

BHARATBHAI BHIMABHAI BHARWAD

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v.

STATE OF GUJARAT AND OTHERS

(Criminal Appeal Nos.1162-1163 of 2019)

JULY 30, 2019

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[R. BANUMATHI AND A.S. BOPANNA, JJ.]

Bail:

Grant of bail – By trial court imposing certain conditions – Application by the complainant u/s. 439(2) Cr.P.C. before High Court challenging the exercise of discretion in granting bail – High Court relegated the matter to trial court holding that the application was for cancellation of bail – Application “speaking to minutes” in respect of the order of the High Court was dismissed – Appeal to Supreme Court – Held: Though the application before High Court was u/s. 439(2) Cr.P.C. i.e. an application for cancellation of bail, but the grounds raised in the application show that it was only challenging the order of grant of bail on the ground that it was an arbitrary exercise of discretion – The considerations applicable for cancellation of bail and for challenging the order of grant of bail on the ground of arbitrary exercise of discretion are different – Matter is remitted to the High Court for consideration of the matter afresh – Code of Criminal Procedure, 1973 – s. 439(2).

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Allowing the appeals and remitting the matter to High Court, the Court

HELD: 1. Though the application has been filed before the High Court under Section 439(2) Cr.P.C. i.e. an application for cancellation of bail, by perusal of the grounds raised in the application, it is seen that the appellant has raised grounds challenging the exercise of discretion in granting bail to respondents No.2 and 3 under Section 439 Cr.P.C. and that the order granting bail is unsustainable in law. In effect, the application filed was only challenging the order of grant of bail on the ground that it was an arbitrary exercise of discretion. The Court while granting bail should exercise its discretion in judicious manner by taking into consideration the relevant facts. [Para 9] [953-E-G]

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- A *State of U.P. Through CBI v. Amarmani Tripathi*
(2005) 8 SCC 21 : [2005] 3 Suppl. SCR 454
– relied on.

2. The consideration applicable for cancellation of bail and consideration for challenging the order of grant of bail on the ground of arbitrary exercise of discretion are different. While considering the application for cancellation of bail, the Court ordinarily looks for some supervening circumstances like; tampering of evidence either during investigation or during trial, threatening of witness, the accused is likely to abscond and the trial of the case getting delayed on that count etc. Whereas, in an order challenging the grant of bail on the ground that it has been granted illegally, the consideration is whether there was improper or arbitrary exercise of discretion in grant of bail. The appellant has challenged the very grant of bail on the ground of arbitrary exercise of discretion ignoring the relevant materials to be considered in the application for bail. Since the High Court proceeded under the footing as if the appellant had filed the application only for cancellation of bail for which, the consideration is different, the impugned order is liable to be set aside and the matter is remitted to the High Court for consideration of the matter afresh. [Para 10] [953-H; 954-A-C]

- E *Anil Kumar Yadav v. State (NCT of Delhi) and Another*
(2018) 12 SCC 129 : [2017] 11 SCR 195
– referred to.

Case Law Reference

- F [2017] 11 SCR 195 referred to Para 7
[2005] 3 Suppl. SCR 454 relied on Para 9

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1162-1163 of 2019

- G From the Judgment and Order dated 26.02.2019 and 07.03.2019 of the High Court of Gujarat at Ahmedabad in R/Criminal Misc. Application No. 3528 of 2019 and in R/Cr/MA/3528/2019 respectively.
Abhishek Singh, Shreshth Arya, Advs. for the Appellant.

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Sushil Kumar Jain, Sr. Adv., Puneet Jain, Ms. Christi Jain, A
Ms. Ankita Gupta, Harshit Khanduja, Harsh Jain, Ms. Pratibha Jain,
Ms. Aastha Mehta, Aniruddha P. Mayee, Advs. for the Respondents.

The Judgment of the Court was delivered by

R. BANUMATHI, J.

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1. Leave granted.

2. These appeals are preferred against the order dated 26.02.2019
passed by the High Court of Gujarat at Ahmedabad in Criminal Misc.
Application Nos.3528 of 2019 and 3529 of 2019 and order dated
07.03.2019 - *“On note for speaking to minutes of order dated* C
26.02.2019 in R/CR.MA/3529/2019” in and by which the High Court
declined to interfere with the order passed by the trial court granting bail
to respondents No.2 and 3-accused No.1 and 2 and further relegating
the appellant-complainant to approach the Sessions Court on the alleged
breach of condition of bail and for imposing the appropriate conditions.

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3. The father of respondents No.2 and 3-accused No.1 and 2
were loaned money by the father of complainant-Bharatbhai Bhimabhai
Bharwad and due to grudge about the transactions, on 10.01.2019, the
complainant-Bharatbhai and the witnesses were abused. On 10.01.2019
at 15:30 hours, Kishanbhai-respondent No.2-accused No.1 inflicted sword
blow on the head of Ajitbhai (brother of complainant) and when Ajitbhai E
tried to save himself by lifting his hand, his left hand palm was cut.
Alpeshbhai-respondent No.3-accused No.2 also dealt sword blow on
the chest of Ajitbhai and when prevented, the blow caused injuries on
his right hand elbow. Ravibhai-accused No.3 has dealt indiscriminate
blows of stick on the complainant and caused injuries to him. Shaileshbhai- F
friend of complainant also sustained injuries on both of his hands. On the
complaint lodged by the complainant, FIR was registered in Crime No.02/
2019 at Viramgam Rural Police Station under Sections 323, 324, 326,
307, 504, 506(2) and 114 IPC.

4. Respondents No.2 and 3 and other accused were arrested on
16.01.2019 and were remanded to judicial custody on 17.01.2019. The
respondents No.2 and 3-accused No.1 and 2 filed bail application which
was allowed by the learned Additional Sessions Judge, Viramgam *vide* G
order dated 06.02.2019. After considering the arguments and also the
materials placed before the court, the learned Additional Sessions Judge

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A observed that *prima-facie* case is made out against the accused and gravity of offence has to be taken into consideration. However, the learned Additional Sessions Judge granted bail on the ground that the injured Ajitbhai was discharged from the hospital on 24.01.2019 and other injured witness-Shaileshbhai was also discharged from the hospital and that weapons allegedly used in the commission of offence have been recovered and also the statements of important witnesses are recorded. The trial court also observed that accused are young, having no criminal antecedents and that they are permanent inhabitants of Sokli village and their presence can easily be secured and on those findings, granted bail to respondents No.2 and 3 *inter alia* by imposing various conditions.

C 5. Challenging the order granting bail to respondents No.2 and 3, the complainant-Bharatbhai filed Criminal Misc. Application No.3528 of 2019 before the High Court. The High Court observed that though the appellant had raised other grounds challenging the grant of regular bail and has also restricted his arguments to the effect that there is breach of condition of bail. Pointing out that the appellant-complainant has restricted his arguments to the effect that there is breach of condition of bail, the High Court relegated the appellant to the Sessions Court to raise the objection on the alleged breach of condition and imposing the appropriate conditions. Learned counsel for the appellant then filed an application before the Registrar “*Speaking to minutes in respect of common order dated 26.02.2019 passed in Criminal Misc. Application No.3528 of 2019 and 3529 of 2019*” *inter alia* contending that the offence is very grave and that the appellant has challenged the very exercise of discretion in granting bail to the accused and therefore, prayed to circulate the “*speaking to minutes*” to the Hon’ble Judge in respect of the order dated 26.02.2019 which came to be dismissed *vide* order dated 07.03.2019.

F 6. We have heard Mr. Abhishek Singh, learned counsel for the appellant and Mr. Sushil Kumar Jain, learned senior counsel for respondents No.2 and 3 and perused the impugned orders and other materials on record.

G 7. Placing reliance upon *Anil Kumar Yadav v. State (NCT of Delhi) and Another* (2018) 12 SCC 129 at paras (17-18), learned counsel for the appellant has submitted that while granting bail, the relevant considerations like; nature of seriousness of the offence; the

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impact of grant of bail that may make on the prosecution witnesses; likelihood of his tampering the evidence and others aspects should be taken into consideration. It was submitted that due to the attack by respondents No.2 and 3, injured Ajitbhai has lost the use of his right thumb and four fingers of his left hand are immobilized which shows the gravity of offence and seriousness of allegations. It was further submitted that though the petition was filed before the High Court under Section 439(2) Cr.P.C.-the provision meant for cancellation of bail, the appellant in fact has challenged the very exercise of discretion in favour of the accused, in view of gravity of the offence and the nature of injuries sustained by Ajitbhai. It was submitted that though the learned Additional Sessions Judge referred to the *prima-facie* materials showing involvement of the accused, has erroneously exercised the discretion in granting bail to the accused and the appellant challenged the arbitrary exercise of discretion and this was not taken note by the High Court. Drawing our attention to “*speaking to minutes*”, the learned counsel submitted that in view of the grounds raised in the “*speaking to minutes*”, the High Court should have afforded an opportunity to the appellant to speak to minutes in respect of order dated 26.02.2019.

8. Learned senior counsel for respondents No.2 and 3 submitted that the appellant having restricted his arguments only to the effect that there was breach of condition of bail and while so, the appellant is not justified in challenging the order dated 06.02.2019.

9. Though the application has been filed before the High Court under Section 439(2) Cr.P.C. i.e. an application for cancellation of bail, by perusal of the grounds raised in the application, it is seen that the appellant has raised grounds challenging the exercise of discretion in granting bail to respondents No.2 and 3 under Section 439 Cr.P.C. and that the order granting bail is unsustainable in law. In effect, the application filed was only challenging the order of grant of bail on the ground that it was an arbitrary exercise of discretion. The Court while granting bail should exercise its discretion in judicious manner by taking into consideration the relevant facts as held in *State of U.P. Through CBI v. Amarmani Tripathi (2005) 8 SCC 21*.

10. It is well settled that the consideration applicable for cancellation of bail and consideration for challenging the order of grant of bail on the ground of arbitrary exercise of discretion are different.

- A While considering the application for cancellation of bail, the Court ordinarily looks for some supervening circumstances like; tampering of evidence either during investigation or during trial, threatening of witness, the accused is likely to abscond and the trial of the case getting delayed on that count etc. Whereas, in an order challenging the grant of bail on the ground that it has been granted illegally, the consideration is whether there was improper or arbitrary exercise of discretion in grant of bail.
- B The appellant has challenged the very grant of bail on the ground of arbitrary exercise of discretion ignoring the relevant materials to be considered in the application for bail. Since the High Court proceeded under the footing as if the appellant had filed the application only for cancellation of bail for which, the consideration is different, the impugned order is liable to be set aside and the matter is remitted to the High Court for consideration of the matter afresh.
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11. In the result, the impugned orders of the High Court dated 26.02.2019 and 07.03.2019 are set aside and these appeals are allowed and the matter is remitted to the High Court for consideration of Criminal Misc. Application Nos.3528 of 2019 and 3529 of 2019 afresh. The High Court shall proceed with the matter as if the application challenges the order of grant of bail and proceed with the matter in accordance with law.
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Kalpana K. Tripathy

Appeals allowed and matter remitted
to High Court