

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.632 OF 2018

Mr.Ashish Anan & Anr. ... **Applicants**

V/s.

The Union Territory of Daman & Diu & Ors. ... **Respondents**

.....

Mr.Harshvardhan Pandey i/b. Mr.Swaroop Karade, Advocate for the Applicants.

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

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CORAM : A.M.BADAR J.

DATED : 21st JANUARY 2019.

P.C. :

1 This is an application for transfer of Special Case No.1 of 2017 for offences punishable under Sections 384, 201, 506 and 120B read with Section 34 of the Indian Penal Code and under Section 13(1)(d) of the Prevention of Corruption Act, 1988 from the file of the learned Special Judge, Daman to any other Court of competent jurisdiction outside the Union Territory of Daman and Diu.

2 Heard the learned Counsel appearing for applicants/original accused. He strenuously urged that the

applicants/accused had filed an application (Exhibit 9) under Section 91 of the Code of Criminal Procedure for preserving the call detail records, but by its inaction, the learned trial Court kept that application pending and ultimately the applicants had to move an application dated 21/03/2018 (Exhibit 34) to point out the manner in which the application was adjourned from time to time. It is further argued by the learned Counsel for the applicants/ accused that the applicants were compelled to move the application at Exhibit 34. Thereafter, the application was decided. But with passage of time, the Telecom Company has informed that the call detail records were archived for one year. The call detail records are, therefore, not available.

3 I have carefully considered the submissions so advanced and perused the Order sheets maintained by the learned trial Court. It is seen from the Order sheet that on 04/12/2017 application under Section 91 of the Code of Criminal Procedure was preferred by the learned Advocate for the accused No.7. It was replied by the prosecuting agency on 12/02/2018. Thereafter, on 21/03/2018, an application came to be moved by the learned Advocate appearing by the accused No.7 by pointing out that the application at Exhibit 9 under Section 91 of the Code of Criminal Procedure needs to be decided urgently. By this application at Exhibit 34, it was pointed out to the trial Court that the Advocate for the accused No.7 had travelled from Delhi to

argue the application at Exhibit 9 moved for involving powers of the trial Court under Section 91 of the Code of Criminal Procedure. It was pointed out that the Counsel has his flight to New Delhi at about 5.30 p.m. and the application deserves to be decided immediately.

4 It is seen that thereafter the parties were heard on the application at Exhibit 9 and the same was allowed vide order dated 07/04/2016. To crown this all, the application moved by the applicants/accused was allowed with a direction to the Telecom Company to produce the documents sought to be called by the accused. It is thus clear from the record that as soon as urgency was pointed out to the learned trial Court on 21/03/2018 by moving application at Exhibit 34, by acting promptly in the matter the learned trial Court had decided the said application moved by the applicants and the same was allowed on 07/04/2018.

5 It was tried to demonstrate that on earlier occasion also the application at Exhibit 9 was pressed, but it was not heard. This claim is totally contrary to the record i.e. the Order sheet maintained by the learned trial Court. Those are not reflecting the fact that the learned trial Court was adjourning the hearing of the application at Exhibit 9 despite efforts on the part of the applicants/accused to work it out. It is well settled that record of

the Court is sacrosanct and it cannot be challenged before any other Court except the Court which maintains it. At this juncture, it is apposite to quote the observations in Paragraph 4 of the Judgment in the matter of *State of Maharashtra v. Ramdas Shrinivas Nayak & Anr.*¹, which reads thus :

“4 When we drew the attention of the learned Attorney General to the concession made before the High Court, Shri A.K. Sen, who appeared for the State of Maharashtra before the High Court and led the arguments for the respondents there and who appeared for Shri Antulay before us intervened and protested that he never made any such concession and invited us to peruse the written submissions made by him in the High Court. We are afraid that we cannot launch into an inquiry as to what transpired in the High Court. It is simply not done. Public Policy bars us. Judicial decorum restrains us. Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. "Judgments cannot be treated as mere counters in the game of litigation". (Per Lord Atkinson in *Somasundaran Chetty v. Subramanian Chetty*, A.I.R 1926 P.C. 136). 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

1 (1982) 2 Supreme Court Cases 463.

court, are conclusive of the facts so stated and no one can contradict such statements by affidavit or other evidence. If a party thinks that the happenings in court have been wrongly recorded in a judgment, it is incumbent upon the party, while the matter is still fresh in the minds of the judges, to call attention of the very judges who have made the record to the fact that the statement made with regard to his conduct was a statement that had been made in error. (Per Lord Buckmaster in *Madhusudan v. Chanderwati*, A.I.R. 1917 P.C. 30). That is the only way to have the record corrected. If no such step is taken, the matter must necessarily end there. Of course a party may resile and an Appellate Court may permit him in rare and appropriate cases to resile from a concession on the ground that the concession was made on a wrong appreciation of the law and had led to gross injustice; but, he may not call in question the very fact of making the concession as recorded in the judgment.”

6 Even otherwise, this is not a fit case which is reflecting bias attitude of the learned trial Court. The application was moved to point out the urgency for deciding the application at Exhibit 9 only on 21/03/2018. Prior to that on 12/02/2018, the prosecuting agency had filed reply to the said application. After pointing out urgency on 21/03/2018, the learned trial Court had expeditiously decided the said application (Exhibit 9) under Section 91 of the Code of Criminal Procedure by allowing the same in favour of the applicants on 07/04/2018.

7 Hypersensitivity of the parties or mini grievance of like nature cannot form a ground for transfer of proceedings from one Court to another. Way back in the year 1956, this Court in ***Ratilal Jasraj v. The State***² has held this :

“When dealing with applications for transfer, we are always reluctant to accede to the request for transfer because in many cases litigants entertain apprehensions that they would not get a fair trial on flimsy, unreasonable or irrational grounds, and we do not encourage such transfer applications unless we are ourselves satisfied that there are some grounds on which the apprehensions of the litigant may be regarded as reasonable.”

Similarly, in the matter of ***Ashish Chadha v. Smt. Asha Kumari & Anr.***³, the Honourable Supreme Court held thus :

“..... We do not find any material to substantiate the fear expressed by respondent No.1 that she would not get a fair trial. The High Court, therefore, should not have transferred the case to the Special Judge, Kangra. Needless to say that such transfers ordered merely on the say-so of a party have a demoralizing effect on the trial court. Unless a very strong case based on concrete material is made out, such transfers should not be ordered....”

2 AIR 1956 Bom. 385.

3 2012 ALL MR (Cri.) 311 (SC).

8 The application, as such, is devoid of merits and the same is rejected.

(A.M.BADAR J.)