

A AFJAL ALI SHA @ ABJAL SHAUKAT SHA

v.

STATE OF WEST BENGAL & ORS.

(Transfer Petition (Criminal) No. 409 of 2021)

B MARCH 17, 2023

**[SURYA KANT AND J. K. MAHESHWARI, JJ.]**

*Code of Criminal Procedure, 1973 – ss. 321, 406 – Constitution of India – Art. 139A – Supreme Court Rules, 2013 – Or. 39 – Petitioner-brother of deceased sought transfer of the criminal trial pending in West Bengal to Assam – Victim-deceased was shot dead by unknown persons – Respondents-accused were charged u/s. 302 r/w s.120B of the IPC and u/ss. 25 and 27 of the Arms Act 1959 – Charge-sheet was filed – Trial commenced – Respondent no.2 (main accused) was in the custody – During pendency of trial, a notification issued by the State of West Bengal directing the Public Prosecutor to apply u/s.321 of Cr.P.C. and withdraw proceedings against respondents subject to consent of trial Court – Notification challenged before the High Court – Pursuant to the direction of the State, Public Prosecutor moved application before the trial Court for withdrawal of the prosecution case – This application was taken up by the Link Judge presiding in the trial Court, despite case was listed for evidence – Link Judge was informed regarding the challenge to the notification in the High Court, regardless thereto, he heard the application and allowed the same – Respondents were acquitted – De-facto complainant filed writ petition before the Single Judge of the High Court, which set aside the notification of the State directing withdrawal of the case – Division Bench set aside the order and remanded the matter for fresh adjudication – Single Judge held that order of the Link Judge would not be acted upon and respondent no.2 was not be released from custody – Meanwhile, trial proceeded – Petitioner filed application to declare the de-facto complainant hostile – However, the said application was rejected – Petitioner filed transfer petition – Petitioner alleged multiple abnormalities during the trial, such as change of Public Prosecutor four times and harassment meted out to the prosecution witnesses and relatives of the deceased – Held:*

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*No legal necessity to transfer the trial outside the State of West Bengal – More than 90 witnesses, most of them Bengali speaking are yet to be examined – Transfer may cause serious impediment in the deposition of those witnesses and some of them may be reluctant to travel to a far away place – However, considering all facts and circumstances, following directions issued: (i) FIR No.495/2019 registered transferred from the Court of Additional Session Judge, 3<sup>rd</sup> Court, Tamluk, Purba Medinipur, West Bengal to the Court of Chief Judge, City Sessions Court at Calcutta; (ii) Trial to be conducted by the Chief Judge, City Sessions Court and case not to be transferred to Additional Sessions Judge; (iii) Trial to be taken on weekly basis; (iv) State directed to appoint a Special Public Prosecutor on the recommendations of the Chief Judge, City Sessions Court with prior approval of the High Court; (v) Wife of deceased and petitioner and other crucial prosecution witnesses to be provided with adequate security; (vi) De-facto complainant to be cross examined by the Special Public Prosecutor; (vii) Respondent no.2 or any other accused who are in custody to be transferred to Central Jail at Calcutta; (viii) Respondent no.2 not to be enlarged on bail till the conclusion of trial save and except by the High Court; (ix) Portfolio Judge of the High Court to monitor and supervise the trial proceedings.*

*Code of Criminal Procedure, 1973 – s. 406 – The power of transfer under Section 406, CrPC is to be exercised sparingly and only when justice is apparently in grave peril and therefore can be allowed only in exceptional cases considering the fact that transfers may cast unnecessary aspersions on the State Judiciary and the prosecution agency – Further the convenience of parties and witnesses as well as the language spoken by them are also relevant factors when deciding a transfer petition.*

**Issuing directions, the Court**

**HELD: 1. Section 406(2) of the CrPC provides that the Supreme Court may transfer a case “only on the application of the Attorney -General of India or of a party interested”. Considering the apt and expansive interpretation of phrase ‘party interested’ under Section 406(2) of the CrPC, it is held that the Petitioner, being the real brother of the Deceased, is vitally interested in a fair trial so that the Deceased and his family gets**

A justice. The Respondents’ challenge to the *locus standi* of the Petitioner is thus rejected. [Paras 22, 24][1106-B-C, G]

2. It has by now been well established that a well-founded apprehension that justice will not be done is a prerequisite for transfer of the case. Tracing the power of transfer of a case, we are reminded of Lord Hewart’s dictum in *Rex v. Sussex Justices* stating that “It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done”. The right to a fair trial is a fundamental right under Article 21 of the Constitution of India and its importance cannot be emphasised enough. However, to obtain the transfer of a case, the Petitioner is required to show circumstances from which it can be inferred that he entertains a reasonable apprehension. This apprehension cannot be imaginary and cannot be a mere allegation. The power of transfer under Section 406, CrPC is to be exercised sparingly and only when justice is apparently in grave peril. This Court has allowed transfers only in exceptional cases considering the fact that transfers may cast unnecessary aspersions on the State Judiciary and the prosecution agency. [Paras 25, 26, 27][1107-A-E]

3. The convenience of parties and witnesses as well as the language spoken by them are also relevant factors when deciding a transfer petition, as has been noted by this Court in a catena of judgments. In some of the recent decisions including in *Neelam Pandey v. Rahul Shukla*, this Court has viewed that transfer of a criminal case from one state to another implicitly reflects upon credibility of not only the State Judiciary but also of the prosecution agency. [Paras 31, 32][1109-C-D]

4. There is no legal necessity to transfer the trial outside the State of West Bengal and the apprehensions of the Petitioner, some of which are indeed genuine, can be effectively redressed by issuing appropriate directions. We say so for the reason that more than 90 witnesses, most of whom are Bengali speaking, are yet to be examined. The transfer of trial to any other neighbouring state will cause serious impediment in the deposition of those witnesses and some of them might be reluctant

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to travel to a far away place and, thus, the case of the Prosecution will be severely prejudiced. So long as the High Court and District Judiciary are ensuring the fairness in trial proceedings within their jurisdictional framework, we are not inclined to accept that the victim's family will not get fair justice, if the trial is held in the State of West Bengal. [Para 35][1110-D-F]

5. Considering all the facts and circumstances, this Court deems it appropriate to dispose of this transfer petition in following terms:- (i) Criminal Trial bearing ST No. 1 (03) of 2020 arising out of FIR No. 495/2019 registered at Police Station Panskura, District Purba Medinipur is ordered to be transferred from the Court of Additional Sessions Judge, 3rd Court, Tamluk, Purba Medinipur, West Bengal to the Court of Chief Judge, City Sessions Court at Calcutta; (ii) The trial shall be conducted by the Chief Judge, City Sessions Court and he shall not entrust the case to any other Additional Sessions Judge; (iii) The Chief Judge, City Sessions Court shall endeavour to take up the trial on a weekly basis and shall make an effort to conclude the same within a period of six months; (iv) The State of West Bengal is directed to appoint a Special Public Prosecutor on the recommendations of the Chief Judge, City Sessions Court, Calcutta with the prior approval of the High Court. This exercise shall be completed within two weeks; (v) The wife of the Deceased, the Petitioner and other crucial prosecution witnesses shall be provided adequate security. The State of West Bengal is directed to ensure that no harm is caused to the life and liberty of the witnesses and no direct or indirect attempt is made by Respondent No. 2 or his co-accused persons or anyone on their behalf to influence, frighten or threaten the witnesses; (vi) The De-facto Complainant who is also stated to be the eyewitness and has allegedly resiled from his version recorded during the examination-in-chief, shall be subjected to cross-examination by the Special Public Prosecutor, for which the advocate engaged by the Petitioner may provide assistance to the learned Special Public Prosecutor; (vii) Respondent No. 2 or any other accused who are in custody shall be transferred forthwith to the Central Jail at Calcutta; (viii) Respondent No. 2, having regard to his criminal antecedents, as well as other accused who are in custody,

A shall not be enlarged on bail till the conclusion of trial save and except by the High Court; (ix) The Learned Portfolio Judge of the Calcutta High Court is requested to regularly monitor and supervise the trial proceedings in terms of the directions issued hereinabove. [Para 36][1110-G-H; 1111-A-G]

B *K. Anbazhagan v. State of Karnataka* (2015) 6 SCC 86 : [2015] 7 SCR 355; *Amarinder Singh v. Parkash Singh Badal* (2009) 6 SCC 260 : [2009] 9 SCR 194; *Nahar Singh Yadav v. Union of India* (2011) 1 SCC 307 : [2010] 13 SCR 851 – relied on.

C *Surendra Pratap Singh v. State of Uttar Pradesh* (2010) 9 SCC 475 : [2010] 11 SCR 909; *Abdul Nazar Madani v. State of Tamil Nadu* (2000) 6 SCC 204 : [2000] 3 SCR 1028; *Sri Jayendra Saraswathy Swamigal (II) v. State of T. N.* (2005) 8 SCC 771 : [2005] 4 Suppl. SCR 556; *Harita Sunil Parab v. State (NCT of Delhi)* (2018) 6 SCC 358 : [2018] 3 SCR 732; *Swaati Nirkhi v. State (NCT of Delhi)* 2021 SCC Online SC 202; *Gurcharan Dass Chadha v. State of Rajasthan* [1966] 2 SCR 678; *Ashish Chandra v. Asha Kumari* (2012) 1 SCC 680 : [2011] 13 SCR 417; *K. Anbazhagan v. Superintendent of Police* (2004) 3 SCC 767 : [2003] 5 Suppl. SCR 610; *Zahira Habibullah Sheikh v. State of Gujarat* (2006) 3 SCC 374 : [2006] 2 SCR 1081; *Maneka Sanjay Gandhi v. Rani Jethmalani* (1979) 4 SCC 167 : [1979] 2 SCR 378; *R. Balakrishna Pillai v. State of Kerala* (2000) 7 SCC 129 : [2000] 3 Suppl. SCR 26; *Neelam Pandey v. Rahul Shukla Transfer Petition (Crl) No. 298 of 2020*, 22 February 2023 – referred to.

D *Rex v. Sussex Justices* [1924] 1 KB 256 – referred to.

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#### G Case Law Reference

[2010] 11 SCR 909 referred to Para 17 (ix)

[2015] 7 SCR 355 relied on Para 17 (ix)

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[2000] 3 SCR 1028	referred to	Para 19 (vii), 31	A
[2005] 4 Suppl. SCR 556	referred to	Para 19 (vii), 31	
[2018] 3 SCR 732	referred to	Para 19 (vii), 31	
[2010] 13 SCR 851	referred on	Para 19 (viii), 27 & 29	B
[1966] 2 SCR 678	referred to	Para 19 (viii)	
[2009] 9 SCR 194	referred on	Para 19 (viii), 26 & 28	
[2011] 13 SCR 417	referred to	Para 19 (ix)	
[2003] 5 Suppl. SCR 610	referred to	Para 23	C
[2006] 2 SCR 1081	referred to	Para 26	
[1979] 2 SCR 378	referred to	Para 26	
[2000] 3 Suppl. SCR 26	referred to	Para 26, 30	D

CRIMINAL ORIGINAL JURISDICTION: Transfer Petition (Criminal) No. 409 of 2021.

Petition Seeking Transfer of Case Bearing S.T.No.1 (03) of 2020, pending in A.S.J. 3<sup>rd</sup> at Tamluk, Purba Medinipur, West Bengal to Competent Kamrup District Court in Assam. E

P. S. Patwalia, Sr. Adv., Nirnimesh Dube, Ms. Bansuri Swaraj, Siddhesh Kotwal, Ms. Ana Upadhyay, Ms. Manya Hasija, Akash Singh, Nihar Dharmadhikari, Ms. Sampriti Baksi, Advs. for the Petitioner.

Kapil Sibal, Neeraj Kishan Kaul, V Giri, Sr. Advs., Ravinder Singh, Nipun Saxena, Srisatya Mohanty, Raveesha Gupta, Sanjeev Kaushik, Ms. Mantika Haryani, Ms. Aparajita Jamwal, Himanshu Chakravarty, Devvrat Singh, Ms. Muskan Surana, Ms. Somya Saxena, Archit Adlakha, Ms. Astha Sharma, Rohit Agarwal, Goutam Dey, Partha Sil, Tavish Bhushan Prasad, Ms. Sayani Bhattacharya, Arjun Ranganathan, Devesh Mishra, Pallak Bhagat, Ms. Reshmi Rea Sinha, Abhishek Sarkar, Mani Bhushan Sinha, Pranab Prakash, Soumya Dutta, Siddhant Upmanyu, Advs. for the Respondents. F G

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A           The Judgment of the Court was delivered by  
**SURYA KANT, J.**

1. This transfer petition has been preferred under Section 406 of the Code of Criminal Procedure, 1973 (hereinafter, 'CrPC'), read with Article 139A of the Constitution of India and Order 39 of the Supreme Court Rules, 2013. The Petitioner herein is the brother of one Kurban Sha (hereinafter, 'Deceased') and he seeks transfer of the criminal trial S.T. No. 1 (03) of 2020, arising out of FIR No. 495 of 2019 registered at PS Panskura, pending in the Court of Additional Sessions Judge, 3<sup>rd</sup> Court, Tamluk, Purba Medinipur, West Bengal (hereinafter, 'Trial Court'), to a competent court in the State of Assam, primarily on the ground that a fair trial will not be possible in the State of West Bengal.

**A. FACTS**

2. The factual matrix is succinctly discussed below before delving into the aforesaid issue that arises for our consideration: -

3. On the date of incident, i.e., 07.10.2019, the Deceased is alleged to have been shot in the neck by 'certain unknown musclemen & goons' when he was working in the office of a political party. The Deceased was immediately rushed to a hospital but was declared dead on arrival. On the next day, the subject FIR was lodged under Section 302 read with Section 120B of the Indian Penal Code, 1860 (hereinafter, 'IPC') and, under Sections 25 and 27 of the Arms Act, 1959 against Respondent No. 2 at the behest of one Jahar Sha (hereinafter, 'De-facto Complainant'), who is stated to be the Deceased's nephew and an eyewitness to the alleged occurrence.

4. After investigation, the police authorities concluded that Respondent Nos. 3 to 11 were also involved in the offence, along with Respondent No. 2. A chargesheet was submitted against the said individuals along with a list of 107 witnesses, including the De-facto Complainant and the Petitioner. It is pertinent to mention that during the investigation, the police is also said to have recovered some incriminating material such as fire arms, ammunition and certain documents.

5. Accordingly, charges were framed against Respondent Nos. 2 to 8 and Respondent No. 11 by the Trial Court under Sections 302 read with 120B of IPC and, under Sections 25 and 27 of Arms Act, 1959. Respondent Nos. 9 & 10 had previously been declared as proclaimed

offenders. The trial commenced in September, 2020. The main accused, i.e., Respondent No. 2, continues in custody as his repeated bail applications have been dismissed by the Trial Court as well as by the Calcutta High Court. A

6. During the pendency of the trial, the Legal Remembrancer & Ex-Officio Secretary to the Government of West Bengal, Judicial Department, by an order of the Governor, issued a notification dated 26.02.2021 directing the Public Prosecutor to apply under Section 321 of CrPC and withdraw the criminal proceedings against Respondent Nos. 2 to 11, subject to the consent of the learned Trial Court. This notification was challenged by the De-facto Complainant before the Calcutta High Court. B C

7. Soon thereafter, on 01.03.2021, a newly appointed Public Prosecutor moved an application before the learned Trial Court praying for withdrawal of the prosecution case stating that it was marred with political and personal vendetta. This application was taken up for hearing on the very next day by a Link Judge who was presiding over the Trial Court, despite the fact that the case was listed for recording evidence on 10.03.2021. The Link Judge was reportedly informed about the pending challenge to the notification dated 26.02.2021 at the Calcutta High Court, but regardless thereto, he proceeded to hear the application and allowed the Prosecution to withdraw the case. As a result, Respondent Nos. 2-11 were acquitted. D E

8. Meanwhile, the writ petition filed by the De-facto Complainant was taken up for hearing on the afternoon of the same day when the Trial Court had allowed the Public Prosecutor to withdraw the criminal case. A learned Single Judge of the High Court noted as follows: F

***“Surprisingly, in the instant case, a specific notification was issued on February 26, 2021, apparently communicating a direction of the Governor to instruct the concerned Public Prosecutor to withdraw the case-in-question subject to the consent of the Sessions Court. However, not an iota of reason and/or how such withdrawal would advance the cause of justice and public interest has been indicated in the said order. That apart, the modus operandi in the present case is rather transparent since the Public Prosecutor actually acted on such instruction and made an application pursuant to the order of the State Government and, despite having knowledge of this*** G H



A *Court being in seisin of the present writ petition, the concerned Sessions Judge has granted consent for such withdrawal, which has the effect of acquitting the accused persons.*

B *It is evident from the stand of the State taken on all previous occasions when bail was rejected, that the State vehemently opposed even the grant of bail to the accused. Hence, it defies logic completely as to what prompted the Government to instruct the Public Prosecutor-in- question to withdraw the case against the accused persons all of a sudden.*

C *Despite the self-imposed restraint which this court imposes upon itself in the exercise of jurisdiction under Article 226 of the Constitution of India, such restraint cannot be a fetter to the court exercising such jurisdiction for the ends of justice where manifest abuse of the process of law has taken place. If the writ court shuts its eyes to the perpetration of*  
D *mala fide and arbitrary administrative action, it would be failing in its incumbent duty of judicial review conferred by the Constitution of India.*

E *In the present case, in view of the arbitrary and unreasoned nature of the instructions of the State to the Public Prosecutor dated February 26, 2021, pursuant to which the Public Prosecutor acted and even the Sessions Court granted consent to such withdrawal, the said instruction as well as the effects thereof have to be set aside.”*

F 9. The High Court observed that none of the parameters to invoke jurisdiction under Section 321 of CrPC were applied either by the Public Prosecutor or by the State and resultantly, it was held that the exercise was bad in law and that the *mala fides* of the State was evident from its contradictory stand wherein it previously opposed the bail applications but now was seeking to withdraw the prosecution itself. Accordingly,  
G the High Court directed that any action taken in the meantime, pursuant to the State Government’s notification dated 26.02.2021, including the order allowing withdrawal of the case was liable to be set aside. It ordered accordingly.

H 10. The De-facto Complainant thereafter submitted an affidavit before the Trial Court expressing his ‘no-objection’ to the grant of bail to

Respondent No. 2. Meanwhile, Respondent No. 2 appealed against the order of the learned Single Judge before a Division Bench, *inter alia*, on the ground of violation of the principles of *audi alteram partem*. The Division Bench set aside the order on this ground and remanded the matter for fresh adjudication. It must be noted that the Petitioner herein had also filed an application for impleadment in the proceedings before the Division Bench but the same was closed with liberty to renew the prayer before the Single Judge.

11. On remand, the learned Single Judge first considered the prayer of the De-facto Complainant for withdrawal of the writ petition and also the application of the Petitioner herein to be impleaded as a party. The learned Single Judge, vide an interim order in the second round of proceedings, noted *firstly* that the Petitioner is the brother of the Deceased and has the *locus* to file a fresh writ petition and *secondly*, in view of the alleged threat to life & liberty of the De-facto Complainant, his name was deleted and the Petitioner was transposed as the writ petitioner. The Single Judge observed that the withdrawal of the writ petition at that stage would frustrate the order of the learned Division Bench as well as the ends of justice. It was, thus, again directed that the order of the Link Judge would not be acted upon and Respondent No. 2 shall not be released from custody, without an order of the competent court. This order was later, upheld by the Division Bench in appeal.

12. Meanwhile the trial proceeded but during his cross-examination, the De-facto Complainant is stated to have resiled from the statement made during examination-in-chief but nevertheless he was not declared hostile by the Public Prosecutor. Thereafter, the Petitioner filed an application before the Trial Court to declare the De-facto Complainant hostile and to allow the Petitioner's lawyer to cross-examine him. The Trial Court considered the said application and noted that the De-facto Complainant had "*made some statements in his cross examination, which are not in conformity with the version of his examination-in-chief*". The Petitioner's application was however, rejected after appreciation of the statutory provisions and the case law. The Trial Court held as follows:

***"In view of the discussions made in the foregoing paragraphs, I am of the opinion that the prosecution should be given a fair chance to unearth the true facts, and an***

A *opportunity shall be given to the Ld. Spl. P.P. to cross examine PW1 after declaring him hostile.*

B *Hence, the Ld. Spl. P.P., and not the Ld. Advocate appointed by this instant petitioner, shall be given permission to cross-examine PW1. The Ld. Advocate appointed by the petitioner Affal Ali Sha can only be permitted to act under the direction of Ld. Public Prosecutor in view of Sec 301(2) of CrP.C.”*

C 13. Meanwhile, the instant Transfer Petition was filed in which this Court *vide* order dated 05.10.2021 directed stay on further proceedings in the trial.

D 14. Thereafter, the learned Single Judge of the High Court, on 02.08.2022, finally decided the writ petition and set aside the Government’s notification dated 26.02.2021. It was observed that *“The attending circumstances of the present case do not inspire much confidence in the bona fides of the State and PP behind the withdrawal”*. The Court viewed that: -

E *“When the charges were initially levelled, the State itself wished Godspeed to the prosecution, which is reflected from the pace at which investigation was concluded and trial commenced. Yet, when the respondent no. 5 allegedly leaned in favour of the ruling party of the State, the prosecution beat a hasty retreat by seeking to withdraw the prosecution, which would have the effect of the accused being discharged scot-free without trial.”*

F It was also noted that on the one hand, the State was defending the withdrawal of Prosecution and on the other, was expediting the trial wherein several witnesses were resiling from their statements. In light of these circumstances, all action taken in pursuance of the notification dated 26.02.2021, including the application and Trial Court’s order under Section 321, CrPC was set aside. The said order appears to not have  
G been challenged and has attained finality.

H 15. The Petitioner has further alleged that multiple abnormalities have occurred during the pendency of the trial, such as the change of the Public Prosecutor four times and the harassment meted out to the prosecution witnesses and relatives of the Deceased. The wife of the

Deceased, Saida Sabana Banu Khatun, is alleged to have been attacked by Respondent No. 2's henchmen and relatives of the other accused persons in the premises of the Trial Court. One witness, named Imran Ali, was allegedly abducted by associates of Respondent No. 2 who also threatened to kill him. The Petitioner has contended that his security cover was withdrawn. It is also averred that the authorities were duly informed of such instances but no appropriate action has been taken. The Petitioner also states that false cases, including one alleging rape, have been fastened on him, in an effort to threaten the witnesses and influence them to depose in favour of the accused persons.

16. It is in this factual backdrop that this transfer petition has been filed.

#### **B. SUBMISSIONS**

17. Mr. P.S. Patwalia, learned senior counsel for the Petitioner has raised the following contentions seeking transfer of the trial outside the State of West Bengal:

- (i) The conduct of the State, which was vigorously opposing the bail applications of Respondent No. 2 in the past, has dramatically changed and is now detrimental to the Prosecution's case;
- (ii) Respondent No. 2 has at least thirty-four (34) criminal cases registered against him and yet, the State directed withdrawal from prosecution without any cogent reason. The power under Section 321, CrPC was blatantly misused;
- (iii) The De-facto Complainant has been gained over during the trial as is evident from his no-objection to the grant of bail to Respondent No. 2; his prayer to withdraw the writ petition challenging the State's notification under Section 321, CrPC and the De-facto Complainant turning hostile during his cross-examination;
- (iv) The witnesses are being threatened and are turning hostile in their cross examination. False cases have been instituted against crucial witnesses to browbeat them;
- (v) There is a serious threat to the life and liberty of the witnesses and they may be influenced due to the lack of a safe environment to truthfully depose before the court.

A Reliance has been placed on certain observations of the Calcutta High Court regarding the *mala fides* of the State;

(vi) It is alleged that on a previous occasion, when the High Court directed to shift Respondent No. 2 from Purba Medinipur to a hospital in Kolkata for medical treatment, the same was not done. Rather, he was kept in the hospital at Purba Medinipur where he had access to luxurious facilities;

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(vii) Reliance has been placed on the High Court's observations while rejecting Respondent No. 2's bail application to the effect that:

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*"The aforesaid narration of events clearly discloses a prevaricating stance on the part of the State of West Bengal. While on one hand, the State proceeded to bury the prosecution by resorting to its withdrawal under Section 321 Cr.P.C., on the other hand it purported to continue the prosecution against the petitioner and other accused persons by examining witnesses.*

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*Be that as it may, it is relevant to note in the prosecution conducted by the State, most of the witnesses have resiled from their earlier statements to police and have turned hostile. It is also pertinent to bear in mind even the informant Jahar Sha, the original writ petitioner in WPA 6315 of 2021 expressed apprehension and was unwilling to proceed with the said proceeding challenging withdrawal of prosecution.*

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*These circumstances give rise to a serious apprehension in the mind of this Court as to the overwhelming and malevolent influence on the witnesses as well as the informant which had prompted them from either withdrawing from the writ petition or resiling from their earlier statements before police during deposition in Court."*

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(viii) In these circumstances, there is a genuine apprehension in the mind of the Petitioner, brother of the Deceased, that they would not receive free and fair justice in the State of West Bengal as the prosecution is compromised;

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- (ix) Reliance has been placed on *Surendra Pratap Singh v. State of Uttar Pradesh*<sup>1</sup> to urge that in similar facts and circumstances, the trial was transferred from the State of Uttar Pradesh to the State of Madhya Pradesh, in order to do fair justice to all the parties. The judgment in *K. Anbazhagan v. State of Karnataka*<sup>2</sup> has also been cited to iterate that once a case stands transferred from one state to another, the transferee state has full control over the prosecution and becomes the prosecuting State. It is the Petitioner's contention that once the prosecuting state changes, the trial can be completed in a fair and just manner.

18. During the course of hearing, Mr. Patwalia clarified that it is not necessary to transfer the trial to the State of Assam and this Court may consider the desirability of transferring it to any other neighbouring States, like Orissa or Jharkhand.

19. Opposing the transfer, Mr. Kapil Sibal and Mr. Neeraj Kishan Kaul, learned senior counsels on behalf of Respondent No. 1- State of West Bengal and Mr. V. Giri, learned senior counsel on behalf of Respondent No. 2, contended that the facts as revealed do not make out a case for transfer of the trial outside the State of West Bengal. At the outset, they have challenged the locus of the Petitioner to file this transfer petition, contending that the Petitioner is not the complainant and is only a witness in the trial. They have made the following submissions:

- (i) The Deceased's wife did not approach the state police about the alleged attack on her in the Trial Court premises on 02.03.2021 and the Petitioner's security arrangement was never withdrawn by the State. The police took prompt action in the matter of abduction of witness Imran Ali as the accused persons & the victims were swiftly located and chargesheet has been filed in the case;
- (ii) The veracity of the media reports relied upon by the Petitioner to show that Respondent No. 2 has access to facilities, such as smartphone, headphones etc. are not based upon correct facts;

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<sup>1</sup> *Surendra Pratap Singh v. State of Uttar Pradesh* (2010) 9 SCC 475.

<sup>2</sup> *K. Anbazhagan v. State of Karnataka* (2015) 6 SCC 86.

- A (iii) The Public Prosecutor gave detailed reasons in his withdrawal application before the Trial Court in compliance with Section 321 of CrPC;
- (iv) The requirements under Section 406, CrPC are not met in this case as no reasonable apprehension that justice will not be done, is made out.
- B (v) There is no allegation or whisper of bias in the State Judiciary as is evident from the fact that the accused persons' bail applications have constantly been rejected by the Trial Court and such rejection has been upheld in the High Court. The High Court has acted as a robust supervisory mechanism to oversee the trial proceedings and check any lapses occurring therein;
- C (vi) There are no allegations of unfair investigation and the only Trial Court order found fault with was the order passed by the Link Judge allowing the application for withdrawal of prosecution;
- D (vii) There are 107 Prosecution witnesses in the trial out of which 80 witnesses reside in Purba Medinipur district where the trial is going on. Till the trial was stayed by this Court, the Trial Court had examined 11 witnesses. Most witnesses are stated to be Bengali speaking. In light of these circumstances, it is stated that the transfer of the case to a court outside the State of West Bengal will cause extreme inconvenience to the Prosecution & most witnesses. The judgment in *Abdul Nazar Madani v. State of Tamil Nadu*<sup>3</sup> wherein this Court considered the convenience of the Prosecution, other accused persons, the witnesses and the larger interest of society while deciding a transfer petition, has been pressed into aid. Other cases have also similarly been cited<sup>4</sup>;
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- F
- G (viii) Reliance has been placed on *Nahar Singh Yadav v. Union of India*<sup>5</sup> wherein this Court noted that the power under

<sup>3</sup> *Abdul Nazar Madani v. State of Tamil Nadu* (2000) 6 SCC 204.

<sup>4</sup> *Sri Jayendra Saraswathy Swamigal (II) v. State of T.N.* (2005) 8 SCC 771; *Harita Sunil Parab v. State (NCT of Delhi)* (2018) 6 SCC 358; *Swaati Nirkhi v. State (NCT of Delhi)* 2021 SCC Online SC 202.

H <sup>5</sup> *Nahar Singh Yadav v. Union of India* (2011) 1 SCC 307.

Section 406, CrPC is to be exercised sparingly and that transfer should be allowed only when there is a well-substantiated apprehension that justice will not be dispensed impartially. Other similar decisions have also been brought to our notice<sup>6</sup>; A

(ix) *Ashish Chandra v. Asha Kumari*<sup>7</sup> has been cited to refer the observations of this Court that transfer of cases have a demoralizing effect on trial courts. B

(x) The Deceased was and the Petitioner is a politically influential person and transfer of the proceedings is sought to a jurisdiction where he will be able to exert his political influence. The Deceased himself is stated to have had multiple criminal cases pending against him; C

(xi) There is nothing on record to show that witnesses have been threatened. Respondent no. 2, being in custody, cannot exert any threat or pressure on the witnesses; D

(xii) The Petitioner has delayed the trial through these proceedings and the accused persons have been in custody for over three years. As such, it is contended that prejudice has been caused to the accused persons and they shall incur heavy expenses to defend themselves if the case were to be transferred outside the State of West Bengal; E

(xiii) To ensure a fair trial, this Court may transfer the case anywhere in the state and appoint a Public Prosecutor while protecting the accused persons and the complainant.

20. All other Respondents have supported this stance and made similar averments. F

### C. ANALYSIS

21. We have carefully considered the submissions made by the parties and perused the record. Before advertent to the contentious issue, we deem it appropriate to discuss the settled principles in relation to the exercise of power to transfer cases under Section 406, CrPC as well as G

<sup>6</sup> *Gurcharan Dass Chadha v. State of Rajasthan* (1966) 2 SCR 678; *Amarinder Singh v. Parkash Singh Badal* (2009) 6 SCC 260.

<sup>7</sup> *Ashish Chandra v. Asha Kumari*, (2012) 1 SCC 680 H



- A the preliminary objection raised by the respondents on the *locus standi* of the petitioner in seeking transfer of the subject trial.

### C.1. LOCUS STANDI OF THE PETITIONER

- B 22. Section 406(2) of the CrPC provides that the Supreme Court may transfer a case “only on the application of the Attorney-General of India or of a party interested”.

23. In the case of *K. Anbazhagan v. Superintendent of Police*<sup>8</sup>, this Court discussed the meaning of expression “a party interested” under Section 406, CrPC and held as follows:

- C *“The words “party interested” are of a wide import and, therefore, they have to be given a wider meaning. If it was the intendment of the legislature to give restricted meaning then it would have used words to the effect “party to the proceedings”. In this behalf the wording of Article 139-A of the Constitution of India may be looked at. Under Article 139-A the transfer can be if “the Supreme Court is satisfied on its own motion or on an application made by the Attorney General of India or by a party to any such case”. (emphasis supplied) Also if the provisions of Chapter XXIX of the Criminal Procedure Code are looked at, it is seen that when the legislature intended a “party to the proceedings” to have a right of appeal it specifically so stated. The legislature, therefore, keeping in view the larger public interest involved in a criminal justice system, purposely used words of a wider import in Section 406. Also, it is a well-settled principle of law that statutes must be interpreted to advance the cause of statute and not to defeat it.”*
- D
- E
- F

- G 24. Considering this apt and expansive interpretation of phrase ‘party interested’ under Section 406(2) of the CrPC, we hold that the Petitioner, being the real brother of the Deceased, is vitally interested in a fair trial so that the Deceased and his family gets justice. The Respondents’ challenge to the *locus standi* of the Petitioner is thus rejected.

H <sup>8</sup> *K. Anbazhagan v. Superintendent of Police* (2004) 3 SCC 767.

## C.2. GROUNDS FOR TRANSFER

25. Coming to the second limb of the contentions raised on behalf of the parties, we may firstly notice some of the well-defined contours in relation thereto. It has by now been well established that a well-founded apprehension that justice will not be done is a prerequisite for transfer of the case. Tracing the power of transfer of a case, we are reminded of Lord Hewart's dictum in *Rex v. Sussex Justices*<sup>9</sup> stating that "***It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done***".

26. The right to a fair trial is a fundamental right under Article 21 of the Constitution of India<sup>10</sup> and its importance cannot be emphasised enough. However, to obtain the transfer of a case, the Petitioner is required to show circumstances from which it can be inferred that he entertains a reasonable apprehension. This apprehension cannot be imaginary and cannot be a mere allegation.<sup>11</sup>

27. The power of transfer under Section 406, CrPC is to be exercised sparingly and only when justice is apparently in grave peril. This Court has allowed transfers only in exceptional cases considering the fact that transfers may cast unnecessary aspersions on the State Judiciary and the prosecution agency.<sup>12</sup> Thus, over the years, this Court has laid down certain guidelines and situations wherein such power can be justiciably invoked.

28. In *Amarinder Singh v. Parkash Singh Badal*<sup>13</sup>, this Court observed as follows:

***"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***

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<sup>9</sup> *Rex v. Sussex Justices* [1924] 1 KB 256.

<sup>10</sup> *Zahira Habibullah Sheikh v. State of Gujarat* (2006) 3 SCC 374; *Maneka Sanjay Gandhi v. Rani Jethmalani* (1979) 4 SCC 167; *R. Balakrishna Pillai v. State of Kerala* (2000) 7 SCC 129.

<sup>11</sup> *Amarinder Singh v. Parkash Singh Badal* (2009) 6 SCC 260.

<sup>12</sup> *Nahar Singh Yadav v. Union of India* (2011) 1 SCC 307; *Neelam Pandey v. Rahul Shukla* [Transfer Petition (Criminal) No. 298 of 2020, 22 February 2023].

<sup>13</sup> *Amarinder Singh v. Parkash Singh Badal* (2009) 6 SCC 260.

A        *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.”*

B        29. In *Nahar Singh Yadav v. Union of India*<sup>14</sup> after analysing the case-law, this Court enumerated the basic principles of the power of transfer under Section 406, CrPC as follows:

C        *“29. Thus, although no rigid and inflexible rule or test could be laid down to decide whether or not power under Section 406 CrPC 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 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:*

E        *(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;*

F        *(ii) when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant;*

G        *(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;*

H        *(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*

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H        <sup>14</sup> *Nahar Singh Yadav v. Union of India* (2011) 1 SCC 307.

*(v) existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice.”* A

30. In *R. Balakrishna Pillai v. State of Kerala*<sup>15</sup>, this Court noted the crucial separation of powers between the judiciary and the executive and held that “*Judges are not influenced in any manner either by the propaganda or adverse publicity. Cases are decided on the basis of the evidence available on record and the law applicable.*” B

31. The convenience of parties and witnesses as well as the language spoken by them are also relevant factors when deciding a transfer petition, as has been noted by this Court in a catena of judgments.<sup>16</sup> C

32. In some of the recent decisions including in *Neelam Pandey v. Rahul Shukla*<sup>17</sup>, this Court has viewed that transfer of a criminal case from one state to another implicitly reflects upon credibility of not only the State Judiciary but also of the prosecution agency. D

33. Adverting to the facts of the case in hand in light of the principles enunciated by this Court from time to time, it is true that the State of West Bengal has taken a complete u-turn with a view to help the main accused, namely, Respondent No. 2 and it went to the extent of resorting to its powers under Section 321 of CrPC to withdraw the prosecution itself. A plain reading of Section 321, CrPC leaves no room to doubt that it is the Public Prosecutor in-charge of the case who has to apply his mind independently and impartially to form a view for withdrawal from the prosecution with the consent of the court. The procedure followed in the case in hand was completely alien to the scheme of Section 321, CrPC as the decision to withdraw prosecution was taken at the level of the State Government and the Public Prosecutor was merely asked to act upon the said Government notification. The Link Judge also showed tearinghurry in accepting the application of the Public Prosecutor and G

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<sup>15</sup> *R. Balakrishna Pillai v. State of Kerala* (2000) 7 SCC 129.

<sup>16</sup> *Abdul Nazar Madani v. State of TN* (2000) 6 SCC 204; *Sri Jayendra Saraswathy Swamigal (II) v. State of T.N.* (2005) 8 SCC 771; *Harita Sunil Parab v. State (NCT of Delhi)* (2018) 6 SCC 358.

<sup>17</sup> *Neelam Pandey v. Rahul Shukla* [Transfer Petition (Criminal) No. 298 of 2020, 22 February 2023]. H

- A permitting withdrawal from prosecution even before the date when the case was listed for prosecution evidence.

34. However, none of these patent illegalities were allowed to sustain as a result of the pro-active exercise of appellate/revisional/writ jurisdiction by the High Court. Not only was the State Government's notification set aside, the order passed by the Link Judge permitting such withdrawal was also annulled by the High Court. It is a matter of record that the learned Trial Judge has repeatedly declined bail to Respondent No. 2 and even the High Court rejected his prayer for enlargement on bail. In this factual scenario, the question arises whether it is essential to transfer the trial outside the State of West Bengal or whether the ends of justice can be adequately met by issuing alternative appropriate directions?

#### D. CONCLUSIONS

35. Having given our thoughtful consideration to this issue, it appears to us that there is no legal necessity to transfer the trial outside the State of West Bengal and the apprehensions of the Petitioner, some of which are indeed genuine, can be effectively redressed by issuing appropriate directions. We say so for the reason that more than 90 witnesses, most of whom are Bengali speaking, are yet to be examined. The transfer of trial to any other neighbouring state will cause serious impediment in the deposition of those witnesses and some of them might be reluctant to travel to a far away place and, thus, the case of the Prosecution will be severely prejudiced. So long as the High Court and District Judiciary are ensuring the fairness in trial proceedings within their jurisdictional framework, we are not inclined to accept that the victim's family will not get fair justice, if the trial is held in the State of West Bengal.

36. Taking into consideration all the facts and circumstances, we deem it appropriate to dispose of this transfer petition in following terms:-

- (i) Criminal Trial bearing ST No. 1 (03) of 2020 arising out of FIR No. 495/2019 registered at Police Station Panskura, District Purba Medinipur is ordered to be transferred from the Court of Additional Sessions Judge, 3<sup>rd</sup> Court, Tamluk, Purba Medinipur, West Bengal to the Court of Chief Judge, City Sessions Court at Calcutta.
- (ii) The trial shall be conducted by the Chief Judge, City Sessions Court and he shall not entrust the case to any other Additional Sessions Judge.

- (iii) The Chief Judge, City Sessions Court shall endeavour to take up the trial on a weekly basis and shall make an effort to conclude the same within a period of six months. A
- (iv) The State of West Bengal is directed to appoint a Special Public Prosecutor on the recommendations of the Chief Judge, City Sessions Court, Calcutta with the prior approval of the High Court. This exercise shall be completed within two weeks. B
- (v) The wife of the Deceased, the Petitioner and other crucial prosecution witnesses shall be provided adequate security. The State of West Bengal is directed to ensure that no harm is caused to the life and liberty of the witnesses and no direct or indirect attempt is made by Respondent No. 2 or his co-accused persons or anyone on their behalf to influence, frighten or threaten the witnesses. C
- (vi) The De-facto Complainant who is also stated to be the eye-witness and has allegedly resiled from his version recorded during the examination-in-chief, shall be subjected to cross-examination by the Special Public Prosecutor, for which the advocate engaged by the Petitioner may provide assistance to the learned Special Public Prosecutor. D
- (vii) Respondent No. 2 or any other accused who are in custody shall be transferred forthwith to the Central Jail at Calcutta. E
- (viii) Respondent No. 2, having regard to his criminal antecedents, as well as other accused who are in custody, shall not be enlarged on bail till the conclusion of trial save and except by the High Court. F
- (ix) The Learned Portfolio Judge of the Calcutta High Court is requested to regularly monitor and supervise the trial proceedings in terms of the directions issued hereinabove.

37. This transfer petition is hence, disposed of in above stated terms. G

38. Pending applications, if any, also stand disposed of accordingly.