

GAHC010139992023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Tr.P.(Crl.)/16/2023

RAKESH KUMAR PAUL
S/O LATE RANJIT KUMAR PAUL
R/O HOUSE NO. 47, SAKTIGARH PATH, P.S. BHANGAGARH, DIST. KAMRUP
(M), GUWAHATI-781005

VERSUS

THE STATE OF ASSAM
THROUGH THE PP, ASSAM

:: PRESENT ::

HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA

For the Petitioner : Mr. D. Das,
Senior Advocate.

For the Respondent: Mr. M. Phukan,
Public Prosecutor,
Assam.

Date of Hearing : 10.01.2024.

Date of Judgment : 18.01.2024.

JUDGMENT AND ORDER (CAV)

Heard the learned senior counsel Mr. D. Das appearing for the petitioner. Also heard Mr. M. Phukan, the learned Public Prosecutor, Assam.

2. This is an application under Section 407 of the CrPC seeking transfer of the Special Case No.05/2021 pending in the court of the Special Judge, Assam to any other equivalent court.

3. The petitioner has been facing trial in a case under the provisions of Prevention of Corruption Act, after spending 5 years and 7 months in judicial custody. After closure of recording of prosecution evidence, the petitioner wanted to examine defence witnesses under Section 243 of the Code of Criminal Procedure. To that effect, the petitioner wanted some time. The trial court provided only 3 hours' time. The petitioner wanted more time but the court refused to grant more time.

4. The petitioner apprehended that the court was biased towards him and he would not get fair and impartial justice in that court. Therefore, the petitioner filed this present application under Section 407 of the CrPC praying for transferring the case from the court of Special Judge, Assam to any other equivalent court.

5. The learned counsel Mr. Das has submitted that the prosecution was allowed so many years to produce prosecution witnesses and the accused/petitioner was given only three hours' time to submit the list of defence witnesses. The learned counsel has termed this act of the trial court to be an act of bias.

6. In order to buttress his point, Mr. Das has relied upon a judgment of

the Supreme Court in *Punjab v. Davinder Pal Singh Bhullar*, (2011) 14 SCC 770. Paragraphs 28, 29, 31 and 36 of the said judgment are quoted as under:

“28. The principle in these cases is derived from the legal maxim—*nemo debet esse iudex in propria sua causa*. It applies only when the interest attributed is such as to render the case his own cause. This principle is required to be observed by all judicial and quasi-judicial authorities as non-observance thereof is treated as a violation of the principles of natural justice. (Vide *Rameshwar Bhartia v. State of Assam* [(1952) 2 SCC 203 : AIR 1952 SC 405 : 1953 Cri LJ 163] , *Mineral Development Ltd. v. State of Bihar* [AIR 1960 SC 468] , *Meenglas Tea Estate v. Workmen* [AIR 1963 SC 1719] and *Transport Deptt. v. Munuswamy Mudaliar* [1988 Supp SCC 651 : AIR 1988 SC 2232] .)

29. The failure to adhere to this principle creates an apprehension of bias on the part of the Judge. The question is not whether the Judge is actually biased or, in fact, has really not decided the matter impartially, but whether the circumstances are such as to create a reasonable apprehension in the mind of others that there is a likelihood of bias affecting the decision. (Vide *A.U. Kureshi v. High Court of Gujarat* [(2009) 11 SCC 84 : (2009) 2 SCC (L&S) 567] and *Mohd. Yunus Khan v. State of U.P.* [(2010) 10 SCC 539 : (2011) 1 SCC (L&S) 180])

31. The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the adjudicator was likely to be disposed to decide the matter only in a particular way. Public policy requires that there should be no doubt about the purity of the adjudication process/administration of justice. The Court has to proceed observing the minimal requirements of natural justice i.e. the Judge has to act fairly and without bias and in good faith. A judgment which is the result of bias or want of impartiality, is a nullity and the trial *coram non iudice*. Therefore, the consequential order, if any, is liable to be quashed. (Vide *Vassiliades v. Vassiliades* [AIR 1945 PC 38] , *S. Parthasarathi v. State of A.P.* [(1974) 3 SCC 459 : 1973 SCC (L&S) 580] and *Ranjit Thakur v. Union of India* [(1987) 4 SCC 611 : 1988 SCC (L&S) 1] .)

36. Thus, it is evident that the allegations of judicial bias are required to be scrutinised taking into consideration the factual matrix of the case in hand. The court must bear in mind that a mere ground of appearance of bias and not actual bias is enough to vitiate the judgment/order. Actual proof of prejudice in such a case may make the case of the party concerned stronger, but such a proof is not required. In fact, what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. However, once such an apprehension exists, the trial/judgment/order, etc. stands vitiated for want of impartiality. Such judgment/order is a nullity and the trial *coram non iudice*.”

7. Mr. Das has further relied upon a judgment of the Supreme Court that was delivered in *State of Gujarat v. R.A. Mehta*, (2013) 3 SCC 1.

Paragraphs 58, 59 and 60 of the said judgment are quoted as under:

“**58.** [Ed. : Para 58 corrected vide Official Corrigendum No. F.3/Ed.B.J./28/2013 dated 11-4-2013.] Absence of bias can be defined as the total absence of any preconceived notions in the mind of the authority/Judge, and in the absence of such a situation it is impossible to expect a fair deal/trial and no one would therefore see any point in holding/participating in one as it would serve no purpose. The Judge/authority must be able to think dispassionately and submerge any private feelings with respect to each aspect of the case. The apprehension of bias must be reasonable i.e. which a reasonable person would be likely to entertain. Bias is one of the limbs of natural justice. The doctrine of bias emerges from the legal maxim *nemo debet esse judex in propria causa*. It applies only when the interest attributed to an individual is such so as to tempt him to make a decision in favour of, or to further his own cause. There may not be a case of actual bias, or an apprehension to the effect that the matter most certainly will not be decided or dealt with impartially but where the circumstances are such so as to create a reasonable apprehension in the minds of others that there is a likelihood of bias affecting the decision, the same is sufficient to invoke the doctrine of bias.

59. In the event that actual proof of prejudice is available, the same will naturally make the case of a party much stronger, but the availability of such proof is not a necessary precondition, for what is relevant, is actually the reasonableness of the apprehension in this regard in the mind of such party. In case such apprehension exists the trial/judgment/order, etc. would stand vitiated for want of impartiality and such judgment/order becomes a nullity. The trial becomes *coram non judice*.

60. While deciding upon such an issue, the court must examine the facts and circumstances of the case and examine the matter from the viewpoint of the people at large. The question as regards “whether or not a real likelihood of bias exists must be determined on the basis of probabilities that are inferred from the circumstances of the case by the court objectively or upon the basis of the impression that may reasonably be left upon the minds of those aggrieved or the public at large”. (Vide *S. Parthasarathi v. State of A.P.* [(1974) 3 SCC 459 : 1973 SCC (L&S) 580 : AIR 1973 SC 2701] , *State of Punjab v. V.K. Khanna* [(2001) 2 SCC 330 : 2001 SCC (L&S) 1010 : AIR 2001 SC 343] , *N.K. Bajpai v. Union of India* [(2012) 4 SCC 653] and *State of Punjab v. Davinder Pal Singh Bhullar* [(2011) 14 SCC 770 : (2012) 4 SCC (Civ) 1034 : AIR 2012 SC 364] .)”

8. *Per contra*, the learned Public Prosecutor Mr. Phukan has submitted that the act of giving three hours’ time to produce the list of defence

witnesses, cannot be termed to be an act of bias. Mr. Phukan submitted that it is a long pending trial and the petitioner knows whom he would examine as defence witnesses and therefore, it is not difficult for the petitioner to file the list of witnesses within three hours. Regarding the apprehension of the petitioner, Mr. Phukan has relied upon a judgment of the Supreme Court that was delivered in *Usmangani Adambhai Vahora v. State of Gujarat*, (2016) 3 SCC 370. Paragraphs 7, 8, 9 and 10 of the said judgment are quoted as under:

“7. So far as apprehension is concerned, it has to be one which would establish that justice will not be done. In this context, we may profitably refer to a passage from a three-Judge Bench decision in *Gurcharan Das Chadha v. State of Rajasthan* [*Gurcharan Das Chadha v. State of Rajasthan*, AIR 1966 SC 1418 : 1966 Cri LJ 1071] , wherein it has been held : (AIR p. 1423, para 13) –

“13. ... The law with regard to transfer of cases is well settled. 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.”

8. This Court in *Abdul Nazar Madani v. State of T.N.* [*Abdul Nazar Madani v. State of T.N.*, (2000) 6 SCC 204 : 2000 SCC (Cri) 1048] has ruled that : (SCC pp. 210-11, para 7)

“7. ... 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."

9. In *Amarinder Singh v. Parkash Singh Badal* [*Amarinder Singh v. Parkash Singh Badal*, (2009) 6 SCC 260 : (2009) 2 SCC (Cri) 971] , while dealing with an application for transfer petition preferred under Section 406 CrPC, a three-Judge Bench has opined that for transfer of a criminal case, there must be a reasonable apprehension on the part of the party to a case that justice will not be done. It has also been observed therein that merely an allegation that there is an apprehension that justice will not be done in a given case alone does not suffice. It is also required on the part of the Court to see whether the apprehension alleged is reasonable or not, for the apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension. In the said context, the Court has held thus : (SCC p. 273, paras 19-20)

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

20. However, the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary. Free and fair trial is sine qua non of Article 21 of the Constitution. If the criminal trial is not free and fair and if it is biased, judicial fairness and the criminal justice system would be at stake, shaking the confidence of the public in the system. The apprehension must appear to the court to be a reasonable one."

10. In *Lalu Prasad v. State of Jharkhand* [*Lalu Prasad v. State of Jharkhand*, (2013) 8 SCC 593 : (2013) 4 SCC (Civ) 103 : (2013) 4 SCC (Cri) 406 : (2014) 1 SCC (L&S) 137] , the Court, repelling the submission that because some of the distantly related members were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, we think it appropriate to reproduce the following passage : (SCC p. 600, para 20)

"20. Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-à-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or

those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstance gets devalued. The public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."

The aforesaid passage, as we perceive, clearly lays emphasis on sustenance of majesty of law by all concerned. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice. (See *Nahar Singh Yadav v. Union of India* [*Nahar Singh Yadav v. Union of India*, (2011) 1 SCC 307 : (2011) 1 SCC (Cri) 39] .)"

9. I have considered the submissions made by the learned counsels of both sides.

10. At this stage, I have decided to consider the circumstances under which the trial court has been conducting the trial.

11. In Bail Application No.423/2021, in paragraph 33, this Court directed the trial court to conduct the trial with utmost priority by taking day-to-day hearing. Similarly, in Bail Application No.904/2022, in paragraph 20, this Court directed the trial court to dispose of the case within next 6 months. This Court further directed the trial court to submit monthly progress report of the trial of the case to the Registrar, Vigilance of this Court for next 6 months. Again, In *Rakesh Kumar Paul v. State of Assam*, reported in 2023 SCC Online Gau. 1046, directed the present petitioner not to cause any delay to the proceedings in Special Case No.05/2021 pending before the trial court.

12. These are the conditions under which the trial court has been conducting the trial of the case. For that matter, I would rely upon a judgment of the Supreme Court that was delivered in *K.P. Tiwari v. State of M.P., 1994 Supp (1) SCC 540*. In paragraph 4 of the said judgment, the Supreme Court has held as under:

“4. ----- It has also to be remembered that the lower judicial officers mostly work under a charged atmosphere and are constantly under a psychological pressure with all the contestants and their lawyers almost breathing down their necks — more correctly up to their nostrils. They do not have the benefit of a detached atmosphere of the higher courts to think coolly and decide patiently. Every error, however gross it may look, should not, therefore, be attributed to improper motive.”

13. I am of the considered opinion that if the trial court gave three hours' time to the petitioner to produce the list of defence witnesses, the trial court cannot be held to be biased against the petitioner. The petitioner has been facing trial for a long time and he knows who will be his defence witnesses. He could have easily provided the list of names of his defence witnesses within 3 hours' time.

14. Under the aforesaid circumstances, I failed to agree with the contention of the petitioner that the trial court was biased towards him and he would not get fair justice in the said court. I find the present petition to be devoid of merit.

15. The instant transfer petition stands dismissed and disposed of accordingly. The earlier stay order stands vacated. The trial court is directed to dispose of the case expeditiously.

JUDGE

Comparing Assistant