

[2011] 10 S.C.R. 1

JAHID SHAIKH & ORS.

v.

STATE OF GUJARAT & ANR.

(TRANSFER PETITION (CRL) NO.55 OF 2010)

JULY 6, 2011

[ALTAMAS KABIR AND CYRIAC JOSEPH, JJ.]

*Code of Criminal Procedure, 1973 – s.406 – Bomb blasts – Sessions Case pending before the Special Judge, Ahmedabad – Transfer petition – Prayer for transfer of the Sessions Case for trial outside the State of Gujarat on ground of bias and vitiated communal atmosphere – Apprehension of the accused of being denied a free and fair trial within the State of Gujarat – Held: Absence of a congenial atmosphere for fair and impartial trial is a good ground for transfer of a case out of a State – However, such a ground, cannot be the only aspect to be considered – In the instant case, the offences with which the accused have been charged are of a very serious nature, but the communally surcharged atmosphere which existed at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously – Also, the Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial – On the other hand, in case the Sessions Trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are large in number, to any venue that may be designated outside the State of Gujarat and prejudice may be caused to the prosecution in presenting its case – Case for transfer of trial outside the State of Gujarat is based on certain incidents which had occurred in the past – The main ground on which the Petitioners sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad – However,*

- A *such allegation is now more speculative than real, nevertheless in order to dispel the apprehension of the petitioners, liberty given to them that in the event their apprehension are proved to be real during the course of the trial, they will be entitled to move afresh before Supreme Court*
- B *for the relief sought for in the present Transfer Petition.*

C **FIRs were lodged with different Police Stations in the State of Gujarat in connection with the bomb blasts that occurred in 2008 in the cities of Ahmedabad and Surat. The present Transfer Petition was filed under Section 406 of CrPC for transfer of Sessions Case arising out of said FIRs and pending before the Special Judge, Ahmedabad, for trial outside the State of Gujarat on ground of bias and vitiated communal atmosphere.**

- D **In support of the Transfer Petition, it was *inter alia* submitted that the local police authorities, jail authorities and the public prosecutor had conducted themselves in a manner which reflected total bias and prejudice against the accused and the same created more than a**
- E **reasonable apprehension in their mind that they would not get a fair and free trial in the State of Gujarat; that charges were framed against the accused without supplying them with the essential documents required to be supplied under Section 207 of Cr.P.C.; that most of the**
- F **accused did not have access to all the police papers at the time of framing of charges against them; that those favoured with copies of the police papers were unable to understand the same, as they were in Gujarati- a language not known to most of the accused, most of them being**
- G **from outside the State of Gujarat; that the counsel for the accused were not permitted to meet their clients even for 10 minutes in their Court chambers, without the police being present; that several affidavits had been filed by the relatives of the accused which revealed the severe**
- H **physical torture inflicted on the accused which were**

supported by medical reports of doctors who examined the victims, but despite such evidence, the trial court did not order an independent probe into the incident; that in the event local communal feelings, which are borne out from the manner in which the accused were treated by the police, jail staff and the Courts are such that they create an atmosphere which is not conducive to the holding of a fair trial, the cases should be transferred to a neutral location in the interest of justice and finally that in the circumstances indicated, it was only just and proper that the Transfer Petition be allowed and that Sessions Case pending before the Special Judge, Ahmedabad, be transferred outside the State of Gujarat for trial.

The State of Gujarat and the Inspector General of Prisons opposed the Transfer Petition *inter alia* contending that a few orders, even if held to be incorrect, could not be a ground for transferring the entire prosecution out of the State of Gujarat as that would lead to various difficulties for the prosecution in producing witnesses at the time of trial; that there were a large number of witnesses in respect of the cases relating to Ahmedabad and Surat and it would be impossible for such a large number of witnesses to be produced before a Court outside the State of Gujarat for giving evidence before a Court where the language used was not Gujarati. It was further contended that the allegation of bias made against the Magistrate or Sessions Judge was no longer relevant since the matter had already been committed by the Magistrate to the Court of Sessions while the Sessions Judge had since been elevated as a Judge of the Gujarat High Court and the trial would be conducted by a Judge other than the said Judge against whom the allegation of bias had been made; that in the changed circumstances the arguments advanced in favour of transfer of the Sessions Case outside the State of Gujarat

A could no longer be justified and were liable to be rejected; that even the allegation of torture in custody was not proved to the satisfaction of the Court; and that all the allegations made by the Petitioners against the Respondents were entirely false and merited rejection.

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Disposing of the Transfer Petition, the Court

HELD:1.1. Apparently, at the initial stages of the investigation and filing of charge-sheets some amount of bias could well have been detected. However, once the matter had gone out of the hands of the Magistrate concerned, no further bias could be attributed to him. Similarly, the allegation of bias against the District & Sessions Judge was no longer available since the incumbent had been elevated as a Judge of the High Court and the trial will be conducted by another Judge. [Para 16] [19-C-D]

1.2. However, the manner in which the charges had been framed, without giving the Petitioners a meaningful opportunity of meeting the allegations made against them in the charge-sheet, will ultimately have a direct bearing on the trial itself. The duty of the Sessions Court to supply copies of the charge-sheet and all the relevant documents relied upon by the prosecution under Sections 207 and 208 Cr.P.C. is not an empty formality and has to be complied with strictly so that the accused is not prejudiced in his defence even at the stage of framing of charge. The fact that many of the accused persons were not provided with copies of the charge-sheet and the other relevant documents, as indicated in Sections 207 and 208 Cr.P.C., seriously affects the right of an accused to a free and fair trial. In the instant case, in addition to the above, it has also to be kept in mind that most of the accused persons in this case are from outside the State of Gujarat and are not, therefore, in a position to understand the documents relied upon by the

police authorities as they were in Gujarati which most of the accused were unable to comprehend. Their demand for translated copies of the documents met with no response, and ultimately it was the very same documents in Gujarati, which were supplied to some of the accused in some of the cases. [Para 17] [19-E-H; 20-A-B]

1.3. The physical torture which was said to have been inflicted on the Petitioners has come on record by way of affidavits to which there is no suitable explanation. Furthermore, the accused persons were not allowed to meet their lawyers without police presence, and as stated by them, it is only natural that an accused in custody will have second thoughts before making or reiterating allegations of torture against the very persons to whose custody they would have to return. [Para 18] [20-C-D]

1.4. Apart from the above, this Court also has to consider the submissions on behalf of the State of Gujarat and the Inspector General of Prisons regarding the convenience of the prosecution which intends to produce a large number of witnesses, who are all said to be residents of the State of Gujarat. It was submitted on behalf of the State of Gujarat and the Inspector General of Prisons that the examination of such a large number of witnesses could be compromised and/or jeopardized in the event they are required to travel outside the State of Gujarat in connection with the trial. There will also be a language problem for the witnesses to be examined outside the State of Gujarat, since the majority of the witnesses were acquainted mostly with Gujarati and would be at a disadvantage in providing a true picture of the series of incidents relating to the bomb blasts which were triggered off in the cities of Ahmedabad and Surat. [Para 19] [20-E-G]

A 2003 (5) Suppl. SCR 610; *Surendra Pratap Singh v. State of U.P. & Ors.* (2010) 9 SCC 475: 2010 (11) SCR 909 – cited.

B 2. In the Indian criminal justice delivery system the balance tilts in favour of the accused in case of any doubt in regard to the trial. The Courts have to ensure that an accused is afforded a free and fair trial where justice is not only done, but seen to be done and in the process the accused has to be given the benefit of any advantage that may enure to his/her favour during the trial. Article C 21 of the Constitution enshrines and guarantees the precious right of life and liberty to a person, deprivable only on following the procedure established by law in a fair trial, assured of the safety of the accused. Except in D to national security, the burden lies heavily on the prosecution to prove its case to the hilt and it is rarely that the accused is called upon to prove his innocence. [Para 20] [20-H; 21-A-B]

E *Commissioner of Police v. Registrar, Delhi High Court* (1996) 6 SCC 323: 1996 (7) Suppl. SCR 432 – relied on.

F 3. The instant case is a case where the apprehension of the accused being denied a free and fair trial within the State of Gujarat has to be considered on the weight of the materials produced on behalf of the accused in support of such apprehension and the prejudice that may also be caused to the prosecution in presenting its case. That the facts involved in this case are of a sensitive nature, cannot be denied, but that by G itself cannot be a ground for transfer of the trial outside the State of Gujarat. A good deal of care and caution has to be exercised to see whether the accused/petitioners have been able to make out a case of bias and prejudice on the part of the State or the prosecuting authorities

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which raises a very real and plausible ground for transferring the trial pending before the Special Judge, Ahmedabad outside the State of Gujarat. Apart from the above, what has also to be taken into consideration is a conceivable surcharged communal climate which could have a direct bearing on the trial itself. The Court has to undertake a balancing act between the interest of the accused, the victims and society at large in the focus of Article 21 of the Constitution to ensure a free and fair trial to the accused. [Para 21] [21-C-F]

*G.X. Francis & Ors. v. Banke Behari Singh & Anr.* AIR 1958 SC 309; *Gurcharan Dass Chadha v. State of Rajasthan* (1966) 2 SCR 678 = AIR 1966 SC 1418; *Maneka Sanjay Gandhi & Anr. v. Miss Rani Jethmalani* (1979) 4 SCC 169; *K. Anbazhagan v. Superintendent of Police, Chennai & Ors.* (2004) 3 SCC 788: 2004 (2) SCR 495; *Abdul Nazar Madani v. State of T.N. & Anr.* (2000) 6 SCC 204: 2000 (3) SCR 1028 – referred to.

4. In order to ensure a free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial is a good ground for transfer of a case out of a State. However, such a ground, though of great importance, cannot be the only aspect to be considered while deciding whether a criminal trial could be transferred out of the State which could seriously affect the prosecution case, considering the large number of witnesses to be examined to prove the case against the accused. Justice must not only be done, but must also be seen to be done. If the said principle is disturbed, fresh steps can always be taken under Section 406 Cr.P.C. and Order XXXVI of the Supreme Court Rules, 1966 for the same reliefs. [Paras 27, 28] [25-B-E]

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A *Zahira Habibulla H. Sheikh vs. State of Gujarat (2004) 4*  
SCC 158: 2004 (3) SCR 1050 – relied on.

B 5. The offences with which the accused have been  
charged are of a very serious nature, but except for an  
apprehension that justice would not be properly  
administered, there is little else to suggest that the  
charged atmosphere which existed at the time when the  
offences were alleged to have been committed, still exist  
and was likely to prejudice the accused during the trial.  
C All judicial officers cannot be tarred with the same brush  
and denial of a proper opportunity at the stage of framing  
of charge, though serious, is not insurmountable. The  
accused have their remedies elsewhere and the  
prosecution still has to prove its case. The communally  
D surcharged atmosphere which existed at the time of the  
alleged incidents, has settled down considerably and is  
no longer as volatile as it was previously. The Presiding  
Officers against whom bias had been alleged, will no  
longer be in charge of the proceedings of the trial. The  
E conditions in Gujarat today are not exactly the same as  
they were at the time of the incidents, which would justify  
the shifting of the trial from the State of Gujarat. On the  
other hand, in case the Sessions Trial is transferred  
F outside the State of Gujarat for trial, the prosecution will  
have to arrange for production of its witnesses, who are  
large in number, to any venue that may be designated  
outside the State of Gujarat. At the present moment, the  
case for transfer of the trial outside the State of Gujarat  
is based on certain incidents which had occurred in the  
G past and have finally led to the filing of charges against  
the accused. The main ground on which the Petitioners  
have sought transfer is an apprehension that communal  
feelings may, once again, raise its ugly head and  
permeate the proceedings of the trial if it is conducted by  
the Special Judge, Ahmedabad. However, such an  
H allegation today is more speculative than real, but in

order to dispel such apprehension, this Court also keeps it open to the Petitioners that in the event the apprehension of the petitioners are proved to be real during the course of the trial, they will be entitled to move afresh before this Court for the relief sought for in the present Transfer Petition. [Para 29] [25-F-H; 26-A-E]

**Case Law Reference:**

2004 (3) SCR 1050	relied on	Paras 9, 14, 27
(1979) 4 SCC 169	referred to	Para 9, 25
AIR 1958 SC 309	referred to	Para 9, 23
2003 (5) Suppl. SCR 610	cited	Paras 10, 25
2010 (11) SCR 909	cited	Para 10
(1966) 2 SCR 678	referred to	Para 10, 24
1996 (7) Suppl. SCR 432	relied on	Para 20
2004 (2) SCR 495	referred to	Para 25
2000 (3) SCR 1028	referred to	Para 26

**CRIMINAL ORIGINAL JURISDICTION : Transfer Petition (Criminal) No. 55 of 2010.**

Under Section 406 Code of Criminal Procedure.

Prasahant Bhushan, Rohit Kumar Singh, Mayank Mishra for the Petitioner.

Ranjit Kumar, Hemantika Wahi, Suvhi Banerjee for the Respondents.

The Judgment of the Court was delivered by

**ALTAMAS KABIR, J. 1.** This Transfer Petition has been filed by one Jahid and 62 other Petitioners under Section 406

A of the Code of Criminal Procedure for transfer of Sessions Case No.38 of 2009 pending before the Special Judge, Ahmedabad, for trial outside the State of Gujarat.

B 2. The aforesaid Sessions Case arises out of FIR Nos.1-236 of 2008 of Shahibaug Police Station and various other FIRs lodged with different Police Stations in the State of Gujarat. Apart from FIR Nos.1-236 of 2008 of Shahibaug Police Station, the aforesaid Sessions Case No.38 of 2009 also involves the following FIRs in which the Petitioners have been implicated :-

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- (a) I-203 of 2008, I-204 of 2008, I-205 of 2008 and I-206 of 2008 of Maninagar Police Station;
  - (b) I-338 of 2008 and I-339 of 2008 of Odhav Police Station;
  - (c) I-400 of 2008 and I-401 of 2008 of Naroda Police Station;
  - (d) I-321 of 2008 and I-322 of 2008 of Ramol Police Station;
  - (e) I-190 of 2008 of Isanpur Police Station;
  - (f) I-218 of 2008 of Vatva Police Station;
  - (g) I-273 of 2008 of Amraiwadi Police Station;
  - (h) I-71 of 2008 of Khadia Police Station;
  - (i) I-220 of 2008 of Bapunagar Police Station;
  - (j) I-123 of 2008 of Kalupur Police Station;
  - (k) I-140 of 2008 of Danilimbda Police Station;
  - (l) I-181 of 2008 of Sarkhej Police Station;
  - (m) I-200 of 2008 of Kalol Police Station;
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- (n) 176 of 2008, 175 of 2008, 179 of 2008 and 180 of 2008 of Kapodra Police Station; A
- (o) 365 of 2008, 363 of 2008, 364 of 2008, 369 of 2008 and 366 of 2008 of Varacha Police Station;
- (p) 203 of 2008 and 208 of 2008 of Katargam Police Station; B
- (q) 651 of 2008 of Umrah Police Station;
- (r) 3019 of 2008 of DCB Police Station; C
- (s) 208 of 2008 and 209 of 2008 of Mahidharpura Police Station.

All the aforesaid FIRs have been lodged in connection with the series of bomb blasts that occurred in 2008 all over the country in major cities like Delhi, Mumbai, Jaipur, Ahmedabad and Bengaluru, killing many and injuring several others. As a response to the aforesaid blasts which were declared to be acts of terrorism by the State Government, a large number of young men belonging to the Muslim community were arrested both from within and outside the State of Gujarat. D E

3. Appearing in support of the Transfer Petition, learned Advocate, Mr. Prashant Bhushan, submitted that the Transfer Petition seeking transfer of the trial of the accused in the Ahmedabad bomb blast cases, as well as in the cases relating to planting of bombs in Surat, out of the State of Gujarat, was necessitated on account of the attitude and conduct of the local authorities. Mr. Bhushan submitted that the local police authorities, jail authorities and the public prosecutor had conducted themselves in a manner which reflects total bias and prejudice against the accused and the same has created more than a reasonable apprehension in their mind that they would not get a fair and free trial in the State of Gujarat. F G

A 4. Among the more glaring examples of bias and  
prejudice pointed out by Mr. Prashant Bhushan was the  
allegation that charges were framed against the accused  
without supplying them with the essential documents which  
were required to be supplied under Section 207 of the Code  
B of Criminal Procedure (Cr.P.C.), particularly when the majority  
of the accused were not being represented through counsel.  
Mr. Bhushan submitted that in cases instituted upon a police  
report, Section 207 Cr.P.C. makes it obligatory on the part of  
the Magistrate to provide the accused, without delay, free of  
C cost, copies of the police report, the First Information Report  
recorded under Section 154 Cr.P.C., the statements recorded  
under Sub-Section (3) of Section 161 Cr.P.C. of all the persons  
whom the prosecution proposed to examine as its witnesses,  
the confessions and statements recorded under Section 164  
D Cr.P.C., as well as any other document or relevant extract  
forwarded to the Magistrate with the police report under Sub-  
Section (5) of Section 173 Cr.P.C. Mr. Bhushan urged that  
under Section 227 Cr.P.C. the accused have a right to oppose  
the framing of charges on the basis of the evidence gathered  
during investigation, which requires the accused to have copies  
E of all the documents mentioned in Section 207 of the Code.  
Mr. Bhushan submitted that the said right to have the police  
papers had been violated by the Respondents, inasmuch as,  
most of the accused did not have access to all the papers at  
the time of framing of charges against them. Mr. Bhushan  
F submitted that those who had been favoured with copies of the  
police papers were unable to understand the same, as they  
were in Gujarati which language was not known to most of the  
accused, most of them were from outside the State of Gujarat.  
Mr. Bhushan also submitted that the learned Advocates of those  
G who were provided with copies of the charge-sheets in Gujarati  
were barely given four days' time to consider the same to  
prepare their case for discharge of the accused.

H 5. Despite the fact that on the date of framing of charges,  
many of the accused had not been served with copies of the

charge-sheet and connected papers, such as the statement of witnesses and confessional statements of the accused recorded under Section 164 Cr.P.C., and other documents, and those who had been served, were served with copies of the same in Gujarati, the learned Designated Judge framed charges against the accused persons on 11th January, 2010. Mr. Bhushan submitted that the majority of the accused were provided with lawyers and copies of the charge-sheet and other documents *after charge had already been framed*. [Emphasis Supplied] Mr. Bhushan submitted that some of the accused, who did not receive the said documents, moved an Application on 15th February, 2010, but the same was rejected without such copies being supplied.

6. Mr. Bhushan urged that apart from the above, one other serious grievance which the accused had, which has led to the apprehension of bias, was that the counsel for the accused were not permitted to meet their clients even for 10 minutes in their Court chambers, without the police being present, despite the applications made on behalf of the accused that they would not be in a position to speak freely in the presence of the police for fear of subsequent reprisal at the hands of the police. Mr. Bhushan submitted that although the Court was fully aware of the fact that the accused would not be able to speak freely about the torture inflicted on them while in custody, it decided to look the other way to prevent the learned advocates for the accused to obtain a true picture of the allegations made by the accused of torture at the hands of police while in custody. Mr. Bhushan submitted that the Court chose to disregard the reality that after their production in Court, the accused would have to go back to the custody of police and to suffer the consequences of their disclosures in Court. Mr. Bhushan submitted that even in the light of the serious allegations made against the police of torture and the evidence in support thereof, the Court did not think it necessary to even order an independent investigation to verify the truth or otherwise of such allegations. Mr. Bhushan urged that on account of the disinterest shown by the Courts

A with regard to the complaints of torture made by the accused, the jail authorities became emboldened and subjected the accused to other indignities, including the storming of the barracks of the accused on 27th March, 2009, and severely beating the inmates thereof.

B 7. Mr. Bhushan submitted that several affidavits had been filed by the relatives of the accused which revealed the severe physical torture inflicted on the accused which were supported by medical reports of doctors who examined the victims, but  
C despite such evidence, the trial court did not order an independent probe into the incident and, instead, sought a report from the jail authorities who, as it could have been expected, stated that it was the accused who had revolted and had to be subdued by the jail authorities. It was the aforesaid  
D explanation of the jail authorities which was ultimately upheld by the Court. Mr. Bhushan submitted that the jail authorities had placed reliance on a report by the Additional Principal Judge into an incident which had taken place prior to the incident of 27th March, 2009. In other words, the matter referred to in the order dated 5th December, 2009, passed by the Gujarat High  
E Court had no connection with the incident forming the basis of the transfer petition.

8. Mr. Bhushan contended that apart from the above, there were several other instances of bias indicated hereinbelow,  
F which had given rise to the apprehension in the minds of the accused that they would not get a free and fair trial as is guaranteed under Article 21 of the Constitution, before the learned Designated Judge, namely,

G (a) On the date of hearing, the Investigating Officer, Mr. Tolia, was seen leaving the Chamber of the learned Designated Judge, which fact was admitted, but was attempted to be explained on the ground that such visits were in connection with other matters  
H pertaining to the bomb blast cases. An application

made thereafter, requesting the learned Judge to A  
recuse herself from the cases remained undecided.

(b) On 15th February, 2010, this Court stayed the B  
proceedings before the Designated Judge and, although, the same was orally conveyed to the learned Judge, she rejected all the applications praying for adjournment, and completed framing of charge and fixed 19th February, 2010, for evidence. Within two weeks thereafter on 21st March, 2010, the Designated Judge also rejected the application for transit remand for 11 accused to be brought to Delhi for framing of charge in connection with the case pending in Delhi, on the ground that charge had already been framed against them and the trial had been stayed by this Court. C D

(c) Although, out of 64 accused, 42 were from outside Gujarat from eight different States, copies of the charge-sheet in Gujarati were attempted to be served on some of the accused in a show of compliance with the provisions of Section 173 Cr.P.C. which would not enable the accused to make an effective representation at the time of framing of charge. Even the copies which were served on 22 of the accused, who were Gujaratis, were found to be illegible. E F

(d) The accused were severely prejudiced by the fact that although the orders passed by the Metropolitan Magistrate or the Designated Judge were appealable, it was impossible for them to seek any further relief since the majority of the accused were from outside Gujarat and their cases were being looked after by Legal Aid counsel or by counsel appearing pro bono. G H

A 9. Mr. Bhushan submitted that it is now well- settled by this  
 Court in the case of *Zahira Habibulla H. Sheikh Vs. State of*  
*Gujarat* [(2004) 4 SCC 158] and *Maneka Sanjay Gandhi &*  
*Anr. Vs. Miss Rani Jethmalani* [(1979) 4 SCC 169], etc., that  
 B the manner in which the accused were treated by the police,  
 jail staff and the Courts are such that they create an atmosphere  
 which is not conducive to the holding of a fair trial, the cases  
 should be transferred to a neutral location in the interest of  
 justice. Mr. Bhushan submitted that as was held in *Maneka*  
 C *Sanjay Gandhi's* case (supra) and quoted with approval in  
*Zahira Habibulla H. Sheikh's* case (supra), one of the more  
 serious grounds which disturbed the conscience of the Court  
 in more ways than one, is the alleged absence of a congenial  
 atmosphere for a fair and impartial trial. Mr. Bhushan submitted  
 D that such a sentiment had been expressed as far back as in  
 1958 by Justice Vivian Bose in the case of *G.X. Francis & Ors.*  
*Vs. Banke Behari Singh & Anr.* [1958 Cr.L.J. 569= AIR 1958  
 SC 309], where his Lordship observed that good grounds for  
 transfer had been made out because of the bitterness of the  
 E local communal feeling and the tenseness of the atmosphere  
 there. His Lordship also observed that public confidence in the  
 fairness of a trial held in such an atmosphere would be seriously  
 undermined, particularly amongst reasonable Christians all over  
 India, *not because the Judge was unfair or biased, but*  
 F *because the machinery of justice is not geared to work in the*  
*midst of such conditions.* [Emphasis Supplied]

10. In support of his aforesaid contention, Mr. Prashant  
 Bhushan also referred to the decisions of this Court in *K.*  
*Anbazhagan Vs. Supdt. Of Police* [(2004 (3) SCC 767],  
 G *Surendra Pratap Singh Vs. State of U.P. & Ors.* [(2010) 9 SCC  
 475], and *Gurcharan Dass Chadha Vs. State of Rajasthan*  
 [(1966) 2 SCR 678 = AIR 1966 SC 1418]. Mr. Bhushan  
 submitted that the law as settled by this Court for transferring  
 a trial did not require the Petitioner to prove that he would be  
 H deprived of a free and fair trial, but the test is whether there

are circumstances which create a reasonable apprehension that he might not get a free and fair trial. Learned counsel further submitted that the contention of the State that the case was no longer before the Metropolitan Magistrate and that even the Designated Judge had since been changed, was of little consequence, since trial by a different Judge would not restore the invaluable rights which had been denied to the accused at the stage of framing of charge. A  
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11. Mr. Prashant Bhushan submitted that in the circumstances indicated, it was only just and proper that the Transfer Petition be allowed and that Sessions Case No.38 of 2009 pending before the Special Judge, Ahmedabad, be transferred outside the State of Gujarat for trial. C

12. Appearing for the State of Gujarat and the Inspector General of Prisons, Ms. Hemantika Wahi, learned Advocate, strongly opposed the Transfer Petition and contended that it was only after intensive investigation that charge-sheets had been filed against the accused persons who had travelled to different parts of Gujarat as a part of a criminal conspiracy under false and vexatious names and planted bombs at different locations in thickly-populated public places to cause the maximum amount of damage and terror. It was submitted that the allegation made relating to the alleged bias and/or lack of confidence in getting a free and fair trial before the Magistrate and the Designated Sessions Judge, was entirely without foundation, as were the allegations also made against the Jail Authorities. Ms. Wahi submitted that a few orders, even if held to be incorrect, could not be a ground for transferring the entire prosecution out of the State of Gujarat as that would lead to various difficulties for the prosecution in producing witnesses at the time of trial. Ms. Wahi submitted that there were a large number of witnesses in respect of the cases relating to Ahmedabad and Surat and that it would be impossible for such a large number of witnesses to be produced before a Court outside the State of Gujarat for giving D  
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A evidence before a Court where the language used was not Gujarati. Apart from the above, in all the offences which had been consolidated in one Sessions Case, there were 144 charge-sheets/supplementary charge-sheets, each containing on an average 2000 to 3000 pages. It was submitted that if the prayer made in the Transfer Petition was allowed, it would result in complete injustice, as it was most likely that the trial would end in acquittal of the accused.

C 13. Ms. Wahi also contended that the allegation of bias made against the Magistrate or Sessions Judge was no longer relevant since the matter had already been committed by the Magistrate to the Court of Sessions while the learned Sessions Judge had since been elevated as a Judge of the Gujarat High Court and the trial would be conducted by a Judge other than the said Judge against whom the allegation of bias had been made. Ms. Wahi submitted that it was not as if the Petitioners were aggrieved by the entire judiciary in the State, inasmuch as, such an allegation would be entirely misplaced and in the changed circumstances the arguments advanced in favour of transfer of the Sessions Case outside the State of Gujarat could no longer be justified and were liable to be rejected.

F 14. Ms. Wahi submitted that the decision in *Zahira Habibulla H. Sheikh's* case (supra) was on a completely different set of facts, and, in any event, each case would have to be treated on its own set of facts and merits. Even the allegation of torture in custody has not been proved to the satisfaction of the Court.

G 15. Ms. Wahi submitted that the case attempted to be made out on behalf of the Petitioners for transfer of the Sessions Trial outside the State of Gujarat, is based on suppression of material facts relating to the alleged non-supply of charge-sheet papers. It was urged that the same had been refused despite having been offered to the Petitioners and that an opportunity was duly given to the Petitioners to engage

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Advocates of their choice on their refusal to accept legal aid as offered by the Court or even from the State Legal Services Authority. In fact, most of the accused persons subsequently engaged Advocates of their choice to represent and defend them at the time of trial, which fact had been withheld from the Court. Ms. Wahi submitted that all the allegations made by the Petitioners against the Respondents were entirely false and merited rejection.

16. Having regard to the nature of the relief sought for by the Petitioners, we have considered the submissions made on behalf of respective parties and the materials on record with care and caution. It appears to us that at the initial stages of the investigation and filing of charge-sheets some amount of bias could well have been detected. However, once the matter had gone out of the hands of the Magistrate concerned, no further bias could be attributed to him. Similarly, the allegation of bias against the District & Sessions Judge was no longer available since the incumbent had been elevated to the Bench and the trial will be conducted by another learned Judge.

17. However, as pointed out by Mr. Prashant Bhushan, learned counsel appearing for the Petitioners, the manner in which the charges had been framed, without giving the Petitioners a meaningful opportunity of meeting the allegations made against them in the charge-sheet, will ultimately have a direct bearing on the trial itself. The duty of the Sessions Court to supply copies of the charge-sheet and all the relevant documents relied upon by the prosecution under Sections 207 and 208 Cr.P.C. is not an empty formality and has to be complied with strictly so that the accused is not prejudiced in his defence even at the stage of framing of charge. The fact that many of the accused persons were not provided with copies of the charge-sheet and the other relevant documents, as indicated in Sections 207 and 208 Cr.P.C., seriously affects the right of an accused to a free and fair trial. In the instant case, in addition to the above, it has also to be kept in mind that most

A of the accused persons in this case are from outside the State  
of Gujarat and are not, therefore, in a position to understand  
the documents relied upon by the police authorities as they were  
in Gujarati which most of the accused were unable to  
comprehend. Their demand for translated copies of the  
B documents met with no response, and ultimately it was the very  
same documents in Gujarati, which were supplied to some of  
the accused in some of the cases.

C 18. The physical torture which was said to have been  
inflicted on the Petitioners has come on record by way of  
affidavits to which there is no suitable explanation. Furthermore,  
the accused persons were not allowed to meet their lawyers  
without police presence, and as stated by them, it is only natural  
that an accused in custody will have second thoughts before  
making or reiterating allegations of torture against the very  
D persons to whose custody they would have to return.

E 19. Apart from the above, we also have to consider Ms.  
Wahi's submissions regarding the convenience of the  
prosecution which intends to produce a large number of  
witnesses, who are all said to be residents of the State of  
Gujarat. It has been submitted by Ms. Wahi that the examination  
of such a large number of witnesses could be compromised  
and/or jeopardized in the event they are required to travel  
outside the State of Gujarat in connection with the trial. There  
F will also be a language problem for the witnesses to be  
examined outside the State of Gujarat, since the majority of the  
witnesses were acquainted mostly with Gujarati and would be  
at a disadvantage in providing a true picture of the series of  
incidents relating to the bomb blasts which were triggered off  
G in the cities of Ahmedabad and Surat on 26th July, 2008.

H 20. However, in our criminal justice delivery system the  
balance tilts in favour of the accused in case of any doubt in  
regard to the trial. The Courts have to ensure that an accused  
is afforded a free and fair trial where justice is not only done,  
but seen to be done and in the process the accused has to be

given the benefit of any advantage that may enure to his/her A  
favour during the trial. As was observed by this Court in  
*Commissioner of Police Vs. Registrar, Delhi High Court*  
[(1996) 6 SCC 323], Article 21 of the Constitution enshrines  
and guarantees the precious right of life and liberty to a person,  
deprivable only on following the procedure established by law B  
in a fair trial, assured of the safety of the accused. Except in  
certain matters relating to economic offences or in regard to  
national security, the burden lies heavily on the prosecution to  
prove its case to the hilt and it is rarely that the accused is called  
upon to prove his innocence. C

21. This is a case where the apprehension of the accused  
being denied a free and fair trial within the State of Gujarat has  
to be considered on the weight of the materials produced on  
behalf of the accused in support of such apprehension and the  
prejudice that may also be caused to the prosecution in D  
presenting its case. That the facts involved in this case are of  
a sensitive nature, cannot be denied, but that by itself cannot  
be a ground for transfer of the trial outside the State of Gujarat.  
A good deal of care and caution has to be exercised to see E  
whether the accused/petitioners have been able to make out  
a case of bias and prejudice on the part of the State or the  
prosecuting authorities which raises a very real and plausible  
ground for transferring the trial pending before the Special  
Judge, Ahmedabad outside the State of Gujarat. Apart from the  
above, what has also to be taken into consideration is a F  
conceivable surcharged communal climate which could have  
a direct bearing on the trial itself. The Court has to undertake  
a balancing act between the interest of the accused, the victims  
and society at large in the focus of Article 21 of the Constitution  
to ensure a free and fair trial to the accused. G

22. The question involved in this case has earlier fallen for  
consideration in various other cases before this Court which  
have been referred to hereinbefore. It will be profitable to refer  
to some of the observations made by this Court in such cases. H

A 23. In this regard, we may first refer to a three-Judge Bench  
decision in the case of *G.X. Francis & Ors.* (supra), where also  
this Court was considering a Transfer Petition filed on the  
apprehension of bias in the minds of the accused. The said  
petition involved the transfer of a complaint wherein the accused  
B were said to have been concerned in one way or the other in  
defamatory statements against the complainant regarding a  
publication known as the "Niyogi Report". Authoring the  
judgment on behalf of the Bench, Vivian Bose, J. observed that  
C where there is unanimity of testimony from both sides about the  
nature of the surcharged communal tension in the area in  
question and the local atmosphere is not conducive to a fair  
and impartial trial, there is a good ground for transfer. The  
learned Judge also observed that public confidence in the  
fairness of a trial held in such an atmosphere would be seriously  
D 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".

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24. We may now refer to another three-Judge Bench  
decision of this Court in the case of *Gurcharan Dass Chadha  
Vs. State of Rajasthan* [(1966) 2 SCR 678 = AIR 1966 SC  
1418], which also involved a Transfer Petition based on the  
F ground of reasonable apprehension on the part of the petitioner  
that justice would not be done to him by the Court before whom  
the trial was pending under the provisions of the Penal Code  
and the Prevention of Corruption Act. While disposing of the  
matter, this Court observed as follows :

G "A case is transferred if there is a reasonable  
apprehension on the part of a party to a case that justice  
will not be done. A petitioner is not required to demonstrate  
that justice will inevitably fail. He is entitled to a transfer if  
H he shows circumstances from which it can be inferred that

he entertains an apprehension and that it is reasonable in the circumstances alleged. It is one of the principles of the administration of justice that justice should not only be done but it should be seen to be done. However, a mere allegation that there is apprehension that justice will not be done in a given case does not suffice. The Court has further to see whether the apprehension is reasonable or not.”

25. The aforesaid question once again cropped up in *Maneka Sanjay Gandhi & Anr. Vs. Miss Rani Jethmalani* [(1979) 4 SCC 169], in a Transfer Petition filed, inter alia, on three grounds, namely,

- (i) that the parties (complainant and petitioners) reside in Delhi and some formal witnesses also belong to Delhi;
- (ii) that the petitioner is not able to procure competent legal service in Bombay; and
- (iii) that the atmosphere in Bombay is not congenial to a fair and impartial trial of the case against her.

Referring to the decision in *G.X. Francis's* case (supra) a Three-Judge Bench of this Court, dismissed the Transfer Petition upon holding that none of the allegations made by the petitioner made out a case that a fair trial was not possible in the Court where the matter was pending. The mere words of an interested party was insufficient to convince the Court that she was in jeopardy or the Court might not be able to conduct the case under conditions of detachment, neutrality or uninterrupted progress. This Court, however, went on to say that it could not view with unconcern the potentiality of a flare up and the challenge to a fair trial. In such circumstances, this Court made certain precautionary observations to protect the petitioner and to ensure for her a fair trial. In *K. Anbazhagan Vs. Superintendent of Police, Chennai & Ors.* [(2004) 3 SCC

A 788], while disposing of two transfer petitions, the learned Judges observed as follows :

B "A free and fair trial is a sine qua non of Article 21 of the Constitution. It is trite law that justice should not only be done but it should be seen to have been done. If the criminal trial is not free and fair and not free from bias, judicial fairness and the criminal justice system would be at stake shaking the confidence of the public in the system and woe would be the rule of law. It is important to note that in such a case the question is not whether the petitioner is actually biased but the question is whether the circumstances are such that there is a reasonable apprehension in the minds of the petitioner."

D 26. Before we proceed to the latest views expressed by this Court in a Transfer Petition also praying for transfer of a trial outside the State of Gujarat on account of bias and a vitiated communal atmosphere, we may refer to a slightly different view taken by this Court by a Bench of two-Judges in the case of *Abdul Nazar Madani Vs. State of T.N. & Anr.* E [(2000) 6 SCC 204]. While disposing of a Transfer Petition filed by the accused in the Coimbatore Serial Bomb Blasts case on the allegation that the atmosphere in the State of Tamil Nadu in general and in Coimbatore in particular, being so communally surcharged that his fair and impartial trial there would be seriously impaired, this Court held that the purpose of a criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. This Court observed that the apprehension of not getting a fair and impartial inquiry or trial is required to be reasonable and not imaginary, based upon conjectures and surmises. The mere existence of a surcharged atmosphere without there being proof of inability of the Court of holding a fair and impartial trial, could not be made a ground for transfer of a case. The alleged communally surcharged atmosphere has to be considered in the light of the accusations made and the nature of the crimes committed by the accused

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seeking transfer of the case. It was observed that no universal and hard and fast rules can be prescribed for deciding a Transfer Petition which has always to be decided on the basis of the facts of each case.

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27. As has been stated hereinbefore, in *Zahira Habibulla H. Sheikh's* case (supra), in order to ensure a free and fair trial the atmosphere in which the case is tried should be conducive to the holding of a fair trial. The absence of a congenial atmosphere for such a fair and impartial trial was held to be a good ground for transfer of the case from Gujarat to Maharashtra.

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28. However, such a ground, though of great importance, cannot be the only aspect to be considered while deciding whether a criminal trial could be transferred out of the State which could seriously affect the prosecution case, considering the large number of witnesses to be examined to prove the case against the accused. The golden thread which runs through all the decisions cited on behalf of the parties, is that justice must not only be done, but must also be seen to be done. If the said principle is disturbed, fresh steps can always be taken under Section 406 Cr.P.C. and Order XXXVI of the Supreme Court Rules, 1966 for the same reliefs.

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29. The offences with which the accused have been charged are of a very serious nature, but except for an apprehension that justice would not be properly administered, there is little else to suggest that the charged atmosphere which existed at the time when the offences were alleged to have been committed, still exist and was likely to prejudice the accused during the trial. All judicial officers cannot be tarred with the same brush and denial of a proper opportunity at the stage of framing of charge, though serious, is not insurmountable. The accused have their remedies elsewhere and the prosecution still has to prove its case. As mentioned earlier, the communally surcharged atmosphere which existed

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A at the time of the alleged incidents, has settled down considerably and is no longer as volatile as it was previously. The Presiding Officers against whom bias had been alleged, will no longer be in charge of the proceedings of the trial. The conditions in Gujarat today are not exactly the same as they  
B were at the time of the incidents, which would justify the shifting of the trial from the State of Gujarat. On the other hand, in case the Sessions Trial is transferred outside the State of Gujarat for trial, the prosecution will have to arrange for production of its witnesses, who are large in number, to any venue that may  
C be designated outside the State of Gujarat. At the present moment, the case for transfer of the trial outside the State of Gujarat is based on certain incidents which had occurred in the past and have finally led to the filing of charges against the accused. The main ground on which the Petitioners have  
D sought transfer is an apprehension that communal feelings may, once again, raise its ugly head and permeate the proceedings of the trial if it is conducted by the Special Judge, Ahmedabad. However, such an allegation today is more speculative than real, but in order to dispel such apprehension, we also keep it open to the Petitioners that in the event the apprehension of the  
E petitioners are proved to be real during the course of the trial, they will be entitled to move afresh before this Court for the relief sought for in the present Transfer Petition.

F 30. The Transfer Petition is disposed of with the aforesaid observations. There will be no order as to costs.

B.B.B.

Transfer petition disposed of.