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Court : Chennai

Decided On : Apr-29-1999

Reported in : 1999(2)CTC418

Judge : P. Shanmugam, J.

Acts : [Constitution of India](#) -- Article 226 and 227; [Code of Criminal Procedure \(CrPC\) , 1973](#) -- Sections 239, 407, 482 and 483; The Prevention of Corruption Act, -- Sections 17-B; Code of Civil Procedure (CPC) Act, 1908 -- Sections 19(3) and 317; [Prevention of Corruption Act, 1988](#) -- Sections 3; Letters Patent Act, 1865

Appeal No. : C.R.P. Nos. 673 and 674 of 1999 and C.M.P. Nos. 3460 and 3461 of 1999

Appellant : Mohammed Asif

Respondent : State Rep. by Additional Superintendent of Police, Q Branch, Cid on Other Duty in Crime Branch, Ci

Advocate for Def. : Mr.S. Masilamani, Senior Counsel for ;Mr.S. Shanmugasundaram Pulice Prosecutor

Advocate for Pet/Ap. : N.Jyothi, Adv.

Judgement :

ORDER

1. Both these Civil Revision Petitions under Article 227 of the [Constitution of India](#) are filed by Thiru Mohd. Asif, who is the fourth accused both in C.C.NO. 4 of 1997 and C.C.No. 13 of 1997 on the file of the XIII Additional City Civil Judge and Special Judge, Chennai-1, praying for the transfer of those cases to any other Special Judge of competent jurisdiction.

2. Though the relief sought for namely transfer of the cases from the court to another comes within the narrow compass, detailed and elaborate arguments were advanced.

FACTS

The investigation of crime No. 17 of 96 led into the filing of three cases C.C.Nos. 4 of 1997, 13 of 1997 and 14 of 1997 before the XIII Additional City Civil Judge and Special and Sessions Judge, Chennai. The broad allegation is that the petitioner, while he was a Minister for Rural Industries, had conspired with the other accused in under-valuing the Government property and selling them. The trial in C.C.No. 14 of 1997 has already commenced. The chargesheet in C.C.No. 4 of 1997 was filed on 15.11.96 and in C.C.No. 13 of 1997 on 22.10.97. The discharge petitions were filed by the petitioners in C.C.No. 4 of 1997 on on 13.10.1997 and in C.C. No.13 of 1997 on 27.10.1998. They were dismissed by the Special Court on 13.11.97 and 11.11.98 respectively. The Criminal Revision filed against these petitions were also dismissed by the High Court in Crl.R.C. No. 952 of 1997 on 9.3.98 and Crl.R.C. 1244 of 1998 on 13.1.98.

4. Petitioner moved Crl.M.P. Nos. 897 and 898 of 1998 in C.C.No. 4 of 1997 and Crl.M.P.Nos. 905 and 906 of 1998 in C.C.No. 13 of 1997 praying for grant of certain statements of witnesses which were in Tamil so as to give it in English language, since he is Urdu speaking and challenged the competency of the investigating officer in terms of section 17-B of the Prevention of Corruption Act. The petitions were adjourned to 28.2.98 for arguments. On that day, he filed adjournment petitions on the ground that his counsel was unwell and suffering

from cold and high temperature and that on the advice of the Doctor he is taking medicine and also is at bed-rest. The applications were opposed to by the prosecution on the ground that the reasons were not bona fide. The adjournment petitions were dismissed on 28.12.98.

5. On 19.2.99, the case was called for furnishing copies to the second accused and after the counsel received the chargesheet in Tamil, the matter was adjourned, according to the petitioner, for 'further proceedings' to 25.2.99, but subsequently it has been posted for 'framing of charges' on 25.2.99. This, according to the petitioner, was at the instance of the public Prosecutor who met the learned Judge in his chambers.

6. In view of these two instances, the petitioner has lost the confidence and feels that he will not get fair justice from the Judge who acts against the interests of the petitioner and is more on the side of the prosecution and therefore, filed the above petitions for transfer of those cases to some other court of competent jurisdiction as envisaged by the Division Bench judgment in W.P.No. 7096 etc., batch of 1998 dated 3.11.98.

7. I have heard the counsel and considered the matter carefully. From the facts set out above, it is seen that the petitioner is the fourth accused in C.C. Nos. 4 of 1997, and 13 of 1997. Petitioner filed two applications each in C.C.Nos. 4 of 1997 and 13 of 1997, one for translated copies from Tamil to English, and the other questioning the competency of the investigating officer. When these petitions came up for hearing on 28.12.98, petitioner's application for adjournment was dismissed. The case of the petitioner is that the order dismissing the application for adjournment inspite of the counsel being unwell is unusual.

8. On the other hand, learned senior counsel appearing on behalf of the respondent submits that petitioner's application were intended only to protract the proceedings. According to him, though these applications were filed in the first week of December, petitioner was seeking adjournments on 7.12.98, 9.12.98, 15.12.98, 18.12.98, 21.12.98, 23.12.98 and finally to 28.12.98. Petitioner was represented by three counsel M/s. K. Panchapakesan, N, Jothi and Mohd. Amjad. Petitioner did not specifically state as to which of the learned counsel was not well

on that day and inspite of the matter being adjourned dates stating some reason or the other. Thus, according to them, no objection can be taken for the refusal to adjourn a matter and that no prejudice could have been caused to the petitioner since there were other senior counsel representing the petitioner.

9. Insofar as the second incident, which according to the petitioner has given rise to the cause of action for transfer petition, it does not relate to the petitioner as such who was the fourth accused in the cases. On 18.2.99. the case was taken up for furnishing Tamil translation of documents to the second accused. The counsel for the second accused filed application under Section 317 C.P.C. to dispense with the presence of the accused and therefore declined to receive the copies on behalf of the 2nd accused and prayed for adjournment. On 19.2.99, the counsel for the second accused received the Tamil translation copies. The learned Judge directed the case to be posted for framing of charges to 25.2.99. According to the petitioner, Initially the matter was adjourned from 19.2.99 to 25.2.99 for further proceedings. Subsequently, at the request of the Public Prosecutor in the chambers of the learned Judge, the records of the court were corrected so as to reflect that the case was being posted on 25.2.99 for framing charges. The respondent has denied that fact of the Public Prosecutor meeting the learned Judge in his chambers and it is further pointed out that the discharge applications filed by the accused Nos.1 to 4 have already been disposed on 28.10.98 and the remaining accused Nos.5 and 6 made an endorsement that they are not filing any application praying for discharge from the case. There is no other reason for the case to be posted for other proceedings except for framing of charges. They denied that the Public Prosecutor ever went to the chamber of the learned Judge. According to them, when the petitioner himself states that he had left the court hall after it was announced on 25.2.1999 that the matter was adjourned to 28.2.99, he has not stated as to how he came to understand of the meeting of the Public Prosecutor and the instructions given by the learned Judge. According to the respondent, the averment is false and vexatious.

10. Insofar as the second instance is concerned, the matter did not relate to the petitioner and the second accused has not filed any application objecting to the posting for framing of charges. It is further seen that the discharge applications

filed by accused 1 to 4 have already been disposed of and there cannot be any further proceedings except to frame charges.

11. It is further stated on behalf of the learned counsel for the petitioner that steps are being taken for filing a revision against the order refusing adjournment.

12. It is stated that the petitioner has filed W.P.No. 17980 of 1998 challenging the appointment of Special Public Prosecutors in the corruption cases pending against him. The said writ petition was dismissed on 3.12.98. He had also filed W.P.No. 18836 of 1998 challenging section 19(3)(c) of the P.C. Act and the same is pending.

13. Legal Aspects: Maintainability of C.R.P. under Article 227 of the [Constitution of India](#):

Though the counter affidavit filed by the respondent raises the question of maintainability of the C.R.P. under Article 227 of the Constitution, ultimately it was argued by the learned senior counsel that this is not a case for interference under Article 227 of the Constitution. However, in lieu of the objection raised in the counter as to the maintainability, learned counsel Mr.N. Jothi relied upon the Division Bench judgment in W.P.No.7096 of 1998 etc., dated 3.11.98 for a transfer under Article 227 of the constitution. The Division Bench was dealing with the constitution of Special Courts and section 3 of the P.C. Act. and it was contended before the Division Bench that since the P.C. Act does not provide for transfer of cases, the learned Judges of the Division Bench observed that the power of transfer as well as the provisions with respect to judicial power of transfer under the code of Criminal Procedure as well as Article 227 of the constitution of India and Clause 29 of the Letters Patent Act could always be exercised, as they have not been excluded specifically much less implicitly. The Division Bench thus held that the transfer of cases can be sought for by invoking the provisions of the criminal procedure code article 227 of the constitution as well as clause 29 of the Letters Patent Act. The observation of the Division Bench does not mean that criminal procedure code which specifically provides for transfer of cases by the High Court can be excluded and that in all cases Article 227 alone can be invoked as a matter of right. In *Kartar Singh v. State of Punjab*, , a constitutional Bench of

the Supreme Court was dealing with the power to grant bail by invoking Article 227 of the [Constitution of India](#), in reference to TADA detenus. It was held, agreeing with the view taken by the supreme Court in State of Maharashtra v. Abdul Hameed Haji Mohammed, : 1994 CriLJ415 as follows:

'Therefore, we totally agree with the view taken by this court in State of Maharashtra v. Abdul Hameed Haji Mohammed, : 1994 CriLJ415 that if the High Court is inclined to entertain any application under Article 226, that power should be exercised most sparingly and only in rare and appropriate cases in extreme circumstances. But, the judicial discipline and comity, of course, require that the High Court should refrain from exercising such extraordinary jurisdiction under such circumstances' (Italics supplied).

14. Petitioner has got a statutory remedy under section 407 to seek for transfer of cases. When there is an effective remedy available to the petitioner under the Criminal Procedure Code, he cannot by pass the same by invoking the extraordinary jurisdiction under article 227 of the constitution. In the petitions, he has not stated as to why he has by passed this alternative remedy and approached the High Court under Article 227 of the Constitution. In Ahmedabad manufacturing & Calico Ptg. Co v. Ramtahel, : (1972)ILLJ165SC , the Supreme Court held that the power under article 227 is intended to be used sparingly and only in appropriate cases for the purpose of keeping the subordinate courts and tribunals within bounds their authority and not for correcting mere errors. To the same effect was the judgment in Chandrasekhar Singh & others v. Siya Ram Singh & others, : 1979 CriLJ13 . Following the principles in the judgments referred to above, I have taken the view in C.R.P.No. 719 of 1999 dated 7.4.99. that the constitutional power of the High Court under article 227 cannot be curtailed, but the said power being extraordinary, it is not ordinarily invoked when there are statutory provisions providing effective relief to the petitioner.

15. Therefore, the civil revision petition is liable to be rejected on the ground of not exhausting the effective alternative remedy available, viz. Sections 407, 482 and 483 of Cr.P.C. However, learned senior counsel appearing for the respondent conceded that assuming that the revision is maintainable, there are no grounds for

interference and for ordering transfer in this case. The matter was heard for considerable time, i.e. nearly six hours and I am of the view that it will be unfair to decide and dispose of the matter delegating the matter to the appropriate forum at this stage. Therefore, I proceed to consider the C.R.Ps. on merits.

16. General Principles for Transfer:

Learned counsel Mr. Jothi appearing on behalf of the petitioner addressed the court elaborately on the settled principles of law relating to transfer of cases. He submitted that transfer of cases should be ordered when there is reasonable apprehension in the mind of the accused that he may not get justice from the court and that there is procedural mistake committed by the court. He also submitted that justice should not only be done, but also seen to be done. He had referred to a number of decisions and as a matter of fact, has compiled a book containing those decisions containing 31 such decisions. It is not necessary to refer to all those decisions because there is no dispute on the principles under which a transfer could be ordered. From a reading of these decisions, the following principles emerge:

- (1) The person arraigned before the court should have confidence in the impartiality of those courts and if a person has reasonable cause to apprehend that the court before whom he is being tried is not completely free from a bias, a transfer should be directed;
- (2) It is of fundamental importance that justice should not only be done, but should manifestly seen to be done;
- (3) If the Magistrate is not discharging the statutory function in a judicial manner and is acting as a mere-mouth-piece of the Public Prosecutor;
- (4) If the procedure adopted by the Magistrate is illegal so as to justify reasonable apprehension that the petitioner would not have fair and impartial trial;
- (5) If the Magistrate's conduct shows that he is biased towards the prosecution;

(6) Any observation of the Magistrate raising reasonable apprehension in the mind of the accused that he would not have a fair trial;

(7) Failure to postpone the case in the interests of justice; and

(8) Whether a litigant could reasonably apprehend that bias attributable to the member of the Tribunal might have operated against him.

17. Applying these decisions, learned counsel for the petitioner submitted that the special Judge has got a bias towards the prosecution and that he passed an unfair order in not granting an adjournment and that there is a procedural mistake committed by him and that there is reasonable apprehension in the mind of the petitioner that he may not get fair justice.

18. By applying these principles in this case, it has to be seen whether there are any grounds made out for the transfer. Neither the rejection of the application for adjournment nor the posting of the case for further proceedings or framing of charges are grounds sufficient enough warranting a transfer of the cases. I am also not inclined to agree with the counsel that these were sufficient to create a reasonable apprehension of unfair trial at the hands of the Judge. From the facts and circumstances of the case set out earlier, it could be seen that the petitioner had been granted sufficient time and was granted several adjournments for getting ready in those two applications. Besides, there are two other senior counsel appearing along with Shri Mohd. Amhd. Amjad, who is none other than the son of the petitioner. No reason is stated why the other two senior counsel could not represent the petitioner on 28.12.1998. Besides, it is stated that the petitioner is making arrangements to file revision against the order refusing adjournment. Therefore, the order of the learned Judge rejecting the application for an adjournment after several earlier adjournments and posting it finally and when other counsel representing the petitioner are available and no reason stated as to why they are not appearing, I do not find anything extraordinary or unusual in the order passed by the learned Judge. He had exercised his jurisdiction rejecting an application, Of course, this is subject to revision which the petitioner is said to have invoked. The second instance actually does not relate to the petitioner's case. It refers to the case of the second accused in the calendar cases and the

posting of the case for further proceedings for filing of a chargesheet, according to the petitioner is a later interpolation on the directions of the Judge at the instance of the Public Prosecutor. There is no evidence whatsoever to say that the learned Judge has subsequently directed to post the cases for framing of charges. As nothing remained except to frame charges since all the applications to discharge had been dismissed, the allegation contrary cannot be sustained. The learned Judge who had been asked to file a report, has stated that the speaking orders were passed on merits. According to the learned Judge after granting number of adjournments and also after granting sufficient time, the order was passed. In reference to the second instance, it is stated that after hearing both sides, it was informed to both the parties whether the case can be posted on 24.2.99 for framing charges against all the accused. The counsel for the second accused represented that six weeks time should be given for perusal of the documents. Only, after considering the request of the counsel, he had decided to post the case on the 24.2.99 for framing charges against all the accused. Later, on the representation of the counsel for the second accused that there was personal inconvenience for the second accused to appear on 24.2.99, the case was posted 25.2.99 for framing charges against all the accused. The Bench clerk did not announce in the open court that the case was adjourned for further proceedings to 25.2.99. Since the petitions filed under Section 239 Cr.P.C. have been already dismissed, he had posted the case for framing the charges. He did not post the case initially on 22.2.99 as stated by the petitioner. According to the Judge, he had acted according to law.

19. After considering the contentions and allegations made by the petitioner and the counter affidavit and arguments, I am fully convinced that the petitioner cannot entertain any reasonable doubt or apprehension as to the fairness of the trial and the allegations are not substantiated. Hence, the request for transfer cannot be granted.

20. Lastly, it is submitted that the Special Judge has subjected himself to a controversy and therefore, it is better that the case should not be posted before him. In support of this contention learned counsel relied on the observation made by Subramani, J. in this case. The matter came up before Justice S.S. Subramani

and he passed the following order on 5.3.99.

'Since the officer met me personally and has talked about the case, I feel it is not proper to continue in this case. I have written a detailed letter to my Lord the Acting Chief Justice as to what transpired on 2.3.99 at my residence and my opinion about the officer. Registry is therefore directed to place the C.R.Ps. before My Lord the Acting Chief Justice for further orders.'

Learned counsel for the petitioner submits that in the light of the observations made by Subramani. J, the petitioner may not get a fair treatment before the Judge. I am unable to draw any inference from the order.

21. Learned senior counsel for the respondent referred to the judgment in State of Maharashtra v. Ramdas Shrinivas Naik, : 1982 CriLJ1581 , wherein the Supreme Court held that matters of judicial record are unquestionable. Their Lordships observed as follows:

'We are bound to accept the statement of the Judges recorded in their judgment, as to what transpired in court. We cannot allow the statement of the Judges to be contradicted by statements at the Bar or by affidavit and other evidence. If the Judges say in their judgment that something was done, said or admitted before them, that has to be the last word on the subject. The principle is well-settled that statements of fact as to what transpired at the hearing, recorded in the Judgment of the court, are conclusive of the facts so stated and no one contradict such statements by affidavit or other evidence.'

Consequent to the order of Subramani, J. the matter was posted before this court, Apart from the observation that the learned judge did not feel it proper to continue in this case, nothing more can be inferred or added so as to say that the learned Judge expressed anything against the Special Judge. That will be unnecessarily drawing the court into controversy. For that reason, the affidavit filed by Mr.Mohd Amjad dated 16.4.99 as to what transpired in the court cannot be received and accepted as part of record. Mr. Mohd. Amjad has already filed an affidavit withdrawing his appearance from the case by filing a separate affidavit on 28.2.99.

22. For all these reasons, there are no sustainable grounds to grant the relief sought for in the Civil Revision Petitions. Hence, both the C.R.Ps. fail and they are accordingly dismissed. Consequently, the related C.M.Ps. are also dismissed.

23. Learned counsel for the petitioner sought for some time for the trial in case this court is not inclined to grant the relief, or else the matter may be taken immediately before the Special Judge. Considering the request made, the Special Judge is directed to proceed with the framing of charges insofar as the petitioner is concerned from 10.5.99.

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