

(2011) 09 GUJ CK 0025
In the Gujarat High Court

Case No : Criminal Miscellaneous Application No. 2337 of 2011

Vijay Arjunbhai Rathod

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 12-09-2011

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 169, 319, 439
Penal Code, 1860 (IPC) — Section 120(B), 201, 302, 341, 342

Citation : (2011) 09 GUJ CK 0025

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : Punit B. Juneja, for the Appellant; Y.N. Ravani, for Respondent 1 and R.C. Kodekar, Assistant Public Prosecutor for Respondent 2, for the Respondent

Judgement

Rajesh H. Shukla, J.—The present application has been filed by the applicant-original accused u/s 439 of the Code of Criminal Procedure for granting regular bail, which is a successive bail application after Criminal Misc. Application No. 8326 of 2009 was rejected vide order dated 22.7.2009.

2. The applicant-accused is charged with having committed offences u/s 120B r/w Section 364, 365, 368, 341, 342, 302, 384 and 201 of the Indian Penal Code for which FIR being C.R. No. I-5/2005 was registered with ATS Police Station, Ahmedabad, which has been treated as CBI Case No. 5/2010 arising from FIR being CBI Case No. RC-BS1/S/2010/0004-MUM.

3. Learned advocate Mr. Punit Juneja for the applicant referred to the papers and submitted that originally an FIR was filed by the ATS being C.R. No. I-5/2005. He submitted that the charge sheet was filed and the applicant was shown as an original witness. However, the co-accused filed an application before the High Court being Criminal Reference No. 1 of 2008 in which the applicant has been arraigned as an accused as per the order passed therein. He submitted that thereafter the order passed in the Reference by the High Court was challenged

before the Hon''ble Apex Court by way of SLP (Cri.) No. 3446 of 2008 and he pointedly referred to the order passed by the Hon''ble Apex Court which is produced at Annexure-B, p. 55/56, and submitted that it was withdrawn with a liberty to the Petitioner to apply for bail before the appropriate court and that is how he had applied for bail before the Sessions Court by way of Criminal Misc. Application No. 209 of 2010, which came to be rejected vide order dated 18.11.2011 by the learned Special Judge-CBI, Ahmedabad, and therefore the present application has been filed.

4. Learned advocate Mr. Juneja referred to the impugned order passed by the learned Special Judge-CBI referring to the observations made by the Hon''ble Apex Court directing the investigation to be handed over to the CBI and submitted that the investigation was handed over to the CBI pursuant to the direction of the Hon''ble Apex Court. Learned advocate Mr. Juneja pointedly referred to para 12 of the order passed by the learned Special Judge-CBI in Criminal Misc. Application No. 209 of 2010 dated 18.1.2011 and submitted that as observed by the learned Judge, the charge sheet is not filed against the applicant and the other two accused and the CBI has not taken any cognizance and therefore the court would not have jurisdiction u/s 439 of Code of Criminal Procedure and therefore the present application has been filed. He also referred to the fact that after the investigation was handed over to the CBI pursuant to the order of the Hon''ble Apex Court, the charge sheet filed by the CBI which is produced at Annexure-E has not found the involvement of the applicant-accused and it has been specifically stated in the said charge sheet against the name of the present applicant accused,

During the course of trial of the case Special Case No. 2405/07 he has been made accused by the Hon''ble Presiding Officer u/s 319 Code of Criminal Procedure Though, his name was not in the Original Chargesheet. During the course of investigation by CBI, it is disclosed that Shri Vijay kumar Rathod, Police Inspector, who jointed ATS, Ahmedabad about a week before this incident and being subordinate official had only acted on the instructions of accused A-1 and A-2. He does not have any active role in the case and also there was no meeting of mind with the main conspirators. Therefore, his name is being removed from the List of Accused in the case.

5. Learned advocate Mr. Juneja has strenuously submitted referring to this that, in the investigation made by the CBI subsequently there is no role attributed and he was only present with the conspirators, he cannot be said to have been involved. Learned advocate Mr. Juneja has also submitted that his case stands on a better footing than the other co-accused who have been released including the accused in Criminal Misc. Application No. 14395 of 2010 and the accused in Criminal Misc. Application No. 12240 of 2010. He has also submitted, referring to the judgment of the Hon''ble Apex Court reported in 1984 GLH 515 in the case of Bhagirathsinh Jadeja v. State of Gujarat, referring to the observations made in para 5, that it may not be punitive, and as now the investigation is over and the

chargesheet is filed, in any case the applicant accused may be released on bail. He therefore submitted that the present application may be allowed.

6. Learned advocate Mr. Juneja has also submitted written submissions though he was heard at length and the submissions have been taken on record which have been dealt with.

7. Learned Counsel Mr. YN Ravani appearing for Respondent No. 1-CBI has referred to the papers and submitted that as per the direction of the Hon''ble Apex Court, the investigation was handed over to the CBI and the status report has been filed by the CBI and the first report is filed on 23.7.2010. He further submitted that some of the persons are not found involved in the investigation made by the CBI which includes the present applicant-accused and it has been the findings of the CBI that the applicant-accused was not having any knowledge of the conspiracy as there was no meeting of mind with the conspirators. He has also submitted, in response to a query by the court, that the CBI has no other material when it was specifically asked whether he is supporting or opposing the application. Learned Counsel Mr. Ravani has specifically stated that there is no other material is with the CBI and he has confirmed the remarks in the chargesheet, which is quoted hereinabove.

8. However, learned Counsel Mr. Ravani has submitted that though the applicant was found present at the scene of offence, he was present along with the superiors with whom he was attached. Learned Counsel Mr. Ravani submitted that he was asked to arrange for the transport vehicle and therefore his presence could not be understood as knowledge about conspiracy or the offence. He has also stated in response to the query by the court as to whether any report has been made as required under the law like Section 169 of Code of Criminal Procedure before the competent court if CBI's investigation suggests that he was not involved and he has stated that no such report is made. He has also submitted that a further status report has been submitted by the CBI to the Hon''ble Apex Court which is required to be approved by the Hon''ble Apex Court.

9. Learned Counsel Mr. Ravani has also submitted that if the man is found involved, then, his role cannot be considered individually, but if he is not involved at all, then, his role is required to be considered and it is not a matter of bifurcation of the role of the accused.

10. In rejoinder, learned advocate Mr. Juneja submitted that the applicant is in jail for a long period and if the bail is not granted it would cause prejudice. He submitted that even if it is accepted about his presence and the involvement, considering his role, the maximum punishment could be three years. He therefore submitted that the present application for bail may be granted.

11. In view of the rival submissions, it is required to be considered whether the present application for bail can be entertained or not which is a successive bail application after Criminal Misc. Application No. 8326 of 2009 has been rejected vide order dated 22.7.2009.

12. It is required to be mentioned that no change of circumstances have been pointed out by learned advocate Mr. Juneja for the applicant except the fact that now the investigating agency is the CBI which is having a different conclusion as mentioned in the chargesheet which is quoted hereinabove. It is required to be mentioned that considering the role and the prima facie case against the applicant accused, Criminal Misc. Application No. 8326 of 2009 was rejected and the said application was made subsequent to the order passed by the Hon''ble Apex Court in SLP (Cri.) No. 3446 and 3766 of 2008 of 2008 which was filed challenging the order passed by the High Court in Criminal Reference No. 1 of 2008. The order of the Hon''ble Apex Court which has been referred to by learned advocate Mr. Juneja has been quoted in that earlier order passed in Criminal Misc. Application No. 8326 of 2009 by which liberty has been reserved and it is in light of such liberty earlier Criminal Misc. Application No. 8326 of 2009 was filed which was rejected after considering the submissions.

13. Therefore, the submissions and the details as to how the applicant who was an original witness has been arraigned subsequently as per the order passed by the High Court in Criminal Reference No. 1/2008 has also been considered even while rejecting the earlier application for bail. It is also required to be mentioned that the order passed by the High Court in Criminal Reference No. 1/2008 has been carried further before the Hon''ble Apex Court by way of SLP (Cri.) No. 3446 of 2008 and the same has been disposed of as withdrawn, meaning thereby, the order of the High Court has merged with the order of Hon''ble Apex Court. It is in this background, now, the submissions which have been made by learned advocate Mr. Juneja are required to be appreciated.

14. Much emphasis has been given on the view of the CBI in the chargesheet. It has been submitted and emphasised that the CBI has stated in the chargesheet that the applicant accused does not have any active role and there was no meeting of mind with the main conspirators and therefore his name is being removed from the list of the accused in the case (emphasis supplied). It is required to be mentioned that once the person is arraigned as an accused as per the order passed by the High Court which has been also sustained before the Hon''ble Apex Court, meaning thereby, he still is an accused, the CBI could not have made these remarks in the chargesheet, and if they had a different opinion, the appropriate procedure including filing a report before the competent court should have been adopted, but the CBI as an investigating agency has no right and could not have stated for removal of the name of the accused particularly when he has been arraigned as an accused as per the order passed by the High Court. Further, the noting which has been much emphasised by learned advocate Mr. Juneja that CBI has found that he does not have any active role and there was no meeting of mind is also a finding which is not appropriate for the investigating agency to conclude when the matter is before the court after the chargesheet is filed. Once the chargesheet is filed, the competent court will have the jurisdiction to decide any such issues. Further, whether he had an active role or whether there was a meeting of mind is a matter of appreciation of evidence

or drawing an inference from the material and evidence on record which is not open to the CBI in light of the facts of the case.

15. Further, the learned Counsel for the CBI in a similar case of the other co-accused being Criminal Misc. Application No. 12240 of 2010 had made the submission that once the applicant accused is found to be present and involved in the offence, bifurcation of the role or individual role is not relevant. The present applicant accused was also admittedly present at the scene of offence. He has been attributed with the role also and therefore whether his role is different from that of the other co-accused, and whether he stands on a better footing than the other co-accused is a matter of scrutiny and appreciation of evidence. It therefore only reflects on the manner and method of investigation, to say the least, and no further comment is required to be made since the matter is before the Hon''ble Apex Court for approval of the Status Report of the CBI also.

16. Therefore, for the purpose of deciding this bail application, the court is required to consider the relevant aspects like change in the material fact-situation for deciding the successive bail application. The Hon''ble Apex Court in a judgment in the case of State of Maharashtra Vs. Captain Buddhikota Subha Rao, has observed that mere cosmetic change would not be sufficient and there has to be material change in the circumstances.

17. Therefore, there has to be a material change in the fact-situation which is not pointed out except the remarks in the chargesheet by the CBI as discussed could not have been made and it should have been left to the competent court by making necessary report or application. Therefore, as there are no changes in the circumstances pointed out, the Court having decided the earlier application considering all these aspects about the prima facie involvement and the role, there is no reason to entertain the present application.

18. The submission made by learned advocate Mr. Juneja that the applicant is in jail for a long period cannot be a ground inasmuch as his case also stands on the same footing as the other co-accused police officers and his presence at the scene of offence is also established with the role attributed to him. It is in these circumstances, when the Hon''ble Apex Court has made the observations while cancelling the bail granted to other co-accused like N.K. Amin v. State of Gujarat, reported in AIR 2008 SCW 3268 , and also Dinesh M.N. (S.P.) Vs. State of Gujarat, the case of the present applicant cannot be considered. The order of the High Court in the case of other co-accused N.V. Chauhan has also been considered and observations have been made by the High Court in the judgment in the case of Nareshbhai Vishnubhai Chauhan Vs. State of Gujarat, in para 30 as under:

...it will not be proper to bifurcate the case minutely as sought to be suggested by the learned Advocates appearing on behalf of the respective applicants. Even otherwise, considering role attributed to them even in the third part is

concerned, same is with respect to killing innocent lady Kausarbi wife of Sohrabuddin....

19. Therefore, at this stage, it cannot be readily accepted that there is no prima facie case suggesting any involvement of the accused as canvassed. In fact, the submission that the case of the present accused stands on a better or different footing than the other co-accused who were present at the scene of offence is misconceived. Admittedly, the applicant accused was also present at the scene of offence and has been attributed with the role. Learned advocate Mr. Juneja has made a reference to the order in the case of other two accused, Mr. Jirawala (Criminal Misc. Application No. 14395 of 2010) as well as Mr. Amit Shah (Criminal Misc. Application No. 12240 of 2010). However, the facts of both the cases stand on a different footing and they were not present at the scene of offence whereas the present applicant, like other police officers who are the co-accused, was also present at the scene of offence. It is in these circumstances the applicant accused cannot claim any parity with the aforesaid other two co-accused.

20. Moreover, as discussed above, the order of the High Court, by which the applicant has been arraigned as an accused, has in fact merged with the order of the Hon''ble Apex Court. The Hon''ble Apex Court, dismissing the SLP, has merely granted permission to move an application for bail, which itself would imply that any such prayer was not acceded. In these circumstances, when the applicant accused has been arraigned as an accused by the order of the High Court which has been carried before the Hon''ble Apex Court, and the Hon''ble Apex Court has also not entertained the SLP, the submissions made by learned advocate Mr. Juneja cannot be accepted as the order of this Court passed in Criminal Reference No. 1 of 2008 has merged with the order of the Hon''ble Apex Court and, therefore, this Court cannot have the jurisdiction to take a different view in the matter once the Hon''ble Apex Court has not granted any such relief to the present applicant-accused.

21. Another facet of the argument that he has been in jail for a long period and even if his role is considered and prima facie involvement is accepted, at the most the punishment could be 3 years, is also misconceived. The Hon''ble Apex Court in the case of Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, reported in has clearly observed,

18. It is a trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non bailable offences are entitled for bail if the

Court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the Court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the Courts can do so.

19. The principles of res judicata and such analogous principles although are not applicable in a criminal proceeding, still the Courts are bound by the doctrine of judicial discipline having regard to the hierarchical system prevailing in our country. The findings of a higher Court or a co-ordinate Bench must receive serious consideration at the hands of the Court entertaining a bail application at a later stage when the same had been rejected earlier. In such an event, the Courts must give due weight to the grounds which weighed with the former or higher court in rejecting the bail application. Ordinarily, the issues which had been canvassed earlier would not be permitted to be re-agitated on the same grounds, as the same would lead to a speculation and uncertainty in the administration of justice and may lead to forum hunting.

22. Therefore, considering the aforesaid aspects and the observations, when there is no change in the material fact-situation or any additional ground made out, the present application for bail cannot be entertained and deserves to be rejected and accordingly stands rejected. Rule is discharged.