Second Blow to Gujarat Government!
Supreme Court Refuses to Modify Earlier Order!
[May 7, 2004

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRL. MISC. PETITION NOS. 4827-4833/2004

IN

CRIMINAL APPEAL NOS. 446-442 OF 2004

AND

CRIMINAL APPEAL NOS. 450-452 OF 2004

WITH

CRL. MISC. PETITION NO. OF 2004

IN

CRIMINAL APPEAL NOS. 446-449 OF 2004

ZAHIRA HABIBULLAH SHEIKH & ANR. ETC.
…APPELLANTS

Versus

STATE OF GUJARAT & ORS. ETC. …RESPONDENTS

J U D G E M E N T

ARIJIT PASAYAT, J.

These two applications "for directions and modification of the judgement and order dated 12.4.2004 in Crl. Appeal Nos. 446-449 of 2004 and Crl. Appeal

Nos. 450-452 of 2004 (Zahira Habibullah H. Sheikh and Apr. vs State of Gujarat and Ors. and connected cases)" (reported in 2004 (4) SCALE 375) have been filed by the State of Gujarat and one of the accused by name 'Tulsibhai Bhikhabhai Tadvi who faced trial in the case. It would be appropriate to first deal with application filed by the State of Gujarat.

The reasons for making this application primarily are that the direction for fresh trial outside the State of Gujarat is unwarranted, per incurium being not permissible in law, in violation of principles of natural justice, without consideration of real factual scenario, without specific prayer in that regard and reflect adversely on the credibility of the entire judiciary and administration of the State.

Mr. Mukul Rohatgi, learned senior counsel appearing for the applicant – State submitted that the direction given for transfer outside the State of Gujarat is not in accordance with law. According to him, such a direction could only have been given on a petition filed under Section 406 of the Code of Criminal Procedure, 1973 (in short the "Code") and not otherwise. Strong reliance is placed on a decision of this Court in A. R. Antulay v. R. S. Nayak and Another (1988 (2) SCC 602). Emphasis is laid on the observations at pages 729 and 730 paragraphs 204 and 206 respectively. It was submitted that even by exercise of power under Article 142 of the Constitution of India, 1950 (in short the 'Constitution') also such a direction could not have been given. Reference in this context was made to Supreme Court Bar Association v. Union of India & Apr. (1998 (4) SCC 409). There is no power according to the applicant-State for suo moto directing such a course to be adopted.

The petition is in essence and substance seeking for a review under the guise of making an application for direction and modification apparently being fully aware of the normal procedure that such applications for review are not, unless Court directs, listed for open hearing in court, at the initial stage at least, before ordering notice to the other side and could be summarily rejected, if found to be of no prima facie merit. The move adopted itself is unjustified, and could not be countenanced also either by way of review or in the form the present application as well. The nature of relief sought, and the reasons assigned are such that even under the pretext of filing a review such an exercise cannot be undertaken, virtually for re-hearing and alteration of the judgement because it is not to the liking of the party, when there is no apparent error on record whatsoever to call for even a review. The said move is clearly misconceived and nothing but sheer abuse of process, which of late is found to be on the increase, more for selfish reasons than to further or strengthen the cause of justice. The device thus adopted, being otherwise an impermissible move by mere change in nomenclature of the applications does not change the basic nature of the petition. Wishful

thinking virtually based on surmises too, at any rate is no justification to adopt such undesirable practices. If at all it should be for weighty and substantial reasons and not to exhibit the might or weight or even the affluence of the party concerned or those who represent such parties when they happen to be public authorities and institutions.

It is to be noted that a review application can be filed under Article 137 of the Constitution read with Order XL of the Supreme Court Rules, 1966 (in short the Rules). Rule 3 of Order XL is significant. It reads as follows :-

"Rule 3 – Unless otherwise ordered by the Court an application for review shall be disposed of by circulation without any oral arguments, but the petitioner may supplement his petition by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. An application for review shall as far as practicable be circulated to the same Judge or Bench of Judges that delivered the judgement or order sought to be reviewed.

As noted by a Constitution Bench of this Court in P. N. Eswara Iyer and Ors. v. Registrar, Supreme Court of India [(1980 4 SCC 680], Suthendraraja alias Suthenthira Raja alias Santhan & Ors. v. State, through DSP / CBI. Chennai [(1990) 9 SCC 323], Ramdeo Chauhan alias Raj Nath v. State of Assam [(2001) 5 SCC 714], and Devender Pal Singh v. State, NCT of Delhi and Another [(2003) 2 SCC 501]. notwithstanding the wider set of grounds for review in civil proceedings, it is limited to "errors apparent on the face of the record' in criminal proceedings. Such applications are not to be filed for the pleasure of the parties or even as a device for ventilating remorselessness, but ought to be resorted to with great sense of responsibility as well.

In Delhi Administration v. Gurdip Singh Uban and others [(2000) 7 SCC 296] it was held that by describing an application one for "clarification" or "modification" though it is really one of review a party cannot be permitted to circumvent or bypass the circulation procedure and indirectly obtain a hearing in the open Court. What cannot be done directly cannot be permitted to be done indirectly. The Court should not permit hearing of such an application for "clarification", "modification" or "recall" if the application is in substance a clever move for review.

In that background, we could have straightway and summarily too dismissed the application with exemplary costs for the blatant abuse of the process of law as done by the applicant – State. But we feel it necessary to highlight the magnitude of deceitfulness adopted to mislead and the patent falsity of the claims made as also the ulterior object behind the petition.

Firstly, the plea that there was no "specific prayer" for transfer outside the State is totally false and misleading. Every prayer need not always be by a separate application, unless such prayer is the only relief sought or that the proceedings filed had no other claim, by way of relief. If the basis of grievance has been sufficiently disclosed openly and the relief sought is one among others specified as incidental or ancillary to main relief and the Court had the power to grant it, the fact that there is no formal or specific application which if at all may be relevant for purposes of determining the Court fee to be paid only, does not in any way undermine the powers of the Court to accord relief. So long as the request in this regard has been indisputably made and was also responded to by the parties before Court. In fact at pages 123 onwards of the paper book in Crl. Appeal Nos. 446-449 of 2004, several grounds to justify the re-trial outside Gujarat have been indicated. The submissions made in this regard are found recorded in the judgement itself and to claim to the contrary is sheer travesty of truth, mean as well as meaningless. Secondly, the plea that issue of transfer was neither raised nor argued by all parties is of no consequence. It is not necessary that all parties should raise or argue it and no one was restrained from arguing it. So far as the question of argument is concerned, it is really shocking that false statement has been made that the point was "not permitted to be argued" (at page 5, para 'B') by a person whose presence and credibility to make such statement itself has not been substantiated. In the said paragraph it has been earlier stated that prayer for transfer outside the State was "opposed by the State". If the former plea does not amount to false statement, probably nothing would. The averment that the point was "not permitted to be argued", when on the same breath it is stated that the prayer was "opposed" really shows the extent of falsehood to which the applicant-State has gone and demonstrate the deterioration and falling standards in preparation and filing of papers in Court. Though we could have proceeded against the person on more than one counts, we only pity him for offering himself to be a scapegoat apparently for reasons best known to him. Which at any rate could not be genuine or ethical whatsoever. The stand that there was no opportunity granted to the State is further falsified in view of what is stated in para 25 of the judgement (page 388 of SCALE). Even that apart opportunity before Courts are to be sought and availed of and there is no need to invite them to do so and grievance, if any, could be made in this regard only when sought for but rejected by the Court.

The decision in A. R. Antulay's case (supra) has really no application to the facts of the present case. Section 406 of the Code relates to a case where either the trial or appeal is pending before a trial Court or the High Court. In the case at hand the appeal against judgement of the High Court was being decided and the entire matter was in the hands of this Court and unless relegated back to the very Court, for which there is no compulsion to sent it automatically, the power of this Court to send it to an appropriate Court to ensure complete justice between the parties

and avert miscarriage of justice, cannot be doubted or questioned. Therefore, the question of filing a petition for transfer in terms of Section 406 of the Code did not arise. The decision in A. R. Antulay's case (supra) was not rendered in the context of the competency, jurisdictions or authority of this Court dealing with a substantial appeal against the judgements of the Courts below in exercise of its plenary jurisdiction, which have been construed to be capable of being exercised in spite of limitations, if any, under special provisions contained in the Constitution or other laws in order to do effective, real and substantial justice, co-extensive and commensurate with the needs of justice in a given case meeting any exigency. Orders of Courts under Article 136 of the Constitution have been held to be unassailable and cannot be said to be void. Whereas, Article 142, though very wide is viewed to be limited to the short compass of the actual dispute before the Court and not to what might necessarily and reasonably be connected with or related to such matter. In A. R. Antulay's case (supra) what was before the Court was an appeal from an order made in a Revision before the High Court which itself was against an order of the Special Judge constituted under the Criminal Law Amendment Act, 1952 rejecting the objections taken to the jurisdiction of the Special Judge to take cognizance of the complaint filed as a private complaint. It is in this context only Article 142 was not of assistance to that case, particularly in the teeth of the special provisions constituting a Special Court of particular nature and speciality de hors the other fact that the Court on its own without the seeking of any one of the parties directed transfer. The observations contained therein cannot be quoted or drawn out of context and consequently the decision in A. R. Antulay's case (supra) has no relevance or application to the present case and the reference to it is wholly inappropriate. Supreme Court Bar Association's case (supra) related to the scope of power under Article 142 of the Constitution and pertained to the authority of this Court to punish an advocate for professional misconduct and not merely to punish him for contempt in respect of which only the main matter itself was before this Court. The powers under Article 142 though considered to be of very wide amplitude are not complementary, and supplementary in nature available no doubt to prevent injustice and to do complete justice between parties in the pending litigation. The ratio in that case has no relevance to the present case and it would only justify the course adopted to prevent injustice and do complete justice between parties, as an inevitable consequence of the decision taken in the main appeal itself. The direction given in the present case for transfer though keeping in view normal principles governing claims for transfer was really in exercise of powers as an Appellate Court with plenary and unlimited powers to do justice while dealing with an appeal under Article 136 of the Constitution and as an inevitable consequence of the appeals being allowed the reasons for which, would equally justify on their own the need for which, would equally justify on their own the need for transfer outside the State as well. It is in essence an adjunctive power. As noted in Union Carbide Corporation and Ors. v. Union of India and Ors. [(1991 (4) SCC 584)] the

purposed constitutional plenitude of the powers of the apex Court to ensure due and proper administration of justice is intended to be coextensive in each case with the needs of justice of a given case and to meeting any exigency. Very wide powers have been conferred on this Court for due and proper administration of Justice. This Court retains an inherent power and jurisdiction for dealing with any extra ordinary situation in the larger interests of administration of justice and for preventing manifest Injustice being done. The power is required to be exercised only in exceptional circumstances for furthering the ends of justice. Therefore, the ratio in A. R. Antulay's case (supra) in no way makes our judgement fragile. On the contrary, as noted above, the ratio in that decision has no application. Additionally, it may be noted that in A. R. Antulay's case (supra) the controversy related to transfer from the special Court to the High Court, a Court which was not the designated or constituted one under the special enactment. When the direction given in the judgement is for a re-trial by a Court of Session the logic applied in A. R. Antulay's case (supra) equally has no application.

It has to be noted that in A. R. Antulay's case (supra) it was noted by this Court that the question of transfer form one court to another was not in issue. As highlighted above, contrary to what has been pleaded by applicant-State there was specific issue relating to transfer of the case outside the State of Gujarat and arguments were advanced.

Another red herring which has been tried to be drawn is regarding pendency of writ petition / SLP involving prayer for transfer. The SLP appears to have been filed before delivery of judgement by the High Court and even before the appeals were heard by the High Court. After delivery of the judgement which was the subject matter of challenge in Criminals Appeals, the plea of transfer stated to have been made in some other SLPs (one of which was subsequently converted as a writ petition under Article 32 of the Constitution) is really of no consequence. The Writ Petition (Crl.) 109 of 2004 is stated to have been filed on 31st July, 2003 and SLP (Crl.) 3770 of 2003 in August, 2003. The appeal before the Gujarat High Court by the State was filed on 7.8.2003, amended twice as noted in the judgement itself. SLP (Crl.) 3770 of 2003 was filed against the judgement of the trial Court. SLP filed by NHRC was treated as one under Article 32 of the Constitution. This Court as the Appellate Court dealing with the judgements of the Trial Court and the Appellate Court, exercising plenary powers under Article 136 of the Constitution, while directing re-trial has ample jurisdiction to fix the place or the Court which should undertake such exercise, keeping in view the needs of justice in a given case with the object of ensuring real, substantial due and proper justice, and that too as an inevitable and necessary corollary of the decision to set aside the judgements of the Courts below. When the appeals were directed to be listed for hearing by constituting this Bench as specially designated by the Hon'ble CJI in exercise of his prerogative, and the proceedings before the other Bench

presided over by the Hon'ble CJI was being adjourned in the presence of parties / counsel appearing before us as well awaiting the result of the appeals directed to be posted before this Bench, it is beyond comprehension and not only unethical but impermissible for anyone to expect that this Bench could not or ought not to have disposed of the appeals, as they deserve and the manner in which interests of justice would require. When the appeals have been directed to be posted before this Bench to hear the appeals, this Bench as the appellate Court exercising powers under Article 136 of the Constitution is entitled to deal with as warranted, necessitated and as they deserved in law, and it is pernicious for anyone to think or expect, as to how the Court should dispose it of, as some would wish or desire, partially or in a parfunctory manner.

So the plea that petitions relating to change of place of trial are pending before this Court deserves to be only noted and rejected.

Another plea which reflects ignorance about the judicial system is the plea that observations made without hearing has demoralising effect on the highest court of the State and Courts subordinate to it. This submission shows lack of awareness and want of understanding, apparently deliberately reigned, about functioning of Appellate Courts. When an appeal is heard and Appellate Court finds non-application of mind or erroneous application of law or perversity in appreciation of evidence it is not required to hear the concerned member (s) of judiciary whose orders are questioned. It is only when adverse comments are made personally attributing malafides or personal bias or involvement in the case, do hors the role as a judicial functionary and that too unrelated to the subject matter of lis, in a given case, the position may be different. Observations made while considering the legality, propriety, reasonableness, rationally or in a given case perversity in the manner of exercise of powers and passing orders by the Courts below under challenge in relation to a particular case to not reflect adversely on the competance of the entire network or Courts. We fail to understand how the observations made in any way can have demoralising effect on the highest Court of the State, or creating negative impact upon the State Judiciary in discharging its functions. A judgement, the observations and criticisms as to the manner of disposal have to be soberly read with objectivity and not out of context or even as a provision of an act or rule, with pre-conceived notions apparently exposing virtually ones' own hidden desires or agendas, if any. If only this court intends to castigate or condemn anyone, who deserved such treatment, be it an institution or authority or incumbent in office, there is no need for it to labour on an excuses to do so indirectly. The monstrosity of the manner in which the Courts below dealt with the matter, though called for stronger and severe handling, we desisted from doing so, keeping in view a fond hope that all those concerned would at least attempt to show better performance, greater circumspection and desired awareness and dispassion to do real, effective and substantial justice.

Another aspect which throws considerable doubt about the bonafides of the State Government and its true colours is the veiled threat of legal action for changed statements and credibility of Zahira as a witness. It sounds more like a stand of the defence and not that of the prosecutor. Reading of the statements in this regard gives an impression as if in the eyes of the State Zahira is the accused who should be in the dock and not the persons who are made accused in the case. The State Government had filed application for acceptance of additional evidence primarily on the ground of what was stated in Zahira's affidavit to highlight the situation when her evidence and those of others were tendered before the trial court. It is, therefore, not only unusual but also reveals the total lack of seriousness and creation of a façade in casting doubts about her credibility and indirect threat to stick to her statement before the trial court. The State Government's sympathies more for the accused than the victims become crystal clear when one looks at the State's stand that the ramifications of the transfer are serious insofar as "the accused" are concerned. The Statement is made by an officer of the State on affidavit based on his knowledge, and are purportedly based on records of the case. One wonders how he could know it and how the records of the case reveal that the counsel for Zahira made "cursory oral submissions at the end of the submissions" regarding transfer or that the consequential questions was "not permitted to be argued", which again is false, as noted above. We express our strong displeasure to such exhibition of recklessness and lack of rectitude shown in filing the application with such false and make believe statements in abundance. The deponent appears to be only a cat's paw and, therefore, as noted earlier we do not propose to take any action against him though the case warranted stringent action.

At the least the aforesaid aspects lead to the inevitable conclusion that the application is thoroughly misconceived a sheer abuse of process of law and deserves to be dismissed with exemplary costs. But we refrain from imposing any cost.

Now, we shall deal with an application filed by accused Tulsibhai Bhikhabhai Tadvi. Mr. K. T. S. Tulsi, learned senior counsel appearing for him adopted the submissions of learned counsel for the State of Gujarat. Additionally, he submitted that when dealing with an appeal against acquittal this Court was required to consider the evidence which weighed with the Court's directing acquittal. Though we had restricted the scope of consideration to the rejection of the application under Sections 311 and 391 of the Code, certain observations have been made which would prejudice the accused persons. They did not get an opportunity to show that the evidence on record was otherwise. This plea is also without any substance and does not merit countenance.

When the primary consideration was the justifiability of rejecting the applications in terms of the Sections 311 and 391 of the Code, the question of considering the evidence on record did not arise. This Court considered the appeal taking note of those aspects. It was not necessary to record any finding in the appeals as to whether the respondents – accused in the appeals were to be convicted or acquitted. The appeals were allowed for the reasons that the investigation was vitiated. Tainted evidence was tendered and distorted trial was held and they would suffice to set aside the judgements. Therefore, the question of considering the evidence on record, except to the extent necessary for deciding the appeals did not arise. The observations made were in the context of the conduct of the public prosecutor, the prosecuting agency and the failure of the Courts below to take note of relevant aspects.

When the matter is taken up for trial afresh as directed by us it is obvious that the worth of the evidence has to be considered by the Court concerned on its own merits and in accordance with law to find out the real truth. That being so, the plea raised by Mr. Tulsi regarding the need for consideration of the evidence on record is really of no consequence and has no merit of acceptance.

The application are dismissed.

……..J.
(DORAISWAMY RAJU)

……..J.
(ARIJIT PASAYAT)

New Delhi.
May 7, 2004