

(2010) 12 GUJ CK 0190

In the Gujarat High Court

Case No : Misc. Criminal Application No. 15199 of 2010 in Miscellaneous Cri. A. No. 10365 of 2010 with Miscellaneous Cri. A. No. 15201 of 2010 in Miscellaneous Cri. A. No. 10466 of 2010

Yashpal Jitubha Chudasama

APPELLANT

Vs

Central Bureau of Investigation and Another

RESPONDENT

Date of Decision : 22-12-2010

Acts Referred:

Constitution of India, 1950 — Article 21

Criminal Procedure Code, 1973 (CrPC) — Section 164, 173(8), 201, 437, 438

Penal Code, 1860 (IPC) — Section 120A, 120B, 149, 164, 201

Citation : (2011) 3 GLR 2254

Hon'ble Judges : Anant S. Dave, J

Bench : Single Bench

Advocate : Uday Lalit, with J.M. Panchal and K.J. Panchal, No. 1 in Misc. Criminal application No. 15199 of 2010, J.M. Panchal for K.B. Anandjiwala, for P.M. Dave, No. 1 in Misc. Criminal application No. 15201 of 2010, for the Appellant; Y.N. Ravani and Prakash Jani, Public Prosecutor, in Misc. Criminal Application Nos. 15199 and 15201 of 2010, for the Respondent

Final Decision : Dismissed

Judgement

Anant S. Dave, J.—The applicants-accused Nos. 18 and 17, as shown in the charge-sheet, have preferred these applications for anticipatory bail under Sec. 438 read with Sec. 482 of the Code of Criminal Procedure, 1973 (for short "the Code") for anticipatory bail and/or extension of anticipatory bail granted vide order dated 21-9-2010 passed by the Co-ordinate Bench of this Court (Coram : Hon'ble Mr. Justice Rajesh H. Shukla) in connection with the F.I.R. registered by C.B.I, bearing No. R.C. BS1/2010/ S0004-MUM at Mumbai for the offences punishable under Sec. 120B read with Sees. 364, 365, 368, 341, 342, 302, 384 and 201 of the I.P.C.

2. According to the applicants they are leading persons in co-operative sector and are also directors in the Ahmedabad District Co-operative Bank and are

enjoying high status and reputation in the society.

3. The prosecution case, as per the charge-sheet, qua the applicants herein, is as under :

4. The accused persons from Gujarat and Rajasthan entered into a criminal conspiracy to eliminate Sohrabuddin as seen from the conduct of subsequent events when Rajasthan and Gujarat Police acted in connivance in the abduction and killing of Sohrabuddin. That the Gujarat Police in order to create reasons for picking up Sohrabuddin stage-managed the firing using the gang members of Sohrabuddin at the business premises of Shri Raman Patel and Shri Dashrath Patel in Navrangpura on 8-12-2004, which is the subject-matter in the Navrangpura P.S. Crime No. 1124 of 2004. As Shri Sohrabuddin was well known to Shri Abhay Chudasama (A-15) he directed Sohrabuddin to create a terror and panic in the town of Ahmedabad, at a well known business premises of Patel Brothers by his gang members resorting to opening of firing. However, with due caution not to cause any physical harm to any persons. Accordingly, Sohrabuddin had sent Sylvester and Tulsi Prajapati to the said premises on 8-12-2004. The firing indeed took place which resulted in the registration of the case in Navrangpura Crime No. 1124 of 2004. The complaint in this case was lodged by one Beena Dave, receptionist of M/s. Popular Builders. In the said firing the victims were Patel Brothers (Raman Patel and Dashrath Patel). Shri Vanzara (A-1) and Shri Amit Shah (A-16) directed Patel Brothers to give a statement against Sohrabuddin and others failing which the Patel Brothers would face dire consequences. They were made as accused at a subsequent stage when Patel Brothers refused to give a statement as directed by Amit Shah (A-16) and Vanzara (A-1) wherein they wanted to implicate Sohrabuddin in a sensational case which could justify elimination of Sohrabuddin at a later stage. The elimination of Sohrabuddin was being used for extortions by the accused persons to establish an element of fear in the minds of businessmen and others. The motive for the accused persons from Rajasthan Police to participate in the conspiracy of elimination of Sohrabuddin was activities of Sohrabuddin in terrorizing Rajasthan Marble lobby.

10. Investigation also revealed that after killing of Sohrabuddin in fake encounter on 26-11-2005, Shri Ramanbhai Patel and Shri Dashrathbhai Patel were arrested on 15-12-2005 by Shri D. G. Vanzara (A-1), the then D.I.G. of A.T.S., Ahmedabad at the instance of Shri Amit Shah (A-16), Minister of State, Government of Gujarat and Rs. 60 lakhs were extorted from them by Shri D. G. Vanzara (A-1) by threatening them and their family with dire consequences. Further Shri Amit Shah (A-16) also caused threats of preventive detention under the Prevention of Anti-Social Activities Act (P.A.S.A.) and demanding Rs. 90 lakhs from the two brothers through his close associate, Shri Ajay Patel (A-17), Chairman of the Ahmedabad District Co-operative Bank, Ahmedabad. In the bargain, the Patel Brothers paid Rs. 70 lakhs in three installments to Shri Amit Shah (A-16), Minister of State, Government of Gujarat through Shri Ajay Patel

(A-17) in May, 2006. After receipt of money, the said proposal under P.A.S.A. was not pursued.

35. Investigation also revealed that after the fake encounter of Sohrabuddin, the accused who formed the A.T.S. Team threatened the Proprietors of M/s. Popular Builders viz. Shri Ramanbhai Patel and Shri Dashrathbhai Patel, to give false statements against some persons including Shri Sohrabuddin and Tulsi Prajapati as per the dictate. If not, they would be implicated in false cases just to justify the fake encounter of Sohrabuddin. Accused Amit Shah forcibly directed them to do whatever accused D.G. Vanzara (A-1) says. All at the instance of accused Amit Shah (A-16). When they did not accede to their pressure tactics both the brothers were arrested in the firing case at the O/o, Popular Builders. Simultaneously, the accused demanded Rs. 1 crore for their release, failing which they would be killed like Sohrabuddin. Both accused, Shri D. G. Vanzara (A-1) and Dr. Rajkumar Pandian (A-2) made the Patel brothers viz. Ramanbhai Patel and Shri Dashrathbhai Patel caught up a sum of Rs. 60 lacs which was received by both these accused on 17-12-2005. Despite this the Patel brothers were forwarded and remanded in P. S. Navrangpura Crime No. 1124 of 2004.

36. Shri Amit Shah (A-16) had accepted during one meeting with Shri Raman Patel and Shri Dashrath Patel that Sohrabuddin was killed because Sohrabuddin himself had foreclosed the alternative of keeping himself alive and that there are political compulsions which an ordinary person like him would not understand. Establishing therein that the false encounter had dual motives that are one, political and the other monetary benefits involved in the encounter.

37. Investigation also revealed that when the investigation of the case was transferred to C.B.I, by the Hon"ble Supreme Court, there were concerted efforts made to hamper investigation. Amit Shah (A-16) directed Ajay Patel (A-17) and accused Yashpal Chudasama (A-18), his close confidants to convince, coerce, threaten, influence the witnesses on his behalf to conceal the truth from C.B.I, about the fake encounter of Sohrabuddin.

38. Investigation further revealed that Shri Ajay Patel (A-17), a close friend of Shri Amit Shah (A-16), M.O.S. of Gujarat State Government conveyed a message to Shri Ramanbhai Patel and Shri Dashrathbhai Patel that a written statement relating to what they have to depose before C.B.I, would be given by Shri Abhay Chudasama (A-15), D.C.P. (Crime), Ahmedabad. Both, Shri Ramanbhai Patel and Shri Dashrathbhai Patel had four meetings with the middleman sent by Shri Amit Shah (A-16), M.O.S., at four places. These meetings have been video graphed by them in a discreet manner and these audio-cum-visual recordings were seized by C.B.I. The transcription of these meetings revealed obstructions and influencing the witnesses of this case by Shri Amit Shah (A-16), M.O.S. and Shri Abhay Chudasama (A-15). The transcription of audio-visual records also indicates how the retraction of witnesses has been managed at the instance of senior politician, Shri Amit Shah (A-16) and Shri Abhay Chudasama (A-15). The audio-visual records also indicate that these two accused viz. Ajay Patel (A-17) and Shri

Yashpal Chudasama (A-18) had actively participated in the main conspiracy and the crime committed in furtherance to the conspiracy.

41. In view of the above-stated facts, the accused A-1 to A-18 except A-10, A-11 and A-14 have committed offences under Sec. 120B read with Secs. 364, 365, 368, 341, 342, 302, 384 and 201 I.P.C. Further, A-2 and A-5 committed an offence under Secs. 364 and 365.

42. A-1, A-2, A-3, A-4, A-5, A-6, A-7, A-8, A-9, A-12, A-13, A-15, A-16, A-17 & A-18 who were main conspirators committed offences under Sec. 120B read with Secs. 364, 365, 368, 341, 342, 302, 384 and 201 I.P.C. A-4 got detained secretly both abducted persons Sohrabuddin and Kausarbi and took Sohrabuddin to the place of occurrence where he was killed.

46. A-17 and A-18 tampered with the evidence with a view to cause disappearance of the evidence to screen the offender, and thereby, committed offence under Sec. 201 I.P.C.

4. It is the case of the prosecution that accordingly first Sohrabuddin was killed in a fake encounter and whereabouts of Kausarbi are not known at all. It is further a case that initially CR No. I 5 of 2005 was registered with A.T.S. Police Station, Ahmedabad and investigation was carried out and summary report was filed by A.T.S. on 29-2-2006.

4.1. Pursuant to Writ Petition (Criminal) No. 6 of 2007 filed by Rubabbuddin, brother of Sohrabuddin, the Hon''ble Supreme Court vide order dated 12-1-2010 [reported in Rubabbuddin Sheikh v. State of Gujarat, 2010 (1) GLR 466 (SC)] directed that the investigation be handed over to the C.B.I. In Paras 65 and 66 of the order, the Apex Court has given certain directions to the C.B.I, which is reproduced by the learned Special Judge, C.B.I., Court No. 4, Mirzapur, Ahmedabad in his order dated 26-8-2010, while rejecting anticipatory bail of the applicants, and therefore, the same are not reproduced herein. Upon rejection of the anticipatory bail applications of the applicants by the learned Special Judge, C.B.I., Court No. 4, Mirzapur, the applicants preferred Misc. Criminal Application Nos. 10365 of 2010 and 10466 of 2010 before this Court and after considering rival submissions and the record of the case, a Co-ordinate Bench of this Court (Coram : Hon''ble Mr. Justice Rajesh H. Shukla) passed order on 21-9-2010 granting anticipatory bail in exercise of powers under Sec. 438 of the Code. In Para 49 of the above order, certain conditions were imposed.

4.2. Being aggrieved by and feeling dissatisfied with the above order, the prosecution preferred SLP (Criminal) Nos. 9452 and 9453 of 2010 wherein Their Lordships have issued notice and the same are in seisin of the Supreme Court.

4.3. In the meanwhile, the life of the order dated 21-9-2010 (Para 51) passed by a Co-ordinate Bench of this Court under Sec. 438 of the Code was to remain in force in case if the applicant was arrested by any time within 90 days from the date of the order. However, the fact remains that during the above period no

action is taken by C.B.I, in view of the pendency of SLP before the Apex Court.

4.4. From the record, it appears that the Registry of this Court had listed this case before the Hon"ble Mr. Justice Rajesh H. Shukla and on 16-12-2010, the following order was passed :

Present application has been filed by the applicant for the prayer that the judgment and order dated 21-9-2010 passed in Misc. Criminal Application No. 10365 of 2010 whereby the applicant-accused was granted anticipatory bail under Sec. 438 of the Code of Criminal Procedure, 1973, may be extended. Prayer also refers to grant fresh anticipatory bail under Sec. 438 of Cr.P.C. read with Sec. 482 of Cr.P.C. as period of 90 days of granting earlier anticipatory bail application is about to expire.

2. Office Note is attached to this application where the Registry has made submissions. However, learned Advocate Mr. Ravani appearing for respondent No. 1 has stated that it is a fresh application, and therefore, it cannot be said to be a successive bail application.

3. In the circumstances, Registry is directed to place this matter before the appropriate Court after obtaining orders from the Hon"ble the Chief Justice on administrative side, considering the office note, the prayer clause, provisions of law as well as the judgment of the Full Bench, reported in Babubhai Bachubhai Bhabhor Vs. State of Gujarat, in the case of Babubhai Bachubhai Bhabhor v. State of Gujarat.

4. Learned Counsel Mr. Panchal has requested that as period of 90 days of granting anticipatory bail application is about to expire, orders are required to be passed on 20-12-2010, and therefore, Registry may be directed to take appropriate steps.

5. Accordingly, Registry is directed to take appropriate steps for placing the matter before the appropriate Court on 20-12-2010.

4.5. Upon submissions made by the Registry, Hon"ble the Chief Justice directed to list the matter before this Court, and accordingly, both the matters are listed and are being heard, today.

5. Mr. Uday Lalit, learned Senior Advocate appearing with Mr. J. M. Panchal for the applicant of Misc. Criminal Application No. 15199 of 2010 has contended that this application is preferred by the applicant on expiry of the period of 90 days, as observed by the learned Single Judge in Para 51 of the order dated 21-9-2010. It is further submitted that though prayers are made in Para 17 of this application about grant of anticipatory bail to the applicant under Sec. 438 of the Code, alternatively, it is also prayed to extend and/or to continue the anticipatory bail granted to the applicant by the order dated 21-9-2009 in connection with the F.I.R. in question.

5.1. Mr. Uday Lalit, learned Senior Advocate, at the outset, emphasized nature of

the charges leveled against the applicant and submitted that initially there are two sets of evidences/material against the applicant. It is further submitted that at the most two sets of evidences surface on record and they are pertaining to Sec. 120B of I.P.C. (conspiracy) and Sec. 201 of the I.P.C. (causing disappearance of evidence of offence, or giving false information to screen offender). Even if relevant papers of the charge-sheet are read, the case of the prosecution is based on five statements of witnesses and audio-visual recording transcription and under no circumstance, it points needle of suspicion towards the applicant with regard to the alleged larger or main conspiracy, and at the most, the role attributed to the applicant would fall under Sec. 201 of the I.P.C, subject to scrutiny of the trial Court. It is next contended that except in one line in the charge-sheet, the applicant is not attributed with any other role in commission of the alleged crime, and therefore, when a Co-ordinate Bench of this Court, after considering relevant material, granted anticipatory bail, this Court while considering this application for extension of anticipatory bail or even afresh, may not take a different view or re-appreciate the material in a different manner. It is next contended that after the order dated 21-9-2010 passed by the learned Single Judge granting anticipatory bail to the applicant, he has abided by all the conditions imposed in that order. It is next contended that the applicant sent letters through R.P.A.D. stating that he would be available and expressed readiness to cooperate with the investigation, but all the efforts of the applicant had gone in vain since there was no response from the investigating agency. It is next submitted that no further material is brought on the record by C.B.I, during the period of 90 days which would even disclose any further role of the applicant in commission of crime. It is further submitted that a bare reading of the material relied upon by the authority i.e. five statements of witnesses, including the statement made by Ramanbhai before the learned Magistrate under Sec. 164 of the Code and audio-visual transcription will not attract the ingredients of alleged offence even if recourse of Sec. 120B of the I.P.C. is taken qua the applicants.

5.2. Learned Counsel also submitted that the applicant has surrendered his passport, as directed by the Court, and therefore, there is no likelihood of the applicant fleeing from the course of justice. It is further submitted that even today the applicant is ready to abide by any of the conditions that may be imposed by the Court and will co-operate in the investigation. Learned Counsel placed reliance on the decision of the Apex Court in the case of Siddharam Satlingappa Mhetre Vs. State of Maharashtra and Others, and submitted that the Apex Court while considering ambit and scope of Sec. 438 of the Code has held that liberty of the citizen, as envisaged under Art. 21 of the Constitution of India is the prime and utmost importance and the Court shall try to maintain fine balance between the societal interests vis-a-vis personal liberty while adhering to the fundamental principles of criminal jurisprudence that the accused is presumed to be innocent till he is found guilty by the competent Court.

5.3. It is further submitted that only time is given to the prosecution agency to

complete investigation by the Apex Court and charge-sheet and even supplementary charge-sheet have been filed and so far as applicant is concerned, no specific role except, at the most, Sec. 201 of the Code has surfaced on the record. Even if case of the prosecution is taken farthest, it has nothing to do with the main or greater or larger conspiracy alleged to have been hatched with regard to fake encounter of Sohrabuddin, disappearance of Kausarbi etc. since allegations in the F.I.R. and charge-sheet appear to be after February, 2010. It is further submitted that issuance of notice by the Apex Court in S.L.Ps. by itself will not preclude this Court from exercising powers under Sec. 438 of the Code.

6. Per contra, Mr. Y. N. Ravani, learned Counsel for the C.B.I, has vehemently opposed grant of anticipatory bail or extension or continuation of the order dated 21-9-2010 passed by Co-ordinate Bench of this Court granting anticipatory bail to the applicant mainly on the ground that the applicant ought to have either approached concerned Special C.B.I. Court or the Apex Court where the matter pertaining to the subject is pending and should have prayed for anticipatory bail. It is further submitted that this Court while exercising powers under Sec. 438 of the Code has very limited role to play. Learned Counsel for the C.B.I, has alternatively prayed that in case if this Court decides to consider the subject-matter afresh, all relevant papers, material, submissions etc. may have to be gone into and there is no bar for this Court to consider and appreciate the material against the accused in a different perspective. Learned Counsel further submits that the applicant-accused is facing serious charges under various Sections, including Sec. 120B of the I.P.C. for which severe punishment is prescribed and when the investigation is yet not completed and C.B.I, has prayed for further investigation under Sec. 173(8) of the Code and especially custodial interrogation of the applicant is necessary to reach to the root and cause of conspiracy, exercise of powers under Sec. 438 of the Code in favour of the applicant, would seriously jeopardize and prejudice the case of the prosecution. It is further submitted that the charge against the accused is not to be read exclusively or distinctly qua Sec. 201 of I.P.C. only, but if the charge-sheet is read as a whole keeping in mind Sec. 120B and language of Sec. 120B of I.P.C. and considering the vital fact that the Apex Court had to interfere and hand over the investigation to the C.B.I., itself is indicative of the fact that the efforts undertaken by investigating agency of the State, were incomplete. It is further submitted that applicants though have offered to co-operate with the investigation, it was decided by the agency to challenge the order of anticipatory bail granted to the applicant, and therefore, the C.B.I, had ignored the request/offer of the applicants. Learned Counsel for the C.B.I, has further apprehended that there is all likelihood of interference by the applicants in free and fair investigation inasmuch as statements of five witnesses and transcription of audio-visual record would reveal that the applicants had indulged into influencing witnesses in the wake of direction issued by the Supreme Court and prima facie the agency has established that attempts were made by the applicants, and

therefore, also the applicants have to be denied anticipatory bail.

6.1. Learned Counsel for the C.B.I, also emphasized need of custodial interrogation of the applicants and reiterated what is the real charge against the applicants-accused by reading the charge-sheet and relevant papers. It is further submitted that when there is conspiracy and influential persons are involved, possibility at this stage cannot be ruled out that applicants, with aid and assistance of other similarly situated persons, would cause interference in free and fair investigation, if they are granted anticipatory bail. Learned Counsel for the C.B.I, has also read out a statement dated 12-4-2010 of Shri Ramanbhai recorded by learned Metropolitan Magistrate, 16th Court, Bellard Pier, Mumbai and audio-visual transcripts and submitted that the above statements and transcripts will reveal the role of the accused applicants. Considering the above, it is submitted that when charge against the applicants is of hatching a greater, larger and bigger conspiracy under Sec. 120B of the I.P.C, considering the law lay down by the Apex Court, the applicants may not be granted anticipatory bail.

6.2. Learned Counsel also placed reliance on the decision of the Apex Court in the case of Ved Prakash Garg Vs. Premi Devi and others, and submitted that powers under Sec. 438 are to be exercised with greater circumscription. Learned Counsel also relied on interpretation of conspiracy by the Apex Court as reported in the case of Firozuddin Basheeruddin and Others Vs. State of Kerala, and reiterated that the applicants are to be refused relief, as prayed for.

7. In rejoinder, Mr. Uday Lalit, learned Senior Advocate re-emphasized on four main aspects on which this Court is required to deal with the case while exercising powers under Sec. 438 of the Code viz. (i) the nature and type of jurisdiction; (ii) type of the law to be applied; (iii) status of the investigation; and (iv) nature and quality of material against the applicants, at this stage. While elaborating the above proposition, it is submitted that when a Co-ordinate Bench of this Court has deliberated on the issue and the subject, a very limited scope is available to this Court and at this stage it is not open for this Court to review or re-write the decision or to take a different view other than the one taken by the learned Single Judge. It is further submitted that parameters for consideration of grant of bail and cancellation are different and after the order passed by learned Single Judge on 21-9-2010 there is no change at all in either fact or law and circumstances as on today are the same as they were on the date of passing of the order, and therefore, this Court is required to exercise powers under Sec. 438 of the Code in favour of the applicants. It is further submitted that considering the nature of inquiry with regard to subject-matter, the powers of this Court are circumscribed and very limited. It is further submitted that in view of the decision of the Apex Court in the case of Kalyan Chandra Sarkar etc. Vs. Rajesh Ranjan @ Pappu Yadav and Another, , no review of the earlier order is permissible. So far as conspiracy, ingredients for attracting offences, role of the conspirators, stages of conspiracy, etc. are concerned, learned Counsel broadly submitted that if all the above factors are taken together, nothing can be

attracted against the applicants so far as conspiracy, as defined in I.P.C, is concerned. It is further submitted that so far as stage and status of the investigation is concerned, even after filing of supplementary charge-sheet, the C.B.I, has prayed for further investigation under Sec. 173(8) of the Code so was the case when the charge-sheet filed earlier on the basis of which the applicants were implicated. No new material surfaced on record except five statements of the witnesses and audio-visual transcription. Learned Counsel re-emphasized that in view of the decision of the Apex Court in case of Mhetre (supra), now it is well established that period of anticipatory bail, if granted by the Court, cannot be curtailed or be made limited, and therefore, the above aspect is to be kept in mind by this Court. It is further submitted that but for the limited period prescribed in the order passed by the learned Single Judge in Para 51 of the order dated 21-9-2010, there would not have been any occasion for the applicants to prefer these applications for grant of anticipatory bail or pray for extension/continuation of the order. Learned Counsel has also referred to the above decision and brought to the notice of this Court Paragraphs Nos. 119, 121, 122, 133, 134, 135, 136, 137, 149 and 150 where Their Lordships have highlighted nature of jurisdiction of the Court while exercising powers under Sec. 438 of the Code and illustrative examples of the Constitution Bench in the case of Shri Gurbaksh Singh Sibbia and Others Vs. State of Punjab, as well as in this case and submitted that reading of bail material or evaluation of the whole material nowhere brings case of the prosecution anywhere near to the charges leveled, and therefore, prayer be granted in their favour.

8. Mr. Y. N. Ravani, learned Counsel for C.B.I, reiterated and re-emphasized that law laid down by the Apex Court in the case of Mhetre (supra) is to be viewed and applied in the facts and circumstances of this case and the whole case is to be examined on its merit and strength. Learned Counsel for the C.B.I, submits that from the reading of audio-visual transcription and statements it transpires that one of the applicants has demanded the amount for withdrawal or discontinuing the proposal of P.A.S.A. and material in this regard is also seized by the investigating agency.

9. Mr. J. M. Panchal, learned Counsel appearing for accused No. 17 would contend that all the statements relied upon by the prosecution, if examined or scrutinized closely qua the applicant-accused No. 17, is about demanding money of Rs. 25 lakhs each on two occasions i.e. 16-5-2006 and 20-5-2006 and Rs. 20 lakhs on 31-5-2006, while the applicant-accused No. 17 was on a tour from 18-5-2006 to 30-5-2006 and same is reflected in his passport. Even if statement under Sec. 164 of the I.P.C. is perused, no nexus or connection with the role attributed to the applicant and in support of his argument with exercise of powers under Sec. 438 of the Code, Mr. J. M. Panchal, learned Counsel for the applicant-accused No. 17 also referred to various Paragraphs of the decision in the cases of Sibbia (supra) and Mhetre (supra) and submitted that the applicant-accused No. 17 also deserves anticipatory bail under Sec. 438 of the Code.

9.1. Mr. J. M. Panchal, learned Counsel for the applicant-accused No. 17 submits that arguments and submissions canvassed by Mr. Uday Lalit qua the applicant of Misc. Criminal Application No. 15199 of 2010 may also be treated as the submissions canvassed by the applicant-accused No. 17 of this application also.

9.2. Mr. Panchal learned Counsel for the applicant-accused No. 17 also submitted that issuance of warrant under Sec. 70 of the Code for which no summons was issued has no significance in view of the discussion of the learned Single Judge in the order dated 21-9-2010.

10. Having heard learned Counsel for the applicants, on perusal of the record of the case, including charge-sheet, and the supplementary charge-sheet and the orders passed by the learned Special Judge, C.B.I., Court No. 4, Ahmedabad and the order dated 21-9-2010 passed by the learned Single Judge, I am of the view that so far as contention raised by Shri Ravani learned Counsel for the C.B.I., about exercise of powers under Sec. 438 of the Code and avenues available to the applicants of approaching the Special Court for their grievance or alternatively to seek order from the Apex Court which is in seisin of the case pursuant to issuance of notices in SLP (Criminal) Nos. 9452 and 9453 of 2010 preferred by C.B.I, against the order dated 21-9-2010, has no merit. Section 438 of the Code has conferred special powers to Sessions Court as well as High Court and particularly when the order dated 21-9-2010 passed by learned Single Judge had a life of 90 days and the said order was not interfered by the higher forum it was open for the applicant to knock the doors of this Court for appropriate relief.

10.1. At the same time, contention raised by Shri Uday Lalit, learned Counsel for the applicants about limited scope of this Court while exercising powers under Sec. 438 of the Code in applications preferred by the applicants for extension/continuation of the orders of grant of anticipatory bail by learned Single Judge of this Court on 21-9-2010 and re-considering the whole record of the case, tantamount to reviewing the earlier orders, has no legal force. On completion of 90 days as prescribed in Para 51 of the order dated 21-9-2010, life of the orders have come to an end, and therefore, nothing will preclude this Court from examining, perusing and scrutinizing the record of the case, while considering the applications under Sec. 438 of the Code.

10.2. It is trite to say that Sec. 438 of the Code confers special powers upon the High Court or the Court of Sessions for a direction that in the event of the arrest of a person apprehending or reasonably believing that he may be arrested on accusation of having committed of non-boilable offence, after considering certain basic factors of nature and gravity of accusations, antecedents of the applicant with regard to crimes, possibility of applicants fleeing from justice and accusation is made with the object of injuring or humiliating the applicant by having him so arrested are to be kept in mind and in case if Court decides to issue directions in the light of facts of a particular case, and if it thinks that by imposing certain conditions of making the applicant available before the investigating authority for interrogation or a condition, as prescribed in sub-sec. (2) of Sec. 438, the

powers can be exercised.

10.3. Both the learned Counsel appearing for the applicants as well as learned Counsel for the C.B.I, have relied upon definition of criminal conspiracy, as contained in Chapter V-A in Sec. 120A and punishment of criminal conspiracy, as found in Sec. 120B of the I.P.C., it is no doubt true that conspiracy has many facets. When two or more persons agree to do or cause to be done - (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy. The above aspects are subject to proviso and explanation contained in the above Section and as per the explanation, it is immaterial whether legal act has the element of such agreement or merely incidental to that object. Thus, prima facie, as laid down by the Apex Court in the case of Yash Pal Mittal Vs. State of Punjab, , it is not necessary that all the conspirators must know each and every detail of the conspiracy as long as they are co-conspirators in the main object of the conspiracy. There may be so many devices and techniques adopted to achieve the common goal of the conspiracy and there may be division of performances in the chain of actions with one object to achieve the real end of which every collaborator must be aware and in which each one of them must be interested. There may be plurality of means sometimes even unknown to one another amongst the conspirators and in achieving the goal several offences may be committed by some of the conspirators even unknown to the others and it is only relevant fact that all means adopted and illegal acts done must be and purported to be in furtherance of the object of the conspiracy, even though, there may be sometimes misfire or lacuna reflected in those actions and in case if some steps are taken recourse to by one or two of the conspirators without knowledge of others, it will not affect the culpability of those others when they are associated with the object of the conspiracy. In order to prove a criminal conspiracy, there must be direct or circumstantial evidence and in most of the cases, it will be difficult to get direct evidence. In the backdrop of the context of the case, standard of proof has to be inferred from circumstances and that can be done only at the stage of trial, and therefore, it is not necessary to examine all the aspects related to conspiracy, at this stage, when prima facie this Court is satisfied about involvement of the accused, as found from the relevant record and discussed in the below Paragraphs.

10.4. The above language of Sec. 438 of the Code if read in juxtaposition with the decision of the Constitution Bench of the Apex Court in the case of Sibbia (supra) and the case of Mhetre (supra), more particularly in Paragraph Nos. 119, 121, 122, 133, 134, 135, 136, 137, 149 and 150, the Apex Court held has under :

119. This Court in the Sibbia's case (supra) laid down the following principles with regard to anticipatory bail :

(a) Section 438(1) is to be interpreted in light of Art. 21 of the Constitution of India.

(b) Filing of F.I.R. is not a condition precedent to exercise of power under Sec. 438.

(c) Order under Sec. 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in Sec. 437 cannot be read into Sec. 438.

(e) Although, the power to release on anticipatory bail can be described as of an "extraordinary" character this would "not justify the conclusion that the power must be exercised in exceptional cases only". Powers are discretionary to be exercised in light of the circumstances of each case.

(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the Section and suitable conditions should be imposed on the applicant.

121. No inflexible guidelines or straitjacket formula can be provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualized for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on facts and circumstances of each case. As aptly observed in the Constitution Bench decision in *Sibbia's case* (supra) that the High Court or the Court of Sessions to exercise their jurisdiction under Sec. 438 of the Code by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honor.

122. The following factors and parameters can be taken into consideration while dealing with the anticipatory bail :

(i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;

(ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;

(iii) The possibility of the applicant to flee from justice;

(iv) The possibility of the accuser's likelihood to repeat similar or the other offences;

(v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;

(vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;

(vii) The Courts must evaluate the entire available material against the accused very carefully. The Court must also clearly comprehend the exact role of the accused in the case. The cases in which Sec. 149 of the Indian Penal Code, the Court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The Court to consider reasonable apprehension of tampering of the witnesses or apprehension of threat to the complainant;

(x) 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.

133. In our considered view, the Constitution Bench in *Sibbia's case* (supra) has comprehensively dealt with almost all aspects of the concept of anticipatory bail under Sec. 438 Cr.P.C. A number of judgments have been referred to by the learned Counsels for the parties consisting of Benches of smaller strength where the Courts have observed that the anticipatory bail should be of limited duration only and ordinarily on expiry of that duration or standard duration, the Court granting the anticipatory bail should leave it to the regular Court to deal with the matter. This view is clearly contrary to the view taken by the Constitution Bench in *Sibbia's case* (supra). In the preceding Paragraphs, it is clearly spelt out that no limitation has been envisaged by the Legislature under Sec. 438 Cr.P.C. The Constitution Bench has aptly observed that "we see no valid reason for rewriting Sec. 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court or the Court of Session, but for the purpose of limiting it.

134. In view of the clear declaration of law laid down by the Constitution Bench in *Sibbia's case* (supra), it would not be proper to limit the life of anticipatory bail. When the Court observed that the anticipatory bail is for limited duration, and thereafter, the accused should apply to the regular Court for bail, that means the life of Sec. 438 Cr.P.C. would come to an end after that limited duration. This limitation has not been envisaged by the Legislature. The Constitution Bench in *Sibbia's case* (supra) clearly observed that it is not necessary to re-write Sec. 438 Cr.P.C. Therefore, in view of the clear declaration of the law by the Constitution Bench, the life of the order under Sec. 438 Cr.P.C. granting bail cannot be curtailed.

135. The ratio of the judgment of the Constitution Bench in *Sibbia's case* (supra) perhaps was not brought to the notice of their Lordships who had decided the

cases of Salauddin Abdulsamad Shaikh v. State of Maharashtra, K. L. Verma v. State, Adri Dharan Das v. State of West Bengal and Sunita Devi v. State of Bihar (supra).

136. In Naresh Kumar Yadav Vs. Ravindra Kumar and Others, a two-Judge Bench of this Court observed "the power exercisable under Sec. 438 Cr.P.C. is somewhat extraordinary in character and it should be exercised only in exceptional cases. This approach is contrary to the legislative intention and the Constitution Bench's decision in Sibbia's case (supra).

137. We deem it appropriate to reiterate and assert that discretion vested in the Court in all matters should be exercised with care and circumspection depending upon the facts and circumstances justifying its exercise. Similarly, the discretion vested with the Court under Sec. 438 Cr.P.C. should also be exercised with caution and prudence. It is unnecessary to travel beyond it and subject to the wide power and discretion conferred by the Legislature to a rigorous code of self-imposed limitations.

138. The judgments and orders mentioned in Paras 135 and 136 are clearly contrary to the law declared by the Constitution Bench of this Court in Sibbia's case (supra). These judgments and orders are also contrary to the legislative intention. The Court would not be justified in re-writing Sec. 438 Cr.P.C.

149. The analysis of English and Indian law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength, but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in Paragraphs 135 and 136 are by two or three Judges of this Court. These judgments have clearly ignored a Constitution Bench judgment of this Court in Sibbia's case (supra) which has comprehensively dealt with all the facets of anticipatory bail enumerated under Sec. 438 of Cr.P.C. Consequently, judgments mentioned in Paragraphs 135 and 136 of this judgment are per incuriam.

150. In case there is no judgment of a Constitution Bench or Larger Bench of binding nature and if the Court doubts the correctness of the judgments by two or three Judges, then the proper course would be to request Hon'ble the Chief Justice to refer the matter to a Larger Bench of appropriate strength.

10.5. If the parameters and ratio laid down by the Apex Court in the cases of Sibbia (supra) and Mhetre (supra), as above are applied to the facts of the present case, in my opinion, powers under Sec. 438 of the Code cannot be exercised in favour of the applicants. The following aspects prima facie appear - (1) charges are leveled under Sec. 120B read with Secs. 364, 365, 368, 341, 342, 302, 384 and 201 of the I.P.C. and if the applicants are convicted, punishment prescribed is severe and may be up to life imprisonment; (2) that filing of charge-sheet, by the investigating agency against the applicants prima facie does not appear to be made with the object of injuring or humiliating the

applicants by arresting them; (3) the nature and gravity of accusation in the backdrop of Sec. 120B of the I.P.C, influencing witnesses and tampering with evidence in the wake of directions issued by the Apex Court in the month of February, 2010 to carry out free and fair investigation by C.B.I, itself is indicative from the statements made by five witnesses and audio-visual transcription, more particularly, a statement recorded on 12-4-2010 by the learned Magistrate, Bombay would reveal role of the applicants prima facie in commission of alleged crime; and (4) it is no doubt that material on record viz. statement of witnesses and the transcription of audio-visual statements are subject to the security of the trial at the stage of evidence, but prima facie the statement recorded by learned Magistrate under Sec. 164 of the Code and authentic version of audio-visual transcription would tilt the balance, at this stage, in favour of the investigating agency. At this stage, any reproduction of the audiovisual transcription may seriously prejudice certain persons, who are not before this Court, and therefore, this Court refrains from reproducing even the extracts of the transcription, keeping it open for the Court concerned to decide at the stage of evidence. The presence and availability of the applicants no doubt can be secured by imposing stringent conditions, but when the investigation, as ordered by the Apex Court, has yet not completed, it is not possible for this Court to grant relief as prayed by the applicants, as the applicants being influential and having high status in the society may try to interfere with the investigation by influencing the witnesses as they have successfully tried earlier, which, prima facie, appeared from the record of the case.

10.6. The submissions of the learned Counsel for the applicants with regard to complying or abiding by the conditions imposed by this Court and offering themselves for investigation and apprising the investigating agency about the same will have no bearing in view of issuance of notice by the Apex Court in SLP (Criminal) Nos. 9452 and 9453 of 2010 filed by the C.B.I. The other contentions about there being no material on record or the case falling only within the purview of Sec. 201 of the Code, cannot be gone into at this stage in light of allegations made under Sec. 120B of the Code coupled with the registration of F.I.R. in year 2004 for incident of firing which took place in the office of Ramanbhai and Dashrathbhai, prior to the fake encounter of Sohrabuddin and directions issued by the Apex Court on 12-1-2010 pursuant to which periodical reports have been submitted by C.B.I., custodial interrogation of the applicants will facilitate the process of investigation and unearth the truth.

11. Considering the overall facts and circumstances of the case, I am of the view that the discretionary relief under Sec. 438 of the Code, at this stage, cannot be granted in favour of the applicants considering the gravity of the offence, punishment prescribed, role attributed to the applicants. These applications are therefore, rejected.

12. At this stage, Mr. J. M. Panchal, learned Counsel appearing for the applicants requested for stay of the operation of this order so as to avail the remedy before

the higher forum. This request is vehemently opposed by Mr. Y. S. Ravani, learned Counsel for the C.B.I.

However, in view of the foregoing discussion and considering the fact that the applicants were already granted anticipatory bail by a Co-ordinate Bench of this Court, I deem it just and proper to stay operation of this order for a period of three weeks from the date of the receipt of this order.

Accordingly, both these applications are rejected.