IN THE HIGH COURT OF GUJARAT AT AHMEDBAD

DISTRICT: AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO. OF 2010

Imtiazkhan S. Pathan & Ors. ...Petitioners.

VERSUS

State of Gujarat and another ... Respondents.

I N D E X

Annex.	Particulars	Page No.
	Memo of petition.	1 to
"A"	Copy of the judgment and order dtd. 28.1.2010 in Misc. Cri. Appln No. 224 of 2010	
"B"	Notification dated 7.5.2009 appointing the Special Court Judges.	
"C"	Judgment of the Hon.Gujarat High Court dtd 15.5.2009 in Special Civil Application No. 2880 of 2008	
"D"	Copies of the orders of the Ld. Addl. Sessions Judge dtd. 14.9.2009 and 4.11.2009.	
"E"	Copy of the orders of the Ld. Addl. Sessions Judge dtd. 06.11.2009.	
"F"	Affidavit dated 11.1.2010 filed by witnesses before Trial Court being Exh: 799.	

"G" Order of the Ld. Addl. Sessions Judge, Ahmedabad, dtd. 18.1.2010. below Exh: 738 and order of this Hon'ble Court in Cri. Revision Application No. 110 of 2010 dtd. 24.02.2010.

"H" Copy of the order of the Ld. Addl. Sessions Judge dtd. 22.02.2010 below 961.

"I" Copy of the order of the Ld. Addl. Sessions Judge dtd. 24.02.2010 below Exh: 996.

"J" Copy of the order of the Ld. Addl. Sessions Judge dtd. 17.11. 2009 below Exh: 585 and this Hon'ble Court in Cri. Revision Application No. 800/2009 dtd. 09.02.2010.

Ahmedabad (M. M. TIRMIZI)

Date: /03/2010 Advocate for the petitioners.

IN THE HIGH COURT OF GUJARAT AT AHMEDBAD

DISTRICT: AHMEDABAD

SPECIAL CRIMINAL APPLICATION NO. OF 2010

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L I S T O F E V E N T S

Sr.No.	Event
	The petitioners herein are the eye witnesses of the offence registered as CR No. I 67 of 2002 with Meghaninagar Police Station, Ahmedabad dated 28.02.2002. In the aforementioned offence as many as 69 people from the minority community were done to death as policemen watched and politicians refused to intervene.
	The charge sheets were filed by the then investigating agency. The National Human Rights Commission filed petitions before the Hon'ble Supreme Court being WP 109/2003. The Hon'ble

Supreme Court after considering the facts and circumstances, was pleased to stay the trials, including the present one. In a related matter WRIT PETITION (CRL) 37-52 OF 2003 (DN Pathak v/s State of Gujarat) that was heard along with the NHRC matter, that had specific prayers for transfer of investigation, the Hon'ble Supreme Court was pleased to direct the formation of the Special Investigation Team (the respondent no. 2 herein). This order was passed by the Hon'ble Supreme Court on 26.3.2008. Thereafter Special Courts were established for these trials on 1.5.2009. The Special Investigation Team was given the onerous charge of both monitoring the trials and in consultation with the Chief Justice, Gujarat appointing Special Judges with experience to conduct them.

Accordingly the trial commenced before the Ld. Addl. Sessions Judge, Court No. 12, Ahmedabad framed the charges against the accused on 11.8.2009 and to date a vast majority of the eye-witnesses have been examined.

The Ld. Addl. Sessions Judge, Ahmedabad conducting the trial has been acting in biased manner especially since and after November 2, 2009 when the deposition of the key eye-witnesses began before him. Before this there was no apparent signs of any bias in the Judge. Since that date however, as the records of the trial will show, on various occasions and in different ways the Judge has been blatantly aggressive and biased towards eye-witnesses. Lamentably members of SIT i.e., the respondent no. 2 herein have not been monitoring the trials with any rigour and SIT has not supported the eye-witnesses' plea for transfer of

the case. It wasn't advisable for the petitioners to file a transfer application until sufficient material had been gathered and collected. Thereafter, the petitioners considered it fit to exhaust all alternative remedies before filing an application for transfer of the case directly to the Hon'ble High Court. Hence, the petitioners filed an application before the Ld. Principal City Sessions Judge, Ahmedabad being Misc. Criminal Application No. 224 of 2010 for transfer to another Court. This is without prejudice to the petitioners' prayers before this Hon. Court for transfer of their trial from the Ld. Addl. Sessions Judge Shri. B. U. Joshi to any other court or the petitioner's prayers if the petitioners decide to approach the Hon'ble Supreme Court praying for trial out of the state of Gujarat to any other state. This power of transfer out of the jurisdiction of the state lies, in law only with this Hon'ble Court and the Supreme Court.

The Ld. Judge was pleased to dismiss the said application by the order dtd. 28.01.2010 merely on grounds that since by special notification, the Hon Gujarat High Court had appointed the Special Judges trying the case, the appropriate forum to file the plea for transfer would be before the Hon. Gujarat High Court. Thus, this petition is being filed before this Hon'ble Court praying for the transfer of the aforementioned case from the court of Ld. Addl. Sessions Judge, Ahmedabad to any court of Sessions.

Hence this petition.

Ahmedabad. (M. M. TIRMIZI)

Date: / 3 /2010. Advocate for the petitioners.

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

DIST: AHMEDABDAD

SPECIAL CRIMINAL APPLICATION NO. OF 2010

In the matter of Articles 14, 21, 226 and 227 of the Constitution of India;

And

In the matter of Section 407 r/w 482 of the Criminal Procedure Code;

And

In the matter between;

(1) ImtiazKhan SaeedKhan Pathan
Age : Adult, Dhando : Vapar, Dharam : Musalman,
Residing.
Amber Tower Opp, Sarkhej road, Juhapura, Ahmedabad.

(2) Rupa @ Tanaz ta Dara Minubhai Modi
Age : 42, Dhando : Gharkam, Dharam : Parsi,
Residing : 11, Rajbir Apartment, BhaiKaka Nagar,
Thaltej, Ahmedabad.

(3) Saeedkhan Ahmedkhan Pathan
Age : 58, Dhando : Vapar, Dharam : Musalman,
Residing : Firozvila Society, Akbar Masjid Near,
Vajalpur Road, Ahmedabad.

(4) Mohammed Rafik Abubakar Pathan,
Age : 30, Dhando : Nokri, Dharam : Musalman,

Residing : Tanksal Pole, Kalupur, Ahmedabad

(5) Firoz mahammad Gulzar mahammad Pathan,
Age : 35, Dhando : Vapar, Dharam : Musalman,
Residing : Sidikabad Coloni, Sarkhej Road, Ahmedabad.

(6) Sayraben Salimbhai Sandhi,
Age : 48, Dhando : Gharkam, Dharam : Musalman,
Residing : A Coloni, Dariyakhan Dhummat Sahibag,
Ahmedabad.

(7) Salimbhai Nur Mahammad Sandhi,
Age : 52, Dhando : Nokri, Dharam : Musalman,
Residing : A, Coloni, Dariyakhan Dhummat, Sahibag,
Ahmedabad. ... Petitioners.

(Prosecution Witnesses)

V E R S U S

1. The Sate of Gujarat
(Notice to be served through
Ld. Public Prosecutor,
Gujarat High Court,
Ahmedabad.)

2. The Special Investigation Team,
Through its Chairman,
Block No. 11,
Jivraj Mehta Bhavan,
Old Sachivalaya,

And the following

(3)List of Accused:

No.	Accused Name	Session case

		No.
3	Kailash Lalchand Dhobi Address.- Ramchandra Colony, Chamanpura, Ahmedabad	152/02 (In Jail)
4	Yogendrasingh alias Lala Mohansing Darbar Address.- Dr. Gandhi ni chali, Chamanpura, Ahmedabad	
5	Surendrasinh alias Vakil Digvijaysinh Chauhan Address.- Navi chali, Chamanpura, Ahmedabad	(In Jail)
6	Mangaji Pokadji Marwadi Address.- Ramchandra Colony, in the house of Jagdishbhai, Meghaninagar, Ahmedabad	
7.	Jayesh Ramubhai Patni Address.- Kalapinagar, Guj. Housing Board. No. 21/238, Meghaninagar, Ahmedabad	
8.	Kishor Mangaji Patni Address.- Kadiya ni chali, Asarwa, Ahmedabad	
9	Sailesh alias Kalubhai Patni Address.- 31/266, G.H. Board, Kalapinagar, Ahmedabad	
10	Kanahiya alias Bablu Maiyau Address.- Hasmukhlal Keshawlal ni chali, Rameshwar Road,	
11	Kantibhai Popatbhai Patni Address.- Gafurmiya Chapra, Nr. Punjab Society, Ahmedabad	
12.	Sakrabhai Sendhabhai Patni Address.- Santokben ni chali,	

	Chamanpura, Ahmedabad	
13.	Manojkumar Premjibhai Parmar Address.- Jogeshwarinagar, Meghaninagar	
14.	Deepakkumar Somabhai Solanki Address.- Chaprama, Nr. Railway Crossing, Omnagar, Ahmedabad	
15.	Vinodbhai Arvindbhai Solanki Address.- Line no.2, Memko, Ambedkarnagar	
16.	Jayesh alias Gabbar Madanlal Jingar Address.- 15, Santokben ni chali, Opp. Gulbarg Society, Chamanpura, Ahmedabad	
17	Ajya Somabhai Panchal Address.-61/1450, GUj. H. Board, Meghaninagar, Ahmedabad	
18.	Dilip alias Kalu Chaturbhai Parmar Address.- 78/425, Ramchandra Colony, Chamanpura, Ahmedabad	
19.	Ratilal Ganeshji Kumbhar Address.- Tejaji Kaluji ni Chali, opp. Ghee wali chali, Chamanpura, Ahmedabad	
20	Sanjaybhai Sakrabhai Patni Address.- B. N. 26/137, MLA Quarter, Opp. Civil Court, Ahmedabad	
21.	Sailesh Natwarbhai Patni Address.- Bapalal Ghanchi ni chali, Chamanpura, Ahmedabad	
22.	Naresh alias Nariyo Bansilal Prajapati	

	Address.- Atmaram Popatlal ni chali, Chamanpura, Ahmedabad	
23.	Sandip alias Sonu Ghugru walwalo Ram Prkash Address.- Parnakunj Society, Vibhag-1, Bungalo no.66, Meghaninagar, Ahmedabad	167/03 (In Jail)
24.	Babubhai Mohanbhai Patni Address.- Patninagar na chapra, Ramchandra Colony, Meghaninagar, Ahmedabad	
25.	Babubhai Manjibhai Patni Address.- Narmadaben ni chali, Opp. Punjabi Society, Meghaninagar, Ahmedabad	
26.	Shankarji Hakaji Mali Address.- Babusingh Chali, Chamanpura, Meghaninagar, Ahmedabad	279/03
27.	Mangilal Dhupchand Jain Address.- Block no. 127/990, Kalapi Nagar, Meghaninagar, Ahmedabad	
28.	Pannalal alias Prabhu Mochi Premchand Sisodiya Address.- Block no. 99/765, Kalapi Nagar, Meghaninagar, Ahmedabad	
29.	Gopaldas Mandas Veshnav Address.- Krishnaji Chapra, Tejaji Kumbhar Chali, Ahmedabad	
30.	Prahlad Rajuji Asori Address.- Kantilal Heeralal Choksi Chali, Chamanpura, Ahmedabad	
31.	Mukesh Pukhraj Sankhla Address.- Santokben Chali, Opp.	

	Gulbarg Society, Meghaninagar, Ahmedabad	
32.	Madanlal Dhanraj Rawal Address.- Mohanlal Vakil Chali, Meghaninagar, Ahmedabad	
33.	Mahendra Mulchand Parmar Address.- 28/C, Astodiya Colony, Nr. Rameshwar Mandir, Meghaninagar, Ahmedabad	
34.	Ambesh Kantilal Jingar (Mochi) Address.- Dhupnagar, Chamanpura, Ahmedabad	
35.	Prahalad Omprakash Songra Address.- 88/684, Guj. Hou. Board, Kalapinagar, Meghaninagar, Ahmedabad	
36.	Krushnkumar alias Krishna (Son of Champaben) Address.- Chamanlal Ambalal Chali, Bh. Shivam Hospital, Chamanpura, Meghaninagar, Ahmedabad	
37.	Ashok alias Aslo Dharsingh Thakor Address.- B. N. 4/91, Slum Quarters, Patrawali Chali, Chamanpura, Meghaninagar, Ahmedabad	
38.	Chirag Dilip Shah Address.- Guj. Hou. Board 66/523, Kalapinagar, Meghaninagar, Ahmedabad	
39.	Prakash alias Kali Khengarji Padhiyar Address.- B. No. 88/ 677, Guj. Hou. Board, Kalapinagar,	

	Meghaninagar, Ahmedabad	
40.	Prakash alias Kali Khengarji Padhiyar Address.- B. No. 88/ 677, Guj. Hou. Board, Kalapinagar, Meghaninagar, Ahmedabad	
41	Mukesh Atmaram Thakor Address.- 32/6/1, Baliya ni chali, Shahibaug, Ahmedabad	
42	Parbatsinh Tarsansinh alias Darshansinh Address.- Thakorwas, Madhupura, Ahmedabad	191/09
44	Jayesh Ramjibhai Parmar Address.- Suvannagar, Nr. Rameshwarnagar Crossing, Meghaninagar, Ahmedabad	193/09 (In Jail)
45	Raju alias Mama Kaniya Ram Awtar Tiwari Address.- Bhimravnagar Chapra, Nr. Omnagar Crossing, Meghaninagar, Ahmedabad	194/09 (SIT) (In Jail)
46	Naran Sitaram Tak alias Naran Chenalwalo Address.- 8/57, Kailashnagar, Nr. Umiyanagar, Meghaninagar, Ahmedabad	(In Jail)
47	Nagin Hasmukhbhai Patni Address.- Santokben ni chali, Nr. Kalgi house society, Meghaninagar, Ahmedabad	
48	Dasrath alias Gating jivanbhai Patni Address.- Santokben ni chali, Meghaninagar, Ahmedabad	

49	Lakhansinh alias Lakhiya Bhuriya Lalubha Chudasma Address.- Block no. 54/421, Guj. Hou. Board, Kalapinagar, Ahmedabad	
50	Dharmesh Prhalad Sukhla Address.- Chandulal Shamaldas chali, Chamanpura, Meghaninagar, Ahmedabad	
51	Jitendra alias Jitu Pratapji Thakor Address.- Peeru Bhatiyara Chali, Nr. Santoshi Mata Mandir, Asarwa, Ahmedabad	
52	Mahesh alias Pappu Pratapji Thakor Address.- Peeru Bhatiyara Chali, Nr. Santsohimata Mandir, Asarwa, Ahmedabad	
53	Kapil Dev Narayan alias Munnabhai Mishra Address.- Poonamchan Bhuraji Chali, Opp. Gulbarg Society, Ahmedabad	
54	Mahesh Ramjibhai Nath (Mahesh Daruwala) Address.- Ramchandra Colony, Chamanpura, Ahmedabad	
55	Suresh alias Kali Dahyabhai Dhobi Address.- Poonamchand Dhoraji chali, Opp. Gulbarg	
56	Sushil Brij Mohan Sharma Address.-Ramchandra Colony, Meghaninagar, Ahmedabad	
57	Bharat alias Bharat Teli Shitla Prashad Balodiya	

	Address.- Guj. Hou. Board. 112/2687, Rameshwar Char Rasta, Meghaninagar, Ahmedabad	
58	Bharat Laxmanbhai Goad Rajput Address.- Madanmohan Maharaj Chali, Chamanpura, Ahmedabad	
59	Pradip Khanabhai Parmar Address.- Guj.H. Board. 146/1141, Kalapinagar, Meghaninagar, Ahmedabad	195/09
60	Kiritkumar Govindji Erda Address.- 901, Meelkamal Apartment, Tithal Road, Valsad	
61	Meghsingh Dhupsingh Chudhry Address.- 35, Parnakunj Society, Vibhag-1, Meghaninagar, Ahmedabad	
62	Atul Indravadan Vaid Address.- 5, Nandanbaug Society, Opp. Civil Hospital, Ahmedabad	
63	Bipin Ambalal Patel Address.- Guj. Hou. Board Block no. 19/439, Meghaninagar, Ahmedabad	
64	Chunilal Jethaji Prajapati Address.- Mohanlal Vakil Chali, Chamanpura, Ahmedabad	
65	Dilip Kantilal Jingar Address.- Dhupsinh Chali, Omnagar, Chamanpura, Ahmedabad.	
66	Dinesh Prabhudas Sharma Address.- 94/97, Patninagar, Chamanpura, Ahmedabad	(In Jail)
67	Shiv Charan alias Jitendra alias	279/09

	Lallu Address.- Ramchandra Colony, Chamanpura, Ahmedabad	
68	Rajesh Dayaram Jinjar Address.- 1, Gulbarg Society, Chamanpura, Ahmedabad (Accused added by court at 22. 1. 2010)	
69	Babu Marwadi, Kalapinagar Housing Board Near Rohidas Housing Society Meghaninagar, Ahmedabad	

(Respondent No. 3 to 69 be served through
The respondent no. 2)

TO

THE HON'BLE THE CHIEF JUSTICE AND HIS COMPANION JUDGES OF THE HON'BLE HIGH COURT OF GUJARAT AT AHMEDABAD.

THE HUMBLE PETITION OF THE PETITIONER ABOVENAMED

MOST RESPECTULLY SHEWETH: -

1. The petitioners are the citizens of India and are entitled to all the fundamental rights, enshrined under the Constitution Of India.

2. That the petitioners are the eye witnesses of the offence registered as CR No. I 67 o 2002 registered with Meghaninagar Police Station, Ahmedabad for the offences u/s 302, 307 etc IPC. The investigation was faulty and subverted to protect powerful accused and policemen and therefore the writ petition was filed before the Hon'ble Supreme Court being Writ Petition (Cri) No. 109 of 2003 and Transfer Petition (Cri) No. 194-202 of 2003 & 326-329 of 2003 and Writ Petition No 37-52 of 2003. The legal rights group, the Citizens for Justice and Peace intervened in the said writ petition and filed affidavits of eyewitnesses and victims including FIRs, policemen and chargesheets that supported their claim of deep and deliberate subversion of the investigation process. The CJP's secretary Teesta Setalvad was also petitioner no. 6 in Writ Petition No 37-52 of 2003 (DN Pathak v/s State of Gujarat) that was the only petition in the apex court that prayed for re-investigation of the major carnage cases. The Citizens For Justice and Peace also filed an application being Cri. M.P. No. 3742/2004 for compensation to the victims. The Hon'ble Supreme Court by the order dtd. 17.08.2004 was pleased to direct the state government to set up a cell of superior officers and was pleased to further observe that the non-governmental organizations which have been participating in this entire process, will be at liberty to draw the attention of the range inspector general to any particular case within the district of a particular range inspector general and the range inspector general will consider the same before deciding whether further/fresh investigation or what action, if any, needs to be taken in connection with the FIRs filed. The Range Inspector General shall see whether the FIRs already filed are defective/deficient or faulty in any manner.

3. The petitioners respectfully state that so far as other nine cases of mass carnage are concerned, the Hon'ble Supreme Court, following a perusal of the affidavits and supporting

documents filed by interveners CJP, was pleased to stay the trials and finally on 26.03.2008 was pleased to direct the State Government to issue appropriate notification regarding the creation of SIT, and was further pleased to observe that the committee shall in its first meeting work out the modalities to be adopted for the purpose of its enquiry/ investigation. The Supreme Court clearly stated that if any person wants to make statement before the SIT for giving his or her version of the alleged incidents, the SIT shall (ie is bound to) record it. Those who want to give their version shall in writing intimate the convenor of the committee so that the SIT can call him or her for the purpose of recording his/ her statement. It is also clear from the apex court order that what was intended was that the SIT should not confine its investigation by recording statements of only those who come forward to give his or her version and was free to make such inquiries/ investigation as felt necessary by it.

Thus the SIT came into existence by order dated 26.3.2008 and fourteen months later Special Courts were formed to conduct the trials pursuant to the further orders of the Hon'ble Supreme Court dtd. 1.5. 2009 (The judgment is reported in 2009 AIR SCW 3049). It was under these circumstances the Hon'ble Chief Justice of the Hon'ble Gujarat High Court was pleased to appoint Mr. B. U. Joshi as Additional Sessions Judge, Ahmedabad City and notification to that effect was issued on 7.5. 2009 by the Registrar General of the Hon.Gujarat High Court.

4. That charges were framed against the accused on 11.8.2009. The petitioners have been examined by the Ld. Addl. Sessions Judge, Ahmedabad Shri. B. U. Joshi from November 2 onwards. Through the past three and a half months, as they gave their testimonies before the learned judge, the

petitioners have been increasingly concerned about the attitude of the Ld. Additional Judge, Ahmedabad Mr. B. U. Joshi. The Ld. Judge Mr. Joshi appeared initially to be fair. However, as soon as eyewitnesses started deposing (2.11.1009) and not only identifying a large numbers of accused, but also testifying to conspiracy and complicity in planning the massacre and destruction of evidence at the highest level, for inexplicable reasons, the learned Judge's attitude underwent a marked change, perhaps due to some "pressure". Since that date he has been consistently acting in a partisan manner and we have at each point pointed out these developments through applications made before the Hon. Trial court. Details that reflect sharply the partisan and biased attitude of the Ld. Judge have been narrated by the petitioners in the forthcoming paragraphs treated as grounds for transferring the trial. The petitioners could have approached this Hon'ble Court directly seeking transfer of the trial from the Ld. Judge Mr. B. U. Joshi in the first instance. However, to avoid any possibility of arguments made by respondent state of Gujarat on alternative remedies, we chose consciously to file a petition before the Ld. Principal City Sessions Judge, Ahmedabad being Misc. Criminal Application No. 224 of 2010 praying for the transfer of the trial to any other Sessions Judge. This application was filed by the petitioners mainly to exhaust all alternative remedies before approaching the Hon'ble High Court. The present writ petition does not restrict itself to the order of the Ld. Principal City Sessions Judge, Ahmedabad but is filed as an independent writ petition considering the provisions of sec. 407 r/w 482 Cr.P.C., and Article 226 of the Constitution Of India. The Ld. Principal City Sessions Judge, Ahmedabad vide order below Exh: 9 was pleased to dismiss the application on 28.01.2010. Annexed hereto and marked as

ANNEXURE : “A” to this petition is the copy of the impugned judgment and order.

5. The petitioners say and submit that it has been brought to the notice of the petitioners recently that the Ld. Judge B.U.Joshi was appointed vide a notification dated 7.5.2009 by the Hon’ble Chief Justice of Gujarat High Court. Annexed hereto as ANNEXURE: “B” to this petition is the copy of the notification.

6. The petitioners respectfully state that six days after the appointment of Ld. Addl. Sessions Judge for this crucial case by the Hon’ble Gujarat High Court, an order of the division bench of the Hon’ble Court dated 15.5.2009 passed some remarks against the conduct of the Ld. Addl. Sessions Judge Mr. B. U. Joshi as a Registrar (Vigilance) in a matter related to the inquiry against a subordinate judicial officer. The petitioners are concerned and surprised that despite the high sensitivity of this Trial, and when several Judges of unimpeachable record are surely must be available, the Judge chosen for this case is one who has had some observations passed against him by the Hon.Gujarat High Court. Para 46 (iv) of the apex court order dated 1.5.2009 specifies that senior judicial officers who inspire confidence in the process of justice should be appointed. Annexed hereto and marked as ANNEXURE : “C” to this petition is the copy of the said judgment dtd. 15.5.2009 as well as all the orders passed in Special Civil Application No. 2880 of 2008.

7. The petitioners most respectfully state and submit that at the start of the trial, before eyewitnesses had stepped into the box, copies of the evidence of the witnesses was given to the accused, as well as the prosecutor free of cost. Hence, on behalf of the present petitioners, an Application being Exhibit-312 was filed on 14.9.2009 requesting the Hon’ble Court for a copy of the evidence of the witnesses. The Learned Additional Sessions Judge, Ahmedabad Shri B.U.

Joshi was pleased to order that the witnesses be given the copies of the evidence at a charge of Rupee 1/- per page and on payment of Rs.500/- as advance the witnesses would be entitled to get the copy of the evidence. It is clear that a step motherly of treatment has been meted out to the petitioners by the Learned Judge from the outset. The petitioners had however paid the fees and had obtained the copies. All that changed from 2.11.2009 the day the evidence of petitioner no 1 herein began to be recorded. The evidence of the witness No.1 i.e. the petitioner No.1 herein, was recorded between 2.11.2009 and 4.11. 2009. Thereafter the Ld. Judge on his own i.e., without there being any application either from the accused or the prosecutor, passed an order dtd. 4.11.2009, reviewing his earlier order below Exh: 312 thereby refusing to give any evidence to the eye witnesses. The bias of the Ld Judge thus became evident and increasingly hostile, creating a strong hostility for the eye witnesses convincing us that he would not impart any justice to the victims. Annexed hereto and marked as ANNEXURE : "D" to this petition are copies of the orders of the Ld. Judge dated both 14.9.2009 and 4.11.2009.

8. That on 2.11.2009 itself the defence objected to the presence of Smt Teesta Setalvad of Citizens for Justice and Peace and Shri RB Sreekumar, former Director General of Police, Gujarat in the courtroom. This objection was turned down by the Judge on 2.11.2002 passing a detailed order. Over two days the evidence that was recorded detailed the conspiracy and identified key accused. Inexplicably, at the conclusion of the testimony of the Petitioner No. I, the Ld Judge had *suo moto* made an observation noting of the presence of Smt Teesta Setalvad in the courtroom. Moreover at the conclusion of this evidence, the Learned Judge had, on his own passed a fresh order, thereby reviewing his own earlier order Exhibit-312. By this order dated 4.11.2009, the Judge directed that

the witnesses would not be entitled to get the copies of the evidence until the completion of examination of all the witnesses. It appears evident that the bias of the Learned Judge against the witnesses intensified. That it is also clear as eyewitness after eyewitness deposed and identified more and more accused, and pointed to a far reaching conspiracy of planning and destruction of evidence that went beyond the accused arraigned in the charge sheet, the Judge adopted a hostile and aggressive attitude that among other things, the petitioners feel, would not impart any justice to the victims.

9. The petitioners most respectfully state and submit that the petitioner witness No.1 preferred an application for obtaining the certified copy of the evidence, personally immediately after his deposition dated 6.11.2009, however the same was denied. On the said Application, the Honourable Sessions Court passed the following order that is reveals a mindset that is likely not to do justice to the prosecution in the case :

> "According to the evidence produced by the witness before the Court, he has engaged an advocate in advance. The NGO namely Citizens For Justice & Peace has been helping him prior to the statement given by this witness to the SIT and that this witness had kept a written statement ready for SIT. Furthermore the fact has come on the record of evidence that he has the charge sheet papers as well as the statement given during the course of the investigation. If the witnesses are provided the copies of the evidence given in the Court, during the cross-examination, and if the same is used for preparation of the other witnesses, then there would not be change in the Trial going on before the Court. In these proceedings, according to the Rule the copies of the oral evidence are provided to the Ld. Special P P as well as to the Advocate of the accused. At the time of recording the evidence on

behalf of the prosecution, the private Advocate engaged by the witnesses as well as the NGO, Smt. Teesta Setalvad have remained present during the course of the evidence. Taking into consideration all these facts, it is not felt just and proper to provide the certified copy to the witnesses or their Advocate till the completion of evidence of the important witnesses. " Annexed hereto and marked as ANNEXURE "E" to this petition is the copy of the said order dtd. 6.11.2009.

11 The petitioners most respectfully state and submit that the petitioners – witnesses had filed an Affidavit before the Ld. Trial Court relying on, and in response to the interim order of the Honourable Court, vide Exhibit-799. In the said Affidavit dated 11.01.10, para No.4, during the hearing of Exhibit-738 the Court had made the following observations in the presence of the petitioners who were present on both 6.1.2010 and 7.1.2010 :

a. "In this trial witnesses have pushed all responsibility onto an advocate who has died."
b. "The witnesses have given their deposition and have negated the statements made before SIT.
c. "Here the witnesses have even produced an affidavit, however, the same doesn't carry his signature. The signature of the Advocate and the notary is there"
   (In this instance, the Court has chosen to ignore the fact that the the signature of this witness is present in the register of the notary).
d. "All the witnesses have made stereotyped applications to the Police Commissioner and affidavits. Similar ones have been sent to the Supreme Court.
   (This comment was made by the Judge in the Trial Court during the post lunch session 7· 1.2010 during the arguments of Advocate Mr. Mihir Desai)

Let it not be forgotten that the Hon Trial Court was making these snide remarks on documents not produced before it by SIT and which are affidavits sworn on oath by witnesses.

e. "In this trial the witnesses are failing to recognize an advocate who has assisted them to whom the Central Government has given an award."

f. "The signature of the witness is not appearing in the Applications being made by the advocates, only the advocate is signing these applications. What if if the witness turn hostile tomorrow?"

From the aforementioned observations made by the Court the mindset of the Ld. Judge stands exposed. It appears that the Ld. Judge is almost goading witnesses to turn hostile. The Petitioners-Witnesses have narrated all these facts by extracting bits from the record and quoting the comments of the Judge on oath. It is increasingly clear to us that there is no hope that the petitioners – witnesses may get the justice unless the case is transferred.

The petitioners most respectfully state and submit that at the time of the deposition of the petitioners – witnesses on the Affidavit produced by the witnesses before the Ld.Court vide Exhibit-799, the Ld. Addl Sessions Judge has passed comments on the reliability/truthfulness of the petitioners – witnesses. The same is produced hereinabove. All such facts are produced before the Court on oath. The same have been specifically averred to in the Affidavit affirmed by the witnesses. In this they state that "Under the circumstances, it is a serious question to us, one that causes untold grief and grave apprehension. The petitioners wonder how ever they'll get justice from this Trial Court in Gujarat ?"

" From the remarks and expressions made by this Court from the dias in the presence of the petitioners – witnesses, it is clearly revealed that the Honourable Court bears a huge grudge against us for initiating the process to get justice, by sticking to the truth. It appears that the Judge has pre-judged the issue before evidence is brought before him, that he appears to have a premature grudge against the petitioners and has already pre-judged that we are not trustworthy. This will affect his evaluation of our testimonies and evidence as has already been revealed.."

The affected petitioners – witnesses have produced the said facts before the Court vide Affidavit at Exhibit-799. Annexed hereto and marked as ANNEXURE "F" to this petition is the copy of the affidavits of the petitioners.

12.

The mindset of the Judge of having prejudged the trustworthiness or reliability of the witnesses becomes clear time and again. The petitioners most respectfully state and submit that the Honourable Court has ordered the arraignment of one more accused (out of the eight prayed for by the witnesses) in their 319 application argued on 6.1. 2010 and 2.1.2010. While deciding this Application under Section 319 of the Code of Criminal Procedure at Exhibit-738, in the said judgment in para No.15 of page 49 the Honourable Court has once again remarked on submissions made with regards the Affidavit(s) of the witnesses at para No.15 (A) to (F). Nowhere, in the said explanation is it mentioned that the statements made by the witnesses are wrong, but in this regard the Hon. Sessions Court has said that the observations made by him in court cannot be called remarks. The Honourable Court states that nowhere has the Court observed that the statements made by the witnesses are wrong neither is the Court saying that nothing of what is

described or mentioned in the affidavit had ever happened. Yet he continues to pass remarks as he does and denies fair process by not allowing proper identification of the accused. Under all these circumstances it is clear that the Honourable Court has a preconceived bias and partisan attitude which is unlikely to assist the process and realization of justice. Hence the case is required to be transferred in the interests of justice. Annexed hereto and marked as ANNEXURE : "G" to this petition is the copy of the order of the Ld. Addl. Sessions Judge, Ahmedabad.

13. The petitioner submits that pursuant to the order dtd 18.1.2010 below exhibit 738 the Ld Addit Sessions Judge in Sessions Case No 152/2002 was pleased to join Rajesh Dayaram Jinger and Babu Marwadi as accused. Pursuant the said order, the witnesses have been ordered to remain present for re-examination. This order was passed by the Ld Judge below exhibit 961 in Sessions Case 152/2002 dtd 22.02.2010. However, the Ld Judge while issuing summons to the four prosecution witnesses, all the rights to the accused and not the prosecution. The Ld. Judge has ordered that the examination in chief of the witnesses should be conducted on behalf of the accused (not the prosecution) even in the absence of the (newly added) accused. Thus, the witnesses have been deprived of their right of examination in chief for the newly added accused i.e., identification in the court as well the role of the newly added accused. It is only after the completion of the examination in chief of the prosecution witnesses, the accused is given right to cross examine the witnesses. Therefore the Ld Judge has expresses his clear bias against the prosecution so as to safeguard the interest of the accused. Annexed as ANNEXURE "H" to this petition is the copy of the order dtd. 22.2.2010.

14. The petitioners respectfully states that on 24.02.2010 the evidence of one eye witness namely Nadim Tassaduk Surori who was being examined since 23.02.2010 was examined till 13.00 hours. The next witness namely Suraiyya Aslamkhan Pathan was sick and therefore the police tendered the sick report to the Hon'ble Addl. Sessions Judge through the Ld. Special Public Prosecutor. The another eye witness namely Taiyyab Ali Fakir Mohammed Saiyed was absent. Thus, the Ld. S.PP. tendered an application for adjournment as no witness was present. The Ld. Judge issued bailable warrant qua the witness Taiyyab Ali and issued next date as 02.03.2010 to Taiyyab Ali, Fakir Mohammed Saiyed, Rashid Khan Ahmed Khan Pathan, Zakia Ehsan Hussein Jafri and Roopaben Dara Modi and Saeedkhan Ahmedkhan Pathan and ordered them to remain present in the court on 02.03.2010. This date was given by the Ld. Judge on his own. Other eye witnesses Noor Mohammed Vali Shah Diwan (by mistake as he was already examined earlier) and Rashida Dilawar Sheikh and Salimbhai Sandhi, Sairaben Sandhi and Mohammed Rafiq Abu Bakar Pathan were summoned for 03.03.2010. That the eye witness Noor Mohammed Vali Shah Diwan was already examined earlier and on 24.02.2010 the prosecution had not given any list of witnesses to be summoned. The Ld. Judge also issued summons to the witness Mr. Ashish Khaitan for 08.03.2010 on his own. These dates for the eye witnesses were given by the Ld. Judge himself and not the Ld S.PP. However, for other police witnesses the Ld. Judge left it to the 'discretion' of the Ld. S.PP. This shows that the Ld. Judge wants to 'finish' of the fate of the trial by hurriedly recording the evidence of the eye witnesses. Annexed hereto and marked as ANNEXURE : "I" to this petition is the copy of

the order of the Ld. Judge below Exh: 996 dtd. 24.02.2010.

12. The Ld. Addl Sessions Judge Shri. B. U. Joshi had tried to distort the evidence of the witnesses and therefore when one of the eye witnesses namely Saeedkhan Ahmedkhan Pathan. That the petitioner no. 3 was confronted with his affidavit dated 2.9.2002, in particular with respect to mentioning of one of the accused Naran Chanelwalo. His answer though was recorded, his explanation under what circumstances, he had made certain statements was not recorded. Despite requests from the advocate from the advocate of the victims, the Ld. Addl. Sessions Judge proceeded with recording the evidence. Therefore an application under exh. 585 was filed on behalf of the petitioner no. 3 and prayed that whatever answer the witness gives should be brought on record by the learned Judge and in the alternative such part of the answer should be recorded in question-answer form. Said application came to be turned down by the learned Judge by his order dated 17.11.2009. The petitioner no. 3 therefore filed Criminal Revision Application No. 800 of 2009 before this Hon'ble Court challenging the said order and this Hon'ble Court on 9.2.2010 ordered as under :

> "Needless to say, learned Judge shall record all the answers given by the witnesses to the questions put in the cross examination including those which may be in the form of voluntary explanations rendered by the witnesses, unless the same is barred by any of the provisions of the Evidence Act or the law laid down by the different Courts."

Annexed hereto and marked as ANNEXURE : "J" to this petition is the copy of the order of the Ld Addl Sessions Judge, Ahmedabad below Exh: 585 dtd. 17.11.2009 as well as the judgment and order of this Hon'ble Court passed in Criminal Revision Application No. .800 of 2009 dtd. 09.02.2010.

14. The petitioners are concerned and surprised that of all the several Trial Court judges available, several of whom have an unimpeachable record the petitioners are sure, one was chosen for the sensitive and tragic Gulberg massacre case who has been made vulnerable by the said remarks passed against him by the highest court in the state. It speaks little for the SIT monitoring that it failed to whet these appointments seriously. Para 46 (iv) of the apex court order dated 1.5.2009 specifies that senior judicial officers who inspire confidence in the process of justice should be appointed.

15. The petitioners therefore crave leave to approach this Hon'ble Court praying for the transfer of the Sessions Case No. 152 of 2002 and allied cases arising from the offence registered as CR No. I 67 o 2002 registered with Meghaninagar Police Station, Ahmedabad on following amongst other grounds:-

GROUNDS

(A) That six days after the appointment of Ld. Addl. Sessions Judge for this crucial case by the Hon'ble Gujarat High Court, an order of the division bench of the Hon'ble Court dated 15.5.2009 passed some remarks against the conduct of the Ld. Addl. Sessions Judge Mr. B. U. Joshi as a Registrar (Vigilance) in a matter related to the inquiry against a judicial officer.

The para 23 of the above judgment reads as under:-

Para 23 "A perusal of the report indicates that the Enquiry Officer namely Shri B.U.Joshi, the then Registrar (Vigilance)

recorded the statements of witnesses behind the back of the petitioner. The enquiry was to ascertain the truth of allegations of misconduct. Neither the report nor the statements recorded by the Enquiry Officer were supplied to the petitioner. The Enquiry Officer gave his findings on the allegations of misconduct. The High Court accepted the report of the Enquiry Officer and recommended to the Government that the probation of the petitioner be terminated, as she was not a suitable person to be retained in service. Thus the findings recorded by the Registrar (Vigilance) in the preliminary inquiry conducted by him, form the foundation of the decision of the High Court of terminating the services of the petitioner. Thus, the termination of the petitioner├ s services was founded on the report of the preliminary inquiry, which was conducted to inquire into the allegations made against the petitioner. The inquiry was not held to find out whether the petitioner was suitable for further retention in service or for confirmation. In this situation, the order of termination is definitely punitive in character as it is founded on the allegations of misconduct. The findings arrived at by the Registrar (Vigilance) upon conducting a preliminary inquiry against the petitioner"

In para 28 it is mentioned as under:

"Examining the findings recorded by the Inquiry Officer, in the context of the evidence on record, though it has come on record that Mr. Thakkar accompanied the petitioner when she took charge at Kodinar Court, there is no reliable material on record to indicate that he had stayed there overnight. However, the Inquiry Officer has come to the conclusion that Mr. Thakkar had stayed there overnight."

"Just because Mr. Thakkar is alleged to have gone to Jetpur via Kodinar, the Inquiry Officer has inferred that he had stayed overnight with the petitioner."

"It is highly unfortunate that such serious aspersions are cast on the character of a lady judicial officer merely on the basis of assumptions and inferences. One shudders to think of the plight of the numerous lady judicial officers at all levels, even the High Court, if any sort of association with male judicial officers is to be viewed with such suspicion."

In para 29 of the judgment the division bench observed as under:-

". In other words, in connection with the Court Building site, the petitioner had not supported the BJP leader. The Inquiry Officer has, thereafter, referred to three criminal cases pending against Mr. Dinubhai Solanki, BJP leader "

In para 30 of the judgment the division bench observed as under "

"On the other hand, 38 advocates stated to be regularly practicing at Kodinar have addressed a representation to the Hon├ ble Chief Justice, stating that certain false and frivolous complaints have been made against the petitioner and in support thereof false statements have also been given. That the Registrar (Vigilance) had visited Kodinar on 19.5.07 but had not called any of them for recording their statements nor had he inquired about them. Therefore, with a view to bring out the truth regarding the applications, they were annexing voluntary affidavits made by them so that no injustice is caused to an innocent person. Along with the said representation affidavits of the concerned advocates have been annexed wherein in effect and substance it has been stated that as the petitioner is an upright and honest judicial officer who conducts the proceedings in accordance with law, certain disgruntled advocates and their clients who may not have succeeded in their litigation along with some members of the

staff have made allegations regarding her integrity as well as her character, which are got up and false."

In para 38, this Hon'ble Court has observed as under:

"A comparision of the statements recorded by the District Judge and the statements recorded by the Registrar (Vigilance) shows that the Registrar (Vigilance) has recorded statements of those persons who had made allegations against the petitioner but has ignored recording statements of persons who routinely came in contact with the petitioner, like the peon posted at her residence, her stenographer, the C.O.C. of the Court etc., who had not stated anything adverse against the petitioner in the discreet inquiry carried out by the District Judge."

"However, for reasons best known to him, the Registrar (Vigilance) has chosen to ignore such important witnesses while conducting the inquiry. "

In para 42 it is mentioned as under:-

"All these conclusions are based merely on presumptions and there is no material on record in support of such conclusions."

Para 43 reads as under:

"It may be pertinent to note that the petitioner has alleged bias against the petitioner insofar as the Registrar (Vigilance) is concerned. The said allegation finds support in the following part of the report which would clearly indicate the biased manner in which the report has been prepared "

Para 44 reads as under:

"Such unfounded imputations leave no manner of doubt regarding the prejudice in the mind of the concerned officer against the petitioner "

Para 46 reads as under:

“Insofar as the observations regarding policy of divide and rule are concerned, from the material on record, it appears that the Registrar (Vigilance) has recorded statements of only those advocates who have spoken against the petitioner. The Registrar (Vigilance) has not bothered to record even a single statement of any advocate supporting the petitioner, despite the fact that in his opinion, there were two groups. Instead after recording the statements of those advocates who had a grudge against the petitioner, the Registrar (Vigilance) has accepted their say to be the gospel truth and on the basis of their statements, held that the allegations against the petitioner are proved. ”

Relevant portion of para 50 reads as under:

“This clearly shows that the Registrar (Vigilance) was already prejudiced against the petitioner prior to being entrusted with the inquiry which is reflected from the remarks made in the inquiry report which are based upon the remarks which he had made against the petitioner at the relevant time when he was the District Judge who had done nothing inspite of various complaints made by the petitioner against the court staff at Kodinar in the year 2006. Besides, the said remarks are also unwarranted as there does not appear to be any basis for making such imputation against the petitioner and only indicates the extent of bias against her.”

Para 51 reads as under:-

“As regards the finding that the petitioner is not temperate, attentive, patient and impartial, except for the statements of the aforesaid advocates there is no material in support of such findings. The Registrar (Vigilance) has not carried out any assessment of the petitioner├ s judicial

work and has merely placed reliance upon the statements of a handful of advocates who bore animosity towards the petitioner and arrived at such conclusions, which lends credence to the submission of the learned Advocate for the petitioner that the inquiry carried out by him is lopsided."

Para 56 of the said judgment reads as under:

"The lopsided inquiry carried out by the Registrar (Vigilance) and the distorted picture presented before the High Court has resulted in causing immense damage to the petitioner├ s reputation, which has been sullied beyond repair. The very fact that only statements of persons against whom the petitioner had complained to the District Judge are recorded gives an indication as regards the manner in which the inquiry has been carried out."

Para 57 reads as under:

"Unfortunately the very District Judge who had chosen to turn a deaf ear to the pleas of the petitioner has carried out the inquiry in the present case as the Registrar (Vigilance), resulting in great prejudice to the petitioner which is evident from the manner in which the inquiry has been made."

The petitioners respectfully states that the petitioners learnt about the above order recently after the application for transfer of the trial was filed before the Ld. Principal Sessions Judge. The above petition was heard on 15.1.2009 and kept for orders, ultimately the 32 page detailed judgment and order was passed on

15.5.2009 whereas the Ld. Addl. Sessions Judge was appointed as the Special Court on 7.5.2009. Thus, if the petitioners were aware of the above judgment, immediately the same could have been brought to the notice of this Hon'ble Court.

(B) The petitioners most respectfully state and submit that the Learned Additional Sessions Judge, Ahmedabad, conducting the crucial trial, wherein as many as 69 innocent people have been killed in a premeditated manner, where the masterminds who planned the conspiracy have not yet been arraigned as accused, that the Hon. Addl Sessions Judge has not only been acting in an obviously partisan manner, but has also not lost a single opportunity of humiliating victims and witnesses and treating us, the present petitioners / eye witnesses as accused. The present petitioners have constantly been made to feel that they ought not to have pursued any prosecution against the accused.

(C) The petitioners most respectfully state and submit that the most humiliating and aggressive behaviour from the Ld. Addl Sessions Judge was during their deposition before the Trial Court. That during their depositions, whenever their earlier Applications and Affidavits (alleging faulty investigation and non-inclusion of the name of correct accused and deliberate inclusion of wrong accused) were referred to in examination in chief or cross examination, the Ld Trial Judge has belittled and ridiculed these documents. These Applications and Affidavits had been sent to the Commissioner of Police Ahmedabad in 2002 and 2003. Whenever these documents were referred to, the Learned Judge Shri B.U. Joshi used nasty and sharp language to intimidate and berate the petitioners by threatening that "the filing of false Affidavits is an offence " implying that the witnesses may have to face

punishment. We say and submit that ironically the SIT has not included in its charge sheets these documents though during the recording of the 161 statements before SIT, eyewitnesses had been grilled on the facts contained in these documents. Hence the Judge made blatant attempts to scare and intimidate witnesses during their testimonies in the trial court. This coupled with the fact that the Learned Addl Sessions Judge was not recording the detailed explanations given by the witnesses when they answered questions put in cross examination with regard to the Affidavits; it is apparent that the Judge has already had or developed through the trial, preconceived notions about the integrity of the eyewitnesses, their affidavits made before the apex court and the Police Commissioner and that such pre conceived notions amount to prejudice and bias.

(D) Besides, the petitioners most respectfully state and submit that during the cross-examination of the witnesses, when-ever the witnesses attempted to supplement replies to specific questions by the defence giving full and complete explanations / answers to the question, the Learned Judge has deliberately not recorded the same. This was also objected to by us. It is under these circumstances, the Advocate of the petitioners filed an Application being Exhibit-585, wherein para-2 specifically carried a contention praying that what-ever explanations are given by witnesses in their responses, should be recorded. The Learned Judge rejected the said Application below Exhibit-585 and passed a detailed order, spread over 6 pages and in para-14 of that order had even observed that the Court was not required, in law, to record what-ever explanation given by the witness on his own. The Judge held that if all explanations of witnesses were recorded, the purpose of the cross-examination would be defeated. The Learned Addl Sessions Judge failed to appreciate Section 165 of the Indian

Evidence Act that is clear and cogent stating that object of recording evidence should be to get to, or find out the truth. Thereafter the petitioner no. 3 challenged the same before this Hon'ble Court and the Hon. Gujarat High Court was pleased to allow our petition and grant the reliefs seeking directions to the Ld. Trial Judge to record the voluntary answers of the witnesses in their entirety. The copy of the said order dtd. 9.2.2010 has been annexed. Time and again, especially since the eyewitnesses and victim survivors began deposing before him, the conduct of the Learned Judge has been openly hostile to the witnesses and the actions of the Ld. Addl. Sessions Judge, clearly seen to be those that are beneficial and helpful to the accused

(E) The petitioners most respectfully state and submit that at the start of the trial, before eyewitnesses had stepped into the box, the evidence of the witnesses was given to the accused, as well as the prosecutor free of cost. Hence, on behalf of the present petitioners, an Application being Exhibit-312 was filed on 14.9.2009 requesting for a copy of the evidence of the witnesses. The Learned Additional Sessions Judge, Ahmedabad Shri B.U. Joshi was pleased to order that the witnesses be given the copies of the evidence at a charge of Rupee 1/- per page and on payment of Rs.500/- as advance the witnesses would be entitled to get the copy of the evidence. It is clear that a step motherly of treatment has been meted out to the petitioners by the Learned Judge from the outset The petitioners had however paid the fees and had obtained the copies. All that changed from 2.11.2009 the day the evidence of petitioner no 1 herein began to be recorded. The evidence of the witness No.1 i.e. the petitioner NO.1 herein, was recorded between 2.11.2009 and 4.11. 2009. On 2.11.2009 itself the defence objected to the presence of Smt Teesta Setalvad of Citizens for Justice and Peace and Shri RB Sreekumar, former Director General of Police, Gujarat in the

courtroom. This objection was turned down by the Judge. At the conclusion of the testimony of the Petitioner No. I however the Ld Judge had made a note of the presence of Smt Teesta Setalvad in the courtroom. Moreover at the conclusion of this evidence, the Learned Judge had, on his own passed a fresh order, thereby reviewing his own earlier order below Exhibit-312 and ordered on 4.11.2009 that the witnesses would not be entitled to get the copies of the evidence until the completion of examination of all the witnesses. Again, the bias of the Learned Judge against the witnesses became evident. That it is clear as eyewitness after eyewitness deposed and identified more and more accused, and pointed to a far reaching conspiracy of planning and destruction of evidence that the Judge adopted an attitude that would not impart any justice to the victims.

(F) The petitioners most respectfully state and submit that the petitioner witness No.1 preferred an application for obtaining the certified copy of the evidence, personally immediately after his deposition on dated 6.11.2009. On the said Application, the Honourable Court passed the following order that is blatantly biased and also reveals a mindset that is likely not to do justice to the prosecution in the case :

> "According to the evidence produced by the witness before the Court, he has engaged an advocate in advance. The NGO namely Citizens For Justice & Peace has been helping him prior to the statement given by this witness to the SIT and that this witness had kept a written statement ready for SIT. Furthermore the fact has come on the record of evidence that he has the charge sheet papers as well as the statement given during the course of the investigation. If the witnesses are provided the copies of the evidence given in the

Court, during the cross-examination, and if the same is used for preparation of the other witnesses, then there would not be change in the Trial going on before the Court. In these proceedings, according to the Rule the copies of the oral evidence are provided to the Special Public Prosecutor as well as to the Advocate of the accused. At the time of recording the evidence on behalf of the prosecution, the private Advocate engaged by the witnesses as well as the NGO, Smt. Teesta Setalvad have remained present during the course of the evidence. Taking into consideration all these facts, it is not felt just and proper to provide the certified copy to the witnesses or their Advocate till the completion of evidence of the important witnesses."

The questionable attitude of the Ld Judge is revealed in the wordings of this order. The Learned Judge has displayed a blatant bias and partial attitude with a view to help the accused not from the very beginning of the trial but soon after the deposition of the eye witnesses applicant victims started.

(G) The petitioners most respectfully state and submit that at the time of the cross-examination of the petitioner No.1 – Imtiyazkhan Saeedkhan Pathan before the Court, in a question in the evening of 4.11.2009, the petitioner in response to a question stated that "I do not remember". The Honourable Court jumped into the fray and aggressively shouted at the witness Imtiyaz, in open court, while he was in the witness box saying that "You remember many things, how come you don't remember this!!" This remark of the Ld. Judge was entirely unwarranted. Once again, the Learned Judge has exhibited a partial and biased attitude towards the witness who has lost several family members including his

mother. Instead of being treated with the dignity that a victim and an eyewitness deserves, the Judge was in fact treating him as if he was an accused, a murderer ! We say and submit that we are shocked at the attitude of a Judge appointed to a Special Court on an order of the Hon. Supreme Court displaying such crude treatment and a hostile attitude to us, victim survivors and eyewitnesses. Such treatment to a witness, who has lost as many as seven persons in a brutal massacre was subjected to aggressive and humiliating treatment by Judge BU Joshi, a Special Judge appointed by the Hon Gujarat high court is shocking to us and moreover makes us genuinely apprehend that justice will not be done in this case.

(H) The petitioners most respectfully state and submit that during the cross-examination of the petitioner No.2 Rupa Modi on 9.11.2009, when the matter of the disappearance/killing of her son Azhar surfaced during the first time in the examination in chief, and this witness, a distraught mother, ie petitioner no. 2 ws recalling the last words ever spoken by him to her, she broke down in tears and wept uncontrollably. After a few minutes, she was made to step down from the witness box and offered water. Despite the request from the lawyer appearing on behalf of the witness that the distraught state of the witness ought to be reflected in the records of the court, the Ld. Judge Mr. B. U. Joshi, refused to record the distraught demeanour of the eyewitness, thereby not merely 'sanitising' the evidence of such a gruesome mass crime but also through his action displaying a biased nature towards a victim mother who had lost her son.

(I) The petitioners most respectfully state and submit that they would like to illustrate one more specific conduct of the judge

that blatantly displays his bias. During the recording of evidence of the petitioners no. 1 and 2 herein, the Court had allowed the witnesses to step out of the box, walk to the back of the courtroom accompanied by a policeman a good 25-30 feet away where the accused are seated as is the normal practice, go near the accused and identify as many as they had named in their depositions out of the total 64 accused. The Petitioner no.1 had named 22 accused through such a procedure and had also identified all of them. As for petitioner no. 2 is concerned, the person named by her (Rajesh Jinger had not been arraigned as accused when she was examined but was arraigned after an application to arraign him was filed by us under section 319 of the CrPC). Suddenly after this the Ld. Addl. Sessions Judge inexplicably changed the permitted system of identifying the accused. During the deposition of petitioner no 3, he did not allow the witness to step out of the box and go close to the accused to identify them, thereby compelling the petitioner no. 3 herein onwards to identify the accused from the witness box alone that is at some distance from where the accused are seated ! The Honourable Court has made the following observation during the deposition of the witness No.3-

> "The witness states that he can identify the accused by going close to where the accused are sitting. The distance of the accused and the witness box is about 20 to 25 feet. The witness is granted permission."

> Also, on page no.13 of the evidence, the Honourable Court has made an observation to the effect that, "as the witness seeks permission to identify the accused by going close to the accused, the permission is granted." This in humble submission of the petitioners, displays a clear bias on the part of the Hon.Addl. Sessions Judge. It reveals a clearcut

desire that is hostile to witness and which favours the accused

(J) The petitioners most respectfully state and submit that after these three eye-witnesses, and during the depositions of all eyewitnesses that followed, witnesses would seek permission to go close to the accused to identify them. In each of these cases, the Ld Judge granted the permission but did not miss the opportunity to make an observation in the evidence regarding the same. This is unwarranted illegal and unprecedented. (Whereas at other times, when it came to expressions of grief or trauma by the victim witnesses, when witness were copiously weeping in the witness box or when, at other time, the eye-witnesses attempted to explain some evidence, the Ld. Judge had, pointedly and markedly, not noted these facts despite the request on behalf of the advocates for the witnesses to note them.) Thereafter for all the witnesses the system of identification of the accused was suddenly, inexplicably and totally altered by the Honourable Court. Thereafter the Hon. Addl. Sessions Court began to insist that the witnesses identify the accused from the witness box itself even though it's a good 25-30 feet away from where the accused are made to sit. We say and submit that it is also possible that accused cannot be seen clearly from the box, that eight long years have passed after the massacre and physiques can change in the period. We say and submit that the Hon. Court was doing all it can to make it difficult for the eye witnesses to identify the accused. The procedure followed by the Honourable Court to identify accused in a case where 64 of the accused are sitting at a fair distance away from the witness box that may make it difficult for the witness to successfully identify, is suspicious and unbecoming conduct of a Special Court trial court judge. We say and submit that considering the fact that we, the victims

and witnesses had left the place where they were residing with the accused as their neighbours immediately after the tragedy seven to eight years ago (Gulberg Society, Meghaninagar, Chamanpura). With an eight year lapse of time, as stated above, physiques can alter, a thin man can put on weight and vice versa. In fact it would be in the interests of due process and the fair carriage of justice is a procedure that is not uncommon, where witnesses go up to the accused and identify them at close quarters, is followed. However despite the fact that this is one of the most important carnage cases related to the 2002, where 69 innocent children, women and men including former parliamentarian Ahsan Jafri were slaughtered in broad daylight in cold blood, the Ld. Judge, has adopted a pro-accused pointed bias. Under the circumstances the applicants have no hope for getting justice from the Ld. Judge Mr. B. U. Joshi.

(K) The petitioners most respectfully state and submit that the usual practice followed by the courts is to make the accused sit in accordance with the number assigned to them in the chargesheet. In the court of the Ld. Addl. Sessions Judge Shri. B. U. Joshi's court even this normal practice is not followed. The petitioners state that the only justifiable reason to depart from normal accepted procedure and compel the witnesses to identify the accused from a distance of about 20 to 25 ft after about seven to eight years of the commission of such a heinous offence, could be to help the accused. In the circumstances the inconsistent attitude of the Honourable Court is the reflection of the bias and partisan mind set of the Honourable Court.

(L) The petitioners most respectfully state and submit that during the deposition of the petitioner no. 4 in the Court, the

Advocate for the petitioner no. 4 submitted before the Ld Judge that on account for the lapse of over seven years, the witnesses should be given an opportunity to identify the accused by going closer to them. At that time the Honourable Court has observed in para 10 of the deposition that "the distance of the box of the accused from the witness box is of 20 feet away and all the accused can be seen chest above from the witness box. The accused are made to sit in such a manner that the upper part of the chest and face of the accused can be seen. Moreover, when the witness has not complained of any difficulty in identification then why is the petitioner's lawyer objecting to said system of identification ? The specific attitude of the Honourable Court appears to be so biased as to ensure that as few as is possible accused may be identified and a large number of the accused may not get identified. As victims and witnesses, the petitioners find it difficult to understand how it would be at all illegal if we go closer to the accused to identify them after a closer look. Would this procedure not serve the ends of justice ? Thus, the biased and partial attitude of the Ld Judge is revealed from a perusal of the records.

(M) The petitioners most respectfully state and submit that during the recording of evidence of witnesses before this Ld Judge, in one case it transpired that a witness took a slightly longer time before identifying the accused. Over seven years have passed and yet the Ld. Judge didn't miss any opportunity to make a note in the evidence to the effect. In our view this is nothing short of an effort to put psychological pressure of witnesses.

In para-12 of the deposition of witness no.142 Ashraf Sandhi, it was so observed by the Judge, "the time of 10

minutes given is over for the identification of the accused. The witness has failed to identify the remaining accused."

In para-15 of the deposition of the witness No. 179 of Ajaz Ali the Honourable Sessions Court has observed that:
"All the accused are sitting and the accused can be seen chest upwards. Furthermore they are sitting in six rows. Accused were made to stand up row by row for the purposes of identification. The witness has not been able to identify any accused other than the one already identified."

In para-4 of the deposition of witness No. 192 Mohemmedai Shahejadali the Court has put in a note stating that:
" On the request of the witness all the accused sitting in a row were asked to stand up together."

"By making all the accused of each row stand up, row by row, they are shown to the witnesses. More than 10 minutes of time is also given. Even then the witness has failed to identify the accused." The witness has requested permission for identifying the accused by going closer where they are seated
Despite this, the Honourable Court has made note that:
" This Court has been established for this trial. The seating arrangement of the accused has been made in a theatre like fashion so that the witness, the Court as well as the persons present in the Court may see the accused clearly. The distance of the accused where they are sitting is situated at the distance of 15 to 20 feet only from the witness box. There is lighting in the courtroom. It is not possible that even though there is enough time for identifying the accused, the witness cannot identify the

accused. There is evidence on record that the accused have been residing in the same area where the witnesses have been residing, passing each other every day, in the mornings and evenings. Taking all this into consideration, and the fact that there is adequate arrangement for seeing and identifying the accused, the permission to identify the accused by going to the back of the room cannot be granted and therefore the said request is rejected." It is specific say of us, the witness that, by giving permission us to go to the back of the room closer to the accused, no damage to the judicial process is caused. We fail to understand the reluctance of the Judge to grant this request, Under the facts and circumstances, the psychgology and mindset of the Honourable Court is clearly favouring the accused, the Honourable Court displays a grudge and hostility towards the eyewitnesses and victims who are the applicants herein.

From the aforementioned process of identification, not only has the biased mindset and thinking of the Ld Judge been exposed but it clearly appears that he intends to favour the accused. Therefore if the case proceeds further under him in the said Court than the petitioners witnesses who have lost their beloved son(s), daughter, parents, brothers, sister, will be denied justice, restitution. A perusal of the records of the Ld. Trial Court reveal that the Court has been clearly and ostensibly established to impart justice to the accused only not the victims. The biased and partisan attitude towards of the Court towards the witnesses have been exposed and reflected time and again especially since November 2, 2010. hence the petitioners have also applied for CCTV cameras to be installed in these Courtrooms so that the Hon Apex Court can see for itself the attitude of the Judge. Without further damage to the

process of justice, without further subversion of the evidence and in the larger interest of justice, the trial is required to be transferred forthwith outside Gujarat State as the "pressure" from within the state is evident as influential accused are involved and one of the persons killed is Ahsan Jafri Ex- MP. However, for the moment the petitioners have been praying for transferring their case from the court of Ld. Addl. Sessions Judge Shri B. U. Joshi to any other judge. The petitioners reserve their right to approach the Hon'ble Supreme Court for appropriate relief.

(N) The petitioners most respectfully state and submit that the applicants – witness has made an application under Section 319 of the Code of Criminal Procedure, before the Ld. Trial Court, vide Exhibit-738 for joining eight (8) persons as accused. The hearing of the said Application was fixed by the Court on dated 6.1.2010 and went on the next day. Advocate Shri Mihir Desai an advocate practicing in Bombay High Court appeared on behalf of the witnesses. The applicant – witnesses remained present before the Honourable Court and even during the hearing of the 319 application, the attitude of the Honourable Court displayed a hostile and aggressive attitude towards the applicant witnesses. During the course of hearing the Honourable Court passed an unjust interim order dated 7.1.2010, wherein the Honourable Court exceeding the jurisdiction vested in it, observed that this Honourable Court has gained knowledge through the news media that, some writ petition is filed in the Supreme Court, and in connection to that, this interim order is being passed for filing of an Affidavit by the Advocate for the Witnesses. Even though the Ld Judge has no power to pass such an order directing the advocate for the witnesses to file an affidavit, the Judge has exceeded his jurisdiction and passed such an order. The intention of the Ld. Trial Court with the

adoption of this crassly unfair attitude appears to be to break the morale and courage of the applicants – witnesses. Given the said facts and under the peculiar circumstances, the said case is required to be transferred forthwith.

(O) The petitioners most respectfully state and submit that the petitioners – witnesses had filed Affidavit before the Ld. Trial Court relying on, and in response to the interim order of the Honourable Court, vide Exhibit-799. In the said Affidavit dated 11.01.10, para No.4, during the hearing of Exhibit-738 the Court had observed from the bench, while petitioners were present on both 6.1.2010 and 7.1.2010 that,

a. "In this trial witnesses have pushed everything onto an advocate who has died."
b. "The witnesses have given their deposition and have negated the statements made before SIT.
c. "Here the witnesses have even produced an affidavit, however, the same doesn't carry his signature. The signature of Advocate and the notary is there"
   (The Court fails to inquire and find out that the signature of this witness is already there in the register of the notary).
d. "All the witnesses have made stereotyped applications to the Police Commissioner and affidavits. Similar ones have been sent to the Supreme Court.
   (This comment was made by the Judge in the Trial Court during the post lunch session 7· 1.2010 during the arguments of Advocate Mr. Mihir Desai)
   Let it not be forgotten that the Hon Trial Court was making these snide remarks on documents not produced before it by SIT and which are affidavits sworn on oath by witnesses.

e. “In this trial the witnesses are failing to recognize an advocate who has assisted them to whom the Central Government has given an award.”

f. “The signature of the witness is not appearing in the Applications being made by the advocates, only the advocate is signing these applications. What if if the witness turn hostile tomorrow?”

From the aforementioned observations made by the Court the mindset of the Ld. Judge stands exposed. It appears that the Ld. Judge is almost goading witnesses to turn hostile. The Petitioners-Witnesses have narrated all these facts by extracting bits from the record and quoting the comments of the Judge on oath. It is increasingly clear to us that there is no hope that the petitioners – witnesses may get the justice unless the case is transferred.

(P) The petitioners most respectfully state and submit that at the time of the deposition of the petitioners – witnesses on the Affidavit produced by the witnesses before the Ld.Court vide Exhibit-799, the Ld. Addl Sessions Judge has passed comments on the reliability/truthfulness of the petitioners – witnesses. The same is produced hereinabove. All such facts are produced before the Court on oath. The same have been specifically averred to in the Affidavit affirmed by the witnesses. In this they state that “Under the circumstances, it is a serious question to us, one that causes untold grief and grave apprehension. The petitioners wonder how ever they’ll get justice from this Trial Court in Gujarat ?”

“ From the remarks and expressions made by this Court from the dias in the presence of the petitioners – witnesses, it is clearly revealed that the Honourable Court bears a huge grudge against us for initiating the process to get

justice, by sticking to the truth. It appears that the Judge has pre-judged the issue before evidence is brought before him, that he appears to have a premature grudge against the petitioners and has already pre-judged that we are not trustworthy. This will affect his evaluation of our testimonies and evidence as has already been revealed.."

The affected petitioners – witnesses have produced the said facts before the Court vide Affidavit at Exhibit-799.
Taking into consideration all the facts and circumstances, it would be in the interest of justice to transfer the case.

(Q) The mindset of the Judge of having prejudged the trustworthiness or reliability of the witnesses becomes clear time and again. The petitioners most respectfully state and submit that the Honourable Court has ordered the arraignment of one more accused (out of the eight prayed for by the witnesses) in their 319 application argued on 6.1. 2010 and 2.1.2010. While deciding this Application under Section 319 of the Code of Criminal Procedure at Exhibit-738, in the said judgment in para No.15 of page 49 the Honourable Court has once again remarked on submissions made with regards the Affidavit(s) of the witnesses at para No.15 (A) to (F). Nowhere, in the said explanation is it mentioned that the statements made by the witnesses are wrong, but in this regard the Hon. Sessions Court has said that the observations made by him in court cannot be called remarks. The Honourable Court states that nowhere has the Court observed that the statements made by the witnesses are wrong neither is the Court saying that nothing of what is described or mentioned in the affidavit had ever happened. Yet he continues to pass remarks as he does and denies fair process by not allowing proper identification of the accused. Under all these circumstances it is clear that the Honourable

Court has a preconceived bias and partisan attitude which is unlikely to assist the process and realization of justice. Hence the case is required to be transferred in the interests of justice.

(R) The petitioners most respectfully state and submit that in the order passed on the Application under Section 319 of the Code of Criminal Procedure, by the Honourable Trial Court, one of the accused viz., Rajesh Dayaram Jinjar remained present in the Honourable Court on 22.1. 2010. He filed an Application for adjournment on grounds that he wanted to file a reply in the said case (Application at Exhibit-859) which was rejected by the Honourable Court. However on the same day that this Jingar was arraigned as a new accused for the first time the Hon Trial Court released him without a single day of custody merely on payment of a Rs 5,000 bond. This was the order passed:

O R D E R

> In the present case, as the accused has remained present in the Court and under provisions of Section 88 of the Code of Criminal Procedure, 1973, it is necessary to take his bond on behalf of the prosecution. The trial has commenced from 7.9.2009. Until today none of the accused have remained absent without reason. With the cooperation of all parties the trial of the present case is going on smoothly. Taking into consideration the entire facts, it is ordered that the accused joined in the present case shall remain present before this Honourable Court on date and a bond of Rs.5000/- may be given."

Thus, although the accused had not filed any Application for bail, merely on the application of adjournment the order of enlarging the accused Rajesh Dayaram Jinjar on the bond of

Rs. Five thousand was passed. It is clear that despite the crime being heinous, the Hon. Trial Court has a clear soft corner towards the accused.

In view of the facts and circumstances narrated above, the petitioners – witness have a specific apprehension that if the said case is allowed to be heard before the Honourable Sessions Judge Shri B.U. Joshi, justice will not be done to the petitioners – witnesses. That the Honourable Judge has become totally bias and partisan against the petitioners – witness displaying a prejudged mindset. Neutral and impartial adjudication of their case and justice would not be available to the petitioners – witnesses. Under the circumstances, in the larger interest of justice, the case is required to be transferred.

That such a case is one of the most heinous cases to have been part of the gruesome violence of 2002 in Gujarat when powerful politicians and policemen have colluded at the very highest level, not to provide speedy help and allow young girls and women to be raped, children and men to be quarterised and killed. In the daylong massacre at Gulberg Society, 69 persons were so killed in cold blood, one of the hapless victims was former Member of Parliament Shri Ahesan Jafri. The macabre conspiracy involved not just state complicity in the killings but the destruction of evidence of the killings by the burning to ashes of the dead remains in the presence of senior officers of the Gujarat Police. Evidence points to the questionable roles of senior Police Officers in the massacre and subsequent destruction of evidence. Despite being such a serious case, the Honourable Trial Court is not taking the matter seriously and appears to be taking steps to help the accused and to see that the accused may be acquitted.

(S) The petitioner submits that pursuant to the order dtd 18.1.2010 below exhibit 738 the Ld Addl Sessions Judge in Sessions Case No 152/2002 was pleased to join Rajesh Dayaram Jinger and Babu Marwadi as accused. Pursuant the said order, the witnesses have been ordered to remain present for re-examination. This order was passed by the Ld Judge below exhibit 961 in Sessions Case 152/2002 dtd 22.02.2010. However, the Ld Judge while issuing summons to the four prosecution witnesses, all the rights to the accused and not the prosecution. The Ld. Judge has ordered that the examination in chief of the witnesses should be conducted on behalf of the accused (not the prosecution) even in the absence of the (newly added) accused. Thus, the witnesses have been deprived of their right of examination in chief for the newly added accused i.e., identification in the court as well the role of the newly added accused. It is only after the completion of the examination in chief of the prosecution witnesses, the accused is given right to cross examine the witnesses. Therefore the Ld Judge has expresses his clear bias against the prosecution so as to safeguard the interest of the accused.

(S) The petitioners say and submit that through Criminal Revision Appln 110/2010 challenged the order on their 319 application that was heard by the Hon. Gujarat High Court on 24.2.2010. This Hon. Court has issued notice to three other accused not arraigned by the Ld Trial Court and put the hearing of the matter on 8.3.2010 whereas qua two accused the same wasn't entertained.

(T) That the Ld trial Court Judge deliberately erred and allowed the evidence of PW 279 M.K. Tandon to be examined on 16.2.2010 (Exh.965). That the petitioners in their application filed under section 319 of the CRPC urged that the then PI Parmar and the then Jt Commissioner of Police M.K. Tandon be also arraigned as accused for offences of tampering with evidemce, protecting the accused and committing criminal and negligent acts. While

deciding the matter the Ld Judge had unusually "held back" deciding on the merits of arraigning the two policemen named above as accused. Under the circumstances it appears odd, suspicious and deliberate that is evidence was hastily recorded when it ought to have waited until a later stage. This too shows a clear-cut desire that the Ld Judge is desirous of shielding powerful accused.

(U) The petitioners most respectfully state and submit that the attitude of the Ld Trial Court since November 2009 that is over the past two and a half months especially has been such to assist the defence in recording of evidence that may help them and if, on the contrary, the statement of the witness goes against the accused, the Honourable Court openly intercepts on behalf of the defence and asked questions or clarifications to dilute the impact of such evidence. Such an attitude of the Honourable Court obviously reflects a mind set on helping the accused.

(V) The petitioners most respectfully state and submit that the Honourable Trial Court has often stated from the dias that the petitioners have not challenged the investigations made by SIT. This is factually untrue. We have through the Citizens for Justice and Peace filed an application in the apex court alleging unprofessionalism in SIT's application and praying for a reconstitution of the SIT. This application was made on 23.10.2009 and was heard by the Hon apex court on 7.12.2009 and then on 21.01.10. The next hearing is scheduled for 9.2.2010. We have through a separate application also asked for CCTV monitoring of the special trial court proceedings. Thus, without objectively evaluating the evidence, if the Ld. Judge blindly proceeds on the footing that the investigation has been properly conducted then again there are chances of a gross miscarriage of justice.

(W) A sensitive issue revealing not just the biased and unbalanced mind of this Judge has been brought to our notice through an order passed by Hon'ble division bench of the Hon Gujarat High Court on May 15, 2009 that is eight days after Shri. B.U. Joshi was appointed as Designated Judge in such a sensitive matter. The order passed by Hon'ble Division Bench was in the matter of Jayshree Chamanlal Buddhhbhatti v/s state of Gujarat (Spl Civil Application No 2880 of 2008). The petitioners further submit that as per the best of the information of the petitioners, one judicial officer Ms. Asha Dave, at present posted at Surendranagar, was sought to be harassed 'sexually' by the then District Judge, Junagadh Shri. B. U. Joshi when Ms. Asha Dave was posted in Visavdar and therefore she was constrained to sent an application to this Hon'ble Court, however, lateron Shri. B. U. Joshi was appointed as the Registrar (Vigilance), Gujarat High Court. Lateron one another judicial officer Mr. A. N. Vinjoda filed an application under the 'Right To Information Act' and sought the communication sent by Ms. Asha Dave to this Hon'ble Court against Shri. B. U. Joshi, however the same was refused to Mr. A. N. Vinjoda. This fact is known to the petitioners recently and therefore the specific contentions have been raised in this petition memo. However, the fact remains that Shri. B. U. Joshi is not a man of integrity. It is a matter of pain and surprise to the petitioners that a judge on whom there was a cloud on whom there were serious question marks of character was chosen above all others by the Hon Gujarat High Court for a case like the Gulberg society massacre wherein more than 69 innocent people have been killed. It appears there are continued attempts to subvert the justice process at the very highest level in Gujarat. This circumstances leads us to believe that justice may only be

done if the case is not only transferred but transferred out of the state.

(X) Among the accused deliberately ignored by the investigating agency and also not arraigned by the Ld. Trial Court are senior members of the police hierarchy, possibly highly placed politicians, certainly the son for a corporator of the ruling party and former deputy Mayor of Ahmedabad. It appears clear from the evidence of eye witnsees and Shri Ahsan Jafri and vulnerable victims of the Gulberg society were conscious and deliberate victims of a preplanned macabre conspiracy motivated with a desire to get politically to Shri Jafri. The locational details of key persons from the chief minister's office, senior policemen, cabinet ministers of 27.2.2002 show that they held meetings at Shayano Plaza, Meghaninagar and Narol, Naroda –areas that we are told not known for communal disturbances—the day before these two areas were ripped apart in broad daylight by a conflagration of the kind that Gujarat or India has not seen. Girls and women were gang raped in broad daylight; accused of the two incidents that together claimed close to 200 lives were in touch with each other, powerful cabinet ministers and policemen on duty all suggesting a sinister design to let these areas burn and people be killed. The failure of SIT to examine and place on record documentary evidence such as fire brigade register and records, control room records and station diary entries is matched by a reluctance of the Ld. Trial Judge to use the powers granted under section 311 of the Code to interrogate the evidence. The petitioners are apprehensive therefore that in this cosy state of affairs every effort is being made at the very highest level to prevent the truth from being told and the actual guilty being punished.

(Y) It has come to the knowledge of the petitioners, and also happened while the petitioners were deposing before the

court, that the learned special public prosecutor in this case, Shri R.K. Shah has been humiliated time and again and insulted on several occasions by the Ld Judge B.U. Joshi without any justification. The petitioners have learned that he may have expressed this in some communication to the SIT. The petitioners urge that this Hon. Court summons the correspondence of the Ld. Special PP Mr. R. K. Shah made to the SIT since this Trial commenced. The petitioners state and submit that yesterday, that is Tuesday, 2.03.2010, the Ld. Special PP has informed the Special Investigation Team (SIT) i.e., the respondent no. 2 of his resignation and that this was conveyed to the Ld Trial Judge. That it is in the interests of justice for this Hon. Court to summon all communications between the special public prosectutor and the SIT to arrive at a honest conclusion about the manner in which both the prosecution is being handled and also the conduct of the Court.

(Z) We say and submit that we have also approached the Honourable Apex Court on the issue of subversion of the investigation and further investigation ordered by the apex court through two separate orders one dated 26-3-2008 (appointing the Special Investigation Team) and second, dated 1-5-2009 lifting the stay on the trials and ordering their commencement under specially monitored conditions in the Special Courts. In this CRMP No 19816 of 2009 we have asked for re-constitution of the SIT in grounds of deliberate efforts by three of the senior Gujarat police officers to protect senior policemen and powerful accused still in influential positions in the state. We say and submit that while this matter is still to be decided (hearing fixed on 9-2-2010) partial veracity of our claims have been established by the severed indictment of one of the officers Smt Geeta Johri in the Sohrabuddin case wherein the apex court has found her to

have concealed information and not investigated the phone calls of the accused police officers. This is just our contention herein for which we had filed an application before SIT dated 14-11-2009 asking for Rahul Sharma, then DCB Crime Branch to be made a witness in the case in connection with the CD for 5 lakh mobile phone records that expose both the conversations between the masterminds and the accused as also their locations during the critical periods of the violence in 2002. The issue at stake here is not just the bias of the judge that is visible in the manner, among other things he refused to entertain the 319 application for more than one of the eight persons for which the case was made out, but a deep rooted subversion of the investigation by SIT and its supervisory officers who have been rendered the sole monitoring agency by the apex court to ensure fair trial. The petitioners crave leave to refer and rely upon the said judgment and order of the Hon'ble Supreme Court in the case of Sohrabuddin's fake encounter at the time of hearing of this petition.

(AA) (I) The Hon'ble Supreme Court in the judgment reported in 2004 AIR SCW 2325 , in para 18, has observed as under:-

> "Witnesses" as Benthem said: are the eyes and ears of justice. Hence, the importance and primacy of the quality of trial process. If the witness himself is incapacitated from acting as eyes and ears of justice, the trial gets putrefied and paralysed, and it no longer can constitute a fair trial. The incapacitation may be due to several factors like the witness being nor a position for reasons beyond control to speak the truth in the Court or due to negligence or ignorance or some corrupt collusion. Time has become ripe to act on account of numerous experience faced by Courts on account of frequent turning of witnesses as hostile, either due to threats coercion, lures and monetary considerations at the instance of those in

power, their henchmen and hirelings, political clouts and patronage and innumerable other corrupt practices ingenuously adopted to smoother and stifle truth and realities coming out to surface rendering truth and justice, to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness. Time has come when serious and undiluted thoughts are to be bestowed for protecting witnesses so that ultimate truth is presented before the Court and justice triumphs and that the trial is not reduced to mockery

Para 19 of the said judgment reads as under:-

Legislative measures to emphasize prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day. Conducts which illegitimately affect the presentation of evidence in proceedings before the Courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair as noted above to the needs of the society. On the contrary, the efforts should be ensure fair trial where the accused and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance if not more, as the interests of the individual accused. In this courts have a vital role to play.

It is further observed that:-

The court has to see whether the apprehension is reasonable or not. The state of mind of the person who entertains apprehension, no doubt is a relevant factor but not the only determinative or concluding factor. But the Court must be fully satisfied about the existence of such conditions which would render inevitably impossible the holding of a fair and impartial trial, uninfluenced by extraneous considerations that may ultimately undermine the confidence of reasonable and right thinking citizen, in the justice delivery system

The Hon'ble Supreme Court has thus given guidelines on what a criminal trial should be especially when it comes to mass violence when a single community is made a target of attack. In this historic verdict that provides a background to the ongoing trials afoot in the state the apex court has observed that:-

"A criminal trial is a judicial examination of the issues in the case and its purpose is to arrive at a judgment on an issue as a fact or relevant facts which may lead to the discovery of the fact issue and obtain proof of such facts at which the prosecution and the accused have arrived by their pleadings; the controlling question being the guilt or innocence of the accused. Since the object is to mete out justice and to convict the guilty and protect the innocent, the trial should be a search for the truth and not a bout over technicalities, and must be conducted under such rules as will protect the innocent, and punish the guilty. The proof of charge which has to be beyond reasonable doubt must depend upon judicial evaluation of the totality of the evidence, oral and not by an isolated scrutiny." Further the apex court had observed that

" Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the

trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty stage-managed, tailored and partisan trial.

"The fair trial for a criminal offence consists not only in technical observance of the frame and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice. "If one even cursorily glances through the records of the case, one gets a feeling that the justice delivery system was being taken for a ride and literally allowed to be abused, misused and mutilated by subterfuge. The investigation appears to be perfunctory and anything but impartial without any definite object of finding out the truth and bringing to book those who were responsible for the crime. The public prosecutor appears to have acted more as a defence counsel than one whose duty was to present the truth before the Court. The Court in turn appeared to be a silent spectator, mute to the manipulations and preferred to be indifferent to sacrilege being committed to justice. The role of the State Government also leaves much to be desired. One gets a feeling that there was really no seriousness in the State's approach in assailing the Trial Court's judgment. This is clearly indicated by the fact that the first memorandum of appeal filed was an apology for the grounds. A second amendment was done, that too after this Court expressed its unhappiness over the perfunctory manner in which the appeal was presented and challenge made. That also was not the end of the matter. There was a subsequent petition for amendment. All this sadly reflects on the quality of determination exhibited by the State and the nature of seriousness shown to pursue the appeal. Criminal trials should not be reduced to be the mock trials or shadow boxing of fixed trials. Judicial Criminal

Administration System must be kept clean and beyond the reach of whimsical political wills or agendas and properly insulated from discriminatory standards or yardsticks of the type prohibited by the mandate of the Constitution.

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

Further the apex court went even further in its order on the state government's attempt at revision was that even after suffering a body blow from the Hon Supreme Court, the attitude of the state of Gujarat appears to be reluctant to face the truth and assist the due process of law. Under these circumstances, we seriously apprehend that similar callousness and deceitfulness will be shown the victims and affected parties if the public prosecutor is appointed by that very same state. State complicity during the carnage and even subsequent to the carnage is of such an extent that victims do not feel it safe to fearlessly depose in courts.

There have been several National as well as International Fact Finding Committee Reports conducted by highly placed individuals and organizations including retired judges of the Supreme Court who have talked about direct state complicity in the carnage and the discriminatory role of the police, investigative agencies, bureaucracy and civil society. Though communal riots have taken place even in the past the same have never been accompanied to the degree it happened in Gujarat by the participation by the police and bureaucracy, involvement of political personnel, large scale mobilization of armed people and ineffectiveness of the judiciary. Even the NHRC, has come to the conclusion that the atmosphere in Gujarat is not congenial for fair trials concerning the carnage cases to be conducted.

Thus, in the above judgment the Hon'ble Supreme Court has taken proper care for the victims as also for the process of justice. In the above reported judgment 14 innocent people were done to death whereas in the present case as many as 69 people have been killed. Thus, if proper care is not taken to safeguard the interest of the

victims and witnesses, the same would result in miscarriage of justice.

(II) In the judgment reported in 2003 SOL Case No. 745, known as the Jayalalitha case where cases related to corruption cases against her, the chief minister Tamil Nadu were transferred to the neighbouring state of Karnataka, the Hon SC not merely transferred the case but held, “It is submitted that the 2nd Respondent being the Chief Minister of Tamil Nadu, the cases pending against her have to be entrusted to an independent agency. I submit that the police officers who are under the control of the State Government cannot be expected to prosecute the cases against the 2nd Respondent and others from punishment. Similarly the law officers appointed by the State Government also cannot be in charge of the cases pending against the 2nd Respondent and others.

> “ It is submitted that justice must not only by done but must be seen to be done. Free and fair trial being the foundation of criminal jurisprudence. There is prevalent apprehension in the mind of the public at large that the trial is neither free nor fair with the present prosecutor appointed by the State Government conducting the trial in a manner where frequently the prosecution witnesses turn hostile especially during cross examination. Recalling most of the witnesses for the purpose of cross examination after the appointment of the Prosecutor chosen by the 2nd Respondent Government and after a lapse of several months itself creates a strong likelihood of official bias in the conduct of prosecution when the Chief Minister of the state is the first accused."

“As revealed from the aforesaid recited facts, great prejudice appear to have been caused to the prosecution which could culminate in grave miscarriage of justice. The witnesses who had been examined and cross-examined earlier should on such a flimsy ground never have been recalled for cross-examination. The fact that it is done after the second respondent assumed the power as the Chief Minister of the State and the public prosecutor appointed by her government did not oppose and or give consent to application for recall of witnesses is indicative of how judicial process is being subverted. The public prosecutor not resorting to Section 154 of the Indian Evidence Act nor making any application to take action in perjury taken against the witnesses also indicate that trial is not proceeding fairly. It was the duty of the public prosecutor to have first strenuously opposed any application for recall and in any event to have confronted witnesses with their statements recorded under Section 161 of Cr.P.C. and their examination-in-chief. No attempt has been made to elicit or find out whether witnesses were resiling because they are now under pressure to do so. It does appear that the new public prosecutor is hand in glove with the accused thereby creating a reasonable apprehension of likelihood of failure of justice in the minds of the public at large. There is strong indication that the process of justice is being subverted.

“ Free and fair trial in 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 biases but the question is not whether the petitioner is actually biased but the question is whether the circumstances are such taht there is a reasonable apprehension in the mind of the petitioner. In the present case, the circumstances as recited above are such as to create reasonable apprehension in the minds of the public at large in general and the petitioner in particular that there is every likelihood of failure of justice.

(III) In AIR 1987 SC 1321, the Hon'ble Supreme Court held in para 5 “Ends of justice are not satisfied only when the accused in acriminal case is acquitted. The Community acting through the State and the Police Prosecutor is also entitled to justice. The cause of the community deserves equal treatment in the hands of the Court in discharge of its judicial function.”

(IV) At this stage, we may notice few decisions of this Court with regard to the scope of Section 406 Cr.P.C. In Gurcharan Das Chadha v. State of Rajasthan, 1966 (2) SCR 678 at SCR p. 686, this Court observed as under :-

> "A case is transferred is there is a reasonable apprehension on the part of a party to a case that justice will not 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 the 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. To judge of the reasonableness of the apprehensions the State of the mind of the person who entertains the apprehensions is no doubt relevant but that is not all. The apprehension must not only be entertained but must appear to the Court to be a reasonable apprehension."

(V) In Mrs. Maneka Sajay Gandhi v. Ms. Rani Jethmalani, (1979) 4 SCC 167, this is what this Court has said in paragraph 2 :

"Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperiling, from the point of point of view of public justice and its attendant environment, is necessity if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touchstone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from the angle the court may weight the circumstances.

(VI) In Abdul Nazar Madani v. State of Tamil Nadu, (2000) 6 SCC 204 : 2000(2) RCR (Cr.) 770 (SC), this court pointed out in paragraph 7 at page SCC p. 210 as under :-

"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 Cr.P.C. 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. No universal or 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. Convenience of the parties including the witnesses to be produced at the trial is also a relevant consideration for deciding the transfer petition. The convenience of the parties does not necessarily mean the convenience of the petitioners alone who approached the court on misconceived notions of apprehension. Convenience for the purposes of transfer means the convenience of the prosecution, other accused, the witnesses and the larger interest of the society."

(VII) In this connection it is critical to cite from 2003 SOL Case No. 745, 2003-11-18 , K. Anbazhagabn v/s The Superintendent of Police and Ors. Etc where the apex court has held that:

" 22. On examination the facts of this case, as adumbrated above, on the touchstone of the decisions of this Court, as referred to above, the petitioner has made out a case that the public confidence in the

fairness of trial is being seriously undermind. As revealed from the aforesaid recited facts, great prejudice appear to have been caused to the prosecution which could culminate in grave miscarriage of justice. The witnesses who had been examined and cross-examined earlier should on such a flimsy ground never have been recalled for cross-examination. The fact that it is done after the second respondent assumed the power as the Chief Minister of the State and the public prosecutor appointed by her government did not oppose and or give consent to application for recall of witnesses is indicative of how judicial process is being subverted. The public prosecutor not resorting to Section 154 of the Indian Evidence Act nor making any application to take action in perjury taken against the witnesses also indicate that trial is not proceeding fairly. It was the duty of the public prosecutor to have first strenuously opposed any application for recall and in any event to have confronted witnesses with their statements recorded under Section 161 of Cr.P.C. and their examination-in-chief. No attempt has been made to elicit or find out whether witnesses were resiling because they are now under pressure to do so. It does appear that the new public prosecutor is hand in glove with the accused thereby creating a reasonable apprehension of likelihood of failure of justice in the minds of the public at large. There is strong indication that the process of justice is being subverted.

23. Free and fair trial in 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 biases but the question is not whether the petitioner is actually biased but the question is whether the circumstances are such taht there is a reasonable apprehension in the mind of the petitioner. In the present case, the circumstances as recited above are such as to create reasonable apprehension in the minds of the public at large in general and the petitioner in particular that there is every likelihood of failure of justice. "

These abovementioned parameters more than apply in the matter of the Gulberg society massacre where the target of the mastermined violence among the 69 other innocent victims was none less than noted former parliamentarian Shri Ahsan Jafri who was hacked mercilessly. The role of the police involved not simply killing but burning the bodies along with the accused thereafter with the supervision of senior officers.

(VIII) In AIR 1958 SC 309 = 1958 CriLJ 569 In the case of G.X. Francis And Ors. vs Banke Bihari Singh And Anr, the case was transferred looking at the overall of circumstances of the case;

(IX) In 2002 (4) GLR 3252, in the matter of Abdul Raoof Abdul Kader Shaikh Versus State Of Gujarat "6 I have considered the submissions of both the learned advocates and have also considered the relevant provisions of sec. 407 of the Code. As per section 407 of the Code, whenever it is made to appear to the High Court - (a) that a fair and impartial inquiry or trial cannot be had in any criminal court subordinate thereto, or (b) that some question of law of unusual difficulty is likely to arise, or (c) that an order under this section is required by provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for

the ends of justice, then, this court can exercise powers to transfer the pending sessions case to other sessions court. There is also one of the condition that such powers can be exercised only when such an application for such transfer has been made to the sessions court concerned and the sessions court concerned has rejected the same. I have considered the decision of the Karnataka High Court reported in 1975 Cri. L.J. 744. Relevant observations made by the Karnataka High Court in the said decision reads as under:

> " After the arguments in appeal were heard by the sessions judge and the judgement was reserved, on the day the judgement was to be pronounced the accused filed an application for recording additional evidence. The Public Prosecutor in his objection to the application stated among other things that the accused was a beggar in the eye of law. This was objected to by the Counsel for the accused. During the exchange of words the sessions judge intervened and said that the PP was a man of integrity and in ability second to none. The sessions judge further expressed his opinion that the accused not only should be convicted but also deserved deterrent sentence. Held that the sessions judge had prejudged the issue and further proceedings could serve no useful purpose. He thus gave an indication of his mind on a vital aspect of the matter and provided a basis for a reasonable apprehension in the mind of the accused.
>
> The observations of the Judge may admit of some explanation But if they tend to create in the mind of the accused an apprehension that he may not have a fair decision, it would be expedient in the interest of justice to order transfer. It is of the utmost importance that litigants should have faith and confidence in the impartiality of the Courts. It is not enough to do justice. It must be seen to be done. "

(X) In case of Govind Sharan Aggarwal versus Pr. Hardeo Sharma Trivedi reported in (1983) 2 SCC 268, this Court has held as under:

> "2. Having regard to the very peculiar and special circumstances of this case, without casting any reflection on the District Judge, we think that the apprehension of the appellant that he will not get fair trial at the hands of Mr. Kainthla cannot be said to be reasonable. One of the factors that has weighed with us was that in a civil suit this very Judge had granted a huge cost of Rs. 5000.00 as lawyer's fee and a sum of Rs. 1500.00 as lawyer's fee in an interlocutory matter. This is a rather very extraordinary course that seems to have been adopted by the learned Judge. He may or may not be justified in this, but if the appellant has an apprehension on this score, it cannot be said that his apprehension is not well founded. "

(XI) According to my opinion, the observations made by the High Court of Allahabad are required to be considered. In almost identical case and situation, the Allahabad High COurt has held as under in the decision reported in 1976 Cri.LJ 1799.In para 2 of the report, it has been held as under:

> "2. One ground, however, is that the present accused had been tried in the same court and had been convicted by the learned judge on the basis of the evidence of certain persons who are also witnesses in the present trial. It is urged that as the learned Judge had believed these witnesses in the earlier case, there is possibility that the learned Judge may believe them again. A witness is believed on the basis of many factors. One of the factors is the demeanor of the witness. In the earlier case, the court had believed these witnesses from which it could be inferred that the demeanor of the witnesses had been accepted as indicating the demeanor of a truthful witness. The same witnesses will be coming again. There is no doubt that the learned

> judge's mind will not be influenced by the fact that he had believed their testimony in the earlier case. But this may be a factor which ay remain lurking in the mind of the accused throughout the trial and if these witnesses are believed again they may have a feeling that the judgement of the learned Judge was influenced by the opinion he had made about these witnesses in the earlier case. In a criminal prosecution a court is always to give an accused a trial in which he may not have even the remotest cause to think or feel that he did not get a fair trial."

(XII) Looking to the peculiar facts of the present case, according to my opinion, there are some observations made by the apex court in other cases which are very relevant and material in the facts and circumstances of the case. They are, therefore, referred to as under:

(XIII) In case of B.K. Narayanpillai versus Parameswaran Pillai (2000) 1 SCC 711, it has been observed by the apex court as under:

> "Technicalities of law should not be permitted to hamper the courts in the administration of justice between the parties."

(XIV) In case of Gaya Prasad versus Pradeep Srivastava reported in (2001) 2 SCC 604, the apex court has observed as under:

> "The time is running out for doing something to solve the problem which has already grown into monstrous form. If a citizen is told that once you resort to legal procedure for realisation of your urgent need, you have to wait and wait for 23 to 30 years, what else is it if not to inevitably encourage and force him to resort to extra legal measures for realising the required reliefs. A Republic, governed by rule of law, cannot afford to compel its citizens to resort to such extra

legal means which are very often contra legal means with counterproductive results on the maintenance of law and order in the country."

(XV) In case of Kulwant Kaur V/s. Gurdial SIngh Mann reported in (2000) 4 SCC 262, the apex court has observed as under:

"Technicality alone by itself ought not to permit the High Courts to decide the issue since justice oriented approach is the call of the day presently."

(XVI) In case of Government of A.P. versus A.P. Jaiswal reported in (2001) 1 SCC 748, the apex court has observed as under:

"Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect for the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the courts have evolved the rule of precedents principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice."

(XVII) In case of Abdul Rehman Antulay V/s. R.S. Nayak reported in (1992) 1 SCC 225 : 1992 SCC (Cri) 93, the apex court has observed as under:

"Now, can it be said that a law which does not provide for a reasonably prompt investigation, trial and conclusion of criminal case is fair, just and reasonable ? It is both in the interest of the accused as well as the society that a criminal case is concluded soon. If the accused is guilty, he ought to be declared so. Social interest lies in punishing the guilty and exoneration of the innocent but this determination (of guilt or innocence) must be arrived at with reasonable despatch -

reasonable in all the circumstances of the case. Since it is the accused who is charged with the offence and is also the person whose life and/or liberty is at peril, it is but fair to say that he has a right to be tried speedily. Correspondingly, it is the obligation of the State to respect and ensure this right. It needs no emphasis to say, the very fact of being accused of a crime is cause for concern. It affects the reputation and the standing of the person amongst his colleagues and in the society. It is a cause for worry and expense. It is more so, if he is arrested. If it is a serious offence, the man may stand to lose his life, liberty, career and all that he cherishes."

(XVIII) In case of R. Balakrishnan Pillai versus State of Kerala reported in 2000 AIR(SCW) 3071, the apex court has observed as under in para 10 of the reports as under:

"10. Further, the contention raised by the learned Counsel for the petitioner that one of the Judges of the Bench was appointed and has worked as an Advocates to assist Justice K. Sukumaran Commission to inquire into malpractices in the execution of the rectification work in Hydro Electric Project called Edamalayar Project and, therefore, the petitioner is not likely to get justice if the appeal is decided by the said Bench, deserves to be rejected. It is true that one of the principles of the administration of justice is that justice should not be done but it should be seen to have been done. However, a mere allegation that there is apprehension that justice will not be done in a given case is not sufficient. Before transferring the case, the Court has to find out whether the apprehension appears to be reasonable. To judge the reasonableness of the apprehension, the state of the mind of the person who entertains the apprehension the state of mind of the person who entertains the apprehension is no doubt relevant but that is not all. The apprehension must

appear to the Court to be a reasonable, genuine and justifiable. In the present day scenario, if these types of applications are entertained, the entire judicial atmosphere would be polluted with such frivolous petitions for various reasons."

(XIX) In 2004 Cri. L. J. 4023 (Cal), Rajinder Singh alias Manu and Anr etc v/s State of West Bengal the Court has held that

"It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done (AIR 1957 SC 425). Confidence in the administration of justice is an essential element of good Government, and reasonable apprehension of failure of justice in the mind of the litigant public should, therefore, be taken into serious consideration. Courts should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom from biasness. Transfer in certain cases is made not because the party approaching the Court will not have a fair and impartial trial but because the party has reasonable apprehension that it will not have such a trial. Examination of the accused under Section 313, Cr. P.C. amounting to lengthy cross-examination, refusal to give opportunity to cross-examine the witness etc. are some of the instances where transfer of a case is justified. When the whole procedure was extremely arbitrary and in direct contravention of law and the judge displayed plenty of zeal and want of judicial spirit, the apprehension entertained by a party that it will not have a fair trial is justified. In the case on hand, the way the learned Judge dealt with the case, the manner in which questions were put to different accused during their examination under Section 313, Cr. P.C. and some observations made in the orders

lead to suggest that he has already formed an idea not conductive to fair trial, and in fact some of the learned counsel during argument before this Court expressed their apprehension in this regard. In such circumstances, it is desirable that the case should be dealt with by a Judge other than Mr. I. A. Shah.

Accordingly, the aforesaid appeals heard analogously be allowed on contest. The impugned judgment and order of conviction and sentence of all the appellants passed by Mr. I. A. Shah in Sessions Trial Case No. XVII/March, 2002 and Sessions Trial Case No. XLVIII/May, 2002 on 31-8-2002 be set aside. The case be remanded to the learned Court below with a direction to comply with the provision of Section 304, Cr. P.C., in respect of the accused persons who are undefended followed by giving opportunity to those accused persons only as mentioned in the body of the judgment to cross-examine the Prosecution witnesses and then examination of the accused persons under Section 313, Cr. P.C. strictly in accordance with the provisions made above and thereafter an opportunity to the defence to adduce evidence in support of its case and than to conclude the trial within a period of three months from the date of receipt of the record.

(XX) In 2001 Cri. L. J. 3629 (Guj) Pritibehn Devendrakumar Acharya v/s State of Gujarat and Anr the Court has held

407 of the Code of Criminal Procedure, 1973, provides that whenever it is made to appear to this Court that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or that some question of law of unusual difficulty is likely to arise or that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is

expedient for the ends of justice, it may order for transfer of a case from the criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction. Sub-section 2 of Section 407 of the Code lays down that this Court may act either on the report of the lower Court or on the application of a party interested, or on its own initiative. From perusal of the provisions of Section 407 of the Code, I am satisfied that this Court has power to transfer the criminal case from the criminal Court subordinate to its authority to any other such criminal Court of equal or superior jurisdiction as enumerated in this section. This transfer of a criminal case from one criminal Court subordinate to its authority to another criminal Court of equal or superior jurisdiction can be either on the report of the lower Court or on the application or a party interested or on its own initiative. Clause (c) of sub-section 1 of Section 407 of the Code gives power to this Court to transfer criminal case from one criminal Court subordinate to any other such criminal Court of equal or superior jurisdiction which will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice. In the case in hand, I find that it is a case where the petitioner has to produce the evidence and naturally most of the witnesses will be from Dakor and in case they are produced at Ahmedabad, it may not be convenient to them. Moreover, in the facts of this case where the only contribution of the respondent No. 2 is to get the matter adjourned from time to time, lightly the matter appears to have been adjourned by the Court and it will and certainly it would have been resulted in causing serious inconvenience as well as hardship to the petitioner. She has to come to Ahmedabad with her relation and sometime to also bring witnesses and if only result is adjournment of the matter on the application of respondent No. 2, it is certainly a cruelty to her. In such matters, the Court has to take all the care to see that unnecessarily the litigants are not put to inconvenience or

hardship while considering the application filed by the other side for adjournment of the matter. Otherwise also, in clause (c) of sub-section 1 of Section 407 of the Code, this Court has power to order for transfer of a criminal case from the criminal Court subordinate to its authority to any other such criminal Court of equal or superior jurisdiction where it is expedient for the ends of justice. Under this clause, much wider power vests in the Court and in the interest of justice, this Court can order for transfer of this case from Ahmedabad to Dakor. It is true that some inconvenience may be there to the accused to attend the Court at Dakor but it is equally inconvenient to the petitioner to attend the case at Ahmedabad. It is hardly relevant that there are nine accused. Accused are to attend the Court unless they are exempted from personal appearance on all the dates. Here, in this case, the petitioner is regularly attending the case in the criminal Court at Ahmedabad but it was adjourned from time to time and it resulted in causing inconvenience to the petitioner, both physically as well as financially, leaving apart other troubles to which she would have been subjected. Normal life of litigation in the Courts is long and she may have to come to Ahmedabad to attend the case on many more dates. If we go by realities and inconvenience to be caused to the respective litigants in the case, certainly the balance tilts in favour of the petitioner. The petitioner, being a lady, she may have so many difficulties in attending the Court at Ahmedabad. The way in which the proceedings of the case are going on in the Court at Ahmedabad, she may be subjected to much more inconvenience and troubles. Her witnesses may also be subjected to inconvenience and troubles and if we go by comparison, certainly the petitioner is in disadvantageous position if the matter is continued at Ahmedabad. The accused may be Government servants and it is hardly any consideration to deny this prayer to the petitioner.

(XXI) In 1975 Cri. L. J. 744 ADAM BASHA, v. THE STATE OF KARNATAKA, the Hon'ble Court was pleased to hold as under:-

> "6. It is seen from the allegations made in the affidavit of the petitioner and the remarks of the Sessions Judge that there were exchanges of words between the Judge and the Counsel for the accused; both appear to have gone out of the case. This has given room to distrust the Judge.

(XXII) The principle on which this Court acts in matters of that kind has been laid down more than once. The principle was laid down in a very early English case, the case of Serjeant v. Dale, (1877) 2 QBD 588 = (46 LJQB 781) where Lush, J., expressed the principle as follows :

> "The law has regard, not so much perhaps to the motives which might be supposed to bias the Judge, as to the susceptibilities of the litigant parties. One important object, at all events, is to clear away everything which might engender suspicion and distrust of the tribunal, and so to promote the feeling of confidence in the administration of justice which is so essential to social order and security."

(XXIII) The same principle was again emphasised by Stone, C.J., in Usman Haroon v. Emperor, (AIR 1947 Bom 409) = (48 Cri LJ 721) where the learned Chief Justice observed that Section 526 of the Code of Criminal Procedure (old) which is similar to Section 407 of the Code of Criminal Procedure, 1973, was not exhaustive and apart from the susceptibilities of the accused, if circumstances existed or events had happened, which were calculated to create in the mind of the accused the reasonable apprehension that he would not be fairly treated at his trial, a transfer of the case should be made. Further the Court held that

> In the case before me, the expression of opinion by the learned Judge that the accused should not only be convicted but deserved deterrent sentence, though was made after the

arguments were heard but during the hearing of the application for recording additional evidence, on the facts of this case, he had pre-judged the issue and further proceedings could serve no useful purpose. When the arguments were heard and the case was posted to judgment, the accused had no grievance at all. The difficulty arose when the application for recording additional evidence was being heard. He thus gave an indication of his mind on a vital aspect of the matter. Where opinion is expressed in such unequivocal terms as in this case, it provides a basis for a reasonable apprehension in the mind of the party against whom it is expressed. When considering the question whether circumstances could create reasonable apprehension that a fair and impartial decision will not be had, the Court has to put itself in the position of the accused seeking transfer and to look at the matter as it would appear to him. The observations of the learned Judge may admit of some explanation. But if they tend to create in the mind of the accused an apprehension which may not be regarded as unfounded that he may not have a fair decision, it would be undoubtedly expedient in the interest of justice to order transfer without entertaining the slightest doubt about the impartiality of the learned Judge. The learned Judge in his explanation has fairly and squarely stated what all happened in the Court and one remarkable thing about it is that he has not tried to justify his remarks. But it is of the utmost importance that litigants should have faith and confidence in the impartiality of the Courts. This confidence has to be maintained at all events. It is not enough to do justice. It must be seen to be done.

XI. As a result of all the considerations mentioned above, I have come to the conclusion that this is a fit case in which the application for transfer should be allowed.

XII. I, therefore, allow this application and transfer the case (Cr. A. 38/1972) pending against the accused to the Sessions

Judge, Chickmagalur who will deal with the case and dispose of the same according to law.

XIII. The petitioners have not filed any other petition either in this Hon'ble Court or in the Hon'ble Supreme Court of India or in any other Court with regard to the subject matter of this petition and having no any other equally efficacious remedy, this petition is filed. –

(XXIV) The petitioners crave leave, to add, amend, alter, delete, or rescind any of the aforesaid Para as and when necessary in the interest of justice.

(XXV) The petitioners therefore humble pray that this HON'BLE COURT BE PLEASED: -

(A) YOUR LORDSHIPS be pleased to issue appropriate writ, order or direction and be pleased to call for the record and proceeding of the offence registered as C.R. No. I – 67 of 2002 with Meghaninagar Police Station being tried as Sessions Case No. 152 of 2002 and allied cases before the Ld. Addl. Sessions Judge, City Civil Court, Court No. 12, Ahmedabad namely Mr. B. U. Joshi and be pleased to transfer the above mentioned cases to any other Sessions Judge from the court of Ld. Addl. Sessions Judge, City Civil Court, Court No. 12, Ahmedabad namely Mr. B. U. Joshi to any other sessions judge in the interest of justice;

(B) YOUR LORDSHIPS be pleased to direct the production of the correspondences between the special public prosecutor in this case and the

Special Investigation Team (ie SIT) in the interest of justice;

(C) YOUR LORDSHIPS be pleased to order that pending admission and or final disposal of the writ petition, the proceedings of the offence registered as C.R. No. I – 67 of 2002 with Meghaninagar Police Station being tried as Sessions Case No. 152 of 2002 and allied cases before the Ld. Addl. Sessions Judge, Ahmedabad be stayed in the interest of justice;

(D) YOUR LORDSHIPS be pleased to call for the record and proceeding of the offence registered as C.R. No. I – 67 of 2002 with Meghaninagar Police Station being tried as Sessions Case No. 152 of 2002 and allied cases before the Ld. Addl. Sessions Judge, Ahmedabad and after perusing the same be pleased to quash and set aside the judgment and order dtd. 28.01.2010 passed by the Ld. Principal City Sessions Judge, Ahmedabad interest of justice;

(E) YOUR LORDSHIP be pleased to grant any other and further relief as may be deemed fit the facts and circumstances of the case.

AND FOR THIS ACT OF KINDNESS AND JUSTICE THE PETITIONERS SHALL AS IN DUTY BOUND FOREVER PRAY.

Ahmedabad. (M. M. TIRMIZI)

Date: /03 /2010 Advocate for the petitioners.

A F F I D A V I T

I, Imtiazkhan s/o Saeedkhan Pathan, aged adult, the petitioner no. 1 in the petition do hereby solemnly affirm and state on oath as under: -

1. I am petitioner no. 1 and am conversant with the facts and circumstances of the case facts and am competent to depose that what is stated petition is true to the best of my knowledge, belief and information and I believe the same to be true.

2. I have gone through a copy of this petition and I solemnly affirm that what is stated in para to are true to my own knowledge and what is stated in memo is true to the best of my information and belief.

3. I state that the Annexures are produced with the accompanying petition are true copies of their original documents.

Solemnly affirmed at Ahmedabad on this 3rd day of March, 2010.

DEPONENT

Explained and interpreted in
Gujarati to dependent by me.

Identified by me.