



Judgment

221 wp589.23

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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR**

CRIMINAL WRIT PETITION NO.589 OF 2023

Radheshyam Mangalchand Agrawal,
aged 61 years, occupation : business, r/o
Near Manohar Chowk, Sachchi Geeta
Pathshala, Imli Bhawan Gondia, tahsil and
district Gondia. **Petitioner.**

:: VERSUS ::

1. State of Maharashtra,
through Police Station Officer City Gondia,
district Gondia.
2. Shivkumar s/o Gorelal Agrawal,
aged 56 years, occupation – business.
3. Kailash s/o Gorelal Agrawal,
aged 58 years, occupation – business.
4. Vinit s/o Shivkumar Agrawal, aged 22 years,
occupation – student.
5. Mrs.Kavita w/o Shivkumar Agrawal, aged
about 50 years, occupation – household.
6. Chetan s/o Kailash Agrawal,
aged 29 years, occupation – business.
7. Tarun s/o Kailash Agrawal, aged about 27
years, occupation – business.

Respondent No.2 to 7 are r/o Manohar
Chowk, in front of District Court Building,
Gondia – 441 601, tahsil and district – Gondia.

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8. Narbad Chandulal Harinkhede, aged 53 years, c/o Shivkumar Gorelal Agrawal, occupation - servant of Shivkumar Gorelal Agrawal, r/o Manohar Chowk, in front of District Court Building, Gondia – 441 601, tahsil and district – Gondia.

9. Ramavtar s/o Nanakram Agrawal, aged 62 years, occupation – business, r/o near Fulchur Naka, Goregaon Road, Gondia, post Fulchur, tahsil and district – Gondia.

10. Kamlesh Deokaran Mothghare, aged 45 years, occupation : service, c/o Shivkumar Gorelal Agrawal, r/o Manohar Chowk, in front of District Court Building, Gondia – 441 601, tahsil and district – Gondia.

11. Yadorao s/o Rajaram Bhelave, aged 55 years, occupation – service, c/o Shivkumar Gorelal Agrawal, r/o Manohar Chowk, in front of District Court Building, Gondia – 441 601, tahsil and district – Gondia. **Respondents.**

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Shri O.W.Gupta, Counsel for the Petitioner.

None appears for Respondents.

Shri H.R.Dhumale, Additional Public Prosecutor for the State.

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CORAM : URMILA JOSHI-PHALKE, J.

CLOSED ON : 22/04/2024

PRONOUNCED ON : 25/04/2024

JUDGMENT

1. Heard learned counsel Shri O.W.Gupta for the petitioner and learned Additional Public Prosecutor Shri H.R.Dhumale for the

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State. None appeared for respondents. **Rule.** By consent, the petition is heard finally.

2. By this petition, the petitioner has challenged order dated 2.6.2023 passed by learned Sessions Judge, Gondia in Misc.Criminal Application No.29/2023 whereby an application filed by the petitioner under Section 406 of the Code of Criminal Procedure seeking transfer of proceedings (fourteen in numbers) bearing RCC Nos.304/2016; 576/2016; 59/2017; 89/2017; 357/2017; 448/2019; 650/2019; 79/2021, and 267/2022, wherein the petitioner is complainant, has been rejected.

The petitioner is also seeking transfer of proceedings bearing RCC Nos.61/2017; 80/2017; 338/2017; 506/2019, and 588/2019 wherein he is accused.

3. As per contentions of the petitioner, nine regular criminal cases are filed by him against respondents. Whereas, five regular criminal cases are filed against him by respondents which are pending in the court of learned Chief Judicial Magistrate at Gondia. During pendency of this petition, RCC Nos.304/2016;

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576/2016; 357/2017; 79/2021; 267/2022, and RCC No.338/2017 are disposed of. He is seeking transfer of said matters from the court of learned Chief Judicial Magistrate as hardship is caused to him in prosecuting matters before Presiding Officer Shri Abheejit Kulkarni, Chief Judicial Magistrate at Gondia as he failed to observe fair and impartial trial. It is alleged that RCC No.267/2022 is initiated on the report of the petitioner regarding theft of cellphone and the matter was kept for evidence of prosecution witnesses, but due to unavoidable circumstances, he could not remain present and, therefore, bailable warrant was issued against him and the case was fixed on 24.1.2023. As the petitioner never served with summons, the warrant was issued to him though the petitioner was present along with family members in other criminal cases before the same court. Though he preferred an application for cancellation of bail, the said application was not accepted and the petitioner was asked to bring say of the APP. On 21.2.2023, though the petitioner requested to record evidence, his request was not accepted and names of two witnesses are dropped from list of witnesses.

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4. Another ground raised by the petitioner is that in counter case RCC No.89/2017, on 11.4.2023, the complainant moved an application to assist the prosecution and filed an application for recalling of witnesses. Learned Chief Judicial Magistrate rejected the application without giving an opportunity of hearing to the petitioner and Exhibit-49 was disposed of without complying principles of natural justice. Another ground raised by the petitioner is that Special Public Prosecutor Pranita Kulkarni appeared in RCC No.79/2021 though she represented respondents in civil proceedings. She was counsel of accused persons in both civil and criminal cases. After raising objections, learned Chief Judicial Magistrate allowed her to proceed with the matter. The sum and substance of allegations were that the court was prejudice against him. The evidence of the witness in RCC No.61/2017 was not recorded properly. Without issuing summons, the bailable warrant was issued against him. Though he applied for cancellation of the warrant, the same was not considered. In RCC No.89/2017, without affording proper opportunity, the application was rejected. Thus, the petitioner would not get justice from the said court and, therefore, matters be transferred from learned

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Chief Judicial Magistrate at Gondia to any other court. Though he filed a Misc.Criminal Application before the sessions court bearing No.29/2023, the said application was rejected and, therefore, by way of this petition, he is seeking transfer of the said proceedings, as mentioned above.

5. The respondents strongly objected the application on ground that basic grievance of the petitioner is in respect of judicial orders which were passed by learned Chief Judicial Magistrate and the same cannot be the subject matter of considerations under Section 406 of the Code. However, the petitioner filed the application for transfer. It is further submitted that since 2016 and 2017, criminal cases are pending. The petitioner for one or other reasons is prolonging matters and, therefore, the trial court by referring the decision of the Honourable Apex Court in the case of Ishwarlal Mali Rathod vs. Gopal and ors (Special Leave petition (Civil) No.14117 & 14118/2021) decided on 28.9.2021 rejected the application for adjournment by observing that in view of the observations of the Honourable Apex court, the court shall not grant adjournment in

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routine manner and shall not be a party to cause for delay in dispensing the justice.

6. In assailing the order impugned, learned counsel for the petitioner submitted that learned Sessions Judge at Gondia has overlooked the settled principles of law required to be seen in transferring judicial proceedings from one court to another. The applications of the petitioner seeking transfer from one court to another is for justifiable reasons. From orders passed by learned Chief Judicial Magistrate, it reveals that learned Presiding Officer is prejudice against the petitioner and the petitioner would not get any justice and, therefore, learned Sessions Judge ought to have considered applications for transfer, but learned Sessions Judge has erroneously rejected the application by observing that no grounds are made out to seek transfer of fourteen matters. As such, interference is called for and matters require to be transferred from one court to another.

7. None appeared for respondents. The say filed by them is considered.

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8. Learned Additional Public Prosecutor for the State submitted that the petition is devoid of merits and not substantiated by any material. The grounds raised by the petitioner for transfer of criminal proceedings regarding judicial orders passed the Presiding Officer can be challenged by appropriate proceedings. Passing of orders against the petitioner cannot be a ground for transferring the proceedings. As such, the petition deserves to be dismissed.

9. Perusal of the order impugned shows that the Sessions Court observed that all fourteen matters of which transfer is sought by the petitioner are pending on the file of learned Chief Judicial Magistrate at Gondia. Instances for purpose of seeking transfer are mentioned by referring RCC Nos.267/2022, 61/2017, and 89/2017, out of which RCC No.267/2022 already came to be disposed of by learned Chief Judicial Magistrate at Gondia vide judgment and order dated 28.4.2023.

10. As far as the ground raised by the petitioner in RCC No.89/2017 is concerned, the same was rejected which is a judicial order and the petitioner is having every right to challenge the

same. Merely because the order is not passed in favour of the petitioner, that by itself is not sufficient to raise the ground of transfer.

11. As far as another ground raised in RCC No.61/2017 is concerned, evidence of witness Kavita is not recorded properly. The petitioner is at liberty to avail remedies which were not availed by him. Moreover, said witness Kavita has not made any grievance that her evidence is not recorded properly. The petitioner has also not made a grievance immediately after recording her evidence. In subsequent point of time, this grievance was raised and learned Chief Judicial Magistrate has rejected the said prayer.

12. It is pertinent to note that when the petitioner is having grievance of not recording the evidence, he has to apply immediately after recording the evidence. In fact, the concerned witness till today has not made any grievance to the effect that her evidence is not recorded as per deposition.

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13. The another ground raised by the petitioner, that learned Chief Judicial Magistrate is acting at the behest of the prosecutor, is not substantiated by any material. On the contrary, it shows that in one of matters i.e. RCC No.267/2022 by passing judgment the accused are convicted wherein the petitioner was the informant.

14. Thus, the contention of the petitioner that the court is prejudice and has passed order against him is not just and proper.

15. The ground raised by the petitioner is that one Pranita Kulkarni is appearing in the proceeding against him though in a civil matter she represented respondents. Regarding the said grievance, the petitioner is at liberty to move an application before the appropriate authority by inviting attention of the said authority that the said prosecutor represented the respondents and acted against the interest of the petitioner. This contention is also not supported by any of material by the petitioner, but State has admitted this fact and stated that she represented the respondents in the civil litigation in her individual capacity. Considering this fact, admittedly, the petitioner is at liberty to approach the

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appropriate authority for changing the prosecutor in the criminal cases by pointing out the said reasons.

16. A bare reading of the impugned order itself indicates that learned Sessions Judge has considered the aspect that judicial orders can be challenged by the petitioner by appropriate proceedings and I do not find any error committed by learned Sessions Judge while rejecting the application.

17. The jurisdiction confers under Sections 406 to 408 of the Code could be exercised on the reasons as set out in the transfer application. The grievance of the petitioner was purely in respect of judicial orders passed by learned Chief Judicial Magistrate which were passed in the course of judicial proceedings before the said court. The petitioner's contention in the transfer application was that the said orders have caused a prejudice to him and only on the basis of the said ground, he is seeking transfer. If transfer application, on such reasons, as moved by the petitioner, is entertained and allowed, it would definitely affect the solemnity and sanctity of the judicial proceedings. Learned Chief Judicial Magistrate has considered the delay caused in trial and by

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referring the judgment of the Honourable Apex Court observed that while considering the adjournment applications, it cannot be granted mechanically in a routine matter and thereby granting a last chance imposed the costs.

18. Thus, it is not that learned Chief Judicial Magistrate has not given any opportunity, but it was given considering the delay caused in concluding proceedings due to the adjournment application filed by the petitioner and after sufficient opportunity, the prosecution has not proceeded with the matter and the adjournment application was rejected. The foremost consideration in dispensation of justice admittedly is the assurance of the fair trial. The observation of the trial court, that last chance is granted subject to the costs of Rs.500/-, sufficiently shows that an opportunity was granted to the petitioner. This opportunity was granted though the matter was pending before the court till six years and at the fag end and there was repeated adjournments by the prosecution.

19. Thus, there is no rigid and inflexible rules of test to decide whether or not power under Section 406 of the Code should be

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exercised. It is manifest from a bare reading of sub-sections (2) and (3) of the said Section and on analysis of the decision of the Honourable Apex Court in various matters, orders of transfer of the trial are not to be passed as a matter of routine or merely because party has expressed some apprehension about proper conduct of a trial. This power has to be exercised cautiously and in exceptional situation, where it becomes necessary to do so to provide credibility to the trial. This power has to be excised cautiously in exceptional circumstances.

20. The Honourable Apex Court in the case of **Rajesh Talwar vs. Central Bureau of Investigation and ors, reported in 2012 ALL MR (Cri) 1333 (S.C.)** laid down broad factors which could be kept in mind while considering an application for transfer of the trial, which are : 1. when it appears that the State machinery or prosecution is acting hand in glove with the accused, and there is likelihood of miscarriage of justice due to the lackadaisical attitude of the prosecution; 2. when there is material to show that the accused may influence the prosecution witnesses or cause physical harm to the complainant; 3. comparative inconvenience and

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hardships likely to be caused to the accused, the complainant/the prosecution and the witnesses, besides the burden to be borne by the State exchequer in making payment of travelling and other expenses of the official and non-official witnesses; 4. a communally surcharged atmosphere, indicating some proof of inability of holding fair and impartial trial because of the accusations made and the nature of the crime committed by the accused; and 5. existence of some material from which it can be inferred that some persons are so hostile that they are interfering or are likely to interfere either directly or indirectly with the course of justice.

21. In the light of the above, if the ground raised by the petitioner are taken into consideration, the same are untenable grounds. It cannot be overlooked that in effecting transfer of proceedings from one court to another, which is also untenable ground, has a direct impact on the other vital aspects especially the confidence and integrity of the judicial officer. Undoubtedly, in a given case, it is an attempt to shatter the judicial attributes by making such an application. Transferring the matters from one court to another by passing an order leads to a hard impact on the

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moral of the judicial officer who is attempting to dispose of the cases being old matters.

22. Thus, it is wholly unjustifiable to transfer the matters from one court to another on the above said grounds. Learned Sessions Judge had exercised his judicial powers and rejected the application by assigning appropriate reasons. Such power of transfer cannot be exercised on any casual considerations.

23. In the light of the above, no interference is called for and the petition being devoid of merits deserves to be dismissed and the same is **dismissed**. Rule is discharged.

The petition stands **disposed** of.

(URMILA JOSHI-PHALKE, J.)

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