

2015 (0) AIJEL-HC 233202

GUJARAT HIGH COURT

Hon'ble Judges: J.B.Pardiwala, J.

Chandrakantbhai Bhaichandbhai Sharma Versus State Of Gujarat

SPECIAL CRIMINAL APPLICATION No. 4884 of 2015;

Criminal Miscellaneous Application No. 17138 of 2015 ; *J.Date :- OCTOBER 8, 2015

- CONSTITUTION OF INDIA Article - 227
- CODE OF CRIMINAL PROCEDURE, 1973 Section - 408 , 407 , 409
- INDIAN PENAL CODE, 1860 Section - 147 , 148 , 149 , 364A , 120B , 447 , 342 , 506(2)

Code of Criminal Procedure, 1973 - S. 407, 408, 409 - Constitution of India - Art. 227 - transfer of case - petitioner is one of the accused persons against whom an F.I.R. was lodged by respondent No. 2 - between 2006 and 2013, complainant kept on seeking time before the Sessions Court only on the ground of the pendency of proceedings - petitioner moved application u/S. 408 of the Code of the Criminal Procedure for transfer of the sessions case - learned Principal Sessions Judge rejected the same - legality and validity of - held, S. 406, 407 and 408 respectively relate to the power of the Supreme Court, High Court and Sessions Judge to transfer cases and appeals - S. 409, 410 (1) and (2) and 411 relate to withdrawal of cases or recalling of cases which had been made over by Sessions Judge, Chief Judicial Magistrate, Judicial Magistrate and Executive Magistrate, for being thereafter tried either by himself or being made over to another Court for trial - clear contrast in language employed by Legislature in the two sets of section is indicative of the difference in the nature of the power conferred there under - power conferred in the Sessions Judge u/s. 408 is on the same level as the power conferred in the High Court u/s. 407 and the power under the two sections is identical - transfer of a case u/S. 408 of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested - application filed by the petitioner u/S. 408 of the Code for transfer is maintainable.

Code of Criminal Procedure, 1973 - S. 408, 409 - Indian Penal Code, 1860 - S. 147, 148, 149, 364A, 120B, 447, 342, 506(2) - transfer of case - whether any case is made out by petitioner for transfer even if the application filed by him u/s. 408 is held to be maintainable - accused has a reasonable apprehension that a fair and impartial trial would not be held and the ends of justice makes it expedient that the transfer should be ordered - held, where the accused has a reasonable apprehension that a fair and impartial trial or inquiry cannot be had or where the ends of justice make it expedient,

transfer should be ordered - two grounds as contended in application are quite conflicting - petitioner definitely is in dilemma - Presiding Officer himself has also not indicated his disinclination to hear the matter - at the same time, he has offered quite a stiff resistance to the plea of transfer as the same is revealed from his remarks forwarded to the Principal Sessions Judge - present Additional Sessions Judge would have acted in a true sense of a Judicial Officer - but nevertheless, to ensure that justice is not only done, but also seems to be done and in the peculiar facts of the case - it will be appropriate if Principal Sessions Judge transfers the case to any other Additional Sessions Judge in the same Sessions Division - transfer shall not be construed as casting any aspersions on the learned Additional Sessions Judge - impugned order quashed - petition allowed.

Imp.Para: [16][17][21][22][26][29][30]

Cases Referred To :

1. Abdul Nazar Madani V/s. State Of Tamil Nadu, AIR 2000 SC 2293
2. Avinash Chander V/s. State, 1983 0 CrLJ 595
3. Brij Mohan Lal V/s. Union Of India And Ors., 2002 5 SCC 1
4. G.X. Francis V/s. Banke Bihari Singh, AIR 1958 SC 309
5. Gambhirsinh Bhavsinh Padheriya V/s. State Of Gujarat, 1993 1 GLR 649 : 1993 (1) GLH 433 : 1993 (1) GCD 486 : 1993 (3) Crimes(HC) 208 : 1993 (2) Crimes(HC) 363
6. Gurcharan Dass Chadha V/s. State Of Rajasthan, AIR 1966 SC 1418
7. Jayesh Nadlal Shah V/s. Jeetendrabhai Darji, Criminal Miscellaneous Application (For Transfer) No.17081 of 2014 decided on 03.11.2014
8. Mrs. Maneka Sanjay Gandhi And Anr. V/s. Miss Rani Jethmalani, AIR 1979 SC 468
9. Musa Mahmad Malek & Another V/s. State Of Gujarat, 1995 1 GLR 845 : 1995 (1) GCD 719 : 1995 CrLR(Guj) 103 : 1994 AIJEL_HC 208085
10. Radhey Shyam V/s.State Of U.P, 1984 0 AllahabadLawJournal 666
11. Ranjit Thakur V/s. Union Of India And Others, 1987 4 SCC 611
12. Ratilal Bhanji Mithani V/s. State Of Maharashtra, AIR 1979 SC 94
13. Satish Jaggi V/s. State Of Chhattisgarh And Others, 2007 3 SCC 62

Equivalent Citation(s):

2016 (1) GLR 652 : 2016 CrLJ 311

JUDGMENT :-

1 By this petition under Article 227 of the Constitution of India, the petitioner - the original accused No.7 calls in question the legality and validity of the order dated 14.08.2015 passed by the learned Principal Sessions judge, Kheda at Nadiad in the Criminal Miscellaneous Application No.545 of 2015 arising from the Sessions Case No.291 of 2003.

2 The case of the petitioner may be summarized as under:

2.1 The petitioner is one of the accused persons against whom an F.I.R. was lodged by the respondent No.2 herein before the Nadiad Town Police Station being C.R. No.I-286 of 2002 for the offence punishable under Sections 147, 148, 149, 364(A), 120B, 447, 342 and 506(2) of the Indian Penal Code.

2.2 At the end of the investigation, the chargesheet was filed on 31.10.2002. The case on being committed to the Court of Sessions was numbered as Sessions Case No.291 of 2003. By now, almost eighteen witnesses have been examined. After completion of the examination of the eighteen prosecution witnesses, the complainant preferred an application vide Exhibit - 137 under Section 319 of the Code of Criminal Procedure, 1973 for joining one Shri Natubhai Maganbhai Edanwala as an accused in the sessions case. The said application came to be rejected vide order below Exhibit - 137 dated 18.05.2006. Being dissatisfied with the said order, the complainant preferred the Special Criminal Application No.1444 of 2006 before this Court. The matter was heard finally on 02.12.2011 and was ordered to be rejected. It appears that being dissatisfied with the order passed by this Court in the Special Criminal Application No.1444 of 2006, the complainant filed a Special Leave Petition (Criminal) No.17262 of 2012 before the Supreme Court. The Supreme Court vide order dated 11.01.2013 rejected the said S.L.P. with an observation that it would be open for the complainant to file an appropriate application under Section 319 of the Code, if at the end of the examination of all the witnesses, some material is found to connect the person sought to be arraigned as an accused with the alleged crime.

2.3 It is the case of the petitioner that between 2006 and 2013, the complainant kept on seeking time before the Sessions Court only on the ground of the pendency of the aforesaid proceedings.

2.4 It appears that the complainant once again filed an application under Section 319 of the Code for arraigning Shri Natubhai Maganbhai Edanwala as an accused in the trial relying on the examination of the prosecution witnesses Nos.19 to 23. Such an application was allowed. Shri Natubhai Maganbhai Edanwala, being dissatisfied with such an order, preferred the Special Criminal Application No.1731 of 2013 before this Court and this Court has stayed the operation of the impugned order.

2.5 It is the case of the petitioner that on 31.07.2015, the matter was on Board before the 3rd Additional Sessions Judge, Kheda at Nadiad. On that date, the petitioner was standing in the parking area meant for the four wheelers. At that time, the petitioner could overhear some conversation between the complainant and his Son and they were discussing about the trial and were talking to each other that the matter would be surely taken up for hearing from the next date onwards and all the accused would definitely be convicted. According to the petitioner, the Presiding Officer thereafter said something regarding the trial which the petitioner correlated with the conversation he had overheard between the complainant and his Son. It is the case of the petitioner that he was quite disturbed with the attitude of the Presiding Officer on that particular date.

2.6 Under such circumstances, referred to above, the petitioner moved an application being the Criminal Miscellaneous Application No.545 of 2015 under Section 408 of the Code of the Criminal Procedure, 1973 before the learned Principal Sessions Judge, Kheda at Nadiad for transfer of the sessions case to any other Court in the same Sessions Division.

2.7 It appears that after such an application was filed, the learned Principal Sessions Judge called for the remarks of the concerned Presiding Officer, and after taking into consideration the remarks as well as the position of law discussed in the impugned order, thought fit to reject the application filed by the petitioner for transfer of the sessions case.

2.8 Being dissatisfied, the petitioner has come up with this petition.

3 Mr. Hriday Buch, the learned counsel appearing for the petitioner vehemently submitted that the learned Principal Sessions Judge committed an error in rejecting the application filed by the petitioner under Section 408 of the Code for transfer of the sessions case to any other Court in the same Sessions Division. He submitted that the learned Judge committed a serious error in placing reliance on the two decisions of this Court (1) in the case of Gambhirsinh Bhavsinh Padheriya vs. State of Gujarat, 1993(1) GLR 649, and (2) Musa Mahmad Malek & another vs. State of Gujarat, 1995(1) GLR 845. Mr. Buch submitted that by placing reliance on the aforesaid two decisions, the learned Judge committed an error in taking the view that once the trial commences, then he has no power to transfer the case to any other Court in the same Sessions Division in exercise of the power under Section 408 of the Code.

4 Mr. Buch submitted that the accused has a reasonable apprehension that a fair and impartial trial would not be held and the ends of justice makes it expedient that the transfer should be ordered. He submitted that it is of paramount importance that an accused should have confidence in the impartiality of the Courts. He submitted that the question should be considered from the point of view of the fear or apprehension in the mind of the accused. It is the state of mind of the accused which is to be seen and not the impression of the Court in regard to any incident.

5 Mr. Buch submitted that the application merits consideration and the impugned order be quashed.

6 Mr. Buch placed reliance on the decision of the Supreme Court in the case of Satish Jaggi vs. State of Chhatisgarh and others [2007(3) SCC 62] and one another decision of the Supreme Court in the case of Ranjit Thakur vs. Union of India and others, [1987 (4) SCC 611].

7 On the other hand, this petition has been vehemently opposed by Mr. Aftab Hussain Ansari, the learned advocate appearing for the respondent No.2 - the original complainant and Ms. Hansa Punani, the learned Additional Prosecutor appearing for the respondent - the State of Gujarat. They both submitted that no error, not to speak of any error of law could be said to have been committed by the learned Judge in rejecting the application and passing the impugned order. They both submitted that the apprehension

expressed by the petitioner herein is absolutely baseless. Such an apprehension must be reasonable and not the result of the reaction of a hypersensitive mind. It must not be indicative either of a desire on the part of the accused to create a situation for claiming transfer of the case when the things are not going his way or of unduly excessive sensitiveness.

8 They both submitted that the Criminal Court referred to in Section 408 covers only those Courts where the cases can be filed. The criminal cases are usually filed in the Court of either the Chief Judicial Magistrate or the Judicial Magistrate. Section 408 refers to those cases and has nothing to do with the cases that might be transferred to the Chief Judicial Magistrate or to the Assistant or Additional Sessions Judges under Section 409. They both submitted that the Sessions Judge could not have exercised his power under Section 408 in respect of a case transferred from the Court of Sessions judge to the Court if the Additional Sessions Judge had already commenced with the trial.

9 They both placed reliance on the judgment delivered by this Court in the case of Jayesh Nadlal Shah vs. Jeetendrabhai Darji (Criminal Miscellaneous Application (For Transfer) No.17081 of 2014 decided on 03.11.2014). They both submitted that there being no merit in this petition, the same be rejected.

10 Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for my consideration is whether the learned Principal Sessions Judge committed any error in passing the impugned order.

11 There are two issues which I need to consider in this matter. First, the question of law whether the application under Section 408 of the Code filed by the petitioner herein for transfer of the sessions case is maintainable, and secondly, whether any case is made out by the petitioner for transfer even if the application filed by him under Section 408 is held to be maintainable.

12 Before advertiring to the submissions of the learned counsel, let me have a cursory look at some of the provisions of the Code of Criminal Procedure, 1973.

12.1 Section 6 falling in Chapter II speaks of classes of criminal cases. Section 6 reads thus:

"6. Classes of Criminal Courts Besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely:-

- (i) Courts of Session;
- (ii) Judicial Magistrates of the first class and, in any metropolitan area, Metropolitan Magistrates;
- (iii) Judicial Magistrates of the second class; and
- (iv) Executive Magistrates."

12.2 Section 9 speaks of the Court of Sessions:

"9. Court of Session

(1) The State Government shall establish a Court of Session for every sessions division.

(2) Every Court of Session shall be presided over by a Judge, to be appointed by the High Court.

(3) The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

(4) The Sessions Judge of one sessions division may be appointed by the High Court to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in the other division as the High Court may direct.

(5) Where the office of the Sessions Judge is vacant, the High Court may make arrangements for the disposal of any urgent application which is, or may be, made or pending before such Court of Session by an Additional or Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by a Chief Judicial Magistrate, in the sessions division; and every such Judge or Magistrate shall have jurisdiction to deal with any such application.

(6) The Court of Session shall ordinarily hold its sitting at such place or places as the High Court may, by notification, specify; but, if, in any particular case, the Court of Session is of opinion that it will tend to the general convenience of the parties and witnesses to hold its sittings at any other place in the sessions division, it may, with the consent of the prosecution and the accused, sit at that place for the disposal of the case or the examination of any witness or witnesses therein.

Explanation:For the purposes of this Code, "appointment" does not include the first appointment, posting or promotion of a person by the Government to any Service, or post in connection with the affairs of the Union or of a State, where under any law, such appointment, posting or promotion is required to be made by Government."

12.3 Section 10 speaks of the subordination of Assistant Sessions Judge:

"10. Subordination of Assistant Sessions Judges

(1) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction.

(2) The Sessions Judge may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges.

(3) The Sessions Judge may also make provision for the disposal of any urgent application, in the event of his absence or inability to act, by an Additional or

Assistant Sessions Judge, or, if there be no Additional or Assistant Sessions Judge, by the Chief Judicial Magistrate, and every such Judge or Magistrate shall be deemed to have jurisdiction to deal with any such application."

12.4 Section 194 speaks of the Additional and Assistant Sessions Judge to try cases made over to them:

"194. Additional and Assistant Sessions Judges to try cases made over to them An Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order, direct him to try."

12.5 Section 406 provides for the power of Supreme Court to transfer cases and appeals:

"406. Power of Supreme Court to transfer cases and appeals

(1) Whenever it is made to appear to the Supreme Court that an order under this section is expedient for the ends of justice, it may direct that any particular case or appeal be transferred from one High Court to another High Court or from a Criminal Court subordinate to one High Court to another Criminal Court of equal or superior jurisdiction subordinate to another High Court.

(2) The Supreme Court may act under this section only on the application of the Attorney-General of India or of a party interested, and every such application shall be made by motion, which shall, except when the applicant is the Attorney-General of India or the Advocate-General of the State, be supported by affidavit or affirmation.

(3) Where any application for the exercise of the powers conferred by this section is dismissed, the Supreme Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding one thousand rupees as it may consider appropriate in the circumstances of the case."

12.6 Section 407 provides for the power of High Court to transfer cases and appeals:

"407. Power of High Court to transfer cases and appeals

(1) Whenever it is made to appear to the High Court-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the

ends of justice, it may order-

- (i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;
- (ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;
- (iii) that any particular case be committed for trial to a Court of Session; or
- (iv) that any particular case or appeal be transferred to and tried before itself.

(2) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative :

Provided that no application shall lie to the High Court for transferring a case from one Criminal Court to another Criminal Court in the same sessions division, unless an application for such transfer has been made to the Sessions Judge and rejected by him.

(3) Every application for an order under sub-section (1) shall be made by motion, which shall, except when the applicant is the Advocate-General of the State, be supported by affidavit or affirmation.

(4) When such application is made by an accused person, the High Court may direct him to execute a bond, with or without sureties, for the payment of any compensation which the High Court may award under sub-section (7).

(5) Every accused person making such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6) Where the application is for the transfer of a case or appeal from any subordinate Court, the High Court may, if it is satisfied that it is necessary so to do in the interests of justice, order that, pending the disposal of the application, the proceedings in the subordinate Court shall be stayed, on such terms as the High Court may think fit to impose:

Provided that such stay shall not affect the subordinate Court's power of remand under section 309.

(7) Where an application for an order under sub-section (1) is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the

application such sum not exceeding one thousand rupees as it may consider proper in the circumstances of the case.

(8) When the High Court orders under sub-section (1) that a case be transferred from any Court for trial before itself, it shall observe in such trial the same procedure which that Court would have observed if the case had not been so transferred.

(9) Nothing in this section shall be deemed to affect any order of Government under section 197."

12.7 Section 408 provides for the power of Sessions Judge to transfer cases and appeals:

"408. Power of Sessions Judge to transfer cases and appeals

(1) Whenever it is made to appear to Sessions Judge that an order under this sub-section is expedient for the ends of justice, he may order that any particular case be transferred from one Criminal Court to another Criminal Court in his sessions division.

(2) The Sessions Judge may act either on the report of the lower Court, or on the application of a party interested, or on his own initiative.

(3) The provisions of sub-sections (3), (4), (5), (6), (7) and (9) of section 407 shall apply in relation to an application to the Sessions Judge for an order under sub-section (1) as they apply in relation to an application to the High Court for an order under sub-section (1) of section 407, except that sub-section (7) of that section shall so apply as if for the words "one thousand rupees" occurring therein, the words "two hundred and fifty rupees" were substituted."

12.8 Section 409 provides for the withdrawal of cases and appeals by the Sessions Judge:

"409. Withdrawal of cases and appeals by Sessions Judges

(1) A Sessions Judge may withdraw any case or appeal from, or recall any case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him.

(2) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, a Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(3) Where a Sessions Judge withdraws or recalls a case or appeal under sub-section (1) or sub-section (2), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be."

12.9 Section 412 speaks of the reasons to be recorded:

"412. Reasons to be recorded A Sessions Judge or Magistrate making an order under section 408, section 409, section 410 or section 411 shall record his reasons for making it."

13 Keeping in mind the above referred provisions, I proceed to answer the question whether the power under Sub-section (1) of Section 408 of the Code can be exercised by the Sessions Judge to transfer a case from one Additional Sessions Judge to any Additional Sessions Judge in his Sessions Division, even if the trial has commenced?

14 A Division Bench of the Delhi High Court in the case of Avinash Chander vs. State, 1983 Criminal Law Journal 595 held as under:

"I have not been able to quite see how, having once said that the Court of Addl. Sessions Judge is a criminal court, does it then cease to be so under S.408, Cr. P. C. and limit the power of the Sessions Judge exercisable under that section? It is not possible by any principle of interpretation to have read sub-section (1A) as a proviso or qualification to the powers available under sub-sec. (1C) of S.528. The new Code has split S.528 into S.408 (old S.528 (1C)) and S.409 (old S.526 (1A)). That cannot be and is not without any significance. Section 408 is the general power to be exercised for the ends of justice while S.409 provides for a power more of an administrative nature given to the Sessions Judge to withdraw any case or appeal made over by him to the Addl. Sessions judge."(Emphasis supplied)

15 The aforesigned decision of the Delhi High Court was followed by a Full Bench of the Allahabad High Court in the case of Radhey Shyam vs. State of U.P. (1984 Allahabad Law Journal 666). It was held as under:

"It is necessary to point out that the power conferred on the Sessions Judge under Section 409 (1), Cr.PC to withdraw any case or appeal from or recall any case or appeal which he had made over to an Assistant Sessions Judge or the Chief Judicial Magistrate subordinate to him, the power conferred on the Chief Judicial Magistrate under Section 410 (1), Cr.PC to withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and to inquire into or try such case himself, or refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same, the power conferred on the Judicial Magistrate under Section 410 (2), Cr.PC to recall any case made over by him under Sub-section (2) of Section 192, Cr.PC to any other Magistrate and to inquire into or try such case himself and the power conferred on District Magistrate or Sub-Divisional Magistrate under Section 11, Cr.PC to make over, for disposal, any proceeding which has been started before him, to any Magistrate subordinate to him and to withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and dispose of such proceeding himself or refer it for disposal to any other Magistrate, are all administrative powers in connection with the distribution of business. These powers are distinct from the judicial power of transfer conferred on the High Court and the Sessions Judge to be exercised if expedient for the ends of justice."(Emphasis supplied)

16 Sections 406, 407 and 408 respectively relate to the power of the Supreme Court, High Court and Sessions Judge to transfer cases and appeals. On the other hand, Sections 409, 410 (1) and (2) and 411 relate to withdrawal of cases or recalling of cases which had been made over by the Sessions Judge, Chief Judicial Magistrate, Judicial Magistrate and the Executive Magistrate, for being thereafter tried either by himself or being made over to another Court for trial. The clear contrast in the language employed by the Legislature in the two sets of section is indicative of the difference in the nature of the power conferred thereunder. I note below the differences :

- (i) Sections 406, 407 and 408 use the words "whenever it is made to appear" while referring to the power of the Supreme Court, High Court or the Sessions Judge to transfer cases. Sections 409, 410 and 411 significantly do not use these words.
- (ii) The captions of Sections 406, 407 and 408 speak of exercise of 'power' to transfer, whereas Sections 409, 410 and 411 do not speak of 'power' but merely refer to 'withdrawal' or 'recalling'.
- (iii) Sections 406, 407 and 408 contemplate the 'power to transfer' being exercised on an application by a 'party interested' (Sections 407 and 408 also contemplate the 'power to transfer' being used on a report of the Lower Court or suo motu; and Section 406 contemplate the power of transfer being used on an application by the Attorney General). These Sections clearly imply a need for hearing before transfer. On the other hand, Sections 409, 410 and 411 contemplate exercise of the power of withdrawal/recalling cases in a routine manner in the day to day administration. They do not contemplate any hearing to the parties interested.

It is clear from the above that the power to be exercised under Sections 406, 407 and 408 is a judicial power to be invoked and exercised in the manner stated therein. On the other hand, the power of withdrawing or recalling of cases under Sections 409, 410 and 411 is an administrative power, complementary to the administrative power of making over cases vested in the Chief Judicial Magistrate/Magistrate and the Sessions Judge under Sections 192 and 194 of the Code.

17 It is also clear that the power conferred in the Sessions Judge under Section 408 is on the same level as the power conferred in the High Court under Section 407 and the power under the two sections is identical (except for two matters which are not relevant for my purposes the first is while the power of the High Court extends over all Criminal Courts sub-ordinate to its authority, the power of Sessions Judge is confined to Courts within its own Sessions Division; and the second is in regard to the limit of compensation awardable for frivolous applications). Therefore, if High Court has the power to transfer 'part- heard' cases under Section 407, the Sessions Court also will have the power to transfer 'part-heard cases', as the wording of the two sections are the same. In fact, Sub-section (2) of Section 407 places an embargo on an application for transfer being filed before the High Court unless an application for such transfer has been made to the Sessions Judge under Section 408 and rejected by him. (See - *In Re: District and Sessions Judge Raisen* [2005 (3) RCR(Cri)779].

18 I may also give a fair idea about the scope of the administrative power under Section 409(2) of the Code, which confers the power to recall any case or appeal which the Sessions Judge has made over to an Additional Sessions Judge, at any time before the trial of the case or the hearing of the appeal having commenced before such an Additional Sessions Judge.

19 By implication, it is clear that a Sessions Judge, in exercise of the administrative power under Section 409 (2) may recall any case or appeal made over by him to an Additional Sessions Judge, once the trial of the case or hearing of the appeal has commenced. It is well settled that 'trial' of a Sessions case commences with the framing of the charge. But what is the position if the Additional Sessions Judge to whom the case has been made over and before whom the trial of the case or hearing of the appeal has commenced, is transferred to another Sessions Division or has retired from service before the completion of the trial ?

20 Legislative intent behind Section 409 (2) is that where the trial of the case has commenced or hearing of an appeal has commenced (for convenience 'becomes part-heard'), the case or the appeal should be continued to be tried or heard by the same Judge before whom the trial of the case or hearing of the appeal has commenced and there should be no interference with the progress of the case or appeal and, therefore, the administrative power of recalling should not be exercised. This salutary principle is to ensure speedy trial and hearing. But when the Additional Sessions Judge trying the case retires or resigns or dies or is transferred out of the Sessions Division and the Court becomes vacant, the case or appeal ceases to be a part-heard case. A case or appeal can be said to be part-heard only when the trial of the case or hearing of the appeal is capable of being continued by the Judge before whom the trial or hearing has commenced. Where the Judge before whom the matter is part-heard, ceases to be a Judge or the Court falls vacant, the matter ceases to be part-heard matter before that Judge and the bar relating to recalling of part-heard matters, ceases to apply. It is clear from the context in which Sub-section (2) has been enacted, that it applies only to cases where trial of the case or hearing of the appeal has commenced before a particular Additional Sessions Judge and such Judge continues to preside over the same Court or continues in the same Sessions Division. If the Additional Sessions Judge is transferred to some other Sessions Division or ceases to be a Judge on account of resignation, retirement or death resulting in the Court becoming vacant, the restriction placed on the power under Sub-section (2) of Section 409 will cease to apply and as a consequence the Sessions Judge can recall the case or appeal under Section 409 (2). But where the Additional Sessions Judge is transferred within the Sessions Division or is on leave or under suspension, the restriction over the administrative power under Section 409 (2) may continue to exist. (See - In Re: District and Sessions Judge Raisen [2005 (3) RCR(Cri)779].

21 In view of the above discussion, the position may be summarized thus :

(a) A Sessions Judge in exercise of judicial power under Section 408 of the Code may transfer any case pending before any Criminal Court in his Sessions Division to any other Criminal Court in his Sessions Division. That would mean that he can

transfer even those cases where the trial has commenced from one Additional Sessions Judge in his Sessions Division to another Additional Sessions Judge in his Sessions Division. The transfer of a case under Section 408 of the Code being in exercise of a judicial power, it should be preceded by a hearing to the parties interested. Further, the reason or reasons why it is expedient for the ends of justice to transfer the case, has to be recorded.

(b) The judicial power under Section 408 (1) and the administrative power under Section 409 (1) and (2) are distinct and different and Section 408 is not controlled by Section 409 (2). A Sessions Judge in exercise of his administrative power under Section 409 may :

(i) withdraw any case or appeal from any Assistant Sessions Judge or Chief Judicial Magistrate subordinate to him;

(ii) recall any case or appeal which he has made over to any Assistant Sessions Judge or Chief Judicial Magistrate sub-ordinate to him;

(iii) recall any case or appeal which he has made over to any Additional Sessions Judge, before trial of such case or hearing of such appeal has commenced before such Judge. and try the case or hear the appeal himself or make it over to another Court for trial or hearing in accordance with the provisions of the Code. No hearing need be granted to any one before exercising such power. But the reason therefor shall have to be recorded having regard to Section 412.

22 Thus, so far as the first question is concerned, I hold that the application filed by the petitioner under Section 408 of the Code for transfer is maintainable and the two decisions of this Court referred to and relied upon by the learned Principal Sessions Judge have no application in the present case.

23 In the case of G.B. Padheriya (*supra*), the issue before a learned Single Judge of this Court was as under:

"Can the Sessions Judge withdraw a part-heard case from the Additional Sessions Judge in exercise of his purported powers under Sec. 399 of the Criminal Procedure Code, 1973 ('the Cr.P.C.' for brief)? In the alternative, can the Sessions Judge withdraw a part-heard case from the Additional Sessions Judge in exercise of his powers under Sec. 409 thereof ? These are the main questions that have cropped up in this petition under Sec. 482 of the Cr. P. C."

23.1 In para 9, a learned Single Judge observed as under:

"It would be quite proper to look at Sec. 409 of the Cr.P.C. st this stage. Under sub-sec. (2) thereof a Sessions Judge can recall inter alia any case which he has made over to any Additional Sessions Judge at any time before the commencement of the trial of the case. The learned Sessions Judge could not have resorted to this provision of law for the simple reason that the trial before the learned Additional Sessions Judge had already commenced and the oral testimonies of the two

witnesses were recorded on 10th December, 1992. Once the trial of a case made over to an Additional Sessions Judge commences, that case cannot be recalled by the Sessions Judge in exercise of his powers under Sec. 409(2) of the Cr.P.C."

23.2 It is evident from the above that the learned Single Judge considered altogether a different issue and that too, one falling under Section 409(2) of the Code. In the said case, the learned Single Judge had no occasion to consider Section 408 of the Code. 24 In the case of Musa Mohammad Malek (*supra*), a learned Single Judge of this Court considered Section 409 (1) of the Code and observed as under:

"5... Sub-sec. (1) of Sec. 409 empowers a Sessions Judge to withdraw any case or appeal, or recall any case or appeal which he has made over to any Assistant Judge or Chief Judicial Magistrate subordinate to him. However, reading sub-sec. (2) of Sec. 409, it becomes abundantly clear that the Sessions Judge is empowered to recall any case or appeal, which he had made over to any Additional Sessions Judge, only before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge. In other words, at any time before commencement of trial of a case hearing of an appeal before the Additional Sessions Judge, power to withdraw or recall any case or appeal is vested in the Sessions Judge, power to withdraw or recall any case or appeal is vested in the Sessions Judge. However, after commencement of the trial of a case or hearing of an appeal, such a power is not left within the Sessions Judge. In this case it is not in dispute that the charge has already been framed by the third Additional Sessions Judge and an order has also been passed by the third Additional Sessions Judge on an application directing the investigating agency to produce certain evidence. That order has also been partly complied with. Therefore, in the present case, the trial had already commenced when the charge was framed. It was, therefore, not open to the Sessions Judge to make over the same to Additional Sessions Judge. The Supreme Court in *Ratilal Bhanji Mithani v. State of Maharashtra*, AIR 1979 SC 94 has held that the trial in a warrant case starts with the framing of charge; prior to it, the proceedings are only an inquiry.

Therefore, exercise of power under Sec. 409 of the Code by a Sessions Judge after the commencement of the trial is not permissible. In this case, as the trial had already commenced with the framing of charge, the learned Sessions Judge had thereafter no power or authority under Sec. 409 of the Code to recall the case from the file of the third Additional Sessions Judge."

24 Thus, in the above noted case also, the issue was altogether different and what was being considered is Section 409 of the Code.

25 I have already explained in details the fine distinction between Sections 406, 407 and 408 compared with Sections 409, 410(1) and (2) and 411 of the Code. I have already explained that the judicial power under Section 408(1) and the administrative power under Section 409(1) and (2) are distinct and different and Section 408 is not controlled by Section 409(2) of the Code.

26 I shall now proceed to answer the second question whether any case has been made out for transfer or not. In the case of Jayesh Nandlal Shah (*supra*), this Court had the occasion to consider the scope of Section 407 of the Code and the circumstances in which a criminal trial could be transferred to any other Court in the same Sessions Division. After considering the various provisions, this Court held:

"It is quite explicit on plain reading of the provisions of Section 407 of the Code of Criminal Procedure that if the High Court is shown or if it is spelt out to the satisfaction of the High Court that

- (i) a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto; or
- (ii) that some question of law of unusual difficulty is likely to arise; or
- (iii) that some of the provisions of Criminal Procedure Code will require passing of such order for the convenience of the parties or witnesses; or
- (iv) it is in the expediency of the larger interest of justice, the High Court may pass order as incorporated under clauses (i) to (iv) of sub-section(1) of Section 407 of the Code of Criminal Procedure as quoted above.

A bare reading indicates that Section 407 enacted with a view to enable the parties to criminal cases to make an application for transfer in case that party apprehends that he cannot get fair and impartial enquiry or trial. The elementary rule of interpretation is that 'Animus Imponentis' i.e. intention of law givers has to be ascertained. At the same time, there is another maxim 'Ut Res Magis Valeat Quam Pereat' which connotes that a statute or any enacting provision must be construed to make it more effective. (see AIR 1959 SC 356). The Parliament has employed the word fair and impartial trial with obvious object that accused should not be prejudiced. In common parlance, trial can be said to be fair if only when it is conducted with honesty. In other words, where it is free from injustice, prejudice and of favouritism. According to Collins Cobuild English Language Dictionary (Collins London and Glasgow 1987 Edition page 509), the word 'fair' means reasonable according to generally accepted standard about what is right and just. Next meaning given to the word 'fair' is that it gives the same or equal treatment to every one concerned. The law requires that an application for transfer can be moved when the applicant apprehends that he would not get equal treatment with the opposite party or that the personal feelings of the court would influence his judgment. The aforesaid provision emanates from a Latin maxim 'Actus Curiae Neminem Gravabit' which means that an act of the court shall prejudice no man. It is better to make a reference of American Jurisprudence (Volume 21, 2nd Edition para 415) which deals with the change of venue or scope of transfer application in criminal matters.

"The Courts are deemed to have inherent power to direct the change of venue in order that an accused may have fair and impartial trial. Change of venue can be had only upon some ground specified in the Statute. The right of the accused to a

change of venue upon the ground of inability to obtain a fair trial in the country where the indictment is found or because of local prejudice and excitement is universally recognised. It is a fundamental principle of our law that every person charged with crime shall have a right to fair and impartial trial."

It is well settled position of law that where the accused has a reasonable apprehension that a fair and impartial trial or inquiry cannot be had or where the ends of justice make it expedient, transfer should be ordered. It is of paramount importance that party arraigned before the Court should have confidence in the impartiality of the courts. It is equally well settled that it is a duty of the High Court at all events to clear away everything which might reasonably create suspicion and distrust in the courts and so to promote and maintain in the public a feeling of confidence in the administration of justice, which is so essential for social order and security. It is of the fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done. However, at the same time, it is necessary to bear in mind that it is not any and every apprehension in the mind of the accused that can be a ground for transfer, but it should be a reasonable apprehension which the High Court considered it reasonable for the accused as a reasonable person to entertain in the circumstances of the case. Even the absence of bias or prejudice, however, does not completely cover the issue. The question has to be considered from the point of view of the fear or apprehension in the mind of the accused and whether the High Court considers that the accused as a normal and reasonable person could reasonably entertain the fear or apprehension in the circumstances complained of."

"To a certain extent, the learned counsel appearing for the accused may be justified in submitting that in dealing with an application for transfer, the Court has to consider not only the question, whether there has been any real bias in the mind of the Magistrate against the applicant, but also the additional question whether incidents may not have happened which, though they may be susceptible of explanation and may have happened without there being any real bias in the mind of the Magistrate, are nevertheless such as are calculated to create in the mind of the accused applicant a justifiable apprehension that he would not have an impartial trial. It is the state of mind of the accused which is to be seen and not the impression of the court in regard to the said incidents. However, as stated above, the apprehension must, nevertheless, be reasonable and not the result of the reaction of a hypersensitive mind. It must not be indicative either of a desire on the part of the accused to create a situation for claiming transfer of the case when things are not going his way or of unduly excessive sensitiveness. The accused must not be unduly imaginative to see bias where it cannot be reasonably seen from the position which the accused occupies. Every case, thus, has to be dealt with on its own peculiar facts and it is neither desirable nor possible to lay any rigid rule which would serve as a straitjacket in all cases."

27 In the case of Satish Jaggi (supra), the Supreme Court observed as under:

"5. The law with regard to transfer of cases is well settled. This Court in the matter of Gurcharan Dass Chadha v. State of Rajasthan (AIR 1966 SC 1418) held that a case is transferred if there is a reasonable apprehension on the part of a party to a case that justice will not be done. This Court said that a petitioner is not required to demonstrate that justice will inevitably fail. He is entitled to a transfer if he shows circumstances from which it can be inferred that he entertains an apprehension and that it is reasonable in the circumstances alleged. This Court further held that it is one of the principles of the administration of justice that justice should not be done but it should be seen to be done. The court has further to see whether the apprehension is reasonable or not. This Court also said that 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 not only be entertained, but must appear to the court to be a reasonable apprehension.

6. It was further held by this Court in Mrs. Maneka Sanjay Gandhi and Anr. v. Miss Rani Jethmalani (AIR 1979 SC 468) that 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 availability of legal services or any like grievance. Something more substantial, more compelling, more imperiling, 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. This Court, in the facts and circumstances of the case, said that the grounds for the transfer have to be tested on this touchstone 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. It further said that even so, the process of justice should not harass the parties and from that angle the Court may weigh the circumstances.

7. In Abdul Nazar Madani v. State of Tamil Nadu (AIR 2000 SC 2293) this Court stated that the purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Code. The apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary based upon conjectures and surmises. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court or even at any place, the appropriate Court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive. No universal or hard and fast rules can be prescribed for deciding a transfer petition which has always to be decided on the basis of the facts of each case. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the

Court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, if any, the witnesses and the larger interest of the society.

8. In G.X. Francis v. Banke Bihari Singh (AIR 1958 SC 309) this Court felt that where public confidence in the fairness of the trial is likely to be seriously undermined under the circumstances of the case, transfer petition could be allowed. On finding that "there is uniformity of testimony from both sides about the nature of surcharged communal tension in that area," the Court found that the local atmosphere was not conducive to a fair and impartial trial which was a good ground for transfer. The Court rejected the contention of the petitioner therein regarding the wild allegations made to the effect that no Court in the State of M.P. would be unbiased or impartial for dispensing justice. In the peculiar facts and circumstances of the case, the trial was transferred to an adjoining Court. The mere existence of a surcharged atmosphere without there being proof of inability for holding fair and impartial trial cannot be made a ground for transfer of a case. Alleged communally surcharged atmosphere has to be considered in the light of the accusations made and the nature of the crime committed by the accused seeking transfer of his case. It will be unsafe to hold that as and when accusations are made regarding the existence of a surcharged communal atmosphere, the case should be transferred from the area where existence of such surcharged atmosphere is alleged.

9. The position was also examined in Pal Singh and Anr. v. Central Bureau of Investigation and Ors.. In that case, considering the fact that large number of witnesses had been examined and few more witnesses were left to be examined, this Court set aside the order of the High Court transferring the case from one Sessions Court to another. The High Court was, therefore, held to be not justified in entertaining the petition for transfer.

10. In this case, one thing which has to be kept in view is that the Sessions Judge himself has not indicated his disinclination to hear the matter. That is probably because he believes that the mere fact that his brother is known to some political heavy weight cannot stand in his way of discharging judicial function impartially without fear and favour. These are the hallmarks of judicial system. A judicial officer in whatever capacity he may be functioning has to act with the belief that he is not to be guided by any factor other than to ensure that he shall render a free and fair decision which according to his conscience is the right one on the basis of materials placed before him. There can be no exceptions to this imperative, but at the same time there should not be any scope given to any person to go away with the feeling that the Judge was biased, however unfounded the impression may be.

"7. The qualities desired of a Judge can be simply stated: "that if he be a good one and that he be thought to be so". Such credentials are not easily acquired. The Judge needs to have "the strength to put an end to injustice" and "the faculties that are demanded of the historian and the philosopher and the prophet". A few paragraphs from the book "Judges" by David Pannick which are often quoted need to be set out here:

"The Judge has burdensome responsibilities to discharge. He has power over the lives and livelihood of all those litigants who enter his Court. His decisions may well affect the interests of individuals and groups who are not present or represented in Court. If he is not careful, the Judge may precipitate a civil war. Or he may accelerate a revolution.....He may accidentally cause a peaceful but fundamental change in the political complexion of the country.

xx xx xx xx Judges today face tribulations, as well as trials, not contemplated by their predecessors. Parliament has recognized the pressures of the job by providing that before the Lord Chancellor recommends any one to the Queen for appointment to the Circuit Bench, the Lord Chancellor 'shall take steps to satisfy himself that the person's health is satisfactory'.....This seems essential in the light of the reminiscences of Lord Roskill as to the mental strain which the job can impose.....Lord Roskill added that, in his experience, 'the workload is intolerable: seven days a week, 14 hours a day'.....

xx xx xx xx He (Judge) is a symbol of that strange mixture of reality and illusion, democracy and privilege, humbug and decency, the subtle network of compromises, by which the nation keeps itself in its familiar shape". (See Brij Mohan Lal v. Union of India and Ors. (2002 (5) SCC 1)

11. We are sure that the present Sessions Judge would have acted in the true sense of a judicial officer. But nevertheless to ensure that justice is not only done, but also seen to be done and the peculiar facts of the case, we feel that it will be appropriate if the High Court transfers the case to some other Sessions Court in Raipur itself. We make it clear that the transfer shall not be construed as casting any aspersion on the Learned Sessions Judge. The Trial Court before whom the trial is to continue should ensure that the trial is completed by the end of May, 2007. Needless to say, the parties shall co-operate in the completion of the trial within the said time."

28 In the case of Ranjit Thakur (*supra*), the Supreme Court observed as under:

"The test of real likelihood of bias is whether a reasonable person, in possession of relevant information, would have thought that bias was likely and whether the authority concerned was likely to be disposed of decide the matter only in a particular way. What is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself, however honestly, "Am I biased ?" ; but so look at the mind of the party before him."

29 The apprehension expressed by the petitioner that he would not get a fair and impartial trial is on the basis of the incident which occurred on 30.07.2015 referred to above. According to the petitioner, he overheard the conversation between the complainant and his son while he was standing in the parking area that from the next date onwards, the trial would commence and all the accused would be convicted. After the said conversation was overheard by the petitioner something transpired in the Court wherein in the absence of the advocate on that day appearing for the petitioner, all of a sudden, the date was fixed i.e. 05.08.2015. This incident led the petitioner to believe that

something is wrong and he would not get justice. It appears that one of the grounds urged in the application filed by the petitioner under Section 408 is quite curious. It says that the Presiding Officer is a convicting Judge and he spares none. As such, the two grounds are quite conflicting. It gives an impression that the accused is afraid of the Presiding Officer being a convicting Judge and on the other hand, indirectly he is trying to convey that the complainant is quite confident that he would be able to secure conviction at any cost. The petitioner definitely is in dilemma. Whether to term his apprehension as reasonable and not the result of the reaction of a hypersensitive mind is the question.

30 It is not in dispute that the Presiding Officer concerned has not examined a single witness till this date. The witnesses examined so far were all examined by the Predecessor in Office. The Presiding Officer himself has also not indicated his disinclination to hear the matter. At the same time, he has offered quite a stiff resistance to the plea of transfer as the same is revealed from his remarks forwarded to the Principal Sessions Judge. I am sure that the present Additional Sessions Judge would have acted in a true sense of a Judicial Officer. But nevertheless, to ensure that justice is not only done, but also seems to be done and in the peculiar facts of the case, I feel that it will be appropriate if the Principal Sessions Judge transfers the case to any other Additional Sessions Judge in the same Sessions Division. I make it abundantly clear that the transfer shall not be construed as casting any aspersions on the learned Additional Sessions Judge.

31 In the result, this petition is allowed. The impugned order is hereby quashed. The application filed by the petitioner under Section 408 of the Code at Exhibit - 6 is hereby allowed. The Principal Sessions Judge shall transfer the Sessions Case No.291 of 2003 to any other Court of the learned Additional Sessions Judge in the same Sessions Division at the earliest. The learned Additional Sessions Judge who would be assigned the sessions cases shall see to it that the trial is completed at the earliest, preferably within a period of six months from the date of receipt of the writ of this order. Rule is made absolute.

32 In view of the order passed in the main matter, the connected Criminal Miscellaneous Application No.17138 of 2015 is also disposed of.

FURTHER ORDER

After the order is pronounced, Mr. Aftabhussein Ansari, the learned advocate appearing for the respondent No.2 - original complainant prays for stay of the operation of the order. In view of what is stated above, the prayer is declined.