

(2004) 05 GUJ CK 0001
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 4817 of 2004

Babubhai Bachubhai Bhabhor

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 12-05-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 389, 389(1), 437(5), 438, 439

Citation : (2004) 14 CriminalCC 600 : (2005) 3 RCR(Criminal) 656

Hon'ble Judges : R.K. Abichandani, J;D.H. Waghela, J;C.K. Buch, J

Bench : Full Bench

Advocate : Pritesh L. Parikh, for the Appellant; Public Prosecutor, for the Respondent

Judgement

R.K. Abichandani, J.—This Special Bench has been constituted by the Hon"ble the Chief Justice for considering whether the procedural directions given by the learned single Judge in the present application by order dated 29.7.2004 should be followed and all the subsequent bail applications under Sections 438 and 439 of the Code of Criminal Procedure be notified before the appropriate Bench as per the roster, except the applications filed u/s 439 after the submission of charge-sheet, or whether the present practice of notifying the subsequent bail applications before the same Judge, who decided the earlier bail application of the accused, be continued to be followed. The Hon"ble the Chief Justice "looking to the importance of the matter and also the fact that this question may pose problems in future", has directed that the said question be placed for consideration and decision before this bench.

2. It is stated in the present Miscellaneous application that the petitioner had earlier filed in this Court, Miscellaneous Criminal Application No.8778 of 2003 before the filing of the charge-sheet, which was rejected as withdrawn on 23rd October 2003 by the learned single Judge. It also appears from the record that the petitioner had preferred an application u/s 439 of the Code (Criminal Misc. Application No.515 of 2004) before the Sessions Court, Godhra, at Dahod, after

the charge-sheet was filed on 28.12.2003, and that application was rejected by the Additional Sessions Judge, Panchmahals, Camp Dahod, on 17th May 2004 by a reasoned order. It is recorded in paragraph 5 of that order that the earlier application (Criminal Misc. Application No. 1163 of 2003) filed by the accused u/s 439 was rejected. After the petitioner's application u/s 439 was rejected by the Additional Sessions Judge on 17th May 2004, the petitioner has filed the present application again u/s 439 before this Court for bail. This application came to be placed before the same learned single Judge, who has rejected the earlier application as withdrawn on 23.10.2003, in view of the circular dated 8th April, 2002 issued in compliance of the direction of the Hon'ble the Chief Justice that: "Let the law of the Land be followed", given in the context of the decisions of the Supreme Court in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, and Harjeet Singh @ Seeta Vs. State of Punjab and Another, , to the effect that the subsequent bail applications were required to be listed before the same Judge who decided the earlier bail applications.

3. By order dated 20th March, 2002 made on Criminal Misc. Application No.5025 of 2001 filed by a complainant for cancellation of bail, the learned single Judge (Hon'ble Mr.Justice B.J.Shethna) had directed the office "to obtain general orders from the Hon'ble the Chief Justice that, in future, all the subsequent bail applications be placed before the same Hon'ble Judges who decided bail applications earlier", expressing the opinion that the application of the complainant was required to be placed before the learned single Judge who had granted bail to the accused. Thereupon, on the office note dated 5th April 2002, in which the decision of the Supreme Court in Shahzad Hasan's case (supra) was referred, the Hon'ble the Chief Justice made the following order: "Let the Law of Land be followed." Thereafter, the Circular came to be issued on 8th April 2002 in compliance of the directions. The said circular is re-produced hereunder for ready reference:

"CIRCULAR

In view of the decision of the Hon'ble Supreme Court in case of Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, and Harjeet Singh @ Seeta Vs. State of Punjab and Another, , relating to subsequent bail applications to be listed before the same Judge who decided the earlier bail applications, the Hon'ble the Chief Justice has been pleased to direct that the law of the land be followed.

Therefore, in compliance of the directions as above, all the concerned are directed to list the subsequent bail applications by the same accused, before the same Judge who decided bail applications earlier. Same practice would also follow even for setting aside the order passed by the Hon'ble Court granting bail.

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

High Court of Gujarat By Order:

Ahmedabad 380 060

Date; 8th April 2002 (M.G.Gulabani)

Joint Registrar

4. It also appears from the record placed before us that, on 12th March 2004, a Division Bench of this Court, dealing with Criminal Misc.ApplicationNo.2201 of 2004 for temporary bail u/s 389(1) of the Code, which was placed before that Bench in compliance of the said Circular since it had earlier rejected the bail by order dated 13.2.2001, directed that the Registry should obtain order from the Hon"ble the Chief Justice for placing that application before the appropriate court as per the roster as it was of the opinion that the application should not have been notified before it. The Division Bench relied upon paragraph 13 of the judgment of the Supreme Court in Mehboob Dawood Shaikh Vs. State of Maharashtra, , while making the said order. The Division Bench observed that the considerations for refusal of regular bail during the pendency and hearing of the appeal would be quite different than those which may apply while considering the questions of the grant of temporary bail. The matter was, therefore, placed before the Hon"ble the Chief Justice by the Registry and the Hon"ble the Chief Justice approved the office note dated 16th March 2004 to the effect that the said Criminal Misc.Application be notified as per the roster and that henceforth, subsequent temporary bail applications u/s 389 and the applications for cancellation of bail under Sections 437(5), 439(2) of the Code of Criminal Procedure be placed before the appropriate court as per the roster instead of placing them before the same Bench.

5. The learned single Judge, while making the order dated 29th July, 2004 releasing the present application from the Board, held that the aforesaid circular was based on a misconception of the law laid down by the Apex Court. In paragraph 2 of the order, the learned single Judge said this in the following words:

I have carefully gone through the decisions mentioned in the circular and also other decisions of the Apex Court as well as this court in relation to this subject. In my humble opinion, the circular appears to have been on misconception of law laid down by the Apex Court. Neither the Joint Registrar nor the Registrar of this Court seems to have properly appreciated the peculiar circumstances appearing in those cases and the stage at which such orders have been passed.

5.1 Dealing with Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, , the learned single Judge observed:

"This decision appears to have been delivered in light of the practice that was prevailing in that High Court and also in view of the peculiar facts of the case."

It was further observed:

"Moreover, the learned Judge who has delivered decision in Shahzad Hasan

Khan's case (supra) was well aware of the practice followed by this court having been elevated to the Supreme Court from this court."

5.2 So far as the decision of the Supreme Court in State of Maharashtra Vs. Captain Buddhikota Subha Rao, , is concerned, the learned single Judge observed: "It was rendered in the peculiar facts of that case...." The learned single Judge again observed even for this decision of the Supreme Court as under:

Even in this case, the learned single Judge who delivered the decision was well aware of the practice of this court having been elevated to the Apex Court from this Court.

5.3 The third decision of the Supreme Court in Harjeet Singh (supra) was distinguished on the ground that it appeared "to have been delivered with a view to avoid unhappy position when one learned Judge, of the same High Court sits in appeal over the decision rendered by another learned Judge of the same High Court."

5.4 Relying upon paragraph 13 of the decision of the Supreme Court in Mehboob Shaikh (supra), which was rendered in the context of an application for cancellation of bail and the order of the Division Bench dated 12th March, 2004 in Criminal Misc.Application No.2201 of 2004, the learned single Judge held that "though both these cases are in relation to application made for cancellation of bail, the principle enunciated therein can well be applied in cases where application for bail is made."

5.5 The learned Single Judge then proceeded to classify the stages of bail applications, namely:-

- (i) Application u/s 438 of Cr.P.C. for anticipatory bail;
- (ii) Application u/s 439 of Cr.P.C. before the submission of the charge-sheet; and
- (iii) Application u/s 439 of Cr.P.C. after the submission of the charge-sheet.

It was held that these cannot be termed as "successive" or "repeated" bail applications in the sense and in the context in which those terms were used by the Apex Court, "especially when at every stage stated above, there is scope of new material being available during the course of investigation which may have its influence over the court's decision on the issue of bail."

It was held:

It is only after 3rd stage the scope of introduction of new material or making new submissions almost vanishes. In my opinion, the applications which maybe filed after 3rd stage can be termed as "repeated" or "successive" bail applications within the meaning of decisions of the Apex Court. It is an established proposition of law that unless substantial change of circumstances is shown no bail application which is filed after the third stage can be entertained on its

merits. It is after the third stage there are chances as also the scope for the accused to play mischief by getting the application placed before some Judge other than the Judge who decided the application u/s 439 of the Cr.P.C. which is filed for the first time after the submission of the charge-sheet.

5.6 The learned single Judge then proceeded to enumerate difficulties created by the circular, namely, (i) a large number of such applications that the Judge may have to deal with would stick to that learned Judge for all time to come; (ii) the purpose behind placing the successive bail applications before the same learned Judge was that the learned Judge would remember what transpired earlier, but in reality, he will not be able to remember all facts and events that had taken place during the hearing at the first or second stage after a period of time; (iii) the Single Judge, if sitting in a Division Bench, will have to break the Division Bench, disrupting his work and causing inconvenience to the other learned Judge; (iv) litigants will have to wait and depend upon the availability of that particular learned Judge, and (vi) Selection of learned Judge was (sic) learned Judge, (v) pre-trial prisoners will have to wait and again depend upon the availability of that particular (sic) equally possible in such matter by filing applications and securing a particular judge for all subsequent occasions.

5.7 The learned single Judge finally observed, "In my opinion, the Apex Court could never have intended causing such hardships to all concerned", and released this application for being placed before the Hon'ble the Chief Justice for appropriate orders.

6. It was contended by the learned counsel for the applicant and the other learned counsel who were allowed to intervene that the stages of the applications under Sections 438 and 439 of the Code were entirely different and, therefore, after rejection of an application u/s 438 of the Code, the subsequent application made u/s 439 was not required to be placed before the same Judge even on the ratio of the decisions of the Supreme Court on the basis of which the Circular was issued. It was further argued that even in respect of the applications u/s 439, those made prior to the filing of a charge-sheet stood on a different footing than the applications made after the filing of the charge-sheet. Therefore, when an application is made u/s 439 of the Code prior to the issuance of the charge-sheet is rejected and a fresh application is filed after the filing of the charge-sheet such fresh application cannot be said to be a "successive" or "repeated" application and, therefore, it would not be required to be placed before the Judge who had rejected the application for bail made u/s 439 prior to the filing of the charge-sheet. Reliance was placed on the decision of a learned single Judge of this Court in case of *Jitubhai Shanabhai Bhatt Vs. State of Gujarat*, in support of the contention that the application filed after the presentation of the charge-sheet stood entirely on a different footing and cannot be treated as a "successive" bail application. It was also submitted that the applications for temporary bail and cancellation of bail stood on a different footing and need not be placed before the Judge who had earlier refused the bail. As noted above, this

aspect was already taken care of by the orders of the Hon'ble the Chief Justice made on 16.3.2004. It was submitted by all the learned counsel that subsequent bail applications filed u/s 439 of the Code after the presentation of the charge-sheet need not be placed before the learned Judge who might have rejected the bail application made by the same person u/s 438 or u/s 439 prior to the filing of the charge-sheet. It was also tried to be contended on behalf of the applicant that the decisions of the Apex Court were based on the practice prevalent in the High Courts of Allahabad and Bombay and no such practice existed in the High Court of Gujarat and, therefore, the Circular could not have been issued for adopting similar practice in this High Court.

7. The learned Government Pleader argued that all the subsequent applications made u/s 438 of the Code may be placed before the Judge who may have rejected similar application u/s 438. It was also submitted that applications made u/s 439 before the charge-sheet is filed can be placed before the Judge who may have disposed of a similar earlier application made before the filing of the charge-sheet, while the subsequent applications can be placed before the learned Judge who rejected the application first made u/s 439 after the filing of the charge-sheet.

8. We may now proceed to consider the decisions of Hon'ble the Supreme Court on the basis of which the practice of directing the subsequent bail applications before the Judge who decided earlier similar application of that accused was crystallized by the Circular as modified by the subsequent order dated 6.3.2004.

8.1 In *Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another*, , after three successive bail applications were rejected and finally disposed of by a Judge of the Allahabad High Court, another Judge who had directed the subsequent application to be placed before the same Judge who had rejected the earlier applications, later recalling that order, himself entertained that subsequent application and granted bail to the accused. The Supreme Court, in paragraph 5 of the judgment, held that, in view of the fact that the three successive bail applications made by the accused had been rejected and disposed of finally by a Judge, it would have been appropriate and desirable and also in keeping with the prevailing practice in the High Court that the subsequent bail application should have been placed before the same Judge. The Supreme Court held:

The convention that subsequent bail application should be placed before the same Judge who have passed earlier orders has its roots in principle. It prevents abuse of process of court inasmuch as an impression is not created that a litigant is shunning or selecting a court depending on whether the court is to his liking or not, and is encouraged to file successive applications without any new factor having cropped up. If successive bail applications on the same subject are permitted to be disposed of by different Judges, there would be conflicting orders and a litigant would be pestering every Judge till he gets an order to his liking resulting in the credibility of the court and confidence of the other side being put in issue and there would be wastage of court's time. Judicial discipline requires

that such matter must be placed before the same Judge, if he is available for orders.

(Emphasis added)

8.2 It is clear from the decision in Shahzad Hasan case that the proposition that if the bail applications of an accused are rejected by a particular Judge, subsequent bail application by that accused should be placed before the same Judge, was not based only on the practice that prevailed in the Allahabad High Court, but was found to be rooted in principle. The convention that subsequent bail applications should be placed before the same Judge prevents abuse of the process of the Court, avoids passing of conflicting orders and saves court's time. The Supreme Court in terms held: "Judicial discipline requires that such matter must be placed before the same Judge, if he is available for orders". Thus, the ratio of this case could not have been confined to its facts on the basis of existence of a practice in Allahabad High Court or absence of practice in this High Court, as done by the learned single Judge, while releasing the present application. The ratio of the decision of the Supreme Court is loud and clear that judicial discipline demands that where bail application of an accused is rejected by a Judge, his subsequent bail applications should be placed for hearing before the same Judge, if he is available for orders. Such a course is appropriate and desirable and rooted in sound principle.

8.3 In State of Maharashtra Vs. Captain Buddhikota Subha Rao, , following the ratio of Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, , the Supreme Court, dealing with a case where successive bail applications preferred by the accused were rejected and all other pending bail applications were also rejected by a common order made by the learned single Judge except one application for enlargement on bail on medical grounds, which was not brought to the notice of that learned single Judge and was granted two days thereafter by another Judge, The Supreme Court held that the order granting bail was not proper and that, judicial discipline, propriety and comity demanded that the order granting bail should not have been passed reversing all earlier orders including the one rendered by the Single Judge of the same High Court only a couple of days before. In paragraph 7 of the judgment, the Supreme Court held:-

In such a situation, the proper course, we think, is to direct the matter be placed before the same learned Judge who disposed of the earlier applications. Such a practice or convention would prevent abuse of the process of court inasmuch as it will prevent an impression being created that a litigant is avoiding or selecting a court to secure an order to his liking. Such a practice would also discourage the filing of successive bail applications without change of circumstances. Such a practice if adopted would be conducive to judicial discipline and would also save the courts time as a Judge familiar with the facts would be able to dispose of the subsequent application with despatch. It will also result in consistency. In this view that we take we are fortified by the observations of this Court in paragraph 5 of the judgment in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, .

(Emphasis added)

8.4 It is at once clear that the above decision in Buddhikota case did not rest on any practice of High Court of Bombay, but the Supreme Court laid down that the proper course of to be followed in such cases was to direct that the subsequent application be placed before the same learned Judge who disposed of the earlier applications.

8.5 The ratio of the above two decisions of the Supreme Court is in no way affected by the subsequent decision of the Supreme Court in Mehboob Shaikh, 2004 ACJ 346 (S.C.): 2004(3) CCC 560 (S.C.): 2004 Cri U 1359 (supra), The Court's observations in paragraph 13 of the judgment were in the context of its earlier decision in Harjeet Singh @ Seeta Vs. State of Punjab and Another, in which it was held that there was a long standing convention and requirement of judicial discipline that subsequent applications for grant or cancellation of bail should be placed before the same learned Judge who had passed the earlier order. The Supreme Court held in Mehboob Shaikh's case that this certainly was a desirable course, but the party making a grievance that the course is not followed has to indicate as to in what manner he was prejudiced. The Supreme Court held:

But where the cancellation is sought for grounds different from those which existed at the time of granting bail, the conventional practice of placing the matter before the same learned Judge need-not be followed as if it is a statutory requirement.

(Emphasis added)

8.6 The observations made by the Supreme Court in Mehboob's case were not at all in the context of the decisions in Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan and Another, , which were not even cited. We hold that the ratio of the decision of the Supreme Court in Shahzad and Buddhikota cases, is in no way affected by the decision in Mehboob's case and the contrary indication in the release orders of the learned Single Judge in the present application and the Division Bench in Criminal Misc.Application No.2201 of 2004 dated 12.3.2004, is not at all warranted. The cancellation of bail applications stands on a different footing than the grant of bail applications and a direction has already been issued by the Hon'ble the Chief Justice on 16.3.2004 to notify the applications for cancellation of bail under Sections 437(5) and 439(2) and temporary bail applications before the appropriate court as per the roster instead of placing them before the same Bench that decided the bail application of the same accused earlier.

9. The above circular based on the decision of the Supreme Court in Shahzad Hasan (supra), the ratio of which was reiterated in Buddhikota (supra), is to be read along with the modification made on 16.3.2004 in order to bring the practice in consonance with the latter decision of the Supreme Court in Mehboob Shaikh's case (supra) and, therefore, there was no valid reason for the learned single Judge to find fault with the practice of placing the subsequent bail

applications of the same accused before the Bench that rejected the earlier application merely on the ground that the stage of the earlier application u/s 439 was different as it was prior to the filing of the charge-sheet. Filing of the charge-sheet may be treated as a changed circumstance enabling the accused to file a fresh application after rejection of his previous application u/s 439 of the Code. In absence of a change in the circumstances, the second application would be deemed to be seeking a review of the earlier order which is not permissible in Criminal Law as held by the Supreme Court in *State of Madhya Pradesh Vs. Kajad*, .

9.1 Even in an application made u/s 439 of the Code of prior to the filing of the charge-sheet, the court may have passed the order relying on police papers including the statements tendered before the Court and referred to on behalf of the accused. It has been held in *Jitubhai Shanabhai Bhatt Vs. State of Gujarat*, that in such an event, "it may not be open for the accused to contend on a future date that he had no fair opportunity to make out a case for bail." The court held in paragraph 9 of the judgment:

If the initial bail application which is not based on the charge-sheet is rejected and if another bail application is submitted after the charge-sheet is filed relying on that charge-sheet, it cannot be said that it is successive bail application based on same material on which earlier application was based, but it is successive application with entire material which was not available to the accused earlier.

(Emphasis added)

9.2 The contention raised on behalf of the accused and by the interveners that the application made after the filing of the charge-sheet is not a successive application by placing reliance on the decision in *J.S.Bhatt's* case (supra) is, therefore, misconceived. Even when change of circumstances by different stages of the criminal investigation and proceedings against a person accused of an offence who is in custody takes place, the nature of applications made u/s 439 remains the same and even when he becomes entitled to make a bail application again, such application is required to be placed before the Judge who rejected his earlier application which was also u/s 439 for the same relief. Thus, the subsequent applications u/s 439 made by the accused, whose earlier application u/s 439 was rejected, will have to be placed before the same Judge, who rejected the earlier application, on the ratio of the decisions of the Supreme Court in *Shahzad Hasan Khan Vs. Ishtiaq Hasan Khan* and *Another*, , as adopted by the circular which cannot be termed as having been "based on misconception of law laid down by the Apex Court", as observed by the learned single Judge.

10. Even in cases where the earlier application for anticipatory bail filed u/s 438 of the Code of Criminal Procedure is rejected, similar repeated application u/s 438 will have to be placed before the same Bench that passed the earlier order. However, an application u/s 439, made after the rejection of an application u/s 438, would only when the person is accused of an offence and is in custody

which is entirely a different situation. An application u/s 438 is filed by a person on an apprehension of arrest of an accusation of a non-bailable offence, while an application u/s 439 has to be made where a person is already accused of a non-bailable offence and is in custody. Therefore, the application u/s 439 would be of a different nature and will not be a "successive" or "repeated" application in the context of the earlier application made u/s 438 by the same person. The decisions of the Apex Court in *State of Maharashtra Vs. Captain Buddhikota Subha Rao*, do not require subsequent bail applications u/s 439 to be placed before the Bench that had decided earlier application for anticipatory bail of the same applicant u/s 438 of the Code.

11. The applications u/s 439(2) are now not being placed before the same Bench that granted bail in view of the latter direction of the Hon'ble the Chief Justice issued on 16.3.2004 on the basis of the decision of the Supreme Court in *Mehboob Shaikh's case (supra)* and the aforesaid Circular stands modified accordingly, as noted above. There is, therefore, no flaw in the practice adopted by the Circular on the basis of the decisions of the Apex Court in *Shahzad Khan and Buddhikota (supra)*, as modified on the basis of the decision of *Mehboob Shaikh (supra)* in respect of the subsequent applications for cancellation under Sections 437(5) and 439(2) and or temporary bail. The question referred to us, therefore, stands answered accordingly.

12. We may add that it is the exclusive power of the Hon'ble the Chief Justice to assign work to different Benches constituted by him. It is clear from the provisions of Rules 121 and 122 of the Gujarat High Court Rules, 1993 that, notwithstanding anything contained in the sitting list (i.e. the roster), the Chief Justice may, if he deems fit, constitute special Benches, or change the sittings during the term. It has never been in dispute that the Chief Justice assigns the work while constituting the Benches and this is entirely his prerogative under the Rules. As held by the Supreme Court in *State of Rajasthan Vs. Prakash Chand and Others*, , the administrative control of the High Court vests in the Chief Justice alone and it is his prerogative to distribute business of the High Court both judicial and administrative. The Chief Justice is the master of the roster. He alone has the right and power to decide how the Benches of the High Court are to be constituted, which judge is to sit alone and which cases he can and is required to hear as also which judges shall constitute Division Bench and what work those Benches shall do. The Puisne Judges can only do that work which is allotted to them by the Chief Justice or under his directions.

13. The Supreme Court, in *State of Maharashtra Vs. Captain Buddhikota Subha Rao*, , as noted above, held that the proper course where subsequent bail application is made was to direct that the matter be placed before the same learned Judge who disposed of the earlier application. It was held that "such a practice if adopted would be conducive to judicial discipline.... This clearly warranted adoption of such practice as a norm commended by the Supreme Court by issuing general orders in this form of a Circular so that the law of the

land as declared by the Apex Court on this aspect was uniformly followed. A provision on the basis on this norm that subsequent bail applications be placed before the same Judge who rejected the earlier bail application would amount to assignment of such work by a general order to the Hon''ble Judge who have decided the earlier bail applications along with the work assigned in the current roster. The assignment of work by general orders made by the Chief Justice on the basis of the norms indicated by the Supreme Court has the same efficacy as that of specific assignment of other work in the current roster. The validity of the said norms adopted was never in issue before the court releasing the present bail application from its board, nor was there any lack of jurisdiction to hear the application. Refusing to entertain such cases which are required to be heard by the Judge by virtue of the general orders reflected in the circulars issued on the directions of the Chief Justice would stand on the same footing as refusal to do the work assigned in the roster, undermining the right and power of the Chief Justice to distribute the Judicial business which is his exclusive prerogative. The exercise of power by the Chief Justice to assign business by general orders reflected in the circular, as modified, was clearly warranted by the decisions of the Apex Court, and could not, therefore, have been questioned.

The reference made under the orders of the Hon''ble Chief Justice stands answered accordingly. This application may now be placed before the appropriate Bench for disposal on merits, as may be directed by Hon''ble the Chief Justice.