

R.Balakrishna Pillai

Vs

State of Kerala

Transfer Petition (Crl.) No. 115 of 2000

(M.B. Shah and S.N. Phukan, JJ.)

30.08.2000

JUDGMENT

**M.B. Shah, J.:**— This Transfer Petition was placed before us for hearing on 21st August, 2000 and on that day while dismissing the same we stated that reasons would follow. Now, we narrate the reasons for the same.

Petitioner, who according to the facts stated in the list of dates, was Minister for Electricity in the Government of Kerala and MLA or MP for over 30 years and has been convicted under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, has filed Criminal Appeal before the High Court of Kerala. This Petition is filed by him for transferring the pending appeal to the High Court of Karnataka. Question, therefore, which requires consideration in this petition is - whether the apprehension of the petitioner that he would not get justice in the criminal appeal if decided by the High Court of Kerala is genuine and justifiable?

The petitioner and a former Chairman of Kerala State Electricity Board were prosecuted for the offences punishable under Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947 and also under Section 120-B IPC, on the charge that by abusing his position the petitioner sold 12241440 units of Kerala electricity to the State of Karnataka to be supplied to M/s. Graphite India Ltd. Bangalore, a private industry in the State of Karnataka and thereby enabled the said company to make pecuniary advantage of Rs.19,58,630.40 and more by way of resultant profit. By judgment and order dated 20.5.1996, the Inquiry Commission and the Special Judge, Thiruvananthapuram found the accused guilty under Section 5(1)(d) with Section 5(2) of the Prevention of Corruption Act, 1947 and sentenced the accused to undergo simple imprisonment for one year and also to pay a fine of Rs. 10,000/- each and in default to undergo simple imprisonment for a further period of two months. Against that judgment and order Criminal Appeal No. 304 of 1996 filed by the petitioner is pending for hearing before the High Court of Kerala. The State had also filed an appeal for enhancing the sentence. The appeals were heard by the learned Single Judge in October/November, 1998 and the judgment was reserved. Thereafter, by judgment and order dated 6.7.2000, the learned Single Judge referred the matter to a Division Bench by stating that the matter involved question of law and facts of public importance. It is stated that on the same date, the Chief Justice of Kerala High Court directed to post the appeals for hearing before a Bench of Mr. P.K. Balasubramanian and Mr. Hassan Pillai, JJ.

Thereafter, on 24th July, 2000, petitioner filed an application before the Chief Justice of Kerala Court that appeals be placed before a different Bench on the ground that Mr. Justice P.K. Balasubramanian had effectively worked against him as an advocate before Justice K. Sukumaran Commission of Inquiry, which was appointed by the State Government in December, 1985. The

Inquiry Commission was appointed to inquire into some of the mal practices in the execution of the rectification work in a Hydro Electric Project called EDAMALAYAR PROJECT, consequent on the discovery of lead in its Power Tunnel. It was stated in the application that petitioner bona fide apprehended that the learned Judge would be prejudiced against him in spite of passage of time and his elevation as a Judge of the High Court. Therefore, it is just and fair that he may not hear the appeals filed by him and filed against him on the ground that justice should not only be done but it should also appear to be done.

In this transfer petition, petitioner changed his version and submitted that criminal appeal pending before the High Court of Kerala be transferred to the High Court of Karnataka at Bangalore on the ground that a fair and reasonable trial is not possible in the State because the Government and that the Press in the State have by their vicious campaign created a situation and impression among the public that the petitioner has committed irregularities, illegalities and crimes in the sale or electricity. It is also stated that Mr. P.K. Balasubramanian. J. while practicing as an Advocate had acted as prosecutor before Justice K. Sukumaran Commission in an inquiry known as EDAMALAYAR case.

At the time of hearing of this matter, Mr. U.R. Lalit, learned senior counsel appearing on behalf of petitioner submitted that the petitioner has reasonable apprehension that if the case is heard by Mr. P.K. Balasubramanian, J., he would not get fair justice because:—

- (a) The learned Judge before elevation appeared as an Advocate for the Commission;
- (b) Chief Justice of the Kerala High Court has not passed any order on the representation made by the petitioner; and
- (c) On 14.8.2000 adjournment of hearing of the appeal was not granted and when counsel for the petitioner refused to argue the appeal by stating that he was not appearing for the appellant-petitioner, Court has issued a bailable warrant returnable on 21st August, 2000.

The learned counsel further submitted that all the aforesaid grounds be considered conjointly for deciding - whether petitioner was justified in having reasonable apprehension that he would not get fair justice if the matter is heard by the same Bench?

As against this, Mr. Harish N. Salve, learned Solicitor General appearing on behalf of the respondent (on caveat) submitted that this kind of application is not required to be entertained or encouraged otherwise litigants would have a chance of selecting the Bench and malign the judicial administration. He also submitted that in the appeal which is pending before the Kerala High Court, the petitioner is not convicted in connection with the offences arising out of the report of the Commission given in 1985 and as such it cannot be stated that Judge, who appeared as Commission's Advocate in 1985 would not do justice to a litigant in a case where he is convicted for different offence in different case.

At the outset, we may state that this petition is filed for transfer of case from the High Court of Kerala to the High Court of Karnataka on the ground of alleged adverse publicity in the Press in the State of Kerala. This contention is apparently raised at a belated stage i.e. after lapse of four years from the date of filing of the appeal in the High Court. Petitioner has not raised any objection with regard to hearing of the appeal by the Kerala High Court when the matter was heard by the learned Single Judge in 1998, who subsequently referred it to a larger Bench. Even in the representation

before the Chief Justice, he has not raised the said contention. Therefore, elaborate submissions made in the transfer petition that a fair trial will not be possible in the State of Kerala as political parties in power have created such a situation that justice, fairness and rule of law cannot be expected in cases against the petitioner and that any person can be influenced consciously or sub-consciously by the adverse publicity against the petitioner, are required to be rejected. Apart from not raising objection for a period of four years, we would further state that in this country there is complete separation of Judiciary from the Executive and Judges are not influenced in any manner either by the propaganda or adverse publicity. Cases are decided on the basis of the evidence available on record and the law applicable. Granting such application and transferring the appeal from High Court of Kerala to High Court of Karnataka would result in casting unjustified aspersion on the Court having jurisdiction to decide the appeal on the assumption that its judicial verdict is consciously or sub-consciously affected by the popular frenzy, official wrath or adverse publicity, which is not the position qua the judicial administration in this country. We would also mention that at the time of hearing the learned counsel has not raised this contention.

Further, the contention raised by the learned counsel for the petitioner that one of the Judge of the Bench was appointed and has worked as an Advocate to assist Justice K. Sukumaran Commission to inquire into mal practices in the execution of the rectification work in Hydro Electric Project called Edamalayar Project and, therefore, the petitioner is not likely to get justice if the appeal is decided by the said Bench, deserves to be rejected. It is true that one of the principles of the Administration of justice is that justice should not only be done but it should be seen to have been done. However, a mere allegation that there is apprehension that justice will not be done in a given case is not sufficient. Before transferring the case, the Court has to find out whether the apprehension appears to be reasonable. To judge the reasonableness of the apprehension, the state of the mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must appear to the Court to be a reasonable, genuine and justifiable. In the present day scenario, if these types of applications are entertained, the entire judicial atmosphere would be polluted with such frivolous petitions for various reasons. Dealing with the transfer petition, this Court in **Maneka Sanjay Gandhi vs. Rani Jethmalani** [(1979) 2 SCR 378] observed:—

"Assurance of a 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 a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touch-stone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weigh the circumstances."

Applying the aforesaid principles in deciding the Transfer Petition, in our view, it requires to be rejected firstly because the petitioner is not convicted on the basis of the said inquiry report. The charges against him are all together for a different case not connected with the rectification work of Edamalayar Project. Secondly, a Judge while practicing as an advocate might have appeared in a number of cases, but that would not mean that he would have any personal interest or connection with the said matters or with persons involved therein and would be biased towards them. Therefore, it would be difficult to presume or to draw an inference that the learned Judge, because of assisting the Commission of Inquiry as an Advocate in different matter, would have bias or

prejudice against the petitioner and would not render justice in accordance with law. Acceptance of such contention would seriously undermine the independence and stern stuff of the Judges.

The second contention that the Chief Justice of the Kerala High Court had not passed any order on the representation made by the petitioner also deserves to be rejected because in a criminal appeal pending for trial, there is no question of passing any order by the Chief Justice of the High Court.

Lastly, it is submitted that on 14th August, 2000 when the adjournment of hearing of appeal was sought, the Court had not granted the same and as the advocate appearing on behalf of the petitioner submitted that he was withdrawing his appearance and refused to argue the matter, the Court issued a bailable warrant to the petitioner to remain present on the date of hearing. In the order, which was passed on the said date (which is produced for our perusal at the time of hearing by the learned counsel for the petitioner), the Court has specifically mentioned that as the learned counsel for the petitioner has withdrawn his appearance, matter cannot proceed and for giving an opportunity to the petitioner to engage a counsel of his choice, matter was adjourned. In our view, this practice of filing an application by an Advocate that he withdraws his appearance on the date of hearing, only for getting the matter adjourned, requires to be strongly discouraged. In such a situation, for seeking the appearance of the petitioner, who was released on bail, there was no alternative for the Court but to issue a bailable warrant. Therefore, the course adopted by the Court was justified. Hence, there is no remotest chance or justification for entertaining apprehension that petitioner would not get justice if the appeal is decided by the Bench to whom it is assigned. Learned counsel for the petitioner submitted that all the aforesaid grounds are to be considered conjointly for arriving at a conclusion that whether the petitioner was having reasonable apprehension that he would not get fair justice if the matter was heard by the said Bench. As discussed above, even considering the grounds conjointly, it would be difficult to accept that there was any justification for such apprehension. Power of transfer of trial or appeal cannot be exercised on hypersensitive grounds or mini-grievances.

Hence, this transfer petition is dismissed.