

(2003) 07 GUJ CK 0063
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 5297 of 2003

Natvarbhai Pitamberbhai Patel

APPELLANT

Vs

State of Gujarat

RESPONDENT

Date of Decision : 30-07-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 438
Penal Code, 1860 (IPC) — Section 167, 405, 407, 409, 420

Citation : (2004) CriLJ 215

Hon'ble Judges : D.H. Waghela, J

Bench : Single Bench

Advocate : P.M. Thakkar and K.S. Jhaveri, Rajeshwar J. Dave, for the Appellant;
Arun D. Oza, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

D.H. Waghela, J.—This application for anticipatory bail u/s 438 of the Code of Criminal Procedure is filed by one of the persons accused of the offences punishable under sections 167, 407, 420, 409, 467, 468 and 471 of the Indian Penal Code as described in the F.I.R. dated 6.6.2003 which is registered in Visnagar Police Station as C.R. No.176 of 2003. The petitioner has admittedly been one of the founding members and directors of the co-operative society named as SHREE KARMAMVIR SANKALCHAND CASTOR COMPLEX CO-OPERATIVE SOCIETY LTD. and the offences alleged against the accused persons arise from transaction of loan to that society by a co-operative bank called "VISNAGAR NAGARIK SAHAKARI BANK LTD., VISNAGAR". Both these institutions are, for the sake of convenience and brevity, described hereinafter as "the Society" and "the Bank" respectively. It is alleged in the said F.I.R. that the accused No.1 in the list of the accused persons also happened to be the chairman of the bank and, by virtue of his influence and position in both the institutions, the Society was granted by the Bank loans of crores of rupees from time to time. Ultimately, there was a debit balance in the account of the Society totalling to about Rs.6.82

crores. The allegations are to the effect that on the one hand such lending by the bank was in violation of the banking regulations and on the other hand such borrowing by the Society was in violation of the relevant provisions of the Co-operative Societies Act and the bye-laws of the Society itself. Such advances were not secured by sufficient securities and the bank, on whose behalf the complaint is filed, has, by virtue of such transactions, faced closure of its operations and the funds of thousands of its depositors are practically lost.

2. There is no dispute about the fact that four persons named as accused Nos.1 to 4 in the F.I.R. were elected for the day-to-day running of business of the Society and the petitioner was a member of the board of directors since inception. It is also not in dispute that the main accused person, who is alleged to have been the chairman of the bank and against whom several other cases are filed, had approached this court by way of a petition under Article 226 of the Constitution with a prayer to quash the aforesaid F.I.R. registered as C.R. No.176 of 2003 and several other F.I.Rs; and that petition of that petitioner is dismissed by an elaborate order dated 19.6.2003 of this Court (Coram: D.P.Buch, J.) in which the following pertinent observations are made:-

"29. However, in the present case we find that four different FIRs have been filed and when it has been alleged that the modus operandi is different, some accused persons are different and when it has further been stated that even the process of committing the offences is different, then, in that event, it is not, possible for this court, at this stage, to hold that all the four offences are the result of one single solitary act of criminal conspiracy. In other words, it has to be held for the purpose of this petition that the petitioner entered into criminal conspiracy, prima facie, with different accused persons in different FIRs in different manners. The ultimate goal of criminal conspiracy may be to earn money of the bank in question but, when the accused persons are different and when the act of criminal conspiracy is different and when the mode of criminal conspiracy is also shown to be different then, in that case, it cannot be said that they form one single offence and therefore subsequently instituted three FIRs should be quashed.

"30. In above view of the matter, in my opinion, it is not possible for this court to hold that all the four FIRs registered at Naranpura Police Station and Visnagar Police Station, constitute one offence and therefore it would not be possible for this court to quash the subsequently instituted three FIRs of Visnagar Police Station being C.R. Nos.176, 177 and 178 of 2003 placed at pages Nos.177, 181 and 185. These petitions for quashing those three FIRs of Visnagar Police Station are therefore required to be dismissed."

3. It may be pertinent to note here that to the above list of offences alleged against the accused persons, section 120B has been added afterwards by Yadi No.2225/03 dated 19.6.2003 and it is also not in dispute that similar petition by the present petitioner also for the purpose of quashing the F.I.R. presently in question has been admittedly withdrawn after arguments at full length.

4. An application for the same purpose of the grant of anticipatory bail was filed by the petitioner in the Court of the learned Additional Sessions Judge, Mehsana and it has been decided after considering and rejecting most of the submissions which have been reiterated before this Court. A prima facie finding is recorded by that court in its judgment dated 4.7.2003 to the effect that there appeared to be a systematic arrangement of loans from the Bank to the Society and there appeared to be no chance of any recovery being effected from the Society.

5. The present application of the petitioner was pressed and argued mainly on the grounds that the petitioner was not a member of the board of directors during the period when the offences are alleged to have been committed in the F.I.R. registered as C.R. No.176 of 2003. It was submitted by the learned senior counsel, Mr.P.M.Thakkar, that no offence was made out as far as the petitioner was concerned and the allegations in the F.I.R. were concocted and the petitioner was implicated after about one year of the alleged offences with an oblique motive of depriving him of the opportunity to contest the election in which he was likely to win. By submitting a draft amendment, it was vehemently argued that the complaint was filed at the behest of a political leader of the ruling party who was the arch rival of the petitioner and the election programme of the Gujarat State Co-operative Marketing Federation Ltd. (GUJCOMASOL) was being sought to be delayed to see that the petitioner was in jail before that election. As for the allegations of loss incurred by the Society and the likelihood of loss to the Bank, it was submitted that the Society was a going and profit-making co-operative society right from 1997 to 2000 and, as it can happen in any other business, the Society had incurred losses due to the reasons beyond their control. It was also submitted that the Society had consistently paid interest on the advances made by the bank and in fact the original loan of rupees three crores had gone up to the total due of more than Rs.6.81 crores. It was submitted that if at all the members of the board of directors were to be responsible for the losses incurred by the Society, the appropriate proceedings under the provisions of the Co-operative Societies Act were already initiated and the petitioner has, without admitting any guilt or liability, offered to share his part of the responsibility and actually offered to repay the amount which he may be held responsible for. It was emphasized by the learned senior counsel that the petitioner was not even alleged to have taken any disadvantage of his position as a member of the board of directors - by pointing out any benefit to either the petitioner himself or to any of his friends or relatives. It was also submitted that the petitioner had a long and unblemished record and reputation of being a leader in the co-operative sector and his impending arrest was likely to spoil his reputation at an advanced age even before any specific allegation of specific offence being substantiated against him. The learned senior counsel also assured that the petitioner would not in any way hamper the investigation and that he would abide by such conditions as may be found to be proper.

6. Learned advocate, Mr.R.J.Dave, who was allowed to appear on behalf of the complainant-bank, submitted that the petitioner was the founder member of the

Society and the signatory of the bye-laws which had been clearly and often flouted which resulted into the original loan of rupees one crore granted in 1997-98 being increased from time to time to rupees three crores without any worthwhile security being furnished to the Bank. He submitted that although the members of the managing committee of which the petitioner was a member had authorised four of the members as the executive committee to run the affairs of the Society, the transactions of huge borrowing were from time to time specifically approved in the meetings of the board of directors and the petitioner, or any member of the board of directors, could not have been unaware of the consequences of the nature of transactions which were being carried on in the name of the Society. He submitted that after the bank being placed under the management of the custodian and upon issuance of notice for recovery to the Society, it was realised that not only that no repayment was being made, but that no recovery was possible also because there were no such stocks as were supposed to have been hypothecated to the bank. It was submitted that the Society is by now under the process of liquidation and practically no amount of loan advanced by the Bank to the Society is likely to be recovered. Thus, the net result of the transactions between the bank and the Society was that approximately the sum of Rs.6.81 crores was not likely to be recovered because the Society has no funds and the loans have been utilized or mismanaged in the alleged business of the society of purchase and sale of castor.

7. Learned Public Prosecutor, Mr.Arun D.Oza, emphasized the fact that two petitions for quashing the same F.I.R. have already been heard and one of them has already been rejected by this Court as mentioned earlier after appreciating the prima facie case against the accused persons and this was practically duplication of the same exercise insofar as same contentions of there being no prima facie case were being reiterated for the petitioner. It was submitted that the investigation was in progress and the specific role of each of the accused persons would crystallize by the end of the investigation. The contention of the petitioner not having continued as a director was, however, specifically refuted on the basis of a letter of the Society itself. He submitted that not only that no letter of resignation was found anywhere on the record but the Society itself had submitted by a letter dated 15.4.2002 a list of the members of the managing committee, which list includes the name of the petitioner. Therefore, the contention that the petitioner had resigned with effect from 26.5.2001 and that even if he had not resigned from that date, he legally ceased to be a member of the managing committee, by consistent absence since then, was inconsistent with the material which has been found during investigation. As regards the counter allegations of oblique and political motive, it was submitted that the person against whom the allegations of inspiring the prosecution are levelled is not made a party to this proceeding and as far as the investigation is concerned, it is carried on against all the persons accused not only in the F.I.R. in this case but into the offences registered vide other F.I.Rs. which were lodged around the same time after detection of the huge scam which has resulted into the closure

of the bank and loss of deposits for thousands of innocent and unwary depositors of the bank. It was submitted that, in the facts of the present case, the institution of the co-operative society and its corporate entity appeared to have been utilized for the purpose of carrying on the business far beyond the boundaries incorporated in the bye-laws of the Society itself and huge finance from the bank has been availed without any individual being exposed to the risks involved in the business of the society even as its members and directors obviously stood to reap the benefits, directly or indirectly. It was also submitted that the record of the society being in possession of the liquidator and the petitioner having access to the same, the evidence was likely to be tampered, manipulated or destroyed. He cited in support of that the factum of the petitioner having produced copies of minutes of successive meetings of the Board of Directors of the Society.

8. On the legal aspect of the matter, it was argued on behalf of the petitioner on the basis of the Full Bench decision of the Supreme Court in *Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab*, , that circumstances may justify grant of anticipatory bail in cases such as criminal breach of trust for which the punishment provided is imprisonment for life. Relying upon paragraphs 16 and 17 of that judgment, it was submitted that it was not proper to hold that in serious cases like economic offences involving blatant corruption at the higher rungs of the executive and political power the discretion u/s 438 of the Code should not be exercised; and it is not possible for the court to assess the blatantness of corruption at the stage of anticipatory bail. Relying upon a judgment of this Court in *Solanki Ravibhai Dipubhai and Others Vs. State of Gujarat and Another*, , it was submitted that in a fit case where a man is accused of even the offence of murder, he can be granted anticipatory bail. Relying upon a recent judgment of the Supreme Court in *MAQSOODAN v. STATE OF HARYANA*, (2002) 10 SCC 97) , it was submitted that the Supreme Court had, having regard to the factum of the appellant being a lady and the offence being less serious, granted anticipatory bail. The judgment of the Supreme Court in *JOGINDER KUMAR v. STAE OF U.P. AND OTHERS* [1994 SCC (Cri.) 1172] was relied upon to point out that according to the Third Report of the National Police Commission, an arrest during the investigation of a cognizable case would be justified in one or the other circumstances where the offences like murder, dacoity etc. were alleged to have been committed and where the movement of the accused person was required to be brought under restraint to infuse confidence, or where the accused was likely to abscond and evade the processes of law, or where the accused was given to violent behaviour and was likely to commit further offence, or where the accused was a habitual offender and was likely to commit similar offence. It is only in such cases that arrest of the accused person would be justified, according to the submission. 02nd August, 2003

9. On the other hand it is also observed by the Full Bench of the Supreme Court in *GURBAKSH SINGH* (supra) that, if an application for anticipatory bail is made

to the High Court or the Court of Session, it must apply its own mind to the question and decide whether a case has been made out for granting such relief. In the judgment in SALAUDDIN ABDJULSAMAD SHAIKH v. STATE OF MAHARASHTRA [1996 SCC (Cri.) 198], it is observed that, ordinarily, the court granting anticipatory bail should not substitute itself for the original court which is expected to deal with the offence. It is that court which has then to consider whether, having regard to the material placed before it, the accused person is entitled to bail. In the judgment of the Supreme Court in State Rep. by the C.B.I. Vs. Anil Sharma, , the following pertinent observations are made in para 6:-

"6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favourable order u/s 438 of the Code. In a case like this effective interrogation of suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail order during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The Court has to presume that responsible police officers would conduct themselves in a responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offender."

In another judgment of the Supreme Court in State of Andhra Pradesh Vs. Bimal Krishna Kundu and another, , it is observed as under:

"13. We are strongly of the opinion that this is not a case for exercising the discretion u/s 438 in favour of granting anticipatory bail to the respondents. It is disquieting that implications of arming respondents, when they are pitted against this sort of allegations involving well orchestrated conspiracy, with a pre-arrest bail order, though subject to some conditions, have not been taken into account by the learned single Judge. We have absolutely no doubt that if respondents are equipped with such an order before they are interrogated by the police it would greatly harm the investigation and would impede the prospects of unearthing all the ramifications involved in the conspiracy. Public interest also would suffer as a consequence. Having apprised himself of the nature and seriousness of the criminal conspiracy and the adverse impact of it on "the career of millions of students", learned single Judge should not have persuaded himself to exercise the discretion which Parliament had very thoughtfully conferred on the Sessions Judges and the High Courts through Section 438 of the Code, by favouring the respondents with such a pre-arrest bail order."

And, very recently, the Supreme Court has, in Ram Govind Upadhyay Vs. Sudarshan Singh and Others, , observed that, the nature of the offence is one of the basic considerations for the grant of bail - more heinous is a crime, the

greater is the chance of rejection of the bail, though, however, dependent on the factual matrix of the matter. Although the relevant considerations for the grant of bail in that case are culled out in the context of the provisions for regular bail u/s 437 of the Cr.P.C., they would apply with greater force in a fit case when an application for anticipatory bail comes before the court. These general principles are formulated in the judgment as under:-

"4. Apart from the above, certain other considerations which may be attributed to be relevant considerations may also be noticed at this juncture though, however, the same are only illustrative and not exhaustive neither there can be any. The considerations being:

(a) While granting bail the Court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not accepted to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the Court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail."

10. The learned Public Prosecutor relied upon the judgment of this Court (Coram: Hon'ble Mr. Justice M.P. Thakkar as His Lordship then was) in *Semabhai Chaturbhai Patel Vs. The State of Gujarat*, wherein, specific guidelines were formulated which, inter alia, provided that the court will not be hustled into exercising its powers in cases where the offence is one which is punishable with death or imprisonment for life. In case of economic offences where the likelihood of repetition of the offence whilst on bail cannot be foreclosed such as, smuggling, hoarding, profiteering, indulging in manipulations of foreign exchange, the court will not consider it safe to exercise the powers and that the power cannot be allowed to be invoked in order to defeat, thwart, stall or render impotent, the provisions relating to remand to police custody for the purposes of facilitating investigation. These guidelines and observations were, however, stated to have been impliedly overruled by the judgment of the Supreme Court in *GURBAKSH SINGH* (supra).

The learned Public Prosecutor also relied upon the recent observations of the Supreme Court in *MANSAB ALI v. IRSAN AND ANOTHER* [2002 AIR SCW 5391], according to which, since jurisdiction for the grant of bail is discretionary, it is

required to be exercised with care and caution by balancing right of liberty of an individual and interest of society in general; the jurisdiction has not to be exercised in a casual and cavalier fashion.

11. During the course of hearing, the learned Public Prosecutor had placed for perusal the papers of investigation carried out so far and it could, *prima facie*, be seen that the petitioner was actively involved in the activities of the Society since its inception. At the time when the initial financial facilities were extended by the bank, he was admittedly a member of the board of directors and even those facilities, increased from time to time to the extent of rupees three crores, were supposed to be by way of hypothecation of goods and, factually, even a statement of such goods supposed to have been hypothecated to the bank did not appear to have been filed and such loans were secured by such guarantees and collateral securities as were evidently insufficient to protect the bank against default. It would be inappropriate and premature to analyse the material at this initial stage of investigation and all ingredients of one or the other particular offence may not be found, at the initial state of investigation, against each individual accused but involvement has to be gathered from the broad facts emerging from the record. On these parameters, *prima facie*, serious offences are disclosed in the facts of the case emerging from the papers of investigation. The definition of "criminal breach of trust" as given in Section 405 of the Indian Penal Code is wide enough to cover the cases where a person entrusted in any manner with property dishonestly uses such property or even wilfully suffers the disposal of such property in violation of any direction of law prescribing the mode in which such trust is to be discharged. In the facts of this case, the apparent commercial activity in the co-operative sector, *prima facie*, turns out to be systematic siphoning of crores of rupees in cynical disregard of not only the in-built checks and balances, but the penal provisions of law. The funds entrusted by the Bank to its officers and officer-bearers for the purpose of legitimate business of banking appears to have been given away or rather taken away by the chairman of the board of directors and his group by using the corporate personality of the society. And the office-bearers of the society appear to have facilitated such grant in the form of loan on the basis of documents and formalities which would turn out to be an exercise in futility or deception. The ultimate utilization of the money in the so-called business of castor is as yet a matter of investigation, but whether the alleged loss in the business of the society was genuine or spurious is hardly relevant for the purpose of ascertaining whether offences in the lending and borrowing were committed. Thus, in short, a *prima facie* conclusion that serious offences, with devastating effect for the bank and its depositors, have been committed by a concerted effort of the accused persons is inescapable at this stage.

12. The broad facts of this case epitomise the culture which appears to have spread like cancer in the co-operative sector which once held the promise of heralding a socio-economic revolution, with Gujarat providing a model therefor. That is apparent from the scam after scam coming to light after closure of one

after another co-operative bank with cascading effect. In such cases of co-operative commission of acts of commission and omission, it would be improper and premature to analyse the material to discern the role of an individual player at the stage of initiation of investigation. And, in exercising the discretion for the grant of pre-arrest bail, the court also has to bear in mind the complications involved in the investigation of alleged offences which might have been committed in the garbs of commercial transactions. Generally, the investigation would always be hampered and handicapped without custodial interrogation of the accused persons and the possibility of destruction or loss of important documentary evidence in such cases cannot be ruled out. The harassment or humiliation likely to be suffered by the persons accused of serious offences has to be weighed against the likely effect of pre-arrest bail on the investigation, the other co-accused persons, the victims of the offences and the public in general. When serious offences are disclosed and involvement of an accused person is, *prima facie*, established, the court would be loath to lean in favour of grant of pre-arrest bail in absence of any other overriding considerations. Prominence or reputation of the petitioner in the society or the prospects of his contesting and winning an election, as strenuously canvassed in this case, cannot be allowed to overshadow the considerations of *prima facie* case and the likelihood of investigation being adversely affected by pre-arrest bail.

13. In the above facts and circumstances and considering the observations on the legal aspect of the matter, it does not appear to be just and proper to exercise the discretion in favour of the petitioner and accordingly the application for anticipatory bail is rejected.

After the judgment as above was dictated and pronounced in the open court today, August 02, 2003, the learned counsel for the petitioner, Mr.Jhaveri, urgently requested that the protection by way of ad-interim relief granted so far to the petitioner may be extended for a further period of one week to facilitate his approaching the higher forum. The learned A.P.P., Mr.H.L.Jani, appearing for the learned Public Prosecutor vehemently objected on the ground that the relief of anticipatory bail was consistently denied to the petitioner by two courts by reasoned orders and, therefore, there was no reason to grant any further protection to the petitioner. However, in the facts and circumstances and on the statement made by the learned counsel that the petitioner shall be available for interrogation and investigation and shall not directly or indirectly attempt to tamper with any evidence, it is ordered that the petitioner shall not be formally arrested in connection with C.R. No.176 of 2003 till 11.8.2003 on condition of his reporting at Mehsana Police Station on 04.8.2003 and 07.8.2003 between 11.00 a.m. and 2.00 p.m., as suggested by the learned counsel.