

# **BOMBAY HIGH COURT**

Ratilal Jasraj

Vs.

State. (Bombay)

Criminal Appln. No. 1382 of 1955

(Gajendragadkar and Gokhale, JJ.)

18.01.1956

## **JUDGMENT**

### **Gajendragadkar, J.**

1. This is an application for transfer of the proceedings pending against the petitioner in the Court of the Additional District Magistrate, Ahmednagar, to a competent Court in any other district. The proceedings in question have been instituted against the petitioner under Section 110(e) and (f), Criminal Procedure Code and the case in which these proceedings are pending before the learned Additional District Magistrate at Nagar is Criminal Case No. 36 of 1955 on his file. The petitioner's grievance is that the course which the proceedings have taken before the learned Additional District Magistrate and the attitude adopted by him have created a reasonable apprehension in his mind that he will not get a fair trial before the learned Magistrate.

2. In dealing with transfer applications, it is essential for the petitioner to satisfy us that he entertains an apprehension that his case would not be fairly tried by the learned trial Magistrate and that his apprehension is such as can be regarded by us as reasonable.

Having regard to the several allegations which had been made by the petitioner in respect of the conduct of the proceedings, Shah and Vyas, JJ. had called for a report from the learned Magistrate when they gave rule to the petitioner. Since then the report has been received. When the attention of Shah and Vyas, JJ. was drawn to the concluding portion of this report on 12-12-1955, they have strongly disapproved of the conduct of the learned Magistrate inasmuch as he purported to advise this Court as to what orders should be passed on the application itself. The learned Magistrate has sent an exhaustive report and at the end he has purported to pronounce his own judgment on the merits of the transfer application by observing that there was no substance in the transfer application and so it may be rejected. We are really surprised that a senior Magistrate who holds the position of an Additional District Magistrate should have allowed his enthusiasm to affect his report to such an extent that he should have lost sight of the limits which

his report had to observe in making his comments on the application in question. As Shah, J. has pointed out, when we send for reports in such cases all that we want to know from the Magistrates in question is their version of the facts which are alleged by the petitioner in respect of the conduct of proceedings pending before the said Magistrates : and it was, we think, absolutely necessary that the learned Magistrate in making this report should have confined it to the statement of facts so far as he was concerned. The fact that the learned Magistrate has stepped beyond the legitimate limits within which the report had to be made has naturally given an argument to Mr. Kavalekar that the learned Magistrate seems to be keen on retaining this case on his file and care must always be taken to see that such an impression is not created in the mind of the litigant by the attitude taken up by the learned trial Magistrate. That, however, is only an incidental aspect of the matter.

3. The learned Government Pleader has, on the other hand, referred us to some expression used in the petition and he contends that expressions of this type should be severely condemned. We have no difficulty in accepting the learned Government Pleader's contention that we must always insist upon petitions of this kind to be presented in proper parliamentary language. Mr. Kavalekar for the petitioner has immediately agreed that some of the words used in the petition are entirely out of place and the only extenuating circumstance to which he has invited our attention is the fact that the petition has been drafted by the party in person who is a layman and who has perhaps not observed the restraint which a draft by his learned Advocate would necessarily have observed. We should, therefore, like to make it clear to the petitioner that he should not be under the impression that the use of strong vituperative language adds strength to the arguments he has to urge in support of such an application. Strong language which is unworthy to be used in a Court of law should never find a place in petitions to the Court. That is why we wish to express our disapproval of some of the statements made by the petitioner and since Mr. Kavalekar as promptly and in an unqualified manner agreed to delete those expressions we propose to say nothing more in that behalf.

4. That takes us to the merits of this application. The proceedings against the petitioner commenced on 1-6-1955, though the hearing began on 10-8-1955. It appears that the case had been adjourned from time to time and, according to Mr. Kavalekar on a majority of the occasions when, the case was adjourned the adjournment was obtained by the opponent and that has caused unnecessary inconvenience and harassment to the petitioner. Though inconvenience caused to parties by adjournments is to be regretted, we cannot entertain the argument that such inconvenience can legitimately create a feeling in the mind of the litigant that he will not get a fair trial in the Court. In due course evidence appears to have been recorded, and when the case stood adjourned to 6-9-1955 the petitioner was asked to leave the premises of the Court and a statement was taken by the learned Magistrate under Section 117(3), Criminal Procedure Code. Ultimately an order was passed as contemplated by the said provision. Against this order the petitioner preferred an appeal in the Court of the learned Sessions Judge and the said order has been reversed. Meanwhile the petitioner was arrested and sent to Visapur Jail. Mr. Kavalekar's

grievance is that even after he was arrested he might easily have been kept at the Nagar Jail, but the Police took him away to Visapur. Mr. Kavalekar's general grievance appears to be that his client differs in his political ideology from the Congress and since he is a social worker himself and he takes active interest in public-questions that agitate the mind of society from time to time he often expresses views which are not compatible with those of the party in power; and Mr. Kavalekar's contention is that the present proceedings are the result substantially of the fact that he is not very popular with the party in power. We are not disposed to consider the merits of this contention. We cannot assume at this stage that the proceedings instituted against the petitioner under Section 110 (e) and (f) are the result of any ulterior motive. On the record we do not find any material to justify this assumption. But the grievance made by Mr. Kavalekar in regard to the conduct of the learned Additional District Magistrate when he purported to exercise his jurisdiction under Section 117(3) of the Code on 6-9-1955 cannot, in our opinion, be dismissed as without any substance. The learned Magistrate has substantially admitted the facts alleged by the petitioner. But he seems to have taken the view that he was not bound to allow the petitioner to remain present and that ex parte proceedings were legitimate. In so far as an interim order is permitted under Section 117 Sub-Section (3), it would be correct, we think, to say that this interim order in an emergency can be passed even in the absence of the person affected by the order. But if the person sought to be present in Court, then it would really be unfair to ask him to vacate the premises of the Court and deliberately proceed against him ex parte. That is a course which is inconsistent with the elementary requirements of fair play and justice.

5. The learned Additional District Magistrate has referred to a decision of the Sind Chief Court in support of the attitude adopted by him. Apparently his attention was not drawn to the full judgment delivered by Davis, C.J. in *Emperor v. Nabibux*<sup>1</sup> This judgment emphasizes the point that an enquiry under Section 117(3) is a judicial enquiry and that the evidence recorded against a party must be allowed to be cross-examined before it is accepted as true. This judgment also points out that an order under Section 117 Sub-Section (3) passed more than two months after proceedings under Section 112 are initiated is not justified. If only the learned Magistrate had borne in mind both the principles laid down by Davis, C.J. in his judgment, he would not have adopted the attitude which he has taken and which he was certainly not justified in taking.

6. Unfortunately, in making his report the learned Magistrate has acted in a dual capacity. He has given this Court the benefit of the knowledge received by him in his capacity as the Personal Assistant to the District Magistrate at Nagar. Indeed, the fact that a trial Magistrate occupies a dual capacity and is likely to know in one capacity many facts about the accused whose case he is trying as a Magistrate in another capacity is bound to create in some cases a very embarrassing situation. Evidence of such an embarrassing situation is writ large on almost the whole of the report made by the learned Additional Magistrate in the present case. The petitioner has made certain allegations against the Police Officers who are primarily concerned with the institution of the present proceedings. Some of these allegations are contained in paragraph 16 of his petition.

In his report the learned Magistrate says that as an Additional District Magistrate he was not concerned with these allegations. If the learned Magistrate had stopped with this statement there would have been no grievance. But the learned Magistrate has then proceeded to make an elaborate statement as to the facts which have come to his knowledge as the Personal Assistant to the District Magistrate, and, what is still more significant is that, though in regard to one of the cases mentioned by the learned Magistrate the petitioner was discharged, he has added his comment that the cases referred to by him throw light on the character of the applicant. In other words, the mere fact that some cases were instituted against the petitioner, or that some cases were instituted against him and he was discharged, is, in the opinion of the learned Magistrate, enough to enable him to come to an adverse conclusion against the petitioner in respect of his character. This view hardly does justice to a judicial approach in criminal matters.

Besides, it shows that the learned Magistrate is apparently finding it difficult to keep apart

<sup>1</sup> AIR 1942 Sind 86

facts which he has known in another capacity in trying the case of the petitioner as additional District Magistrate and that appears to be the root cause of the apprehension entertained by the petitioner in the present case. In paragraph 17 of the petition, which incidentally uses strong words, now categorically withdrawn by Mr. Kavalekar some allegation is made against a Police Sub-Inspector. The learned Magistrate, in his report, again begins with the observation that he was not concerned with this allegation and he proceeds to tell this Court that a Sub-Divisional Officer who made personal enquiries had apparently told him that the allegations were found to be baseless and false by the said Police Officer. Mr. Kavalekar's instructions are that the proceedings are pending. But whether or not the proceedings are pending, the learned Magistrate need not have gone out of his way to contact the Sub-Divisional Police Officer and collect from him the information as to the opinion that he had formed as a result of this enquiry. Paragraph 18 of the petition refers to the propaganda carried on by the petitioner against the Congress at the time of the general election and what the petitioner regards as the result of the said propaganda. He feels that a cognizable offence was registered against the petitioner out of spite. The learned Magistrate again draws on the information received by him as the Personal Assistant to the District Magistrate and describes what was revealed in the enquiry made by him in that capacity.

7. Another allegation made by the petitioner is that he had taken a stall in the Kopergaon Agricultural Exhibition. The Mamlatdar collected some contributions from all the stall-keepers virtually under compulsion. The petitioner refused to make a contribution. In the result, the deposit of Rs. 257 made by the petitioner was returned to him after considerable time and that too when the petitioner made insistent demands for the return of the said deposit. The learned Magistrate could have easily said that he was not concerned with this affair. But he has chosen to give a detailed version as to what happened about this demand and even from the report it looks probable that the Mamlatdar went out of his way to collect certain contributions from the stall-keepers. Whether or not the Mamlatdar should have adopted this course we do not propose to discuss. But the learned Magistrate has protested against the suggestion that there was any delay in refunding the amount in the office of the District Magistrate and he has concluded this part of

his report with the observation that in any event he had nothing to do with this matter because he had not taken charge of his post as Personal Assistant to the District Magistrate when this incident took place. Now, the amount in question was refunded to the petitioner on 15-7-1954 and paragraph 10 of the report shows that the learned Magistrate took charge on 10-11-1953. The two dates do not support the statement of the learned Magistrate that he was not concerned with this matter because he was not then the Personal Assistant to the District Magistrate at Nagar.

8. When dealing with applications for transfer, we are always reluctant to accede to the requests 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. Having regard to the allegations made by the petitioner and the statements made by the learned Additional District Magistrate in his report, we are not prepared to hold that the apprehension of the petitioner is not reasonable in the present case. The petitioner seems genuinely to be under the impression that the present proceedings are intended to harass him. Whether or not this feeling is justified we are not in a position to say and we do not propose to express any opinion on this matter. But where proceedings of the kind permitted under Section 110, Criminal Procedure Code are pending against the petitioner before a Magistrate who holds a dual capacity and who seems to be unable to distinguish between facts which he must know and on which he must act as a Magistrate and facts which he must ignore and exclude from his consideration though known to him in another capacity, we cannot hold that the apprehension of the petitioner that he will not get a fair trial is not reasonable. Therefore, we have come to the conclusion that the petitioner is entitled to claim the transfer of the proceedings to another Court of competent jurisdiction.

9. The learned Government Pleader has suggested that, if we decide to transfer these proceedings, we might ask the learned District Magistrate at Nagar himself to try this case. In ordinary circumstances we might have considered this suggestion more favorably. But it does appear that the petitioner had moved the learned District Magistrate in this matter in the past, and though we are not prepared to accept Mr. Kavalekar's argument that the learned District Magistrate has made up his mind in the matter and would not try his case fairly, we think, having regard to all the circumstances in this case, the fairer order would be to direct that these proceedings should be tried by the learned District Magistrate at Poona. If a transfer has to be made outside the district of Nagar, both the learned Government Pleader and Mr. Kavalekar have agreed that it would be convenient for both the parties if the case is transferred to the learned District Magistrate at Poona. We direct accordingly.

Order accordingly. .