

# Kanubhai Mahadevbhai Lamka (Bharwad) vs State Of Gujarat on 27 March, 2018

**Author: J.B.Pardiwala**

**Bench: J.B.Pardiwala**

R/CR.MA/30205/2017

ORDER

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL MISC.APPLICATION NO. 30205 of 2017

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KANUBHAI MAHADEVBHAI LAMKA (BHARWAD)

Versus

STATE OF GUJARAT

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Appearance:

MR PARTHIV A BHATT(5331) for the PETITIONER(s) No. 1

Mr RAKESH PATEL, APP (2) for the RESPONDENT(s) No. 1

RULE UNSERVED(68) for the RESPONDENT(s) No. 2

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CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 27/03/2018

ORAL ORDER

1. It appears from the report filed by the Police Sub Inspector, Adalaj Police Station that the respondent no.2 - original accused has gone in hiding.

In such circumstances, despite best of the efforts to serve the notice issued by this Court upon the accused, the police has failed to do so. It prima facie appears that as many prosecutions have been instituted against the accused herein, he might have absconded. Although the endorsement on the board is to the effect that the notice has not been served upon the respondent no.2, yet having regard to the report of the police and the fact that the accused has gone in hiding, the present application has been taken up for hearing.

2. By this application under Section 439(2) of the Code of Criminal Procedure, 1973, the applicant - original first informant, prays for the following reliefs: 5(A) be pleased to quash and set aside the order dated 13/11/2017 passed in Criminal Misc. Application No.1276/2017 granting R/CR.MA/30205/2017 ORDER anticipatory bail to the accused, Respondent no.2 in connection with the FIR being C.R. No.I

131/2017 registered with Adalaj Police Station for the offence punishable under Sections 406, 420, 114 of the I.P.C. in the interest of justice.

(B) any other and further relief as may be deemed fit the facts and circumstances of the case.

3. The applicant herein lodged an F.I.R. dated 30/10/2017 before the Adalaj Police Station, District Gandhinagar bearing C.R. No. 131 of 2017 for the offence punishable under Sections 406, 420 r/w. 114 of the Indian Penal Code.

4. The case put up by the first informant in his F.I.R. is summarized as under: That the first informant who is a Contractor and resides at Gota, Ahmedabad along with his family. As per the FIR, prior to one and half year from the date of registration of FIR, it is stated that as the complainant/ first informant was looking for a flat/ house and wanted to purchase the same, for this purpose his nephew namely Rajubhai Jivanbhai Bharwad, who happens to be in business of real estate, introduced the first informant to one Kanuji Mafaji Thakore, who told the first informant about one flat at mouje - Koteswar, Chandkheda, Ahmedabad in a scheme namely "Sangath Nano" being flat no. A/202 and which was fully furnished flat. The said flat belongs to the present applicant and his wife.

The first informant was interested to purchase the said flat and for which an amount of Rs.25,51,000/ came to be finalized between the first informant and the present applicant and his wife, and with this regards it was decided that on 05.04.2016, all R/CR.MA/30205/2017 ORDER interested parties i.e. the buyer and the seller/s shall meet at Gandhinagar Sub - Registrar, where as agreed, an amount of Rupees 17 Lakhs i.e. Rupees Ten Lakhs in cash and Two Cheques of Rupees Three Lakhs Fifty Thousand each came to be parted to the seller/s against which a banakhat came to be registered vide no.5225/2016.

It is further alleged that present applicant demanded an amount of Rupees Ten Lakhs from the first informant stating that as he wants to purchase a new flat, and he shall take into account the said amount towards the remaining eight Lakhs Fifty Thousand Rupees which the first informant was supposed to pay towards the final purchase amount as agreed. It is further stated that as the first informant was tempted to purchase the furnished flat so he agreed to said demand. Further, on 02.05.2016 the husband of the present applicant paid back Rupees Ten Lakhs to the first informant and took away the Kabja Karar and also got one "Samjuti Karar" signed by the first informant before the Notary.

It is further alleged that the first informant further paid a sum of Rupees Seven Lakhs in parts to the present applicant towards other expenses and was ready and willing to pay the further remaining amount of Rupees One Lakh Fifty One Thousand and got the sale deed executed but the present applicant did not comply with the condition of Banakhat.

5. The accused apprehending arrest, filed an anticipatory bail application before the Sessions Court at Gandhinagar. The Principal Sessions Judge, Gandhinagar, by his order dated 13/11/2017 allowed the application and granted anticipatory bail to the accused. While R/CR.MA/30205/2017 ORDER exercising discretion in favour of the accused, the Court below recorded the findings, which reads as under: □  
"[2] The case of the prosecution, in nutshell, is that the complainant had paid earnest money to purchase a flat, co-owned by the applicant. Thereafter, the complainant has found that applicant had mortgaged the property with Union Bank of India, obtained loan of Rs.23,40,000/□  
He has executed an agreement to sell in favour of one Harshil Vikrambhai. Thus, the applicant has executed an agreement to sell in favour of two persons and, he has not returned Rs.24,00,000/□ to the complainant.

[3] The Notice was issued to other side. Learned Public Prosecutor Mr.H.N.Raval representing the State, has appeared before the Court.

[4] At the time of arguments, learned Advocate for the applicant has submitted that applicant is innocent and, is falsely involved in the case. It is contended that dispute between the parties, is of civil nature. It is contended that applicant and, his wife are already filed Special Civil Suit No.148 of 2017 before the Civil Court, Gandhinagar wherein they have claimed that alleged agreement to sell, is not binding upon them and, are prayed for cancellation of registered sale deed.

[5] It is contended that complaint is nothing but attempt to extort more money from the applicant. It is contended that applicant is ready and willing to co-operate in the investigation. So, the bail application may be allowed.

[6] At the time of arguments, learned Advocate for the applicant has contended that applicant has produced xerox copy of notarized agreement between the parties wherein the complainant signed the documents and, he has returned the earnest money. He has drawn my attention towards a copy of notice issued on behalf of applicant by his learned Advocate and, a copy of Civil Suit, filed by the applicant and, co-owner of the property.

[7] While opposing the bail application, learned Public Prosecutor has contended that there is prima facie case against the present applicant. It is contended that applicant has executed an agreement to sell in the name of another person.

Thus, the applicant has committed the offence of cheating. It is contended that if the applicant is released on anticipatory bail, he would again indulge in such type of activity. So, the bail application is required to be rejected.

[8] After considering the rival submissions and, considering the fact that the dispute between the parties, is of Civil nature and, the case is R/CR.MA/30205/2017 ORDER triable by Judicial Magistrate, First Class and, considering the judgment of the Honourable the Apex Court in Siddharam Satlingappa Mhetre V/s. State of Maharashtra And Others reported in (2011)1 S.C.C. 694, I am of the view that applicant is required to be released on anticipatory bail with certain conditions. The applicant has made out the case for anticipatory bail, the protection can be given for apprehension of arrest of applicant. Hence, following order:"

O R D E R The Application under Section 438 of Criminal Procedure Code, 1973 filed by the applicant namely Daxkumar Masheshbhai Panchal hereby stands allowed by directing that in the event of arrest of the applicants herein in connection with the F.I.R. being I Cr.No.131 of 2017 registered with Adalaj Police Station, Gandhinagar for the offences punishable under Sections 406, 420 and, 114 of the Indian Penal Code, 1860 the applicant shall be released on bail on the following conditions:

6. Being dissatisfied with the order of grant of anticipatory bail, the applicant - original first informant is here before this Court praying for cancellation of the same.

7. Mr. Parthiv Bhatt, the learned counsel appearing for the applicant submitted that the impugned order of grant of anticipatory bail could be termed as a non-speaking order. No reason worth the name has been assigned by the Court below as to why the discretion was being exercised in favour of the accused. The learned counsel would submit that the applicant has antecedents. Five similar type of FIRs have been registered against the accused. Despite pointing out this fact to the Court below, the same was overlooked and despite antecedents, the Court proceeded to exercise its discretion in favour of the accused. In such circumstances referred to above, the learned counsel prays that the impugned order is illegal and deserves to be quashed.

8. Mr. Rakesh Patel, the learned APP appearing for the State has R/CR.MA/30205/2017 ORDER supported this application seeking cancellation of anticipatory bail. The learned APP confirms after taking instructions from the Investigating Officer concerned that the applicant is in the habit of indulging into such type of illegal activities. There are five FIRs registered against the accused.

9. Mr. Rakesh Patel, the learned APP submitted that the discretion exercised by the Court below in favour of the accused could not be termed as judicious exercise of discretion.

10. Having heard the learned counsel appearing for the parties and having considered the materials on record, the only question that falls for my consideration is whether the Court below committed any error in granting the anticipatory bail to the accused.

11. I am of the view having regard to the nature of the allegations and the antecedents of the accused that the Court below committed an error in exercising its discretion in favour of the accused.

12. The Supreme Court in *Siddharam Satlingappa Mhetre (supra)* after considering the earlier judgments of this Court laid down certain factors and parameters to be considered while considering application for anticipatory bail:

"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;

R / C R . M A / 3 0 2 0 5 / 2 0 1 7 O R D E R  
iii. The possibility of the applicant to flee from justice;

iv. The possibility of the accused'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 accused is implicated with the help of sections 34 and 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 witness 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."

13. Thus, the antecedents of the accused as well as the possibility of the accused again indulging in the similar type of offences, are two prime considerations for the purpose of considering the plea for regular bail as well as anticipatory bail. When there are five offences registered against the accused at the different Police Stations of similar offences, the same, by itself, is indicative of the fact that the accused is habitually indulging in such type of offences. There was no good reason for the R/CR.MA/30205/2017 ORDER Court below to grant anticipatory bail to such an accused having antecedents. It is a settled position of law that neither anticipatory bail nor regular bail can be granted as a matter of rule. The anticipatory bail, being an extraordinary privilege, should be granted only in exceptional cases. The judicial discretion conferred upon the Court has to be properly exercised after proper application of mind to decide whether it is a fit case for grant of anticipatory bail.

14. In 'State of M.P. & Anr. v. Ram Kishna Balothia & Anr.', AIR 1995 SC 1198, this Court considered the nature of the right of anticipatory bail and observed as under:

"We find it difficult to accept the contention that Section 438 of the Code of Criminal Procedure is an integral part of Article 21. In the first place, there was no provision similar to Section 438 in the old Criminal Procedure Code..... Also anticipatory bail cannot be granted as a matter of right. It is essentially a statutory right conferred long after the coming into force of the Constitution. It cannot be considered as an essential ingredient of Article 21 of the Constitution. And its non-application to a certain special category of offences cannot be considered as violative of Article 21."

15. While deciding the aforesaid cases, the Supreme Court referred to the 41st Report of the Indian Law Commission dated 24th September, 1969 recommending the introduction of a provision for grant of anticipatory bail wherein it has been observed that "power to grant anticipatory bail should be exercised in very exceptional cases".

16. The character, behavior, means, position and standing of the accused are some of the relevant considerations for the purpose of considering the prayer for grant of anticipatory bail. The likelihood of the offence, being repeated, is also one of the important considerations. So far as the grant of anticipatory bail to an accused with antecedents is concerned, the concept of setting aside an unjustified, illegal or perverse R/CR.MA/30205/2017 ORDER order is totally different from cancelling an order of anticipatory bail on the ground that the accused had misconducted himself or because of some supervening circumstances w a r r a n t i n g s u c h c a n c e l l a t i o n . Although, in the present case, there may not be any complaint of breach of the conditions imposed by the court below in the order of grant of anticipatory bail, yet the order, being absolutely unjustified, illegal and perverse, the same deserves to be quashed.

17. I have reached to an inescapable conclusion that the Sessions Court did not comply with any of the aforesaid parameters rather dealt with the anticipatory bail application in a most casual manner and showed undeserving and unwarranted sympathy towards the accused. Discretion has to be guided by law; duly governed by rule and cannot be arbitrary, fanciful or vague. The court must not yield to spasmodic sentiment to unregulated benevolence. The order dehors the grounds provided in section 438, Cr.P.C, itself, suffers, from non□ application of mind and, therefore, cannot be sustained in the eyes of law.

18. This Court, in one of its judgments, in the case of 'State of Gujarat vs. Desai Jigishbhai @ Rajubhai Nagjibhai', Criminal Misc. Application No.23576 of 2015, decided on 4th February, 2016, observed as under;

"25. When a Court is given a discretion, the statute confers upon it the power to act according to what may appear to be best and appropriate under the circumstances of the particular case. The discretion is not willful or arbitrary, but is regulated by well□known and well established principles. In many circumstances, the Judge has a discretion as to whether, and in what manner, to exercise his powers. Commonly encountered instances of judicial discretion are the discretion as to grant of bail in a non□bailable offence. However, no discretion is absolute and there may be a successful appeal to the Court of Appeal in relation to the exercise of a judicial discretion if the appellant can show that the judge exercised his discretion under a mistake of law, or under a misapprehension as to the facts, or that he took into account irrelevant matters or gave insufficient weight, or too much weight, to certain factors or that he failed to exercise his R/CR.MA/30205/2017 ORDER discretion at all.

26. In *Puran v. Rambilas and Anr.* (2001 (6) SCC 338) it was noted as follows :

"11. Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation. This position is made clear by this Court in Gurcharan Singh v. State (Delhi Admn.). In that case the Court observed as under (SCC p. 124, para 16) :

"If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existing, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-à-vis the High Court."

19. The presumption of innocence, by itself, cannot be the sole consideration for grant of bail. The presumption of innocence is one of the considerations, which the court should keep in mind while considering the plea for bail. The salutary rule is to balance the cause of the criminal defendant and the cause of public justice. Over solicitous homage to the liberty of the accused can, sometimes, defeat the cause of public justice. Over a period of time, a feeling seems to exist in some quarters that the object of criminal law is to protect the rights of the accused and that the criminal justice system is envisioned as a sentinel of the rights of the accused. It is not so. The law is the sentinel of rights of the society and of the individual. The rights of the accused will be as zealously guarded, as the cause of public justice.

R/CR.MA/30205/2017 ORDER

20. In the result, this application succeeds and is hereby allowed. The impugned order grant of anticipatory bail passed by the Principal Sessions Judge, Gandhinagar, dated 13/11/2017 in the Criminal Misc. Application No.1276 of 2017 is hereby quashed and set aside. Consequently, the grant of anticipatory bail stands cancelled.

As noted above, the report of the Police would indicate that the accused is absconding. The whereabouts, as on date, is unknown. Let



appropriate steps be taken at the earliest in accordance with law. The report of the police is taken on record.

Direct service is permitted (J.B.PARDIWALA, J) aruna