

CASE NO.:
Appeal (crl.) 61-62 of 2005

PETITIONER:
Fatima Riswana

RESPONDENT:
State Rep. By A.C.P., Chennai & Ors.

DATE OF JUDGMENT: 11/01/2005

BENCH:
N.Santosh Hegde & S.B.Sinha

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl) Nos.1518-1519 of 2004)
Criminal Appeal Nos. 61-62 of 2005
(Arising out of SLP(Crl.)Nos.1518-1519 of 2004
With

CRIMINAL APPEAL NO. 63 OF 2005
(Arising out of SLP (Crl) No. 1606 of 2004)

SANTOSH HEGDE, J.
Heard learned counsel for the parties.
Leave granted.

The appellant is a prosecution witness in S.C. No. 9 of 2004 wherein respondents 2 to 6 are the accused facing trial for offences punishable under Section 67 of Information Technology Act, 2000 r/w Section 6 of Indecent Representation of Women (Prohibition) Act, 1986, u/s 5 & 6 of Immoral Traffic (Prevention) Act, 1956, u/s 27 of Arms Act, 1959 and Sections 120 (B), 506 (ii), 366, 306 & 376 I.P.C. The said trial relates to exploitation of certain men and women by one of the accused Dr. L. Prakash for the purpose of making pornographic photos and videos in various acts of sexual intercourse and thereafter selling them to foreign websites. The said sessions trial came to be allotted to the V Fast Track Court, Chennai which is presided over by a lady Judge. That court also happened to be the "Mahila Courts" constituted vide Government Notification G.O.Ms. No. 556 Home (Courts II) Department of the Tamil Nadu Government, constituted to exclusively deal with offences against women and for speedy trial of cases of offences committed against women and also case under other Social Laws enacted by the Central and the State Governments for the protection of women.

When the said trial before the V Fast Track Court was pending certain criminal revision petitions came to be filed by the accused against the orders made by the said court rejecting their applications for supply of copies of 74 Compact Discs (CDs) containing pornographic material on which the prosecution was relying. The said revision petitions were rejected by the Madras High Court by its order dated 13th February, 2004 holding that giving all the copies of the concerned CDs might give room for copying such illegal material and illegal circulation of the same, however the court permitted the accused persons to peruse the CDs of their choice in the Chamber of the Judge in the presence of the accused, their advocates, the expert, the public prosecutor and the Investigating Officer. While doing so the High Court observed thus :-

"Learned Public Prosecutor and the Learned Counsel for the petitioners submitted that there will be some embarrassment for them to view

the said C.Ds in the Chambers of the learned District Judge who is a lady Officer. It is true that there may be some embarrassment for the Presiding Officer of the said Court when she being a lady Officer. But, neither the counsel for the accused nor the accused themselves have filed any application for transfer of the said case to some other court presided by a male officer. In such circumstances, it is open to the learned District Judge concerned whether the said case should be transferred to some other court, if she feels embarrassment or it is open to the parties themselves to file transfer petitions at the earliest opportunity without causing any further delay in the trial of the case since already this court has ordered expeditious trial of the case since all the accused are in jail. (Emphasis supplied).

It is seen from the above that the court anticipated the possibility of some embarrassment being caused to the Presiding Officer who was a lady if the CDs were to be viewed in the Chamber of the Judge in the company of other male persons, therefore, the court observed that if the Presiding Officer felt any embarrassment in trying the case she could transfer the case to another appropriate court presided over by a male Judge.

After the above order was made and the matter went back to the concerned Fast Track Court another criminal revision petition, (Criminal O.P. No. 5989 of 2004) was filed by the 6th respondent herein who is an accused in the trial possibly taking clue from the observations made by the High Court in the previous revision petition, for transfer of the sessions case from the file of the V Fast Track Court to another court within the jurisdiction of Chennai and presided by a male Judge. It is in this revision petition that the High Court by the impugned order has directed the transfer of S.C. No. 9 of 2004 from the file of the V Fast Track Court, Chennai (which as stated above is presided by a lady Judge) to the file of IV Fast Track Court, Chennai which is presided over by a male Judge. The basis of the transfer was that the entire proceedings in the said trial would be about the exploitation of women and their use in sexual escapades by the accused, and the evidence in the case is in the form of CDs, and viewing of which would be necessary in the course of the trial, therefore, for a woman Presiding Officer it would cause embarrassment. While transferring the said case on the above ground the High Court recorded the consent of the public prosecutor for such transfer. But it is pertinent to note that while so transferring the witnesses like the appellants herein were not heard because they were not parties to the proceedings nor did the court take into consideration the object of the creation of Mahila Courts.

Soon after coming to know of the transfer of the sessions trial from the V Fast Track Court to IV Fast Track Court, the appellant moved a criminal revision petition O.P. No. 9528 of 2004 contending that such transfer of the case from a court presided over by lady Judge to a court presided over by a male Judge would embarrass the appellant, she being a woman. It was also contended that such transfer runs counter to the object of the creating the Mahila Courts as also to the decision of this Court in the case of State of Punjab vs. Gurmit Singh 1996 (2) SCC 384. The High Court rejected the said prayer of the petitioner hence this appeal. In this appeal the learned senior counsel appearing for the appellant contended the entire approach of the High Court in the instant case runs counter to the interest of the witnesses who are really in the shoes of victims. It is also contended that the concerned

Presiding Officer having not expressed any embarrassment in conducting the trial herself the court could not have presumed such an embarrassment based on the fact that the Presiding Officer is a lady officer. It is submitted that the embarrassment arises from an attitude of mind of a person and the same cannot be confined to lady Officer alone. Hence, the High Court ought not to have transferred the case solely on the ground that the V Fast Track Court is presided over by a lady Officer. At any rate, it is contended that when the appellant brought to the notice of the court the problems faced by her in view of the transfer of the said case to a court presided over by a male Presiding Officer the High Court ought to have appreciated her point of view and allowed the petition by re-transferring the trial to IV Fast Track Court.

Countering the above argument of the learned counsel for the respondents contended the law officer appearing in the case had expressed their embarrassment in conducting the trial before a lady Presiding Officer and even though the Presiding Officer did not expressly record her embarrassment, it was apparent that she too wanted the case to be transferred to another court, therefore, this Court should not interfere with the order of transfer. It is also submitted on behalf of the respondents that the appellant though arrayed as a witness, for all purposes was an accused herself being involved in the illegal activities of accused No. 1, hence re-transferring at her request should not be permitted. It is also submitted that the High Court has erred in not granting the copies of the CDs on which the prosecution based its case.

The last of the argument pertaining to the issuance of copies of CDs need not be gone into in this appeal because same does not arise in this appeal. We are also told that the respondents have already filed another SLP challenging that part of the High Court order by which they were denied the copies of the CDs. Therefore, we will confine ourselves to the correctness of the order of transfer of the sessions trial from V Fast Track Court to IV Fast Track Court by the High Court and the correctness of the rejection of the petition filed by the appellant for re-transferring the case to the V Fast Track Court.

As noted above, the sole ground on which the High Court directed the transfer of the case at the instance of the accused on 13-2-2004 was that the proceedings in the trial being one involving pornographic acts and the evidence in the case is such that it would embarrass a lady Presiding Officer. It is to be noticed herein the concerned lady Presiding Officer has not sought for or directed the transfer of the case. This is an inference drawn by the High Court merely based on the fact that the Presiding Officer is a lady. It is also to be noticed at this stage that at an earlier stage the High Court had given the choice of the transfer to the Presiding Officer herself but she did not direct or seek the transfer of the trial. In this background, we are unable to accept the correctness of the presumption drawn by the High Court.

As contended by the learned counsel for the appellant embarrassment is a state of mind which is more individual related than related to the sex of a person. It is but natural that any decent person would be embarrassed while considering the evidence in a case like this but this embarrassment cannot be attributed to a lady Officer only. A Judicial Officer be it a female or male is expected to face this challenge when the call of duty required it. It is expected of a Judicial Officer to get over all prejudices and predilections when situation requires, hence in our considered opinion the High Court was not justified in presuming embarrassment to the Judicial Officer solely on the ground that she is a lady Officer even when the Officer concerned had not expressed any reservation in this regard. If situation requires the Presiding Officer may make such adjustments/arrangements so as to avoid viewing the CDs in the

presence of male persons. This is a matter of procedure to be adopted by the Presiding Officer.

It was nextly contended on behalf of the respondent that even the prosecution counsel and the defence counsel would feel embarrassed to appear before the court presided over by a lady Officer in a trial like this. But we think this cannot be a ground for transfer of the case. So far as the lawyers are concerned they have accepted the brief knowing very well the facts of the case, it is left to them to decide whether to continue in or not. Their embarrassment cannot be a ground for transfer of the case in a situation like this.

It is also to be seen that the High Court has considered only the embarrassment that may be caused to the lawyers and Judges and has failed to take into consider the embarrassment that may be caused to the lady witnesses like the appellant herein who have been summoned in this case to appear before a court presided over by a male Judge to give evidence more where their own acts are part of the prosecution evidence. Therefore, if at all, there was a question of avoiding the embarrassment caused to any of the people involved in the case, in our opinion, the court ought to have considered the embarrassment that would be caused to the witness who are actually in the nature of victims while giving evidence of their acts before a male Judge. The learned counsel for the appellant, in our view, was justified in this context in relying upon the judgment of this court in the case of State of Punjab Vs. Gurmit Singh (supra).

The argument of the learned counsel for the respondent that a retransfer at the instance of the appellant ought not to be done because the appellant herself is in a position of an accused in this trial cannot be countenanced. The fact that the respondent wants the appellant to be arrayed as an accused has no relevance for the purpose of deciding the present appeal.

For the reasons stated above, we are of the considered opinion that this appeal has to be allowed in the sessions case No. 9 of 2004 now transferred to the IV Fast Track Court, Chennai be transferred back to the V Fast Track Court, Chennai and the trial be proceeded before the said Fast Track Court as expeditiously as possible keeping in mind the direction issued by the High Court in this regard.

It is ordered accordingly.
Appeals allowed.

Criminal Appeal No. 63 of 2005
(Arising out of SLP(Crl.)No.1606 of 2004)

In view of our order in Crl.A.Nos\005\005\005\005of 2005 arising out of SLP(Crl.)Nos. 1518-1519 of 2004, there is no need to pass any separate order, hence, Crl.A.No\005.\005..of 2005 arising out of SLP(Crl.)No. 1606 of 2004 is disposed of in terms of the above order.