

(2013) 10 GUJ CK 0017

In the Gujarat High Court

Case No : Criminal Miscellaneous Application (for Modification of Orders) No. 5369 of 2013

Shantilal Javerchand Jain

APPELLANT

Vs

State of Gujarat and Another

RESPONDENT

Date of Decision : 25-10-2013

Acts Referred:

Citation : (2013) 10 GUJ CK 0017

Hon'ble Judges : S.G. Shah, J

Bench : Single Bench

Advocate : Chetan K. Pandya, s No. 1, for the Appellant; R.J. Oza, Advocate for the Respondent(s) No. 2 and Public Prosecutor for the Respondent(s) No. 1, for the Respondent

Final Decision : Dismissed

Judgement

S.G. Shah, J.—Petitioner has challenged the conditions of order dated 17.04.2002 and prays that such conditions be suspended with a permission to the applicant to go abroad for a period of 6 months and for the purpose to direct the Court of Chief Judicial Magistrate, Bhuj return passport, on such terms and conditions as deemed fit by this Court in the interest of applicant. By an order dated 17.04.2002, the then Chief Judicial Magistrate, Bhuj had in file No. D.R.I. G.R.U. INT - 6/2001 granted default bail to the applicant u/s 167(2) in connection with offence u/s 135 of the Customs Act. So far as proceedings are concerned, there is no dispute that such proceedings are solely for evasion of custom duty by the applicant, for which proceedings were initiated against him. The applicant was arrested in connection with such file and was released on bail with certain conditions amongst which, one of the conditions was regarding not to leave the area of Kachchh district was deleted by this Court by an order dated 12.08.2002 passed in Criminal Misc. Application No. 4884 of 2002, whereas condition No. 1 regarding marking presence before the office of the DRI, Gandhidham was modified by an order dated 27.04.2004 by this Court in

Criminal Misc. Application No. 10415 of 2003 in Criminal Misc. Application No. 4884 of 2004. While modifying such condition regarding marking presence before the DRI, Gandhidham this Court has directed the petitioner that he shall mark his presence before D.R.I., Mumbai, once in a month without fail, with liberty to the applicant to move an appropriate application with such prayer as and when requires with direction to the applicant to furnish present and permanent address and other details to DRI authority, keeping all other conditions in operation. It is submitted by the petitioner that in view of the decision by the Apex Court in case of Omprakash v. Union of India in Writ Petition (Criminal) No. 66 of 2011 dated 30.04.2011 offences are bailable. It is also submitted by the applicant that in view of the decision in case of Sultan Kamruddin Dharani Vs. The Union of India (UOI), The Deputy Director, DRI and The State of Maharashtra, the condition regarding the accused person to surrender his passport to the Court is not termed as bail and though bail is granted subject to such condition it will defeat the rights u/s 436(1) of the Code of Criminal Procedure to be set at liberty. However, in the same judgment it is also observed that in a given case if there is an apprehension that the accused is likely to abscond, steps can also be taken as per law including impounding the passport. Petitioner has also relied upon the decision in case of Rasiklal Vs. Kisore Wadhwani, . However, gist of such judgment is to the effect that bail in bailable offence can be granted if accused is willing to abide by reasonable conditions, which may be imposed upon him. Petitioner has also relied upon the case of Vaman Narain Ghiya Vs. State of Rajasthan, submitting that the Court has no discretion while granting bail under Sections 436 and 450 of Chapter XXXIII of the Code of Criminal Procedure to impose any condition except security with sureties. Whereas it is submitted that this High Court in case of Hasmukhlal Kalidas Choksi and Others Vs. State of Gujarat, grant passport to the accused and permitted him to stay permanently at USA.

2. It is further submitted that arrest is always for the purpose of investigation and once purpose has been exhausted and when offence is non-cognizable and bailable one, the Magistrate Court should not impose any such conditions which is otherwise not legal and proper. It is further submitted that applicant is regularly appearing before the Court of Chief Judicial Magistrate, Bhuj and when practically there is no order or direction restraining the applicant to go abroad and that in view of settled legal position of law there cannot be any such condition.

3. Petitioner has also relied upon several other decisions cited with reference to the powers by the Magistrate and procedure to be followed in such cases submitting that order of the Chief Judicial Magistrate directing the applicant to surrender his passport is illegal. It is further submitted that once applicant is arrested for the purpose of investigation, purpose of arrest and detention of the applicant has been satisfy and fulfilled, pending investigation when applicant is co-operated on all levels and therefore now there is no reason to restrict him to move freely. It is further submitted that applicant is now aged about 66 years

and residing in Mumbai with family of mother, wife, daughter and son from last 46 years and therefore there is no question of abscondment. It is also submitted that petitioner is paying income tax and has paid almost Rs. 1 Crore as tax during last 3 years since turnover of his business is ranging between Rs. 200 Crores to Rs. 560 Crores during last 3 years and that he is Managing Director of Varsha Group of Companies, which is holding/owing several business houses. It is further submitted that petitioner is involved in business of export-import and therefore he is required to go abroad to work out with terms and conditions of business with various purpose since applicant is a business man he is visiting so many countries and there is no likely hood of abscondment. Therefore, petitioner has prayed to delete all the conditions imposed by an order dated 17.04.2002 while releasing him on bail. As recorded herein above since condition Nos. 1 and 3 are already been modified earlier, if we perused other condition Nos. 2, 4, 5, 6 and 7 cannot be altered or modified, whereas condition No. 8 is pertaining to surrendering passport to the Court and therefore practically petitioner is entitle, if at all then modification of condition No. 8 only.

4. However, it cannot be ignored that petitioner has prayed similar relief earlier before this Court by filing Criminal Misc. Application No. 10862 of 2010 in Criminal Misc. Application No. 4884 of 2002 wherein also the applicant has prayed for deletion of condition by which he was directed to handover the passport. Such petition was decided by the judgment and order dated 22.11.2010 wherein the learned Single Judge has observed as under:

5. In view of the rival submissions, it is required to be considered whether present application can be entertained or not.

6. As it transpires from the facts, the goods were imported for the purpose of victim of earth quake at Gujarat which was admittedly found to have been transported outside Gujarat. Applicant has been arrested in year 2002 and has been released as stated above thereafter subject to the conditions. The conditions have been remained in force during all this time and in fact now on the contrary prosecution has been launched which would imply that the presence of applicant is required to be secured which would on the contrary justify such conditions. Further, where the arrest was for the purpose of investigation and the prosecution and the conditions which have been remained in force for long period are not secured by this application. The fact that prosecution which is not launch is pending. The proceedings for evasion of Customs duty have been initiated and appeal has been disposed of as a separate than prosecution for breach of violation of the Act which involves the mens rea. Therefore, without any further elaboration the submissions or premises for submissions that everything is over as appeal under the Customs Act is disposed of and there is no need of such condition is misconceived. Similarly, submission that there is no link between the arrest and the prosecution is also misconceived as the person is arrested for the purpose of inquiry/investigation and subsequently on the basis of further materials appropriate steps are taken. In the facts of the present case, these

conditions have remained in force which cannot be deleted. As a matter of fact, the conditions imposed are not merely a formality which cannot be deleted admitted when the applicant desires to visit abroad. The condition has been suspended as it can be transpired from the record, and, therefore, it cannot be said that any prejudice has been caused to him. The submission made by learned counsel Mr. Pandya that he has fundamental right to visit abroad is also misconceived as such liberty or right or the freedom is subject to reasonable restriction under the law of the land including the Customs Act and the Criminal Procedure Code where suitable conditions could be imposed while releasing the person on bail. Therefore, the submissions made cannot be accepted as one cannot claim an absolute right as even under Article 21 of the Constitution of India as the person who is facing prosecution or the charges, his right would be put to reasonable restriction, and, therefore, these submissions also cannot be accepted. However as the prosecution has now been rightly launched, it is rightly submitted that it cannot be justified in entertaining application regarding deletion of condition No. 8 imposed while releasing the applicant on bail.

7. In view of above, present application deserves to be rejected and accordingly it stands rejected. Rule is discharged.

5. Even thereafter petitioner has preferred one another Criminal Misc. Application No. 17020 of 2011 again for the same relief i.e. for modification of conditions imposed by the Chief Judicial Magistrate in connection with file No. DRI/GRU/INT-6/2001. This Court (Coram: R.H. Shukla, J.) has dealt with the subject in detail and discussing all the citations which are relied upon by the applicant at present. Discussion of factual and legal issues are in para 3 to 6 and in para 14. Thereafter, Court has decide as under:

15. Therefore, in light of the aforesaid discussions, considering the provisions of Section 436 of Cr.P.C. as well as the binding precedent as discussed above with the specific observations made by the Hon"ble Apex Court in case of Rasiklal (supra), the submissions made by learned Advocate Shri Pandya for the Applicant cannot be accepted and the present Criminal Misc. Application deserves to be rejected to the extent that it claims total deletion of the conditions though the prayer for modification or temporary suspension of the condition could be considered and has been considered.

16. It is required to be mentioned that the prayer clause in this Criminal Misc. Application has both the prayer for "modification" and "deletion of the condition" and the emphasis is totally on deletion, which cannot be granted. The modification or suspension for a limited period could always be considered. Rule is discharged.

6. As against that respondent No. 2 has filed detail affidavit in reply. However I do not want to reproduce the content of the affidavit for the simple reason that in addition to denying the factual submission by the applicant, respondent has mainly relied upon the judgment and order dated 17.02.2012 in Criminal Misc.

Application No. 17020 of 2011.

7. Thereby, fact remains that this is third application for cancellation of conditions regarding passport.

8. Though it was argued that it can be said that principal of res-judicata is not applicable to criminal law, the fact remains that the except of bail repeated application on similar ground for similar relief even if filed intelligently by different drafting cannot be entertained even in criminal jurisprudence. The fact remains that when first attempt for modification and cancellation of terms and conditions imposed upon by the magistrate was failed and when this Court has dismissed the application for such modification, unless and except there is change in circumstances of factual details or law point practically second application may be on different ground cannot be entertained by the same authority. Applicant shall challenge the first order before the higher authority. In the present case, applicant has preferred second application for the same relief relied upon several previous decisions, such second application was also dismissed by the Court specifically observing that modification or deletion of particular conditions for limited purpose can always be considered but deletion of condition cannot be granted. Thereby when such second application was decided considering the legal issues practically now there remains nothing for the applicant to plead and to request for modification or cancellation of conditions on the same ground except for specific limited period. Unfortunately, applicant has again prayed for cancellation of condition Nos. 1 and 8 without applying for the same before the trial court for the limited purpose as per the judgment and order dated 17.02.2012.

9. Therefore, though technically this Revision Application can be disposed of on such ground, since petitioner has not come forward with personal credentials, the same are taken into consideration, which are referred in starting paragraphs. However, only because of personal credentials as recorded herein above, this Court has power and jurisdiction to entertain such application even after judgment and order dated 17.02.2012. Even if consider that principal of res-judicata does not apply to such proceedings and thereby even if we believe that successive application is permissible. I am concurring with the discussion and decision by this Court (Coram: R.H. Shukla, J.) in judgment and order dated 17.02.2012 in 17020 and held that there is no substance in the present application so as to cancel or modify the condition Nos. 1 and 8 in any manner as prayed before this Court.

10. Therefore, application deserves to be dismissed. However, applicant has also prayed for returning of passport for 6 months so as to enable him to go abroad for 6 months. Considering the nature of offence and attitude of filing successive applications, it would be appropriate to hold that when applicant has not applied before the trial Court for temporary modification or deletion of such condition, same cannot be entertained by this Court. Thereby applicant may apply before the trial Court for suspension of relevant conditions for short/reasonable period.

Thereby, there is no substance in the application either on merits or on personal credentials of the petitioner and even on legal grounds and therefore application deserves to be dismissed. Hence, the same is dismissed. Rule is discharged.