

**(2013) 11 CHH CK 0009**

**In the Chhattisgarh High Court**

**Case No : Transfer Petition (Criminal) No. 9 of 2013**

Nirmal Chand Kothari and Another

APPELLANT

Vs

State of C.G. and Others

RESPONDENT

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**Date of Decision : 27-11-2013**

**Acts Referred:**

**Citation : (2014) 2 CGLJ 43**

**Hon'ble Judges : Goutam Bhaduri, J**

**Bench : Single Bench**

**Final Decision : Allowed**

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## **Judgement**

Goutam Bhaduri, J.—This is an application for transfer of the criminal trial bearing No. 199/2006, State of C.G. Vs. Nirmal Chand Kothari and another which is pending before C.J.M. Rajnandgaon, the brief facts of the case is that non-applicant No. 2, Jitendra Vaishnav is a practicing lawyer at Rajnandgaon court. As a member of District Bar Association, Rajnandgaon he lodged a complaint at Kotwali Police Station, Rajnandgaon against the present applicants and on that report the crime was registered u/s 294 and 506 read with Section 34 of IPC against the petitioner. After the investigation by the Police a charge sheet was filed on 25/07/2006 before the Chief Judicial Magistrate of Rajnandgaon u/s 294 & 506 of IPC. It is submission of the applicants that before submission of such charge sheet and during the course of investigation a meeting was convened by the Bar Association Rajnandgaon which was steered at the behest of non-applicant No. 3 and on that meeting a resolution was passed by Bar Association that no member of the Bar Association Rajnandgaon will defend the applicants in the criminal case for which report was made. This is the core issue involved in the matter as to whether such restraint can be upheld and justified? Learned counsel appearing for the respondent No. 2, Shri Rakesh Thakur submits that there had been no incident had taken place like such, however he submits that there are number of cases are pending against the applicants in the court of Rajnandgaon which is numbering as many as more than 35 or more. He further

submits that the resolution which was passed was of year 2006 and the present order sheet do not reflect such restraint was the cause to restraint the Advocate to appear on behalf of the applicants so to defend them in criminal trial.

2. He further submits and invited the attention of the court to order sheet dated 10/08/2006 and tried to demonstrate the conduct of the applicants was not above suspicion and went through the order sheet so as to demonstrate that the learned trial court has also observed that the way the applicants behaved before the trial court it purports that the clerk of the court had written the bail bond were accepted though it was not actually done. For this the clerk was given a warning by the court.

3. I have heard learned counsel for the parties at length and perused the records.

4. The applicants referred to an affidavit which is sworn by Yogeshwar Das Vaishnav, Advocate r/o of Rajnandgaon who was defending the applicant Affidavit is dated 10/06/2013. In such affidavit at para 3 it is categorically stated by the counsel on oath that on 23/11/12 that he filed an application for personal exemption of the applicants (his clients) on the ground that because the applicants were to attend some bereavement out side the city and therefore, on their instruction he had filed an application for exemption of the applicants for appearance in the court. On the date itself he had also scribed his signature on the order sheet on it's margin. He further has stated if the Bar Association had taken any decision on that date he was not aware of it. He has further stated that when he had filed the application and it was made known to the respondent No. 2, Jitendra Vaishnav and the other witnesses then he was pressurized and cornered to take back such application by certain members of the bar. He has further stated that since he was pressurized by members of the bar, he had to take back such application and the signature in the order sheet was also scrap off. He has further stated that on such basis since application was taken back and withdrawn, the learned court below had to issue the arrest warrant against the applicants. In order to verify such statement the order sheet dated 23/11/12 was also perused by this court. The order sheet purports that the learned court below had issued the arrest warrant by canceling the bail bond for non appearance of the applicants. Interestingly enough in the corner of the order sheet reflected the signature which was scrap off.

5. Necessarily the facts corroborated the statements of affidavit. Therefore it can be very well presumed that since counsel for the applicants who was forced to take back his appearance in the case and was made to withdraw an application for exemption for personal appearance, the applicants had suffered great injury. Further more there is no reason to disbelieve affidavit on oath by an advocate. Such statement on oath corroborated by the order sheet of the trial court.

6. Now the question falls for consideration as to whether the members of the bar were justified to pass a resolution to deprive any person to be defended in a criminal case by an advocate?

7. This issue is squarely settled by the Hon''ble Supreme Court in the case of A.S. Mohammed Rafi Vs. State of Tamil Nadu Rep. by Home Dept. and Others, of such order is reproduced here under:--

24. Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Association in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

8. Similarly three Judges Bench in the matter of Maneka Sanjay Gandhi and Another Vs. Rani Jethmalani, has settled the right and issue of criminal trial. Reliance is placed on Maneka Sanjay Gandhi and Another Vs. Rani Jethmalani, Para 4 and 5 of the judgment is reproduced hereunder:--

4. Now to the next ground. The sophisticated processes of a criminal trial certainly require competent legal service to present a party's case. If an accused person, for any particular reason, is virtually deprived of this facility, an essential aid to fair trial fails. If in a certain court the whole Bar, for reasons of hostility or otherwise, refuses to defend an accused person - an extraordinary situation difficult to imagine, having regard to the ethics of the profession - it may well be put forward as a ground which merits this Court's attention. Popular frenzy or official wrath shall not deter a member of the Bar from offering his services to those who wear unpopular names or unpalatable causes and the Indian advocate may not fail this standard. Counsel has narrated some equivocal episodes which seem to suggest that the services of an efficient advocate may not be easy to procure to defend Mrs. Maneka Gandhi. Such glib allegations which involve a reflection on the members of the Bar in Bombay may not be easily accepted without incontestable testimony in that behalf, apart from the ipse dixit of the party. That is absent here. It is difficult to believe that a person of the position of the petitioner who is the daughter-in-law of the former Prime Minister, wife of a consequential person and, in her own right, an editor of a popular magazine, is unable to engage a lawyer to defend her, while, as a fact, she is apparently represented in many legal proceedings quite competently.

5. A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed

by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse. This tendency of toughs and street roughs to violate the serenity of court is obstructive of the course of justice and must surely be stamped out. Likewise, the safety of the person of an accused or complainant is an essential condition for participation in a trial and where that is put in peril by commotion, tumult or threat on account of pathological conditions prevalent in a particular venue, the request for a transfer may not be dismissed summarily. It causes disquiet and concern to a court of justice if a person seeking justice is unable to appear, present one's case, bring one's witnesses or adduce evidence. Indeed, it is the duty of the court to assure propitious conditions which conduce to comparative tranquility at the trial. Turbulent conditions putting the accused's life in danger or creating chaos inside the court hall may jettison public justice. If this vice is peculiar to a particular place and is persistent the transfer of the case from that place may become necessary. Likewise, if there is general consternation or atmosphere of tension or raging masses of people in the entire region taking sides and polluting the climate, vitiating the necessary neutrality to hold a detached judicial trial, the situation may be said to have deteriorated to such an extent as to warrant transfer. In a decision cited by the counsel for the petitioner, Bose, J., observed: ....But we do feel that good grounds for transfer from Jashpurnagar are made out because of the bitterness of local communal feeling and the tenseness of the atmosphere there. Public confidence in the fairness of a trial held in such an atmosphere would be seriously undermined, particularly among reasonable Christians all over India not because the Judge was unfair or biased but because the machinery of justice is not geared to work in the midst of such conditions. The calm detached atmosphere of a fair and impartial judicial trial, would be wanting, and even if justice were done it would not be "seen to be done."

9. Applying the said analogy, the way the trial happened which is demonstrated by the order sheet and the affidavit filed by the learned counsel who was appearing on behalf of the applicants certainly if such affair are allowed to continue it will defeat the very canons of fair trial which is guaranteed to a applicant under the Constitution. Applying the said principles, however it can be safely presumed that resolution of Bar which mandates that no advocate shall appear for a particular party in any criminal case pending in within their jurisdiction will defeat the set up of democracy of fair trial and the rule of law. Therefore, by said resolution by a bar the criminal trial can not be made porous.

10. In view of the foregoing discussion, I am of the opinion that substantial grounds are made out by the applicants that they shall not get fair impartial justice if they are not properly defended by expert lawyer.

11. In view of this, it is ordered that the criminal case renumbered as 111/2013 pending in the name of State of C.G. Vs. Nirmal Chand Kothari and other stands transferred to the court of C.J.M., Durg. The transfer petition is allowed. The parties shall appear before the C.J.M., Durg on 16th December, 2013.