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Alexander Vs. C.B.i.

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Court : Kerala

Decided On : Apr-07-2005

Reported in : 2005(3)KLT310

Judge : V. Ramkumar, J.

Acts : Code of Criminal Procedure (CrPC) , 1973 - Sections 161, 239, 245 and 407

Appeal No. : T.P.(Crl.) No. 23 of 2005

Appellant : Alexander

Respondent : C.B.i.

Advocate for Def. : S. Sreekumar, Adv. and; T. Ravikumar, Public Prosecutor

Advocate for Pet/Ap. : K. Ramakumar and; T. Ramaprasad Unni, Advs.

Judgement :
ORDER

V. Ramkumar, J.

In this petition filed under Section 407 Cr.P.C. the petitioner who is the accused in C.C. No. 4/95 on the file of the Special Court (SPE/CBI)-I, Ernakulam, seeks a transfer of the above case from the said Court to the other Court dealing with the

C.B.I. cases at Ernakulam, for an adjudication of the question of discharge in a fair, unbiased and transparent manner. The Central Bureau of Investigation (C.B.I.) and the State of Kerala are the respondents to this petition. The matter was argued in detail before me.

Petitioner's Contentions

2. In the words of the petitioner himself, when his petition for discharge was argued before the Special Judge on 7.3.2005, what transpired was the following:

The Special Judge remarked:

'I have to frame charges'. My counsel replied 'only if there are sufficient materials'.

'I was in Court and was completely taken aback and shocked at the observation made by the Court. The Court was then impressed upon the fact that the Supreme Court has permitted me to raise all arguments in support of discharge'.

3. The matter was thereafter posted to 23.3.2005. According to the petitioner on that day also what took place is the following:

'When the case was called it was represented that my Counsel was engaged before the High Court and a short adjournment was sought. However, the learned Judge observed as follows:

'This is a case in which I have to frame charges. Of course I will be hearing you. But I am making clear of the conclusion. Tell him that. If it is to avoid me, until something happens, I will be here for another two more years.'

Thereafter the learned Judge added:

'Last day's arguments tenor was that he has a good defence, but at this stage I need not look into these matters. All that is required is whether 'there is a prima facie case.'

(Why should I go into the whole gamut of it? I shall dismiss it and give you. You may go and obtain a stay. I will frame the charge for you) (translation is mine)

4. The above observations by the Special Judge, according to the petitioner, indicate that even before the hearing, the learned Judge had pre-judged the whole issue and was determined to frame charges whatever be the arguments. The petitioner alleges that the above observations have engendered an apprehension in the mind of the petitioner that he will not get justice from the biased Judge who has made no secret of his prejudice against the petitioner. Buttressing his contentions Adv. Sri. K. Ramakumar intelligently placed reliance on the following passages:

(A) '131. In Black's Law Dictionary Sixth Edition at page 162 bias is defined as under:

'Inclination; bent; prepossession; a preconceived opinion; a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction. To incline to one side. Condition of mind, which sways judgment and renders Judge unable to exercise his functions impartially in particular case. As used in law regarding disqualification of Judge, refers to mental attitude or disposition of the Judge toward a party to the litigation, and not to any views that he may entertain regarding the subject-matter involved. State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 622, 143 p.2d 652, 655.

132. The rule of bias is founded on the well-known maxim nemo judex non causa sua: no person can be a Judge in his own cause'.

'The frequency with which allegations of bias have come before the Courts in recent times seems to indicate that the reminder of Lord Hewart, C.J., in R. v. Sussex Justices, (1924) 1 KB 256 (259) that it is 'of fundamental importance that justice should not, only be done, but should manifestly and undoubtedly be seen to be done'.

In Metropolitan Properties Co. (F. G. C.) Ltd. v. Lannon, (1968) 3 All. ER 304 at 310, it was held thus:. in considering whether there was a real likelihood of bias, the Court does not look at the mind of Justice himself or at the mind of the Chairman of the tribunal, whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour

one side at the expense of the other. The Court looks at the impression which would be given to other people. Even if he was in impartial as could be, nevertheless, if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does sit, his decision cannot stand: See R. v. Muggins, 1985-99 All.ER Rep 914 : 1895(1) QB563), R. v. Sunderland Justices, 1901 (2) KB 357 at P.373, Per Vaughan Williams, L.J. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough: See R. v. Cambome Justices, Exp. Pearce, 1954 (2) All. ER 850, R. v. Nail Sworth Justices, Exp. Bird, 1953 (2) All. ER 652. There must be circumstances from which a reasonable man would think it likely or probable that the Justice, or Chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking'. The Judge was biased'.

'145. In Ranjit Thakur v. Union of India, (1988) 1 SCR 512 at 520 : (AIR 1987 SC 2386 at pp.2390-91) the law was stated by one of us, Venkatachaliah, J. (as he then was) as under: 'As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the Judge is not to look at his own mind and ask himself, however, honestly. 'Am I biased?' but to look at the mind of the party before him'. (Vide AIR 1996 SC 11 -- Tata Cellular v. Union of India).

(B) Bias may be generally defined as partiality or preference. It is true that any person or authority required to act in a judicial or quasi-judicial matter must act impartially .... It is not every kind of bias which in law is taken to vitiate an act. It must be a prejudice which is not founded on reason, and actuated by self-interest -- whether pecuniary or personal. Because of this element of personal interest, bias is also seen as an extension of the principles of natural justice that no man should be a judge in his own cause. Being a state of mind, a bias is sometimes impossible to determine. Therefore, the Courts have evolved the principle that it is sufficient for a litigant to successfully impugn an action by establishing a

reasonable possibility of bias or proving circumstances from which the operation of influences affecting a fair assessment of the merits of the case can be inferred', (vide G.N. Nayak v. Goa University and Ors., (2002) 2 SCC 712.

(C) 'In R. v. Sussex Justices, (1924) 1 KB 256 (259) it has been indicated that answer to the question whether there was a real likelihood of bias depends not upon what actually was done but upon what might appear to be done'. (Vide Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-education) Higher Secondary School and Ors., AIR 1993 SC 2155).

(D) 26. The concept of 'Bias' however has had a steady refinement with the changing structure of the society. Modernisation of the society, with the passage of time, has its due impact on the concept of Bias as well. Three decades ago this Court in S. Parthasarathi v. State of Andhra Pradesh, (1974) 3 SCC 459 :AIR 1973 SC 2701 : 1973 Lab.I.C. 1607 proceeded on the footing of real likelihood of 'bias' and there was in fact a total unanimity on this score between the English and the Indian Courts.

Mathew, J. in Parthasarthi's case observed:

'16. The tests of 'real likelihood' and 'reasonable suspicion' are really inconsistent with each other. We think that the reviewing authority must make a determination on the basis of the whole evidence before it, whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The Court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the part of an inquiry officer, he must not conduct, the enquiry nevertheless; there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent. The Court will not inquire whether he was really prejudiced. If a reasonable man would think on the basis of the existing circumstances that he is likely to be prejudiced, that is sufficient to quash the decision (See per Lord Denning, H.R. in Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon, (1968) 3 WLR 694 at 707). We should not, however, be understood to

deny that the Court might with greater propriety apply the 'reasonable suspicion' test in criminal or in proceedings analogous to criminal proceedings.' (Vide AIR 2001 SC 24--Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant and Ors.).

(E) 'Justice is a principle which regulates the distribution of things, valued by men awarding them to some, denying them to others. It is, at the same time, a principle whereby man's worth is appraised. Justice gives to 'every one that which is his'. It is not, a free gift from the Court. The subject of a civilised country is entitled as a matter of right to get it freely without sale, fully without any denial and speedily without delay'. The Court only appraises it. In doing so the Court must act and appear to act without partiality and without prejudice or as it is often expressed, 'justice should not only be done but should manifestly and undoubtedly seem to be done.'

'If a litigant feels that he will not get justice in a particular Tribunal, he can demand a transfer of the case to some other Court.'

'The question is for the Court to determine whether the applicant who applies for the transfer feels that he is not likely to have a fair trial in the other Court. In coming to a conclusion on this point, the question for consideration is what is the effect likely to be produced in the mind of the party and not in the mind of the Judge. It is the feeling of the party that has to be ascertained and it necessarily depends on the individual concerned, his temperament and failing, his interest and circumstances.

If the Court on a consideration of all the facts conies to the conclusion that the applicant feels that he is not likely to have a fair trial in the Court from which he seeks the transfer it is the duty of the Court to make the order.' (Vide Rupendra Deb Raikut v. Ashrumati Debi and Ors., AIR 1951 Cal.286).

(F) 'It is of vital necessity, if law and order are to be maintained, that the Criminal Courts whose duty it is to administer the penal laws, should be above criticism or challenge. Justice must not only be done, but must manifestly appear to be done'. (Vide Uaman Haroom and Ors. v. Emperor, AIR 1947 Bom. 409).

(G) 'It is particularly mentioned that on 10.2.1950, after the statement of Shri Satya Deo, Secretary, District Congress Committee, Jaisalmer, had been completed and he had been discharged, he was asked to produce certain documents, that when on 12.4.1950, Satya Deo appeared for re-cross-examination by the accused, he was asked about the documents and when he stated that they were not with him, the Magistrate lost his temper and observed:

'Why should not chits be affixed to your Congress Office? The police had committed a mistake and not taken possession of the documents beforehand. You want to hide the truth. You are a liar and want to shield the accused wrongly. Certainly, there is something in the documents.'It was further alleged that after this the Magistrate and the Prosecuting Inspector held consultations whereupon the Prosecuting Inspector said to the Magistrate that he was declaring the witness hostile. Thereupon, the Magistrate asked the Prosecuting Inspector to submit an application which was promptly made whereupon the counsel for the accused requested for an opportunity to address arguments before the witness was declared hostile but the Magistrate paid no heed to it and declared the witness hostile with the remark that he wanted to shield the accused. It is said that on account of the above reasons the accused had a reasonable apprehension that they would not get a fair trial before Shri Goswami'.

'Courts should be very cautious in making observations in the course of a trial, because, while disposing of a Transfer Petition the Superior Courts have to see whether or not the particular observation made by the Court will raise a reasonable apprehension in the minds of the accused that they would not have a fair trial in that Court. Observations like the one mentioned above must necessarily raise such an apprehension in the mind of the accused. Moreover, the observation complained of appears to be uncalled for'. (Vide Bhanwar Lal v. The State, AIR 1951 Raj. 107).

(H) 'In dealing with an application for transfer there are certain well-established principles which have been stated in (1977) 2 QBD 558 at p.567 and (1924) 1 K.B. 256 (2) at p.259. The propositions deductible are these:

(1) One important object, at all events, is to clear away everything which might engender suspicion and distrust of the Tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security.

(2) The law, in laying down this strict rule, has regard not so much perhaps to the motives which might be supposed to bias the Judge as to the susceptibilities in the litigant parties.

(3) It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seem to be done.

(4) Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice'. (Vide Annubeg Muckimbeg Musalman and Anr. v. Emperor, AIR 1944 Nag. 320).

(I) 'It is of the utmost importance that litigants should have faith and confidence in the impartially of Courts. The confidence has to be maintained. It is not enough to do justice. It must be seen to be done. Giving the impression by some remarks, made before the close of the argument about the character of important prosecution witnesses which had a bearing on the value of their evidence, that the issue has been prejudged would justify a demand for transfer of the case' (Vide N.C. Bose v. Porbodh Dutta Gupta, AIR 1955 Assam 110).

Stand of the C.B.I.

5. Advocate Sri. S. Sreekumar, the Standing Counsel appearing for the C.B.I., after instructions from his counterpart in the Court below submitted that no such thing as is alleged by the petitioner had taken place so as to justify the fear expressed by the petitioner and that when the petitioner's Advocate started arguments on the merits of the case by reading the statements of witnesses recorded under Section 161 Cr.P.C. the learned Special Judge asked him whether the test was not the existence of a prima facie case.

Judicial Conclusion

6. Knowing the Special Judge, (Mr. Kemal Pasha) as I do, I did not consider it necessary to call for the remarks from the Special Judge.

7. There cannot be any quarrel about the propositions laid down in the rulings relied on by the petitioner. But there are certain equally important propositions indicating the other side of the coin as well. In paragraph 140 of the decision in Tata Cellular's case, AIR 1996 SC 11 (supra) the Apex Court has observed as follows:

In University College of Swansea v. Cornelius, 1988 ICR 735 at 739 holds:

'Cases of bias and ostensible bias had to be regarded in the light of their own circumstances. The circumstances of this case could have no relevance to other cases.'

8. In the very same decision of the Apex Court, we find the following quote from R. v. Liverpool City Justices, ex parte Topping, (1983) 1 All. ER 490 at paragraph 139 of the report:

'We conclude that the test to be applied can conveniently be expressed by slightly adapting the words of Lord Widgery, C.J. in a test which he laid down in R. v. Uxbridge Justices, ex.p. Burbridge, (1972) Times, 21 June and referred to by him in R. v. McLean, exp Aikens, (1974) 139 JP 261 at 266: would a reasonable and fair-minded person sitting in Court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?'

9. Similarly, in R.L.. Sharma's case, AIR 1993 SC 2155 (supra) the Apex Court has observed as follows:

'In Halsbury Laws of England, (4th Edn.) Vol. 2 para.551, it has been indicated that the test of bias is whether a reasonable intelligent man, fully apprised of all the circumstances, would feel a serious apprehension of bias. The same principle has also been accepted by this Court in Manna Lal v. Dr. Prem Chand, 1957 SCR 575 : AIR 1957 SC 425.'

10. The following observations in paragraphs 31 and 32 of Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant, AIR 2001 SC 24 are apposite:

'31. The Court of Appeal judgment in Locabail (2000 QB 451) (supra) though apparently as noticed above sounded a different note but in fact, in more occasions than one in the judgment itself, it has been clarified that conceptually the issue of bias ought to be decided on the facts and circumstances of the individual case a slight shift undoubtedly from the original thinking pertaining to the concept of bias to the effect that a mere apprehension of bias could otherwise be sufficient.

32. The test, therefore, is as to whether a mere apprehension of bias or there being a real danger of bias and it is on this score that the surrounding circumstances must and ought to be collated and necessary conclusion drawn therefrom. In the event however the conclusion is otherwise inescapable that there is existing a real danger of bias the administrative action cannot be sustained. If on the other hand, the allegations pertaining to bias is rather fanciful and otherwise to avoid a particular Court, tribunal or authority, question of declaring them to be unsustainable would not arise. The requirement is availability of positive and cogent evidence and it is in this context that we do record our concurrence with the view expressed by the Court of Appeal in Locabail's case (supra).

11. The increasing tendency calculated to demoralise the criminal judiciary in this State was taken judicial notice of by this Court in Berely v. Xavier and Anr., 1986 KLT 1078, wherein it has been observed as follows:

'13. This Court has noticed an increasing tendency to file such Transfer Petitions on the basis of unfounded allegations against Criminal Courts. Sessions Judges and Magistrates had occasion to complaint that they are facing considerable difficulties in the conduct of trials. Very often they are told to their face 'you may dismiss the petition. I will go to the High Court' (In this case also, the defence counsel told the Sessions Judge that when he makes a particular averment in the Transfer Petition before the High Court, the Sessions Judge should not deny it). Such actions have a demoralising effect on the criminal judiciary and seriously affect administration of criminal justice. No person, not a litigant, not a counsel, not

a prosecutor, not a Court should contribute anything to the demoralisation of the criminal judiciary. Apparently, threat of filing Transfer Petition is being held as Democles sword against judicial officers. I see only a reaction, perhaps an avoidable one, on the part of the learned Sessions Judge to this situation. Viewed in the background of the findings recorded in the order dismissing the Transfer Petition, there is no doubt that the allegation of bias against the learned Sessions Judge was baseless and unfounded.'

12. In Maneka Sanjay Gandhi v. Rani Jethmalani, AIR 1979 SC 468, the Apex Court observed as follows:

'Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the Court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touch-stone 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.'

13. Again in R. Balakrishna Pillai v. State of Kerala, 2000 (3) KLT 425 (SC): AIR 2000 SC 2778, the Apex Court observed as follows:

'It is true that one of the principles of administration of justice is that justice should not only be done but it should be seen to have been done. However, a mere allegation that there is the apprehension that justice will not be done in a given case is not sufficient. Before transferring the case Court has to find out whether the apprehension appears to be reasonable. To Judge the reasonableness of the apprehension, the state of mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must appear to the Court to be reasonable, genuine and justifiable. In the present day scenariao, if these types of applications are entertained, the entire judicial administration would be polluted

with frivolous petitions for various reasons.'

14. A practical and down-to-earth observation by Frank, J. in Linahan Re. (1943) 138 F 2d 650, 652 was noted by the Apex Court in G.N. Nayak's case, (2002) 2 SCC 712 (supra). The said observation reads as follows:

'If however, 'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the Judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions and the processes of education, formal and informal, create attitudes which precede reasoning in particular instances and which, therefore, by definition, are prejudices.'

Facts specific

15. The petitioner who was a senior I.P.S. Officer and who was holding very responsible positions in life including the post of Director General of Police is not a stranger to the judicial institutions. The Courts are also not unfamiliar to the petitioner who, after retirement from service got himself enrolled as an Advocate and it was describing himself as an Advocate that he filed Crl.M.C. No. 107/1997 earlier.

16. Having regard to the chequered progression of this case which is solely attributable to the petitioner, I have no hesitation to conclude that there is absolutely no bona fides in the application for transfer. It is pertinent to remember in this context that unlike the Superior Courts, the Trial Court which has before it all the prosecution records, is in a more advantageous position to know where the shoe pinches. The F.I.R. in this case was registered on 12.9.1991. The petitioner challenged the F.I.R. before the Delhi High Court but ultimately without success. After a detailed investigation by the C.B.I. the charge-sheet was laid before the Court on 17.11.1995. The petitioner unsuccessfully challenged the charge-sheet before this Court and also before the Hon'ble Supreme Court. Both this Court as well as the Supreme Court reserved the right of the petitioner to plead for a discharge before the Special Court at the appropriate stage.

17. It is admitted in paragraph 5 of this Transfer Petition that the application filed by the petitioner for discharge was being taken up from time to time and that he has filed application for summoning documents to support his plea of discharge. This means that the petitioner was clearing the deck for another innings of forensic battle at the pre-charge stage also. All that is required at the stage of framing charge is to see whether a prima facie case has been made out or not. (See State of H.P. v. Krishanlal, AIR 1987 SC 773). Despite the difference in language in Sections 245 and 239 Cr.P.C. the legal position is that if the Trial Court is satisfied that a prima facie case has been made out, a charge has to be framed. (See R.S. Nayak v. Antulay, AIR 1986 SC 2045). At the stage of framing charge the Court cannot look into the documents produced by the accused. (See Supdt. and Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhurya, AIR 1980 SC 52 and State of Orissa v. Debendra Nath Padhi, 2004 (10) SCALE 50. If so, the petitioner could not have filed petitions to compel production of documents to support his plea of discharge.

18. It is in the above backdrop that the contentions of the petitioner have to be examined. Even assuming that what is attributed to the Special Judge is true, he had evidently done, some homework and was only reminding the petitioner's counsel about the correct legal position. What is ascribed to the Special Judge do hot at all suggest the mind of a prejudiced Judge who had pre-determined the issue before him for consideration.

19. While it is true that a judicial officer by words, deeds or his conduct should never give room for any litigant or the public to suspect that there is even the slightest possibility of prejudice, conscious or unconscious, and that considerations of sobriety, moderation and reserve will have to be the hallmark of his actions, just as the members of Bar and the litigant public, Judges are also human beings made of flesh and blood and at times prone to susceptibilities which are purely of human nature as observed in paragraph 13 above. They occasionally react to provocative stimuli and dilatory tactics proceeding from the litigants or their counsel. The killing pendency of cases due to docket explosion and the stress and strain of the crowded Court atmosphere in the Subordinate Courts are to be seen to be believed. Added to that, there is the target to be achieved by the

presiding officers. If in such situations, when they come across sharp practices and frontal attacks on their impartiality, some poor souls react, the system's inhibitions notwithstanding. They are more sinned against than being sinners. They cannot be driven to the wall and cowed to terms by parties or their counsel who want justice to be tailored to suit their whims.

20. If the apprehensions of the petitioner are driven to their logical conclusions, a Judge or Magistrate who has already taken a view at the interlocutory stage of the matter renders himself disqualified to proceed further in the matter because it could legitimately be argued that his subsequent view in the same matter would take the hue of the view he has already taken. Stretched to ludicrous proportions, a Magistrate who dismisses a bail application becomes ineligible to try the case; a civil Judge who declines an interlocutory relief either to the plaintiff or to the defendant becomes a biased Judge rendering himself unfit to finally decide the lis. I do not think that the doctrine of bias deserves to be pushed to such illogical and unrealistic extremes.

21. The statements of the petitioner are only expressions of hypersensitivity and do not constitute the basis for a reasonable apprehension by a person well-informed about the judicial institutions. The subjective sense of justice or morality of an oversensitive suitor cannot form the basis of a reasonable apprehension to justify a transfer of the case. The aspersions cast on the impartiality of the Special Judge are unfounded and do not constitute the basis for entertaining a genuine fear or justifiable ground that the petitioner will not get justice at the hands of the Special Judge.

This Transfer Petition (Crl.) is accordingly dismissed in limine.

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