case may be at an earlier point of time and to proceed thereafter in accordance with law. The court before which the final report or chargesheet is filed shall deal with the report or chargesheet, as the case may be, as required in law." In view of the aforesaid order of this Court, the instant case was registered by the Anti Corruption Branch, CBI, Ghaziabad as Case RC-

1(A)/2008/CBI/ACB/Ghaziabad against late Ashutosh Asthana and 82 other accused persons on 1st October 2008.

3. The CBI filed periodical status reports in this Court with regard to the progress made in the investigations from time to time. Ultimately, the final report was filed by the CBI on 30th July 2010.

According to the final report, the investigations had revealed that during the period 2001- 2008, late Ashutosh Asthana while working as Bill Clerk and Central Nazir, District Court, Ghaziabad, by abusing his official position as public servant entered into a criminal conspiracy with 6 District Judges/Incharge District Judge and 71 others with the intent to cheat the District Courts, Ghaziabad/Government of U.P., fraudulently and dishonestly withdrew over `6 Crores from the District Treasury as GPF withdrawals, creating fake/forged documents for withdrawing money in the name of GPF of Class-IV employees using them as genuine, thereby causing a loss of over `6 Crores to the Government Exchequer and corresponding gains to themselves. According to the report, a chargesheet under Section 120-B read with Sections 420, 467, 468 and 471 of the IPC and Section 13(2) read with Section 13(1)(d) of the Act against accused persons, as named in the chargesheet, has been filed in the Court of Special Judge, CBI, Ghaziabad on 3rd July 2010.

4. In the affidavit under consideration, filed by the CBI, it is stated that there is an immediate need to transfer the trial of the case to any other place outside the State of U.P., preferably Delhi, for the following reasons:

(i) Chargesheet has been filed against 6 former District Judges of Ghaziabad, 3 of whom were later elevated as Judges of the Allahabad High Court and 48 Class-III and Class-IV employees of District Court, Ghaziabad. All these persons and their close associates have been working in the District Court, Ghaziabad for many years and have close contacts with various Judges and Magistrates, who remained posted in Ghaziabad and other Districts of U.P.;

(ii) The Special Judge, CBI, in whose court, chargesheet has been filed, had also worked with/under some of the chargesheeted judicial officers in the past;

(iii) Smt. Rama Jain, former Special Judge, CBI, Ghaziabad is the complainant in the case and is currently serving as Additional District Judge, District Farrukhabad, U.P.;

(iv) 13 Judicial Officers and more than 25 employees of District Court, Ghaziabad have been cited as prosecution witnesses in the case, whose testimony would be crucial to establish the criminal cases against the chargesheeted accused persons.

(v) The court of Special Judge, CBI, Ghaziabad is already over-burdened with the trial of about 175 cases including the sensitive Nithari killings cases, which are being tried on a day to day basis on the directions of Allahabad High Court.

5. Subsequently, another affidavit was filed by the CBI, pointing out certain subsequent developments, warranting transfer of the trial from Ghaziabad.

6. Vide order dated 4th August 2010, notice was issued to all the accused named in the chargesheet to show cause as to why the trial should not be transferred from the Court of Special Judge, CBI at Ghaziabad to some other competent court, preferably under the jurisdiction of the Delhi High Court. In response, affidavits have been filed on behalf of accused Nos.1,4,5,6,8,15,19,20,55 and some other

accused. All the named accused have objected to the transfer of the trial from Ghaziabad to any other place on diverse grounds.

7. We have heard Mr. G.E. Vahanvati, learned Attorney General appearing for the CBI and learned counsel appearing on behalf of the objectors - accused at some length.

8. Mr. G.E. Vahanvati, learned Attorney General, submitted that it is a settled principle that justice should not just be done, but should also be seen as being done, and in view of the fact that some of the named accused happen to be ex-judges/administrative judges, there would be reasonable apprehension in the mind of the public at large that the trial judge, being their former colleague, may be biased in favour of the accused and, therefore, the peculiar circumstances of the case warrant that in the interests of justice the trial be shifted to a neutral venue. Learned counsel further submitted that the paramount consideration which should weigh with the Court while considering an application for transfer is that public's faith in the judiciary should be maintained, and given the gravity of the allegations, in the present case, it would be expedient to transfer the trial to a Special Judge in Delhi.

9. Mr. Prashant Bhushan, learned counsel appearing on behalf of the petitioners (in SLP (C) No. 12981 of 2008), contended that mere inconvenience of the accused cannot be the ground for rejecting the application for transfer, especially in a case like the present one, where there is a serious apprehension that the trial may not be free and fair because of the past association between the accused, witnesses and the trial judge.

10. Per contra, learned counsel appearing on behalf of some of the accused contended that Section 406(2) of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C.") provides that an application for transfer can be moved only by an interested party, and therefore, the CBI which is the investigating agency cannot be said to be an interested party within the meaning of the said provision and entitled to move such an application for transfer of the trial. Commending us to the decision of this Court in A.R. Antulay Vs. R.S. Nayak & Anr.¹, learned counsel contended that the power to enlarge the jurisdiction of a Special Judge under Section 4 of the Act is legislative in nature, and therefore, an application under Section 406 of the Cr.P.C. is misconceived. It was next contended that none of the named accused are holding a judicial office, and therefore, there is no reason to believe that they will influence the witnesses, especially when 13 witnesses are themselves judicial officers. It was argued that if the sole ground for transfer is the fact that the witnesses might be influenced because of the past status of some of the accused, the location of the trial has no bearing in that regard. It was stressed that transfer of trial would cause great hardship to the accused persons, as they would have to re-locate themselves to Delhi, far away from (1988) 2 SCC 602 Lucknow or Allahabad, where they are residing after retirement and engage new counsel for their defence.

11. Mr. Vishwajit Singh, learned counsel, appearing for 34 Class III and IV employees who have been named as accused, contended that the transfer of trial would cause immense hardship to the accused, who would not only have to travel long distances but will also have to engage expensive lawyers in Delhi. Learned counsel also contended that the CBI has not produced any evidence, much

less credible material in support of its apprehension that there would be a miscarriage of justice if the trial is held at Ghaziabad.

12. Before advertng to the main issue, viz. whether it would be desirable to transfer the trial from Ghaziabad, we shall deal with the preliminary objection raised on behalf of some of the accused about the locus standi of the CBI in preferring the application for transfer of trial. In order to appreciate the contention of the objectors-accused persons, in relation to the capacity of the CBI to move an application for transfer of the instant case, it would be expedient to refer to Section 6 of the DSPE Act, which reads as:

"6. Consent of State Government to exercise of powers and jurisdiction. Nothing contained in Section 5 shall be deemed to enable any member of the Delhi Special Police Establishment to exercise powers and jurisdiction in any area in a State, not being a Union Territory or Railway area, without the consent of the Government of that State."

13. It is manifest that by operation of Section 6 of the DSPE Act, once a State Government issues notification transferring the investigation to the CBI, for all intents and purposes, the CBI is entitled to exercise the same powers as the State police, in relation to the investigation transferred to it. As a necessary corollary, in light of the current structure and status of the CBI, it is manifest that the CBI steps into and assumes the role of the prosecuting agency for that particular case.

14. Section 406(2) of the Cr.P.C. provides that the Supreme Court may exercise power under sub-section (1) thereof only on an application in that behalf by either the Attorney General for India or the Advocate General of a State or a party interested.

15. A criminal trial is a judicial examination of evidence with the object of punishing the offenders on a proper proof of relevant facts, the core question being the guilt or innocence of the accused. Given the pivotal role accorded to the prosecuting agency in a criminal trial, we are unable to hold that the CBI is not an interested party for the purposes of Section 406(2) of the Cr.P.C.

16. We are of the opinion that once a notification has been issued by a State Government under Section 6 of the DSPE Act, the CBI assumes the role of an investigating agency and as afore-stated the CBI is also invested with the role of the prosecuting agency in relation to that particular case, and therefore, it is entitled to move an application under Section 406(2) of the Cr.P.C. Accordingly, the preliminary objection is rejected.

17. Reverting to the main issue, a true and fair trial is sine qua non of Article 21 of the Constitution, which declares that no person shall be deprived of his "life" or "personal liberty" except according to the procedure established by law. It needs no emphasis that a criminal trial, which may result in depriving a person of not only his personal liberty but also his life has to be unbiased, and without any prejudice for or against the accused. An impartial and uninfluenced trial is the fundamental requirement of a fair trial, the first and the foremost imperative of the criminal justice delivery system. If a criminal trial is not free and fair, the criminal justice system would undoubtedly be at

stake, eroding the confidence of a common man in the system, which would not augur well for the society at large. Therefore, as and when it is shown that the public confidence in the fairness of a particular trial is likely to be seriously undermined, for any reason whatsoever, Section 406 of the Cr.P.C. empowers this Court to transfer any case or appeal from one High Court to another High Court or from one criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction subordinate to another High Court, to meet the ends of justice. It is, however, the trite law that power under Section 406 of the Cr.P.C. has to be construed strictly and is to be exercised sparingly and with great circumspection. It needs little emphasis that a prayer for transfer should be allowed only when there is a well-substantiated apprehension that justice will not be dispensed impartially, objectively and without any bias. In the absence of any material demonstrating such apprehension, this Court will not entertain application for transfer of a trial, as any transfer of trial from one State to another implicitly reflects upon the credibility of not only the entire State judiciary but also the prosecuting agency, which would include the public prosecutors as well.

18. In *Zahira Habibulla H. Sheikh Vs. State of Gujarat & Ors.*², while explaining the import of the expression "fair trial", this Court had observed that:

"Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is (2004) 4 SCC 158 eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

19. In *Maneka Sanjay Gandhi & Anr. Vs. Rani Jethmalani*³, speaking for a bench of three learned Judges of this Court, V.R. Krishna Iyer, J. said:

"Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

20. In *Abdul Nazar Madani Vs. State of T.N. & Anr.*⁴, dealing with a similar application, this Court had echoed the following views:

"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 (1979) 4 SCC 167 (2000) 6 SCC 204 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."

21. In *K. Anbazhagan Vs. Superintendent of Police & Ors.*⁵, this Court had an occasion to deal with the prayer for transfer of a criminal trial from Tamil Nadu to another State mainly on the ground of apprehension of political interference in the trial. While finally directing the transfer of the case to the State of Karnataka, the Court observed thus:

"Free and fair trial is sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the mind of the petitioner."

(2004) 3 SCC 767

22. Recently, in *Captain Amarinder Singh Vs. Parkash Singh Badal & Ors.*⁶, while dealing with two transfer applications preferred under Section 406 of the Cr.P.C. on the ground that with the change in State Government, the trial was suffering setback due to the influence of the new Chief Minister as also the lack of interest by the Public Prosecutor, P. Sathasivam, J., speaking for a three-judge Bench has observed thus:

"18. For a 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 is one of the principles of administration of justice that justice should not only be done but it should be seen to be done. On the other hand, mere allegations that there is apprehension that justice will not be done in a given case does not suffice. In other words, the court has further to see whether the apprehension alleged is reasonable or not. The apprehension must not only be entertained but must appear to the court to be a reasonable

apprehension.

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.

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.

(2009) 6 SCC 260 The apprehension must appear to the court to be a reasonable one."

23. In R. Balakrishna Pillai Vs. State of Kerala⁷, while rejecting a prayer for transfer which was made on the ground that one of the Judges hearing the appeal had previously appeared as an advocate in a commission enquiring into an allegation of misconduct against the petitioner in another matter, this had Court observed as under:

"The charges against him are altogether for a different case not connected with the rectification work of Edamalayar Project. Secondly, a Judge while practising as an advocate might have appeared in a number of cases, but that would not mean that he would have any personal interest or connection with the said matters or with persons involved therein and would be biased towards them. Therefore, it would be difficult to presume or to draw an inference that the learned Judge, because of assisting the Commission of Inquiry as an advocate in a different matter, would have bias or prejudice against the petitioner and would not render justice in accordance with law. Acceptance of such contention would seriously undermine the independence and stern stuff of the Judges."

24. Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 of the Cr.P.C. should be exercised, it is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on an analysis of the decisions of this Court that an order of transfer of trial is not to be passed as a matter of routine or (2000) 7 SCC 129 merely because an interested party has expressed some apprehension about the proper conduct of a trial. This power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. Some of the broad factors which could be kept in mind while considering an application for transfer of the trial are:-

- (i) when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution;
- (ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;
- (iii) comparative inconvenience and hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State Exchequer in making payment of travelling and other expenses of the official and non-official witnesses;
- (iv) a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and
- (v) existence of some material from which it can be inferred that the some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice.

25. Having considered the rival claims of both the parties on the touchstone of the afore-stated broad parameters, we are of the view that the apprehension entertained by the CBI that the trial of the case at Ghaziabad may not be fair, resulting in miscarriage of justice, is misplaced and cannot be accepted. From the material on record, we are unable to draw any inference of a reasonable apprehension of bias nor do we think that an apprehension based on a bald allegation that since the trial judge and some of the named accused had been close associates at some point of time and that some of the witnesses are judicial officers, the trial at Ghaziabad would be biased and not fair, undermining the confidence of the public in the system. While it is true that judges are human beings, not automatons but it is imperative for a judicial officer, in whatever capacity he may be functioning, that he must act with the belief that he is not to be guided by any factor other than to ensure that he shall render a free and fair decision, which according to his conscience is the right one on the basis of materials placed before him. There is no exception to this imperative. Therefore, we are not disposed to believe that either the witnesses or the Special Judge will get influenced in favour of the accused merely because some of them happen to be their former colleagues. As already stated, acceptance of such allegation, without something more substantial, seriously undermines the credibility and the independence of the entire judiciary of a State. Accordingly, we outrightly reject this ground urged in support of the prayer for transfer of trial from Ghaziabad.

26. As regards the plea that the Court of Special Judge, CBI, Ghaziabad is already heavily over-burdened, in our opinion, that is again not a ground for transfer of trial. If at all the said Court is over burdened, it will be open to the High Court to request the State Government to create another Court of a Special Judge at Ghaziabad and we are confident that having regard to the nature of the case and the serious concern already shown by the State Government by issuing Notification dated 10th September 2008 promptly and expeditiously, the State Government will take appropriate

steps in that behalf so that the guilty are brought to book at the earliest not only in this case but in other sensitive trials, stated to be pending in that Court, as well.

27. For the afore-stated reasons, as at present, we do not find any merit in the request of the CBI for transfer of the trial from Ghaziabad to any other place. Accordingly, the prayer is declined. The Trial Court is directed to proceed with the case expeditiously.

..... (D.K. JAIN, J.) (V.S. SIRPURKAR, J.)
..... (G.S. SINGHVI, J.) NEW DELHI;

NOVEMBER 19, 2010.