

(2011) 12 BOM CK 0129

In the Bombay High Court

Case No : Criminal Application (Main) No. 214 of 2011

Kashinath Shetye, Ketan Govekar and Pradeep Kakodkar

APPELLANT

Vs

Shri Shaik Faisal

RESPONDENT

Date of Decision : 02-12-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 438, 439(2), 482
Mines and Minerals (Development and Regulation) Act, 1957 — Section 7
Penal Code, 1860 (IPC) — Section 120B, 217, 218, 34, 405
Prevention of Corruption Act, 1988 — Section 10, 11, 12, 13, 7

Citation : (2011) 12 BOM CK 0129

Hon'ble Judges : A.P. Lavande, J

Bench : Single Bench

Advocate : S.A. Samant, Advocate for respondent No. 1 and Mr. C.A. Ferreira, Public Prosecutor for the respondent Nos. 2 and 3, for the Respondent

Judgement

A.P. Lavande, J.—By this application under Sections 439(2) and 482 of Criminal Procedure Code, the applicants have challenged the order dated 9th November, 2011, passed by Special Judge, North Goa at Panaji, by which an application for intervention filed by the applicants has been rejected and the application filed by respondent no. 1 u/s 438 of Cr.P.C., has been granted on the terms and conditions mentioned therein. The applicants herein filed an application u/s 156(3) of Cr.P.C., before Judicial Magistrate First Class, Pernem seeking registration of offences under various Sections of I.P.C. and other Acts against one Jitendra Deshprabhu and several others. Learned Judicial Magistrate, First Class, directed registration of FIR. Consequently FIR No. 17/2011 was registered at Police Station, CID Crime Branch, North Goa Panaji under Sections 217, 218, 405, 409, 420, 468, 471, 120B and Section 34 of I.P.C, Sections 7, 8, 9, 10, 11, 12 and 13 of the Prevention of Corruption Act, 1988, Sections 17-A and 17-B of the Town and Country Planning Act and Section 7 of Mines and Minerals Act, 1957.

2. The FIR was registered on 9th May, 2011. In the course of investigation,

statement of respondent no. 1 was also recorded. Respondent no. 1 apprehending arrest in connection with the said FIR filed an anticipatory bail application u/s 438 of Cr.P.C., before Special Judge on 23rd September, 2011. Thereafter, the applicants filed an application for intervention on 30th September, 2011. By order dated 9th November, 2011, Special Judge allowed the application filed by respondent no. 1 on certain terms and conditions and in so far as the application for intervention is concerned the Special Judge held that the applicants were heard before bail application was heard on merits and further held that intervenors strictly speaking have nothing specific to do to assist the Court in appreciating the case. The Special Judge further held that no further assistance is required to deal with the application, and consequently held that she did not find it appropriate to hold that their intervention is justified in the application. The Special Judge, further held that applicants were heard earlier when the bail application of other suspects, namely Gitesh Naik and Jitendra Deshpabhu were heard.

3. The applicant no. 1 who has appeared in person submitted that he was heard when the anticipatory bail application of Jitendra Deshpabhu was considered by Special Judge and in view of the Judgment of this Court in the case of Vinay Poddar Vs. State of Maharashtra and anr., 2009 ALL MR (CRI) 687, the applicants were entitled to be heard. Applicant no. 1 therefore submitted that the impugned order be set aside and Special Judge be directed to decide the application filed by respondent no. 1 afresh after giving opportunity of being heard to the applicants.

4. Mr. Samant, learned Counsel appearing for respondent no. 1 states that he has no objection, if the impugned order is set aside and Special Judge is directed to decide the application afresh after giving opportunity of being heard to the applicant no. 1. However, he submitted that till the application is decided, respondent no. 1 be protected by interim order since impugned order is in operation since 9th November, 2011 and the State has not taken any steps to challenge the same.

5. Mr. Ferreira, learned Public Prosecutor appearing for respondent nos. 2 and 3 submitted that he has no objection, if the impugned order is set aside and the matter is remanded to Special Judge to decide the application afresh after giving opportunity of being heard to the applicant no. 1. Mr. Ferreira, further submitted that he has no objection if respondent no. 1 is protected till the application is decided.

6. I have considered the rival submissions and perused the record.

7. In the case of Vinay Poddar (Supra), learned Single Judge of this Court, after considering several judgments, has held that in an anticipatory bail application if the first informant appears before the Court, he cannot be denied a right of making oral submissions either in person or through his counsel. Learned Special Judge has dismissed the application for intervention firstly on the ground that the applicants were heard before anticipatory bail application was taken up for

hearing. Second ground on which learned Special Judge has dismissed the application is that the applicants were heard while considering the bail applications of other accused in the case, namely Gitesh Naik and Jitendra Deshprabhu. Learned Special Judge has further held that the intervenors have nothing specific to assist the court in appreciating the case and as such, no further assistance was required to deal with the application.

8. In my considered opinion, all the reasons given by Special Judge are untenable in law. In view of the judgment in the case of Vinay Poddar (supra), the Special Judge was obliged to hear the applicants at the time of considering the application u/s 438 of Cr.P.C. filed by respondent no. 1 who is, admittedly, an accused in the FIR registered pursuant to the application filed u/s 156(3) of Cr.P.C. On this ground alone the impugned order is unsustainable in law and is liable to be set aside.

9. Before concluding, it may be mentioned here that in the course of hearing the contents of the reply filed before Special Judge by respondent nos. 2 and 3 opposing the anticipatory bail application filed by respondent no. 1 were brought to my notice. Perusal of the reply discloses that reference has been made to the names of the witnesses and the contents of the statements made by them during the course of the investigation. I am really surprised that the investigating agency and that too Crime Branch and learned Public Prosecutor appearing before the Special Judge are unaware of the basic principles which have to be followed during investigation of a crime. In this connection, it would be appropriate to refer to the Division Bench Judgment of this Court in the case of Smt. Vimal Ashok Thakre and Another Vs. In-Charge, Police Station Officer, Nagpur and Others, , to which I was a party, in which it has been clearly held that the investigating agency is not entitled to divulge any information gathered during the course of investigation to public on three counts, i.e. principles, authority and propriety. In the said case, in the course of investigation, Police Commissioner of Nagpur held the media press conference and made available copy of the medical reports of the victim. While considering this point, the Division Bench has considered the propriety of investigating agency disclosing the material to the media. Though the factual matrix in the present case is slightly different, in my considered opinion, the same principle applies even while filing a reply to the bail application or anticipatory bail application before filing charge sheet. No doubt, in the reply filed to the application/anticipatory bail application prosecuting agency is entitled to point out to the learned Judge/Magistrate the material available against the accused justifying the refusal of bail or anticipatory bail, but at the same time, investigating agency is not entitled to disclose the names of the witnesses and contents thereof recorded in the course of investigation.

10. It appears that the investigating agencies in Goa, as and Assistant Public Prosecutors appearing in the Courts of Judicial Magistrate, First Class are not aware of this principle since in number of matters it has come to my notice that

in reply to bail application/anticipatory bail application the names of the witnesses examined and the contents thereof are disclosed in the reply filed when the accused seeks bail/anticipatory bail before filing the charge sheet. I, therefore, deem it necessary to direct the Registrar to send a copy of this Order and also a copy of judgment in the case of Vimal Thakre(Supra) to the Chief Secretary, State of Goa as well as to the Director General of Police, so that proper care is taken in future.

11. The Chief Secretary and the Director General of Police, to circulate copy of this order as well as judgment in the case of Vimal Thakre (Supra) to the concerned officers/Public Prosecutors/Assistant Public Prosecutors for compliance.

12. In the result, therefore, the impugned order dated 9th November, 2011 passed by the Special Judge, North Goa, Panaji is set aside. The application for intervention filed by the applicants is allowed. The Special Judge shall give an opportunity of being heard to applicant no. 1 or advocate appearing for the applicants, learned Advocate appearing for respondent no. 1 and learned Public Prosecutor, and pass appropriate order, in accordance with law, in the light of observations made above. Till the application is decided by the learned Special Judge, in the event respondent no. 1 is arrested in connection with FIR No. 17/2011, he shall be released on the same terms and conditions imposed by the learned Special Judge in the impugned Order.

13. Applicant no. 1 and respondent no. 1 shall appear before Special Judge on 9th December, 2011 at 2.30 p.m. Learned Special Judge shall dispose of the application expeditiously. It is made clear that I have not expressed any opinion on the merits of the contentions of the rival parties. The application stands disposed of.