

(1979) 11 BOM CK 0019

In the Bombay High Court

Case No : Criminal Revision Application No. 523 of 1979

Mahfooskhan Mehboob Sheikh and Another

APPELLANT

Vs

R.J. Parakh and Another

RESPONDENT

Date of Decision : 05-11-1979

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 191, 408, 409, 410, 526
Customs Act, 1962 — Section 135(1)

Citation : (1980) MhLj 646

Hon'ble Judges : V.S. Kotwal, J

Bench : Single Bench

Advocate : J.A. Barday, P.P., V.D. Mehta and J.D. Ved, for the Appellant; A.R. Gupte, Advocate, for the Respondent

Judgement

V.S. Kotwal, J.—In pursuance of prior information and intelligence, the concerned Customs Officers lay in wait for the arrival of the two motor-trucks enroute from Kolhapur as they had suspected that both the vehicles carried smuggled articles. The members of the raiding party concealed themselves for keeping a watch near the New Bombay Bridge on April 15, 1976. The information appears to have proved to be fruitful, in that, within a short time, a motor-truck No. MHT-2533 was seen proceeding towards Bombay side. The driver of the vehicle obviously suspected danger on sighting the Customs Officers and, therefore, he was in a mood to bolt away from the spot. However, he was chased for a short distance and ultimately, the truck was intercepted. The ignition-key was removed. Apart from the driver, another person was travelling in the said truck and he claims to be the cleaner of the said truck. The panch-witnesses were also present on the spot. As the information related to the arrival of two trucks, the members of the raiding party continued to lie in wait at the same spot expecting arrival of the second truck. Their guess work also proved to be advantageous, inasmuch as, within a short time, another truck was sighted proceeding towards Bombay side. The driver was more active in respect of the second vehicle, inasmuch as, he was in no mood to surrender and wanted to make his escape good and for that

purpose, he travelled a further distance in the same truck. The Customs Officers obviously realised a further potential danger and in order to arrest the further travel of the truck, they had to resort, first of all, to opening fire in the air so as to alarm the truck driver and compel him to bring the vehicle to a stand-still. This did not prove to be quite fruitful and, therefore, they had to shoot at one of the wheels of the truck, on account of which it became flat and as a further result, the vehicle had to be brought to a stand-still. The truck driver then realised that the game was completely exposed and, therefore, he surrendered at that stage. It is alleged that this second incident occurred near the Golf Club within the limits of Chembur, which was not far away from the spot where the first truck was intercepted. The second truck had its number as MHL-3091 and had two persons travelling---the driver and the cleaner. Both the vehicles contained ostensibly sugar bags and on a careful search, which was effected in the presence of the panchas, at the Central Excise Godown after unloading the said sugar bags, it was revealed that in one truck, about 21,748 wrist watches, some rolls of sarees and other textiles entirely to the tune of Rs. 18,43,898/- on the basis of market value, were un-earthed. This was in truck No. MHT-2533. In the other truck, about 22 tins and one suit case were found containing 22,142 wrist watches, rolls of sarees and other textiles to the tune of Rs. 16,42,713/-, were found. Both the vehicles thus contained 22 tins and one suit case each. In all, four persons came to be apprehended as the persons travelling in the said two vehicles. In due course, the investigation commenced vigorously and the statements of these persons came to be recorded u/s 108 of the Customs Act. It was disclosed during the course of investigation that the trucks were loaded within the limits and outskirts of the city of Kolhapur though we are not very much concerned with the details of the investigation or with the outcome of investigation as it is not germane to this proceeding.

2. The Customs Officers after observing the necessary formalities, appraised the superiors and obtained the necessary sanction to prosecute these four accused persons in two different cases and ultimately, two separate complaints came to be lodged in the Court of the Chief Metropolitan Magistrate, Greater Bombay, for offences under sections 135(1)(a) and 135(1)(b) read with section 135(1)(i) of the Customs Act, 1962. Criminal Case No. 131/CW/79 pertains to truck No. MHL-2533 while Criminal Case No. 130/CW/79 pertains to truck No. MHL-3091, Both these complaints came to be lodged on the same day, that is, 19th March, 1979. Mehfooz M. Shaikh and Lalle Samsuddin are the accused persons in Case No. 130/CW/79, while Mehboobkhan Mohamed Khan Allauddin Abdul Wahid are the accused in Case No. 131/CW/79. It may incidentally be observed that all these articles came to be attached under a Common Panchnama and it is further clear from Annexure "B" that came to be accompaniment of both the complaints, gives out the names of 14 witnesses who are identical in both the cases. The complainant is one Shri R.J. Parakh, Assistant Collector, Marine and Preventive Wing, Customs (Preventive) Collectorate, Bombay.

3. It appears from the record that in the routine course, the said two cases came

to be made over by the learned Chief Metropolitan Magistrate to the learned Additional Chief Metropolitan Magistrate, 40th Court, Girgaum, Bombay. A statement has been made at the bar on behalf of the prosecution that several of the cases lodged under the Customs Act have been made over to this particular Court for the purpose of disposal in accordance with law and the said two cases followed suit among other cases. After those were received by the said Court of the learned Additional Metropolitan Magistrate, Criminal Case No. 131/CW/79 relating to truck No. MHT-2533 was given a fresh number being Criminal Case No. 48/CW/79, whereas, the other case, namely, Case No. 130/CW/79 pertaining to truck No. MHL-3091 was numbered as Criminal Case No. 47/CW/79.

4. It further appears from the record that Case No. 48/CW/79 relating to truck No. MHT-2533 was taken up first for hearing by the learned Additional C.M.M. Certain evidence was recorded on the basis of which the prosecution invited framing of the charge which was accepted and thereafter, the witness were subjected to further cross examination and after leading further evidence, the prosecution intimated to allow them to close their case. The accused who figured in the said criminal case as stated above are Mehboobkhan and Allauddin. The said two accused persons accepted that they were travelling in the truck in question and that the truck was intercepted by the Customs Officers near the New Bombay Bridge and it also appears from the record that they did not controvert the finding of contraband articles in the truck. However, both the accused persons came out feigning ignorance about the existence of the said contraband articles and in any event, they were not conscious of the same. The prosecution examined the complainant Shri Parakh. In addition thereto, another Customs Officer who was a member of the raiding party, namely, Inspector Jadhav also came to be examined in support of the prosecution. After hearing both the sides, the learned trial Magistrate held that no offence has been made out against the accused satisfactorily and conclusively and in keeping with this finding, he recorded an order of acquittal in favour of the two accused persons by his order dated 29th June, 1979. It should also be mentioned at the threshold itself that while recording the order of acquittal, the learned Magistrate was pleased to pass some remarks against the perfunctory nature of the investigation carried out by the Customs Officers, inasmuch as, he was of the opinion that no serious efforts were made by the Customs Officers to nab the real and the main culprits at Kolhapur even though their identity could be fixed on the basis of statements of the two accused persons. The learned Magistrate also criticised that the Customs Officers decided to prosecute only the carriers. The learned Magistrate was pleased to direct a copy of the said order to be forwarded to the Collector of Customs specifically inviting his attention to the said observations which are incorporated in para 10 of the said judgment. This will assume some importance, inasmuch as, there is a controversy, even in this proceeding, about the consequence that would be entailed on account of recording of such remarks.

5. In so far as the same criminal case is concerned, the chapter was closed. However, after the decision of the said case, the learned Magistrate decided to

take up the other case, namely, Criminal Case No. 47/CW/79 wherein two other accused persons-Mehfoozkhan and Lalle Samsuddin figured. The prosecution at that time, perhaps, realised the potential danger of likelihood of damage being caused to their case, if the same was allowed to proceed further in the same Court, in view of the decision recorded in the earlier case by the learned Magistrate. Their apprehension was based on two-fold reason, namely, on account of the observations and the remarks recorded by the learned trial Magistrate exhibiting the perfunctory nature of the investigation and secondly, it was also felt that as the evidence was common, the witnesses were identical and the panchnama was also common, the learned Magistrate had already expressed his opinion while acquitting the accused in the earlier case. On the basis of this, it was felt by the Customs Officer and the concerning prosecution agency incharge of the prosecution that it would be expedient in the interest of justice to get this case transferred to the file of the learned Chief Metropolitan Magistrate and it would also causes embarrassment to the learned Additional C.M.M. in view of the fact that he has already committed himself to a particular view, especially when the nature of evidence in the tow cases is almost identical. It appears from the record that the prosecution moved the trial Court to stay the proceeding of the said second case on the ground that they wanted to move this Court by way of appeal against the order of acquittal. This prayer did not find favour with the learned trial Magistrate, who rejected the said motion. Shri Gupte, the learned Counsel appearing on behalf of the Customs Officer, has made a statement at the Bar that he had also made an oral request to the learned trial Magistrate, not to take up the second case in view of the decision in the earlier case and he further makes a statement that the learned Magistrate was not impressed by that prayer also. The case was then posted for recording of evidence on 3rd July, 1979. Finding themselves landed in a very unhappy but delicate, situation the Customs Officers felt that they had no choice but to move the learned C.M.M. and consequently, an application in that behalf came to be filed on the same date, that is, on 3rd July, 1979, praying therein that the other case, namely, Case No. 47/CW/79 pending in the 40th Court at Girgaum be transferred to any other Court for final disposal in accordance with law. Pending disposal of the said application, stay of the further proceedings in the said case, was also prayed for. This application came to be numbered as Case No. 72/TA of 1979. A notice was issued to the respondents in response to which they appeared through their counsel on the 12th July, 1979 and a detailed reply was given by them raising several contentions. It was mainly contended therein that no valid ground has been made out justifying the transfer of the said case. It was contended that merely making of the remarks or even passing of strictures against the investigating machinery, can hardly be a ground for transfer, inasmuch as, the same are essential and predominantly meant for the function and guidance of the investigation, in future. It was also contended, inter alia, that the learned Chief Metropolitan Magistrate had no jurisdiction to transfer the said case u/s 410 Cri.P.C. after amendment and the only permissible course open for the Customs officer was to move the Sessions Court u/s 408 Cri.P.C. by way of a

regular transfer application. It was further contended that provisions contained in section 410 of the Code postulate interference with the administrative orders and when a transfer is asked for on a judicial ground, then the Chief Metropolitan Magistrate has no powers. On the basis of these contentions, it was ultimately prayed that the application for transfer should be rejected.

6. After hearing the concerned parties, the learned C.M.M. has recorded an elaborate order dated 16th July, 1979 repelling all the contentions raised on behalf of the respondents and be recorded a clear finding that it was pre-eminently a proper case for transfer in view of the facts as also in view of the remarks made by the learned trial Magistrate. In keeping with these findings, the learned C.M.M. passed an order, as---

"Cases No. 47/CW/79 is withdrawn from the file of the learned Additional Chief Metropolitan Magistrate, 40th Court and kept for hearing on the file of this Court. The case to be on board on 27-7-79."

It is this order that is being impugned in this proceeding on behalf of the accused.

7. Shri Mehta, the learned Counsel for the petitioners has reiterated all the contentions which he had raised in the trial Court and perhaps, has added a few more. In fairness to the learned Counsel however, it must be observed and placed on record at the threshold itself that the learned Counsel made it clear to this Court so as to avoid any misunderstanding that his clients have no objection if the case is tried by the Chief Metropolitan Magistrate provided, the transfer is legally permissible and secondly his clients have no insistence at all that the case should be tried by a particular Magistrate, including the presiding Magistrate of 40th Court. This must be said to the credit of the learned counsel on the fair attitude adopted by his clients. He, however, instead of being in mood to concede, was very vigorous in his attack in so far as the legal aspect is concerned. On facts, he contended that no valid ground has been made out by the Customs Officer even to ask for a transfer. His second ground is that recording of certain observations even by way of strictures can hardly be a ground for transfer. He has again strenuously submitted that the main and pre-dominant plank in the application of the Customs Officer made before the chief Metropolitan Magistrate is restricted to the remarks and not to the facts of the case. In other words, Shri Mehta has emphasized that the Customs Officer wanted the transfer more on the ground that remarks have been made by the learned trial Magistrate and not on the ground that common evidence was likely to be led in the other case. He did contend before the lower Court that, inasmuch as, the Additional C.M.M. was not subordinate to the C.M.M. the transfer was unwarranted under the provisions of law. For that purpose, he wanted to rely on certain provisions in the Code to submit that both are on par and of equal status and unless there is provisions of any subordination as such, the transfer was not permissible. This point has been waived in this proceeding in view of the clear provisions contained in the direction issued by this Court dated 27th August, 1975 wherein, it has been stipulated that in exercise of the powers conferred

under sub-sections (2) of section 19 of the Code of Criminal Procedure, 1973, all the Additional Chief Metropolitan Magistrates of Bombay, appointed u/s 17(2) of the said Code, shall be subordinate to the Chief Metropolitan Magistrate, Bombay and their subordination shall be deemed to be of the same kind and extent as the subordination of the Metropolitan Magistrate, Bombay to the Chief Metropolitan Magistrate, Bombay under sub-section (1) of section 19 of the said Code. In view of this direction, Shri Mehta has fairly conceded that he had initially opposed it mainly resting on the assumption that the Additional C.M.Ms. are not subordinates to the C.M.M. In view of the clear dicta incorporated in this direction, the point also does not survive on merits.

8. The second and equally important plank adopted by Shri Mehta rests entirely on the interpretation of the various provisions of the Code. In substance, he has submitted that u/s 410, a transfer application is not maintainable before the Chief Metropolitan Magistrate, even assuming that the Addl. C.M.M. is subordinate to him. It was further, inter alia, submitted that section 410 governs orders entirely and exactly of administrative nature and only such matters could be withdrawn or recalled by the Chief Metropolitan Magistrate. The learned Counsel, therefore, submits that the impugned order cannot be termed as purely an administrative order, inasmuch as, element of prejudice has been reflected in the controversy and, therefore, it would be a judicial ground on merits and consequently, an application u/s 410 is misconceived. The learned Counsel further submitted that the only course permissible to the Customs Officer was to move an application u/s 408 of the Code. Shri Mehta also submitted that not only the C.M.M. has not applied his mind on all those factors which were strongly canvassed by him before the lower Court and consequently, this is a proper case, calling for interference by this Court.

9. Shri Gupte, the learned Counsel appearing on behalf of the Customs Officer has taken a contrary stand. He has submitted that there is primarily no hurdle while interpreting the provisions of section 410, not to restrict the same only to matters of administrative nature. He has contended that the C.M.M. was fully empowered under law to direct a regular transfer of any case on any ground from any Magistrate, to the file of any other Magistrate of competent jurisdiction. On facts, Shri Gupte submitted that this, is pre-eminently a proper case wherein, transfer is a must, inasmuch as, a very embarrassing situation has come into existence on account of the decision recorded by the learned trial Magistrate without deciding the other case simultaneously.

10. Before addressing myself to the questions propagated by both the sides relating to the interpretation of relevant provisions and specially contained in section 410 of the Code. I am tempted to record a finding on facts as to whether a transfer is necessary or not. This would, therefore, conclude the first part of the controversy on the factual aspect. After carefully going through the judgment recorded by the learned trial Magistrate and looking to the tenor of both the complaints, coupled with the attending circumstances. I have absolutely on

reservation in my mind that a transfer under the situation is a must. As I have given out an indication about the nature of allegations as also the nature of offences while setting out the facts and the circumstances, out of which this proceeding emerges, it would be manifest that the facts are so glaring and the situation is so unique that there is no escape from the conclusion that it is not desirable that the same Magistrate should conduct both the cases. As stated earlier, there was an intimation received by the Customs Officer that two trucks were expected to enter the limits of greater Bombay from Kolhapur carrying contraband goods and they were lying in wait near the New Bombay Bridge. Initially, one truck arrived which was intercepted which contained ostensibly certain sugar bags and within a short span of time, another truck followed, though the driver of the said other truck was in a more chivalrous mood, and therefore, he had to be intercepted even at the cost of resorting to same violence, which was permissible in law. Both the trucks were searched in the presence of the Panchas at the godown where the sugar bags were unloaded. It is further revealed that each truck contained 22 tins and each tin contained several wrist watches, rolls of sarees material and other textiles, as detailed in the panchnama. One truck contained contraband goods to the tune of Rs. 18,43,898/- while the other contained goods worth Rs. 16,42,713/-. The concerned Customs Officers had reasonable belief that those were smuggled articles of foreign origin and, therefore, they come to be attached and I am told at the Bar that this subsequently came to be confiscated in the proceeding. It is further clear from the record that a list of witnesses has been annexed to both the complaints and identical numbers and identical names figure in the said list, Annexure "B". It is also worthwhile to note that both the complaints came to be lodged on the same day and almost at the same time. It also appears from the record that sanction was accorded by the Additional Collector in respect of both the matters on the same day on 3rd March, 1979. A statement has also been made at the Bar by Shri Gupte on behalf of the prosecution that the same pattern of evidence would be unfolded in the second case when the recording of evidence commences. It is further a common ground that Shri Pawar, the concerned Customs Officer who has recorded the statements of all the accused in the two cases u/s 408 and Inspector Jadhav would be figuring in both the cases as eye-witness, as he was the person present among other Customs Officers when the trucks were intercepted. It is also submitted by Shri Gupte that though no specific evidence could be collected in so far as the Kolhapur incident is concerned, the pattern of evidence in the second case would be identical, inasmuch as, they would be relying mainly on the intelligence received earlier in respect of the destination of the trucks in question, the conduct of one of the two drivers in trying to bolt away from the spot, interception of the said trucks and ultimately, finding of contraband articles in the search.

11. The following features, therefore, emerge out of this---

1) Information and intelligence was common.

- 2) The same related to the arrival of the two trucks enroute from Kolhapur to Bombay.
 - 3) The intelligence proved to be not merely a guess work, but it yielded fruitful and tangible results, inasmuch as, the trucks did arrive in pursuance thereof.
 - 4) The two trucks arrived apparently in quick succession, with a short gap in between.
 - 5) Each truck contained two personnel one driver and one cleaner.
 - 6) Attempt was made by both the drivers to make this escape good and that the driver in the second case was more aggressive.
 - 7) Both the trucks came to be intercepted at or near about the time in question.
 - 8) The second truck that was halted near the Golf Club at Chembur was also brought back to the New Bombay where the first truck was intercepted and stopped, and thereafter, both the trucks were together taken to the Customs godown.
 - 9) Both the trucks ostensibly were loaded with sugar bags and the pattern of loading of merchandise was common to both the trucks.
 - 10) After unloading of the sugar begs, both the trucks revealed existence of 22 tins and one suit case in each truck.
 - 11) Both the trucks contained more or less similar contraband articles, such as, wrist watches, watch-parts and textiles and the value of such goods in both the trucks was more or less to tune of Rs. 16,00 lacs to Rs. 18,00 lacs and odd.
 - 12) Articles seized from both the trucks were attached under a common panchnama.
 - 13) Statements of four persons were recorded by the same officer, namely, Shri Pawar.
 - 14) Sanction was accorded by the Assistant Collector in both the cases, on the same day i.e. on 3-3-79.
 - 15) Both the complaints came to be lodged on the same day, i.e. on 19-3-79 in the Court of the Chief Metropolitan Magistrate.
 - 16) Both the complaints alleged commission of a similar offence of the same style, in a similar mode.
 - 17) There obviously would be common pattern of evidence to be adduced at both the trials.
 - 18) Annexure "B" which is the list of witnesses filed along with both the complaints, gives out identical numbers and names of witnesses.
12. The judgment recorded by the learned Additional C.M.M. in Case No. 48/

CW/79 has also been placed before me for perusal. The learned trial Magistrate come to the conclusion that the accused persons though found travelling in the truck in question, and though the contraband goods were found in the said truck, had no requisite knowledge about the existence of the said contraband articles which were concealed under the sugar bags, and as such, no criminal liability can be fastened on them. He has also held that the requisite nexus between the accused persons and the contraband articles on the basis of which knowledge could be imputed to them by presumption, was lacking in the case. In this view of the matter, he acquitted the said two accused persons in that case. However, in para, 10 of the judgment, was a remark making some strictures against the Customs Officers and not being satisfied with that, the learned trial Magistrate felt that a copy thereof was required to be sent to the Collector of Customs, presumably, for attracting his attention to the said remarks. The learned trial Magistrate observed as---

"The investigation in this case is perfunctory. in these statements, there is a clear reference that instructions were given to accused Nos. 1 & 2 by Raiz and Mohiuddin to go to Kolhapur and to bring smuggled goods and therein, a stout man with curly hair was referred to, who would meet them near the Kolhapur Naka....."

".....Suffice it to find from these statements that the real interest behind this smuggling was of Raiz and Mohiuddin and that stout man with curly hair, than accused Nos. 1 and 2 who are merely driver and cleaner of the truck, and as such, simply carriers, and those are not the real smugglers....."

The learned trial Magistrate also criticised the so-called lapse on the part of Shri Parakh for not going to Kolhapur for the purpose of investigation and he expressed surprise as to why, Mohiuddin and Raiz atleast were not arrested or not even interrogated. Ultimately, he observed as---

"I do not think that senior officer like Parakh was helpless in apprehending real smugglers and was required to be satisfied by prosecuting mere carriers in this case. In my opinion, no real and genuine effort is made by investigating officers to find out the real smugglers behind the curtain."

13. No doubt, Shri Mehta to some extent is justified that the application filed by the Customs Officer is not happily worded. In fact, he criticised the same by submitting that no valid ground has been made out in the said application. In para 5 of the said application, it has been specifically mentioned as---

"I say that the witnesses examined and their evidence in Case No. 47/CW/79 now pending before the 40th Court are identical to that in Case No. 48/CW/79. already decided. The learned Magistrate, while delivering the judgment, was also.....pleased to pass certain remarks on the investigation."

In the ultimate para No. 6, it has been mentioned as-

"In the circumstances, the Department desires that the second case, viz., Case

No. 47/CW/79. pending in the Court No. 40 at Girgaum be transferred to any other Court."

Shri Mehta, therefore, submitted that it was only by way of desire of the concerned officer that they moved the learned C.M.M. for the transfer of the case and according to him, a mere desire cannot be tantamount to spelling out a legal ground for transfer. He has further submitted that the main ground made out in the application pertains to the remarks, and the further criticism is that even the main ground accepted by the learned C.M.M. has mainly concentrated on the remarks, rather than, on the identical nature of evidence. On the basis of this, Shri Mehta submitted that merely passing of such remarks cannot be a ground for transfer, and ultimately, he submitted that many a time, such remarks are passed as a guide-line or guidance for further investigation. Though, prima facie, something certainly can be said in favour of the criticism made by the learned Counsel for the petitioners, but I cannot endorse the same, inasmuch as, one has got to look to the core of the grievance and the approach of the Court below and not merely to the phraseology of words used in the application. It is true that the Department expressed their desire for the transfer of the case, it however, cannot be overlooked that the Department was not expected to go by the verbatim terminology which is normally used in the concerned provisions under the Code, when an application for transfer is made. It is in that context that they used the word "desire" in their application, though they really wanted and meant to say that in the fitness of things, the case deserves to be transferred. In my opinion, therefore, no fetish can be made out of it and one need not be so touchy about the employment of a wrong word or non-employment of a correct word. Spirit carries more importance than the letter. It is equally true that one of the grounds made in the application and accepted by the learned C.M.M. is about the remarks passed by the learned trial Magistrate. I further want to make it clear that it is not the only ground that was relied upon, inasmuch as the application clearly mentions in para 5 that the evidence sought in both the cases is identical. Even the learned trial Magistrate has accepted that contention. Therefore, reliance on the remarks passed by the trial Magistrate is only one of the grounds adopted by the learned C.M.M. I may hasten to add that if it was a case resting solely on the grounds of remarks passed by the learned trial Magistrate, then, the complexion would have been changed and may be, there would not have been a proper ground in existence for the transfer of the criminal case. I am, therefore, relying more on the other ground of identical nature of evidence that is sought to be led in both the cases, rather than, the remarks passed by the learned trial Magistrate. As observed earlier, there are several common features and the common pattern exhibited in the course of investigation, the defence taken and the common nature of evidence in both the cases and, therefore, in the fitness of things, when the learned trial Magistrate has committed himself to a particular view as expressed in the earlier judgment, it would be proper to withdraw the second case and make it over to another Court for disposal, in accordance with law. This would save embarrassment to

the learned trial Magistrate himself and it would also be expedient in the interest of justice. Here, it would not be out of place to observe that the learned trial Magistrate was persuaded to uphold the defence contention that the accused were mere carriers, and that no direct nexus was established with the accused, and it was thereafter that the learned trial Magistrate was pleased to discard the evidence led by the prosecution, and, therefore, when the same evidence is sought to be led in the second case with the same contentions on behalf of both the sides, then, it would be difficult to expect the learned trial Magistrate to record a finding on the same set of evidence, different than the one already recorded by him in the earlier judgment. In the nature of things, therefore, a reasonable chance will have to be given to the Customs Officer to agitate the second case on a different forum.

14. I am again tempted to make certain, further observations. It is really surprising to note that having realised that both the cases cover, more or less, the same pattern of evidence, it was absolutely necessary for the learned trial Magistrate not to take up the first case separately, but, the proper course to be adopted by him would have been to record the evidence in both the cases simultaneously or one after another, to hear arguments in both the cases at the same time or one after another, and in any event to decide both the cases on the same date. This was inevitable in the situation and the circumstances obtaining, and I am really constrained to observe that the learned trial Magistrate has, for no apparent reasons, deviated from this set principle. It is this deviation that has created all these difficulties. A further surprising feature to my mind is that after having decided the first case, it would have been in the fitness of things that the learned trial Magistrate himself should have reported to the Chief Metropolitan Magistrate to relieve him of the embarrassment by withdrawing the case from his file. This would have not only been a fair approach, but also an inevitable approach, it cannot be under-estimated that not only justice should be done, but both the sides must feel confident and it equally should appear to them that justice is being done. The prosecution also should share the same feelings. It is this feeling of satisfaction which is equally important in the administration of justice. From that point of view, I am really surprised to note the omission on the part of the learned trial Magistrate himself to make a report to the Chief Metropolitan Magistrate to recall the case from his own file. Shri Mehta, no doubt, made a very hesitant effort to submit that at that stage, perhaps, the learned Magistrate had no inkling or indication pattern of evidence in both the cases would be same. This so-called justification about the learned Magistrate, on the part of the learned defence Counsel, is hardly acceptable. It cannot be overlooked that in the earlier case that was decided by the learned trial Magistrate, it is specifically mentioned in the compliant that two trucks had arrived, giving different numbers and it was also indicated that two separate cases are being lodged in respect of the said two trucks. It is, therefore, absolutely an untenable submission to make that the learned trial Magistrate had not even an inkling about the common pattern of evidence. There is no escape

from the conclusion that the learned trial Magistrate must have been fully aware of it from recitals in the complaint, as well as the, evidence adduced before him.

15. In this view of the matter, on facts, I have absolutely no reservation to observe that this case will have to be recalled or withdrawn from the file of the trial Magistrate, as has been rightly done by the learned C.M.M.

16. This takes me to the next plank of the petitioners contention relating to the powers of the C.M.M vis-a-vis, the relevant provision of the Code of Criminal Procedure. It is strenuously canvassed by Shri Mehta for the petitioners that there is no power vested in the C.M.M u/s 410 of the Code to transfer a case as such and the second submission is that under the said provision only on administrative ground a case can be withdrawn or recalled. In short, therefore, the two-fold submission is that no transfer application can be entertained and that the withdrawal or recalling of a case can be only on administrative grounds. The corollary of this submission is that if transfer is sought for on a judicial ground, as in the instant case, then the concerned party must move the Sessions Court and not the C.M.M.

17. As against this, Shri Gupte for the Customs Officer and Shri Barday for the State have contended that there is no prohibition or restriction on the powers of the C.M.M. to entertain a transfer application on merits not only on administrative ground, but also on judicial ground such, for example, as on the ground of prejudice, Both the learned Counsels also submitted that the different phraseology has been purposely used in different provisions in that context, through the meaning and purport is the same.

18. At the threshold itself, it is necessary to have a resume of some of the relevant provisions of the Code. The new Code came into force on April 1, 1974. Certain provisions have been substantially amended whereas, some new provisions are inserted to suit the exigencies. A prominent change relates to switching over to three-tier system two-tier system. Thus, in district, the main forums were Court of Judicial Magistrate and the Sessions Court, while in the Metropolitan areas, it consisted of the courts of the Metropolitan Magistrates (originally recognised as Presidency Magistrates) and High Court, though Sessions Court was not concerned with any orders passed by the Metropolitan Magistrates. By switching over to a three-tier system, a post Chief Judicial Magistrate is created in districts, while Sessions Court in Metropolitan areas is conferred with appellate powers with reference to the orders passed by the Metropolitan Magistrates.

19. The Code envisages u/s 3 that any reference to the Chief Judicial Magistrate shall, in relation to a Metropolitan area, be construed as a reference to Chief Metropolitan Magistrate exercising jurisdiction in that area. Section 6 relates to constitution of Criminal Court such as, Court of Session, Judicial Magistrate and Metropolitan Magistrate. Section 8 refers to the Metropolitan area. Court of Session as per section 9 comprises of Sessions Judge. Additional Sessions Judge

or Assistant Session Judge. Section 10 relates to the sub-ordination of Assistant Session Judges.

20. We may then usefully to other provisions relating to Chief Judicial Magistrate and Chief Metropolitan Magistrate which would be quite germane to the proceeding. Thus, Chief Judicial Magistrate is appointed in every district u/s 12. The same applies to the post of Additional Chief Judicial Magistrate. Correspondingly, Chief Metropolitan Magistrate is appointed u/s 17(1) while Additional Chief Metropolitan Magistrate may be appointed u/s 17(2). Section 15(1) contemplates that every Chief Judicial Magistrate shall be sub-ordinate to the Sessions Judge, and every other Judicial Magistrate shall subject to the general control of the Sessions Judge be sub-ordinate to the Chief Judicial Magistrate. Correspondingly, section 19(1) contemplates that the C.M.M. and Additional C.M.M. shall be sub-ordinate to the Sessions Judge, and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the C.M.M. As regards the sub-ordination of the Additional C.M.M., powers are vested in the High Court u/s 19(2) to define its extent. As indicated earlier, the High Court in exercise of these powers has directed that all additional Chief Metropolitan Magistrates, Bombay, appointed u/s 17(2) shall be sub-ordinate to the Chief Metropolitan Magistrate and their sub-ordination shall be deemed to be of the same kind and extends as the subordination of the Metropolitan Magistrate to the Chief Metropolitan Magistrate u/s 19(1).

21. It is then stipulated under the scheme of the Code that the cases are to be filed

in the Court of Chief Metropolitan Magistrate in Metropolitan areas and in the Court of Chief Judicial Magistrate in districts and the said two courts would allot or distribute the business. However, for convenience and practical working, cases are being filed directly in cash courts as are designated for each Police Station. This is, however, done in pursuance of the rules framed or directions issued by the said two officers. The power of making such rules of issuance of orders consistent with the Code as to the distribution of business among Judicial Magistrate sub-ordinate to him, are conferred on Chief Judicial Magistrate u/s 15(2) though subject to the provisions contained in section 14, while similar powers are conferred on the C.M.M. u/s 19(3). Thus, it is directed by the High Court under its Circular dated 4/6th March, 1974 that at District Head-quarters, all criminal cases should be instituted in the Court of C.J.M., who has to distribute or allot the cases to different trial courts, though in moffussil, the cases can be instituted directly in the concerned Magistrate's Court. These provisions are relevant from another angle also, viz., the distribution of work flows from these two authorities. It is also significant that such power is obviously not vested in the concerned Sessions Court.

22. An examination of some other provisions relating to the powers of the C.J.M. in district may also be useful in a comparative study for bringing on par the

powers of C.J.M. being reflected in the legislative intent. u/s 35, C.J.M. has to decide as to the successor-in-office of J.M.C.J.M. can try a person below 16 years as the presiding Judge of Juvenile Court u/s 27, he can inflict sentence upto a term of seven years and impose unlimited time, whereas, the J.M. has limit upto three years and 1000/-, he can direct production of any article, parcel from postal or telegraph authorities u/s 92; he can release u/s 123(1) a person who is imprisoned in failure to give security; u/s 191, he can transfer a case to the file of another Magistrate; he can make over any case u/s 192(2) even after taking cognizance; he can transfer a case and try it himself u/s 322. These are some of the provisions indicating the extent and dimensions of the powers vested in C.J.M.

23. Important and relevant direction have been issued by High Court in exercise of its powers u/s 17(2) of the Code that Addl. C.M.M. shall exercise all the powers of the C.M.M under the Code except the powers u/s 19(3) and section 410. As stated, the first provision relates to distribution of work to Metropolitan Magistrate, while the second provision relates to withdrawal of recalling of a case from the file of Metropolitan Magistrate. This, coupled with the extent of subordination as stated earlier of the Addl. C.M. with reference to C.M.M. would further point out through for Judicial functions and other powers, Addl. C.M.M., may be on par with C.M.M., yet the power of allotment or distribution of business and powers to withdraw or recall cases is taken out of their jurisdiction. They are also deemed to be sub-ordinate to C.M.M. to the same extent as that of M.M. to C.M.M., as per the directions issued by the High Court, while defining the extent of sub-ordination. This will have enormous bearing to the point involved in this proceeding.

24. Armed with this resume some of the relevant provisions, one may go direct to the main provisions relating to transfer of cases. Those are embraced by provisions contained in sections 406 to 412 and are clubbed together in one Chapter No. XXXI which is titled as " Transfer of Criminal Cases" The clubbing of all these sections together under a common title is quite significant. The arrangement of section denote the pattern or scheme underlying. As one ascends the ladder, it would be noticed that the powers in that behalf are conferred on District Magistrate, Chief Judicial Magistrate and Chief Metropolitan Magistrate, Sessions Judge, High Court and Supreme Court. Section 406 deals with the powers of the Supreme Court while section 407 deals with those of the High Court and then follow the powers of Sessions Court u/s 408. Under old Code, section 528 was a composite one containing provisions relating to Sessions Judge, Chief Presidency Magistrate and District Magistrate. Under the new Code, this has now been split up and the relevant provisions are now contained in sections 408 to 411. However, there does not appear to be much difference in the basic structure. Section 410 which figures prominently in this controversy, could be quoted to appreciate the real nature of the controversy:

"Section 410(1) Any Chief Judicial Magistrate may withdraw any case from, or

recall any case which he has made over to, any Magistrate sub-ordinate to him, and may inquire into or try such case himself, or refer it for inquire or trial to any other such Magistrate competent to inquire into or try the same.

(2) Any Judicial Magistrate may recall any case made over by him under sub-section (2) of section 192 to any other Magistrate and may inquire into or try such case himself."

The Supreme Court can transfer a case or appeal from one High Court to another High Court and from one Criminal Court to another Court, whereas, the High Court can transfer a case or appeal from one Criminal Court sub-ordinate to its authority any such Criminal Court of equal or superior jurisdiction, or commit a case to the Court of Session or get the appeal transferred to itself for being disposed of. Likewise, Sessions Judge can transfer a case from one Criminal Court to another Criminal Court only in his Sessions Division. In so far as these three provisions are concerned, the act is denoted by the word "transfer". In contrast to this, sections 409 and 410 do not employ the same word, but instead use the word "withdraw" or "recall". On the basis of this distinction, Shri Mehta submitted that section 410 does not contemplate a transfer as such or there was no difficulty for the legislature to use the word "transfer" in that provision also. The other plank of his submission is that by the employment of the word "withdrawal" or "recalling, and non-employment of the word "transfer", it is indicated that a case can be withdrawn or recalled by the Chief Metropolitan Magistrate only on administrative grounds. I am afraid, some of the subtleties and finer aspects are lost sight of and if the gloss is removed, then it would be clear that the distinction that is ought to be made is absolutely illusory. On the contrary, it would be clear that the employment of different terminology was necessary under the circumstances though the intent and purpose in both the cases is really the same. As stated earlier, a Sessions Court consists of the Sessions Judge, Additional Sessions Judge and Assistant Sessions Judge. Therefore, when it is contemplated u/s 408(1) that the Sessions Judge can transfer a case from one Criminal Court to another Criminal Court in a Sessions Division, it would mean that the Sessions Judge would be referring to a case filed not in the Sessions Court but pending before the Magistrate. Otherwise, if the Sessions Court comprise of the same three authorities, then it cannot transfer in that sense, a case from that file to another Sessions Court. In other words, when the section contemplates a case pending in the Criminal Court, it would embrace all the cases pending on the file of such courts sub-ordinate to the Sessions Court. Therefore, in that context, section 408 appears to have been enacted. It is true that a Court of Chief Judicial Magistrate would be covered by a Criminal Court u/s 408 and if that be so, a question is normally likely to be posed as to why it was necessary to have the same authority, namely, C.J.M. again included in section 409. However, the answer is not far to seek. Some cases even after commitment to the Court of Sessions, are found to be triable with equal jurisdiction and competence by C.J.M., and therefore, the Sessions Judge may make over such a case to the file of the C.J.M. It is such a case that can be

withdrawn or recalled by the Sessions Judge u/s 409. It also appears from section 381 that a C.J.M. is empowered to hear and dispose of an appeal arising out of an order-passed by a Magistrate of the Second Class and sub-section (2) of section 381 also stipulates that C.J.M. can hear even such appeals as the Sessions Judge or the High Court makes over to him. Thus, a contingency of some appeals being heard by C.J.M. is in existence. It is in that context that u/s 409. not only a case but an appeal is also indicated which could be disposed of by the C.J.M. It is also worth nothing that criminal cases not triable by the Sessions Court but by the Magistrate are either in the Court of C.J.M. or are directly filed in the Court of the concerned Magistrate-Judicial Magistrate or Metropolitan Magistrate. That means, the Sessions Judge himself does not make over any cases to the Judicial Magistrate or the Metropolitan Magistrate. As in contrast to this, Sessions case on commitment, always go to the file of the Sessions Judge and it is the Sessions Judge who thereafter makes over such cases either to the Additional Sessions Judge or the Assistant Sessions Judge. The same applies to criminal appeals filed In the Sessions Court. Therefore, it is in this context that the words in section 409 are used to mean that a Sessions Judge can withdraw or recall any case or appeal made over by him to the Additional Sessions Judge or the Assistant Sessions Judge. The only qualification being that in case of Additional Sessions Judge, the case or the appeal should not have commenced hearing. I have also observed earlier that u/s 10, the Assistant Sessions Judges are sub-ordinate to the Sessions Judge and the Sessions Judge has powers to make rules regarding distribution of business among the Assistant Sessions Judges. Therefore, in so far as the Sessions Court is concerned, the sub-ordination clause is contained in section 10. It would thus be indicative of the fact that the user of the term "withdrawal" or "recall" is done whenever a regional distribution is made by the said authority. Thus, it is because the Sessions Judge makes over Sessions cases and appeals to the Assistant Sessions Judge that he gets a power to withdraw or recall the said cases or appeals. This could obviously not apply to such cases which are on the file of the Magistrate, inasmuch as, the criminal cases are not made over by the Sessions Judge to the Magistrate, as the cases are filed directly in the Court of the Magistrate. This has necessitated employment of the different terminology in sections 409 and 410 as against the earlier three sections. However, the effect of a transfer u/s 408 and the withdrawal or recalling of a case u/s 409 would be identical. In effect, the case cannot be transferred by the Sessions Judge u/s 409 because it is originally not filed in that particular Court. It has got to be withdrawn or recalled, because it is that very authority which has already made over that case in that Court. It is also worth-noting that after withdrawal or recalling of such a case or appeal, the Sessions Judge is empowered u/s 409(3) either to make it over to the other Judge, that is, Assistant Sessions Judge or the Additional Sessions Judge or to try to hear the matter himself. This is again in contrast to the provisions contained in section 408, inasmuch as, a Sessions Judge after directing transfer of a case from one Criminal Court, to another Criminal Court, obviously, has no jurisdiction to hear that case himself, inasmuch as, the said case is only triable

by a Judicial or Metropolitan Magistrate. This is another reason for employment of different phraseology, which is different only in letter but not in meaning.

25. This consideration and analogy will apply with equal force to the provisions contained in section 410. u/s 15, every Judicial Magistrate subject to the general control of the Sessions Judge, is sub-ordinate to the Chief Judicial Magistrate and correspondingly, u/s 19, every Metropolitan Magistrate subject to the general control of the Sessions Judge, is sub-ordinate to the Chief Metropolitan Magistrate. Under the direction referred to above issued by the High Court in exercise of the powers u/s 19(2), the Additional Chief Metropolitan Magistrates are also deemed to be subordinate to the Chief Metropolitan Magistrate. I have also indicated that by reason of the said direction referred to earlier, an Additional C.M.M. cannot exercise powers u/s 19(3) and section 410 of the Code. It would thus be clear that sub-ordination even of the Additional C.M.Ms. to the C.M.M. is defined and the limitation of the powers are also defined. Powers u/s 410 are totally taken out of the purview of the Additional C.M.Ms. u/s 15(2), the C.J.M. can distribute the business and for that purposes make the rules consistent with the Code and correspondingly, u/s 19(3), the C.M.M. can make rules regarding such distribution of business to Metropolitan Magistrates including Additional Chief Magistrate. This power is also vested exclusively in C.M.M. under the said direction. The combined effect of these provisions would be that in district, the Chief Judicial Magistrate and in Metropolitan area, the Chief Metropolitan Magistrate would be distributing various cases to the Judicial Magistrates and Metropolitan Magistrates including the Additional Chief Metropolitan Magistrates. The subordination of the Magistrates including Addl. C.M.Ms. to the C.J.M. and C.M.M. is also apparent. Therefore, it would further be manifest that, inasmuch as, the C.J.M. and C.M.M. have the initial or the basic power or authority to make over certain cases to the Judicial Magistrates or the Metropolitan Magistrates including the Additional Chief Metropolitan Magistrates, they ipso facto and logically should get power to withdraw those cases which they have already made over. It is in this context that the word "withdraw" or "recall" has been employed in section 410. It is also clear that such a case can be tried by the C.J.M. or C.M.M. himself or can be made over to another Magistrate for disposal. As indicated earlier, if a case is removed from the file of a Magistrate by the Sessions Court, then, it cannot take the case itself for trial and therefore, it has got to transfer the case to some other Magistrate. This is obviously not the case of the said two upper Magistrates. Therefore, from that point of view also, though they can be said to withdraw or recall the case the effect would be the same. Even prima facie also, there is no scope for adopting the inference which is sought to be done by the petitioners' learned Counsel that section 410 envisages only an administrative function. A plain reading of the section does not admit of such an interpretation and casts no prohibition or restriction on the powers of the concerned authority. In view of the sub-ordination and power of distribution and other control by the C.J.M. and C.M.M. over the Magistrates, it would be in the fitness of things that they have an

authority to examine the case for the proposed withdrawal or recalling of the case. As the making over of the case flows from such authority, the withdrawal also must be embraced by that authority. It is true that in the earlier three sections, it has been indicated that the Court can be approached either by the concerned party or on the basis of the report of the lower Court or even the Court can have *sou motu* action and this has not been specifically mentioned in section 410. However, the said omission is of no consequence, inasmuch as, it is basic that a Court can be moved by any agency and the aggrieved party always has a right to move the concerned Court for withdrawal of the case. Just as that, even the lower Court itself can approach the C.M.M. with a request to recall the case if it deems proper and lastly, the C.M.M. obviously can take a *sou motu* action if it is made to appear to him necessary through any source, it is then equally true that the provisions contained in sub-clauses (3) to (7) and (9) of section 407 though made applicable to section 408, have no reference to section 410. However, that also would hardly make any difference, inasmuch as, those sub-clauses deal with the procedure and these are the steps for the disposal of the application on merits. It is again a basic principle that if an order is to be passed against a party, then, that party should be heard beforehand and, therefore, even in the absence of any specific provision in section 410, a notice can be issued to the concerned party on the ground of principles of natural justice.

26. The same considerations would apply to the powers of the District Magistrate contained in section 411 while dealing with the cases pending on the file of the concerned Executive Magistrate.

27. Section 412 gives some clue about the judicial nature of the powers contained in section 410. The said section stipulates that while passing an order under sections 409, 410 and 411, the Judge or the Magistrate shall record his reasons for making the same. Assigning of reasons is the basic foundation of any judicial order. Thus, for instance, if a case is to be withdrawn purely on administrative ground, such as, when a Court is over flooded with cases and requires some relief, then, a cryptic order of withdrawal of the case purely on administrative ground can be made and the same can be valid even if it is not accompanied by reasons. However, if an order on judicial ground is passed, such as, the party contending that the learned Magistrate may have pre-judged the issue or some allied considerations are canvassed, then, if an order of withdrawal is made without assigning any reasons, it would fail to become valid. Therefore, the necessity of assignment of reasons is another indication about the nature of orders that can be passed u/s 410 which thus can be administrative as well as judicial.

28. I have discussed earlier the various powers vested in the C.J.M. and the C.M.M. u/s 191, a Chief Judicial Magistrate can transfer a case in certain circumstances to another Magistrate. u/s 10, in the absence of the Sessions Judge, the Additional Sessions Judge or the Assistant Sessions Judge can hear

and dispose of an urgent application and in the eventuality of their being no Additional or Assistant Sessions Judge, then, the C.J.M. can dispose of such an urgent application. This would also indicate the magnitude of the powers vested in the C.J.M. I have deliberately projected some prominent features of the powers of C.J.M. while dealing with the powers of C.M.M. as u/s 3 of the Code, any reference to C.J.M. shall be construed to refer to C.M. in metropolitan area, and there is a clear mention of C.J.M. in the provisions contained in section 410 of the Code. The comparative study has thus become necessary and inevitable.

29. It is also to be noted that the idea of enacting a three-tier system is mainly for the purpose of reducing the pressure or load on the Sessions Court and therefore, in districts, the C.J.M. is clothed with certain powers in that context. In the metropolitan area, a similar power is conferred on the C.M.M., so that, the burden on the Sessions Court can be reduced to some extent. It is also rightly contended by Shri Barday and Shri Gupte that before the amendment of 1973 to the Code, for years together a practice was being followed of moving the Chief Metropolitan Magistrate (Chief Presidency Magistrate as he was then called), to hear and dispose of the regular transfer applications u/s 528(2) of the old Code, corresponding to section 410 of the new Code. The idea appears to be that in a Metropolitan area where there is a vast field of litigation, a litigant need not be driven to approach previously the High Court as it was the only other forum then and at present, the Sessions Court in the first instance, by way of transfer application, which would be expensive as well as time consuming and, therefore, the Legislature thought that such a remedy should be within the reach of an ordinary litigant and for that purpose, it must have been contemplated that a litigant can move even the Chief Metropolitan Magistrate by a regular transfer application. From that point of view also, the contentions raised on behalf of the prosecution, will have to be upheld. Shri Gupte also rightly submitted that in the metropolitan area, the Chief Metropolitan Magistrate hears the appeals arising out of the orders passed by the Juvenile Courts. This would also indicate the dimensions of the powers conferred on the C.M.M.

30. Having considered all these aspects in proper perspective, I am of the opinion that the C.J.M. in a district and the C.M.M. in a metropolitan area, are empowered u/s 410 to entertain an application not only on the administrative ground but also on the judicial ground and the employment of the phraseology "withdraw or recall" hardly makes any difference and in the import and meaning, it is almost identical with the term "transfer". In this view of the matter, the learned Chief Metropolitan Magistrate, Esplanade had ample powers to get the said case withdrawn from the file of the 40th Court to his, own file. It, therefore, fully agree and concur with the reasons assigned by the learned C.M.M. in support of his order, though I have elaborated the said features in more details, inasmuch as, the matter was canvassed in equal details.

31. Reliance was placed on behalf of the State by Shri Barday who is joined with equal emphasis by Shri Gupte, on certain authorities, which however, do not

answer directly the question posed by Shri Mehta. It is, however, significant to note that in most of the cases cited, though the point involved was slightly different, yet the Court proceeded on the footing that the Chief Metropolitan Magistrate or the District Magistrate---as the case may be---had jurisdiction .and powers to transfer a case from one Court to another not purely on administrative ground, but also on a judicial ground.

32. Thus, in *Fakira v. Goma*, 37 CriLJ 1936 , the power vested in the District Magistrate to transfer a case u/s 528 of the Code was accepted, though the decision related to the issuance of a notice to the opposite party. Same ratio is available in *Jageshar Vs. Emperor*, . In *Mohini Mohan Roy v. Punam Chand Sethia*, ILR (1924) Cal 820 , it was accepted that Chief Presidency Magistrate could lawfully withdraw a case made over to a Presidency Magistrate. In *Mt. Kamni Begam and Another Vs. Emperor*, , transfer by District Magistrate u/s 528 was held to be permissible, though issuance of notice was said to be advisable. It was also held therein that anyone could bring to the notice of the District Magistrate the facts requiring transfer of a case. This is notwithstanding the fact that section 528 relating to the powers of the District Magistrate, does not explicitly indicate the mode by which the authority can be approached. It is equally worth-nothing that in many of these and other cases, the transfer was made either by District Magistrate or by Chief Presidency Magistrate not on an administrative ground only, but on a judicial ground as well, and the same has not been disturbed on the ground that both these authorities had no such power. However, inasmuch as these and other authorities have no direct bearing on the point involved, though inferentially those are certainly relevant, no further discussion in that respect is necessary.

33. However, reliance is rightly placed on the ratio of a decision of this Court in (*Re : P.D. Shamdasani*)⁵, 32 B.L.R. 1128. Despite the fact that the point raised therein was slightly in different context, yet, the same can be-usefully considered in the instant case. In the said case, the party aggrieved had moved that Court by way of a transfer application, presumably u/s 526(8) of the Code. It was mainly canvassed while opposing the application that the petitioner ought to have moved the Chief Presidency Magistrate first before approaching the High Court and hence, it was contended that the application need not be entertained on that count alone. Repelling that objection, this Court held that the petitioner had a right to approach this Court, notwithstanding his right to approach the Chief Presidency Magistrate first. Thus, it was held that normally one should approach the Chief Presidency Magistrate in the first instance and not this Court directly, though there was no legal impediment or prohibition on such direct approach to the High Court, inasmuch as, both the authorities had jurisdiction and power to entertain such application and decide it on merits. It is, thus, manifest that the power of Chief Presidency Magistrate (and at present C.M.M,) to decide an application for transferring a case by withdrawing it and making it over to some other Court, is implicit in the observations and ratio of that case. It is further clear that transfer was asked for not on any administrative ground but

on a judicial ground. This is further clear from the fact that there would have been no question of filing a transfer application to this Court if it was being sought for only on administrative ground. On facts and the nature of allegations in the application, this position is clear. Therefore, the ratio of this case, to some extent atleast, reinforces my conclusion. It is with interest that can be incidentally observed that it is indicated in the said case that it has been a long-standing practice prevailing for years in the metropolitan area of Greater Bombay that a party has to move the Chief Presidency Magistrate requesting for a transfer of a criminal case. This has its own relevance.

34. Shri Mehta for the petitioners canvassed another contention about the maintainability of an application for transfer at the instance of the State. In effect, the learned Counsel agitated that it is not permissible for the State and as such, for that matter, for the Customs Officials to move for transfer of a case. He has presumably based this contention on the premise that the State is in itself the machinery initiating prosecution in a Court of law, cannot have a grievance about the forum, and further, the State can normally have no grievance against any Court. For that purpose, reliance is placed on State of Uttar Pradesh Vs. Ram Bahadur Singh, . Therein, a question was posed whether the State can file a transfer application u/s 526 of the Code. However, significantly the question posed remained unanswered. The discussion mostly applied to the question as to who would be the proper person to make an affidavit in support of the application on behalf of the State. The judgment then proceeds to consider other points on merits. This decision, therefore, is of no assistance to the learned counsel in support of the view propagated by him. In State Vs. Ram Sia and Others, , a similar question was posed and answered in the affirmative that the State can file a transfer application, but was qualified by cautioning that the State should be slow. It is obvious that the State is one of the vital parties to the proceeding and as such, it has got to be vigilant in protecting the interest of justice and its own-self, as also to ensure fair administration of justice. The State obviously cannot be denied such a right to agitate when it is warranted on merits, though normally it would be slow and would not resort to the extreme step unless so driven by compelling reasons. There is thus no merit in the said submission.

35. In view of this, the order passed by the learned Chief Metropolitan Magistrate deserves to be upheld on the question of law as also of fact. I may, however, hasten to add that there is another tinge to this aspect, in that, when this Court is now seized of the matter and thus, it is made to appear to this Court by whatsoever agency, this Court independently u/s 407 can record a regular order of transfer. There are no fetters on the discretion and powers of this Court, especially when, this Court is empowered to transfer a matter suo motu. Therefore, viewed from this angle, even u/s 407 treating this as an independent proceedings, I am inclined to transfer the case from the file of the 40th Court to the file of Chief Metropolitan Magistrate. However, as I am upholding the order of the Court below, this shall be a matter of secondary importance.

36. I am not concerned with the correctness or otherwise of the order of acquittal recorded in the earlier case, nor, am I called upon to express any opinion about the property and maintainability of the remarks passed in the said judgment, more so, when it is stated at the Bar that the State has preferred an appeal against the order of acquittal and has applied for expunging of the said remarks. As regards the second case which is at the trial stage, I am not expressing any opinion, inasmuch as, the discretion of the learned trial Magistrate should remain in tact.

37. In the result, the Rule is discharged. The order in Case No. 72/TA/ 79 recorded by the learned Chief Metropolitan Magistrate. Esplanade, Bombay on 16th July, 1979 withdrawing Criminal Case No. 47/C/79 from the file of the learned Addl. Chief Metropolitan Magistrate, 40th Court, Girgaum, Bombay and retaining it on his own file for hearing and disposal in accordance with law", is confirmed. The stay of the proceedings granted at the time of admission, therefore, obviously stands vacated.