(2015) 08 AHC CK 0070

In the Allahabad High Court

Case No : Criminal Misc. Second Bail Application No. 934 of 2015

Govind Prakash Pandey APPELLANT

Vs

State of Uttar Pradesh and Others RESPONDENT

Date of Decision : 28-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Criminal Procedure Code, 1973 (CrPC) — Section 482
Evidence Act, 1872 — Section 114(b)
Penal Code, 1860 (IPC) — Section 120-B, 415, 420, 422, 467
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : (2015) 08 AHC CK 0070

Hon'ble Judges : Amreshwar Pratap Sahi, J

Bench : Single Bench

Advocate : Ravindra Sharma and K.S. Hanif, for the Appellant; Anurag Khanna, Advocates for the Respondent

Final Decision : Allowed

Judgement

Amreshwar Pratap Sahi, J—This is a second bail application that has been filed by the applicant, who is stated to be a Group Accounts Manager of M/s. Jagran Solutions, a unit of Jagran Prakashan Limited.

2. The first bail application was rejected by me on 15.10.2014 on merits which is a detailed order of 11 pages.

3. This second bail application has been heard by me on three previous occasions and finally on 31.7.2015. Sri Manoj Goel, learned Counsel has advanced his submissions contending that this second bail application deserves to be heard keeping in view the Apex Court pronouncement in the case of Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, AIR 2005 SC 921 : (2005) CriLJ 944 : (2005) 1 CTC 783 : (2005) 1 JT 482 : (2004) 10 SCALE 427 : (2005) 2 SCC 42 : (2004) AIRSCW 6868 : (2004) 7 Supreme 6 , to urge that if an application for bail is once rejected, then the concerned person is not

precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. He has further invited the attention of the Court to paragraph No. 19 of the said judgment to urge that it is true that judicial discipline as evolved, the Court would not permit re-agitation of the same issue on the same grounds subsequently but if there is some material change in the fact situation calling for a different view, then there is room for filing a subsequent bail application as observed in paragraph No. 20 thereof. This argument has been advanced by Sri Manoj Goel keeping in view the preliminary objection raised by Sri N.I. Jafri, learned Counsel for the C.B.I., who contends that the first bail application has been rejected after consideration on merits and there is no new ground or any new change of fact situation which may allow this Court to re-open the issues having been decided earlier. The exercise of judicial discretion should, therefore, be refused keeping in view the aforesaid facts as also the nature of the offence which is of a very wide magnitude.

4. Learned Counsel for the applicant contends that the first major change in the fact situation for reconsideration of bail on behalf of the applicant is the order passed by the Apex Court in the matter of a large number of co-accused, even though mainly doctors, but also for suppliers in the case of Sanjai Awasthi Vs. State of U.P. and another, Special Leave to Appeal (Criminal) No. 833 of 2015, and other connected matters. He submits that most of the said accused had filed applications (U/Section 482 Cr.P.C.) before the High Court that were rejected where the prayer was for quashing of the charge-sheet. On dismissal of these applications (U/Section 482 Cr.P.C.), they approached the Apex Court by filing the said Special leave petition where the prayer for bail was also entertained and directions were issued on 14.7.2015. The order passed by the Apex Court is extracted here under:-

"ITEM No. 14 COURT No. 2 SECTION II SUPREME COURT OF INDIA RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl.) No(s). 833/2015

(Arising out of impugned final judgment and order dated 16/01/2015 in AN No. 152/2015 passed by the High Court of Judicature at Allahabad, Lucknow Bench)

UPON hearing the counsel the Court made the following

ORDER

S.L.P. (Crl.) Nos. 4664/2015, 4654/2015, 4839/2015, 4892-4894/2015, 4832/2015, 5107/2015, 5274/2015, 3603/2015, 5029/2015, 5031/2015, 5116/2015 and CRLMP No. 10918/2015 in S.L.P.(Crl.) No. 3725/2015:

These matters are de-tagged.

List these matters on 21.07.2015.

IN REST OF THE MATTERS:

As many as 74 different cases have been registered by the Central Bureau of Investigation ("CBI") established under the Delhi Special Police Establishment Act for offences punishable under Sections 13(1)(d) and 13(2) of the Prevention of Corruption Act and Sections 420, 120-B, 467, 468, 471 and other provisions of the Indian Penal Code ("IPC") against a very large number of Officials working in the U.P. State Health and Family Welfare Departments and against suppliers of drugs and medicines. The cases, it appears, came to be registered pursuant to a direction issued by the High Court of Allahabad in a Public Interest Litigation ("PIL") which brought to fore what is now known as National Rural Health Mission ("NRHM"). It is common ground that NRHM was launched on 12.04.2005 throughout the country to provide accessible, affordable and quality health care to the rural population, specially the vulnerable sections of society and to reduce the infant mortality ratio. The Scheme/Mission was to be implemented by the State Governments.

The prosecution case appears to be that between 2005 and 2011 a large sum of money said to be to the tune of Rs. 11,080.53 crores was allocated by the Government of India for the State of Uttar Pradesh, Ministry of Health and Family Welfare, out of which, a sum of Rs. 9,133.77 crores was in due course released. It is also the case of the prosecution that out of the amount so released a sum of Rs. 8,658.03 crores is said to have been spent on the Mission by the State Government.

Allegations among others of large scale irregularities, misappropriation of funds, fake billing and purchases at exorbitant rates led the High Court of Allahabad to direct an inquiry into the scam by the CBI, which in turn led to the registration of 74 Regular cases and 28 Preliminary inquiries by the CBI branches at SC-II, STF, Delhi, EOU. IV, SCB, Lucknow and Dehradun. Mr. Maninder Singh, learned Additional Solicitor General, appearing for the CBI submitted that investigation in as many as 56 cases, out of the above, has already been completed and charge sheets filed in as many as 46 cases. In 5 other cases, the CBI appears to have submitted closure reports, while sanction for prosecution is awaited in 5 other cases. All the preliminary inquiries are said to have been disposed of leaving just about 18 cases only in which investigation is currently in progress.

With the filing of the charge sheets before the Special Courts concerned, warrants appear to have been issued to the accused named therein for their appearance before the Courts concerned. Apprehending their arrest in connection with the said cases some of the petitioners appear to have approached the High Court of Allahabad in petitions filed under Section 482 of the Code of Criminal Procedure for quashing the charge sheets and the warrants issued for their arrest/production. These petitions were dismissed by the High Court with the direction that the petitioners ought to approach the trial court for redress. Petitioners in Special Leave Petitions Nos. 4229/2015, 4237/2015 and 4239/2015 however appear to have filed regular bail application before the trial court, which were rejected, whereupon the petitioners appear to have approached the High

Court, who too concurred with the view taken by the trial court. Aggrieved by the orders passed by the High Court, the petitioners have filed the present special leave petitions for grant of protection against arrest/bail in the cases pending before the Trial Courts concerned.

When these petitions came up before us for preliminary hearing, notices were issued to the respondents and interim protection granted to the petitioners against arrest on the condition that they deposit with the trial court the amount stipulated in the orders passed by this Court. In some of these cases, we directed petitioners to furnish bail bonds to the satisfaction of the trial court besides deposit of the amount mentioned in the orders.

It is not in dispute that the petitioners have deposited the amount directed to be deposited. It is also not in dispute that wherever a direction was issued for the petitioners to furnish bail bonds, the requisite bail bonds have also been furnished by them to the Courts concerned.

Having heard learned counsel for the petitioners and Mr. Maninder Singh, learned Additional Solicitor General appearing for the CBI, we are of the view that these petitions can be disposed of with appropriate directions. It is noteworthy that the CBI had not chosen to arrest any one of the petitioners during the investigation. Investigation into the cases was completed and charge sheets filed without the agency facing any impediment whatsoever. There is in that view no compelling reason for the petitioners to be committed to custody at this stage. That apart the prosecution has cited a large number of witnesses in each charge sheet, which would imply that conclusion of the trial is likely to take time. There is no possibility of the petitioners jumping bail, as most if not all of them are serving doctors in the U.P. State Health and Family Welfare Department. In the circumstances even when the petitioners could have approached the trial court we see no reason to relegate them to that process at this stage which may only prolong their agony and lead to multiplicity of proceedings. In the result, we issue the following directions:

(i) Such of the petitioners as have not already furnished bail bonds to the satisfaction of the trial courts concerned shall do so within a period of two weeks from today in which event the protection against arrest shall continue but only subject to their furnishing such bonds.

(ii) The trial court(s) shall satisfy themselves about the deposit of the amount directed by us, in terms of our Order(s) passed in each one of the cases. In case deposit is not made as directed, the same shall be made within four weeks from the date the trial Court issues a direction to that effect after verification.

(iii) Liberty is reserved to the CBI to move the trial court concerned in case the amount already deposited by the petitioners does not match the amount on a proportionate basis that should be recovered from them having regard to the amount alleged to have been misappropriated or wrongfully paid/received. Should the petitioner(s) fail to deposit any such further amount directed by the trial court, the bail order granted in his/her favour shall stand cancelled without any further reference to this Court.

(iv) The trial court(s) shall be free to direct deposit of Passports by the accused-persons in such of the cases at it may consider just and proper.

(v) The petitioners shall not tamper with the evidence in any manner whatsoever and if they do so, the Court shall be free to cancel the bail granted to the accused concerned.

(vi) The amount deposited by the petitioners shall be remitted by the trial court(s) to the State Government, Department of Health and Family Welfare, for utilisation in the ongoing NRHM Scheme.

(vii) The trial court(s) shall endeavour to expedite the trial and shall be free to pass appropriate order(s) against the petitioners including an order withdrawing the concession of bail granted to them or any one of them, if the accused do not cooperate or otherwise resort to dilatory tactics.

The special leave petitions are disposed of with the above directions. We make it clear that the amount of deposit made by the petitioners in terms of the court''s order shall have no bearing on the legitimacy and/or legality of the prosecution launched by the CBI.

5. He next contends that apart from the aforesaid new factor which has come into existence now, the applicant worked for a company and there is a clear undertaking given on behalf of the company to recoup and deposit the entire amount, the misappropriation whereof is alleged to have resulted on account of the transaction in the present case. In view of this offer, the submission is that this aspect should also be considered keeping in view the directions of the Apex Court and various bail orders in the case of other co-accused in the same scam where bails have been granted upon deposit of the alleged defalcated amount. The applicant has throughout cooperated with the investigation and has never avoided or absconded to cause any obstruction.

6. He further submits that there is no evidence of any illegal gratification but what is important is that the entire process of investigation is clouded inasmuch as the C.B.I. upon an investigation has created a case of misappropriation against the applicant whereas there is no evidence to establish the same. He submits that the manner in which the Investigating Officer has bifurcated the transactions to indicate misappropriation is his own creation with no evidence to fix any such financial liability having occurred on account of the act of the applicant. The contention is that such a faulty investigation should not be taken to be a ground to refuse bail when there is ample material to demonstrate that the allegations cannot be established by any stretch of imagination so as to convict the applicant. Sri Manoj Goel has summarised his submissions in written form as follows:-

"IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

ORIGINAL CRIMINAL JURISDICTION

CRIMINAL MISC. BAIL APPLICATION No. 934 OF 2014 WITH PRAYER FOR INTERIM RELIEF

IN THE MATTER OF:

Govind Prakash Pandey................................Applicant

Versus

State of Uttar Pradesh and Anr.................Respondents

NOTE OF ARGUMENTS BY MR. MANOJ GOEL

COUNSEL ON BEHALF OF APPLICANT

Dated 01.05.2015''

NOTE

1. The Contract, subject-matter of the present proceedings, was floated in Nov, 2010, by the State of UP for procurement as well as operationalization of Medical Mobile Units (MMUs) in 15 Districts of Uttar Pradesh for providing health services in the Rural/Suburban areas of the aforesaid 15 Districts for a period of 3 years. The bid has to be for each District separately. There were several participants in the bidding process, including National level players, for running MMU services. The range of the bid amount varied from Rs. 1.34 Cr. to Rs. 6.73 Cr. Per MMU.

2. Re Merits:

A. (i) The bid was a Composite Bid Contract i.e. the aggregate price for procurement and operationalization of MMUs in each of the 15 Districts was to be the basis of award of Contract. [Pr. 2.6.4 @ Pg. 62-3; Pr. 4.7.2 @ Pg. 75; Pr. 4.7.3 @ 75 and Format 14 of Request For Proposal MMU/2010-11- @ Pg. 96-9.]

Fixed price Contract includes everything, irrespective of Component Price, so that nothing could be added or subtracted afterwards; bidding is on the basis of estimates of price of components. However, actual price may vary. But variation of actual price of components, whether higher or lower, See

Hindusthan Sugar Mills Vs. State of Rajasthan and Others, AIR 1978 SC 1496 : (1978) 4 SCC 271 : (1979) 1 SCR 276 : (1979) 43 STC 13 : (1978) 10 UJ 624

Sterlite Industries (India) Limited Vs. Union of India (UOI) and Another

The award of the Contract was essentially on basis of lowest estimated aggregate price, which included both Capital Expenditure (Cap. Ex.) and Operational Expenditure (Op. Ex.). On that basis, the Applicant''s Company (Jagaran Solutions) was awarded Contract in 4 Districts namely, Balia, Deoria, Ghazipur and Kushi Nagar, as its aggregate bid was the lowest in these 4 Districts. Since in each District, lowest bidder has been awarded with the Contract, there is no question of any loss to the exchequer. [See Chart set out in Pr. 3(xi) @ Pg. 8-9].

JS''s Capital Expenditure (Cap. Ex.) - Rs. 31.94 Lakhs

JS''s Operational Expenditure (Op. Ex.) - Rs. 1.05 Crores

Total Aggregate Price - Rs. 1.37 Crores (approx.)

(ii) However, strangely, in the present case, the Investigation Officer has segregated the Composite price into Cap. Ex. and Op. Ex.

Firstly, this was not open in law because the Government is concerned with total outgo in the form of Composite/Aggregate price and not with the price of Component as such.

Secondly, Investigating Officer has only compared the bills on the basis of the Cap. Ex. but not on the basis of Op. Ex. On the basis of Cap. Ex., the position that emerges in respect of the three successful bidders is as under:-

Comparative Chart of CAP. EX. amongst successful bidders

The Investigating Agency missed the basic premise that the MMUs approved by the Central Government @ Rs. 11,95,000/- [@ Pg. 221] were meant for ''Maternal and Child Health'' services only whereas the Scope of Work in UP MMUs was much comprehensive - 5 additional heads/groups of services. [See Pg. 103-105]

Even the exonerated Successful bidder CAMP quoted "capital cost" at Rs. 16.42 Lakhs per MMU as against the Central Government''s Rs. 11,95,000/- and the difference between the two would add up to a total profit of Rs. 1.43 Crores for CAMP too. [See Pr. 4.1.1(f) @ Pg. 14]

Thirdly, if component of Op. Ex. was alone to be the basis by Investigating Officer, then neither Jagaran Solution, nor the Applicant would have been accused. The emerging position would be as under:-

Comparative Chart of OP. EX. amongst successful bidders

Therefore, there is a fundamental flaw in the approach of the investigating agency.

B. Working out JS''s alleged profit of Rs. 4.007 Cr. Fundamentally flawed:

It is alleged by the prosecution in the charge-sheet that JS received Rs. 15.83 Cr. And submitted inflated bills regarding fabrication and instrumentation, whereas, JS actually spent Rs. 11.83 Cr. For fabrication and instrumentation. Thus, JS allegedly cause pecuniary advantage to them of Rs. 4.007 Cr. [See Pr. 16.51 of C/S @ Pg. 232 r/w Pg. 317]. This is the biggest fallacy in the prosecution charge.

The total bid amount for fabrication and instrumentation in Cap. Ex. by the Applicant''s Company (JS) for supply of 59 MMUs in aforesaid 4 Districts was Rs. 15.83 Cr. The break-up of the said amount is as follows:

This amount was reflected in the balance-sheet of the Applicant''s Company. The Investigating Officer has, however, erroneously not considered the expenditure that was to be incurred by the JS for the period of 3 years for maintenance and replacement of the MMUs.

In this regard, it is reiterated that bid had to be inclusive, and the consideration payable to the successful bidder was as per the bid submitted by operator and accepted by Govt. [Also Art. 3.2 @ Pag. 135] [Art. 8.1, 8.3 @ Pg. 139]

As per the terms of agreement, the successful bidder (JS) was saddled with responsibilities - to maintain the MMUs - regularity of service; vehicles in good working condition; to make provisions for alternatives. Therefore, the Cost of Rs. 4.007 Cr. Was added to Rs. 11.83 Cr. [Art. 4.3, 4.4 @ Pg. 135] [Art. 14.4 @ Pg. 147] [Pleadings - Pr. 4.1.5 @ Pg. 16]

If the agreement ran its full duration of 3 years [See Art. 5.1 @ Pg. 136], there would have been no profit at all as JS had to maintain the vehicles and also provide for replacements etc. ensuring continued performance for the agreement duration. The reflection of the figure of Rs. 4.007 Cr. In JS''s books of account was as a result of the wind-fall that JS received due to stoppage of project only after 9 months of launch. This, cannot be made basis to implicate JS or the applicant for making ''undue pecuniary advantage'' [See Annex P/14 @ Pg. 316 - 317]

C. Re allegation as to illegal pecuniary advantage of Rs. 89 Lakhs:

(i) So far as the theory of bogus bills is concerned, the first and foremost duty of the IO was to go and inspect each MMU to find out if the four equipments in question were actually missing. He did not make any visits and check if the equipments are present or not. The equipments in question are: fan, battery, awning and inverter.

(ii) Applicant has annexed the photographs of the MMUs [See Pg. 319-329] with all the equipments duly fitted. [List of equipments - @ Pg. 123-124]

(iii) Every penny of 89 Lakhs received by Applicant''s Company has been paid to vendors through RTGS. [See Pg. 271]

(iv) the only basis for alleging non-supply is that the four vendors did not pay their trade tax. This has been done by the vendors to evade trade tax, which is an offence.

(v) Vehicles had been inspected. If the instruments were absent, authorities should have reported the same. [Pg. 281-292]

(vi) Statements of the vendors are not strictly speaking evidence under Sec. 3 of Indian Evidence Act, as has been held right since the case of Bhuboni Sahu V. The King, by Privy Council, which was approved by the Supreme Court in Kashmira Singh Vs. State of Madhya Pradesh, AIR 1952 SC 159 : (1952) CriLJ 839 : (1952) 1 SCR 526 .

(vii) The use of such statement of co-accused is very limited as pointed out by Supreme Court in several judgments. In Chandrakant Chimanlal Desai Vs. State of Gujarat, (1992) CriLJ 2757 : (1992) 1 Crimes 232 : (1991) 5 JT 373 : (1991) 2 SCALE 1352 : (1992) 1 SCC 473 it was observed that this is not the starting point and that it can only be used to lend assurance. In the instant case there is absolutely no other evidence to prima facie show that the equipments were not supplied.

(viii) It is also against the use of statement of accomplice as provided in S. 114(b) of Indian Evidence Act.

(ix) Last but not the least, none of the statements of the traders implicate the Applicant or Applicant''s Company.

D. The offences for which Applicant has been charges are under Sec. 120-B r/w Sec. 420 of IPC.

(i) Re Conspiracy:

There have to be facts and material to show conspiracy. In the instant case, there is only bald allegation as to conspiracy and absolutely no facts to show how the Applicant even had knowledge about the alleged illegal motives of the concerned officers, leave aside having agreement with them. Only one line alleged that the Applicant ''joined''. [See pr. 16.41 @ Pg. 277-8] In similar circumstances, Supreme Court disbelieved the charge of cheating u/s. 422 r/w S. 120-B of Indian Penal Code preferred by C.B.I.

See Central Bureau of Investigation, Hyderabad Vs. K. Narayana Rao, (2012) CriLJ 4610 : (2012) 6 CTC 569 : (2012) 9 JT 359 : (2012) 9 SCALE 228 : (2012) 9 SCC 512 .

(ii) Re Cheating:

No only this, for offence of cheating, ''intent'' has to be there at the inception of the alleged criminal act. However, in a tender process at the national level with several participants of national repute, the contract having been awarded on the basis of the lowest bidder of the aggregate price, there was no occasion for such ''intention'' from the inception to cause loss to the public exchequer.

It is not the case of the IO that since he stage of tendering the bid, the accused had an intention of preparing false and bogus bills. At best it can be a civil breach.

See illus. (g) of Sec. 415 of IPC. Ingredients of cheating as defined by S. 415, particularly illus. (g), of Indian Penal Code, are missing in the instant case.

See

Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi, AIR 2003 SC 2545 : (2003) CriLJ 3041 : (2003) 3 CTC 356 : (2003) 182 CTR 1 : (2003) 87 ECC 473 : (2003) 155 ELT 433 : (2003) 262 ITR 466 : (2003) 4 JT 381 : (2003) 4 SCALE

471 : (2003) 5 SCC 257 : (2003) 3 SCR 1118 : (2003) AIRSCW 2735 : (2003) 4 Supreme 274

Anil Mahajan [(2005) 10 SCC 228; para 8, 9, 10]

Vir Prakash Sharma [(2007) 7 SCC 373; Para 12, 13, 14]

3. Re Allegation as to Applicant Absconding: [See Pr. 4.2 @ Pg. 19-23];

(i) FIR registered on 5.3.2012. During entire investigation applicant fully co-operated. Four occasions applicant appeared/gave documents. [Pr. 4.2.2 @ Pg. 19-20];

(ii) Charge-sheet filed on 31.7.2013 on basis of document provided by applicant; [Pr. 4.2.3 @ Pg. 20]

(iii) During entire period, starting from registration of FIR on 5.3.2012 till his arrest on 3.7.2014, the applicant has been attending office; [Pr. 4.2.4 @ Pg. 20 r/w Pg. 341]

(iv) Applicant''s travelled abroad during this period to several Countries; (Pr. 4.2.4. @ Pg. 20 r/w P/18 @ Pg. 339-343; 344-350]

(v) Applicant has been dealing with public authorities; [Pr. 4.2.4 @ Pg. 20]

(vi) Applicant has been agitating his legitimate Constitutional and legal rights before various Courts;

(vii) After filing of charge-sheet dt. 31.7.2013 and order taking cognizance dt. 12.8.2013, the Applicant''s Company and the Applicant, filed a quashing petition being Crl. Misc. Appln. No. 36308/2013 before this Hon''ble Court; [Pr. 4.2.5 @ Pg. 20-1]

(viii) The Crl. Misc. Appln. No. 36308/2013 same was heard on several occasions and vide interim orders, the proceedings were also stayed and vide order dated 24.9.2013, the Judgment was reserved. But ultimately the quashing petition was dismissed on 6.2.2014 and applicant was given 45 days time to surrender; [Pr. 4.2.5 @ Pg. 20-1]

(ix) The applicant however, did not avail the time so given and challenged the Judgment of this Hon''ble Supreme court in SLP (Crl.) 3613/2014; [Pr. 4.2.5 @ Pg. 20-21]

(x) Applicant was regularly appearing before the CBI Court through his duly appointed Advocates who kept the Court apprised of the developments; [Pr. 4.2.26 @ Pg. 21]

(xi) Applicant''s father expired and so he moved for exemption on 13.6.2014 but the same was rejected; [Pr. 4.2.7 @ Pg. 21]

(xii) Recall application moved by Applicant on 16.6.2014 but was not decided; [See Pr. 4.2.7 @ Pg. 21]

(xiii) On 1.7.2014, applicant filed Crl. Misc. 22365/14 before this Hon''ble Court against 13.6.2014 order; [Pr. 4.2.8 @ Pg. 20 r/w P/19 Pg. 351-372]

(xiv) The Crl. Misc. 22365/14 was heard on 3.7.2014 and adjourned to 4.7.2014 for hearing by appropriate Bench; [Pr. 4.2.9 @ Pg. 22; r/w See. Pg. 374]

(xv) Applicant arrested on night of 3.7.2014 from his own house at Faridabad. The Crl. Misc. 22365 dismissed as infructuous on 4.7.2014; [See Pg. 376]

See

Durga Burman (Roy) Vs. State of Sikkim, (2014) AIRSCW 4451 : (2014) 8 JT 484 : (2014) 9 SCALE 49

Nainamal Punjai Shah Case [(1969) 3 SCC 904; Pr. 22, 25]

4. Re TAMPERING OF EVIDENCE [See Pr. 4.5 @ Pg. 26-27]

See

Nainamal Punjai Shah Case [(1969) 3 SCC 904]

Chandraswami and another Vs. Central Bureau of Investigation, (1996) 8 AD 73 : AIR 1997 SC 2575 : (1997) CriLJ 3124 : (1996) 4 Crimes 159 : (1996) 8 SCALE 244 : (1996) 6 SCC 751 : (1996) 8 SCR 554 Supp : (1997) AIRSCW 2525 : (1996) 7 Supreme 785

5. Re DELAY IN TRIAL [See Pr. 4.4 @ Pg. 23-26]

(i) 91 witnesses to be examined; [Pr. 4.4.1 @ Pg. 23; r/w Pg. 378-384]

(ii) voluminous documents - 364 Exhibits; [Pr. 4.4.1 @ Pg. 23 r/w 386-406]

(iii) Charge-sheet itself contains 9047 pages; [Pr. 4.4.1 @ Pg. 23]

(iv) 45-50 Trials pending presently; [Pr. 4.4.2 @ 24 r/w Pg. 255]

(v) Applicant is also granted liberty by Supreme Court and has to move for discharge; [Pr. 4.4.3 @ Pg. 24]

(vi) The Judge hearing the cases has been transferred which would further contribute to delaying the trials;

(vii) Entire trial is based on documentary evidence; [Pr. 4.4.6@ Pg. 26]

See

Sanjay Chandra Vs. CBI, AIR 2012 SC 830 : (2012) CriLJ 702 : (2011) 4 RCR(Criminal) 898 : (2011) 13 SCALE 107 : (2012) 1 SCC 40 : (2011) 6 UJ 4077

Mehmood Mohammed Sayeed Vs. State of Maharashtra, AIR 2002 SC 482 : (2002) 10 SCC 677 : (2002) AIRSCW 8 : (2001) 4 Supreme 435

6. DEPOSIT OF AMOUNT OF ALLEGED AMOUNT OF CRIME: [See Pr. 4.6 @ Pg. 27 r/w Pg. 408-9]

7. RE MORE THAN 6 MONTHS ELAPSED SINCE REJECTION OF APPLICANT''S 1ST BAIL APPLICATION AND BAIL ALSO GRANTED TO CO-ACCUSED:

The applicant was arrested on 3.7.2014 i.e. Almost 10 months back and Applicant has been in Judicial Custody continuously since then. The Applicant''s 1st Bail Application was rejected on 15.10.2014 on different grounds. Thus, more than 6 months has also elapsed since the rejection of the Applicant''s 1st Bail Application.

Also, since then, the main accused in the present case, Shri Pradeep Shukla has been enlarged on bail by the Hon''ble Supreme Court vide order dated 2.12.2014."

On the count and again in rejoinder as follows:-

"IN THE HIGH COURT OF JUDICATURE AT ALLAHABAD

ORIGINAL CRIMINAL JURISDICTION

CRIMINAL MISC. BAIL APPLICATION No. 934 OF 2014 WITH PRAYER FOR INTERIM RELIEF

IN THE MATTER OF:

Govind Prakash Pandey.........Applicant

Versus

State of Uttar Pradesh and another.............Respondents

NOTE ARGUMENTS IN REJOINDER BY MR. MANOJ GOEL

COUNSEL ON BEHALF OF APPLICANT'' ON MAINTAINABILITY OF 2ND BAIL APPLICATION

Re MAINTAINABILITY OF 2ND BAIL

1. Continued incarceration of an accused directly curtails his Fundamental Right to life and personal liberty and therefore that deprivation must strictly be ''in accordance with the procedure established by law''. Procedure established must be fair and reasonable.

2. Interpretation of law must be put which is in consonance with Art. 21 and not in its deprivation. There is no provision in Cr.P.C. restricting 2nd or successive bail petition and the grounds on which such petition can be preferred.

See

Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, AIR 1980 SC 1632 : (1980) CriLJ 1125 : (1980) 2 SCC 565 : (1980) SCC(Cri) 465 : (1980) 3 SCR 383

1.2 The Supreme Court in the case of Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, AIR 2005 SC 921 : (2005) CriLJ 944 :

(2005) 1 CTC 783 : (2005) 1 JT 482 : (2004) 10 SCALE 427 : (2005) 2 SCC 42 : (2004) AIRSCW 6868 : (2004) 7 Supreme 6 has added only one exception to ensure that hierarchical system of judicial administration functions smoothly; thus, when on a given ground bail is refused by a higher Court, then on that very ground a 2nd bail petition cannot be re-agitated in the lower Court or the same Court unless there is change in material circumstances, justifying it.

Accused has the right and liberty to move 2nd bail application. However, only the points argued and considered by the Court cannot be re-agitated. Even in respect of arguments raised and considered, if there is factual change, that can be re-agitated in a 2nd bail application. That is all that Sarkar [at Prs. 19, 20] holds.

In Sarkar''s case, the Supreme Court categorically rejected that res judicata is not applicable in bail jurisdiction. Yet to say that Supreme Court in same case allowed constructive res judicata to be applicable in bail jurisdiction is both incongruous as well as anomalous.

If Sarkar''s is interpreted too broadly, it would be rendered per incurium, because of it depriving a fair procedure to the accused under Art. 21. Importing principles of Sec. 11 of CPC or principles analogous to it, to Cr.P.C. would be complete negation of ''fair procedure'' guarantee.

2.1 However, neither res judicata nor constructive res judicata is applicable in criminal law.

See Fatma Bibi Ahmed Patel Vs. State of Gujarat and Another, AIR 2008 SC 2392 : (2008) CriLJ 3065 : (2008) 7 SCALE 519 : (2008) 6 SCC 789 : (2008) AIRSCW 3962 : (2008) 4 Supreme 308

Devendra and Others Vs. State of U.P. and Another, (2009) CLT 1207 : (2009) 8 JT 120 : (2009) 7 SCALE 613 : (2009) 7 SCC 495 : (2009) 7 SCR 872

2.2 Pre-condition for applying res judicata even in Civil cases is that in the earlier proceedings the point was directly and substantially, and not collaterally or incidentally, in issue and the same must have been argued and finally decided. [See Sec. 11 CPC]

Thus, for application of doctrine of res judicata - there must be arguments and actual determination.

See

Imratlal Vishwakarma and Others Vs. State of Madhya Pradesh, (1996) JLJ 642 : (1996) 41 MPLJ 662 : (1996) MPLJ 662

Here, the points argued now were not even argued, leave alone their consideration and final determination. Where is the question of application of res judicata then?

2.3 However, barring an accused to raise those pleas, which were neither argued nor considered earlier would be punishing him by invoking principle of constructive res judicata which, as stated earlier, are not applicable to Criminal law as such.

See

Dal Chand and Others Vs. State of U.P., (2000) CriLJ 4579

3. The nature of rejection of a bail application is not a final determination and such an order is only an interlocutory order. Therefore, in any case, res judicata cannot apply to bail orders.

See Babu Singh and Others Vs. State of U.P., AIR 1978 SC 527 : (1978) CriLJ 651 : (1978) 1 SCC 579 : (1978) SCC(Cri) 133 : (1978) 2 SCR 777

Dal Chand and Others Vs. State of U.P., (2000) CriLJ 4579

Babu Singh has been approved in a number of judgments, including recently in Sanjay Chandra Vs. CBI, AIR 2012 SC 830 : (2012) CriLJ 702 : (2011) 4 RCR(Criminal) 898 : (2011) 13 SCALE 107 : (2012) 1 SCC 40 : (2011) 6 UJ 4077 . To hold otherwise, would render K.C. Sarkar per incurium.

Accordingly, as held in Babu Singh (Supra), more detailed facts etc. can be given subsequently in subsequent bail application.

4. Moreover, even a Judgment, not interlocutory in nature, is only authority for what it decides and not what can be deduced from it.

See

The State of Orissa Vs. Sudhansu Sekhar Misra and Others, AIR 1968 SC 647 : (1970) 1 LLJ 662 : (1968) 2 SCR 154

Observations made by a Constitution Bench of the Apex Court without the issue being argued, was held to be not binding precedent and a Division Bench considering the issue later disagreed with those observations and took a different view.

See

State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, (1993) 41 ECC 326 : (1991) 3 JT 268 : (1993) 2 SCALE 65 : (1991) 2 SCALE 110 : (1991) 4 SCC 139 : (1991) 3 SCR 64 : (1992) 87 STC 289 : (1991) 2 UJ 396

5. The judgment of this Hon''ble Court in Satya Pal [1998 (37) ACC 287] is per incurium because it is incorrectly decided.

Firstly, the ratio of State of Maharashtra Vs. Captain Buddhikota Subha Rao, AIR 1989 SC 2292 : (1989) CriLJ 2317 : (1989) 3 Crimes 495 : (1989) 4 JT 1 : (1989) 2 SCALE 707 : (1989) 2 SCC 605 Supp : (1989) 1 SCR 315 Supp : (1990) 1 UJ 192 is not correctly appreciated. In that case, on the very same ground of facilitating yogic classes for the accused, previous bail applications were rejected 2 days before allowing a subsequent one by another Judge and was, therefore, reversed by the Supreme Court.

Secondly, the Judgment of Babu Singh which was squarely applicable, was referred but not at all considered and dealt with. Therefore, the said judgment is Satya Pal is per incurium.

Thirdly, it says that order on bail can be passed without reasons and even that would be binding. That would be far beyond and worse than the application of doctrine of res judicata (See Pr. 7 at Pg. 290]

Lastly, it also applied principle of constructive res judicata to bail even when it has been held by Supreme Court that even res judicata is not applicable to criminal law, particularly to bail jurisdiction. [See K.C. Sarkar (Supra)]

The Division Bench judgment of this Hon''ble Court by G.P. Mathur J. in Dal Chand, which relied upon the Supreme Court Judgment in Babu Singh, lays down the correct law in this regard.

6. No plea raised herein has been raised and considered in the earlier bail application.

NEW GROUNDS/CIRCUMSTANCES:

(i) delay in trial/appeal is a ground for 2nd bail application;

(See Kashmira Singh Vs. The State of Punjab, AIR 1977 SC 2147 : (1977) CriLJ 1746 : (1977) 79 PLR 679 : (1977) 4 SCC 291 : (1978) 1 SCR 385 : (1977) 9 UJ 593]

(ii) long period of incarceration after rejection of 1st bail;

(iii) applicant did not abscond;

(iv) offer of securing the alleged amount involved."

7. Replying to the said submissions, Sri Jafri has invited the attention of the Court to the facts contained in the counter-affidavit filed on behalf of the C.B.I. and in particular, paragraph No. 8 of the counter-affidavit which is as follows:-

"8. That, the contents of para 3(vi) are incorrect and misleading, hence denied. The factual position in respect of proposal submitted by Government of Uttar Pradesh in the year 2010-11 for operationalising Mobile Medical units is as under-

From the aforesaid table it is very much clear that total MMUs proposed for operationalisation were 1211. The capital cost of each Mobile Medical Unit was Rs. 13.28 Lacs and recurring cost for running one mobile medical Units was Rs. 18 lacs per annum.

The approval in respect of aforesaid proposal submitted by Government of Uttar Pradesh was accorded by the government of India vide record of proceeding dated 07.05.2010. The details of approval as under-

From the above table it is very much clear that Government of India approved the operationalisation of only 150 Mobiles Medical units in 15 districts of the State of U.P. with a sanctioned budget of Rs. 42.686 Crores. It is also clear that Government of India has specifically mentioned in the approval that the capital cost for one Mobile Medical Unit will be Rs. 11,95,200/-, recurring cost for one MMU for one year Rs. 16.20 Lacs and cost for office set up in each district was Rs. 3 Lacs/-"

8. He, therefore, submits that the price was manipulated in the manner aforesaid in contravention of the approved rates by the Central Government and the deviation there from clearly indicated the intention to defraud government Exchequer. He further submits that different components were to be paid by different methods but the applicant''s contracts were manipulated in a way and payments were made by altering terms and conditions of the applicant''s contract to suit his benefits.

9. He has then invited the attention of the court to the relaxation granted to the applicant''s firms after the bid through the then Principal Secretary (Health) Sri Pradeep Shukla and the Director, Medical Health, Sri S.P. Ram.

10. He, therefore, submits that the bail having already been rejected on the first count, there does not appear to be any reason to grant bail to the applicant.

11. He has also cited the judgment in the case of Dal Chand and Others Vs. State of U.P., (2000) CriLJ 4579 , and the judgment in the case of Satyapal Vs. State of U.P. and others, 1998 (37) ACC 287, to urge that this second bail cannot be granted.

12. Having considered the submissions raised, the first issue is with regard to scope of entertaining a second bail application. On a consideration of the judgment which has been cited at the Bar, there is no doubt that unless there are fresh and new grounds available, the same ground which existed at the time of the first bail rejection order, cannot be permitted to be re-agitated. The question also is as to whether grounds, which had not been raised earlier and agitated before the Court, can they be permitted to be raised in a second bail application. To answer these questions the facts as placed on record deserve mention.

13. The NRHM Scam has proceeded for trial and several witnesses have been examined and the matter is proceeding before the trial court. It is at this stage one will have to consider the impact of the order passed by the Apex Court dated 14.7.2015 in the same scam relating to other co-accused, who have been extended the benefit of bail with other directions that have been issued extracted herein above. This order obviously takes notice of the progress of the trial and the likelihood of the trial proceeding in future coupled with the status of the accused in this case. It is no doubt that the said order was passed mainly in relation to doctors and government servants and it is they, who have been bailed out.

14. Following the directions, which have been issued from time to time and also the nature of bail orders passed by the Apex Court, this Court has also extended the benefit of bail on deposit of the proportionate amount as observed by the Apex Court herein above. This situation was, however, not existing when the first bail of the applicant was rejected on 15.10.2014. Consequently, the contention of Sri Manoj Goel is correct that this new circumstance of the directions issued by the Apex Court and grant of bail is a complete new factor, which has intervened after the first bail rejection order.

15. The question is now as to what would be the scope of argument in this second bail application in the light of the aforesaid development.

16. It is here that the Court would like to emphasize that the nature of the arguments that were advanced when the first bail application was rejected was not exhaustive to the extent of the argument that has now been advanced pointing out various facts and the alleged defects in the investigation. This is quite obvious with the change of situation and coming forth of evidence but in the present case substantially most of the points and the nature of the offence and it''s gravity had been considered when the earlier bail was rejected.

17. So far as the arguments now advanced are concerned, they do indicate that all such points had not been agitated or decided after consideration at the time of the first bail rejection order and, therefore, in view of the new developments as indicated above, the applicant can be permitted to raise such issues and to which answer on merit has also been given by the C.B.I. in it''s counter-affidavit and in the arguments that have been advanced by Sri Jafri.

18. What deserves to be noticed is that the contention about the reflection of an erroneous calculation by the Investigating Agency is subject matter of evidence which is there on record but at the same time, the contention of the C.B.I. is also there that in spite of the approval of the benchmark as set forth by the Central Government, the cost of the mobile units was enhanced. The explanation given by the applicant is that the Investigating Agency has erred in not differentiating between the capital cost and the recurring cost for each medical mobile unit. The enhancement was on account of other charges, which were over and above the capital cost, which was in the shape of operational expenses. The contention of the C.B.I., on the other hand, is that all this was manipulated and was in contravention of the rules and regulations. To this, Sri Goyal responds by saying that so far as the applicant is concerned, he had cooperated with the investigation to provide with the entire information to justify his stand and he did not abscond. Not only this after having taken into custody, he is still in Jail and there are no reports either adverse or otherwise to indicate that the applicant has tried to tamper with the evidence or cause any undue influence otherwise.

19. Sri Goyal has vehemently urged that in spite of the alleged loss which has been indicated through the State Exchequer, even if that is deducted, the company is yet to receive additional payments.

20. There are other charges relating to payment being received and being defrayed to the Company of the applicant instead of being given directly to those who were entitled to receive the same which was also manipulated. In effect such defrayment was also manipulated by the conspiracy of which the applicant was a part. The key player against whom conspiracy was alleged was the Principal Secretary, Medical and Health Sri Pradeep Shukla, who filed a bail application on medical grounds on which the following order was passed on 15.9.2014:-

"ITEM No. 51 COURT No. 12 SECTION II SUPREME COURT OF INDIA RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl.) No(s). 4624/2014

(Arising out of impugned final judgment and order dated 26/05/2014 in CRLMB No. 15985/2014 passed by the High Court of Judicature at Allahabad)

PRADEEP SHUKLA.......................Petitioner(s)

VERSUS

CBI.......................Respondent(s)

(with appln. (s) for bail and exemption from filing O.T. and extension of bail and permission to file additional documents and permission to file lengthy list of dates and permission to place addl. documents on record and office report)

Date: 15/09/2014 This petition was called on for hearing today.

CORAM: HON''BLE MR. JUSTICE MADAN B. LOKUR HON''BLE MR. JUSTICE C. NAGAPPAN

UPON hearing the counsel the Court made the following

ORDER

We have received a report dated September 11, 2014 from the All India Medical Sciences. The report which is signed by eight doctors states as follows:

"After evaluation of the medical condition of the petitioner including the investigations, the medical board is of the opinion that the present medical condition of the petitioner is not such that he cannot attend court proceedings. The Medical Board is also of the opinion that at present the petitioner does not suffer from an ailment that makes his further detention in custody possibly dangerous to his life. However, in view of his past history, in event of an emergency, he should have access to proper health care facility."

It appears that a copy of the report has not been supplied to learned counsel for the parties.

The Registry shall make a photostat copy of the report and furnish it to the Advocate-on-record for the parties preferably by tomorrow, i.e., 16.09.2014.

Additional documents, if any, be filed within two days.

Interim orders to continue.

A copy of this order may be communicated to the Trial Court.

List the matter on 22.09.2014.

He was, however, granted bail in spite of the aforesaid order by the Apex Court subsequently and has reportedly now been reinstated in service as Principal Secretary of a substantial department in the Government of U.P.

21. There are further developments which have been noticed by this Court in other matters after the orders were reserved in the present case. Similar matters relating to the key-players were taken up by the Apex Court, one of them was Surendra Chaudhary, who against the rejection of the bail order dated 24.7.2015, has filed Special Leave to Appeal (Criminal) No. 6461 of 2015, in which on 17.8.2015 the following order has been passed:-

"HON''BLE MR. JUSTICE T.S. THAKUR HON''BLE MR. JUSTICE V. GOPALA GOWDA HON''BLE MRS. JUSTICE R. BANUMATHI

UPON hearing the counsel the Court made the following

ORDER SLP (Crl.) No. 6461 of 2015:

Heard.

Issue notice.

Mr. Maninder Singh, learned Additional Solicitor General, accepts notice on behalf of the respondents.

Counter affidavit be filed by the respondents within two weeks. Rejoinder affidavit, if any, be filed by learned counsel for the petitioner within two weeks thereafter.

Post after needful is done along with SLP (Crl.) No. 4664 of 2015.

22. In another matter relating to rejection of the bail of Devendra Mohan vide order dated 29.5.2015 by this Court, the Apex Court in Special Leave to Appeal (Criminal) No(s). 5935 of 2015 on 21.8.2015 has passed a similar order extracted here under:-

"HON''BLE MR. JUSTICE T.S. THAKUR HON''BLE MR. JUSTICE V. GOPALA GOWDA

UPON hearing the counsel the Court made the following

ORDER

Issue notice.

Dasti, in addition is also permitted.

Post along with SLP (Crl.) No. 4664 of 2015.

In another matter where the bail was rejected in the case of the then Minister Babu Singh Kushwaha by the High Court on 11.2.2014, the Apex Court in Special Leave to Appeal (Criminal) No(s). 10149 of 2014 on 20.8.2015 has passed the following order:-

"HON''BLE MR. JUSTICE JAGDISH SINGH KHEHAR HON''BLE MR. JUSTICE N.V. RAMANA

UPON hearing the counsel the Court made the following

ORDER

Having heard learned counsel for the rival parties, we consider it just and appropriate to direct the trial Court to frame charges, in furtherance of the charge sheet filed by the prosecution, if made out, as expeditiously as possible.

In case, charges are framed, the trial Court shall record the statements of important/vital witnesses including the statements of Manvendra Chadha and Girish Malik, within three months from the date of framing the charges.

List for further consideration, after four months.

23. A latest order in the case of Vijay Singh, another co-accused in the same NRHM Scam where this Court had granted bail on deposit of amount following the Apex Court orders, the following order has been passed:-

"ITEM No. 601 COURT No. 2 SECTION II SUPREME COURT OF INDIA RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Crl.) No(s). 7083/2015

(Arising out of impugned final judgment and order dated 17/07/2015 in CRMBA No. 4404/2015 passed by the High Court of Judicature at Allahabad)

Date: 27/08/2015 This petition was called on for hearing today.

CORAM: HON''BLE MR. JUSTICE T.S. THAKUR HON''BLE MR. JUSTICE KURIAN JOSEPH

UPON hearing the counsel the Court made the following

ORDER

Heard.

The amount of Rs. 12.50 lakhs stipulated by the High Court in the impugned order shall stand reduced to Rs. 8,00,000/- (Eight Lakhs) to be deposited by the petitioner within four weeks from today.

Subject to the deposit, notice shall issue to the respondent, returnable within six weeks.

24. In the said background and having considered the submissions raised on behalf of the learned Counsel for the applicant and the explanation given at this stage, it appears that since the applicant had throughout cooperated with the investigation and had not absconded and there is no likelihood of his tampering with the evidence, the applicant deserves to be granted bail in view of the undertaking given before this Court to deposit the alleged misappropriated amount. The said amount has been pointed out in the counter-affidavit of the C.B.I. in paragraph Nos. (xxi) and (xxii), which comes to the tune of Rs. 4,89,87,416/-. The applicant shall deposit the said amount with the trial court as has been directed on the same terms by the Apex Court in the order dated 14.7.2015 quoted herein above. Subject to the said deposit, the applicant is entitled for bail.

25. Let the applicant Govind Prakash Pandey, involved in CBI CASE No. RC 04(A)/2012, SCU-V/SC-II, NEW DELHI, REGISTERED UNDER SECTION 120-B R/W 420 IPC AND 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988, be released on bail on his furnishing a personal bond and two sureties each of the like amount to the satisfaction of the court concerned on the following conditions:-

1. The applicant shall not tamper with the prosecution evidence;

2. The applicant shall not pressurize the prosecution witnesses;

3. The applicant shall appear on the date fixed by the trial court.

4. The applicant shall deposit his passport with the trial court.

26. In case of default of compliance with any of the conditions enumerated above, the order granting bail shall stand cancelled automatically.

27. The application stands allowed, accordingly.