

(2017) 04 GUJ CK 0123
In the Gujarat High Court
Case No : 17689 of 2014

ABHIJIT PRABHAKAR KONDUSKAR

APPELLANT

Vs

STATE OF GUJARAT & Anr

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 438](#), [Section 439\(2\)](#), [Section 437\(5\)](#) - Direction for grant of bail to person apprehending arrest - Special powers of High Court or Court of Session regarding bail - When bail may be taken in case of non-bailable offence
[Indian Penal Code, 1860](#), [Section 120B](#) - Punishment of criminal conspiracy
[Narcotic Drugs and Psychotropic Substances Act, 1985](#), [Section 25](#), [Section 23](#), [Section 30](#), [Section 24](#), [Section 22](#), [Section 28](#), [Section 29](#), [Section 38](#), [Section 27\(a\)](#) - Punishment/or allowing premises, etc., to be used/or commission of an offence - Punishment for illegal import into India, export from India or transshipment of narcotic drugs and psychotropic substances - Preparation - Punishment/or external dealings in narcotic drugs and psychotropic substances in contravention of Section 12 - Punishment for contravention in relation to psychotropic substances - Punishment/or attempts to commit offences - Punishment for abetment and criminal conspiracy - Offences by companies - Punishment for consumption of any narcotic drug or psychotropic substance

Citation : (2017) 04 GUJ CK 0123

Hon'ble Judges : Akil Kureshi, J.B.Pardiwala, A.J.Desai

Bench : Full Bench

Advocate : DILBUR CONTRACTOR, DEVANG VYAS, MITESH AMIN

Judgement

1. This Special Bench has been constituted as per the order of Hon'ble the Chief Justice, pursuant to an oral order dated 27/04/2016 passed by learned Single Judge (Coram: Hon'ble Mr.Justice Anant S. Dave) observing as follows: "5. Having heard learned advocates appearing for the parties and on perusal of the decision rendered by the larger bench of this Court in Criminal Misc. Application

No. 4917 of 2004 and decision of the Apex Court in the case of Mehboob Dawood Shaikh (supra) , I am of the view that the issue namely whether observations made by a larger Bench of this Court in Criminal Misc. Application NO. 4817 of 2004 relying on case of Mehboob Dawood Shaikh Vs. State of Maharashtra, reported in 2004 AIR SCW 527 subsequent bail applications for cancellation of bail under Sections 437(5) and 439(2) of the Code and for temporary bail need not to be placed before the same Judge. Further, such subsequent applications are required to be placed before the appropriate Court as per the roster will strictosensu apply where, learned Judge of this Court is in seisin of regular successive bail application and during pendency of such successive regular bail application, temporary/interim application is filed by the accused and the circular dated 25.8.2004 issued by Joint Registrar, High Court of Gujarat does not deal with such a situation. Therefore, in my view, it is not clear whether such successive/ temporary/ interim bail application is to be placed and heard by the same learned Judge or to be placed and heard by the appropriate Court as per the roster or as per specific order passed by Hon"ble the Chief Justice."

2. The above issue arose before the learned Single Judge, arising from following facts of the case as well as in view of Circular issued by High Court of Gujarat, as per the decision of the larger bench of this Court in case of Babubhai Bachubhai Bhabhor V/s. State of Gujarat reported in 2004(3) Gujarat Law Herald 101. The present applicant came to be arrested for the offence punishable under Sections 22, 23, 24, 25, 27(A), 28, 29, 30 & 38 read with Section 8 (c) of Narcotic Drugs & Psychotropic Substances Act, 1985 read with Section 120-B of the Indian Penal Code, 1860, for the complaint lodged by the Directorate of Revenue Intelligence, Zonal Unit at Ahmedabad, which was registered as File No.DRI/AZU/NDPS-1/2011. He has filed an application u/s.439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Code") before the learned Sessions Court. The said application was rejected by the learned Trial Court. He preferred similar application before this Court, which was dealt with by the learned Single Judge of this Court (Coram: Hon"ble Mr.Justice Anant S. Dave) and ultimately the same was rejected by a reasoned order.

The applicant having received some more material, preferred another bail application before this Court u/s.439 of the Code, being Criminal Misc. Application No.17689 of 2014. Being a successive bail application, the same was placed for hearing before the same Judge (Coram: Hon"ble Mr.Justice Anant S. Dave), who had dealt with the case of the accused in past, in view of the Circular dated August 25, 2004 issued by the High Court in pursuant to a judgement delivered by larger bench of this Court in Criminal Misc. Application No.4817 of 2004 dated 12/08/2004 reported in the case of Babubhai Bachubhai Bhabhor (Supra). During the pendency of the successive bail application, the applicant preferred an application, being Criminal Misc. Application No.2611 of 2016 in the successive bail application and prayed that he may be granted interim bail during the pendency of the successive regular bail application, which was pending for hearing from 2014.

Criminal Misc. Application No.17689 of 2014 preferred by the applicant-accused for releasing him on regular bail, came to be decided on merits and the same was rejected by the learned Single Judge by CAV judgement dated 27/04/2016.

Learned Single Judge while dealing with the application, which was filed by the applicant for interim bail, having found no judicial pronouncement or Circular, about placement of an application filed by an accused for releasing him on interim / temporary bail in a successive bail application, observed in para-5 of his judgement, as referred hereinabove.

3. We have heard learned advocate Ms.Dilbur Contractor for the applicant-accused; Mr.Mitesh Amin, learned Public Prosecutor for the respondent-State of Gujarat and Mr.Devang Vyas, learned Assistant Solicitor General of Union of India with regard to the issue in question.

4. Ms.Dilbur Contractor, learned advocate appearing for the applicant- accused would submit that if a successive bail application is pending before one of the Courts of the High Court and if he seeks temporary / interim bail, the same should be listed for hearing before the appropriate Court as per the current roster, since there would be numerous ground for getting bail for a limited period, for which, merits and demerits of the case are not required to be looked into by the Court. She would further submit that when an accused applies for temporary/ interim bail, he is requesting the Court to release him from the judicial custody for a particular purpose and for a limited period, for which, entire papers of investigation are not required to be dealt with either by learned advocate for the accused; learned Public Prosecutor or by the Hon"ble Judge. She, therefore, would submit that if an accused files such application in a successive bail application, the same may be placed for hearing before appropriate Court, having such roster, on the day of hearing of the application.

5. Mr.Mitesh Amin, learned Public Prosecutor appearing for the respondent-State of Gujarat would submit that when a successive bail application is under consideration by "A" Judge, who had an occasion to deal with the case prior to completion of investigation or subsequent to filing of the charge-sheet, would be the best judge to decide whether the accused before the Court can be released even on temporary/ interim bail or not? He would submit that the Court, who had rejected the application of an accused in past, would be in position to decide whether the applicant is able to establish any change in circumstances to release an accused even on temporary/ interim bail. He would submit that while dealing with a successive bail application, the larger bench of this Court in the case of Babubhai Bachubhai Bhabhor (Supra), by relying upon the decision rendered by Hon"ble Apex Court, has specifically held that when successive bail application either u/s.439 or u/s.438 of the Code, is filed by the same accused, such applications shall be placed for hearing before the Judge, who had earlier rejected the application. Accordingly, High Court has issued a Circular on August 25, 2004. He therefore, would submit that this Court may further clarify that if an application for interim bail is filed by the accused in a successive bail

application, the same shall be listed before the Judge, who is in-charge of successive bail application.

6. Mr.Devang Vyas, learned Assistant Solicitor General of Union of India, has adopted the arguments advanced by Mr.Mitesh Amin, learned Public Prosecutor.

7. Before dealing with the issue raised in the Reference, we would like to reproduce the Circular dated August 25, 2004 issued by the High Court, which deals with a successive bail application filed u/s.439 of the Code, anticipatory bail application filed u/s.438 of the Code as well as an application filed for cancellation of bail u/s.437(5) and 439(2) of the Code. As is self evident, the Circular was issued pursuant to the judgement of the Larger Bench in case of Babubhai Bachubhai Bhabhor (supra) and reads as under: "C I R C U L A R

While hearing of the Criminal Misc. Application No.4817 of 2004, the Larger Bench comprising Hon"ble M/s. Justices R.K.Abichandani, C.K.Buch & D.H.Waghela has been pleased to observe that the practice adopted by the Circular dated 8th April,2004 on the basis of the decisions of the Apex Court in the case of Shahzad Hasan Khan Vs. Ishtiag Hasan Khan, reported in AIR 1987 SC 1613 and State of Maharashtra V/s. Captain Buddhikota Subha Rao, reported in AIR 1989 SC 2292 are required to be followed and accordingly, the subsequent bail applications under Section 439 of the Code are required to be listed before the same Judge who decided the earlier bail applications. It is observed that in view of the decision in case of Mehboob Dawood Shaikh Vs. State of Maharashtra, reported in 2004 AIR SCW 527, subsequent bail applications for cancellation of bail under section 437(5) and 439(2), of the Code and for temporary bail need not to be placed before the same Judge and such subsequent bail applications under Section 437(5) and 439(2) of the Code are required to be placed before the appropriate Court as per the roster. However, it is clarified that where the earlier application for anticipatory bail filed under Section 438 of the Code is rejected; the similar repeated application under Section 438 of the Code will have to be placed before the same Judge.

Therefore, in compliance of the latest decision of the Large Bench of our own High Court, henceforth, all the concerned are directed to list the subsequent bail applications as per the observations made by the Larger Bench as above, without fail.

All the concerned are directed to follow the above instructions scrupulously failing which it would be viewed seriously.

High Court of Gujarat,

By order

Ahmedabad380 060.

(P.R.Patel)

Date: August 25,2004.

I/c.Joint Registrar"

Keeping in view the above circular and having examined the exigencies which have arisen in the case, we would like to deal with the same.

8. As far as the present applicant - accused is concerned, he had filed a successive regular bail application being Criminal Misc. Application No.17689 of 2014, which was listed for hearing as per Circular dated August 25, 2004. During the pendency of the said application, the applicantaccused filed another Criminal Misc. Application No.2611 of 2016 and prayed as under: "8(A) Your Lordship may be pleased to grant interim bail to the applicant during the pendency of the regular bail application being Criminal Misc. Application No.17689/2014 in connection with FIR registered with File No.DRI/AZU/NDPS1/ 2011 pending with DRI, Ahmedabad and registered as Special Civil Case No.5 of 2012 pending before the Sessions Court at Ahmedabad.

(B) Your Lordship may be pleased to grant adinterim relief in terms of para (A);

(C) Pass such other and further orders as may be deemed fit and proper by this Hon"ble Court, in the interest of justice;

(D) The present application is filed as per the instructions received from the applicant."

9. If the prayers are perused, the applicant had requested the Court to release him on interim bail i.e. till the successive bail application is heard and finally decided. In our views, there is a difference between interim bail and temporary bail. Therefore, when an applicant makes a prayer to release him for interim bail i.e. till the successive bail application is decided, the concerned Judge has to deal with the case on merits. Essentially it is in the nature of interim relief pending consideration of prayer for regular bail. If an application is filed for interim bail, which would not be for a specific period, the same would require detailed scrutiny of evidence, therefore, in our views, it should be heard by the Judge, who is in-charge of the successive bail application. Even procedurally, such application for interim bail would be filed "In" the main application for regular bail and therefore will always tag along with such proceedings.

10. However, when an accused, whose successive bail application is pending before the High Court, files an application for releasing him on bail for a limited period on various types of reasons, the Court has to look into the reasons for the prayers made by the applicant for his temporary release. There would be number of reasons for asking temporary bail such as marriage in the family, death of relatives, etc. When an under trial prisoner comes forward with a prayer to release him from the judicial custody for a particular reason for a limited period, the considerations before the Court would be different. When an application is filed for temporary bail, the matter is not required to be argued on merits for grant of regular bail. The Court, before whom such application for temporary bail is placed for hearing, would examine the jail record of accused, his behaviour in

the jail, whether he is released on temporary bail in past and his conduct during the temporary release period, police report, etc. Therefore, when the Court finds that the cause put forward by the accused is genuine, such application would be granted by the Court for a limited period on appropriate terms and conditions. The criteria for considering an application for temporary bail therefore would be different than the application for interim bail, which is required to be decided on merits after examining the evidence. Therefore, we answer the reference as under:

(i) If the application is filed by an accused for interim bail in a pending successive bail application, the same shall be listed before the Judge, who is in-charge of successive bail application.

(ii) If temporary bail application is filed during the pendency of a successive bail application, the same shall be placed before an appropriate Court, as per the roster.

11. Though we have answered the reference hereinabove to ensure that all relevant facts are brought before the Court, we would like to further observe as under: "When a successive bail application is being heard by a Court, learned Public Prosecutor as well as learned advocate for the accused in such application, shall declare before the Court whether the applicant is in judicial custody or has been released on temporary bail pursuant to order passed by coordinate bench of this Court."