

(2001) 04 GUJ CK 0058
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 3068 of 2001

Narendra Shankarbhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 30-04-2001

Acts Referred:

Constitution of India, 1950 — Article 21, 22(1), 226
Criminal Procedure Code, 1973 (CrPC) — Section 437, 437(1), 437(3), 439, 498
Gujarat Ownership Flats Act, 1973 — Section 3(2), 42, 7(1)(2)
Penal Code, 1860 (IPC) — Section 120(B), 304, 418, 420
Police and Criminal Evidence Act, 1984 — Section 56(1)

Citation : (2001) 04 GUJ CK 0058

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : R.M. Vin, for the Appellant; A.D. Oza, Public Prosecutor and S.K. Patel, APP, for the Respondent

Judgement

H.K. Rathod, J.—Heard Mr. R.M. Vin, learned advocate for the petitioner and Mr. A.D. Oza, learned Public Prosecutor with Mr. S.K. Patel, learned APP on behalf of the respondent State.

"The relief has to be granted by the Court according to sound legal principles and ex debito justitiae. The Court has to administer justice between the parties and cannot convert itself into an instrument of injustice or an engine of oppression. While exercising the powers, the Court must keep in mind the well settled principles of justice and fair play and should exercise the discretion only if the ends of justice require it, for justice is not an object which can be administered in vacuum."

[Extract : Vaish Degree College Vs. Laxminarayan reported in AIR 1976 SC page 888]

"Law cannot be interpreted and enforced divorced from their effect on human beings for whom the laws are meant. Undoubtedly, rule of law must prevail but

as is often said, rule of law must run akin to rule of life. And life of law is not logic but experience .." While administering law it is to be tempered with equity and if the equitable situation demands after setting right the legal formulations not to take it to the logical end, this Court would be failing in its duty if it does not notice equitable considerations and mould the final order in exercise of its extraordinary jurisdiction."

[Extract : Municipal Board, Pratapgadh Vs. M.S.Chawla reported in AIR 1982 SC page 1493]

"Article 226 grants an extraordinary remedy which is essentially discretionary although founded on legal inquiry. It is perfectly open for the Court, exercising this flexible power, to pass such order as public interest dictates and equity projects;

`Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved. Accordingly, the granting or withholding of relief may properly be dependant upon considerations as of public interest."

[Extract : Shivshankar Dal Mill Vs. State of Hyryana reported in AIR 1980 SC page 1037]

Rule. Mr. A.D. Oza, learned Public Prosecutor waives service of Rule on behalf of the respondent State.

2. The brief facts of the present petition are as under :-

The police Inspector Shri R.L. Chavda of Navrangpura Police Station, Ahmedabad City has filed a FIR being C.R.No.I-76 / 2001 of Navrangpura Police Station on 16th February, 2001 at 8.15 P.M. against the present petitioner and three other unnamed persons for offence punishable u/s 304 read with Section 120(B)(i), 418 and 420 of IPC and u/s 3(2)(c)(i) and Section 7(1)(i)(ii) (2) read with Section 42 of the Gujarat Ownership Act. The allegations in the FIR in short are that the petitioners in conspiracy with three other unnamed persons was responsible as `Builder" for defective construction of a building viz. `SETU APARTMENTS" which was made contrary to the rules and regulations under the Ownership Act by using sub standard materials knowingly and wilfully that the construction was likely to collapse resulting in damage to life and property on the fateful day viz. 26th January, 2001 and because of unprecedented earthquake of very high intensity and long duration, a portion of `Setu Apartments" got partially damaged resulting in the partial collapse of about four flats one over the other and the falling debris caused the death of one person named Deval who at the relevant time was a guest in the flat owned and occupied by one Madhukar Shankarlal, Flat No.202. That on coming to know about the filing of the FIR, the petitioner voluntarily surrendered himself on 9th February, 2001 to the police at Navrangpura Police Station and after one remand, the applicant is in judicial

custody since then.

The present petitioner has filed application being Criminal Misc. Application No.599 of 2001 in the City Sessions Court at Ahmedabad for releasing him on bail and the said application has been rejected by Court No.20 by judgment and order dated 30th March, 2001 and hence the order passed by the Additional Sessions Judge, Ahmedabad dated 30th March, 2001 is under challenge in the present petition by the petitioner u/s 439 of CrPC 1973 on the ground that the petitioner is completely innocent and he is not the builder but in his capacity as Chairman of non trading association namely Bijal Association got constructed through the qualified people after plans etc. were prepared by technical civil engineer personnel and approved by the officers of the Ahmedabad Municipal Corporation.

The petitioner in the present petition has submitted that in fact he had absolutely no connection with the building or even management in question and even before the FIR was filed against him, he himself out of humanitarian considerations undertook urgent repairs of the pillars etc. strengthened them by additional construction for which he has spent about Rs.2.25 lacs for which he has got bills and accounts. It is also submitted that out of sixteen blocks, in twelve flats occupants have started residence after the repairs and they reside in their respective flats even today. Moreover, present petitioner also took upon himself a complete reconstruction of the four damaged flats for which negotiation were going on between the petitioner and the flat owners before his surrendered to custody. According to the petitioner, even a draft contract to that effect was prepared. According to the petitioner, he is prepared even today to reconstruct the damaged portion of the building at his own expense and restore the damaged flats to a condition in which the affected flat owners can occupy and stay in their flats with complete guarantee of safety and security. It is also submitted that the petitioner is prepared to carry out and abide by any conditions that may be imposed by this Court.

3. Learned Advocate Mr. R.M. Vin appearing on behalf of the petitioner has submitted that present petitioner Shri NARENDRA SHANKARBHAI PATEL is prepared to file undertaking before this Court to the effect that damaged building 'Setu Apartments' was constructed during my Chairmanship of the Bijal Association under whose aegis, Setu Apartment was built. The same was built under my Supervision and guidance. That as regards the damaged building, the petitioner undertake to reconstruct and restore all the four flats by undertaking constructing myself at my entire cost. However, if the flat owner or owners choose and desire to pay some any amount by way of contribution as may be received from the Government aid or any agency by him or them, it will be open to me accept the same but I will not compel in any way any of them to make any such contribution by resorting to litigation or in any other manner I further undertake to complete the construction by the end of February, 2002 and put the respective flat owners in actual possession of their respective flats. If I fail in any

way to deliver possession of reconstructed flats to the respective owner or owners by the end of February, 2002, I will pay rent compensation at the rate of Rs.5000/- per month to each of such flat owner. If however any flat owner chooses not to have reconstructed flat, I will pay him the price thereof paid by him. Mr. Vin, learned advocate appearing on behalf of the petitioner has also further submitted that the petitioner is ready to pay Rs.75,000/- to the legal heirs of the deceased Deval Ajit Dattatreya within three months of the date of release of the petitioner from jail.

4. Learned advocate Mr. Vin has prepared draft undertaking and copy of the said draft undertaking has also been given to the learned PP Shri A.D. Oza. However, Mr. A.D. Oza, learned PP has verified the statement made by the present petitioner in the draft undertaking and according to him, the present petitioner has taken sufficient care of interest of the members as well as the person who died in such incident.

5. In the present petition, this Court has issued notice on 26th April, 2001 made it returnable on 27th April, 2001 and thereafter the matter has been adjourned by this Court on 30-4-2001, the respondent State has filed reply against the present petition which is taken on record.

6. I have considered the averments made in the present application and also considering the statement of Mr. R.M. Vin, learned advocate for the petitioner in respect of the draft undertaking so also considering the submissions made by both the learned advocates for the respective parties without deciding the merits of the matter and considering the request of both the learned advocates for the parties who requested not to pass reasoned order and therefore considering the matter and before passing the final order, according to my opinion, some observations made by the Apex Court as well as Division Bench of this Court while dealing with such application which are pertinent to quote in relevance of the facts and circumstances of this case which are reproduced as under :-

Recently, the Apex Court in case of GAYA PRASAD V. PRADEEP SRIVASTAVA reported in (2001) 2 SCC page 604, para-19 observed as under :-

"The time is running out for doing something to solve the problem which has already grown into monstrous form. If a citizen is told that once you resort to legal procedure for realisation of your urgent need you have to wait and wait for 23 to 30 years, what else is it if not to inevitably encourage and force him to resort to extra-legal measures for realising the required reliefs. A Republic, governed by rule of law, cannot afford to compel its citizens to resort to such extra-legal means which are very often contra-legal means with counterproductive results on the maintenance of law and order in the Country."

There is recent observation of the Apex Court in case of MAKAHN LAL BANGAL V. MANAS BHUNIA, reported in (2001) 2, SCC 652, para-26,

"An alert Judge actively participating in court proceedings with a firm grip on

oars enables the trial smoothly negotiating on shorter routes avoiding prolixity and expeditiously attaining the destination of a just decision. The interest of the counsel for the parties in conducting the trial in such a way so as to gain success for their respective clients is understandable but the obligation of the Presiding Judge to hold the proceedings so as to achieve the dual objective search for truth and delivering justice expeditiously - cannot be subdued. However, sensitive the subject matter of trial may be; the courtroom is no place of play for passions, emotions and surcharged enthusiasm."

Recent observation of the Apex Court in case of GOVERNMENT OF A.P. V. A.P. JAISWAL reported in (2001) 1 SCC 748, para-24 which runs as under :

"Consistency is the cornerstone of the administration of justice. It is consistency which creates confidence in the system and this consistency can never be achieved without respect for the rule of finality. It is with a view to achieve consistency in judicial pronouncements, the Courts have evolved the rule of precedents, principle of stare decisis etc. These rules and principles are based on public policy and if these are not followed by courts then there will be chaos in the administration of justice."

There is recent observation of the Division Bench of this Court in case of Peoples Union for Civil Liberties and Another Vs. State of Gujarat and Others, observed that;

"A Judge on assuming office during his tenure sits cut-off from the society as he cannot continue to be in public life, but as he also comes from the society with his own experience of it, he is better stationed at a distance from the problems of the society to view them in a more objective, detached and dispassionate manner, than those involved in it, and for that reason, he is more suited to resolve conflicts and competing claims of the individual and the society. [para 22]".

The Apex Court in a decision rendered in case of JOGINDAR KUMAR VS. STATE OF UP reported in AIR 1994 S.C. page 1349, certain observations are quoted as under :-

`No arrest can be made because it is lawful for the Police Officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police Officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a a person can cause incalculable harm to the reputation and self-esteem of a person. No arrest can be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a Police Office in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness and bona fides of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest. Denying a person of his liberty is a serious matter. The

recommendations of the Police Commission merely reflect the constitutional concomitants of the fundamental right to personal liberty and freedom. A person is not liable to arrest merely on the suspicion of complicity in an offence. There must be some reasonable justification in the opinion of the Officer effecting the arrest that such arrest is necessary and justified. Except in heinous offences, an arrest must be avoided if a police officer issues notice to person to attend the Station House and not to leave station without permission would do. The, there is the right to have some one informed. That right of the arrested person, upon request, to have someone informed and to consult privately with a lawyer was recognised by Section 56(1) of the Police and Criminal Evidence Act, 1984, in England. These rights are inherent in Arts. 21 and 22(1) of the Constitution and require to be recognised and scrupulously protected. For effective enforcement of these fundamental rights, the Supreme Court issued the following requirements :

(1) An arrested person being held in custody is entitled, if he so request to have one friend relative or other person who is known to him or likely to take an interest in his welfare told as far as is practicable that he has been arrested and where is being detained.

(2) The police officer shall inform the arrested person when he is brought to the police station of this right.

(3) An entry shall be required to be made in the Diary as to who was informed of the arrest. These protections from power must be held to flow from Arts. 21 and 22(1) and enforced strictly.

It shall be the duty of the Magistrate, before whom the arrested person is produced, to satisfy himself that these requirements have been complied with. The above requirements shall be followed in all cases of arrest till legal provisions are made in this behalf. These requirements shall be in addition to the rights of the arrested persons found in the various Police Manuals."

23. In India, Third Report of the National Police Commission at Pg-32 also suggested :

"... An arrest during the investigation of a cognizable case may be considered justified in one or other of the following circumstances :-

(i) The case involves a grave offence like murder, dacoity, robbery , rape etc. , and it is necessary to arrest the accused and bring his movements under restraint to infuse confidence among the terror stricken victims.

(ii) The accused is likely to abscond and evade the process of law.

(iii) The accused is given to violent behavior and is likely to commit further offences unless his movements are brought under restraint.

(iv) The accused is a habitual offender and unless kept in custody he is likely to commit similar offences again.

It would be desirable to insist through departmental instructions that a police officer making an arrest should also record in the case diary the reasons for making the arrest, thereby clarifying his conformity to the specified guidelines ...
"

The Apex Court in case of GURCHARAN SINGH V. STATE [DELHI ADMN.] reported in AIR 1978 page 179 has in para-22 observed as under :-

"In other non-bailable cases the court will exercise its judicial discretion in favour of granting bail subject to sub sec (3) of Section 437, Cr.P.C. , if it deems necessary to act under it. Unless exceptional circumstances are brought to the notice of the Court which may defeat proper investigation and a fair trial, the court will not decline to grant bail to a person who is not accused of an offence punishable with death or imprisonment for life. It is also clear that when an accused is brought before the Court of a Magistrate with the allegation against him of an offence punishable with death or imprisonment for life, he has ordinarily no option in the matter but to refuse bail subject, however, to the first proviso to Section 437 (1) Cr.P.C. and in a case where the Magistrate entertains a reasonable belief on the materials that the accused has not been guilty of such an offence. This will, however, be an extraordinary occasion since there will be some materials at the stage of initial arrest, for the accusation or for strong suspicion of commission by the person of such an offence."

The Apex Court in case of The State Vs. Captain Jagjit Singh, has made observed as under :-

`It (the High Court) should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or the State, and similar other considerations, which arise when a court is asked for bail in a non bailable offence. It is true that u/s 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non bailable offence", we are of the opinion that the above observations equally apply to a case u/s 439 of the new Code and the legal position is not different under the new Code."

7. After considering the above observations as well as the averments made in the application and considering the draft undertaking which has been suggested by the learned advocate Mr.Vin, it is a duty of the Court to see and protect the interest of the person who have become victim in such grave incident and simultaneously also to consider the fate of the persons who are behind the bar because of this incident.

8. After considering the aforesaid statement made by the learned advocate Mr.

R.M. Vin appearing for the petitioner to the effect that the petitioner will file necessary undertaking which has been suggested as above and considering the submissions of both the learned advocates and further considering the fact that as per the statement made at the Bar by learned advocate Mr.Vin, that necessary undertaking will be filed by the petitioner before this Court within 10 days from the date of release and considering the peculiar facts and circumstances emerging of this case so also taking into consideration observations made by the Hon"ble Apex Court and the Division Bench of this Court, following order is passed.

The parties do not press for reasoned order. Considering the submissions made on behalf of the parties, and having regard to the circumstances and facts of the case, the application is allowed and he is ordered to be released on bail in connection with Crime Register No. I- 76 / 2001 registered at Navrangpura Police Station for the offence charged against him in this application on executing bond of Rs.25,000/- each (Rupees Twenty Five Thousand only) with one surety of the like amount to the satisfaction of the lower Court and subject to the conditions that he shall,

- a) not take undue advantage of his liberty or abuse his liberty;
- b) not to try to tamper or pressurize the prosecution witnesses or complainant in any manner;
- c) maintain law and order and should co-operate the investigating officers;
- d) not act in a manner injurious to the interest of the prosecution;
- e) mark their presence before Navrangpura Police Station on every Sunday between 9.00 a.m. to 2.00 p.m. till filing of the chargesheet and after filing of the chargesheet against the present petitioner, shall mark his presence before the aforesaid police station once in a month preferably on 1st Sunday of each month till the trial is over.
- f) furnish the address of his residence to the I.O. and also to the Court at the time of execution of the bond and shall not change the residence without prior permission of this Court;
- g) surrender his Passport, if any, to the lower court within a week;

3. If breach of any of the above conditions is committed, the City Sessions Judge, Ahmedabad will be free to issue warrant or take appropriate action in the matter.

4. Bail before the lower Court having jurisdiction to try the case. It would be opened to the trial court concerned to give time to furnish the solvency certificate if prayed for.

9. In view of statement made by the learned Advocate Mr. R.M. Vin on behalf of the petitioner, necessary undertaking which is annexed to this order, is directed

to be filed before this Court within 10 days from the date of the release of the petitioner without fail.

10. It is further directed to the petitioners to supply xerox copy of the affirmed undertaking to the office of the Public Prosecutor, concerned trial court and to the concerned investigating officer.

11. It is also made it clear that the amount of Rs.75,000/- in respect of victim who died in the incident, shall not come in the way for claiming compensation in accordance with law.

12. It is further directed to the petitioners that in pursuance of the statement made before this court, necessary undertaking as referred to in this order is required to be filed before this Court by the petitioner within 10 days from the date of release and the such undertaking is required to be strictly complied with by the petitioner without fail, otherwise in the event of non compliance of any such term of the said undertakings, the respondent State as well as the concerned members of 'Setu Apartments' - a building in question in the present order, are entitled to file necessary application before this Court for cancellation of order granting bail in favour of the petitioner.

13. It is open for the parties including the concerned members of the said 'Setu Apartments' and legal heirs of the victim in case of any difficulty in respect of any such terms as incorporated in the undertaking will be at liberty to apply before this Court by way of necessary application.

14. This order is passed by this Court considering the peculiar facts and circumstances of the case as well as considering the undertaking of the petitioner and undertaking to make the payment to the victim, therefore this order may not be treated as precedent for other similar cases.

15. However, it is made it clear that undertaking that may be filed by the petitioner before this Court pursuant to the order passed by this Court, will not come in the way in any manner while facing and / or defending the proceedings arising from C.R. No. I - 76 / 2001 of Navrangpura Police Station. It is also made it clear that the present undertaking which will be filed by the present petitioner only in connection with relief of grant of bail in favour of the petitioner and therefore such undertaking will not amounts to an admission of the petitioner in respect of criminal liability which will be obviously required to be faced by the petitioner in respect of the offence registered against him pursuant to C.R. No. I - 76 / 2001 - Navrangpura Police Station.

16. Before parting with the present order, according to my opinion, the humanitarian stand and approach taken by the petitioner is in real sense satisfying the genuine rehabilitation of the members affected on account of earthquake and have become victim of this unprecedented earthquake.

Rule is made absolute accordingly. Direct service is permitted today.