

(2010) 08 GUJ CK 0168

In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 8651 of 2010

Rajendra Jain @ Jirawala

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 25-08-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Criminal Procedure Code, 1973 (CrPC) — Section 167, 178, 436, 439, 482

Penal Code, 1860 (IPC) — Section 120B, 201, 302, 341, 342

Citation : (2011) 1 GLH 669

Hon'ble Judges : Z.K. Saiyed, J

Bench : Single Bench

Advocate : S.V. Raju, for S.V. Raju Associates, for the Appellant; Y.N. Ravani, for Respondent 1 and P.K. Jani, Public Prosecutor for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

Z.K. Saiyed, J.—The petitioner has filed this Application u/s 439 read with Section 482 of Cr.P.C., and under Articles 226 and 227 of the Constitution of India in connection with Case No. RC BS1/S/2010/2004 (R.C. 4(S)/2010-Mumbai) registered by C.B.I., Mumbai in connection with the offences punishable u/s 120-B read with Sections 341, 342, 365, 368, 384, 302, 201 of I.P. Code.

2. It is the case of the petitioner that the petitioner is not named in FIR as an accused, however, his complicity and involvement in commission of crime has surfaced during investigation to the extent that he had conspired with other accused and had given his Arham Farm House from 25.11.2005 to 29.11.2005 to the accused ATS Police Officials for safe house where the deceased Soharabbuddin and his wife Kausarbi were kept in illegal confinement and thereby the petitioner had facilitated the accused persons in concealing the presence of deceased Soharabbuddin and his wife Kausarbi before their elimination as well as in destruction of evidence of case post crime. It is alleged

that the petitioner did not disclose the facts of the deceased persons being kept in his farm house to the authorities and thereby the petitioner had committed offences under Sections 120-B read with Sections 342 and 201 of I.P. Code. It is the case of the petitioner that at about 11.00 AM the CBI Officers had visited the residence of the petitioner and without disclosing their identity asked for whereabouts of the petitioner, and the family members of the petitioner replied that the petitioner would be in the office. Thereafter the CBI officers visited the office of the petitioner, but the petitioner was not present in the office. It is the case of the petitioner that again the CBI officers visited the petitioner's residence after disclosing their identity and informed the family members of the petitioner that they want to record the statement of the petitioner. Thereafter the petitioner was served with summons seeking the petitioner's presence at CBI office, Gandhinagar, on 26.7.2010.

3. Heard learned Counsel Mr. S.V. Raju for the petitioner and learned Counsel Mr. Yogesh Ravani for respondent No. 1 - CBI and the learned P.P. Mr. Jani for the respondent No. 2 - State.

4. Mr. Raju has contended that the petitioner has been arrested on 26.7.2010 in connection with the offences alleged against him. The petitioner has therefore filed Criminal Misc. Application No. 23 of 2010, u/s 436 Cr. P.C., before the learned Special Judge, CBI Court No. 2, Ahmedabad, for bail. The learned Judge has vide order dated 27.7.2010 rejected said application filed by the petitioner. Mr. Raju has contended that the offences under Sections 342, 201 and 120-B of I.P. Code alleged against the petitioner are bailable offences. Mr. Raju has also contended that looking to the facts of the case the petitioner is also having right to file Application under Article 226 of the Constitution of India before this Court. He has contended that he has not filed this Application under Sections 439 or 482 Cr.P.C. or under Article 227 of the Constitution. Mr. Raju has also relied upon the decision of this Court in the case of Kanubhai Chhaganlal Brahmabhatt Vs. The State of Gujarat and Another, and contended that no person shall be deprived of his life or personal liberty except according to procedure established by law. The relevant observation made by this Court reads as under:

These provisions are akin to the provisions contained in Sections 61 and 167 of the Criminal Procedure Code. In our opinion, therefore, it is clear that when any person accused of a bailable offence is arrested or detained without a warrant by an officer in charge of the police station or appears or is brought before the court and is prepared, at any time while in custody of such officer or at any stage in the proceeding before such court, to give bail, such person shall be released on bail. In our opinion, the magistrate has no discretion in the matter and it is not open to the Magistrate to authorise his detention in the police custody if the accused was prepared to give bail. Even when a person arrested on a charge of a cognizable offence which is bailable does not give bail, it is doubtful if it would be open to the Magistrate to authorise his detention in police custody. Apparently, in such a case, the accused should be sent in judicial custody. However, as this

question does not specifically arise before us, we do not think it necessary to answer it. In the instant case, we are of the opinion that the order passed by the learned Magistrate authorising detention of the accused is clearly wrong and illegal.

8. Mr. Raju has contended that the order of the lower Court is not an interim order. He has also relied upon the decision in the case of Usmanbhai Dawoodbhai Memon and Others Vs. State of Gujarat, (more particularly Para - 24) and contended that from the arrest Memo it can be seen that all the sections mentioned therein are bailable. Mr. Raju has also read the Production Memo with Remand application and contended that when the bailable offences are registered against the present petitioner, the petitioner has right to file this application before this Court.

9. Learned Counsel Mr. Y.N. Ravani, appearing on behalf of CBI, has vehemently opposed this application and contended that the petitioner cannot file this application straightway before this Court and, therefore, present application is not maintainable. Mr. Ravani has also placed reliance upon the decisions of this Court in the case of S.K. Gandhi v. State of Gujarat in Criminal Revision Application No. 2 of 1997, decided on 7.1.1997, and in the case of Harivallabh Parikh v. State of Gujarat in Special Criminal Application No. 648 of 1996, decided on 17.6.1996. Mr. Ravani has also produced previous charge-sheet papers and contended that against the present petitioner serious offences, like offences under Sections 302 read with 120-B have also been registered as the petitioner has entered into criminal conspiracy with other conspirators in connection with the murder. He has contended that looking to the papers, prima facie, it is established that there is meeting of mind and agreement between co-conspirators. He has also read the contents of the affidavit and contended that the present petitioner is a part of larger conspiracy and, prima facie, his involvement in the non-bailable offence is established and, therefore, the application filed by the petitioner is not required to be entertained and the same is required to be dismissed.

10. Heard learned Counsel for the parties. I have also perused the papers produced before me and also perused the charge-sheet. From Para - 48 of the previous charge-sheet it is revealed that u/s 178 further investigation was carried out by CBI in view of the direction given by the Hon"ble Supreme Court to unearth the larger conspiracy wherein the involvement of other important functionaries is being investigated upon. Looking to the papers produced before me it clearly appears that the investigation is in progress and on completion of further investigation, supplementary charge-sheet is likely to be filed before the concerned Court. Prima-facie it is established beyond reasonable doubt that against the petitioner non-bailable offences have also been registered and when the non-bailable offences are registered against the present petitioner then straightway he has no right to approach this Court by filing this application. Normally, such application must, first, be made before the Sessions Court instead

of approaching the High Court. Considering the convenience for smooth and effective functioning of the Court, it is always desirable that at the first instance the application is required to be filed before the Court of first instance, so that before the Court, Police papers will have to be summoned and police papers can be easily made available and P.P. and I.O. will be able to effectively and quickly assist the Court in considering the application. In such situation, if the application filed before the lower Court is rejected and thereafter it is filed before the High Court, it would be advantageous for the High Court to not only know the full facts, but, also the view of the Sessions Judge.

11. Looking to the facts of the case, in my opinion, the petitioner cannot approach this Court directly by filing this Application on the ground that bailable offences are registered against the petitioner. It is true that the High Court has got plenary jurisdiction under Article 226 of the Constitution of India, but, at the same time, this jurisdiction is extra-ordinary in nature which needs to be exercised to do complete justice. This Court, under purported exercise of jurisdiction under Article 226 of the Constitution of India, cannot by-pass any substantive law under which the petitioner could have approached for being enlarged on bail i.e. u/s 439 of Cr.P.C. in the Court of first instance. Hence, this is not the case of extra-ordinary nature in which extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution of India can be invoked. From the charge-sheet papers and other papers produced by Mr. Ravani, learned Counsel, it clearly appears that the present petitioner is involved in the offence as co-conspirator and looking to the circumstantial evidence also it is established beyond reasonable doubt that, prima facie, case is made out against the present petitioner - accused. Therefore, the present application can not be entertained even on merits also. Looking to the papers it clearly reveals that petitioner is involved in a serious conspiracy and the offences alleged against the petitioner are non-bailable offences.

12. From the above observation, prima facie, it is established that against the present petitioner non-bailable offences have been registered and, therefore, in my opinion, the application filed by the petitioner is not required to be entertained as the same is not tenable. Hence, the application is dismissed. Rule is discharged.