

(2011) 10 GUJ CK 0010
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 14224 of 2011

Dipak Shubhashchandra Mehta

APPELLANT

Vs

Central Bureau of Investigation Banking and Securities Fraud
C and 1 Another

RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 438, 439
Penal Code, 1860 (IPC) — Section 120B, 406, 420, 467, 468

Citation : (2011) 10 GUJ CK 0010

Hon'ble Judges : Rajesh H Shukla, J

Bench : Single Bench

Advocate : Kamini Jaiswal, Mr. N.D. Nanavati, Mr. A.J. Yagnik and Mr. S.M. Vatsa, for the Appellant; Y.N. Ravani for Respondent(s) 1 and Mr. H.L. Jani, Assistant Public Prosecutor for Respondent(s) 2, for the Respondent

Final Decision : Dismissed

Judgement

Rajesh H. Shukla, J.—The present application has been file by the applicant original accused under sec. 439 of the Code of Criminal Procedure for regular bail which is a successive bail application after Criminal Misc. Application No. 11415 of 2010 was rejected vide order dated 19.10.2010. The applicant accused is charged with having committed offences under sections 406, 420, 467, 468, 471 and 120B of the Indian Penal Code for which FIR being BS&FC/MUM bearing No. 1 (E)/2010 has been registered with CBI, Mumbai.

2. Learned Sr. Counsel Ms. Kamini Jaiswal appearing with learned Sr. Advocate Mr. ND Nanavati and learned advocate Mr. A.J. Yagnik for the petitioner submitted that the alleged offences have been committed in 2006 and the petitioner is the Managing Director of an Export House. Learned Sr. Counsel Ms. Jaiswal has referred to the papers and emphasised that in fact no offence, prima facie, can be said to have been committed by the petitioner. She submitted that due to economic recession all around, the petitioner's export house also suffered

and resulted in non-payment of the advances from the banks. It was submitted that the company of the petitioner had been carrying on the business as an export house and had availed of the financial facilities. However, as the business of the export house was affected, payments could not be made, which led to the litigation including civil litigation for recovery in the form of suits as well as proceedings before the DRT.

3. Learned Sr. Counsel Ms. Jaiswal, therefore, submitted that in this background, the court is required to consider whether the applicant can be released on bail in our criminal justice system. She emphasised that bail is the rule and criminal justice system is not meant for pre-trial punishment or sentence. She emphasised and submitted that the person/accused may not be released on bail till the chargesheet is filed in order to see that a free and fair investigation takes place and the accused may not interfere with the investigation. Further, at the time of considering the application, it is also required to be considered whether the presence could be secured for the purpose of trial and whether he would jump the bail. She emphasized that the petitioner is having deep roots in the society which, on the contrary, has to be considered that he is not likely to go away and his presence can be secured for the purpose of trial. Therefore, when the investigation is over and there is delay in the trial, there is all the justification for releasing the applicant on bail.

4. Learned Sr. Counsel Ms. Jaiswal submitted that earlier the petitioner had filed Criminal Misc. Application No. 11415 of 2010 which came to be rejected vide order dated 19.10.2010 by a reasoned order which was carried further before the Hon"ble Apex Court by way of SLP (Cri.) No. 83 of 2011 and the Hon"ble Apex Court was about to grant bail. However, as the statement was made by the learned Addl. Solicitor General that the trial may be completed with a period of three months, the Hon"ble Supreme Court declined to accede to the request. She pointedly referred to the following order of the Hon"ble Apex Court:

We have considered the rival contentions and have also perused the documents. In view of the fact that other two accused, namely, A-2 and A-3 were released mainly on the ground of illness and old age and on assurance by the learned Addl. Solicitor General that the trial may be completed within a period of three months, we are not inclined to accede to the request of the petitioner.

She, however, submitted that as the Hon"ble Apex Court has made it clear that if the trial continues beyond the period, such application could be moved and therefore the applicant moved an application before the learned Special Judge, CBI, by way of CBI Criminal Misc. Application No. 195 of 2011 which came to be rejected without considering these aspects. Learned Sr. Counsel Ms. Jaiswal has, therefore, submitted that the Special Judge, CBI, has failed to appreciate these aspects and has considered the merits of the case with regard to the alleged offences and has not touched the aspect of delay in the trial and the fact that if the trial is not over within a certain period, permission has been granted by the Hon"ble Apex Court to move the court.

5. Therefore, learned Sr. Counsel Ms. Jaiswal submitted that the court has to consider the present day scenario and the well-accepted principles in criminal justice system that bail is the rule and not jail. She emphasised and repeated that once the investigation is over and the chargesheet is filed and when the trial has not commenced, the applicant may be released on bail as he cannot be detained in jail as a pre-trial punishment before the charges are established.

6. Learned Sr. Counsel Ms. Jaiswal has also referred to the judgment of the Hon'ble Apex Court reported in Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, in the case of Siddharam Satlingappa Mhetre v. State of Maharashtra and ors., in support of her submission to emphasise the right to personal liberty and the aspect of bail. She submitted that though it is a matter regarding anticipatory bail under sec. 438, observations have been made with regard to personal liberty. Referring to this judgment and the observations, she submitted that the rights/interest of the society and the rights of the accused which have been referred would not be affected if the applicant is released on bail. She has also tried to submit that the ultimate object or purpose in such cases should be that if he is released on bail and allowed to do the business, he could repay the outstanding dues of the financial institutions like the banks and the recovery could be effected and the object should not be that a man should be detained in jail and thereby he is destroyed. She submitted that punishing the petitioner is not even in the interest of the society.

7. Referring to the merits of the case, learned Sr. counsel Ms. Jaiswal submitted that the charges are also not well sustained and submitted that even the supplementary charges do not support the allegations levelled. She submitted that though the allegations about fraud and siphoning off the money etc. have been made, but it has to be understood in the context of material and evidence as the banks have not initially filed any complaint and recovery was sought to be made. She referred to such papers regarding the recovery proceedings and submitted that even in the supplementary charges when the material do not support about siphoning off the money, the same cannot be accepted.

8. Learned Sr. counsel Ms. Jaiswal submitted that, in any case, till the charges are established, he is presumed to be innocent and the present application for bail may be considered, particularly when the case is based on documentary evidence and the documents have been collected by the investigating agency. The witnesses are officers of the bank. Further, she referred to the affidavit of the CBI and submitted that such allegations are made without any basis.

9. Lastly, learned Sr. Counsel Ms. Jaiswal referred to the medical certificates and other papers to emphasise that the petitioner has been released on temporary bail and has not committed any breach of the conditions and has surrendered in time and therefore when he has deep roots in the society, he is not likely to jump the bail. She, therefore, submitted that considering the medical certificates also, when the doctors and the jail authorities have also stated about his ailments, he may be released when he has been in the custody for 11/2 years. She submitted

that the affidavit of the CBI stating that it is a successive bail application and the order of the Special Judge, CBI referring to the successive bail application has to be considered in light of the aforesaid relevant aspects which have not been considered.

10. Learned counsel Mr. Ravani for the CBI has submitted that the present application is a successive bail application where there are no changes in the material fact-situation. He submitted that the contentions which have been raised in this application have been considered while deciding the earlier bail application being Criminal Misc. Application No. 11415 of 2010 and the same has been rejected by a reasoned order which was also carried before the Hon''ble Apex Court. He strenuously submitted that the Hon''ble Apex Court has also declined to interfere and release the petitioner on bail. There is no reason now at this stage to release the petitioner on bail in the absence of any new ground or justification. He pointedly referred to the order passed by this Court in Criminal Misc. Application No. 11415 of 2010 dated 19.10.2010 and pointedly emphasised that the same or similar arguments have been dealt with like the civil suit and the DRT proceedings for recovery, the case based on documentary evidence and also the submission referring to Art. 21.

11. Learned counsel Mr. Ravani has also referred to the few observations as well as the details with regard to the alleged offences and submitted that forged documents were given to the banks which led to the advances by the banks, which otherwise the banks would not have given but for such misrepresentation. He submitted that the forged contract was made to avail the advances and in the name of export of diamonds it was utilised for other purposes which has also been referred to in the order of the Special Judge, CBI. This Court has, while rejecting the earlier bail application being Criminal Misc. Application No. 11415 of 2010 has dealt with in detail all the submissions which are sought to be raised and once it has been rejected, there is no reason to entertain the present application. He emphasised that it has also been observed that a systematic, well-designed fraud has been committed and there are 4-5 FIRs registered for such offences by which the banks have been duped of huge amounts. He, therefore, submitted that as the allegations stand, there was a well-designed fraud to dupe the banks for huge amounts which itself would suggest a prima facie case and therefore without any justification, the present application may not be entertained.

12. He also submitted that the grounds about the medical certificate was also available and in fact even though the earlier bail application was rejected, admittedly, the petitioner has been granted temporary bail for a long period to take treatment and he has admittedly enjoyed the temporary bail and therefore on such ground he may not be released. He referred to the affidavit filed by the CBI to emphasise about the prim facie case and the involvement of the accused and submitted that the present application may not be entertained. Learned counsel Mr. Ravani submitted that the main emphasis made by learned counsel

Ms. Jaiswal for the petitioner is on delay in the trial. However, he submitted that the prosecuting agency is not at fault. He submitted that this aspect was also considered in the earlier order referring to the case of Pappu Yadav and even under Art. 21 of the Constitution a person cannot claim the bail merely because there is some delay in the trial as other aspects like the gravity of the offence, prima facie case, etc. are also relevant. He emphasised that considering the gravity of the offence as well as other factors that he is a habitual offender, there are repeated offences of big scams, the present application may not be entertained.

13. In view of rival submissions, it is required to be considered whether the present application, which is a successive bail application, can be considered or not.

14. It is well-accepted that for a successive bail application, there has to be material change in the fact-situation or additional ground or reason for taking a different view. The change in the material fact-situation would imply not merely a cosmetic change. In the facts of the present case, learned Sr. Counsel Ms. Jaiswal for the petitioner has emphasised on the aspect of delay in the trial giving much emphasis on the observations in the order of the Hon''ble Apex Court which have also been quoted while recording the submissions. While passing the order earlier in Criminal Misc. Application No. 11415 of 2010 dated 19.9.2010, it was discussed by this court referring to the judgment of the Hon''ble Apex Court in the case of Himanshu Chandravadan Desai and Others Vs. State of Gujarat, , where a word of caution has been expressed by the Hon''ble Apex Court and the aspect of liberty under Art. 21 of the Constitution of India cannot be overemphasized It is required to be mentioned that the Hon''ble Apex Court while declining to interfere with the order of this court in Criminal Misc. Application No. 11415 of 2010 dated 19.9.2010, which was carried by way of SLP (Cri.) No. 83 of 2011 by the petitioner, has clearly observed and noted:

We have considered the rival contentions and also perused all the relevant documents. In view of the fact that the other two accused, namely, A-2 and A-3 were released mainly on the round of illness and old age and of the assurance by the learned Additional Solicitor General that the trial will be completed within a period of three months, we are to accede to the request of the petitioner.

However, we make it clear that for any reason if the trial continues beyond the period assured by the learned Additional Solicitor General, the petitioner is free to move bail application before the Special Court. In such event the Special Court is permitted to consider in accordance with law. We also direct the Special Court to take all endeavor for an early completion of the trial as suggested by the learned additional Solicitor General.

15. This observation about endeavour to complete the trial earlier has been emphasised by learned Sr. Counsel Ms. Jaiswal for the purpose of this bail application. It is required to be mentioned that while disposing the SLP, the

Hon''ble Apex Court has considered the aspect of illness, the other two accused who have been released on bail and the gravity of the charges was also focused. It is in this background the submissions made by learned Sr. Counsel Ms. Jaiswal is required to be considered for successive bail application. The Hon''ble Apex Court in the case of Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, has observed,

19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-ordinate Bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

16. The first aspect referring to Art. 21 of the Constitution of India and the submission made with much emphasis that the criminal justice system is not for pre-trial conviction or detention and normally bail is the rule, has to be considered. Though submissions have been advanced with much emphasis, one cannot overlook the other relevant criteria with regard to grant of bail which have been laid down by way of guideline by catena of judicial pronouncements of the Hon''ble Apex Court. If only on the aspect of delay or the fact that now charge sheet has been filed, a person can claim bail is to be accepted, then, the criteria or guidelines which refer to other factors will not have any significance. The submissions on this aspect have to be considered in background of the facts of the case and the gravity of the offence, where the applicant accused is charged with serious offence of large-scale, well-designed fraud to dupe more than one bank, and it is in this background even the Hon''ble Apex Court has, in such cases, expressed a word of caution as observed in its judgment in the case of Himanshu Chandravadan Desai (supra). The Hon''ble Apex Court has also noting the change in the circumstances has made the observation that it is even at a higher pedestal than murder as it will lead to affect many lives as observed in the judgment reported in 1991 (2) Crimes 325.

17. In the judgment in the case of Kalyan Chandra Sarkar (supra), the Hon''ble Apex Court has made observations even referring to the rights of the accused under Art. 21 of the Constitution of India and delay in the trial as follows:

18. It is a trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which

are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non bailable offences are entitled for bail if the Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the Courts can do so.

18. Moreover, the observations made by the Hon"ble Apex Court in the case of State of Gujarat Vs. Mohanlal Jitmalji Porwal and Another, , which has also been referred and quoted by the Special Judge, CBI, is required to be considered. The Hon"ble Apex Court in this judgment has observed,

An economic offence is committed with cool calculation and deliberate design with an eye on personal profit, regardless of the consequence to the community. A disregard for the interest of the community can be manifested only at the cost of forfeiting the trust and faith of the community in the system of administration of justice in the even handed manner without fear of criticism from the quarters which view while collar crimes with a permissive eye unmindful of damage done to the National Economy and National Interest.

19. Though the facts may be different, the underlying philosophy or approach has to be the same considering the present day scenario where with the globalisation and technological advancement and with the increase in trade, while collar crimes have also increased which are well designed and difficult to detect. Ostensibly, such crimes could be committed under the guise of economic activity or trade or business which in fact is only aimed at personal gain. Therefore, one cannot be oblivious of the realities and the submissions made by learned Sr. Counsel Ms. Jaiswal cannot be accepted at the face value that there is not even a prima facie case and the petitioner who was the Managing Director of an export house had to suffer because of recession in the economy world-wide. A closer scrutiny of the record and evidence, which has also been reflected in the earlier order as well as the chargesheet and other papers, would make it very clear that there is more than a prima facie case when the applicant has forged the contract for supply of agro-products worth Rs. 642.60 lacs and obtained credit facilities from Andhra Bank as well as Union Bank of India and concealing the fact fraudulently obtained double finance for the same export for the same product from two banks, misused the funds without doing the export of which advances were availed of. There are several such other transactions involving siphoning off the money.

20. Therefore, it is a matter of appreciation of evidence which requires a closer scrutiny and the submission that there is not even a prima facie case cannot be readily accepted. In fact, learned Sr. Counsel Ms. Jaiswal has not referred to the details of the allegations and mainly emphasised and focused on the aspect of delay in the trial as well as the observations made in the order of the Hon''ble Apex Court. She has emphasised that it was in wake of the statement made by the learned Addl. Solicitor General that the trial would be completed within a stipulated period of three months, the court declined and was about to otherwise grant bail cannot be readily accepted as in such a case the trial may take time.

21. In any view of the matter, this court is required to consider the present successive bail application within the bounds of law whether such successive bail application could be entertained. It is required to be mentioned that the aspect of delay also cannot be emphasised to claim the bail, as even the right of the accused under Art. 21 of the Constitution of India cannot be overemphasized when the person has been in judicial custody as per the law established in the country and the person who is accused of serious charges in a scam cannot claim liberty on the same footing as any other citizen. It is required to be submitted that though much emphasis has been given by learned Sr. Counsel Ms. Jaiswal that the criminal justice system is not meant for pre-trial detention or punishment and once the chargesheet is filed and when the trial is likely to take time, the bail is the rule, the same cannot be accepted as such a submission though could be made for an accused, other relevant facts which have been laid down by way of guidelines by catena of judicial pronouncements of the Hon''ble Apex Court like gravity of the offence, the manner in which the offence is committed and also whether presence of such accused could be secured and whether he is likely to tamper with the witnesses etc. are also required to be considered. The system has in fact been in favour of the accused generally when about 80-90% of the accused are released on bail.

22. The Hon''ble Apex Court has time and again, while laying down guidelines, has observed that no hard and fast rule can be laid down and it depends on exercise of sound discretion depending upon the facts of each case where the balance has to be struck between the right of an individual accused and his liberty and the interest of the society at large. Therefore, with the increase in white collar crimes there has to be a fresh look if the criminal justice system and the rule of law are to prevail. There has to be some kind of deterrent impact, otherwise it would lead to giving a wrong signal that one can easily get bail after commission of the crime and the shortcomings of the system like delay could be taken advantage of. Therefore, the submissions made by learned counsel Ms. Jaiswal cannot be readily accepted.

23. Another facet of the argument that if the person is released on bail he can pay up the dues by engaging in the business or trade and there is no point in keeping him behind the bars is also without any merit. The system is not at the mercy of a person like the accused for recovery of the outstanding dues, and if

there is a will sufficient provision in the form of laws like the Securitisation Act has been enacted which can be resorted to for recovery of the dues. Therefore, the submission that if he is released he can pay up the dues which in other words would mean that a person like the accused can bargain for bail in the guise of repayment of the dues, which he is even otherwise under an obligation to repay. Therefore, this submission or theory is without any merit, and if it is accepted, it would amount to giving a premium on dishonesty and accepting that the system is so weak that the financial institutions cannot recover the outstanding dues and has to remain at the mercy of persons like the accused. Therefore, such submissions though advanced on behalf of the accused have no basis and are meritless.

24. One is also required to consider that, is the system so toothless that the financial institutions cannot recover the outstanding dues after such large-scale irregularity or scam is committed and noticed, that it has to permit such bargain? Further, even if there are shortcomings in the system, it may require a fresh look including stern attitude by all concerned rather than taking a compromising stand which would on the contrary encourage repetition of such offences and will give a wrong signal in the society to such others for commission of such offences.

25. Another aspect which has been emphasised by learned Sr. Counsel Ms. Jaiswal is that there is delay referring to the judgment reported in the case of Siddharam Satlingappa Mhetre (supra). It is required to be mentioned that the observations referring to Art. 21 and liberty are made in the context of an application for anticipatory bail where the observations have been made about protection of liberty before the arrest and the observations have been made in context of the arrest of a person and not as the criteria for grant of bail. Further, the aspect of delay in the trial is required to be considered in context of the facts and merely there is some delay in the trial by itself is not sufficient for entertaining such application, ignoring all other aspects like the gravity of the offence and the guidelines laid down by the Hon"ble Apex Court for grant of bail.

26. Therefore, it is required to be considered that a person like the accused who has been in judicial custody as per the law or the system of the country cannot claim right to liberty as one is deprived of such liberty for justifiable reason and he cannot claim liberty on the same footing as any other citizen as it will be subject to the criminal justice system of the country. Article 21 of the Constitution of India speaks of the right to liberty of an individual or a citizen, but the criminal justice system also has to be in its place for proper administration of justice and maintenance of rule of law.

27. It is required to be mentioned that as rightly emphasized in the affidavit filed by the CBI and learned counsel Mr. Ravani that the accused is a habitual offender and there are repeated offences inasmuch as there are other FIRs/cases registered which itself speaks of the attitude of the petitioner which would disentitle the petitioner from getting any such discretionary relief.

28. One more aspect has been pressed into service by learned Sr. Counsel Ms. Jaiswal referring to the medical certificates on the ground of health. However, the applicant has been granted temporary bail on such certificates on the ground of health and he has been provided with sufficient medical treatment and if and when the occasion arises, he can claim temporary bail for such medical purposes and therefore it cannot be a ground for seeking regular bail. It is in this background, considering the fact that the present application is a successive bail application and as there are no fresh grounds made out, except the aspect of delay in trial, the present application cannot be entertained and it deserves to be rejected and accordingly stands rejected. Rule is discharged.