

(2010) 09 CAL CK 0025

Calcutta High Court

Case No: C.R.R. No. 2093 of 2010

Central Bureau of Investigation

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: Sept. 8, 2010

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 164, 167, 167(2), 401, 407
- Explosive Substances Act, 1908 - Section 3, 4
- Penal Code, 1860 (IPC) - Section 427
- Railways Act, 1989 - Section 150, 151
- Unlawful Activities (Prevention) Act, 1967 - Section 16, 18

Citation: (2011) 1 CHN 801 : (2011) 2 Crimes 389

Hon'ble Judges: Ashim Kumar Roy, J

Bench: Single Bench

Advocate: Himangshu De and Navanil De, for the Appellant; Shiladitya Sanyal, for O.P. Nos. 2 to 6, Mrityunjay Chatterjee, for O.P. No. 7, Asish Roy, for O.P. No. 8 and Balai Chandra Ray and Tirthankar Ghosh for State, for the Respondent

Final Decision: Allowed

Judgement

Ashim Kumar Roy, J.

On May 28, 2010 at around 20.40 hours while 2102 UP Howrah - LTT Jnaneshwari Express was passing through KM 134/17 between Khemasuli and Sardiha Railway Station, at Kharagpur-Tata Nagar Section the said train was derailed and about 153 passengers were killed and more than thousand passengers were severely injured. Since on preliminary investigation it was found that was a case of sabotage and malicious wrecking of railways, the driver of the said locomotive lodged a complaint to the Officer-in-Charge, G.R.P.S., Jhargram. Whereupon, Jhargram G.R.P.S. FIR No. 05/10 u/s 427 of the Indian Penal Code and under Sections 150 / 151 of the Indian

Railways Act and under Sections 3 / 4 of the Indian Explosive Substance Act was registered and on June 3, 2010, the police arrested accused Khagen Mahato and on June 7, 2010 accused Samir Mahato.

2. In the meantime, having regards to the seriousness of the crime the charge of investigation was transferred to the Central Bureau of Investigation (for the sake of brevity hereinafter referred to as "CBI") pursuant to a notification issued u/s 5 of the Delhi Special Police Establishment Act, on June 3, 2010 by the Central Government and a corresponding notification issued u/s 6 of the said Act on June 7, 2010 by the State of West Bengal. The CBI after taking over of the charge of the aforesaid case registered a regular case being the Case No. R.C. 4/S/2010 dated June 9, 2010 u/s 427 of the Indian Penal Code and under Sections 150 / 151 of the Indian Railways Act and under Sections 3/ 4 of the Indian Explosive Substance Act and under Sections 16 / 18 of the Unlawful Activities (Prevention) Act, 1967 by treating the FIR relating to the Jhargram G.R.P.S. Case No. 5/10 as the original FIR of the case. Immediately after taking over the charge of investigation on June 14, 2010 and June 18, 2010 the C.B.I. arrested accused Hiralal Mahato and accused Bhola Nath Mahato respectively. Thereafter on June 19, 2010 both the accuseds Bapi Mahato and Bimal Mahato were arrested, while accused Amiya Mahato was arrested on June 22, 2010.

3. Now, invoking Sections 401 and 482 of the Code of Criminal Procedure read with Section 407 of the Code, the C.B.I. moved this application seeking transfer of the proceedings relating to Case No. R.C. 4/S/2010 dated June 9, 2010 corresponding to RLY. G.R. Case No. 5/10, pending before the Learned Additional Chief Judicial Magistrate, Jhargram, arising out of Jhargram G.R.P.S. Case No. 05/10 to any other Court at Kolkata preferably to the C.B.I. Court situated at Bichar Bhavan (for the sake of brevity the aforesaid application for transfer is hereinafter referred to as "this application").

After filing of this application the C.B.I. filed as many as four supplementary affidavits in connection therewith and another application for addition of the accused persons as the opposite parties, who were arrested during the pendency of hearing of this application.

4. During the pendency of this application, the C.B.I. arrested five more accused persons. On July 7, 2010 while accused Manik Mahato and Laxman Mahato were arrested, the accused Jaladhar Mahato, Altab Hossain Syed and Tapan Mahato were arrested on July 31, 2010, August 5, 2010 and on August 8, 2010 respectively.

It is an admitted position that till date the investigation of the case has not been completed and C.B.I. has not submitted its report in final form.

5. Mr. Himangshu De, the Learned Senior Advocate and the Special Public Prosecutor appearing on behalf of the C.B.I. submitted before this Court that during investigation it transpired that some of the senior leaders of Police Santras Birodhi Janasadharaner Committee, a frontal organization of Maoist activists and other left

wing extremist groups were very much involved in the commission of the crime and from the confessional statements of two of the accused persons recorded u/s 164 of the Code of Criminal Procedure, not only the involvement of those persons, who were still at large, were unfolded, the modus operandi and other details had also been divulged. He further submitted that all the arrested accused persons were now in jail custody and had been detained and confined at the Midnapore Central Correctional Home and after expiry of remand periods they were produced before the Learned Additional Chief Judicial Magistrate, Jhargram, on regular interval and on the very particular day fixed by the Court, while passing order of remand. According to Mr. Himangshu De, the Learned Counsel of C.B.I., the distance between the Midnapore Central Correctional Home and the Court of the Learned Additional Chief Judicial Magistrate, Jhargram is nearly 50/60 kilometers and not only in Jhargram area but in an around the entire Paschim Midnapore District, the Maoist extremist and People Committee against Police Atrocities (PCPA) and other leftist extremist wings are quite active and the entire area was fully dominated by them and the regular incident of land mines blasts, attacked on police personnels, destroying and damaging the public properties, murder and abduction of the innocent persons, at the behest of the terrorist, are quite rampant, to strike terror amongst people. He further submitted on each remand date the accused persons and the police team escorted them have to travel through a dense forest which runs into about 20/25 kilometers and such area is fully infested with the terrorist activities and under their complete control. Mr. De then submitted in view of the surcharged atmosphere prevailed in the area, it was reasonably apprehended, that the escorting police team as well as the accused persons, at any time, on their way to Court from the Correctional Home or on their return, at a known time and date, via such dense forest, shall be attacked by the terrorists not only to take revenge against the police personnel due to the reason in several encounters many of their leaders were killed but also to eliminate the accused persons, who in their judicial confessions implicated the leaders of the terrorists group and the details as to how such crime was committed and to cause disappearance of the evidence of crime as well as to free the other accused persons now in custody. Mr. De further submitted that the local police has also expressed their inability to provide adequate forces due to the paucity of the security personnel at their command and the Superintendent of Police, Jhargram has advised and suggested the C.B.I. for taking steps for transfer of the case from Jhargram to Kolkata. Mr. De lastly submitted that it would be expedient in the interest of justice that the case be transferred to Kolkata as prayed for, and the accuseds be confined at the Presidency Correctional Home, Kolkata, which would not cause any prejudice to the accused persons and C.B.I. was ready and willing to take the responsibilities and to bear all the expenses for the relations of the accused persons to visit them at the Correctional Home once in every month as permitted under the provisions of the West Bengal Correctional Services Act. Mr. De in support of his submissions relied upon the following decisions;

(i) State (CBI) v. Klichine Aleksandre and Ors. reported in 1996 (1) CHN 507, (ii) Mrs. Maneka Sanjay Gandhi and Anr. v. Miss Rani Jethmalani reported in 1979 SCC (Cri) 934, (iii) Zahira Habibulla H. Sheikh and Anr. v. State of Gujarat and Ors. reported in 2004 SCC (Cri) 999, (iv) Sri Jayendra Saraswathy Swamigal (II), T.N. v. State of T.N. and Ors. reported in (2006) 1 SCC (Cri) 1, (v) [Bhimappa Basappa Bhu Sannavar Vs. Laxman Shivarayappa Samagouda and Others](#), , (vi) [Central Bureau of Investigation \(C.B.I.\) Vs. Hopeson Ningshen and Others](#), .

Mr. Asish Roy appearing on behalf of the accused/opposite party no. 8, Mr. Mrityunjoy Chatterjee appearing for the accused/opposite party no. 7 and Mr. Shiladitya Sanyal appearing on behalf of the accused opposite party Nos. 2, 3, 4, 5, 6 vehemently opposed the prayer for transfer. According to them invoking Section 407 of the Code of Criminal Procedure, only the enquiry, trial and appeal can be transferred, but there is no scope for seeking transfer of a proceeding, which is still under the stage of investigation. According to them the allegations are all unfounded and the apprehension of the C.B.I. has no reality. There was no proof of any threat either against the C.B.I. or against the accused persons and no single incident of attempt to attack the police party escorting the accused persons on their way to Court had ever happened. It was vehemently urged that not only the C.B.I. has failed to make out a case justifying transfer but if the proceeding at this stage, is transferred as prayed for same would cause immense hardship to the accused persons in their defence and they would be deprived from a fair and impartial trial. It was further submitted since no trial has been commenced as yet and case is pending before a Court of Magistrate the production of the accuseds before the Court may be done by availing the medium of Electronic Video Linkage.

Mr. Sanyal vehemently urged before this Court that the Midnapore Central Correctional Home, where the accused persons had been confined was adequately protected and secured, both from outside and inside and as such there cannot be any apprehension as regards to the safety and security of the accused persons at the said Correctional Home and the C.B.I. has not expressed its anguish over the security arrangement followed at the Correctional Home. No single incident was ever occurred wherefrom it can safely be inferred that the safety and security of the escorting police party as well as the accused persons were at stake. There was no contemporaneous record to show that the C.B.I. was advised by the Superintendent of Police, Paschim Midnapore for seeking transfer of the proceedings from Jhargram to Kolkata. The apprehension of encounter in course of transportation of the accused persons from the Correctional Home to Court is totally baseless and is imaginary. Mr. Sanyal further submitted that the accused/opposite party No. 2 has been arraigned as accused in as many as eight cases registered at Jhargram Police Station, therefore, it would not at all be prudent to transfer this particular case to Kolkata while other cases against him would still be pending before the Court at Jhargram. The Learned Counsel for the accused/opposite parties in support of their submissions relied on the following cases, viz., (i) Ranjit Singh v. Hon'ble The Chief

Justice and Ors. reported in 1986 Cri. L.J. 632, (ii) Kehar Singh and Ors. v. State (Delhi Administration) reported in 1988 SCC (Cri) 711, (iii) State v. Samar Dutta and Ors. reported in 2004 C Cr LR (Cal) 821, (iv) Captain Amarinder Singh v. Parkash Singh Badal and Ors. reported in (2009) 2 SCC (Cri) 971, (v) [Dr. Ram Chander Singh Sagar and Another Vs. State of Tamil Nadu and Another,](#)

On the other hand, the Learned Advocate General appearing on behalf of the State lent full support to the stand taken by the C.B.I. According to him, this is a case of sabotage by Terrorist Act, where several innocent persons have been victimized and more than 150 passengers were killed and thousands were injured. It is an extraordinary case to subvert the democratic structure of the State by striking terror upon the people at large and not a simple case of mere killing. According to the Learned Advocate General, during the last few years several cases have been registered at the Jhargram Police Station, over the incident of attacking the police personnels by the terrorist and causing death and injuries to the innocent people and damage and destruction to public properties by using explosives and land mines. He further submitted it may not be possible for the State police to provide adequate force for the safety and security to the escorting police team and to the accused persons, on the face of this tremendous threat perception. The Learned Advocate General further submitted that this is an application, moved not only invoking Section 407 of the Code of Criminal Procedure, but also invoking the inherent jurisdiction of this Court u/s 482 of the Code of Criminal Procedure. According to him the whole object of inherent jurisdiction is to secure the ends of justice and to do the real and substantial justice and the inherent jurisdiction can be taken recourse to in appropriate cases, where there is neither any expressed provision in the Code providing the remedy nor any prohibition. He further submitted a party seeking transfer of a criminal case only obliged to show that there is a reasonable apprehension that justice will not be done and is not at all required to demonstrate that justice will inevitably fail. The party is entitled to transfer, if he is able to show circumstances from which it can be inferred that the apprehensions he entertains is reasonable. In this connection the Learned Advocate General relied on the following decisions, viz., (i) [Gurcharan Das Chadha Vs. State of Rajasthan,](#) (ii) [M.V. Elisabeth and Others Vs. Harwan Investment and Trading Pvt. Ltd., Hanoekar House, Swatontapeth, Vasco-De-Gama, Goa,](#) (iii) Dupeyron and Anr. v. Driver reported in 23 Cal. 495.

6. Heard the Learned Counsels appearing on behalf of the parties. Perused the materials on record as well as the case laws cited by them.

7. Now, before adverting to the rival submissions of the parties it may be recorded that in spite of giving liberty to the parties to file affidavits, the State did not file any affidavit, although it is the primary responsibility of the State to maintain the law and order within its territory. Be that as it may, as this Court felt for just decision of the case, it is extremely essential to assess the law and order situation in and

around the area and actual threat perception against the accused persons and the escorting police party, accordingly reports were called for from the Director General and Inspector General of Police, West Bengal as well as from the Superintendent of Midnapore Central Correctional Home and from the Court belows. They have submitted their reports and same are with the records.

8. At the behest of the C.B.I. this application for transfer has been brought before this Court at a stage, when investigation is still proceeding and no report in final form has been filed, nor the case has been culminated into a trial. Therefore, invoking the power conferred u/s 407 of the Code of Criminal Procedure no order of transfer can at all be made. However, this Court is not unmindful about the wide amplitude of its inherent jurisdiction, which conferred upon this Court, an extraordinary power, amongst other, to secure ends of justice and in other words to do the real and substantial justice for which alone it exists. As the law stands inherent jurisdiction can be exercised by High Court, not only when an application therefore is filed but also suo moto, even while exercising other jurisdictions. In this connection reliance may be placed on the decision of the Hon"ble Supreme Court in the case of *Popular Muthiah v. State* reported in (2006) 3 SCC (Cri) 245. Be that as it may, the C.B.I. has however moved this application both by invoking Section 407 of the Code as well as Section 482 of the Code. It is well settled that the inherent power of the High Court must not be resorted to if there is expressed provision in the Code or in other enactment for the redress of the grievance of the aggrieved party or there is expressed bar in the Code. In the Code of Criminal Procedure neither there is expressed provision to deal with a matter relating to transfer of any proceeding at the stage of investigation relating to remand of accused nor there is any embargo. Now, having regards to the case of the petitioner and the materials on record, in my opinion, a case for invoking inherent jurisdiction of this Court to consider the question of transfer has been made out.

9. According to the provisions of Section 167(2) of the Code of Criminal Procedure, in every case whenever any person is arrested and detained in custody and it appears that investigation cannot be completed within a period of 24 hours, fixed by Section 57 and there are grounds for believing that the accusation or information is well founded, the police officer making investigation shall forthwith transmit the accused to the nearest Judicial Magistrate. Such Magistrate to whom the accused is forwarded under the said section, whether he has or has not jurisdiction to try the case but has the jurisdiction to commit the case for trial, may authorize the detention of the accused in such custody, as such Magistrate thinks fit for a term not exceeding 15 days in the whole. Since this is a case involving offences punishable under the Unlawful Activities (Prevention Amendment) Act, 2008, with reference to Section 167 of the Code, "15 days shall be construed as 30 days". Although under the said provisions, no Magistrate is empowered to authorize detention of an accused in the custody of the police unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in

police custody but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through medium of Electronic Video Linkage.

Since, it appears from the reports submitted by the Superintendent, Midnapore Central Correctional Home as well as by the Registrar General of our High Court, there is no facility available at the Midnapore Central Correctional Home for production of the accused in Court through the medium of Electronic Video Linkage and nor there is any feasibility of installing such system in a short time, the question of production of the accused through the Video Linkage System in the Court does not at all arise.

10. The real question that arises for decision in this application, is not whether, it would be expedient in the interest of justice or for an impartial and fair trial, the remand proceeding during the midst of investigation be transferred from the Court of the Learned Additional Chief Judicial Magistrate, Jhargram to the C.B.I. Court at Kolkata. It is nobodies case that before the Court below where the remand proceeding is pending, dispensation of justice is not secured or otherwise at peril. However, in this case transfer has been sought for by the C.B.I., in the midst of investigational proceedings on the ground of threat perception against the accused persons and the escorting police party on their way to Court from the Correctional Home and vice versa through the dense forest, due to the reasons that the attempt may be made by the underground outfit of such extremist and terrorist groups, to eliminate the accused persons who have made judicial confessions disclosing the identity of the other accused persons, who happened to be the Senior Leaders of the extremist groups, viz., the leaders of Maoist groups, left wing extremist groups, People Committee against Police Atrocities (PCPA), Police Santras Birodhi Janasadharaner Committee (PSBJC), who are still at large, and further disclosing the modus operandi about the commission of the crime and other details and to free the other accuseds. In other words, transfer of remand proceedings has been sought for to ensure the safety and security of the accuseds, who are truly cooperating with the C.B.I. and that of the escorting police party and to prevent release of other accused persons by landing attack on the police.

Although it has been claimed by the C.B.I. that this application for transfer has been instituted on the advice of the Superintendent of Police, Jhargram, but no contemporaneous record as to the same has been produced before this Court in spite of having sufficient opportunity but in the supplementary affidavit affirmed on July 23, 2010, only a list of cases registered at Jhargram Police Station against the activists of C.P.I. (Maoists)/Police Santras Birodhi Janasadharaner Committee, People Committee against Police Atrocities, Sidhu Kanu Gana Militia and other Left Wing extremist group has been filed, which clearly shows the area situated within the Jhargram Police Station are now heavily surcharged with the terrorist activities. It further appears from the report submitted by the Director General and Inspector

General of Police, West Bengal, accompanied by a report of the Superintendent of Police, Paschim Midnapore, that the distance between the Midnapore Central Correctional Home and the Court of the Learned Additional Chief Judicial Magistrate, Jhargram is about 65 kilometers and it passes through NH - 60 and NH - 6 and the stretch of road from Lodashuli to Jhargram Court is about 14 kilometers and is forest area and villages on both sides of road are infested with the terrorist and since the date of production is made known in advance, there is every possibilities of attacking the escorting police team by the terrorists during transit, to free the accused persons. But from the self-same police report it appears that Midnapore Sadar Court is situated at the heart of the Midnapore Town and is about 2/4 kilometers from the Midnapore Central Correctional Home and the law order situation of the town is normal. It further appears from the said police report that on the face of the threat perception of the accused persons and escorting police party, it is quite possible to extend sufficient security coverage to the accuseds and the escorting police party by strengthening the deployment of armed police escort and that would be adequate in the present scenario existing in the areas between the Correctional Home and the Sadar Court, Paschim Midnapore.

11. In view of above, although this Court is of the opinion that the C.B.I. has been able to make a good case for transferring the remand proceedings as prescribed u/s 167 of the Code of Criminal Procedure from the Court of Learned Additional Chief Judicial Magistrate, Jhargram, but failed to make out any case justifying transfer of the same to the C.B.I. Court at Kolkata. It is never the case of C.B.I. that safety and security of the accused persons at Midnapore Central Correctional Home are at stake, except the mere allegations that Chatradhar Mahato, one of the leader of Police Santras Birodhi Janasadharaner Committee has also been confined there. Moreover, transfer of accuseds from one correctional home to another can always be done by the Administrative Authority, if situation so arises. However, considering the facts that really there is a serious threat perception existing against the escorting police team for release of extremists accuseds and against the accuseds, who confessed the guilt and implicated the leaders of the terrorist groups, the principal offender who are still at large, and taking into consideration the aforesaid police reports in my opinion it would be expedient in the interest of justice that remand proceedings u/s 167 of the Code of Criminal Procedure relating to the RLY. G.R. Case No. 05/2010, corresponding to R.C. Case No. 4/S/2010 now pending before the Learned Additional Chief Judicial Magistrate, Jhargram, be transferred to the Court of Learned Chief Judicial Magistrate, Sadar Court Paschim Midnapore.

Accordingly, it is directed the records relating to the aforesaid case be transferred from the Court of the Learned Additional Chief Judicial Magistrate, Jhargram to Learned Chief Judicial Magistrate, Sadar, Paschim Midnapore at once and henceforth the accuseds will be produced on remand before the Court of Learned Chief Judicial Magistrate, Sadar Court, Paschim Midnapore.

This application thus stands partly allowed.

The Registrar General of this Court is directed to communicate this order to the Court below at once.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.