

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AT AURANGABAD.**

Criminal Writ Petition No. 235 of 2015

Khalil Gani Patel (Attar),
Age : 45 years,
Occupation : Business,
R/o. Bagwan Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.

.. Petitioner
(Original respondent no.20)

versus

1. The State of Maharashtra.
2. Asadbin s/o. Amer Chaus,
Age : 35 years,
Occupation : Business & Agriculture.
3. Sahalbin Amir Chaus,
Age : 56 years,
Occupation : Business.
4. Taleb Amir Chaus,
Age : 32 years,
Occupation : Business.
5. Islam Ganam Chaus,
Age : 44 years,
Occupation : Business.

All R/o. Raj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.

6. Wasim Khan Shahin Khan Pathan,
Age : 25 years,
Occupation : Business,
R/o. Masjid Chowk, Majalgaon,
Taluka : Majalgaon, Dist. : Beed.

7. Shaikh Shahed Shaikh Kalimoddin,
Age : 36 years,
Occupation : Business,
R/o. Masjid Chowk, Majalgaon,
Taluka : Majalgaon,
District : Beed.
8. Mahaj Islam Chaus,
Age : 41 years,
Occupation : Business,
R/o. Chaus Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
9. Jawed Amanulla Maniyar,
Age : 36 years,
Occupation : Business,
R/o. Wajaj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
10. Jaker Amanulla Maniyar,
Age : 45 years,
Occupation : Business,
R/o. Wajaj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
11. Wajed Amanulla Maniyar,
Age ; 29 years,
Occupation : Business,
R/o. Wajaj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
12. Shaikh Raju Shaikh Abdul,
Age : 25 years,
Occupation : Business,
R/o. Khatik Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.

13. Naser Rashid Qureshi,
Age : 33 years,
Occupation : Business,
R/o. Khatik Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
14. Awad Rais Chaus,
Age : 40 years,
Occupation : Business,
R/o. Mogal Mohalla, Majalgaon,
Taluka : Majalgaon,
District : Beed.
15. Jawed Said Chaus,
Age : 40 years,
Occupation : Business,
R/o. Mogal Mohalla, Majalgaon,
Taluka : Majalgaon,
District : Beed.
16. Muslam Amar Makrani,
Age : 42 years,
Occupation : Business,
R/o. Chaus Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
17. Abujal Faisal Chaus,
Age : 25 years,
Occupation : Business,
R/o. Raj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.
18. Idris Nasar Antosh,
Age : 31 years,
Occupation : Business,
R/o. Pathan Mohalla, Pathri,
Taluka : Pathri,
District : Parbhani.

19. Faisal Amir Chaus,
Age : 46 years,
Occupation : Business,
R/o. Raj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.

20. Bilal Sahal Chaus,
Age : 24 years,
Occupation : Business,
R/o. Raj Galli, Majalgaon,
Taluka : Majalgaon,
District : Beed.

.. Respondents
(No.2 - Original petitioner
before Sessions Court, Beed)

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Mr. Sudarshan J. Salunke, Advocate, for the petitioner.

*Mr. U.S. Mote, Additional Public Prosecutor, for
respondent no.1 - State.*

*Mr. Sanjay R. Choukidar, Advocate, for respondent
nos.2 to 20.*

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CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 7TH APRIL 2015

ORAL JUDGMENT :

1. Heard Adv. Mr. S.J. Salunke for the petitioner, learned APP Mr. U.S. Mote for respondent no.1, and Adv. Mr. S.R. Choukidar for respondent nos.2 to 20.

2. Rule. Rule made returnable forthwith. By consent, heard

finally.

3. The petitioner herein questions the correctness and validity of the order dated 17th January 2015, passed by the Sessions Judge, Beed, below Exhibit 1 in Misc. Criminal Application No. 107/2014, thereby transferring R.C.C. No. 68/2009 and R.C.C. No. 69/2009, from the Court of Judicial Magistrate (F.C.) [Court No.3], to the Court Judicial Magistrate (F.C.) [1st Court], Majalgaon, for disposal.

4. The petitioner herein happens to be the complainant in R.C.C. No. 68/2009. The petitioner is an accused in the cross case i.e. R.C.C. No. 69/2009. After completion of investigation, charge sheet was filed in the Court of Judicial Magistrate (F.C.) at Majalgaon. The charge was framed. In R.C.C. No. 69/2009, two witnesses were examined. In R.C.C. No. 68/2009, the prosecution had examined eight witnesses. At that stage, the accused in R.C.C. No. 68/2009 filed an application under Section 408 of the Code of Criminal Procedure, 1973, thereby requesting the Sessions Court at Beed, to transfer both the cases to another Court. The application was filed on 19th December 2014. The applicant therein has submitted before the Sessions Court, that the court was not recording the evidence properly. The material portion was not taken on record. That, the learned court had a premonition that the applicant and other accused had committed the offence. That, the Court was recording the evidence favourable and helpful to the case of the accused in R.C.C. No. 69/2009 and, therefore, the applicant was convinced that the Court would record conviction against them. The applicant therein had faced trial in R.C.C. No. 130/2008 before the same Court and although there was trustworthy

and believable evidence on record, the Court had convicted the applicant and his brother. The applicant was seeking a fair and impartial trial. The applicant therein has also submitted that in order to maintain dignity of the Court, he had avoided to make other allegation against the Judicial Magistrate (F.C.)[Court No.3], Majalgaon. The prosecution has requested the Court to pass an appropriate order in accordance with law. The petitioner had filed his say and objected to the said transfer as it was against record.

5. The learned Sessions Judge, by an order dated 17th January 2015, has been pleased to allow the application filed by the respondent no.2 herein. It is pertinent to note, that the learned Sessions Judge has observed, that prima facie it appears that the grievances against the Presiding Officer are product of imagination. That, the apprehension of the accused / applicant was not supported by any material placed on record. The learned Sessions Court has further observed, that ordinarily it would not be proper to withdraw the trial from one Court and transfer the same to the other, but looking to the attitude of the petitioner and other accused, if the trial against them is continued before the same Court, they may not cooperate with the Presiding Officer and Court for early conclusion of the trial. The learned Court was also aware of the fact, that an order of transfer need not be made only for asking. However, the learned Court was of the opinion that there are peculiar circumstances in the present case.

6. It is a matter of record, that in the application filed by the accused in R.C.C. No. 68/2009, no sufficient material was placed on

record, even to remotely indicate instances that the Presiding Officer had not discharged his duties in accordance with law. The notes of evidence were not placed on record for perusal of the Sessions Court. The learned Sessions Court had also not called for the record and proceedings from the Judicial Magistrate (F.C.)[Court No.3] at Majalgaon and only to satisfy the grievances of the accused, the case was transferred from the Court of Judicial Magistrate (F.C.)[Court No.3] to the Court of Judicial Magistrate (F.C.)[1st Court]. The learned Counsel for the petitioner fairly submits that in the absence of any material on record, it was not proper for the Sessions Court to transfer the matter. The petitioner had objected the transfer.

7. The learned Counsel for respondent nos.2 to 20 submits as follows :

- (a) That, there is a lurking suspicion in the mind of the accused, that they would not get a fair trial.
- (b) That, earlier the present respondent had faced a trial before the same Judge and he was convicted therein. However, he has no grievance about the conviction.
- (c) That, although the order of transfer passed by the Sessions Judge is a judicial order, in fact, it is an administrative order.
- (d) That, besides the Court of Judicial Magistrate (F.C.)[Court No.3] at Majalgaon, there are two other courts available and if the trial proceeds

before any of the other two courts, no prejudice would be caused to the petitioner.

(e) Last submission is that, in the eventuality, that the matter is re-transferred to the Court of Judicial Magistrate (F.C.) [Court No.3], Majalgaon, the Court would be prejudiced against the accused and would have an adverse premonition against the accused persons and no justice would be imparted in favour of the applicant since the accused had made a grievance against the Judicial Officer in respect of his judicial functioning.

8. The learned Counsel for respondent nos.2 to 20 has placed implicit reliance upon the judgment delivered by the Hon'ble Apex Court, on 4th February 2015, in ***Criminal Appeal No. 222 of 2015***, in the case of ***Kanaklata Vs. State of (NCT) of Delhi & others***. The learned Counsel has drawn attention of this Court, to the following observations of the Hon'ble Apex Court :

“ The present appears to be one such case where despite the safeguards provided by the High Court's observations, the apprehension of the complainant continues to subsist. We do not think that such apprehension is wholly misconceived nor can it be dubbed as forum shopping in disguise. The earlier order passed by the trial Court is so strongly worded that it could in all likelihood give rise to a reasonable apprehension in the mind of the complainant which cannot be lightly brushed aside. We must hasten to add that we are not in the least suggesting that the Presiding

Officer of the trial Court is totally incapable of adopting a fair approach while passing a fresh order but then the question is not whether the Judge is biased or incapable of rising above the earlier observations made by her. The question is whether the apprehension of the complainant is reasonable for us to direct a transfer. Justice must not only be done but must seem to have been done. A lurking suspicion in the mind of the complainant will leave him with a brooding sense of having suffered injustice not because he had no case, but because the Presiding Officer had a preconceived notion about it. On that test, we consider the present to be a case where the High Court ought to have directed a transfer. Inasmuch as it did not do so, we have no option but to interfere and direct transfer of the case to another Court. "

9. As against this, learned Counsel for the petitioner has placed reliance upon judgment of the Hon'ble Apex Court, in the case of ***Ashish Chadha Vs. Smt. Asha Kumari & another***, reported in ***2012 CRI. L.J. 77***, and particularly, following observations of the Hon'ble Apex Court :

" Needless to say that such transfers ordered merely on the say so of a party have a demoralizing effect on the trial courts. Unless a very strong case based on concrete material is made out, such transfers should not be ordered."

10. It is obvious that in the present case, there was no material

placed before the learned Sessions Judge, nor the learned Sessions Judge had called for record & proceedings to ascertain as to whether the Presiding Officer was discharging the judicial functions in accordance with law. The learned Sessions Judge has been swayed by the lurking suspicion in the mind of the accused, that justice would not be imparted to them. This would result in Forum Hunting and would set a wrong precedent.

11. Upon perusal of the application filed by the accused, it is clear that one of the grounds is the conviction recorded in R.C.C. No. 130/2008. It is specifically contended that the Presiding Officer had convicted the accused in the absence of any trustworthy and believable evidence. In fact, none of the contentions would support the order of transfer passed by the learned Sessions Judge. Once the learned Sessions Judge had arrived at a conclusion that there was no material for transferring the matter, it would not be appropriate to transfer the matter. What was considered is only the prejudice which would be caused to the accused persons. In the present case, the petitioner and the respondents / original accused are being tried in cross complaints and only on the basis of allegations levelled by the accused in R.C.C. No. 68/2009, grave prejudice would be caused to the accused in R.C.C. No. 69/2009. In fact, the findings recorded by the learned Sessions Judge are unwarranted and unfounded without any supporting material and, therefore, the order passed by the learned Sessions Judge, transferring both the matters to another court, deserves to be quashed and set aside.

12. That, by transferring the matters from one court to another, in

the absence of any foundation, would demoralise the Court seized with the matter. It is necessary to instill faith and confidence in the Court of Law and not oblige the litigant just for the asking. Sub-Section 1 of Section 408 of the Code of Criminal Procedure, 1973, reads thus :

"Power of Sessions Judge to transfer cases and appeals – (1) Whenever it is made to appear to a Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division. "

It is clear that an order of transfer is to be passed only when it is expedient to meet the ends of justice. The learned Sessions Judge has not expressed an opinion that it is expedient in the interest of justice but what is considered is that the accused may not cooperate with the Presiding Officer. Law has to take its own course.

13. In the result, the petition is allowed.

(A) The order passed by the learned Sessions Judge, Beed, dated 17th January 2015, below Exhibit 1 in Misc. Criminal Application No. 107/2014, is hereby quashed and set aside.

(B) It is hereby directed, that R.C.C. No. 68/2009 and R.C.C. No. 69/2009 be re-transferred and assigned to the Court of Judicial Magistrate (F.C.) [Court No.3], Majalgaon, for their disposal in accordance with law.

The said transfer shall be effected within four weeks from today.

(C) The learned Magistrate, to whom the aforesaid cases stand re-transferred, shall not be influenced by the observations made by this Court. The learned Magistrate shall also not be, in any way, adversely influenced by the filing of the application by the accused under Section 408 of the Code of Criminal Procedure, 1973, and shall record evidence in accordance with law.

14. Rule is made absolute in the above terms.

15. At this stage, learned Counsel for respondent nos.2 to 20 makes an oral prayer for staying the effect and operation of the present judgment and order for a period of four weeks. The oral prayer is hereby rejected.

(SMT. SADHANA S. JADHAV)
JUDGE

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