

(2010) 07 GUJ CK 0007

In the Gujarat High Court

Case No : Special Criminal Application No. 387 of 2010

Imtiazkhan Saeedkhan Pathan and Others

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 29-07-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 311, 319, 408, 409, 482

Evidence Act, 1872 — Section 165

Citation : (2010) CriLJ 4510

Hon'ble Judges : Jayant Patel, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : M.M. Tirmizi, for the Appellant; J.M. Panchal, Spl. Public Prosecutor for Respondent 1, K.G. Menon and Ajaykumar Choksi for Respondent 2, Vaibhav A. Vyas, for Respondent 2 and B.N. Limbachia, for Respondent(s) 4, 7 - 8, 11 - 12, 20, 24 - 25, 27 - 28, 31, 34 - 41, 46 - 58, 62 - 64 and 67, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Patel, J.—The present petition is preferred by the petitioners seeking transfer of Sessions Case No. 152/02 pending before the learned Additional Sessions Judge, City Civil Court No. 12, Ahmedabad. The petitioners since had earlier approached before the Principal City Civil Judge for transfer of the said sessions cases under Sections 408 read with Section 409 of the Cr.P.C. and the learned Principal Sessions Judge declined the prayer for transfer by rejecting the application of the petitioners, the petitioners have also challenged the said order in the present petition.

2. In order to appreciate the grievance on the part of the petitioners herein, some factual background may be required and the same is as under:

The petitioners are either witnesses or victims of Sessions cases which are sought to be transferred. All such sessions cases pertain to communal riot incidents and it is the case of the petitioners that about 69 persons have lost

their lives in the incident, therefore, their sentiments are attached with the conducting of the trial and they are desirous to see that the offenders are punished in accordance with law. After registration of FIR and investigation of the matter by the State Police, as per the direction of the Apex Court, the investigation was assigned to Special Investigation Team (hereinafter referred to as "SIT" for the sake of convenience) and thereafter, there was further investigation and charge-sheets have been filed and the matters are pending before the learned Sessions Judge. The Apex Court had issued various directions in the case of National Human Rights Commission v. State of Gujarat and Ors. reported at 2009 (6) SCC 767, which inter alia includes the direction for selection of the judicial officer to be nominated for conducting the trials such cases vide para 40(iv), relevant of which reads as under:

It is imperative, considering the nature and sensitivity of these nominated cases, and the history of the entire litigation, that the senior judicial officer be appointed so that these trials can be concluded as soon as possible and in the most satisfactory manner. In order to ensure that all concerned have the highest degree of confidence in the system being put in place, it would be advisable if the Chief Justice of the High Court of Gujarat selects the judicial officers to be so nominated. The State of Gujarat has, in its suggestions, stated that it has no objection to constitution of such "Fast Track Courts" and has also suggested that this may be left to the Hon'ble the Chief Justice of the High Court.

In view of the aforesaid direction issued by the Apex Court in the above referred decision, so far as the present cases are concerned, the then Hon'ble Chief Justice (as his Lordship then was) had selected the present judicial officer Shri B.U. Joshi to conduct the present sessions cases and it has been stated that the trial is being conducted on day to day basis and by now, when the matter was heard on 15.07.2010 by this Court, about 292 witnesses were already examined. It is at that stage, the question is required to be considered by us as to whether in exercise of the power of this Court under Article 226 or 227 of the Constitution of India read with the powers under Sections 408 and 409 of Cr.P.C, whether such sessions cases should be transferred to another sessions judge or not?

The grievance on the part of the petitioners is that certain behaviour and conduct of the judicial officer is such that the petitioners feel that the learned Sessions Judge is having bias against the victim and the witnesses and it is further case of the petitioners that such has transpired during the course of conducting the trial, therefore, they have the apprehension that they will not get justice, hence the prayer for transfer of the sessions cases to another judicial officer who may be in a position to conduct the sessions cases.

3. The petitioners further contend that when the witnesses wanted to have the certified copy of the deposition recorded, initially the same was permitted and thereafter, vide order dated 04.09.2009, the learned Sessions Judge observed that since the deposition of important witnesses have started from 02.11.2009, considering the facts and circumstances, unless the evidence of all victim

witnesses are concluded, till then the lawyer of the witnesses should not be supplied copy of the evidence. It is only after recording of all evidence of victim witnesses, the copies shall be supplied to the advocate of the applicants.

4. The second ground is that when the copy of the Rojkam was applied to be given on payment of necessary charges, the learned Judge passed the order that first the aspect shall be decided as to whether the Rojkam and other proceedings can be termed as document for which the certified copy is applied and it is only after the decision is taken, the copy can be supplied and therefore, at that stage, the application was rejected. The third ground is that the behaviour of the learned Judge is hostile and unsympathetic to the witnesses. When the witnesses wanted certain things to be recorded, such as tears in the eyes of the witnesses when they were giving deposition, such was declined by the learned Judge but the learned Judge of his own recorded in the proceedings the presence of N.G.O. of Ms. Teesta Shetalvad. When the witnesses wanted for the purpose of identification to come out of the oath administering box to the place at which the accused were standing, such was declined by the learned Judge. It was also submitted that the learned Judge had passed certain comments to the witnesses, i.e., if he is remembering certain incidents, why he is not in a position to answer and remember certain other aspects. This has been considered by the petitioners herein as hostile and unsympathetic treatment by the learned Judge. It was also submitted that when one of the witnesses appeared in response to the summons of the court, an application was given to put him in custody contending that he was the person who was present at the time of incident and has committed offence and the learned Judge instead of sending him to custody, and though there was no application for bail by the person concerned, has released on personal bond. Further, the application was made to implead certain persons as accused after the evidence was recorded since as per the said applicant, they were involved in the alleged offences. However, the learned Sessions Judge passed the order granting the application in respect of certain person and had declined permission in respect of other persons. It was also submitted that the then Public Prosecutor Shri R.K. Shah had addressed a letter to the Chairman of SIT about the aforesaid conduct on the part of the learned Sessions Judge. It has been submitted on behalf of the petitioners herein that when the then Public Prosecutor who was conducting the case has supported the case of the petitioners, it would be a case for transfer of the matter to another Sessions Judge. At this stage, it may be recorded that Shri R.K. Shah, the then Public Prosecutor subsequently had tendered his resignation and he is no more Special Public Prosecutor of the case since then. The aforesaid appears in substance to be the main ground for transferring the Session case to any other sessions judge.

5. We have heard Mr. M.M. Tirmizi, learned Counsel for the petitioners and Mr. K.G. Menon, Senior Counsel with Mr. Ajayukumar Chimanlal Chokshi for SIT and Mr. J.M. Panchal, learned Special Public Prosecutor for the State.

6. All the aforesaid grounds, as such, can be broadly classified under two heads;

one is for exercise of judicial power and the other is the behaviour and conduct of the learned Sessions Judge while conducting the trial. The third aspect which may be required to be considered is as to whether such could be termed as bias, or can it be said that the apprehension, in the mind of the petitioners is reasonable or just an apprehension having no reasonable basis applying the test of prudence at par with the other litigant. Incidentally, the aspect may also be required to be considered as to whether lenient exercise of the power in a matter of transfer accepting the allegation of bias against the presiding officer of the Court would result into tinkering with the impartiality of a judge and/or would result into having any demoralising effect upon a judge who is otherwise required to discharge the duty with all strength of power in order to render justice, may it be against either party, to which he would not be concerned.

7. The contention of the learned Counsel for the petitioners is that on the basis of the instances as referred to hereinabove, the reasonable apprehension in the mind of the petitioner could be said as with substance and such would attract the power for transfer of the case u/s 408 read with Section 409 of the Cr.P.C. to another Sessions Judge. He also contended that it is true that initially, the application was made to the Principal Sessions Judge u/s 408 read with Section 409 of the Cr.P.C., but the learned Principal Sessions Judge without recording any reasons whatsoever, has rejected the application, therefore, the present petition. He also contended that after admission of the present petition by the Hon'ble Single Judge of this Court, the petitioners were desirous to make appropriate representation to the Honuorable Chief Justice for transferring of the sessions case to another learned Sessions Judge, but the matter has been assigned to the present Division Bench. In the submission of the learned Counsel for the petitioners, the Honourable Chief Justice also could have exercised the power on administrative side to transfer the matter to another learned Sessions Judge. He contended that it is not a matter where no similarly situated judicial officers are transferred, since one of such judicial officers taking up the matter in Mehsana which was also a communal riots case has been transferred to other place. Therefore, it was submitted that the power of the Honourable Chief Justice on administrative side as per the direction of the Supreme Court could be said as *persona designata* and if the nature of the power is to be considered as that of *persona designata*, the Honourable Chief Justice on administrative side could consider the matter, but as the matter is now assigned to the Division Bench of this Court, pursuant to the administrative order passed by the Honourable Chief Justice, the petitioners are making submissions in the present case for seeking transfer of the matter in exercise of the power of this Court under Article 226/227 of the Constitution read with Sections 408 and 409 of the Cr.P.C.

8. Whereas, on behalf of the SIT, the learned Counsel submitted that all basis of the apprehension are judicial orders passed by the learned Judge. It was submitted that the judicial orders passed by the learned Sessions Judge to which the petitioners had grievance, have been carried before this Court by preferring revision or by invoking the power of this Court u/s 482 of the Cr.P.C. and/or

under Article 226 of the Constitution, as the case may be. He submitted that in majority of the cases, this Court has not interfered with the said judicial orders passed by the learned Sessions Judge. He also submitted that in any case, no observations or strictures have been passed by this Court in those proceedings in connection with the conduct or behaviour of the learned Sessions Judge. He therefore submitted that if the exercise of the judicial power is confirmed by this Court or not interfered by this Court, or no observations or strictures are made, it cannot be said that there is any valid basis for the petitioners for attributing bias of the learned Sessions Judge before whom the matter is pending. It was submitted that out of 21 orders passed by the learned Sessions Judge, the petitioners had grievance only for 3 orders against which the matters were carried before this Court and out of those three orders, 2 orders are already confirmed by this Court and for the challenge against the 3rd order, the judgement and order is reserved and the outcome is being awaited.

9. On behalf of SIT, a clear and unequivocal statement has been made by the learned Counsel at para 16 of the affidavit, as under:

16. It is respectfully stated that, having regard to the totality of the facts, it would appear to this Honourable Court that the Trial Judge is not biased against the either of the parties before him.

The Trial Judge neither has prejudice against the petitioners or any of the prosecution witnesses and not the Trial Judge is favouring any of the accused persons.

It is respectfully stated that, the approach of the Trial Court would show that he is discharging his duties in utmost judicious, fair and impartial manner and is bringing on record all relevant facts which transpires during the course of the Trial.

Further, virtually not a single ground has been alleged against the Trial Judge which would make a reasonable case of any apprehension in the mind of Petitioners that they would not get Justice at the hands of the Trial Judge Mr. B.U., Additional Sessions Judge.

10. On the aspects of the letter addressed by the learned Special Public Prosecutor, the stand of the SIT as stated in para 18 of the affidavit-in-reply is as under:

18. It is respectfully stated that, so far as the prayer regarding production of the correspondence between the Special Public Prosecutor and the Special Investigation Team is concerned, the same was not the prayer before the Trial Court and therefore, it cannot be agitated for the first time before this Honourable Court in a Special Criminal Application. It is respectfully stated that, even otherwise the said correspondence between the Special Public Prosecutor and the Special Investigation Team is a confidential and administrative internal correspondence and therefore, the Honourable Court may not grant the said

relief to the petitioners, more particularly when the said chapter is closed by the Honourable Supreme Court and the same has nothing to do with the Transfer of Mr. B.U. Joshi, Additional Sessions Judge.

11. The learned Counsel Mr. Panchal for the State submitted that the State would abide by the orders of this Court while supporting the stand of SIT contending that it cannot be said that the learned Sessions Judge is having any prejudice or bias against any of the victim or the witnesses.

12. Before we proceed to examine the aforesaid aspects, certain observations of the Apex Court for the approach of the Court and more particularly in communal riot cases, would be relevant. In the case of *Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and Others*, it was observed inter alia at para 35, the relevant of which reads as under:

If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.

13. At para 38, it was observed thus:

A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and circumstantial and not by an isolated scrutiny.

14. At para 40, it was observed thus-

The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice.

15. At para 44, it was observed on the aspect of interpretation of Section 165 of the Evidence Act read with Section 311 of the Cr.P.C. that-

Object of the Section is to enable the Court to arrive at the truth irrespective of the fact that the prosecution or the defence has failed to produce some evidence which is necessary for a just and proper disposal of the case. The power is exercised and the evidence is examined neither to help the prosecution nor the defence, if the Court feels that there is necessity to act in terms of Section 311 but only to subserve the cause of justice and public interest. It is done with an object of getting the evidence in aid of a just decision and to uphold the truth.

16. At para 56, it was observed thus:

56. As pithily stated in *Jennison v. Backer* 1972 (1) All E.R. 1006, "The law should not be seen to sit limply, while those who defy it go free and, those who seek its protection lose hope". Courts have to ensure that accused persons are punished and that the might or authority of the State are not used to shield themselves or their men. It should be ensured that they do not wield such powers which under the Constitution has to be held only in trust for the public and society at large. If deficiency in investigation or prosecution is visible or can be perceived by lifting the veil trying to hide the realities or covering the obvious deficiencies, Courts have to deal with the same with an iron hand appropriately within the framework of law. It is as much the duty of the prosecutor as of the Court to ensure that full and material facts are brought on record so that there might not be miscarriage of justice. (See *Shakila Abdul Gafar Khan (Smt.) v. Vasant Raghunath Dhoble and Anr.*)

17. On the aspect of contradiction of the evidence, it was inter alia observed by the Apex Court at para 59, relevant of which reads as under:

It is only after admission, the Court should consider in each case whether on account of earlier contradiction before Court and the testimony allowed to be given as additional evidence, which of them or any one part or parts of the depositions are creditworthy and acceptable, after a comparative analysis and consideration of the probabilities and probative value of the materials for adjudging the truth. To reject it merely because of contradiction and that too in a sensitised case like the one before Court with a horror and terror oriented history of its own would amount to conspicuous omission and deliberate dereliction of discharging functions judiciously and with a justice-orientated mission.

18. The aforesaid enlightens for the proactive role on the part of the learned Sessions Judge before whom the trial is being conducted and his role would not be like that of a silent spectator or like a machine recording the evidence. But, such should not result into any action lacking wisdom on the part of the learned Judge which may result into creating an atmosphere of prejudicing the rights of either party. A judge while discharging the judicial function, has to bear in mind basically three broad aspects which will have a vital role in the system of administering justice; one would be the broad vision to see the things which are apparent and to see also certain things which may be required to be read between lines. The second aspect would be to apply wisdom after having a broad

vision of the case. Wisdom would include not only to act as a silent spectator, but would also include the aspect of his behaviour while functioning as a judge. There may be cases where the learned Judge if conveys his view so as to curtail the consumption of judicial time of the Court, the same would be in the larger interest of the system or in any case, for conclusion of the trial, but at the same time such expression of views should not result into rude atmosphere which may lead to an impression in the mind of either side that the learned Judge is not open until the last or the final decision is given. It is true that the demeanor of the witnesses while recording the evidence may be taken note of by the learned Judge, but such should be in a sober manner as if the Court is receptive to the said aspects and not that the Court will have any hostile approach thereto. There could be numerous interconnected aspects thereto if we go on narrating the same but suffice it to say that after applying common sense, the function of the learned Judge should be guided by wisdom. It would be thereafter for the Judge to exercise the power which is vested to him with all strength, be it may in favour of either party or be it may against any party to the proceedings. At that stage, the Judge is hardly concerned as to whether such decision would be welcome or opposed by either party to the proceeding or not. It is for the Judge to uphold the law with all strength of power which is vested in him and if any party is aggrieved by such decision, the remedy to such party as per the system of administration of justice is to approach before higher forum and to raise all grievances as may be available to them. It is with this background, we find that the matter deserves further consideration as observed hereinafter.

19. The exercise of judicial power by any judge or the presiding officer of the Court if considered as bias or a basis of bias, it would not be in the larger interest of system of administration of justice. No judge or the presiding officer would be in a position to discharge his duty with all strength or the power vested to him if his decision in either way is to be treated as a valid base for inferring bias on the part of the learned judge. At this stage, we may refer to the decision of this Court in the case of Gautam Devjibhai Rathod v. State of Gujarat reported at 2005 (0) GLHEL HC 214219 (decided by one of us on the Bench, Jayant Patel, J.), wherein the question arose as to whether the exercise of the judicial power by the learned Judge for issuance of non-bailable warrant against the District Superintendent of Police and other witnesses could be termed as a valid ground for transfer of the case or not? This Court at para 3 observed thus-

3. Further, merely because the coercive process is issued against some of the witnesses is hardly any ground for justifying the transfer of the case from one Sessions Court to another Sessions Court. It needs to be recorded that the Court of law with a view to enforce the presence of any witness may exercise the power. It is also true that in normal circumstances, the Court may first issue summons. Thereafter if the summons is not honoured after service, the Court may issue bailable warrant and if the same is also not respected the Court may also issue non-bailable warrant. But all such aspects are procedural aspects and the learned Judge conducting the trial has to exercise the discretion, keeping in

view the sound principles of judicial discipline. Merely because there is error in exercising judicial discretion of issuance of process against certain witnesses, the same cannot be a sufficient ground for transferring the case to another Court, more particularly when as observed earlier, no comments/remarks whatsoever were called for by the learned District and Sessions Judge before exercise of the power. Under the circumstances, the order passed by the District and Sessions Judge for transfer of the case cannot be maintained in the eye of law.

(Emphasis supplied)

20. We may also refer to another decision of this Court (Single Judge) (Decided by one of us on the Bench, Jayant Patel, J.) in the case of Krishnalal Ratanji Sorathia v. State of Gujarat in Criminal Revision Application No. 118/03 and allied matters decided on 08.08.2003, more particularly the observations made at paras 5 and 8 which reads as under:

5. Having considered the aforesaid submissions made on behalf of petitioner, it is required to be taken note that there can not be any dispute to the principle that whenever any litigant finds a reasonable apprehension that there are chances of any bias decision from the presiding officer of the court, it becomes a good ground for transferring the matter from the presiding officer to any other court or any other presiding officer, but at the same time, it is also required to be taken note of that the morale of a judge or presiding officer can not be put down or lowered down by baseless apprehension.

21. Therefore, the crucial aspect would be as to whether there any reasonable apprehension or is the material sufficient for alleging bias against the presiding officer who adjudicates the matter.

8. When any order is passed by any presiding officer of a competent court while discharging his judicial functions, no litigant can be heard to say that the matter should be transferred merely because the learned judge has rejected the application. If such contentions are entertained and accepted no presiding officer will be able to discharge his duties and administer the law without any fear. Liking or disliking by the litigant while discharging duties as a judge or presiding officer is not to be considered and what is required to be considered is whether the presiding officer or judge has discharged his functions as a judge/presiding officer in accordance with law and in the interest of justice. Even in the revisional jurisdiction when this Court found it *prima facie* not to interfere with the orders passed by the learned judge and if the petitioner himself has also not chosen to challenge the order passed by the learned judge in my view as such can not be said to be a valid ground for making out a case of bias at all and if such is the basis for the petitioner to apprehend that he will not get justice and injustice will be caused, then in that case it will have to be observed that such apprehension is not genuine but is thoroughly misconceived.

(Emphasis supplied)

22. In the case of Girishnarain Awasthy Vs. The State, the Allahabad High Court had also an occasion to consider the similar aspects. At para 6, it was inter alia observed as under:

It is unnecessary at this stage to consider whether the order rejecting the application was a correct or an incorrect order. If it had been passed and had been an incorrect order, it would even then have provided no ground for transfer as it would have been a judicial order passed by the Magistrate after hearing the applicant and his counsel and the mere fact that a judicial order happens to be passed against a party cannot be considered to be a ground for transfer.

(Emphasis supplied)

23. In the case of Ms. Sarika Vs. The State of Maharashtra and Others the High Court of Bombay, in Criminal Application No. 1898/07 decided on 06.09.2007, had an occasion to consider the similar aspect and it was observed inter alia at para 9, relevant of which reads as under:

...Simply because a few orders are adverse, an inference of bias cannot be drawn. It would be inappropriate on the part of higher courts to transfer the cases from one court to another on the ground that a few adverse orders are passed against the party. If that is done, perhaps no judge would ever be able to finally dispose off any case.

(Emphasis supplied)

24. The aforesaid if considered in light of the facts of the present case, shows that as stated on behalf of SIT, out of 21 orders passed by the learned Sessions Judge while conducting trial, in exercise of the judicial power, the petitioners had the grievance against 3 orders only and those orders are challenged before this Court by way of appropriate proceeding, viz. Criminal Revision Application No. 800/09, for ventilating the grievance on the part of the petitioners that while recording the evidence of the witnesses, some of the answers given by the witnesses, particularly by the present petitioners therein were not recorded by the learned Presiding Officer. This Court in the said revision had observed in the concluding part of the order that the learned Judge shall record all answers given by the witnesses to the question put in the cross-examination including those which may be in the form of voluntary explanations rendered by the witnesses. It was also observed that the learned Judge shall examine the same in accordance with law and give his decision on the basis of the facts as may emerge.

25. The aforesaid goes to show that the Court did not interfere with the order, but made only certain observations leaving judicial discretion to be exercised by the learned Judge. The pertinent aspect is that while exercising the judicial power of this Court, no observations are made for extracting or finding any bias on the part of the learned Judge.

26. Against the second order, the petitioners preferred Criminal Revision Application No. 154/10 for ventilating the grievance for releasing the accused on

personal bond of Rs. 5,000/-. In the said matter, this Court vide its decision dated 19.03.2010, had observed that Section 319 of the Cr.P.C. does not mandate the Court to take such person in custody irrespective of the circumstances so demand or require. This Court further observed that the order passed by the learned Sessions Judge in exercise of power u/s 88 read with Section 319 of the Cr.P.C. cannot be said to be illegal per se. Ultimately, this Court found no substance in the contention raised on behalf of the learned advocate for the applicant/petitioner therein and the petition was rejected. This shows the confirmation of the order passed by the learned Sessions Judge which is sought to be canvassed as a basis for bias by the Judge concerned.

27. The third order is also carried in Cr. Revision Application No. 110/10 for ventilating the grievance for impleading 8 persons as accused u/s 319 of the Cr.P.C. At the initial stage, when the matter has been considered by this Court vide order dated 24.02.2010, it has found no substance to the challenge in part and it was observed at para 15 of the said order that the learned Judge has examined all these aspects at considerable length in the impugned order and found that he would defer the question of adding the said person as additional accused for further evidence and this Court observed that there is no reason to take a different view so far as the adding two police officers as additional accused is concerned. Further, order of this Court is reserved.

28. In any case, there is no material whatsoever on record before this Court in the present proceeding that any observations were made by this Court while exercising the judicial power against the order passed by the learned Sessions Judge which are made as the basis for bias or, that there was biased approach on the part of the learned Sessions Judge or any further observations thereto. Therefore, it is not possible for us to accept the contention of the learned Counsel for the petitioners that as certain judicial orders were passed by the learned Sessions Judge which were also carried before this Court and not interfered by this Court or that they had any grievance against such orders, the same should be considered as a valid basis for considering bias by the learned Sessions Judge.

29. The contention that in some other functioning of the learned Sessions Judge when he was the Vigilance Officer, while exercising the administrative duty, observations were made by this Court in the case of *Jayshree Chamanlal Buddhbhatti v. State of Gujarat* reported at GLHEL HC 221635 can hardly be of any help to the petitioners inasmuch as the exercise of administrative power cannot be treated at par with the exercise of judicial power. Functioning of a judicial officer in his administrative capacity would be altogether different than while discharging functions as a judge while exercising judicial power. Further, the statement has been made at the bar on behalf of the learned Counsel for the SIT that the matter is carried before the Apex Court by the High Court on administrative side and the SLP is pending. Therefore, we refrain ourselves from making any further observations on the said aspects, but it is not possible for us

to accept the contention of the learned Counsel for the petitioners that as some observations are made against the learned Judge when he was functioning as Vigilance Officer on administrative side of the High Court, we should infer the same manner and method of functioning while he discharges his judicial function in the present case.

30. In any case, each action or the exercise of power by a judicial officer, be it on administrative side or be it on judicial side is to be looked into independently and separately. The contention can hardly be accepted, merely because one had in one action, remained overactive or overenthusiastic or callous, such is to be inferred in all other functioning though otherwise, the action can stand on merits to the requirement under law.

34. The aforesaid leads us to examine the second aspect of the behaviour and conduct of the learned Sessions Judge whether would lead to any valid base for attributing bias or not. As earlier observed, it is expected for the learned Judge consider to act in a sober manner while considering the evidence or submission of either side and to react with all wisdom.

35. At this stage, we may refer to the decision of this Court in the case of Krishnalal Ratanji Sorathia (*supra*), wherein the question had arisen before this Court about certain views expressed by the Court during the course of conducting of the trial and while also considering the submissions of the parties to the proceedings, which was sought to be canvassed as the basis of the transfer. The learned District and Sessions Judge had declined transfer against which the revision was preferred before this Court. This Court in para 9 observed as under:

9. The contention that the learned judge has expressed his view in the open court that he will dismiss the suit or that there is no merit in the suit in my view is also without any basis. There is nothing on record to substantiate such submission. Mr. Ramnani made an attempt to submit that for such remarks of the presiding officer there will not be any proof because no advocate or litigant would come forward to support the case of the petitioner and therefore he submitted that since no proof can be there it should be accepted. In my view such approach on the part of the petitioner is ill founded because if a learned judge after going through the papers expresses any *prima facie* view it can hardly be said to be a ground for transfer. On the contrary, in the system which we have adopted if the learned judge after going through papers gives any *prima facie* view the same would enable the litigant or the party or the advocate to make an attempt to canvass on the points which are found as weak points by the learned judge on *prima facie* expression. In my view such is a healthy practice and would on the contrary save the time of hearing arguments and would make the arguments of the parties fruitful with a view to arrive at a decision. Therefore, even if it is accepted that any *prima facie* view was expressed by the learned judge it can hardly be said to be a final view nor such *prima facie* expression can be said as a valid ground for transferring the matter to the other court.

(Emphasis supplied)

36. If the facts of the present case are examined in light of the aforesaid, merely because some remarks are made by the learned Judge, it should not be considered or treated as a biased approach on the part of the learned Judge. At the most, such behaviour on the part of the learned Judge can be termed as an overenthusiastic approach or rather could be termed as not a very sober approach on the part of the learned Judge while conducting the trial. We do deem it proper to observe that the learned Judge while conducting trial, shall avoid making any remarks which may disturb the atmosphere of the Court proceedings and he will soberly consider the evidence which may be led by either side at the trial. But such observations would in no way control the judicial exercise of the power to be discharged for rendering justice at the ultimate conclusion of the trial. In any case, such in our view cannot be termed as a biased approach creating a valid base for recording the conclusion of a reasonable apprehension in the mind of the party to the proceedings that they shall not get justice.

37. While considering the aspects of reasonable apprehension on the mind of the parties to the proceeding, we cannot forget that maintenance of impartiality and a neutral approach on the part of the judge is the substratum of exercise of judicial power. A judge should neither be carried by any fanciful representation nor should be swayed away or impressed just by any sentimental material or submissions. It is for the judge to maintain the link with the real cause of justice and then to uphold the law. While upholding the law, it is for the Judge to see that the offenders are punished and the victim gets justice. Therefore, while ensuring the said aspects, neither party should be in a position to tinker with the impartiality of the judge, be it the victim or the prosecution or be it the offender. If in the matter of transfer of the Sessions Case, which is at the stage where about 292 witnesses are already examined, the grievance on the part of the victim that on the aspects of some passing observations or remarks by the judge concerned, is treated as a valid base for the bias on the part of the learned Judge, the consequence may arise for controlling or adversely affecting the exercise of judicial power by the learned Judge in an impartial manner. Neither side should be allowed to take any undue benefit thereof and if such is permitted, it may result into psychological pressure upon the Judge concerned on account of the encouragement of such grievances, consequently may not only have demoralising effect amongst the judicial officer, but would also have an adverse effect on the system of administration of justice which is to be conducted and discharged by the judicial officers. Therefore, we find that when bias is sought to be canvassed or attributed to a Presiding Officer of the Court or a Judge, the Court cannot lose sight of the aspects that neither side should be in a position to control the judicial discretion of the presiding officer or browbeat the judge concerned by throttling the process of impartiality to be maintained in the judicial decision nor anybody should have any opportunity to derail the judge concerned by any attempt to attribute bias in a lighter way and thereby, to

ultimately tinker with the impartiality of the judge concerned. It is with this background, the higher Courts would be required to consider the aspects of reasonable apprehension on the mind of any litigant or the party to the proceedings and consequently, the aspects of justice appearing to have been done. Merely because a party to the proceeding comes with the grievance of apprehension or bias on the part of the judge concerned can hardly be considered on the ipsi dixit and on the contrary, if the morale of the judge concerned is to be maintained, by maintaining the substratum of the exercise of the power, which is impartiality in the judicial function, we find that a scanned view is called for, while exercising supervisory jurisdiction of this Court in the matter of transfer of the cases.

38. The principles to trace the bias were also observed in the decision of this Court in the case of Krishnalal Ratanji Sorathia (*supra*) at para 6, which reads as under:

6. The principles of bias are wellknown for which no elaborate discussion is required. Some of the instances are that if the learned judge himself is interested in the case, the principles of bias would be attracted. It has been further extended by the Apex court even if the judge has conducted the matter as an advocate in the said case normally it is expected that such matters are not taken up as judicial officer. If any nearest relative of the judge is party to the proceedings then also the judge may not take up the matter, but all these principles are with a view to see that the presiding officer or the judge can impartially deal with the matter and render decision. If the judge feels that he will not be able to impartially decide the matter nothing prevents him from requesting the authority for transferring the matter to other court or other presiding officer, but certainly the said request for transfer at the instance of the litigant who is party to the proceedings before the learned judge can not be dealt with lightly.

It is neither the case of the petitioners nor any material whatsoever has been produced worth the name in the proceedings which may show the applicability of any of the principles for tracing bias on the part of the learned Sessions Judge.

39. The decision in the case of (Dr.) Bachubhai Mafatlal Suthar v. the State of Gujarat reported at 1992 (1) GLH (UJ 7), was not only on the manner of recording evidence by the learned Sessions Judge but was coupled with the circumstance that the witness concerned was found to have met the learned Sessions Judge in the chamber, which created an apprehension in the mind of the party seeking transfer. Therefore, the said decision is of no help to the learned Counsel for the petitioners.

40. In the case of Hasmukhkumar Ishwarbhai Patel v. State of Gujarat and Anr. reported at 1985 GLH 82, the Court did not find that there was any basis of apprehension of bias, but this Court having found that there was also case of personal safety of the parties to the proceedings and therefore, the powers were

exercised for transfer. Therefore, the said decision is of no help to the learned Counsel.

41. In the case of Govind Sharan Aggarwal v. Pt. Hardeo Sharma Trivedi, (1983) 2 SCC 268 since heavy cost was awarded as lawyers fees, the Apex Court found that the case deserves to be transferred, but the observations made by the Apex Court was that the course adopted by the learned Judge was extraordinary course. Such is not the fact situation in the present case. Nor the decision can be read to lay down the principle that any judicial order could be made as a basis for seeking transfer of the case.

42. In the case of Himanshu Singh Sabharwal Vs. State of M.P. and Others, the Apex Court in view of the facts of that case that the witnesses had been forced, threatened and the role of the Investigating Agency was at doubt, the trial was transferred. Such is not the fact situation of the present case.

43. In the case of Abdul Raoof alias Raoof Abdul Kader Shaikh Vs. State of Gujarat, the Court found that the approach of the learned Judge in the similar fact situation and the same witnesses was different and therefore, found substance in the apprehension. Hence, the powers were exercised for transfer. No such circumstance exist in the present case. Under these circumstances, the aforesaid decision sought to be relied upon by the learned Counsel for the petitioners are of no help to them.

44. In view of the aforesaid, we find that it would not be a case to exercise our discretionary jurisdiction under Article 226/227 read with Sections 408 and 409 of the Cr.P.C., if the facts and merits of the case are considered.

45. It is true that the Principal Sessions Judge while passing the impugned order dated 28.01.2010, has rejected the application for transfer without recording reasons on merits except to the extent that the application is not maintainable. However, we find that even on merits if it is to be considered, in view of the reasons recorded hereinabove, it would not be a fit case to exercise the powers for transferring the case and exercising jurisdiction under Article 226/227 of the Constitution read with Sections 408 and 409 of the Cr.P.C. Therefore, no useful purpose would be served in examining the contention that as no reasons are recorded by the learned Sessions Judge on merits of the transfer application, the impugned order should be quashed. At this stage, we may observe that on the aspects of maintainability, the learned Principal Sessions Judge cannot be faulted because as per the above referred direction of the Apex Court in the case of National Human Rights Commission (supra), the powers of selection of judicial officer for conducting of the trial were assigned to the Honourable Chief Justice and the Honourable Chief Justice having exercised the power and having selected the Senior Judicial Officer for conducting the trial of the present case, the Principal Sessions Judge could not have exercised the power for transfer of the case to another Sessions Judge and we leave the matter at that stage on the said aspects without observing further.

46. The aforesaid leads us to examine the contention of the power of the Honourable Chief Justice being persona designata pursuant to the direction issued by the Apex Court in the case of National Human Rights Commission (supra). It does appear that as per the aforesaid direction, the powers were so vested with the Honourable Chief Justice to select the senior judicial officers in the State for conducting of the trial. Further, as observed hereinabove, such powers have already been exercised by the then Hon'ble Chief Justice K.S. Radhakrishnan (as his Lordship then was) and the present Sessions Judge is one of the Senior Judicial Officer so selected for conducting of the present trials. Once such powers are already exercised and the petitioners having invoked the judicial power of the Principal Sessions Judge u/s 408 read with Section 409 of the Code and there being a judicial decision by the Principal Sessions Judge of rejection of the application for transfer, coupled with the circumstance that of the petitioners herein having challenged the said judicial order of the Principal Sessions Judge in the present petition, and the present petition having been admitted by the learned Single Judge, and consequently, when the matter was at large pending on judicial side of this Court under Article 226 of the Constitution of India, the petitioners thereafter could not have invoked the persona designata power of the Honourable Chief Justice even if it is considered for the sake of examination that such powers were persona designata of the Honourable Chief Justice on administrative side. It is hardly required to be stated that any decision on judicial side would over march the decision on administrative side. When the matter was at large pending on judicial side of this Court, even otherwise also, the powers on administrative side could not be invoked and even if invoked, could be validly not entertained if the judicial verdict of this Court was to be awaited. At this stage, we would like to observe the conduct and approach of the petitioners herein. When the matter was at large pending before the learned Sessions Judge, who has been assigned with the power to conduct the trial, nothing prevented the petitioners to invoke the power of the Honourable Chief Justice on administrative side for transfer of the case had the petitioners believed that such powers were persona designata and in this circumstances, in any case, there was no occasion for the petitioners to file any application u/s 408 read with Section 409 of Cr.P.C. to the Principal Sessions Judge. Not only that, but after the decision of the Principal Sessions Judge, the petitioners have chosen to invoke the judicial power of this Court under Article 226 of the Constitution read with Sections 408 and 409 of the Cr.P.C. This Court (Coram: Anant S. Dave, J.) entertained the matter by admitting the petition. Thereafter, at the time of final hearing of the matter, the petitioners took up a different stand for invoking the jurisdiction of the Honourable Chief Justice on administrative side. When the matter was already pending on judicial side, the Honourable Chief Justice on administrative side has directed to list the matter before the Division Bench of this Court. It is at the stage of final hearing of the matter on judicial side, now the petitioners contend that such powers of transfer were persona designata power of the Honourable Chief Justice so as to further contend that this Court may not exercise the judicial power. Had the petitioners come out with the clear

stand that the petitioners are not desirous to pursue any proceedings on judicial side including the present proceedings for transfer of the matter and would be satisfied by invoking the power of the Honourable Chief Justice on administrative side, the matter could have been different, but the contention of the petitioners is also to invite order on judicial side. Under these circumstances, we are required to consider the aspects on judicial side and hence, the discussions and observations made hereinabove and also the findings on the aspects of merits of the case seeking transfer to the another Sessions Judge.

47. In view of the aforesaid observations and discussions, we find that the alleged apprehension of bias for seeking transfer of the cases cannot be termed as a reasonable apprehension to attract the power of transfer of the sessions case/s. But, at the same time, as observed hereinabove, we find it proper to reiterate that the learned Sessions Judge while conducting the trial will have a sober approach to the witnesses while exercising the judicial power and he would also, as far as possible, avoid making any uncalled for comments or remarks to the parties to the proceedings, unless he finds that the same are directly relevant for exercising his judicial functions. We also find it proper to observe that since all contentions are raised before us by parties to the proceedings, we have examined the same on merits. Ultimately, the selection of the learned Judge by the Honourable Chief Justice on administrative side is in view of the directions of the Honourable Apex Court in the case of National Human Rights Commission (supra). As such, when the powers are assigned to the Honourable Chief Justice pursuant to the judicial order of the Apex Court in the above referred decision, it can be said that the power for altering any directions or for making any further observation to the Honourable Chief Justice on administrative side may also be exercised by the Apex Court by modifying the directions issued by the Apex Court on judicial side as per the above referred decision. Therefore, we find it proper to observe and clarify that the present order shall not operate as a bar to the Honourable Chief Justice in exercising the power on administrative side for transfer of the case/s if any contingency so arises, independently or if it so observed and/or directed by the Apex Court.

48. Subject to the aforesaid observations, the petition fails. Hence, dismissed. Rule discharged.