K. Anbazhagan vs The Superintendent Of Police & Ors on 18 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 524, 2004 (3) SCC 767, 2003 AIR SCW 6468, 2004 (1) UJ (SC) 181, (2003) 4 KHCACJ 720 (SC), 2004 SCC(CRI) 882, 2004 UJ(SC) 1 181, (2003) 9 JT 31 (SC), 2003 (7) SLT 300, 2003 (4) KHCACJ 720, 2003 (9) SCALE 680, 2003 (4) LRI 483, 2004 CRILR(SC&MP) 163, (2004) 1 SUPREME 335, 2004 CHANDLR(CIV&CRI) 500, (2004) SC CR R 1026, (2003) 2 MADLW(CRI) 929, (2003) 12 INDLD 395, (2003) 4 CURCRIR 440, (2004) 2 EASTCRIC 32, (2004) MAD LJ(CRI) 89, (2004) 27 OCR 380, (2004) 2 RAJ CRI C 352, (2004) 1 RECCRIR 441, (2004) 2 ALLCRIR 1687, (2003) 9 SCALE 680, (2003) 3 CHANDCRIC 378, (2004) 1 ALLCRILR 314, (2004) 1 CRIMES 261

Bench: S.N. Variava, H.K. Sema

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           CASE NO.:
Transfer Petition (crl.)  77-78 of 2003

PETITIONER:
K. Anbazhagan

RESPONDENT:
The Superintendent of Police & ors.

DATE OF JUDGMENT: 18/11/2003

BENCH:
S.N. VARIAVA & H.K. SEMA.

JUDGMENT:
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J U D G M E N T SEMA,J These two petitions have been preferred under Section 406 of the Code of Criminal Procedure, seeking transfer of CC No.7 of 1997 and CC No. 2 of 2001 on the file of the XI Addl. Sessions Judge (Special Court No.1) Chennai in the State of Tamil Nadu to a court of equal and competent jurisdiction in any other State. The facts are common in both the petitions. Reference to parties will be as arrayed in Transfer Petition No.77 of 2003. We also propose to dispose of the petitions by this common judgment. Brief facts leading to the filing of the present petition may be noticed. In 1991-96, the second respondent herein was the Chief Minister of Tamil Nadu. AIADMK party headed by the second respondent was defeated in the General Election held in 1996 and DMK party was voted to power. Special courts were constituted for the trial of cases filed against the second respondent and others, the constitution of which came to be upheld by this Court. Thereafter, in 1997, CC No. 7 was filed for the trial of respondent nos. 2, 3, 4 and 5, who have been charge-sheeted for offences under Sections 120-B IPC, 13(2) read with 13(1)(e) of the

Prevention of Corruption Act, 1988 (hereinafter referred to as the Act) for alleged accumulation of wealth of Rs. 66.65 crores disproportionate to their known sources of income. In 2001, CC No.2/2001 was filed on the file of Principal Special Judge, Chennai. Respondent No. 2 and Mr. T.T.V. Dinakaran (respondent No.3 in T.P.No.78 of 2003) have been charge-sheeted for offences under Sections 120-B IPC, 13(2) read with 13(1)(e) of Prevention of Corruption Act, 1988 for acquisition and possession of pecuniary resources and property outside India, which are disproportionate to known sources of income, by resorting to clandestine transfer of funds belonging to respondent No. 2 with the help of Mr.T.T.V. Dinakaran from India to outside country by violating the provisions of Foreign Exchange Regulation Act and from other countries into the United Kingdom. Trial of CC No.7 of 1977 progressed and by August 2000, 250 prosecution witnesses had been examined. We are told that only 10 more witnesses remained to be examined in this case. In the general election held in May, 2001 AIADMK party headed by the second respondent secured an absolute majority in the legislative assembly. The second respondent was unanimously chosen to be the leader of the house by the AIADMK party. The said appointment was challenged and this Court nullified the appointment. Consequently, on 21.9.2001, the second respondent ceased to hold the office of Chief Minister. It is claimed that a nominee of the second respondent was sworn in as Chief Minister of Tamil Naidu. The Election Commission of India announced the bye-election to the Andipatti Constituency. In the bye election held on 21.2.2002, the second respondent was declared elected and she was again sworn in as Chief Minister on 2.3.2002. With the change in government, 3 public prosecutors resigned. Senior counsel S. Natarajan, who was appearing for the State also resigned. It appears that IO Mailama Naidu, who had earlier been given an extension, also resigned. It must be mentioned, even though we are sure that it has nothing to do with the change in government, that due to retirements and routine transfers there were changes in the Special Judge also. On 7.11.2002, the trial in CC No.7 of 1997 resumed. It is alleged that since 7.11.2002 when the trial resumed as many as 76 PWs have been recalled for cross examination on the ground that counsel appearing for the respondents or some of them had earlier been busy in some other case filed against them. It is claimed that the public prosecutor did not object and/or give consent to the witnesses being recalled. Out of total 76 PWs, 64 PWs resiled from their previous statement in chief. It is alleged that the Public Prosecutor has not made any attempt to declare them hostile and/or to cross-examine them by resorting to Section 154 of the Indian Evidence Act. No attempt has been made to see that Court takes action against them for perjury. It has also been alleged that the presence of second respondent has been dispensed with during her examination under Section 313 Cr.P.C. and instead a questionnaire was sent to second respondent and her reply to the questionnaire was sent to the court in absentia. It is alleged that the procedure so adopted is unknown to the law and the public prosecutor has not objected to the application of the respondent No.2 for dispensing her presence at the time of examination under Section 313 Cr.P.C. These are the main facts, which have been pointed out by the counsel for the petitioner. We have heard Mr. T. R. Andhyarujina, learned senior counsel for the petitioner. We have also heard Mr. Subramanium Swamy who was the original complainant. We have heard Mr. K.K. Venugopal and Mr. V.A.Bobde and Mr.ATM Ranga Ramanujam, learned senior counsel for the respondents. We have also heard Mr. Altaf Ahmed learned ASG . Before we advert to the merit of the case, we may at this stage, dispose of a preliminary objection raised by the counsel for the respondents, with regard to the maintainability of the present petitions. The main thrust of argument has been advanced by Mr. K.K. Venugopal, learned senior counsel for respondent no. 2. The other respondents' counsels have

more or less adopted the arguments of Mr. Venugopal. It is contended by Mr. Venugopal that the petitioner has filed Writ Petition Nos. 630 of 2002 and 1777 of 2002, praying for identical relief which have been heard extensively by the High Court of Madras at Chennai and the judgment had been reserved on 19.2.2003. He submitted that the petitioner has filed the present petition before this Court without disclosing that similar petitions are pending before the High Court of Madras and on this score alone the Transfer Petitions are liable to be dismissed. He has further submitted that although the petitioner was aware that the aforesaid two writ petitions were to be taken up for further hearing on 6-2-2003, he has filed the present transfer petition on 5-2-2003 by suppressing the fact that the grievances and facts raised in these petitions are the same as were before the High Court of Madras in the aforesaid two writ petitions. Learned counsel has also invited our attention to paragraph I of the counter statement of respondent No.2 to show that the statement of facts and grievances raised before the High Court of Madras in writ petition Nos. 630 of 2002 and 1777 of 2002 are in pari-materia with the statement of facts and grievances raised before this Court in T.P. No. 77 of 2003. In this connection, learned counsel particularly referred to statement of facts before this Court in paras 3, 4, 7, 8, 9, 10, 13, 14, 15, 16, 17 and 18 which are stated to be in parimateria to paras 4, 6, 9, 10, 11, 12, 15, 17, 18, 19, 20 and 21 in writ petition No. 630 of 2002. Learned counsel, therefore, urged that parallel proceedings over the same statement of facts pending in the High Court, if allowed to be transferred to outside the jurisdiction of the High Court, the majesty of the High Court would be greatly affected. It is further argued by the counsel that the petitioner is trying to over reach the court by taking the court for a ride, the conduct of which is highly reprehensible. Reliance has been placed by Mr.Venugopal, senior counsel for the respondent on S.B. Mathur vs. Matti Ullah (1995 Supp.(2) SCC 650). There, the petitioner filed a writ petition in the High Court of Delhi seeking interim order against his proposed transfer. The High Court merely issued notice but had not granted any interim order. While that petition was pending the petitioner filed another writ petition in J & K High Court without disclosing the fact of pendency of the writ petition in the Delhi High Court and obtained the interim order from J & K High Court and subsequently withdrew the writ petition filed in the High Court of Delhi. It is in these circumstances, this Court has stayed the interim order, passed by the J & K High Court, on the ground that the petitioner obtained interim order without disclosing the fact that the writ petition is also pending before the Delhi High Court. Mr. Venugopal also relied on the decision rendered in G.Narayanaswamy Reddy(dead) by Lrs. Vs. Government of Karnataka, (1991) 3 SCC 261. In that case, the interim orders of stay of dispossession from land were issued by courts in favour of the landowners. This was a highly material fact for deciding the question of delay in making the award under the Land Acquisition Act. This fact was not disclosed by the petitioners in Special Leave Petitions and the fact was highlighted by the counter affidavit filed on behalf of the respondents. It is in these circumstances, this Court observed that relief under Section 136 of the Constitution is discretionary. The petitioner who approaches this Court for such relief must come with full disclosure of facts and on this ground the Special Leave Petitions were dismissed.

It would have been advisable for the petitioner to have informed this Court about the proceedings in the Madras High Court. However, as is set out in greater detail hereinafter, it appears that justice is not being done. In fact it appears that the course of justice is being subverted. Thus even though this Court might otherwise have viewed the conduct, in not disclosing, seriously we do not feel that, in this matter, on this ground, we can allow the course of justice to be subverted. Further we find that

even though some statements of facts made before the High Court, are in parimateria with the facts stated before this Court, these petitions are not parallel proceedings. The petitions pending before the High Court are under Article 226 of the Constitution and the Transfer Petitions have been filed under Section 406 of the Code of Criminal Procedure. The jurisdiction of the High Court under Article 226 of the Constitution and the jurisdiction of this Court under Section 406 Cr.P.C. are quite distinct and different. It is also to be noticed that the prayer made before the High Court and before this Court are also different. Before the High Court in writ petition No. 630 of 2002 the petitioner prayed the following reliefs:-

> "I pray that this Hon'ble Court may be pleased to direct the appointment of an independent experienced Lawyer as the Special Public Prosecutor for the conduct of the prosecution case in C.C.No. 7 of 97 on the file of the XI Additional Sessions Judge (Special Court 1) Chennai, and C.C.No.2 of 2001 on the file of the Learned Principal Sessions Judge transferred to the file of XI Additional Sessions Judge (Special Court 1) Chennai pending disposal of the writ petition.
>
> I, therefore, pray that this Hon'ble Court may be pleased to issue a Writ of Mandamus or any other appropriate order or direction in the nature of a writ, directing the entrustment of C.C.No. 7 of 97 on the file of the XI Additional Sessions Judge (Special Court 1) Chennai, and C.C. No.2 of 2001 on the file of the Learned Principal Sessions Judge (Special Court 1) Chennai to the 1st Respondent or any other independent agency not under the control of the State Government of Tamil Nadu, and pass such further order or orders as deem fit and proper in the circumstances of the case and thus render justice.
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> In Writ Petition No.1777 of 2002, the following reliefs are prayed for:
>
> " In the above circumstances, it is most humbly prayed that this Hon'ble Court may be pleased to issue a Writ of Mandamus or any other appropriate order or direction in the nature of Writ, appointing one or more experienced Counsel as the prosecutor or prosecutors for conducting the criminal case in C.C. No. 7 of 97 pending on the file of the XI Additional Sessions Judge cum Special Judge No.1, Chennai and C.C. No. 2 of 2001 (which has been ordered to be transferred from the Learned Principal Special Judge Chennai to the XI Additional Sessions Judge cum Special Judge No.1, Chennai by this Hon'ble Court in Crl. O.P. No.21969 of 2001 dated 10.1.2002) and directly monitor the conduct of the above said cases under the powers of Judicial Superintendence vested in the High Court and to pass such further orders as deemed just and proper in the circumstances of the case and thus render justice. "

In the present petitions before this Court the following reliefs are prayed for:

> "(a) transfer of C.C.No.7 of 1997 entitled to The Superintendent of Police Vs. J.Jayalalitha & Ors. and C.C.No.2 of 2001 entitled to Additional Superintendent of Police Vs. J. Jayalalitha & Ors. on the file of the XI Additional Sessions Judge

(Special Court-I) Chennai in State of Tamil Nadu to Court of equal and competent jurisdiction in any other State.

(b) pass such other or further order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case."

It is also contended by the counsel for the respondent, that having known that the judgment in the writ petitions has been reserved by the High Court on 19.2.2003, the petitioner obtained interim order before this Court on 28th March, 2003 without disclosing the fact that the judgment in writ petitions, before the High Court, has been reserved. It is true, that it was incumbent on the part of the petitioner, to have disclosed the fact that the writ petitions are also pending before the High Court, in which the judgment has been reserved. But non-disclosure of this fact would not, for reasons set out above, non-suit the petitioner to approach this Court with an application under Section 406 Cr.P.C.

The second leg of argument what appears to be an argument of despair, is of locus standi of the petitioner. In point of fact this question need not detain us any longer because on 28.2.2003 this Court had already granted permission to the petitioner to file the petition. No application has been taken out to revoke the permission so granted. Therefore, this question becomes mere academic. However, since the question involved is of public importance, we proceed to answer the question. Mr. V.A. Bobde, learned senior counsel, appearing for respondent Nos. 3 and 4 in CC 7 of 1997 and respondent No. 3 in CC 2 of 2001 contended that in view of the provision of sub-section 2 of Section 406 Cr.P.C. the petition is maintainable only when motion is moved by the Attorney General or by "party interested". According to the counsel, it is the "party interested" and not a "person interested" and, therefore, only Attorney General or a "party interested" has locus standi to file application and the petitioner not being a party to the proceeding is not a "party interested", and has no locus standi to file the present petition. We are unable to accept this submission for more than one reason. It will be noticed that the "party interested" has not been defined under Cr.P.C. The word "party interested" is of a wide import and, therefore, it has to be given a wider meaning. If it was the intendment of the legislature to give restricted meaning then they would have used words to the effect, "party to the proceedings". In this behalf the wording of Article 139A of the Constitution of India may be looked at. Under Article 139A the transfer can be if "the Supreme Court is satisfied on its own motion or on the 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 proceeding" 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 well-settled principle of law that statutes must be interpreted to advance the cause of statute and not to defeat it. The petitioner being a political opponent, is vitally interested in the administration of justice in the State and is a "party interested" within the meaning of sub-section 2 of Section 406 Cr.P.C. Even otherwise Mr. Subramanium Swamy was the original complainant. He supports these transfer petitions.

It has also been urged that the petitioner being a political opponent of respondent No.2, these petitions have been launched against respondent no.2 on ground of political vendetta. This submission has also no force. In a democracy, the political opponents play an important role both inside and outside the House. They are the watchdogs of the government in power. It will be their effective weapon to counter the misdeeds and mischieves of the government in power. They are the mouthpiece to ventilate the grievances of the public at large, if genuinely and unbiasedly projected. In that view of the matter, being a political opponent, the petitioner is a vitally interested party in the run of the government or in the administration of criminal justice in the State. The petition lodged by such persons cannot be brushed aside on the allegation of a political vendetta, if otherwise, it is genuine and raises a reasonable apprehension of likelihood of bias in the dispensation of criminal justice system. This question has been set at rest by this Court in Sheonandan Paswan v. State of Bihar, (1987) 1 SCC 288 (SCC p. 318, para 16), where it is said:

> "It is a well established proposition of law that a criminal prosecution, if otherwise justifiable and based upon adequate evidence does not become vitiated on account of mala fides or political vendetta of the first informant or the complainant."

This decision was reiterated in State of Haryana & Ors. Vs. Bhajan Lal & Ors., 1992 Supp.(1) SCC 335.

In the present case, in our view, the petitioner has raised many justifiable and reasonable apprehensions of miscarriage of justice and likelihood of bias, which would require our interference in exercise of our power under Section 406 Cr.P.C.

At this stage, we may notice few decisions of this Court with regard to the scope of Section 406 Cr.P.C. In Gurcharan Das Chadha Vs. State of Rajasthan, 1966 (2) SCR 678 at SCR p.686, this Court observed as under:-

> "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. "

In Mrs. Maneka Sanjay Gandhi Vs. Ms. Rani Jethmalani, (1979) 4 SCC 167, this is what this Court has said in paragraph 2:

"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 imperiling, 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.

In Abdul Nazar Madani Vs. State of Tamil Nadu , (2000) 6 SCC 204, this court pointed out in paragraph 7 at page SCC p.210 as under:-

"The purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 Cr.P.C. 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."

Reverting to the facts of the case, respondent no.2 is the Chief Minister of Tamil Nadu. Respondent Nos. 3, 4 and 5 are her close relatives or close associates. In CC 7 of 1997 and CC 2 of 2001 she has been arraigned as accused No.1. In this petition serious contentions have been raised from paragraph 25 to paragraph 33. These are extracted:

"25. It is submitted that the 2nd Respondent being the Chief Minister of Tamil Nadu, the cases pending against her have to be entrusted to an independent agency. I submit that the police officers who are under the control of the State Government cannot be expected to prosecute the cases against the 2nd Respondent diligently. In fact there will be every attempt to save the 2nd Respondent and others from

punishment. Similarly the law officers appointed by the State Government also cannot be in charge of the cases pending against the 2nd Respondent and others.

26. It is submitted that after nearly 7 months of lull the trial in the Rs.66.65 crores disproportionate wealth case in C.C.No. 7/97 against the 2nd Respondent Chief Minister Ms.J.Jayalalitha and others resumed on the 7-11-2002. In this connection it is pertinent to point out that it is common knowledge that number of witnesses have been cross-examined before the trial came to a pause due to reconstitution of the Special Courts. When the trial resumed on 7-11-2002 Indian Bank Official Shri A.R. Arunachalam was cross examined. On his chief examination which took place on 16-6-2000 Shri Arunachalam was cited as a witness by the DVAC. He was an official of the Indian Bank at the relevant point of time. He was cross examined on the accounts maintained by Mrs. Sasikala a close associate of Ms.J.Jayalalitha as well as the accounts maintained by Sasikala's relatives.

27. It is submitted that it is ascertained that another witness Shri R.Krishnamoorthy of Saidapet who was working as a Section officer in the Inormation and Tourism Department of Government of Tamil Nadu at the relevant point of time was also cross examined. In his chief examination on 31-5-2000 Shri R.Krishnamoorthy had deposed that Shri Natarajan, husband of Sasikala joined the social welfare department as a Publicity Assistant on 13-5-1970 and he became an Information and Public Relation Officer on 13-11-1970. He further deposed in his chief examination that Shri Natarajan was in the said post till 1976 till the abolition of the post. In 1980 Shri Natarajan got back the post and he became a Deputy Director in 1988. Shri R.Krishnamoorthy has clearly deposed in his chief examination that Shri Natarajan husband of Sasikala had given Mrs. Sasikala's name as the PPF nominee and Shri Natarajan obtained a scooter advance apart from a housing loan of Rs. 1,84,700/- Shri Natarajan also obtained a car loan of Rs.80,000/- in the year 1987. However on the cross examination held on 7-11- 2002 the witness of Shri R.Krishnamoorthy said that he did not tender any evidence regarding the nomination of PPF account of Shri Natarajan. The witness also said in his cross examination that he did not know the dates on which Shri Natarajan applied for Scooter loan or when he obtained the loan amount. The witness went on to say that he did not know when Shri Natarajan applied for housing loan and when it was sanctioned.

28 It is submitted that on 8-11-2002 P.W. 151 Mansoor Ahamed was cross examined. On 11-11-2002 P.W. 148 Mohan who is running the business of Automobile upholstery turned hostile during his cross-examination. On 11-11-2002 itself P.W.196 Hajaj Ahmed, a tailor who was entrusted with the task of tailoring the marriage dress of the 5th Respondent herein/the fourth accused was cross-examined. The fourth accused Shri Sudhagaran is the sister's son of the second accused Mrs. Sasikala. On 12-11-2002 P.W. 184 a tourist car operator was cross-examined. On the subsequent day of 13-11-2002 P.W. 147 Madan Lal, P.W. 186 Chalapathy Rao and P.W. 219 R.S.Usman were cross-examined. The trial stood adjourned to 18-11-2002. The

Special Judge has ordered summons as per the process list as prepared by the Special Court.

29. On 18.11.2002 five witnesses were recalled and cross- examined by the Counsel for the accused. The five witnesses who were examined on this date were P.W.127 Rajseshwari, P.W.180 Suseela, P.W.143 Geethalakshmi, PW. 174 Mani and P.W. 206 Abdul Jaffar. The Trial continued on 19-11-2002 and two witnesses were examined. P.W.171 Abdul Razack, Village Administrative Officer of Thiruthuraipoondi village was examined on that date. The other witness who was examined on the said day was P.W.234 Mohamed Asumathulla Hussain who is Block Development Officer of Siruvathoor village in Thiruporur Taluk. The next date of effective proceedings were on 2-12-2002 on which date four more witnesses were examined. They were P.W.183 Ramesh, P.W. 198 Jayaraman, P.W. 216 Naziruddin and P.W.218 V.M. Somasundaram.

30. Similarly during the trial at the end of January 2003, P.W. 237 Shri S.S.Jawahar, I.A.S. formerly working as Deputy Secretary who was examined as prosecution witness in the year 2000 was recalled at the instance of the Accused and was cross examined. In that cross examination he has stated that what he has deposed in the Chief Examination in the year 2000 was under pressure. The Public Prosecutor has not taken any steps to treat him hostile or to file any petition for perjury. So also P.W.230 Shri N.V.Balaji, Auditor of some of the Accused whose chief examination was over in the year 2000, on recall has stated in the cross examination that the Accused had enormous funds during the relevant period. His statement was made orally contrary to his deposition in chief examination, unsupported by any Assessment returns or other documentary evidence. Public Prosecutor has not disputed this nor put any suggestion controverting the above statement.

31. On 3-2-2003 in the Crl.M.P.No.125 of 2003 filed on behalf of Respondent No.4/Accused No.3 for recall of witnesses Special Public Prosecutor made an endorsement that he had no objection for allowing the petition. After recording the above endorsement the Special Court allowed recall of witnesses for cross examination by the Accused, who were all examined more than 2 years back. Consequently on 4-2-2003 P.W.46 Shri T.G.Gopinath, P.W.51 Shri Amarnath Mariacose, P.W.84 Shri V.Ayyadurai, P.W.141 Shri M.Swaminathan and P.W.201 Shri C.K.R.K.Vidhyasagar were summoned and cross-examined by the Accused. All the above witnesses have stated that their earlier deposition in Chief examination was given under pressure. The Public Prosecutor has not made any effort to declare them hostile and cross-examine them.

32. It is submitted that the act of recalling most of the witnesses for the purpose of cross examination and the fact of some of the witnesses turning hostile does not inspire confidence in the mind of public that free and fair trial would be conducted by the present prosecution. There is a genuine apprehension in the mind of the public

> and that there is a real likelihood of bias, if not a pronounced bias in the conduct of prosecution by the prosecutor appointed by the AIADMK Government.
>
> 33. It is submitted that justice must not only be done but must be seen to be done. Free and fair trial being the foundation of criminal jurisprudence. There is prevalent apprehension in the mind of the public at large that the trial is neither free nor fair with the present prosecutor appointed by State Government conducting the trial in a manner where frequently the prosecution witnesses turn hostile especially during cross examination. Recalling most of the witnesses for the purpose of cross examination after the appointment of the Prosecutor chosen by the 2nd Respondent Government and after a lapse of several months itself creates a strong likelihood of official bias in the conduct of prosecution when the Chief Minister of the state is the first accused."

Counter on behalf of the second respondent has been filed. In fact respondent nos. 3,4 and 5 have adopted the counter of respondent No.2. Respondent No.3 has denied the correctness of the statement made by the petitioner in respect of PW-126 R. Krishnamoorthy and PW-230 N.V. Balaji. The rest of the statements contained in paragraphs 25 to 33 have not been controverted. The second respondent has filed a detailed counter. In the counter of the second respondent also the statements made in paragraphs 25 to 33 of the petition have not been controverted. Respondent No.1 has also filed a detailed counter. In paragraph 8 of the said counter, it is stated as under:-

> "I submit that the petitioner has not appreciated the legal concept of a "hostile witness", correctly. Accurate narration has not been made by the petitioner, in so far as the instances set out by him. The depositions of witnesses Mr. Krishnamurthy and Mr. Balaji have not been accurately summarised by him. I submit that the Investigating Agency and the Prosecutor took a considered decision as to when they should seek cross-examination of their own witnesses under section 154 of the Evidence Act. If any aspect is to be clarified, it is done by re-examination, which, in fact, was done in the case of witness Balaji. In so far as witness Krishnamurthy was concerned, he did not say that he has not tendered evidence regarding the nomination of the Provident Fund account of Natarajan. He only stated that he did not tender any documentary evidence."

It is undisputed that 76 witnesses have been recalled. Many of them had earlier been cross-examined. On a question from Court we were informed that the witnesses were recalled as Senior counsel for the second Respondent had been busy attending to some other case filed against her when they were first examined. This could hardly have been a ground for recall of witnesses. The fact that the public prosecutor now appointed did not object to such an application itself suggests that free and fair trial is not going on. It appears that process of justice is being subverted. This gets reinforced by the fact that even when witness after witness has resiled from what they had stated in the evidence in chief, yet no steps have been taken by the public prosecutor to resort to Section 154 of the Indian Evidence Act. As already noticed, the second respondent became the Chief Minister in May, 2001. The list of witnesses recalled and cross-examined after 14.5.2001 has been set out by the

Petitioner in Annexure P-2 of the affidavit of the petitioner. For brevity, we refer to few instances. PW-98 Velayudham was examined in chief on 6.12.1999; cross- examined by A1 and A2 on 6.12.1999; recalled and cross-examined on 18.12.2002; resiled from his previous statement. No re-examination and not treated as hostile.

PW-116 Jayabal was examined in chief on 23.12.1999; cross- examined by A1 on 6.1.2000 and 13.1.2000; re-examined on 13.1.2000; recalled and cross-examined on 30.12.2002, 31.12.2002 and 2.1.2003 by A1, A2 and A4; resiled from his previous statement. No re-examination and not treated as hostile.

PW-126 Krishnamurthy was examined in chief on 10.2.2000 and 2.3.2000; recalled and cross-examined on 2.1.2003 and 23.1.2003; resiled from his previous statement. No re-examination and not treated as hostile. PW-129 Namasi was examined in chief and cross-examined on 9.3.2000; recalled and re-examined on 13.12.2002. No re-examination. PW-130 Maran was examined in chief and cross-examined on 9.3.2000; recalled and cross-examined on 13.12.2002; resiled from his previous statement. No re-examination and not treated as hostile. PW-134 Rajendran was examined in chief and cross-examined on 12.4.2000. 18.4.2000. 25.4.2000 and 5.5.2000; recalled and cross-examined on 6.1.2003; resiled from his previous statement. No re-examination and not treated as hostile.

PW-135 Parthasarathy was examined in chief on 25.4.2000, 2.5.2000, 12.5.2000 and 17.5.2000; recalled and cross-examined on 6.1.2003 by A1, A2 and A4; resiled from his previous statement. No re-examination and not treated as hostile.

PW-155 Subburaj was examined in chief on 12.5.2000; recalled and cross-examined on 22.1.2003 by A1, A2 and A4; resiled from his previous statement. No re-examination and not treated as hostile. We have cited only a few instances to show how the prosecution appears to have acted hand in glove with the accused.

On examining the facts of this case, as adumbrated above, on the touchstone of the decisions of this Court, as referred to above, the petitioner has made out a case that the public confidence in the fairness of trial is being seriously undermined. As revealed from the aforesaid recited facts, great prejudice appear to have been caused to the prosecution which could culminate in grave miscarriage of justice. The witnesses who had been examined and cross-examined earlier should on such a flimsy ground never have been recalled for cross-examination. The fact that it is done after the second respondent assumed the power as the Chief Minister of the State and the public prosecutor appointed by her government did not oppose and/or give consent to application for recall of witnesses is indicative of how judicial process is being subverted. The public prosecutor not resorting to Section 154 of the Indian Evidence Act nor making any application to take action in perjury taken against the witnesses also indicate that trial is not proceeding fairly. It was the duty of the public prosecutor to have first strenuously opposed any application for recall and in any event to have confronted witnesses with their statements recorded under Section 161 of Cr.P.C. and their examination-in-chief. No attempt has been made to elicit or find out whether witnesses were resiling because they are now under pressure to do so. It does appear that the new public prosecutor

is hand in glove with the accused thereby creating a reasonable apprehension of likelihood of failure of justice in the minds of the public at large. There is strong indication that the process of justice is being subverted. 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. In the present case, the circumstances as recited above are such as to create reasonable apprehension in the minds of the public at large in general and the petitioner in particular that there is every likelihood of failure of justice. Mr.Venugopal, learned senior counsel for the respondent, contended that merely because the witnesses were not declared hostile, would not exclude or render unworthy of consideration the facts rendered by them in their evidence-in-chief. He submitted that the Court can consider any part of their testimony and can still believe and rely upon that part of testimony which was given in the evidence in chief if that part of the deposition is found to be creditworthy. According to Mr.Venugopal by not declaring the PWs as hostile witnesses no prejudice has been caused to the prosecution case. To buttress his contention reliance has been placed in Gura Singh Vs. State of Rajasthan, (2001) 2 SCC 205, State of Bihar vs. Laloo Prasad , (2002) 9 SCC 626 and Pandappa Hanumappa Hanamar Vs. State of Karnataka (1997) 10 SCC 197. This Court in Laloo Prasad's case (supra) observed that it is open to the party who called the witness to seek the permission of the Court as envisaged in Section 154 of the Evidence Act at any stage of the examination and it is a discretion vested with the court whether to grant the permission or not. It is further observed that normally when the public prosecutor requested for the permission to put cross- questions to a witness called by him the court used to grant it. It was further pointed out that if the public prosecutor had sought permission at the end of the chief examination itself the trial court would have no good reason for declining the permission sought for. On a combined reading of the aforesaid decisions of this Court, it emerges clearly that even in a criminal prosecution when a witness is cross-examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether. It is for the Judge of fact to consider in each case whether as a result of such cross-examination and contradiction, the witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it. The decisions by this court in the above referred cases are rendered in cases where the public prosecutor seeks permission to question his own witnesses by resorting to Section 154 of the Evidence Act and the court allowed the public prosecutor to cross-examine his own witnesses, In such cases the trial judge has discretionary power to examine the entire testimony and accept that part of testimony which he finds to be creditworthy and act upon it. But in the present case, the public prosecutor has not sought permission from the court by resorting to Section 154 of the Evidence Act even though the witnesses have resiled from their earlier testimony. In such a situation the subsequent testimony of the witnesses remains uncontroverted. Just to take an example, when the witness now states that his earlier evidence was given under pressure and no attempt is made to cross-examine such a witness,

the Court may find it difficult if not impossible to accept the earlier statement. The Trial Judge may find it difficult not to accept the subsequent testimony of the witness, which has remained uncontroverted. This causes great prejudice to the prosecution culminating in great miscarriage of justice. Mr. Andhyarujina, learned senior counsel for the petitioner, has brought to our notice the manner in which the examination of 2nd respondent under Section 313 is sought to be done, which according to him, is unknown to the procedure established by law. The second respondent filed a criminal M.P.No.230 of 2003 dated 24.2.2003 with the prayer to dispense with the personal appearance and to permit her to answer the questionnaire through the counsel, a copy of which is made available to us. It is averred in paragraph 5 of the application that she has just returned from hectic election campaign after a week's tour of Thoothukudi District. She has further stated that she is quite exhausted and laid up with fever and the doctor has advised her complete rest for a few days. She is physically incapacitated to attend the Court in person to fulfil the requirement of Section 313 Cr.P.C. The physical hardship, which the applicant may undergo while answering the questions, will further aggravate physical condition. In paragraph 6 she has further stated that she is making the application not because of the position she is holding but purely on the ground of physical condition. The public prosecutor did not oppose the said application. In the aforesaid facts, the trial court allowed the application by an order dated 24.2.2003. Be you ever so high the law is above you. In our view, the grounds recited in the application as referred to above, were not at all mitigating circumstances to have granted dispensation of personal appearance. To say the least, that was a ploy adopted to circumvent the due process of law. Mr. Venugopal has drawn our attention to the decision of this Court rendered in Basavaraj R. Patil Vs. State of Karnataka (2000) 8 SCC 740, where this Court allowed the accused to dispense with personal appearance and make application to the court praying that he may be allowed to answer the questionnaire without making his physical appearance in court under the conditions stipulated therein. That order was rendered in exceptional exigency circumstances. The accused was in a far-away country - America and he had to incur a whopping expenditure and undertake a tedious long journey solely for the purpose of answering the court questions. This authority makes it clear that the general rule remains that the accused must answer the questions by personally remaining present in Court. It is only in exceptional circumstances that the general rule can be departed/dispensed with. In this case respondent No.2 is holding the position of the Chief Minister of Tamil Nadu. She was available at Chennai. There was no exceptional exigency or circumstances such as her having to undertake a tedious long journey or incur a whopping expenditure to appear in Court to answer the questions under Section 313 Cr.P.C. None of the facts, which have weighed with the consideration of the Court in Basavaraj's case (supra), was available in the given case. The grounds given in her application do not make out any case for granting exemption from personally appearing to answer question under Section 313. The conduct of the public prosecutor in not opposing such a frivolous application has to be deprecated.

Lastly, it is contended by counsel for the respondents, that the petitions seeking transfer of the cases have been filed belatedly and these petitions deserve dismissal for laches and negligence of the petitioner. Reliance was placed on the decision of this Court rendered in R.Balakrishna Pillai Vs. State of Kerala, (2000) 7 SCC 129, where this Court dismissed the petition on the ground that objection was raised four long years after filing of the appeal and no objection was taken when the appeal was heard by a Single Judge who referred the matter to a larger Bench. The facts of that case are not applicable in the facts of the present case. As already noticed, sequence of events leading to

the filing of the petitions started on 7.11.2002. The present petitions were filed on 5.2.2003. We do not find any delay and laches much less, inordinate delay, which would non-suit, the petitioner.

In the result, we deem it expedient for the ends of justice to allow these petitions. The only point that remains to be considered is now to which State the cases should be transferred. We are of the view that for the convenience of the parties the State of Karnataka would be most convenient due to its nearness to Tamil Nadu. Accordingly, the petitions are allowed. CC No.7 of 1997 and CC No.2 of 2001 pending on the file of the XI Addl. Sessions Judge (Special Court No.1) Chennai, in the State of Tamil Nadu shall stand transferred with the following directions:-

> (a) The State of Karnataka in consultation with the Chief Justice of the High Court of Karnataka shall constitute a Special court under the Prevention of Corruption Act, 1988 to whom CC No.7 of 1997 and CC No.2 of 2001 pending on the file of the XI Addl. Sessions Judge (Special Court No.1) Chennai in the State of Tamil Nadu shall stand transferred. The Special Court to have its sitting in Bangalore.
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> (b) As the matter is pending since 1997 the State of Karnataka shall appoint Special Judge within a month from the date of receipt of this Order and the trial before the Special Judge shall commence as soon as possible and will then proceed from day to day till completion.
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> (c) The State of Karnataka in consultation with the Chief Justice of High Court of Karnataka shall appoint a senior lawyer having experience in criminal trials as public prosecutor to conduct these cases. The public prosecutor so appointed shall be entitled to assistance of another lawyer of his choice.

The fees and all other expenses of the Public Prosecutor and the Assistant shall be paid by the State of Karnataka who will thereafter be entitled to get the same reimbursed from the State of Tamil Nadu. The Public Prosecutor to be appointed within six weeks from today.

(d) The investigating agency is directed to render all assistance to the public prosecutor and his assistant.

(e) The Special Judge so appointed to proceed with the cases from such stage as he deems fit and proper and in accordance with law.

(f) The Public Prosecutor will be at liberty to apply that the witnesses who have been recalled and cross-examined by the accused and who have resiled from their previous statement, may be again recalled. The public prosecutor would be at liberty to apply to the court to have these witnesses declared hostile and to seek permission to cross-examine them. Any such application if made to the Special court shall be allowed. The public prosecutor will also be at liberty to apply that action in perjury to be taken against some or all such witnesses. Any such application/s will be undoubtedly considered on its merit/s.

(g) The State of Tamil Nadu shall ensure that all documents and records are forthwith transferred to the Special Court on its constitution. The State of Tamil Nadu shall also ensure that the witnesses are produced before the Special Court whenever they are required to attend that Court.

(h) In case any witness asks for protection the State of Karnataka shall provide protection to that witness.

(i) The Special Judge shall after completion of evidence put to all the accused all relevant evidence and documents appearing against them whilst recording their statement under Section 313. All the accused shall personally appear in Court, on the day they are called upon to do so, for answering questions under Section 313, Criminal Procedure Code.

These Petitions are allowed in the above terms.