

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.266 OF 2017

Ms.Kavita Vilas Upadhye & Anr. ... **Applicants**

V/s.

The State of Maharashtra & Ors. ... **Respondents**

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Mr.Sangharsh Waghmare i/b. Mr.Ravi Jadhav, Advocate for the Applicants.

Mr.S.V.Gavand, APP for the Respondent/State.

Mr.Nitin Gangal, Advocate for the Respondent No.2.

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CORAM : A.M.BADAR J.

DATED : 21st JUNE 2018.

P.C. :

1 This is an application under Section 407 of the Criminal Procedure Code for transfer of Regular Criminal Case No.128 of 2016 registered against respondent Nos.2 to 4 on the basis of investigation of the FIR lodged by applicant No.1 Kavita Upadhye. Prayer is made for transfer of said Regular Criminal Case No.128 of 2016 pending on the file of the learned Judicial Magistrate First Class, Khalapur to any other Court of competent jurisdiction.

2 Heard the learned Advocate appearing for the applicants at sufficient length of time. He took me through the annexures to the application as well as documents tendered across the bar in the form of pursis filed by Advocate Mansi Deshpande in Regular Criminal Case No.157 of 2016 withdrawing her *vakalatnama* as well as photo copy of application of Suraj Hanumant Kadam dated 23/11/2016. The learned Advocate for the applicant argued that the police are threatening Suraj Kadam, who had accompanied the present applicants. The learned Advocate further argued that at Khalapur there is no favourable atmosphere in which the applicants can conduct trial of the criminal case. The learned Advocate further argued that no Lawyer is taking up the case of the applicants and, therefore, the case needs to be transferred to some other Court of competent jurisdiction for fair trial thereof.

3 The learned Additional Public Prosecutor opposed the application by contending that no tangible evidence is produced to show that opportunity of fair trial would not available to the applicants at the Khalapur Court.

4 The learned Advocate appearing for the respondent Nos.2 to 4/original accused opposed the application by placing reliance on the affidavit-in-reply. He argued that several cases are

initiated by the applicants against the accused persons and others and they are pending before various Courts in which services of Advocates are availed by the applicants. The learned Advocate further argued that even President of the Bar Association at Khalapur has sworn an affidavit stating that the applicants did not approach members of the Bar for availing legal services. The learned Advocate further argued that the applicants have filed several complaints against all Advocates working in the Chamber of respondent No.2/original accused, who himself is a senior Advocate at Khalapur.

5 I have carefully considered the rival submissions and also perused the material placed on record.

6 It is not in dispute that the Regular Criminal Case No.128 of 2016 is registered on the basis of investigation done by the Police Station, Khopoli into the FIR dated 29/02/2016 lodged by applicant No.1 Kavita Upadhye. Respondent Nos.2 to 4 are charge-sheeted accordingly and that is how Regular Criminal Case bearing No.128 of 2016 is registered and is pending for trial in the Court of learned Judicial Magistrate First Class, Khalapur. The learned Additional Public Prosecutor has stated that the said case is fixed for framing the charge.

7 Suffice to state that the said criminal case is a State case and not a complaint case. The Public Prosecutor is there to represent the prosecuting agency in that case. In this view of the matter, it is not possible to accept the contention of the learned Advocate for the applicants that services of Advocates are not available to them at Khalapur. Nothing substantial and tangible is placed on record to buttress this contention. The copy of pursis allegedly signed by Mansi Deshpande pressed into service by the learned Advocate for the applicants shows that the said Advocate has withdrawn her *vakalatnama* in some other criminal case. That does not by *ipso facto* means that legal services are not available to the applicants. The learned Advocate for the applicants has not demonstrated that the applicants have filed any such application before the learned trial Court demonstrating this fact.

8 So far as allegations of threatening to Suraj Kadam in the matter is considered, it is in respect of other incident and the same is not related to the trial of the Criminal Case No.128 of 2016 in which the charge is not yet framed.

9 Duly sworn affidavit of the respondent No.2 shows that about 16 legal proceedings are initiated by the present applicants against accused persons and those are pending before several Forums including this Court. In the light of this fact, it cannot be said that legal assistance is not available to the applicants.

10 It is also seen from the affidavit filed by the respondent No.2 that complaint against the Advocates working in the Chamber of the respondent No.2 are filed before the Bar Council of Maharashtra and Goa by the applicants.

11 All these facts demonstrate that the applicants are not under any fear or threat nor it is seen that they are deprived of any fair trial or favourable atmosphere to conduct the trial at Khalapur Court. The apprehension of not getting fair and impartial trial is required to be reasonable and not imaginary based on surmises and conjecture. Each case is required to be tested on its own facts. Way back in the year 1979, the Honourable Supreme Court has cautioned not to exercise such jurisdiction on hyper sensitive motion made by the parties. As held by the Honourable Apex Court in the matter of *Mrs.Maneka Gandhi v. Rani Jethmalani*¹, assurance of 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 the parties 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 required for the Court exercising such type of jurisdiction. In the case in hand, motion obviously seems to be outcome of hypersensitivity.

1 AIR 1979 SC 468.

12 It is brought on record by the applicants themselves that similar such motion was moved before the learned Sessions Judge, Alibag. It was requested that along with two other cases, subject criminal case be transferred to some other Court. With a reasoned Order, the said motion bearing Criminal Application No.968 of 2016 came to be rejected by the learned Sessions Judge, Raigad at Alibag on 03/12/2016. Nothing is pointed out to demonstrate that this Order is further challenged by filing appropriate proceedings by the applicants. The learned Advocate appearing for the applicants tried to demonstrate that this Order dated 03/12/2016 passed by the learned Sessions Judge, Raigad at Alibag is impugned in the instant application. That is not permissible under the scope of application of Section 407 of the Criminal Procedure Code.

13 In the light of foregoing discussions, I hold that the applicants have failed to demonstrate that their apprehension of not getting fair and impartial trial is reasonable. The application is without any substance.

14 The application is, therefore, rejected.

(A.M.BADAR J.)