

30.11.2022

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
WRIT PETITION NO. 3144 OF 2022**

Mr. Kamal Sundardas Bathija

...Petitioner

V/s.

Mr. Manohar Mangharam Galani

and Ors.

...Respondents

Mr. Girish Agrawal, Advocate for the petitioner.

Mr. D.H. Sharma a/w. Mr. D.M. Galani, Advocate for respondent no.1.

Mr. A.A. Palkar, APP for State-respondent no.3.

CORAM : SANDEEP K. SHINDE, J.

CLOSED FOR ORDERS ON : 17TH NOVEMBER, 2022.

ORDER PRONOUNCED ON : 30TH NOVEMBER, 2022.

P.C. :

1. This petition under Article 227 of the Constitution of India, takes exception to order dated 10th August, 2022 by which learned Sessions Judge, Thane in exercise of power under Section 308 of Criminal Procedure Code, refused to transfer Criminal Appeal No. 83/2015, as sought by the petitioner.

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Briefly stated, facts of the case, are as under :

2. In Regular Criminal Case No.191/1991 petitioner-accused, was acquitted of the offences punishable under Sections 448, 452, 504, 506(II) of the Indian Penal Code. The said prosecution was launched on complaint of, Manohar M. Dalani.

3. Feeling aggrieved by the order of the acquittal, Mr. Manohar Dalani, filed Criminal Appeal No. 83/2015 under Section 372 of the Criminal Procedure Code.

4. The petitioner is respondent no.2 in the said Appeal. On 4th April, 2022 the Appeal was argued by the appellant and was posted on 11th April, 2022 for arguments of the respondent no.2-petitioner herein. The petitioner sought adjournment. It was granted subject to costs and accordingly posted on 29th April, 2022. A day before, on 28th April, 2022 the petitioner filed Misc. Application No. 252/2022 under Section 408 of the Criminal Procedure Code seeking transfer of Criminal Appeal to another Court.

5. Thereafter, on the pretext of pending transfer application, at his instance, Appeal was adjourned nearly for eleven times.

6. Petitioner (respondent no.2 in Criminal Appeal), sought transfer of the Appeal on the ground that, justice will

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not be done to him, if Appeal was heard by the Court, to which it has been assigned. The ground pleaded in the application, was that, in May, 2015 parole application of one, Suresh Budharmal Kalani @ Pappu Kalani was placed before Shri. Kachare, Judge. The petitioner was apprehending that the learned Judge would grant parole to Pappu Kalani for extraneous considerations. Therefore, he addressed a letter/email to the Principal District & Sessions Judge, with request to transfer parole application of Pappu Kalani to some other Court. In the letter/email dated 20th/21st May, 2022, petitioner would allege that, Pappu Kalani had approached Learned Judge through Mukesh Kamara, who had assured him of securing parole, from the learned Judge. The petitioner would allege that, the learned Judge was very close to Mukesh Kamara and that Mukesh Kamara, was the partner of the learned Judge and that consideration in other matters, was routed through Mukesh Kamara, for securing favourable orders. On the above premise, the complainant pleaded that, the petitioner having had filed complaint/email on 20th/21st May, 2021 the learned Judge before whom the Criminal Appeal is pending, may decide the Appeal with prejudice mind.

7. The Learned Sessions Judge, Thane rejected the application moved under Section 408 of the Criminal Procedure Code, with costs of Rs.1,000/-. Feeling aggrieved by the said order, this petition is preferred.

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8. Heard Mr. Girish Agarwal, learned Counsel for the petitioner, Mr. D.A. Sharma for the respondent no.1 and Mr. Palkar, APP for State.

9. A three Judge Bench decision, in **Gurucharandas Chadha Vs. State of Rajasthan, AIR 1966 SC 1418**, it has been held that, if there is reasonable apprehension on the part of the party to a case, that justice will not be done, he has to show circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. However, mere allegations that, there is apprehension that justice will not be done in the given case, would not suffice. Thus, Court has further to see, whether apprehension is reasonable or not. To judge the reasonableness of apprehension, the state of mind of the person who entertains the apprehension, was no doubt relevant, but such apprehension must appear to the Court to be a reasonable apprehension.

10. In the case of **Usmangani Adambhai Vahora Versus. State of Gujrat and Another, (2016) 3 Supreme Court Cases 370**, has held that, order of transfer under Section 408 of Criminal Procedure Code is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about conduct of trial, or proceedings. Thus, held that, transfer power has to be

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exercised cautiously and in exceptional situations and there has to be a real apprehension.

11. In the case at hand, the Appeal was filed in the year 2015. Appeal was assigned to the Court of Judge, Shri. S.V. Kachare on 3rd February, 2021. It was argued by the appellant (respondent herein) on 4th April, 2022 and was posted on 11th April, 2022 for arguments of the petitioner. On 11th April, petitioner sought adjournment, on the ground that, there was some misunderstanding as to the date of posting the Appeal for hearing. It is pertinent to note that, the adjournment application does not remotely suggest, the apprehension of the petitioner that, learned Judge would decide the Appeal with prejudiced mind. In any case, the ground on which transfer was sought, does not appear to be convincing and/or reasonable, as to draw inference therefrom that, learned Judge would decide the Appeal with prejudiced mind. Petitioner's case is, because he made allegations against the learned Judge in letter/email as aforestated, that justice will not be done to him.

12. Herein, question is whether, letters/email dated 20th-21st May, 2021 allegedly addressed by the petitioner to Learned Sessions Judge, questioning integrity of the Judge, would be a reason or circumstance to infer, that Mr. Kachare Learned Judge would decide the Criminal Appeal with prejudice mind. Answer is in negative. Reason being,

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neither the Sessions Court has power to grant parole and further assuming the learned Judge before whom the parole application was moved, infact, had not granted parole to Mr. Pappu Kalani. Moreover, the allegations against the Learned Judge in the said letter/e-mail, were contemptuous. Therefore, the ground raised and taken up for seeking transfer of the Criminal Appeal No.83/2015 to another Court, being without substance, the apprehension of the petitioner that justice will not be done, was unreasonable. Even otherwise, the fact remains, assuming, the petitioner was entertaining the apprehension that justice will not be done in the given Appeal, he ought to have moved the application before it was taken up for hearing. However, it is evident that, after the Appeal was argued by the petitioner on 4th April, 2020 application was moved on 28th April, 2022.

13. Thus, in view of the above facts and for the reasons stated, the jurisdiction exercised by the learned Sessions Judge, under Section 408 of the Code of Criminal Procedure, declining to transfer the Criminal Appeal from the Court of Hon'ble Shri. S.B. Kachare, to another Court, cannot be faulted with. Thus, for want of jurisdictional error, this petition preferred under Article 227 of the Constitution of India, requires no consideration and therefore dismissed.

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(SANDEEP K. SHINDE, J.)