

# Hardikbhai Mukeshbhai Chauhan vs State Of Gujarat on 5 September, 2018

**Author: R.P.Dholaria**

**Bench: R.P.Dholaria**

R/SCR.A/7642/2018

JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CRIMINAL APPLICATION NO. 7642 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE R.P.DHOLARIA

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

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HARDIKBHAI MUKESHBHAI CHAUHAN

Versus

STATE OF GUJARAT

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Appearance:

MR MAULIN G PANDYA(3999) for the PETITIONER(s) No. 1

MR LB DABHI, APP (2) for the RESPONDENT(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE R.P.DHOLARIA

Date : 05/09/2018

ORAL JUDGMENT

1. What is challenged in the present writ petition under Article 227 of the Constitution of India are the order dated 28.8.2018 passed by learned District and Sessions Judge, Nadiad in R/SCR.A/7642/2018 JUDGMENT Criminal Revision Application No.67 of 2018 and the order dated 18.5.2018 passed by learned Judicial Magistrate, First Class, Nadiad whereby both the courts below rejected the prayer of handing over the vehicle in question i.e. Force Tempo Tavera having its registration No.GJ-03-BV 2824 in connection with the FIR being CR No.82 of 2018 registered with Nadiad Town Police Station, District Kheda for the offence under the provisions of the Gujarat Prohibition Act 1949 ("the Act" for short). Being aggrieved by the same, the petitioner has preferred the present petition under Article 227 of the Constitution of India.

2. It is contended by learned advocate for the petitioner that learned trial Court as well as Revisional Court have not handed over interim custody of the vehicle in question in view of the provisions of section 98 of the Act which provides embargo for handing over the custody of the vehicle used in the offence pending the trial. It is, therefore, requested that appropriate directions should be given to the concerned Magistrate / trial Court who is dealing with such questions to hand over such vehicles to its owner or to the person from whom the said vehicles are seized by taking appropriate bond / guarantee / solvent surety for the return of the said vehicles if required by the Court at any point of time.

R/SCR.A/7642/2018 JUDGMENT

3. On the other-hand, Mr.L.B.Dabhi, learned Additional Public Prosecutor vehemently submitted that there is embargo under section 98 of the Code of Criminal Procedure 1973 to release the muddamal vehicle used in the offence and while interpreting the provisions of law, the coordinate bench of this Court in the case of Pareshkumar Jaykarbhai Brahmbhatt Vs State of Gujarat, decided on 15.12.2017 held that in view of the embargo, the magisterial courts as well as revisional courts have no jurisdiction to hand over custody of the vehicle used in the offence as per the provisions of section 451 of the Code of Criminal Procedure 1973. Lastly, he requested this Court to dismiss the present petition in limine.

4. In view of the aforesaid factual scenario, this Court has noticed that hundreds and thousands of such vehicles are lying either in the compound of the concerned police stations or the said vehicles are being kept in an open ground which might have been hired for keeping such vehicles and therefore, such vehicles remained idle/unutilized and by passage of time, the value of the vehicles is being diminished. This Court has also noticed that in view of the backlog of such cases, the Magistrate Courts are not equipped with the machinery so as to complete with the trial and hearing within time bound R/SCR.A/7642/2018 JUDGMENT schedule but usually, such sort of cases required minimum 4 to 5 years in disposal of such cases and therefore, if the vehicles are kept in that manner in an open place for about 4 to 5 years, then naturally, the condition of the vehicle would be deteriorated and would render useless for the purpose and thereafter even if it may be confiscated, then also, it would not fetch any value which might have been indicated in the seizure memo and ultimately, it would be a loss to the public exchequer.

5. This Court has also noticed the detailed guidelines laid down by the Honourable Apex Court in the celebrated decision in the case of Sunderbhai Ambalal Desai Vs State of Gujarat reported in 2003(1) GLH 307 wherein the Honourable Apex Court in clear and unequivocal terms directed the Court concerned to hand over the custody of such vehicles to the persons who are entitled thereto as per the provisions of section 451 of the Code of Criminal Procedure 1973.

6. It also appears that the coordinate bench of this Court in various writ petitions while exercising the writ jurisdiction has granted interim custody of the vehicles taking into consideration the decision of the Honourable Apex Court in the case of Hema Mishra Vs State of UP and others, reported in (2014) 4 SCC 453 and R/SCR.A/7642/2018 JUDGMENT wherein in spite of clear embargo granted anticipatory bail in the case under the provisions of the Scheduled Casts and Scheduled Tribes (Prevention of Atrocities) Act. The Apex Court, while considering said embargo, held that the High Court and/or Sessions Court cannot grant the anticipatory bail under section 438 in view of clear embargo under the Atrocity Act but in appropriate case, to meet with the ends of justice, while exercising the writ jurisdiction, the High Court can grant anticipatory bail. Relying upon such interpretation, this High Court granted interim custody of the vehicles taking it analogous interpretation though embargo is provided under the Act.

7. Indisputably, the vehicle in question is alleged to have been used in the commission of offence under the provisions of the Act. It is pointed out during the course of hearing of the present matter that at present, in the police station premises or in open plot hired by the concerned authority, number of vehicles are kept unattended and vehicles become junk and scrap day by day. It is also worth to note that the offence in question is not being committed by the vehicle but by the offender who is involved in the case i.e. human being.

8. This Court is also conscious of the fact that to determine degree of guilt or involvement R/SCR.A/7642/2018 JUDGMENT or non-involvement or even connivance on the part of the owner of vehicle by this Court would be hazardous to the parties to the proceedings at the time of trial.

9. It would be fruitful to refer to the decisions of the Honourable Apex at this stage which are as under.

"In Hema Mishra Vs. State of U.P. and others (2014) 4 SCC 453, the Apex Court was called upon to decide a very important question as regards the power of the High Court under Article - 226 of the Constitution of India vis-a-vis non- applicability of Section 438 of the Criminal Procedure Code in the State of U.P. K.S.Radhakrishnan, J (As His Lordship then was) in his separate judgment observed as under;

"22. I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in

appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India."

His Lordship Justice A.K.Sikri in his separate but concurring judgment observed as under;

R/SCR.A/7642/2018 JUDGMENT "4. It is for this reason, we are of the opinion that in appropriate cases the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 of Cr.P.C. are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused persons would not be entitled to claim such a relief under Art. 226 of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus. At the same time, as rightly observed in para 21 extracted above, the High Court cannot be completely denuded of its powers under Article 226 of the Constitution, to grant such a relief in appropriate and deserving cases; albeit this power is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. What is emphasized is that the High Court is not bereft of its powers to grant this relief under Art. 226 of the Constitution.

11. It is pertinent to mention that though the High Courts have very wide powers under Art.226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

12. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The powers are, therefore, to be exercised to R/SCR.A/7642/2018 JUDGMENT prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Art.226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Art.226 is not to be exercised liberally so as to convert it into Section 438,Cr.P.C. proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Art.226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Art. 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified."

10. Considering the aforesaid legal position as well as considering the facts emerging out in the present case, I am inclined to exercise writ jurisdiction under Article 226 of the Constitution of India and order release of the vehicle in question i.e. Force Tempo Tavera having its registration No.GJ-03-BV 2824 pending the trial.

11. In the result, this application is allowed. The learned trial Court concerned is directed to immediately release the vehicle in question i.e. Force Tempo Tavera having its registration No.GJ-03-BV 2824 after due verification and following the procedure of R/SCR.A/7642/2018 JUDGMENT recording such evidence as it thinks necessary as provided under section 451 of the Code of Criminal Procedure 1973 and on the petitioner fulfilling the following conditions.

(1) The petitioner shall furnish a solvent surety of the amount equivalent to the value of the vehicle in question as per the value disclosed in the seizure memo or panchnama.

(2) The petitioner shall file an undertaking on oath before the trial Court that he shall not transfer, alienate, part with the possession of the vehicle or create any charge over the vehicle till the conclusion of the trial.

(3) The petitioner shall produce the vehicle as and when the authority or the Court concerned directs him to do so.

With the above, this petition is disposed of. Rule is made absolute.

(R.P.DHOLARIA, J) H.M. PATHAN