

**IN THE GAUHATI HIGH COURT**  
**(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)**

**ITANAGAR PERMANENT BENCH**

**Tr.P. (CrI.) 02 (AP) 2018**

- 1. Lama Ngawang Norbu,**  
Residing at Tawang Monastery, Tawang District, Arunachal Pradesh.
- 2. Lama Lobsang Thapke Khum,**  
Residing at Tawang Monastery, Tawang District, Arunachal Pradesh.
- 3. Lama Dondu,**  
Residing at Tawang Monastery, Tawang District, Arunachal Pradesh.
- 4. Lama Cher,**  
Residing at Tawang Monastery, Tawang District, Arunachal Pradesh.
- 5. Lama Tashi Chogyal,**  
Residing at Tawang Monastery, Tawang District, Arunachal Pradesh.
- 6. Gaden Namgyal Lhatse Welfare & Charitable Society (Tawang Monastery),** represented by its Secretary, **Lama Lobasang Thapke Khum** (applicant No.2), Residing at Tawang Monastery, Tawang District, Arunachal Pradesh.

**.....petitioners.**

**-VERSUS-**

- 1. The State of Arunachal Pradesh** through its Public Prosecutor, Arunachal Pradesh.
- 2. Sri Sang Phuntsok,** S/o Late Kesang Wangchu, resident of Tawang, Tawang District, Arunachal Pradesh.
- 3. Sri Lobsang Dorjee,** S/o of Late Sangey Tsering, resident of New Bazar, Tawang District, Arunachal Pradesh.
- 4. Sri Yeshi Tsering,** S/o of Late Sangey Tsering, presently resident of Shillong, Meghalaya.

**5. Sri Phuntsok Tsering**, Gaon Burah, S/o Late Kesang Tamrin, resident of Lebrang village, Tawang District, Arunachal Pradesh.

**6.Sri Lobsang Tashi**, S/o Late Kesang Tamrin, resident of Changporong village, Tawang District, Arunachal Pradesh.

**7. Sri Jampel Tsewang**, S/o Kesang Wangchu, resident of Old Bazar, Tawang District, Arunachal Pradesh.

**8.Sri Lobsang Samdup**, S/o Late Kesang Wangchu, resident of Old Market, Tawang District, Arunachal Pradesh.

**9.Sri Tashi Dondup**, S/o Sri Lobsang Tashi, resident of Changporong village, Arunachal Pradesh.

**10.Smti. Tsering Chuki**, D/o late Sangey Tsering, resident of Dirang, West Kameng District, Arunachal Pradesh.

**11. Smti. Tashi Yuton**, D/o late Kesang Tamrin, resident of Lebrang village, Arunachal Pradesh.

**12. Smti. Jamba Chhotton**, D/o Late Kesang Tamrin, resident of Lebrang village, Arunachal Pradesh.

**13. Smti. Passang Tsering**, S/o late Lei Kunjo, resident of Bomdila, West Kameng District, Arunachal Pradesh.

**14. Smti. Ngawang Tsering**, S/o late Lei Kunjo, resident of Lhou village, Tawang District, Arunachal Pradesh.

**15.Shri Tamrin**, S/o late Lie Kunjo, resident of Jang village, Tawang District, Arunachal Pradesh.

**16. Sri Thinley**, s/o late Lei Kunjo, resident of Jang village, Tawang District, Arunachal Pradesh.

**.....respondents.**

**By Advocates:**

For the **petitioner:**

Mr. D. Panging

Mr. J.Tsering,

Ms. D.Tamuk

Mr. M.Doje

For the **respondents:**

Mr. K. Tado, learned Public Prosecutor, Arunachal Pradesh  
Mr. S.K. Medhi, learned Sr. Counsel for respondents No. 2 to 16.  
Mr. O.Pada,  
Mr. T.Ete  
Mr. T.Tsering,  
Mr. V.Jamoh,  
Mr. A.Das

**:::BEFORE:::**

**HON'BLE MR. JUSTICE AJIT BORTHAKUR**

Date of hearing : **27.08.2018**

Date of Judgment : **27.08.2018.**

**JUDGMENT & ORDER (ORAL)**

Heard Mr. D. Panging, learned counsel for the petitioner. Also heard Mr. K. Tado, learned Public Prosecutor, Arunachal Pradesh, appearing for State respondent No. 1 and Mr. S. K. Medhi, learned senior counsel appearing for the respondent Nos. 2 to 16 assisted by Mr. T. Ete, learned counsel.

**2.** This is a petition under Section 407 (2) Code of Criminal Procedure, 1973 (for short, 'Cr.P.C. '), praying for transferring the Case No. TJ-192/2014 to any other Executive Magistrate having the jurisdiction of West Sessions Division, West Kameng District, Bomdila from Tawang District, Arunachal Pradesh.

**3.** Be it mentioned that the petitioners have filed the instant petition under Section 407 Cr.P.C. after the learned Additional Sessions Judge, Bomdila dismissed their another petition filed under Section 408 Cr.P.C. vide order, dated 14.02.2018, passed in CrI. Misc. Appl. No.01/2018 in Case No. TJ-192/2014.

**4.** The petitioners' case, in a nut-shell, is that the respondents, herein, had filed a complaint before the Deputy Commissioner, Tawang, on 26.08.2014, alleging that on 22.08.2014, the petitioners, herein, and other monks of Tawang Monastery had trespassed upon their land at Urgelling village and illegally removed the fencing. On receipt of the complaint, the Deputy Commissioner, Tawang, vide order No.TJ-192/2014/5772-74, dated 24.11.2014, sought consent

from the parties for referring the dispute for resolution by arbitration as provided under Section 38 (2) of the Assam Frontier (Administration of Justice) Regulation, 1945 (for short, 'AFR'). However, the respondents did not give their consent and as such, on being, *prima-facie*, satisfied about likelihood of breach of peace arising out of the land dispute, the learned District Magistrate, Tawang, by order, dated 15.10.2014, initiated the said proceeding under Section 145 Cr.P.C. and directed both the parties to maintain status quo over the disputed land fixing 27.10.2014 for filing of claims in respect of actual possession of the land. The said proceeding was registered as Case No. TJ-192/2014.

**5.** The petitioners have contended that the learned District Magistrate, Tawang, finally heard the matter on 20.03.2015 and adjourned the case for pronouncement of judgment without fixing any date. However, before judgment was pronounced in the proceeding, the learned District Magistrate, who had presided over the case was transferred from Tawang and as such, the final judgment was not delivered. Thereafter, on 22.07.2016, the respondent No. 2, herein, Sri Sang Phuntsok, IAS took over the charge as Deputy Commissioner, Tawang, who is one of the complainants in the said case No. TJ-192/2014. Therefore, the petitioners have contended that the incumbent, the Deputy Commissioner-cum-learned District Magistrate, Tawang, is privy to the said case pending adjudication before the Additional District Magistrate, Lumla as same involves his personal interest, for which, he transferred the said case by an order, dated 14.09.2017, to the Court of learned Additional District Magistrate, Lumla and accordingly, the learned Additional District Magistrate, Lumla, by an order, dated 24.11.2017, fixed the case on 14.12.2017 for filing written statement in respect of claim of possession over the disputed land.

**6.** According to the petitioners as the learned Addl. District Magistrate, Lumla, who is also the Addl. Deputy Commissioner is a direct subordinate Officer like any other Executive Magistrate in the District under the Direct control and supervision of the Deputy Commissioner-cum-District Magistrate, Tawang/the respondent No. 2, herein. Though, the Deputy Commissioner-cum-District Magistrate may not be presiding over the case, but, by virtue of being the superior controlling Officer of the learned Addl. District Magistrate, Lumla, there is every likelihood of him influencing the proceeding pending before his said subordinate officer.

**7.** In the backdrop of the above reasonable apprehension, the petitioners had filed an application on 14.12.2017 praying for recusal of the learned Addl. District Magistrate, Lumla Sri R.D. Thunghon from adjudicating the case No. TJ-192/2014, whereupon, the learned Addl. District Magistrate, Lumla, by order, dated 14.12.2017, declined recuse himself from the case and dismissed the application with observations, *inter-alia*, that every Court in India has an independent entity and functions devoid of any control or supervision of any other Court while adjudicating any case and therefore, directed for filing of written statements or evidence by the petitioners, fixing 30.01.2018.

**8.** Being aggrieved by the above order of dismissal of the application, the petitioners filed an application under Section 408 Cr.P.C. in the Court of learned Addl. Sessions Judge, West Sessions Division, Bomdila, vide Misc. CrI. Case No.01/2018 (WSD/BDL), which also stood dismissed by order, dated 06.06.2018, observing that the Addl. Deputy Commissioner, Lumla, is an independent adjudicatory authority and the Deputy Commissioner, Tawang, has not been shown having presided over the proceeding and as such, there is no reasonable apprehension of the presiding learned Addl. District Magistrate to be biased in writing the judgment and order, which is manifestly an anticipated ground only. The petitioners have contended that it is a well known maxim of criminal jurisprudence that justice should not only be done but should seem to be done and as such, in the interest of justice, the said proceeding should be transferred to any other Executive Magistrate of the nearby West Sessions Division, West Kameng District, Bomdila, Arunachal Pradesh.

**9.** Mr. D. Panging, learned counsel for the petitioners, reiterating the facts averred in the petition stated above, submits that in view of the aforesaid facts of events, what is required is not whether, in fact, fair and impartial trial cannot be held but whether there is reasonable apprehension in the mind of the petitioners about it.

**10.** Mr. Panging further submits that events, apart from susceptibility of the petitioners, there are circumstances or events which are calculated to create in their mind a reasonable apprehension that they would not get a fair justice is a sufficient ground for transfer of the case, even though the Addl. District Magistrate

may have no real bias in the matter, where the complainant/respondent No.2 is very much interested in the result of the case in the touchstone of a reasonable person would have certainly have such apprehension.

**11.** Mr. Panging submits that in the facts and circumstances, the petitioners have reasonably apprehended that they would be deprived of fair justice due to sitting of the complainant/respondent No.2 at the helm of the district executive head, exercising control over the presiding officer of the case, who is the Additional District Magistrate, Lumla. In support of his argument, Mr. Panging has relied upon the judgments rendered by the Hon'ble Supreme Court in *Manak Lal (shri), Advocate vs. Prem Chand Singhbi and Ors.*, reported in *AIR 1957 SC 425*; *Gurcharan Das Chadha vs. State of Rajasthan*, reported in *AIR 1966 SC 1418* and *Satish Jaggi Vs. State of Chhattisgarh & Ors.*, reported in *(2007) 3 SCC 62*.

**12.** Mr. K. Tado, learned Public Prosecutor, Arunachal Pradesh submits that in view of the recent separation of judiciary in the State of Arunachal Pradesh from the executive, as the judiciary in the district of Tawang is already separated and the court of the Judicial Magistrate is established at Tawang the case in question may be transferred to the said court for trial to restore complete faith in the mind of the petitioners on the fair and impartial administration of justice.

**13.** The respondent Nos. 2 to 16 in their affidavit-in-opposition averred and Mr. S. K. Medhi, learned Sr. Counsel appearing on their behalf, submits that the petition suffers from suppression of material facts known to the petitioners and as such, lacks bonafide with intend to deter and obstruct the administration of justice. It has been contended that the petitioners had earlier filed a petition under Section 408 Cr.P.C. in the Court of the learned Addl. Sessions Judge, Bomdila, (WSD) registered as CrI. Misc. Case No. 01/2018, which was, however, dismissed on merit vide order, dated 06.06.2018, but, the legality of the said order being not put to challenge, the instant petition is not maintainable.

**14.** Mr. Medhi, learned senior counsel, submits that the Additional Deputy Commissioner, Lumla was upgraded as Headquarter of independent Addl. Deputy Commissioner, Lumla from Sub-Divisional Office Headquarter vide Govt. Notification No. DAD-24/2007, dated 23.01.2009, and as such, the Addl. Deputy Commissioner, Lumla being an independent Addl. Deputy Commissioner has

analogous powers and functions of the Deputy Commissioner within his territorial jurisdiction and consequently, the respondent No.2 transferred the case to his Court for fair adjudication against which act, the petitioners had never raised any apprehension of biasness till filing of a recusal application on 14.12.2017, when the matter came up for final hearing and after hearing both the parties, by order passed on the same day, rejected the application.

**15.** Mr. Medhi, learned Sr. Counsel appearing for the respondent Nos. 2 to 16, fairly submits that there is no dispute regarding the facts narrated in the petition except in respect of existence of any reasonable apprehension of the presiding officer of the case likely to be biased in delivering a fair and impartial judgment, suspecting privity between the complainant/respondent No. 2, who is the Deputy Commissioner-cum-District Magistrate, Tawang to him, who is administratively subordinate to him. Mr. Medhi further submits that the case has been proceeding in accordance with law, where further chance to make submissions by the petitioners herein was accorded fixing 30.01.2018 by way of filing their written arguments or evidence, if any, but the petitioners have neither appeared nor sought for adjournment. However, the learned Court of the Addl. Deputy Commissioner-cum-Addl. District Magistrate, Lumla fixed the case again on 28.02.2018 giving one more chance to the petitioners for filing their written arguments, if any. Since the final hearing in the case was completed on 20.03.2015 and again on 14.12.2017, the only remaining part of the proceeding is to pass the judgment.

**16.** In paragraph 13 of the affidavit-in-opposition, the respondent Nos. 2 to 16 stated as herein below extracted:-

***"That the answering opposite parties beg to state that the Hon'ble Supreme Court has been consistently laying down that independence of judiciary is not only confined to the superior courts but is also equally applicable to all subordinate courts. The Hon'ble Supreme Court has held that even while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of***

***superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants. The independence of the judiciary has been considered as a part of the basic structure of the Constitution and such independence is postulated not only from the Executive, but also from all other sources of pressure”.***

**17.** Mr. Medhi submits that in view of the aforesaid facts and circumstances and taking into consideration of the established principle of independence of judiciary, the instant petition is not a fit case, at all, wherein, the provisions of Section 407 Cr.P.C. can be invoked and as such, the petition is liable to be dismissed, with cost. Mr. Medhi, in support of his argument, relied upon the judgments rendered by the Hon'ble Supreme Court in *Usmangani Adambhai Vahora Vs. State of Gujarat & Anr.*, reported in (2016)3 SCC 370; *Lalu Prasad alias Lalu Prasad Yadav Vs. State of Jharkhand*, reported in (2013) 8 SCC 593 and *Abdul Nazar Madani vs. State of Tamil Nadu*, reported in (2000) 6 SCC 204.

**18.** It needs to be mentioned that assurance of a fair trial is the absolute imperative of the dispensation of justice and as such, the trial must be free from any apprehension in the mind of either of the parties of the Court of being bias or likely to be biased in the given reasonable circumstances depriving of fairness in administration of justice.

**19.** Section 407 Cr.P.C. sets out elaborately the circumstances in which the High Court may order transfer of a case or appeal from one subordinate court to another or from any subordinate court to itself. A party to a proceeding may apply for transfer, on one or more of the three grounds stated in Clauses (a) to (c) of Sub-Section (1) of Section 407 Cr.P.C., and the High Court, on its satisfaction as to the aforesaid any of the grounds may pass any of the four orders mentioned in Clauses (i) to (iv) of Sub-Section (1) of Section 407 Cr.P.C. for the ends of justice.



**20.** In *Manak Lal (supra)*, the Hon'ble Supreme Court held that it is well settled that every member of a tribunal that is called upon to try issues in judicial or quasi-judicial proceedings must be able to act judicially; and it is of the essence of judicial decisions and judicial administration that judges should be able to act impartially, objectively and without any bias. In such cases the test is not whether in fact a bias has affected the judgment; the test always is and must be whether a litigant could reasonably apprehend that a bias attributable to a member of the Tribunal might have operated against him in the final decision of the Tribunal. It is in this sense that it is often said that justice must not only be done but must also appear to be done.

**21.** In *Gurcharan(supra)*, the Hon'ble Supreme Court held that a case is transferred if there is 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 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 would not only be done but it should be seen to be done.

**22.** In *Satish Jaggi(supra)*, the Hon'ble Supreme Court held that a judicial officer in whatever capacity he may be functioning has to act with the belief that he is not to be guided by any factor other than to ensure that he shall render a free and fair decision which according to his conscience is the right one on the basis of materials placed before him. There can be no exceptions to this imperative, but at the same time there should not be any scope given to any person to go away with the feeling that the judge was biased, however, unfounded the impression may be.

**23.** In *Ranjit Thakur-vs- Union of India*, reported in *AIR 1987 SC 2386*, the Hon'ble Apex Court interpreted the law relating to 'bias' thus-" As to the tests of the likelihood of bias what is relevant is the reasonableness of the apprehension in that regard in the mind of the party. The proper approach for the judge is not to look at his own mind and ask himself however, honestly, "Am i biased?" but to look at the mind of the party before him". Earlier, in *S.Parthasarathi-vs-State of A.P.*,

reported in (1974) SCC 459: AIR 1973 SC 2701, the Court observed: " The tests of "real likelihood" and "reasonable suspicion" are really inconsistent with each other. We think that the reviewing authority, must make a determination on the basis of the whole evidence before it. Whether a reasonable man would in the circumstances infer that there is real likelihood of bias. The court must look at the impression which other people have. This follows from the principle that justice must not only be done but seen to be done. If right minded persons would think that there is real likelihood of bias on the party of an enquiry officer, he must not conduct the inquiry nevertheless; there must be a real likelihood of bias. Surmise or conjecture would not be enough. There must exist circumstances from which reasonable men would think it probable or likely that the inquiring officer will be prejudiced against the delinquent".

**24.** In *Abdul Nazar Madani(supra)*, the Hon'ble Supreme Court held that the purpose of the criminal trial is to dispense fair and impartial justice uninfluenced by extraneous considerations. When it is shown that public confidence in the fairness of a trial would be seriously undermined, any party can seek the transfer of a case within the State under Section 407 and anywhere in the country under Section 406 of the Code. 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. If it appears that the dispensation of criminal justice is not possible impartially and objectively and without any bias, before any Court or even at any place, the appropriate Court may transfer the case to another Court where it feels that holding of fair and proper trial is conducive.

**25.** In *Usangani Adambhai (supra)*, the Hon'ble Supreme Court, in Para 10 of the judgement observed:

*"10. In Lalul Prasad alias Lalul Prasad Yadav Vs. State of Jharkhand [(2013) 8 SCC '593], the Court, repelling the submission that because some of the distantly related members were in the midst of the Chief Minister, opined that from the said fact it cannot be presumed that the Presiding Judge would conclude against the appellant. From the said decision, we think it appropriate to reproduce the following passage:-*

*" Independence of judiciary is the basic feature of the Constitution. It demands that a Judge who presides over the trial, the Public Prosecutor who presents the case on behalf of the State and the lawyer vis-a-vis amicus curiae who represents the accused must work together in harmony in the public interest of justice uninfluenced by the personality of the accused or those managing the affairs of the State. They must ensure that their working does not lead to creation of conflict between justice and jurisprudence. A person whether he is a judicial officer or a Public Officer or a Public Prosecutor or a lawyer defending the accused should always uphold the dignity of their high office with a full sense of responsibility and see that its value in no circumstances gets devalued. The Public interest demands that the trial should be conducted in a fair manner and the administration of justice would be fair and independent."*

*The aforesaid passage, as we perceive, clearly lays emphasis on sustenance of majesty of law by all concerned. Seeking transfer at the drop of a hat is inconceivable. An order of transfer is not to be passed as a matter of routine or merely because an interested party has expressed some apprehension about proper conduct of the trial. The power has to be exercised cautiously and in exceptional situations, where it becomes necessary to do so to provide credibility to the trial. There has to be a real apprehension that there would be miscarriage of justice. [See: Nahar Singh Yadav & Anr., Vs. Union of India and others [(2011)1 SCC 307]."*

**26.** Thus, the underlying paramount consideration for transfer of a case, within the ambit and scope of Section 407 Cr.P.C., as is deciphered from the above precedents, in the backdrop of the circumstances incorporated therein, really lies in the reasonable apprehension in the mind of the litigants of not having a fair trial, that is, likelihood of not getting a fair and impartial justice, which is imperative of the dispensation of justice, that a reasonable man would in the stated circumstances would infer the question of reasonableness of such apprehension of likelihood of not getting justice from the trial court, which, of course, need not be shown to be certain.

**27.** In the instant case, in the backdrop of the above facts averred by the petitioners, the respondent No.2 namely, Sri Sang Phuntsok, IAS, who is one of the complainants in Case No. TJ-192/14, is presently the Deputy Commissioner-cum-District Magistrate, Tawang and the said case is pending in the Court of the Additional Deputy Commissioner-cum-Additional District Magistrate, Lumla, who is administratively subordinate to the said

complainant Deputy Commissioner, Tawang in his individual capacity. Although the learned Additional District Magistrate, Lumla is independently discharging his judicial duties as averred in the affidavit-in-opposition by the respondents No.2 to 16, it cannot be denied that the complainant/respondent No.2 has some sort of proximity to him being his subordinate administrative officer and his privy to the Case No.TJ-192/14, which is pending at the stage of delivery of judgment in his Court. Therefore, there is need to remove the apprehension in the mind of the petitioners that they may likely to be deprived of fair justice in the case and thereby to uphold the settled principle that justice must not only be done, but must also appear to be done, to both the parties to the proceeding. Because the matter of apprehension is not prone to be proved by any available evidence as law does not provide criteria for its assessment and consequently, the question of reasonable apprehension is to be determined in the backdrop of the demonstrated sequence of circumstances in the proceeding or incidental thereto, balancing all the relevant facts averred by the petitioners and in the affidavit-in-opposition by the respondents, which my conscience proposes to do away with herein accordingly.

**28.** It may pertinently be mentioned that a proceeding under Section 145 Cr.P.C. is the preventive jurisdiction of the Executive Magistrate, regarding dispute over possession of land or water or its boundary, which in his opinion, based on his subjective satisfaction, may likely to give rise to breach of public peace and tranquillity in the locality. Therefore, the proceeding in question cannot be transferred to the court of the learned Judicial Magistrate, Tawang, who exclusively exercises criminal jurisdiction and when the object of this Section is to maintain law and order and to prevent a breach of the peace, which is pertaining to the domain of the executive jurisdiction.

**29.** Resultantly, in the backdrop of the above significant and rarely exceptional facts, the petition stands allowed.

**30.** Accordingly, the Case No. TJ-192/2014, is hereby directed to be transferred to the Court of learned Executive Magistrate, having jurisdiction over West Sessions Division, West Kameng district from Tawang district for disposal as prayed for.

Petition stands **disposed of** accordingly.

**JUDGE**

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