GUJARAT CRIMINAL JUDGEMENTS

2024(2)GCRJ497

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Umesh A Trivedi]

Criminal Miscellaneous Application (For Anticipatory Bail) No. 16057 of 2024

dated 25/09/2024

Medhuben Bhurabhai Rabari

Versus

State of Gujarat

ANTICIPATORY BAIL GRANTED

Bharatiya Nyaya Sanhita, 2023 Sec. 85, Sec. 54, Sec. 108, Sec. 115 - Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 482, Sec. 194 - Anticipatory Bail Granted - Applicant, aged 60, sought anticipatory bail after being accused of abetting her daughter-in-law's suicide under Bharatiya Nyaya Sanhita - Allegations included domestic quarrels and instigation of her son - Applicant argued she lived separately and had no role in the offense - Court found general allegations without direct evidence linking her to abetment - Considering her age and lack of custodial interrogation requirement, anticipatory bail was granted - Application Allowed

Law Point: Anticipatory bail may be granted when general allegations fail to establish a direct role in the offense, especially considering the applicant's age and the absence of custodial interrogation necessity

ભારતીય ન્યાય સંહિતા, 2023 કલમ 85, કલમ 54, કલમ 108, કલમ 115 – ભારતીય નાગરિક સુરક્ષા સંહિતા, 2023 કલમ 482, કલમ 194 – આગોતરા જામીન મંજૂર – અરજદાર, 60 વર્ષની વયના, ભારતીય ન્યાય સંહિતા હેઠળ તેની પુત્રવધૂને આત્મહત્યા માટે પ્રેરિત કરવાના આરોપ પછી આગોતરા જામીનની માંગણી કરી – આરોપોમાં ઘરેલું ઝઘડા અને તેના પુત્રની ઉશ્કેરણીનો સમાવેશ થાય છે – અરજદારે દલીલ કરી હતી કે તેણી અલગ રહે છે અને ગુનામાં તેની કોઈ ભૂમિકા નથી – કોર્ટે તેણીને ઉશ્કેરણી સાથે જોડતા સીધા પુરાવા વિના સામાન્ય આરોપો શોધી કાઢ્યા – તેણીની ઉંમર અને કસ્ટોડિયલ પૂછપરછની જરૂરિયાતના અભાવને ધ્યાનમાં લેતા, આગોતરા જામીન મંજૂર કરવામાં આવ્યા હતા – અરજીની મંજૂરી.

કાયદા નો મુદ્દો: જ્યારે સામાન્ય આરોપો ગુનામાં સીધી ભૂમિકા સ્થાપિત કરવામાં નિષ્ફળ જાય ત્યારે આગોતરા જામીન મંજૂર થઈ શકે છે, ખાસ કરીને અરજદારની ઉંમર અને કસ્ટોડિયલ પૂછપરછની જરૂરિયાતની ગેરહાજરીને ધ્યાનમાં રાખીને.

Acts Referred:

Bharatiya Nyaya Sanhita, 2023 Sec. 85, Sec. 54, Sec. 108, Sec. 115

Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 482, Sec. 194

Counsel:

P S Datta, Hardik Mehta

JUDGEMENT

Umesh A. Trivedi, J.- [1] Rule returnable forthwith. Mr. Hardik Mehta, learned APP, waives service of notice of Rule on behalf of respondent-State.

1. This application is filed by the applicant, who is mother in law of the deceased, under Section 482 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as "BNSS"), in connection with the FIR being C.R. No. I 11205044240477 of 2024 registered with Padhdhar Police Station, District: Kutch West Bhuj for the offence punishable under Sections 108, 115(2), 85, 54 of the Bharatiya Nyaya Sanhita, 2023 (hereinafter referred to as "BNS") and under Section 194 of the "BNSS".

[2] According to the case of prosecution, the applicant being mother in law, instigated the husband and thereby husband was occasionally beating the deceased, who committed suicide because of cruelty meted out to her by the accused named in the FIR.

[3] Mr. P.S. Dutta, learned advocate for the applicant, submitted that the applicant is aged 60 years, mother in law, staying in a separate dwelling, maybe near the house of deceased and there is no question of meting out any cruelty to her as they don't stay together. Therefore, it is submitted that since nothing is to be recovered or discovered, no custodial interrogation of the applicant is required, and therefore, she be granted anticipatory bail.

[4] As against that, Mr. Hardik Mehta, learned APP, drawing attention of the Court to the contents of the FIR submitted that the deceased complained to the applicant her mother in law, she, on the contrary, instigating her husband instead of taking her side. It is further submitted that they all were telling her to go away from they house and took up quarrel frequently with her on one or other pretext. Therefore, he submitted that no anticipatory bail be granted to the applicant.

[5] Having heard the learned advocate for the applicant as also Mr. Hardik Mehta, learned APP for the State, and considering the papers of investigation, it appears that present applicant, who is mother in law aged about 60 years, even if the allegations leveled in the FIR and the papers of charge-sheet are taken into consideration, has no role to play so far as an offence under Section 108 of the "BNS" is concerned.

Over and above that, very general allegations are made, that too, pertaining to domestic quarrel between family members, which has nothing to do with the offence, that too, of abetment to commit suicide.

Since this is an application for anticipatory bail, it is avoided to conclude whether even an offence under Section 85 of the "BNS" is made out or not.

At any rate, applicant being a lady accused and there appears no reason to have the custodial interrogation of her, I deem it fit to grant anticipatory bail to her.

[6] Taking into consideration the facts of the case, nature of allegations, gravity of offence, role attributed to the accused, without discussing the evidence in detail, at this stage, this Court is inclined to grant anticipatory bail to the applicant. This Court has also taken into consideration the law laid down by the Hon'ble Apex Court in the case of **Siddharam Satlingappa Mhetre vs. State of Maharashtra and Ors**, 2011 1 SCC 694, wherein the Hon'ble Apex Court reiterated the law laid down by the Constitution Bench in the case of **Shri Gurubaksh Singh Sibbia & Ors. Vs. State of Punjab**, 1980 2 SCC 565.

[7] In the result, the present application is allowed. The applicant is ordered to be released on bail in the event of her arrest in connection with a FIR being C.R. No. I 11205044240477 of 2024 registered with Padhdhar Police Station, District: Kutch West Bhuj on 19.7.2024, on executing a personal bond of **Rs.10,000/- (Rupees Ten Thousand Only)** with one surety of like amount on the following conditions:

(a) shall cooperate with the investigation and make himself available for interrogation whenever required;

(b) shall remain present at concerned Police Station on **03.10.2024** between 11.00 a.m. and 2.00 p.m.;

(c) shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the fact of the case so as to dissuade him from disclosing such facts to the court or to any police officer;

(d) shall not obstruct or hamper the police investigation and not to play mischief with the evidence collected or yet to be collected by the police;

(e) shall at the time of execution of bond, furnish the address to the investigating officer and the court concerned and shall not change his residence till the final disposal of the case till further orders;

(f) shall not leave India without the permission of the Trial Court and if having passport shall deposit the same before the Trial Court within a week; and

(g) it would be open to the Investigating Officer to file an application for remand if he considers it proper and just and the learned Magistrate would decide it on merits;

[8] Despite this order, it would be open for the Investigating Agency to apply to the competent Magistrate, for police remand of the applicant. The applicant shall remain present before the learned Magistrate on the first date of hearing of such application and on all subsequent occasions, as may be directed by the learned Magistrate. This would be sufficient to treat the accused in the judicial custody for the purpose of entertaining application of the prosecution for police remand. This is, however, without prejudice to the right of the accused to seek stay against an order of remand, if, ultimately, granted, and the power of the learned Magistrate to consider such a request in accordance with law. It is clarified that the applicant, even if, remanded to the police custody, upon completion of such period of police remand, shall be set free immediately, subject to other conditions of this anticipatory bail order.

[9] At the trial, the Trial Court shall not be influenced by the prima facie observations made by this Court in the present order.

[10] Rule is made absolute to the aforesaid extent. Direct service is permitted

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2024(2)GCRJ500

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Divyesh A Joshi]

Criminal Appeal No. 722 of 2007 **dated 23/09/2024**

Mukeshbhai Mohanlal Saragra

Versus

State of Gujarat

CONVICTION UPHELD

Indian Penal Code, 1860 Sec. 114, Sec. 302, Sec. 323 - Code of Criminal Procedure, 1973 Sec. 374, Sec. 209, Sec. 313 - Bombay Police Act, 1951 Sec. 135 - Conviction Upheld - Appellant challenged his conviction under Sections 302 and 323 IPC for inflicting a fatal knife blow during a quarrel - Trial court convicted the appellant based on circumstantial evidence and a dying declaration - Appellant argued inconsistencies in witness testimonies, delayed complaint, and contradictions between medical evidence and the prosecution's case - Court upheld the conviction, finding the dying declaration credible, supported by corroborating evidence, and dismissed the appeal - Appeal Dismissed

Law Point: A conviction based on circumstantial evidence and a credible dying declaration can be upheld despite discrepancies in witness testimonies, as long as the chain of evidence is unbroken and consistent with guilt

ભારતીય દંડ સંહિતા, 1860 કલમ 114, કલમ 302, કલમ 323-કોડ ઓફ ક્રિમિનલ પ્રોસિજર, 1973 કલમ 374, 209, 313- બોમ્બે પોલીસ અધિનિયમ, 1951 કલમ 135 દોષિત ઠેરવવામાં આવેલ અપીલકર્તાએ કલમ 302 અને કલમ 323 IPC હેઠળ ઝઘડા દરમિયાન ફટકો મારવા બદલ તેની દોષિતતાને પડકારી હતી – ટ્રાયલ કોર્ટે સંજોગોવશાત્ પુરાવા અને ડાઈંગ ડિક્લેરેશનના આધારે અપીલકર્તાને દોષિત ઠેરવ્યો હતો. – અપીલ કર્તાએ સાક્ષીઓ ની વિસંગતતા, વિલંબિત ફરિયાદ અને તબીબી પુરાવા વચ્ચેના વિરોધાભાસને પડકરેલ હતો – કોર્ટે માન્ય રાખ્યું કે પ્રતીતિ, મૃત્યુની ઘોષણા વિશ્વસનીય, સમર્થન પુરાવા દ્વારા સમર્થિત - અપીલ બરતરફ

કાયદા નો મુદ્દો: સંજોગોવશાત્ પુરાવા અને વિશ્વસનીય મૃત્યુની ઘોષણા પર આધારિત પ્રતીતિને સાક્ષીઓની જુબાનીઓને સમર્થન આપી શકાય છે, જ્યાં સુધી પુરાવાની સાંકળ અખંડ અને અપરાધ સાથે સુસંગત હોય.

Acts Referred:

Indian Penal Code, 1860 Sec. 114, Sec. 302, Sec. 323
Code of Criminal Procedure, 1973 Sec. 374, Sec. 209, Sec. 313
Bombay Police Act, 1951 Sec. 135

Counsel:

Maulin G Pandya, Monali Bhatt

JUDGEMENT

Divyesh A. Joshi, J.- [1] This is an appeal at the instance of the appellant-convict under Section 374(2) of the Criminal Procedure Code, 1973 (for short "the Code") against the judgment and order of conviction dated 22.02.2007 passed by the learned Addl. Sessions Judge, Vadodara in Sessions Case No.230 of 2002, whereby the learned trial judge convicted the appellant accused of the charges for the offence punishable under Sections 302, 323 and 114 of the Indian Penal Code and Section 135 of the Bombay Police Act.

[2] Case OF THE PROSECUTION:-

2.1 It appears that the PW-1, Kishanbhai Ramabhai Marvadi, the brother of the deceased lodged a first information report, Exh.18 on 18.03.2004. In the complaint at Exh.18 lodged by the brother of the deceased, it has been stated that the deceased viz. Kantibhai Ramabhai happened to be his real brother. They were three brothers, namely, the complainant Kishanbhai Ramabhai himself who is the elder brother, then younger to Kishanbhai is Bhagwanbhai and the most youngest one was deceased

Kantibhai Ramabhai. They all were residing at Harni, Vadodara along with their parents. It has been stated that both the complainant and Bhagwanbhai are married and the deceased was bachelor. The complainant is a tailor by profession whereas the deceased Kantibhai Ramabhai was running a tea stall along with his father in the vicinity. Accused Babubhai Samnaji was their neighbor. It has been further alleged that one Suresh Punamji was working at the tea stall of the deceased, who met with an accident and sustained disability. Therefore, he was being looked after by the mother of the complainant and the deceased, at which point of time, the said Sureshbhai Punamjibhai received certain amount of accidental claim. It is also stated that the said Sureshbhai Punamjibhai, before his death, executed a will for the amount of claim received by him and lying in his bank account in favour of the mother of the complainant and the deceased. However, accused Babubhai Samnaji also claimed to have the same will executed by Sureshbhai Punamjibhai in his favour, Thus, there were counter claims from both the sides, which resulted in the disputes between them and both the sides initiated legal proceedings against each other in the court of law. It is also alleged that keeping a grudge of the same, on 31.12.2001, at around 23:30 hours, when the deceased Kantibhai Ramabhai was going for urinating towards the canal, the said Babubhai along with the appellant and other coaccused, confronted the deceased Kantibhai and started altercation with him. It is alleged that all the accused persons then started beating the deceased and the appellant herein inflicted knife blow on the left side of the stomach of the deceased due to which the deceased received serious injuries. It is the case of the prosecution that thereafter the deceased was taken to the S.S.G. Hospital where on 11.01.2002 at around 10:15, the deceased Kantibhai Ramabhai succumbed to the injuries, and thereby all the accused persons, with the aid of each other, committed the offence under Sections 302, 323 and 114 of the IPC as well as Section 135 of the Bombay Police Act.

2.2 Under the aforesaid circumstances, the complainant thought fit to lodge the complaint at the police station.

2.3 On the complaint being lodged the investigation had commenced. The inquest panchnama, Exh.30, of the dead body of the deceased was drawn in presence of the panch witnesses. The panchnama of the place of occurrence, Exh.24, was drawn in presence of the panch witnesses. The dead body of the deceased was sent for postmortem examination and the postmortem report, Exh.51, revealed that the cause of death was "shock following septicemia following injury". Thereafter, all the accused persons were arrested. The statements of various witnesses were recorded. Finally on completion of investigation, the investigating officer filed charge sheet against all the accused persons in the Court of the Judicial Magistrate, First Class, Vadodara. As the case was exclusively triable by the Sessions Court, the Judicial Magistrate, First Class, Vadodara, committed the case to the Sessions Court under Section 209 of the Criminal Procedure Code.

2.4 The Sessions Court framed the charge against the accused persons at Exh.6 for the offence punishable under Sections 302, 323 and 114 of the IPC as well as Section 135 of the Bombay Police Act and the plea of the accused were recorded wherein the accused persons did not admit the charge and claimed to be tried.

2.5 The prosecution adduced in all twenty oral evidences and twenty one documentary evidences in support of its case;

2.6 After completion of oral as well as documentary evidence of the prosecution, the statements of the accused persons under Section 313 of the Criminal Procedure Code were recorded in which the accused persons stated that the complaint was a false one and they were innocent.

2.7 At the conclusion of the trial, the learned trial Judge convicted the appellant-accused of the offence under Section 302, 323 and 114 of the Indian Penal Code as well as Section 135 of the Bombay Police Act and sentenced him to undergo simple imprisonment of seven years with fine of Rs.2000/-, and in default to make the payment of fine, further simple imprisonment of three months. whereas the rest of the accused persons came to be acquitted of all the charges.

2.8 Being dissatisfied with the judgment and order of conviction and sentence, the accused-appellant has come up with the present appeal.

[3] Contentions ON BEHALF OF THE ACCUSEDAPPELLANT:-

3.1 Learned advocate Mr. Maulin Pandya appearing for the appellant-accused vehemently submits that the trial Court committed a serious error in convicting the accused-appellant for the offence of murder while acquitting the other co-accused persons on the same set of evidence. As per the case of the prosecution, there were three eye-witnesses to the incident in question, however, at the time of considering and appreciating the evidence of those eye-witnesses, the learned trial judge has completely discarded their evidence and recorded the findings to the effect that the depositions of those eyewitnesses do not inspire any confidence as they cannot be considered as the eye-witnesses. It is further recorded that at the most, they can be termed as chance witnesses who might reach at the scene of offence after occurrence of the incident, and by giving such findings, the trial judge has completely discarded the evidence of the three so called eye-witnesses, and based upon such findings, the learned trial judge has acquitted the other co-accused persons, and the said judgment and order of acquittal has not been assailed by the State any further and thus the said findings recorded by the trial court has attained finality. He further submits that, therefore, in the absence of any eye-witness, the case of the prosecution would automatically turn into a case hinges upon the circumstantial evidence, and it is the settled proposition of law that in a case of circumstantial evidence, the prosecution is required to establish the continuity in the links of the chain of the circumstances so as to lead to the only and inescapable conclusion of the accused being the assailant,

inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused. He further submits that if a single link is missing, then the benefit of doubt should always go in favour of the accused. Mr. Pandya also submits that if the oral evidences of the prosecution may be seen, there are so many discrepancies, omission and improvements in the depositions of the witnesses, and despite the said contradictions and discrepancies in the evidence of the key witnesses apparent on the face of it, yet the learned trial judge has passed an order of conviction, which is required to be interfered with.

3.2 Learned advocate Mr. Pandya submits that while convicting the appellant-accused, the learned trial court has given much weightage to the evidence of the Executive Magistrate who recorded the dying declaration of the deceased. In his deposition, the said witness has categorically stated that he went to the hospital for recording the dying declaration after 48 hours of the incident, which has not been taken note of by the learned trial judge. The trial judge has also erred in appreciating the fact that before giving the dying declaration to the Executive Magistrate, a history was given to the doctor by the deceased at the very fist in point of time when he was brought to the hospital, wherein the deceased had stated that as he fell down from the terrace, he was hit by the metal sheet and, therefore, sustained injuries. Even at the time of giving the Janva Jog entry before the police who was present over there in the hospital, the same version was given by the deceased. Subsequently, before the Executive Magistrate, an altogether a different story was narrated by the deceased and, thus, there are two contradictory statements made by the deceased before the different authorities, and in such a situation, the learned trial judge has to give specific findings to the effect that from the two different set of evidences available on record, why a particular piece of evidence is being given more weightage, discarding another, which the learned trial judge has failed to do in the present case, and solely relying upon the dying declaration given before the Executive Magistrate without thee being any corroborative piece of evidence to the same, order of conviction cannot be passed. He submits that in his dying declaration, the deceased has mentioned that Mukesh had inflicted a knife blow to him, but which Mukesh, as there are two accused named as Mukesh. Thus, the said evidence is also shaky and cannot be relied upon to pass an order of conviction.

3.3 Learned advocate Mr. Pandya submits that none of the circumstances emerging from the record of the case points towards the guilt of the accused-appellant. According to Mr. Pandya, the theory of homicidal death due to stab injuries advanced by the prosecution is not fully established by the medical evidence on record. Mr. Pandya submits that none of the circumstances on which reliance has been placed by the trial Court in convicting the accused-appellant are conclusive in nature. Mr. Pandya further submits that the prosecution has cited three witnesses as the eye-witnesses and all those so called three eye-witnesses are the family members of the

deceased and, therefore, what has been stated by them in their testimonies cannot be believed as the gospel truth. Moreover, as per the case of the prosecution, the so called incident had occurred at a public place in the night hours of 31.12.2001, and generally on the last day of the year, i.e, on 31st December, there is a frequent movement of the people even in the late night, however, except the interested witnesses, the prosecution has not examined any independent witnesses who can be called as the actual eye-witnesses. Mr. Pandya also submits that the complainant, in his crossexamination, has admitted the fact that after the incident, at the very first instance when they took the deceased to the hospital, they informed the police as well as to the doctor present over there in the S.S.G. Hospital that as the deceased went over the roof to adjust the antenna of the T.V., he fell down from the roof and sustained such an injury being hit by metal sheet. Even they did not bother to register the FIR on that day and on 02.01.2002, at the instance of the police, they gave a written complaint to the police. The police started investigation after two to three days from the incident and the dying declaration of the deceased also came to be recorded after two to four days from the incident and during that period, the deceased was in a conscious state of mind. Learned advocate Mr. Pandya submits that however subsequently they have changed their version and came with altogether a different story and stated that the deceased was beaten by the appellant-accused and he inflicted knife blow to the deceased following the altercation took place between them on the fateful day. Learned advocate Mr. Pandya further submits that the medical officer who treated the deceased has also deposed in his deposition at Exh.41 that when the deceased was taken to the hospital, the deceased himself had given history before him wherein the deceased stated that as he fell down from the roof, he sustained injuries. Moreover, it is an admitted position of fact and as averred in the complaint itself that the complainant side and the accused were having inimical terms and, therefore, with a view to teach lesson to the accused and to settle the score, he might have been implicated in the present crime with a malice. Mr. Pandya also submits that the dying declaration of the deceased also came to be recorded after 48 hours from the incident. In his cross-examination, the said witness PW-14, Exh.43, has admitted that when he reached to the hospital he straightway went to the deceased without contacting and obtaining certificate from the concerned medical officer as regards as to whether the injured victim was in a full conscious state of mind to give the statement in a proper manner and, therefore, reliability of the said dying declaration is also doubtful as the Executive Magistrate himself did not follow the prescribed procedure and thereby committed a grave error. Further, the deceased died after almost 11 days and as per the deposition of the medical office at Exh.50 wherein he has stated that the cause of death of the deceased might be due to 'pus cell and decay' and, therefore, looking to the evidence of the said vital witness, the appellant-accused is entitled to get the benefit of doubt. To bolster his submissions, learned advocate Mr. Pandya relies upon the following case laws;

i) In the case of **Irfan @ Naka vs. State of Uttar Pradesh**, 2023 AIR(SC) 4129;

ii) In the case of Suchand Pal vs. Phani Pal,2003 0 AIJEL 30631; (SC)

iii) **Phulel Singh vs. State of Haryana**, 2023 AIR(SC) 4653;

iv) In the case of Harisinh Motisinh Jodha vs. State of Gujarat, Criminal Appeal No.2010 of 2004;

3.4 In such circumstances, referred to above, Mr. Pandya prays that there being merit in the appeal, the same deserves to be allowed.

[4] Contentions ON BEHALF OF THE STATE:-

4.1 Ms. Monali Bhatt, learned Additional Public Prosecutor appearing for the State has vehemently opposed the present appeal. Ms. Bhatt submits that the trial Court committed no error in finding the appellant-accused guilty of the offence of murder. Ms. Bhatt supported the impugned judgment and argued that PW Nos.1 to 3 cannot be discredited simply because they happen to be the brother, mother and sister-inlaw of the deceased and that their statements were very natural and logical. She further submits that the complainant in the present case is the eye-witness who claimed to have witnessed the unfortunate incident. In the present case, the prosecution has, in all, examined significant witnesses consisting of the eye-witnesses, doctors, panch witnesses and the Executive Magistrate as well as also produced the documentary evidence including the dying declaration of the deceased. Ms. Bhatt submits that all the eye-witnesses have very categorically stated in their depositions that the accused Mukesh Mohanbhai stabbed the deceased with a knife on his stomach, which is corroborative with the dying declaration, medical papers and the contents of the FIR. She also submits that the prosecution has successfully proved its case through medical evidence and the evidence of the eye-witnesses are completely supported by the medical evidence and, therefore, their evidence can be believed to be true. Ms. Bhatt submits that even in the dying declaration given by the deceased before the Executive Magistrate, he has specifically given the name of the appellant-accused as one of the assailants who inflicted knife blow to him, which also supports the case of the prosecution. She submits that initially the complainant and his family members did not disclose the correct fact before the police and the doctor due to the threats administered by the accused persons, however, later they gathered the courage and registered the FIR by narrating true and correct facts and, therefore, merely relying upon the initial story given by the complainant, the entire case of the prosecution cannot be brushed aside.

4.2 Learned APP Ms. Bhatt submits that it is a settled proposition of law that when the dying declaration of the deceased itself is found to be credible, believable and inspires confidence, then there is no corroborative evidence is required to establish

the guilt of the accused. Admittedly, in the case on hand, the prosecution has proved its case beyond reasonable doubt by leading cogent and convincing evidences, and relying upon piece of evidences, more particularly the dying declaration given before the Executive Magistrate, the learned trial judge has rightly passed an order of conviction, which does not require any interferecne.

4.3 Ms. Bhatt submits that the appellant-accused is a headstrong person and there was an ongoing enmity between the complainant side and the accused persons due to some earlier disputes and, therefore, the fact of incident of quarrel took place between the accused persons and the deceased on the fateful day cannot be completely ruled out and the medical evidence also suggests that there was a stab injury on the stomach of the deceased which can be caused by some sharp weapon. Learned APP Ms. Bhatt lastly submits that it is a settled proposition of law that if the person recording the dying declaration is satisfied that the declarant is in a fit medical condition to make a dying declaration, then such dying declaration will not be invalid solely on the ground that the doctor has not certified as to the condition of the declarant to make the dying declaration. In support of her submission, learned APP Ms. Bhatt has put reliance upon the following precedents;

i) In the case of Muthu Kutty & Anr. vs. State by Inspector of Police, T.N., 2005 9 SCC 113;

ii) In the case of Atbir vs. State (Govt. Of NCT of Delhi),2010 0 AIJEL 48718. (SC);

4.4 In such circumstances, referred to above, Ms. Bhatt prays that there being no merit in the conviction appeal, the same deserves to be dismissed.

ANALYSIS

[5] I have carefully examined the trial court record, perused the testimony of the witnesses and the medical evidence and given my thoughtful consideration to the arguments advanced by both sides.

[6] Before embarking on examining the evidence brought on record, it may be noted that there is no direct evidence in the present case to connect the accused with the offence in question and the case of the prosecution rests solely on circumstantial evidence. I am saying so because the persons who are cited as the eye-witnesses are the interested witnesses who happens to be the real brother, mother and sister-in-law of the deceased and they have not elaborated the entire sequence of events of the incident that had taken place on the fateful day and, therefore, the trial court in the impugned judgment itself has made detailed discussion in this regard and given the findings to the effect that the said witnesses cannot be termed as the eye-witnesses as they might have reached to the place of offence immediately after the occurrence of the incident and the said findings of the trial court has not been challenged by the prosecution side

and thus has attained finality. Thus, after the said findings of the trial court rendered in the final judgment whereby the other co-accused have been acquitted, the entire case of the prosecution would now become the case based on circumstantial evidence. Thus, keeping this aspect in mind, it is necessary to state the law relating to circumstantial evidence. It is well settled that in a case of circumstantial evidence, the cumulative effect of all the circumstances proved, must be such as to negative the innocence of the accused and to bring home the charge beyond reasonable doubt. [Refer: **Prem Thakur vs. State of Punjab**, 1983 CrLJ 155, **Ram Avtar vs. State (Delhi Administration)**, 1985 CrLJ 1865 and **State of Tamil Nadu vs. Rajendran**, 1999 AIR(SC) 3535]

[7] Let me at the outset, before delving into the issue as regards the circumstantial evidence, reproduce the excerpt in the form of a Quote of an American Philosopher from the judgment of the Hon'ble Apex Court in the case of Ramanand @ Nandlal Bharti vs. State of Uttar Pradesh, Criminal Appeal Nos.64-65 of 2022, penned by His Lordship Justice J.B. Pardiwala, as under;

> 1. Mark Twain, the great American writer and philosopher, once said:
>
> "It is like this, take a word, split it up into letters, the letters, may individually mean nothing but when they are combined they will form a word pregnant with meaning. That is the way how you have to consider the circumstantial evidence. You have to take all the circumstances together and judge for yourself whether the prosecution have established their case."

[8] It is well settled that the following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established.

> (i) The circumstance from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.
>
> (ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.
>
> (iii) The circumstances should be of a conclusive nature and tendency.
>
> (iv) They should exclude every hypothesis but the one to be proved, and
>
> (v) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that within all human probability the act must have been done by the accused.

[9] A case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction.

[10] In **Padala Veera Reddy vs. State of Andhra Pradesh & Ors**, 1989 Supp2 SCC 706, the Supreme Court had laid down the tests that must be satisfied in a case that rests upon circumstantial evidence as follows:-

> "10. Before adverting to the arguments advanced by the learned counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:-
>
> (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

[11] Keeping in mind the aforesaid principles of law, I shall now proceed to examine the relevant circumstances that are appearing in the present case.

[12] P.W.No.1-Complainant, i.e, the brother of the deceased, namely, Kishanbhai Ramabhai Marvadi has deposed in his examination-in-chief that the incident in question took place on 31.12.2001 at around 11:30 in the night and at that time he was present over there. He has also deposed that the cause for occurrence of the incident was due to some past enmity. It has been further deposed that at the time of the incident, accused Mukesh Mohanlal was having knife in his hand, accused Babubhai was having stick accompanied by accused Rameshbhai Mohanlal Marvadi and accused Mukesh Nemaji Marvadi. It has also been deposed by the said witness that accused Mukesh Mohanlal Marvadi, i.e, the appellant inflicted knife blow to the deceased Kantibhai and, therefore, they took the deceased to the stairs of the temple where he became unconscious. Thereafter, the said witness, accompanied by his mother and one another person, took the deceased Kantibhai to S.S.G Hospital for treatment where a mob of almost 15 to 20 persons of Marvadi community immediately came at the hospital and tried to lure the complainant that they will bear the entire expenses of the

deceased likely to be incurred behind his treatment and threatened him not to register a complaint, otherwise, the complainant will also have to face the same consequences. Therefore, for about two days, they did not register the complaint. It has been further deposed that then on the next day, they all went to the police station to register the complaint and explained the delay in registering the complaint. Thereafter, upon insistence of the police to file a written complaint, he gave a written complaint to the police. In his examination-in-chief, the said witness had also identified the knife used in the commission of the offence.

[13] In his cross-examination conducted by the defense counsel, the P.W. No.1-complainant has admitted that there was a civil litigation going on between the accused and the complainant side and accused Babubhai got the stay in his favour on the basis of the will and the said suit is still pending. He has admitted in his cross-examination about the occurrence of the incident on 31.12.2001. The said witness has also admitted in his cross-examination that when they took deceased Kantibhai to the S.S.G. Hospital, at the very first instance when the police and the doctor present over there asked about the cause of injuries received by the deceased, they told them that as there was 31st December, various year ended programs were running on the TV and, therefore, deceased Kantibhai went to the terrace to adjust the antenna and fell down down from the terrace, due to which, Kantibhai sustained injuries being hit by metal sheet. He has also admitted in his cross-examination that the area where they are residing is a very dense locality and due to 31st December, there was a frequent movement of the people and people were awaken. He has also admitted that the Executive Magistrate came after two to three days and at that time, his deceased brother was in a conscious state of mind. The said witness in his cross-examination has also admitted that in the Exh.18 complaint, he has not stated that the mob of 15 to 20 people of Marvadi community came to the hospital and threatened them not to register the complaint and, therefore, they did not register the complaint on that day. He has also admitted that his brother was treated as an indoor patient for about 11 to 12 days and he was operated twice due to some medical complications in the first operation, and after the second operation due to septicemia, the health condition of his brother got more critical. He has also admitted that after the second operation, within a period of two to four days, his brother had died.

[14] Thus, there are vast discrepancies in the Exh.18 complaint filed by the complainant and his testimony recorded during the trial. On one hand, in the FIR which can be called as a report that reaches the police first in point of time, the complainant has stated that before the occurrence of the incident in question, there was quarrel between accused Babubhai and one person of the Marvadi community wherein the deceased had intervened to segregate them. Thereafter, after some time, when the deceased was going for urinating towards the canal, the accused persons stopped him and started quarreling with the deceased which resulted in foul play. On the other

hand, in his examination-in-chief as also in his cross-examination, there is no mention about the quarrel that had taken place just prior to the incident. Further, in his complaint, the complainant has stated that after the incident, when his deceased brother was coming towards the house in a wounded condition, the complainant and his mother rushed to the deceased and at that point of time, all the accused already fled away. Contrary to the same, in his examination-inchief, at the very outset, the complainant has deposed that he was present at the time of the incident. Thus, there appears to be vast contradictions in the evidence of the complainant itself.

[15] Pw No.2-Jamnaben, the mother of the deceased and the complainant has deposed in his examination-in-chief that they had a quarrel with accused Babu Samna regarding execution of will by one Suresh and cross-complaint were filed by them in this regard. She has further deposed that Mukesh was having the knife and inflicted blow with the same to his son. She was present at the time of the said incident. She has also deposed that all the accused persons came to the hospital along with the other people and threatened them not to register the complaint.

[16] In his cross-examination, the PW No.2 has admitted that she and her son Kishan took the deceased Kantibhai to the hospital and none else was there along with them. She has also admitted that when they took the deceased to the hospital, they told the police and the doctor present over there that as his son went to the terrace, he fell down and sustained injuries being hit by metal sheet. She has also admitted that the place where the incident took place was a very dense area.

[17] Thus, there appears to be vast contradictions in the testimonies of the PW No.1 and PW No.2. In the evidence of the PW No.1, he has stated that mob of 15 to 20 people of Marvadi community came to the hospital and threatened them and not the accused persons. whereas the evidence of the PW No.2 states that all the accused persons came to the hospital and administered threat to them. She has also deposed that she was present at the time of the incident whereas in the complaint, the complainant has stated that they rushed to the deceased after seeing him coming towards the house.

[18] Pw. No.3- Paliben Kishanbhai Marvadi, the sister-in-law of the deceased has deposed in her examination-in-chief that accused Mukesh killed the deceased with knife and she had witnessed the said incident.

[19] Pw No.3, in her cross-examination, has stated that after the occurrence of the incident, police came at the place of offence after 10 to 15 minutes and at that time, police had interrogated her. She has also stated in her cross-examination that the quarrel continued for about ten minutes and people from the vicinity also gathered there.

[20] The above evidence of the PW No.3 makes the picture more clear. She has stated in her cross-examination that after 10 to 15 minutes of the incident, police

reached at the place of occurrence and interrogated her. Now the question that arises is that when the complaint was registered on the next day, then how the police could reach at the scene of offence as there was no compliant registered till that time. Thus, the version given by the PW No.3 is also contradictory to the versions given by the PW Nos.1 and 2. Even the PW No.1 in his cross-examination has stated that on 01.01.2002, neither police came to the hospital nor they went to the police station.

[21] Thus it appears from the above that all the three key witnesses have given contradictory versions in their depositions and such contradictions are vast contradictions, which cannot be ignored while deciding the conviction appeal.

[22] Pw No.13-Dr. Uday Hriday Prakash Exh.41, who gave the preliminary treatment to the deceased has stated in his examination-in-chief that the deceased was brought to the hospital at around 12:15 by the complainant. The deceased was injured and there was a wound on the left side of his stomach and the patient was in a conscious state of mind at that point of time. He has further deposed that at that time, the deceased had given a history before him that as he fell down from the terrace, he sustained injuries.

[23] Pw No.14- Jayantilal Manilal Salot-an Executive Magistrate, Exh.42 has deposed in his examination-in-chief that he received a Vardhi on 02.01.2002 at around 10:45 in the night. Therefore, he reached at the S.S.G. Hospital and started recording the dying declaration of the deceased. The certificate of the doctor was also obtained. He has further deposed that the deceased in his dying declaration has stated that Mukesh had inflicted knife blow to him. However, the said witness, in his cross-examination has stated that after reaching the hospital, he did not contact the doctor and straightway went to the deceased for recording dying declaration. He has further admitted that after the recording of the dying declaration, the endorsement of the doctor was obtained.

[24] Pw No.16- Dr. Hareshbhai Budhabhai Kothari, Exh.50, who conducted the autopsy has deposed in his examination-inchief that when the body of the deceased was brought for the postmortem, there was a bleeding from the nose and mouth of the deceased. In his entire examination-in-chief, the said witness has only disclosed the nature of the injuries, however, he has specifically stated that number of incised wounds were found on the body of the deceased having stench septicemia. The said witness in his cross-examination has admitted that except one vertical injury, all those injuries were surgical injuries. He has also admitted in his cross-examination that the cause of death given by him is due to increase in the septicemia which can be happened due to side effects of the medicine.

[25] From the cumulative assessment of the aforesaid evidences, it appears that the accused and the complainant side were having some inimical terms as apparent from the body of the complaint itself and they all were residing in the same vicinity.

The incident alleged to have taken place on 31.12.2001 at a public place at around 11:30 hours in the night. It appears that in the FIR it is stated that when the deceased was going for urinating towards the canal, he was stopped by the accused persons and brutally beaten by them, however, I am unable to find anywhere in the entire body of the complaint that whether the complainant was accompanying the deceased or not and how he came to know about the occurrence of the incident. It has not been stated anywhere in the complaint that whether he rushed to the place of occurrence on some noise of quarrel being heard by him or whether somebody informed him about the said quarrel. The complaint is completely silent about the same. The record further reveals that in the complaint, the complainant has stated that after the incident, when the deceased was returning home and slumped on the road, the complainant and his mother rushed to him and found the deceased wounded lying on the road, whereas in his examination-in-chief, he has stated at the very outset that he was present at the time when the alleged incident took place. Therefore, there are contradictory statements made by the complainant in the complaint and in his examination-in-chief. The postmortem report (Ex.51) mentions that no other injury was noticed on the dead body except the wound on the stomach and as per the case of the prosecution, some altercation took place between the deceased and the accused persons and there was a free fight between them. However, the PM report does not reflect any swelling injuries on the body of the deceased. As per the PM Note Exh.51, the cause of death is due to " shock following septicemia following injury", which as per the evidence of the medical officer recorded by the defense side, can be due to not lack of proper treatment. Moreover, as per the evidence of the P.S.I. Shri Jayantilal Manganlal Sharma, Exh.53, initially a Janva Jog entry was given to the police wherein all the witnesses had given the information that the deceased went to the roof of the house to adjust the antenna of the TV and fell down from the roof due to which he sustained injuries being hit by metal sheet. The medical officer Dr. Uday Prakash in his deposition at Exh.41 has also deposed that when the deceased was brought to the hospital, he stated before him that he fell down from the roof and sustained the injuries. This Court has also taken note of the fact that the dying declaration of the deceased came to be recorded after 48 hours of the incident and in the said dying declaration he has stated that Mukesh inflicted knife injuries to him, however, it was not clearly stated by the deceased that which Mukesh inflicted injuries to him as there are two accused persons having similar name as Mukesh.

[26] Thus, it appears that all the above referred evidences are corroborative to each other and predominantly supporting the case of the defense side and not the prosecution. It is the case of the prosecution that the alleged incident took place on 31.12.2001 in the night hours and there was a frequent movement of the people on the road due to last calendar day of the year. However, not a single independent witness has been examined by the prosecution. All the witnesses are either the family members of the deceased or the police witnesses as well as the medical officers.

[27] The next important question is as to whether the circumstances attending the case establish the guilt of the accused satisfactorily and unerringly so as to incriminate him with the crime of murder. The prosecution has heavily relied on the testimonies of PW Nos. 1 to 3 who are the brother, mother and sister-in-law of the deceased and has sought to draw an inference against the guilt of the appellant on the following circumstances:-

(i) That the appellant-accused had an enmity with the deceased and his family members due to some earlier disputes;

(ii) On the fateful day, when the deceased was going for urinating towards the canal, the accused persons caught the deceased and started quarreling with the deceased;

(iii) That in the night hours of 31.12.2001, during such quarrel, the appellant-accused inflicted knife blow to the deceased and fled from the spot;

[28] Now coming to the argument advanced by the defense side that the evidences of PW Nos.1 to 3 stand discredited as they are the interested witnesses, it is a well settled rule of prudence that the evidence of a related or interested witness should be examined very meticulously. In circumstances where the related/interested witness has some enmity with the accused, then the yardstick for evaluating his evidence should be more stringent and the scrutiny, doubly so. The law with regard to appreciation of evidence of a related and/or interested witness has been explained by the Supreme Court in **Dalip Singh vs. State of Punjab**, 1954 SCR 145, in the following words:-

"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation, is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

[29] In **Darya Singh vs. State of Punjab**, 1965 AIR(SC) 328, the following are the observations made by the Supreme Court on evaluation of evidence of an interested witness:-

"6. There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal courts examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.....It may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of the enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars." (emphasis added)

[30] In **Sarwan Singh v. State of Punjab**, 1976 4 SCC 369, the Supreme Court held as under:-

"10. .....The evidence of an interested witness does not suffer from any infirmity as such, but the courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth, such evidence could be relied upon even without corroboration."

[31] In **Kartik Malhar vs. State of Bihar**, 1996 1 SCC 614, the Supreme Court opined that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

[32] In **Jayabalan v. UT of Pondicherry**, 2010 1 SCC 199, once again, the Supreme Court highlighted the caution required to be taken in appreciating the evidence given by the interested witness as under:-

> "23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency."
>
> (emphasis added)

[33] I may also profitably refer to **Raju vs. State of Tamil Nadu**, 2012 12 SCC 701 where the Supreme Court held as follows:-

> "24. For the time being, we are concerned with four categories of witnesses - a third party disinterested and unrelated witness (such as a bystander or passer-by); a third party interested witness (such as a trap witness); a related and therefore an interested witness (such as the wife of the victim) having an interest in seeing that the accused is punished; a related and therefore an interested witness (such as the wife or brother of the victim) having an interest in seeing the accused punished and also having some enmity with the accused. But, more than the categorization of a witness, the issue really is one of appreciation of the evidence of a witness. A court should examine the evidence of a related and interested witness having an interest in seeing the accused punished and also having some enmity with the accused with greater care and caution than the evidence of a third party disinterested and unrelated witness. This is all that is expected and required."
>
> (emphasis added)

[34] A glance at the above decisions makes it clear that the evidence of an interested and/or related witnesses should not be examined with a coloured vision simply because of their relationship with the deceased. Though it is not a rule of law, it is a rule of prudence that their evidence ought to be examined with greater care and caution to ensure that it does not suffer from any infirmity. The court must satisfy itself that the evidence of the interested witness has a ring of truth. Only if there are no contradictions and the testimony of the related/interested witness is found to be credible, consistent and reasonable, can it be relied upon even without any corroboration. At the end of the day, each case must be examined on its own facts. There cannot be any sweeping generalisation.

[35] At this stage, before I conclude, it is worth noting that the deceased when brought to the hospital, has stated before the doctor that as he slumped from the terrace, he sustained such injuries. Subsequently, before the Executive Magistrate, the deceased gave altogether a different story. Thus, there are two contradictory statements/dying declarations of the deceased on record and the question that arises is whether which one is to be considered as trustworthy. It is on record that the dying declaration by the Executive Magistrate was recorded after 48 hours of the incident. Now the question arises what would have been if the deceased died immediately after being brought to the hospital. In that case, we would have left with no other option but to consider the history given by the deceased at the first in point of time before the doctor as the dying declaration, wherein he stated that he sustained injuries being hit by metal sheet when he fell down from the terrace. The factors to be considered while determining the dying declaration has been very elaborately discussed by the Hon'ble Apex Court in a decision penned by His Lordship Justice J.B. Pardiwala in the case of Irfan @ Naka vs. State of U.P.,2023 SCCOnlineSC 1010, the relevant observations of which, are as follows;

> "DYING DECLARATIONS VIS-A-VIS ORAL EVIDENCE OF THE EYE-WITNESSES ON RECORD
>
> 39. The picture that emerges on cumulative assessment of the materials on record is that the appellant-convict had strained relationship with his son Islamuddin (deceased) born in the wedlock of his first marriage with Ishrat. His relations with his two brothers (deceased persons) were also strained. The defence put forward by the appellant-convict is that with a view to grab the property, PW-2 Shanu alias Shahnawaz, PW-4 Soni and others conspired to eliminate the deceased persons and thereafter, to throw the entire blame on the appellantconvict of having committed the crime. The incident occurred in the night hours. The three deceased were sleeping in one room. The PW-2 and PW-4 are said to have been sleeping in an adjoining room in the house. The appellant-convict is said to have locked the door of the room from outside in which, the deceased persons were sleeping. He poured inflammable substance in the room and set the room on fire. The three deceased persons suffered severe burn injuries and ultimately succumbed to death. Islamuddin and Irshad are said to have given their dying declarations before the A.S.I. as referred to above. Why the dying declaration of Naushad could not be recorded is not clear. A close perusal of the two dying declarations indicates that Irshad and Islamuddin raised alarm on getting severely burnt and they were taken out of the room by the neighbour. Who is this neighbour, they are referring to in their dying declarations is also not clear? At the same time, it is pertinent to note that the Irshad and Islamuddin in their respective dying declarations do not say a word about the presence of the PW-2 Shanu alias

Shahnawaz and PW-4 Soni. Both these witnesses do not figure in the two dying declarations. It is also pertinent to note that in both the dying declarations it has been very clearly stated that after a long time a neighbour came to their rescue and took them out of the burning room.

40. Keeping the aforesaid in mind, if we look into the oral evidence of the PW-2 Shanu alias Shahnawaz then according to him, he along with his sister Soni (PW-4) noticed fire in the room in which the deceased persons were sleeping. According to the PW-4, she also witnessed the appellant- convict pouring kerosene and setting the room on fire in which, the deceased persons were sleeping. PW-2 also claims to have witnessed, the appellant-convict fastening the door latch from outside and thereafter, running away from that place. In the same manner, if we closely look into the oral evidence of the PW-4 Soni, then according to her on seeing the flames of fire in the room, in which the deceased persons were sleeping, she immediately opened the door and saw that the appellant-convict was running from the roof towards the stairs. The PW-4 claims that Amzad and Shafiq also saw the appellant-convict running away. Amzad and Shafiq have not been examined as the prosecution witnesses. It is not clear whether police even recorded the statements of Amzad and Shafiq under Section 161 of the CrPC?

41. If PW-2 and PW-4 were present at the time when the room was on fire and it is they who opened the door and took out the three deceased persons, then why the PW-2 and PW-4 do not figure in the dying declarations of Irshad and Islamuddin? Why Islamuddin and Irshad said in their dying declarations that after a long time, the neighbour came to their rescue and took them out of the room? If a neighbour came to their rescue, then where were PW-2 and PW-4 at the time of the incident? PW-2 and PW-4 have deposed that they both were sleeping in the room adjacent to the room in which the deceased persons were sleeping. This is one very crucial aspect of the matter which, the prosecution has not been able to explain or clarify.

42. In such circumstances referred to above, we are left with either to believe the dying declarations or the oral evidence of the two so called eye- witnesses to the incident. It is also important to note that the PW-4 Soni, in her cross-examination has stated that to the best of her knowledge, Islamuddin and Naushad had fastened the latch from inside. If the door of the room, in which the deceased persons were sleeping was closed from inside, then how did the appellant-convict manage to open the door and enter the room so as to set the room on fire as alleged?

43. The juristic theory regarding the acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to

falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason, the requirements of oath and cross- examination are dispensed with. Since the accused has no power of cross- examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, should always be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. See: **Laxman v. State of Maharashtra**, 2002 6 SCC 710.

44. The mode and manner, in which the dying declarations came to be recorded, is also something which creates a doubt, as regards its truthfulness and trustworthiness. Although, the Investigating Officer says that the recording of the dying declarations was videographed and the CD has been exhibited in evidence yet it is very important to determine the evidentiary value of the same.

45. We should also look into the genesis of the occurrence from a different angle. It is not in dispute that the three deceased died on account of severe burn injuries. It is also not in dispute that the room in which they were sleeping caught fire on account of which they suffered severe burn injuries. It is also not in dispute that inflammable substance like kerosene was found from the room which ignited the fire. However, the moot question is who set the room on fire? Could it be said that the prosecution has been able to prove beyond reasonable doubt that it was only and only the appellant-convict who set the room on fire by pouring the inflammable substance?

46. It appears to us that whoever did the act, the inflammable substance was not directly poured or sprinkled on the three deceased persons. Had it been so, they would have immediately woken up and by the time, the room is sat on fire, they would make good their escape or catch hold of the culprit. It appears that the inflammable substance might have been poured on the floor of the room and thereafter, the fire must have been ignited. Once, the room is on fire, the person responsible for setting the room on fire would immediately leave that place. We find it very difficult to believe that the appellant-convict was still inside the room or even outside the room to be witnessed by the deceased persons as well as by the PW-2 and PW-4, locking the room from outside after setting the room on fire. The conduct of the accused may be unnatural because he was residing in the very same house, however, the

conduct which may be a relevant fact under Section 8 of the Indian Evidence Act, 1872 (for short, 'the Act 1872'), by itself may not be sufficient to hold a person guilty of the offence of murder.

47. On overall assessment of the materials on record, we have reached to the conclusion that neither the two dying declarations inspire any confidence nor the oral evidence of the PW-2 and PW-4 respectively inspire any confidence. Had the dying declarations stood corroborated by the oral evidence of the PW-2 and PW-4, then probably, it would have been altogether a different scenario. However, as noted above, the two dying declarations are not consistent or rather contradictory to the oral evidence on record.

48. The justification for the sanctity/presumption attached to a dying declaration, is two fold; (i) ethically and religiously it is presumed that a person while at the brink of death will not lie, whereas (ii) from a public policy perspective it is to tackle a situation where the only witness to the crime is not available.

49. One of the earliest judicial pronouncements where the rule as above can be traced is the King's Bench decision of the **King v. William Woodcock**, 1789 1 Leach 500: 168 ER 352, where a dying woman blamed her husband for her mortal injuries, wherein Judge Eyre held this declaration to be admissible by observing: -

"...the general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone: when every motive to falsehood is silent, and the mind is induced by the most powerful consideration to speak the truth; a situation so solemn, and so awful, is considered by the law as creating obligation equal to that which is imposed by a positive oath administered in a Court of Justice. (b) But a difficulty also arises with respect to these declarations; for it has not appeared and it seems impossible to find out, whether the deceased herself apprehended that she was in such a state of morality as would inevitably oblige her soon to answer before her Maker for the truth or falsehood of her assertions. .... Declarations so made are certainly entitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled must always be a matter for the sober consideration of the Jury, under all the circumstances of the case."

(Emphasis supplied)

50. Interestingly, the last observation of Judge Eyre showcases, even at the inception of this principle, that the Courts were wary of the inherent weakness of dying declarations and cautioned for great care to be adopted.

51. It is significant to note the observations made by Taylor that "Though these declarations, when deliberately made under a solemn sense of impending death, and concerning circumstances wherein the deceased is not likely to be mistaken, are entitled to great weight, if precisely identified, it should always be recollected that the accused has not the power of cross examination, a power quite as essential to the eliciting of the truth as the obligation of an oath can be, and that, where a witness has not a deep sense of accountability to his Maker, feelings of anger or revenge, or, in the case of mutual conflict, the natural desire of screening his own misconduct, may effect the accuracy of his statements and give a false colouring to the whole transaction. ...". [See: Taylor on "Treatise on the Law of Evidence", 1931, 12th Edition Pg. 462]

52. It is observed in Corpus Juris Secundum Vol XL, Page 1283 that:

"In weighing dying declarations, the jury may consider the circumstances under which they were made, as, whether they were due to outside influence or were made in a spirit of revenge, or when declarant was unable or unwilling to state the facts, the inconsistent or contradictory character of the declarations, and the fact that deceased has not appeared and accused has been deprived of the opportunity to cross- examine him, and may give to them the credit and weight to which they believe, under all the circumstances, they are fairly and reasonably entitled."

53. In India in the relevant provision of Section 32 of the Act 1872, the first exception to the rule against admissibility of hearsay evidence, is as under:

"32(1). When it relates to cause of death.- When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

54. Jon R. Waltz, American Jurist observed that, "It has been thought, rightly or wrongly, that Dying Declarations have intrinsic assurances of trustworthiness, making cross examination unnecessary. The notion is that a person who is in the process of dying, and knows it, will be truthful immediately before departing to meet his Maker. (Of course, the validity of this hearsay exceptions is open to some debate. What about the person who is not deeply religious? What of the person who, as his last act, seeks revenge by falsely naming a life-long enemy as his killer? How reliable is the

perception and memory of a person who is dying?)" [See: Waltz, J.R. (1975) Criminal Evidence, Chicago: Nelson-Hall. pp.75-76]

55. The Privy Council in **Neville Nembhard v. The Queen**, 1982 1 AllER 183, on Section 32(1) of the Act 1872 opined that the evidence of dying declaration under the Indian law lacks the special quality as in Common Law and hence, the weight to be attached to a dying declaration admitted under Section 32 of the Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules.

56. The below cited observations from the decision of Nembhard (supra) are of significant importance:

"final observation should be made concerning the cases al ready mentioned that have been decided in the Court of Appeal for Eastern Africa. It appears that rule of practice has been developed that when a dying declaration has been the only evidence implicating an accused person a conviction usually cannot be allowed to stand where there had been a failure to give a warning on the necessity for corroboration: see for example Pius Jasunga s/o Akumu v. The Queen,1954 21 EACA 331 and Terikabi v. Uganda,1975 EA 60. But it is important to notice that in the countries concerned, the admissibility of a dying declaration does not depend upon the common law test:

upon the deceased having at the time a settled hopeless expectation of impending death. Instead there is the very different statutory provision contained in section 32 (1) of the Indian Evidence Act 1872. That section provides that statements of relevant facts made by a person who is dead are themselves relevant facts:

"When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question."

(emphasis added).

In Pius Jasunga s/o Akumu v. The Queen it was pointed out (for the reason associated with the italicised words in the subsection) that the weight to be attached to a dying declaration admitted by reference to section 32 of the Indian Evidence Act 1872 would necessarily be less than that attached to a dying declaration admitted under the common law rules. The first kind of statement would lack that special quality that is thought to surround a declaration made by a dying man who was conscious of his condition and

who had given up all hope of survival. Accordingly it may not seem surprising that the courts dealing with such statements have felt the need to exercise even more caution in the use to be made of them than is the case where the common law test is applied."

57. This Court in **Muthu Kutty & Anr. v. State by Inspector of Police, T.N.**, 2005 9 SCC 113, while discussing the decision in Woodcock (supra) referred to above had cautioned the courts to ensure that a dying declaration is reliable before relying on it, with the following observations: -

"13. ... The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. These aspects have been eloquently stated by Eyre, L.C.B. in R. v. Woodcock,1789 1 Leah 500: 168 ER 352. Shakespeare makes the wounded Melun, finding himself disbelieved while announcing the intended treachery of the Dauphin Lewis explain:

"Have I met hideous death within my view, Retaining but a quantity of life, Which bleeds away even as a form of wax, Resolveth from his figure 'gainst the fire? What is the world should make me now deceive, Since I must lose the use of all deceit? Why should I then be false since it is true That I must die here and live hence by truth?" (See King John, Act V, Scene IV) The principle on which dying declaration is admitted in evidence is indicated in the legal maxim "nemo moriturus praesumitur mentire - a man will not meet his Maker with a lie in his mouth".

14. ... The situation in which a person is on the deathbed is so solemn and serene when he is dying that the grave position in which he is placed, is the reason in law to accept veracity of his statement. It is for this reason that the requirements of oath and cross-examination are dispensed with. Besides, should the dying declaration be excluded it will result in miscarriage of justice because the victim being generally the only eyewitness in a serious crime, the exclusion of the statement would leave the court without a scrap of evidence.

15. Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the court also insists that the dying declaration should be of such a nature as to inspire full confidence of the court in its correctness. The court

has to be on guard that the statement of the deceased was not as a result of either tutoring, or prompting or a product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailant. Once the court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. ..."

(Emphasis supplied)

58. This Court in **Nallapati Sivaiah v. Sub-Divisional Officer, Guntur, Andhra Pradesh**, 2007 15 SCC 465 and **Bhajju alias Karan Singh v. State of Madhya Pradesh**, 2012 4 SCC 327 had explained the meaning and principles of dying declarations upon which its admissibility is founded, with the following observations: -

"20. There is a historical and a literary basis for recognition of dying declaration as an exception to the hearsay rule. Some authorities suggest the rule is of Shakespearian origin. In The Life and Death of King John, Shakespeare had made Lord Melun utter "Have I met hideous death within my view, retaining but a quantity of life, which bleeds away, ... lose the use of all deceit" and asked, "Why should I then be false, since it is true that I must die here and live hence by truth?" William Shakespeare, The Life and Death of King John, Act 5, Scene 4, lines 22-29.

Xxx xxx xxx

22. It is equally well settled and needs no restatement at our hands that dying declaration can form the sole basis for conviction. But at the same time due care and caution must be exercised in considering weight to be given to dying declaration inasmuch as there could be any number of circumstances which may affect the truth. This Court in more than one decision has cautioned that the courts have always to be on guard to see that the dying declaration was not the result of either tutoring or prompting or a product of imagination. It is the duty of the courts to find that the deceased was in a fit state of mind to make the dying declaration. In order to satisfy itself that the deceased was in a fit mental condition to make the dying declaration, the courts have to look for the medical opinion.

23. It is not difficult to appreciate why dying declarations are admitted in evidence at a trial for murder, as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying

man. Nobody, it has been said, would wish to die with a lie on his lips. A dying declaration has got sanctity and a person giving the dying declaration will be the last to give untruth as he stands before his creator.

24. There is a legal maxim "nemo moriturus praesumitur mentire" meaning, that a man will not meet his Maker with a lie in his mouth. Woodroffe and Amir Ali, in their Treatise on Evidence Act state:

"when a man is dying, the grave position in which he is placed is held by law to be a sufficient ground for his veracity and therefore the tests of oath and cross- examination are dispensed with".

25. The court has to consider each case in the circumstances of the case. What value should be given to a dying declaration is left to court, which on assessment of the circumstances and the evidence and materials on record, will come to a conclusion about the truth or otherwise of the version, be it written, oral, verbal or by sign or by gestures." (Emphasis supplied)

59. This Court in Bhajju (supra) has observed as under:

"23. The "dying declaration" essentially means the statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting into his death. The admissibility of the dying declaration is based on the principle that the sense of impending death produces in a man's mind, the same feeling as that of a conscientious and virtuous man under oath. The dying declaration is admissible upon the consideration that the declaration was made in extremity, when the maker is at the point of death and when every hope of this world is gone, when every motive to file a false suit is silenced in the mind and the person deposing is induced by the most powerful considerations to speak the truth.

Xxx xxx xxx

26. The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. ...."

60. Since time immemorial, despite a general consensus of presuming that the dying declaration is true, they have not been stricto-sensu accepted, rather the general course of action has been that judge decides whether the essentials of a dying declaration are met and if it can be admissible, once done, it is upon the duty of the court to see the extent to which the dying declaration is entitled to credit.

61. In India too, a similar pattern is followed, where the Courts are first required to satisfy themselves that the dying declaration in question is reliable and truthful before placing any reliance upon it. Thus, dying declaration while carrying a presumption of being true must be wholly reliable and inspire

confidence. Where there is any suspicion over the veracity of the same or the evidence on record shows that the dying declaration is not true it will only be considered as a piece of evidence but cannot be the basis for conviction alone.

62. There is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. Certain factors below reproduced can be considered to determine the same, however, they will only affect the weight of the dying declaration and not its admissibility: -

(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?

63. It is the duty of the prosecution to establish the charge against the accused beyond the reasonable doubt. The benefit of doubt must always go in favour of the accused. It is true that dying declaration is a substantive piece of evidence to be relied on provided it is proved that the same was voluntary and truthful and the victim was in a fit state of mind. It is just not enough for the court to say that the dying declaration is reliable as the accused is named in the dying declaration as the assailant.

64. It is unsafe to record the conviction on the basis of a dying declaration alone in the cases where suspicion, like the case on hand is raised, as regards

the correctness of the dying declaration. In such cases, the Court may have to look for some corroborative evidence by treating the dying declaration only as a piece of evidence. The evidence and material available on record must be properly weighed in each case to arrive at an appropriate conclusion. The reason why we say so is that in the case on hand, although the appellant-convict has been named in the two dying declarations as a person who set the room on fire yet the surrounding circumstances render such statement of the declarants very doubtful.

65. In **Sujit Biswas v. State of Assam**, 2013 12 SCC 406, this Court, while examining the distinction between "proof beyond reasonable doubt" and "suspicion" in para 13 has held as under:

"13. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense."

66. It may be true as said by this Court, speaking through Justice Krishna Iyer in **Dharm Das Wadhwani v. State of Uttar Pradesh**, 1974 4 SCC 267, that the rule of benefit of reasonable doubt does not imply a frail willow bending to every whiff of hesitancy. Judges are made of sterner stuff and must take a practical view of the legitimate inferences flowing from the evidence, circumstantial or direct. Even applying this principle, we have a doubt as regards the complicity of the appellantconvict in the crime.

67. In the present case, it is difficult to rest the conviction solely based on the two dying declarations. At the cost of repetition, the PW-2 has been otherwise also not believed by the High Court.

68. As discussed above, the oral evidence of the PW-4 Soni, also does not inspire any confidence. We are not satisfied that the prosecution has proved its case against the appellant-convict beyond reasonable doubt."

[36] In the aforesaid judgment, the Hon'ble Apex Court has summarized the categories of the dying declarations when to be considered as truthful. It is observed that there is no hard and fast rule for determining when a dying declaration should be accepted; the duty of the Court is to decide this question in the facts and surrounding circumstances of the case and be fully convinced of the truthfulness of the same. I would like to again reproduce that excerpts of the judgment where the Hon'ble Apex Court has highlighted the factors to be kept in mind while determining the truthfulness of the dying declaration, as under:-

"(i) Whether the person making the statement was in expectation of death?

(ii) Whether the dying declaration was made at the earliest opportunity? "Rule of First Opportunity"

(iii) Whether there is any reasonable suspicion to believe the dying declaration was put in the mouth of the dying person?

(iv) Whether the dying declaration was a product of prompting, tutoring or leading at the instance of police or any interested party?

(v) Whether the statement was not recorded properly?

(vi) Whether, the dying declarant had opportunity to clearly observe the incident?

(vii) Whether, the dying declaration has been consistent throughout?

(viii) Whether, the dying declaration in itself is a manifestation / fiction of the dying person's imagination of what he thinks transpired?

(ix) Whether, the dying declaration was itself voluntary?

(x) In case of multiple dying declarations, whether, the first one inspires truth and consistent with the other dying declaration?

(xi) Whether, as per the injuries, it would have been impossible for the deceased to make a dying declaration?"

[37] In the instant case, there can be said to be two dying declarations of the deceased on record, and both the dying declarations are not consistent with each other. They both are contradictory in nature. Further, it was recorded after 48 hours of the incident and, therefore, cannot be said to be at the earliest opportunity. Thus, it can

safely be said that the evidence in the form of dying declaration in the present case does not fall in any of the above categories enumerated by the Hon'ble Apex Court so as to inspire any confidence to hold the appellant-accused guilty of the offence.

[38] Further, in the case on hand, there are in all total four accused persons named in the FIR. They all have been tried together on the selfsame evidences. However, at the end of the trial, though the evidences against all the accused persons are similar, the trial court, after considering the same, has reached to a discriminating conclusion by acquitting the three other co-accused and convicting appellant-accused. The law is well settled in this regard that when there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. Which means that the criminal court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination. To further elaborate the above position, I would like to refer to and rely upon the recent past decision of the Hon'ble Supreme Court in the case of Javed Shaukat Ali Qureshi vs. State of Gujarat,2023 SCCOnlineSC 1155, wherein while deciding an appeal challenging the judgment of the High Court whereby the Court convicted some of the accused, while acquitting others, the Division Bench of Abhay S. Oka and Sanjay Karol, JJ. has acquitted the convict by setting aside the judgment of the Trial Court as well as the judgment of the High Court, by observing thus;

> "15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal Court should decide like cases alike, and in such cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.
>
> 16. As far as accused nos.3 and 4 are concerned, they did not prefer any appeal. In the case of **Pawan Kumar vs. State of Haryana**, 2003 11 SCC 241 this Court dealt with similar contingency in some detail. This Court held that the jurisdiction under Article 136 of the Constitution of India can be invoked in favour of the party even suo moto when the Court is satisfied that compelling ground for its exercise exists. However, such suo moto power should be used very sparingly with caution and circumspection. The Court held that the power must be exercised in the rarest of the rare cases.
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> 17. Accused nos. 1,5 and 13 were convicted only on the basis of the testimony of PW25 and PW26. They were acquitted by holding that the testimony of both witnesses was unreliable and deserved to be discarded. If the same relief is not extended to accused nos. 3 and 4 by reason of parity, it

will amount to violation of fundamental rights guaranteed to accused nos. 3 and 4 by Article 21 of the Constitution of India. Therefore, we have no manner of doubt that the benefit which is granted to accused nos. 1,5 and 13 deserves to be extended to accused nos.3 and 4, who did not challenge the judgment of the High Court. In this case, the suo motu exercise of powers under Article 136 is warranted as it is a question of the liberty of the said two accused guaranteed by Article 21 of the Constitution.

18. Now, we come to the case of accused no.2. By the order dated 11th May 2018, a special leave petition filed by accused no.2 was summarily dismissed without recording any reasons. The law is well settled. An order refusing special leave to appeal by a nonspeaking order does not attract the doctrine of merger. At this stage, we may refer to a three judge Bench decision of this Court in the case of **Harbans Singh v. State of U.P. & Ors.**, 1982 2 SCC 101 In paragraph 18, this Court held thus:

"18.To my mind, it will be a sheer travesty of justice and the course of justice will be perverted, if for the very same offence, the petitioner has to swing and pay the extreme penalty of death whereas the death sentence imposed on his co-accused for the very same offence is commuted to one of life imprisonment and the life of the coaccused is shared (sic spared). The case of the petitioner Harbans Singh appears, indeed, to be unfortunate, as neither in his special leave petition and the review petition in this Court nor in his mercy petition to the President of India, this all important and significant fact that the life sentence imposed on his co accused in respect of the very same offence has been commuted to one of life imprisonment has been mentioned. Had this fact been brought to the notice of this Court at the time when the Court dealt with the special leave petition of the petitioner or even his review petition, I have no doubt in my mind that this Court would have commuted his death sentence to one of life imprisonment. For the same offence and for the same kind of involvement, responsibility and complicity, capital punishment on one and life imprisonment on the other would never have been just. I also feel that had the petitioner in his mercy petition to the President of India made any mention of this fact of commutation of death sentence to one of life imprisonment on his co accused in respect of the very same offence, the President might have been inclined to take a different view on his petition."

(emphasis added)

19. We have found that the case of accused no 2 stands on the same footing as accused nos. 1,5 and 13 acquitted by this Court. The accused no.2 must get the benefit of parity. The principles laid down in the case of Harbans Singh (supra) will apply. If we fail to grant relief to accused no 2, the rights

guaranteed to accused no.2 under Article 21 of the Constitution of India will be violated. It will amount to doing manifest injustice. In fact, as a Constitutional Court entrusted with the duty of upholding fundamental rights guaranteed under the Constitution, it is our duty and obligation to extend the same relief to accused no.2. Therefore, we will have to recall the order passed in the special leave petition filed by accused no.2."

(Emphasis added).

[39] In the instant case, it is the case of the prosecution that before the incident in question, there was a fight between the accused Babubhai and one person belonging to Marvadi community, and at that time, the brother of the complainant, i.e, the deceased intervened and tried to segregate them. After such a row, the said Babubhai along with the appellantaccused and one another Mohan was standing there and when the deceased Kantibhai was going for urinating towards the canal, they stopped him and started beating him and in the said quarrel appellant-accused inflicted knife blow to the deceased. If that was the case of the prosecution, then the evidence of the said witness with whom accused Babubhai had a quarrel just before the occurrence of the incident in question had to be recorded and he had to be examined by the prosecution, which the prosecution has miserably failed to do in the present case. A mere fight between the accused and the deceased on the fateful day over a petty issue cannot be treated as an acceptable evidence to prove that there was a serious quarrel between the accused and the deceased which led the appellant-accused to kill the deceased. Except the PW Nos.1 to 3, there is no independent witness who has seen the fight allegedly taken place between the accused persons and the deceased. Learned defense counsel is therefore justified in stating that in the above circumstances, the sole testimonies of the PW Nos.1 to 3, without any independent corroboration, cannot lead to an irresistible inference that it was the appellant-accused who inflicted the knife blow. The picture is so foggy in the present case. There is no independent witness who has come fore to depose that he had seen the incident. Even the complainant has not stated that he had seen the appellant-accused inflicting knife injuries. What he has stated in the complaint is that after the incident when they saw his deceased brother coming towards the home and fell down on the road they rushed to him and by that time, the assailants were fled away. Contradictory to what has been stated in the complaint, the complainant, in his examination-in-chief, has deposed that he was present there at time of the incident.

[40] No doubt, a family has lost its loved one in the present case, but the pivotal issue remains as to whether the totality of the circumstances unerringly point a finger at the appellantaccused as the real culprit and none else. The circumstances indicated by the learned APP do create a suspicion against the appellant-accused but the point is whether those circumstances would be sufficient to hold that he was guilty of this crime. In my opinion, the distance between "may be true" and "must be true" has not been satisfactorily traversed by the prosecution to establish an unbroken link between

the appellant-accused and the crime. One must be mindful of the fact that no one can be convicted on the basis of a mere suspicion however strong such a suspicion may be. See: **Palvinder Kaur vs. State of Punjab**, 1952 AIR(SC) 354; **Chandrakant Ganpat Sovitkar vs. State of Maharashtra**, 1975 3 SCC 16; **Sharad Birdhichand Sarda vs. State of Maharashtra**, 1984 4 SCC 116; Padala Veera Reddy (supra) and State of Uttar Pradesh vs. Wasif Haider & Ors,2018 SCCOnLineSC 2740.

[41] I am therefore of the view that the circumstances appearing in the present case when examined in the light of the above legal principles, do not lead to an inevitable and decisive conclusion that the appellant-accused had committed the murder of the brother of the complainant. As the prosecution has not been able to dispel the cloud of doubt as to the culpability of the appellant-accused, I am inclined to extend him the benefit of doubt.

[42] Resultantly, the present appeal succeeds and is hereby allowed. The impugned judgment of conviction dated 22.02.2007 passed by the learned Addl. Sessions Judge, Vadodara in Sessions Case No.230 of 2002 is quashed and set aside and the appellant-accused is ordered to be acquitted of all the charges. Since the appellant-accused is on bail pending trial, the bail bonds furnished by him stands discharged

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2024(2)GCRJ532

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Divyesh A Joshi]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 21237 of 2019 **dated 19/09/2024**

Marshall Amubhai Vadariya

Versus

State of Gujarat & Anr

FALSE PROMISE ALLEGATION

Indian Penal Code, 1860 Sec. 376, Sec. 498A, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 482 - Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3 - False Promise Allegation - Applicant sought quashing of FIR alleging rape under IPC Sec. 376, based on a promise to marry - Complainant claimed she was impregnated by the accused, but DNA testing disproved the allegation - Complainant also married another person and showed no interest in pursuing the case - Court found the relationship consensual and observed that failure to marry due to unforeseen circumstances does not amount to rape unless a false promise was made with intent to deceive - FIR quashed due to lack of evidence and misuse of legal process - FIR Quashed

Law Point: A consensual relationship cannot be classified as rape under IPC Sec. 376, especially when there is no false promise to marry and no evidence of intent to deceive.

ભારતીય દંડ સંહિતા, 1860 કલમ 376, કલમ 498A, કલમ 506 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 482 – અનુસૂચિત જાતિ અને અનુસૂચિત જનજાતિ (અત્યાચાર નિવારણ) અધિનિયમ, 1989 કલમ 3 – ખોટા વચનનો આરોપ – અરજદારે IPC કલમ હેઠળ લગ્ન કરવાના વચનના આધારે બળાત્કારનો આરોપ મૂકતી કલમ 376 હેઠળ ની FIR રદ કરવાની માંગ કરી – ફરિયાદીએ દાવો કર્યો હતો કે તેણી આરોપી દ્વારા ગર્ભિત હતી, પરંતુ ડી. એન. એ. પરીક્ષણે આરોપને ખોટો સાબિત કર્યો – ફરિયાદીએ પાણ અન્ય વ્યક્તિ સાથે લગ્ન કર્યા અને કેસ ચલાવવામાં કોઈ રસ દર્શાવ્યો નહીં – કોર્ટે સંબંધને સહમતિપૂર્ણ ગણાવ્યો અને અવલોકન કર્યું કે લગ્ન કરવામાં નિષ્ફળતા અણધાર્યા સંજોગોને કારણે બળાત્કાર ગણાતો નથી સિવાય કે છેતરવાના ઈરાદાથી ખોટું વચન આપવામાં આવ્યું હોય – પુરાવાના અભાવે અને કાનૂની પ્રક્રિયાના દુરુપયોગને કારણે FIR રદ કરવામાં આવી – FIR રદ.

કાયદા નો મુદ્દો: આઈપીસી સેક્ન્ડ હેઠળ સહમતિથી સંબંધને બળાત્કાર તરીકે વર્ગીકૃત કરી શકાતો નથી. 376, ખાસ કરીને જ્યારે લગ્ન કરવાનું કોઈ ખોટું વચન ન હોય અને છેતરવાના ઈરાદાનો કોઈ પુરાવો ન હોય

Acts Referred:
Indian Penal Code, 1860 Sec. 376, Sec. 498A, Sec. 506
Code of Criminal Procedure, 1973 Sec. 482
Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 Sec. 3

Counsel:
R V Acharya, Jay Mehta

JUDGEMENT

Divyesh A. Joshi, J.- [1] Rule returnable forthwith. Learned APP waives service of notice of rule for and on behalf of the respondent-State.

[2] The respondent No.2, although served with the notice issued by this Court, has chosen not to remain present before this Court either in person or through an advocate and oppose the present application.

[3] By this application under section 482 of the Code of Criminal Procedure,1973, the applicant seeks to invoke the inherent powers of this Court praying for quashing of the First information report being C.R. No.I-35 of 2019 registered before the Keshod

Police Station, Junagadh for the offence punishable under Sections 376, 506(2) of IPC and Sections 3(1), W(i)(ii), 3(2)(5), 3(2)(5A)of the Atrocities Act.

[4] According to the complaint Filed on 21.02.2019, the complainant- and the applicant-accused came into contact with each other about one and a half year ago, and before Five months, the applicant-accused entered into a physical relationship with the complainant by giving her a promise to marry. Thereafter, they continued to meet each other. After some time the applicant-accused called the complainant at his Vadi and again made a physical relationship with her. It is alleged that after some period of time, on the complainant realizing her of being pregnant, she informed the applicant about the same, however, the applicant-accused declined to accept the same and backed from his promise. With this sort of allegations, the impugned FIR has been registered.

[5] Learned advocate Ms. R.V. Acharya appearing for the applicant submits that even assuming that the entire allegations of love affair and the promise made by the applicant to marry the complainant are true, still, the same would not make out an offence of rape at all, as it is projected by the prosecution. She submits that the applicant-accused is an innocent person against whom a false and frivolous complaint is Filed by the complainant, a consensual party, which is nothing but a sheer abuse of process of law. She further submits that from the FIR itself, it appears that there was a love affair between the applicant-accused and the complainant which continued for about one and half year. Learned advocate Ms. Acharya also submits that the complainant voluntarily entered into a physical relationship with the applicant-accused. Even the impugned FIR has also been Filed after a period of six months. She submits that it is the specific case of the prosecution that the applicant-accused impregnated her and after came to know about the same, the applicant-accused deserted her. In this regard, she would like to submit that after registration of the complaint, she delivered a baby boy claiming to be through the relationship with the applicant-accused. However, during the course of investigation, the concerned investigator collected the DNA samples of both, the applicant-accused and the son of the complainant and sent it to the FSL for analysis, a report of which, was received on 10.07.2019, and as per the said report, the applicant-accused is not a biological father of the son of the complainant. Moreover, during the pendency of the present proceedings, the complainant has got married with another person and, therefore, despite service of notice, the complainant has chosen not to appear and oppose the present application, which clearly shows that she may not be interested in pursuing further with the matter. Thus, According to her, allowing the case to be proceeded with further would be a wastage of valuable time of the trial Court.

5.1 In such circumstances, referred to above, learned advocate Ms. Acharya prays that there being merit in this application, the same be allowed and the impugned FIR be quashed.

[6] But the learned APP Mr. Jay Mehta appearing for the respondent-State has stoutly opposed this application. According to him, in the present case, charge-sheet has already been Filed and the same has also been culminated in Sessions Case No.11 of 2019.. The learned APP further submits that at the First time, when the applicant expressed his love to the complainant and promised to marry her, whether he had any intention to deceive her or not, is a matter to be appreciated on the basis of evidence to be let in only at the time of trial. However, looking to the evidence available on record, more particularly, the DNA report of the FSL and the non-appearance of the original complainant, rest is left for the Hon'ble Court whether to exercise the inherent powers or not.

[7] I have considered the above submissions.

[8] Before delve into the rival submissions made by the respective parties, let us have a look into Section 376 of the IPC, which reads as follows;

"376. Punishment for rape.-

(1)Whoever, except in the cases provided for in sub- section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which [shall not be less than ten years, but which may extend to imprisonment for life, and shall also be liable to ne](Subs. by Act 22 of 2018, s. 4, for "shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to ne" (w.e.f. 21-4-2018)

(2)Whoever,-

(a)being a police o+cer, commits rape-

(i)within the limits of the police station to which such police o+cer is appointed; or

(ii)in the premises of any station house; or

(iii)on a woman in such police o+cer's custody or in the custody of a police o+cer subordinate to such police o+cer; or

(b)being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or

(c)being a member of the armed forces deployed in an area by the Central or a State Government commits rape in such area; or

(d)being on the management or on the sta0 of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution, commits rape on any inmate of such jail, remand home, place or institution; or

(e)being on the management or on the sta0 of a hospital, commits rape on a woman in that hospital; or

(f)being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g)commits rape during communal or sectarian violence; or

(h)commits rape on a woman knowing her to be pregnant; or

(i)commits rape on a woman when she is under sixteen years of age; or

(j)commits rape, on a woman incapable of giving consent; or

(k)being in a position of control or dominance over a woman, commits rape on such woman; or

(l)commits rape on a woman su0ering from mental or physical disability; or

(m) while committing rape causes grievous bodily harm or maims or dis gures or endangers the life of a woman; or

(n)commits rape repeatedly on the same woman,shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to ne.

Explanation.- For the purposes of this sub-section, -

(a)"armed forces" means the naval, military and air forces and includes any member of the Armed Forces constituted under any law for the time being in force, including the paramilitary forces and any auxiliary forces that are under the control of the Central Government or the State Government;

(b)"hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation;

(c)"police o+cer" shall have the same meaning as assigned to the expression "police" under the Police Act, 1861 (5 of 1861);

(d)"women's or children's institution" means an institution, whether called an orphanage or a home for neglected women or children or a widow's home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

(3)Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to ne:

Provided that such ne shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any ne imposed under this subsection shall be paid to the victim."

[9] A cursory perusal of the above provision makes it clear that in the entire provision, there is not a whisper about a person committing rape on a woman being her love interest. Because the word love in itself carries 'consent'. Clause (j) of sub-section (2) of Section 376 talks about a woman incapable of giving consent, which means either a girl of a tender age who is not so matured enough to understand the things and the consequences of the consent being given by her for the proposed act, or a mentally disabled girl or a woman. Here, in the instant case, at the time of the alleged offence, as per the say of the applicants' counsel, the girl was 19 years old and had already attained the age of majority and was matured enough to understand what is right and what is wrong and what would be the consequences of a particular act being allowed to be done upon her. That apart, looking to the allegations as stated in the complaint, the same do not make out a case under any of the other categories as mentioned in Section 376, requiring the applicant-accused to undergo the ordeal of trial.

[10] The word "rape" is derived from the Latin term "rapio" which means to "seize". In other words, rape can be defined as the ravishment of a woman without her consent, by force, fear against her will. To further define a rape, it can be once and there must be a resistance from the victim upon which such an sexual assault is attempted to be committed. But if such a sexual act was allowed to be continued for some time by a woman, for which FIR is being lodged at a later stage upon disputes having been cropped up, then the element of consent would come into play, and when consent comes, that too of a major girl, then the case no longer remains to be of a rape.

[11] Like the cases under the provisions of the Domestic Violence Act and under Section 498(A), the cases of consensual sexual relationship being later converted into allegations of rape are rapidly increasing. In the case at hand, the applicant-accused and the complainant was in relationship past one and a half year. She knew the applicant-accused since quite a long time. It is alleged that before Five months from the date of the Filing of the complaint, applicant-accused established a sexual relationship with her on the promise of marriage. Now the question arises that mere say of a woman of being promised to marry by the accused, can be so believable so as to held the accused guilty of the offence of rape. The answer is 'No'. In every case where a man fails to marry a woman despite a promise made to her, cannot be held guilty for committing the offence of rape. He can only be held guilty if it is proved that the promise to marry was given with no intention to honour it and also that was the only reason due to which the woman agreed to have a sexual relationship. Let us assume that instead of asking her to share the bed, if a woman is asked to provide anything else by the accused like any assets or some other valuable things of her

ownership on a promise to marry her later, then whether would she fulfill such a demand; if 'No', then why her precious corpus before marriage?, and if still it has been done, then she can be presumed to be the consensual party fully aware about the consequences of the proposed act and action, and deliberately avoiding or ignoring any foresee danger, would result into the present situation. Further, a girl who is fully aware of the nature and consequences of the sexual act, gives consent for the same based on a promise to marry and continue her relationship for a long period, then in such cases it becomes really diHcult to determine whether the reason behind the giving of consent was only the promise made by the boy and not a mutual desire to be together.

[12] Further, there is a distinction between a false promise and a breach of promise. False promise relates to a promise which the accused had no intention to fulfill from the beginning, whereas a breach of promise may happen due to many factors. Such as if a boy fell in love with someone, he might get involved with another partner, he might be compelled by his family to marry someone else, etc. this doesn't mean that the promise was false from the beginning. So, the determining factor is only the intention of the accused. However, the determining factor of the consent, whether it was obtained voluntarily or involuntarily, will depend on the facts of each case. The court must consider the evidence and the circumstances in every case before reaching a conclusion, but if the court Finds that the prosecutrix was also equally keen, then, in that case, the offence would be condoned.

[13] With regard to the controversy on hand, the Hon'ble Apex Court in a decision in the case of Pramod Suryabhan Pawar v State of Maharashtra, AIR 2019 SC 4010, penned by Justice Dr. D.Y. Chandrachud has observed as under;

> "The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfill his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no o0ence under Section 375 of the IPC has occurred."

[14] In another decision in the case of **Prashant Bharti v. Delhi**, 2013 AIR(SC) 2753 the Supreme Court observed that the age of the victim should be taken into consideration to evaluate the issue of consent and to know an indication of how wordly-wise she is, and to what degree she is judged to given her consent based on the belief that the accused will execute his promise of marriage. It has been observed as under;

> "16. The factual position narrated above would enable us to draw some positive inferences on the assertion made by the complainant/prosecuterix - against the appellant-accused (in the supplementary statement dated 21.2.2007). It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23.9.2008 reveals, that the complainant/prosecuterix was married to Lalji Porwal on 14.6.2003. It also reveals, that the aforesaid marriage subsisted till 23.9.2008, when the two divorced one another by mutual consent under Section 13B of the Hindu Marriage Act. In her supplementary statement dated 21.2.2007, the complainant/prosecuterix accused Prashant Bhati of having had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant/prosecuterix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.9.2008 produced before us by the complainant/prosecuterix herself is taken into consideration alongwith the factual position depicted in the supplementary statement dated 21.2.2007, it would clearly emerge, that the complainant/prosecuterix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 1.1.2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satis ed that the assertion made by the complainant/prosecuterix, that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsi ed.

17. Would it be possible for the prosecution to establish a sexual relationship between Priya, the complainant/prosecuterix and Prashant Bharti, the appellant-accused, is the next question which we shall attempt to answer. Insofar as the instant aspect of the matter is concerned, medical evidence discussed above reveals, that the complaint made by the complainant/prosecuterix alleging a sexual relationship with her by Prashant Bharti, the appellant-accused, was made more than one month after the alleged occurrences. It was, therefore, that during the course of her medical examination at the AIIMS, a vaginal smear was not taken. Her clothes were also not sent for forensic examination by the AIIMS, because she had allegedly changed the clothes which she had worn at the time of occurrence. In the absence of any such scienti c evidence, the proof of sexual intercourse between the complainant/prosecuterix and the appellant-accused would be based on an assertion made by the complainant/prosecuterix. And an unequivocal denial thereof, by the appellant-accused. One's word against the other. Based on the falsity of the statement made by the complainant/ prosecuterix noticed above (and other such like falsities, to be narrated hereafter), it is unlikely, that a - factual assertion made by the complainant/prosecuterix, would be acceptable over that of the appellant-accused. For the sake of argument, even if it is assumed, that Prashant Bharti, the appellant- accused and Priya, the complainant/prosecuterix, actually had a physical relationship, as alleged, the same would necessarily have to be consensual, since it is the case of the complainant/prosecuterix herself, that the said physical relationship was with her consent consequent upon the assurance of marriage. But then, the discussion above, clearly negates such an assurance. A consensual relationship without any assurance, obviously will not substantiate the o0ence under Section 376 of the Indian Penal Code, alleged against Prashant Bharti."

[15] In **Deepak Gulati v. State of Haryana**, 2013 AIR(SC) 2071, the Supreme Court held that an accused can be convicted for the offence of rape under the penal provisions only if there is evidence to show that 'the intention of the accused was mala Fide and that he has clandestine motives.' The Court further observed that the defendant should have adequate evidence to show that he had no intention to marry the victim in the First place. Section 90 of the IPC cannot be invoked in such a situation, to fasten the criminal liability on the accused and to pardon the act of the victim in entirety unless the court is assured of the fact that the accused never intended to marry the victim from the very beginning. I may quote some of the relevant observations of the said decision as under;

"8. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by

deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala de motives, and had made a false promise to this e0ect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not ful lling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated di0erently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala de, and that he had clandestine motives.

21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

22. The instant case is factually very similar to the case of Uday (Supra), wherein the following facts were found to exist:

I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the signi cance and morality associated with the act she was consenting to.

II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.

III. It was di+cult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her.

IV. There was no evidence to prove conclusively, that the appellant had never intended to marry the prosecutrix.

23. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre- decided by them. She also waited for him for a long time, and when he nally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police."

[16] In **Uday v. State of Karnataka**, 2003 AIR(SC) 1639 the Supreme Court observed that the consent given by the victim to sexual intercourse with a person whom she is deeply in love on a promise to marry her in future, cannot be said to be a misconception of fact under Section 90 of IPC and hence, the accused will not be convicted for rape within the meaning of Section 375.

"There is yet another diHculty which faces the prosecution in this case. In a case of this nature two conditions must be fulFilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was diHcult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it

were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and Find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very diHcult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

In view of our Findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 Fourthly and Fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.

In the result, this appeal must succeed, and is accordingly allowed. The impugned judgment and order convicting and sentencing the appellant for the offence punishable under Section 376 IPC is set aside, and the appellant stands acquitted of the charge. Since the appellant was granted exemption from surrendering when the special leave was granted, no further order for his release is necessary."

[17] The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In **Jayanti Rani Panda vs. State of West Bengal and another**, 1984 CrLJ 1535 the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded:-

> "The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

[18] Before I conclude, it is to be worth noting that after the registration of the complaint, the complainant gave birth to a baby boy claiming to be through the relationship with the applicant-accused. Therefore, the DNA samples of both, the son of the complainant and the applicant-accused was taken and sent to the FSL for analysis, and a report thereof on record suggests that both the DNA samples are not matching to each other and the applicant-accused is not a biological father of the son of the complainant. After that nothing more remains to be said. Because specific allegation has been made in the complaint that the complainant became pregnant through the relationship with the applicant-accused, however, as per the DNA report of

the FSL, the applicant-accused is not a biological father of the son of the complainant, which completely falsifies the case of the prosecution.

[19] So far as the allegations under the provisions of the Atrocities Act are concerned, looking to the allegations made in the complaint, the same do not constitute an offence under the Atrocities Act.

[20] Based on the holistic consideration of the facts and circumstances summarized in the foregoing paragraphs as well as the tenets of law enunciated in the above referred decisions, I am of the view that the present application deserves consideration.

[21] In the result, the present application succeeds and is hereby allowed. The First Information Report being C.R. No.I-35 of 2019 registered before the Keshod Police Station, Junagadh is hereby ordered to be quashed. All consequential proceedings arising from the same also stands terminated. Rule is made absolute to the aforesaid extent.

Direct service is permitted

2024(2)GCRJ545

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Umesh A Trivedi]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 1298 of 2023 **dated 17/09/2024**

Punjaji Chehraji Solanki

Versus

State of Gujarat & Anr

FIR QUASHING REJECTED

Indian Penal Code, 1860 Sec. 420, Sec. 427, Sec. 506, Sec. 447, Sec. 406 - Code of Criminal Procedure, 1973 Sec. 482 - FIR Quashing Rejected - Applicant sought quashing of an FIR alleging offenses under Sections 406, 420, 447, 427, and 506 of IPC, related to misuse of funds and encroachment under Pradhan Mantri Awaas Yojana-Gramin - Applicant argued the issue was civil in nature - Court noted that the applicant had misused funds and repeatedly encroached on Panchayat land despite eviction - Charge-sheet was already filed, and there was no basis for quashing the FIR - Application rejected

Law Point: FIR and charge-sheet cannot be quashed when clear allegations of misuse of funds and encroachment exist, and a prima facie case is made out against the accused

ભારતીય દંડ સંહિતા, 1860 કલમ 420, કલમ 427, કલમ 506, કલમ 447, કલમ 406 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 482 – એફ. આઈ. આર. રદ કરવાનો ઈનકાર – અરજદારે આઈ. પી. સી. ની કલમ 406, 420, 447, 427, અને 506 હેઠળ ભંડોળના દુરુપયોગ અને અતિક્રમણને લગતા અપરાધોનો આરોપ મૂકતી એફ. આઈ. આર. ને રદ કરવાની માંગ કરી હતી, જે પ્રધાનમંત્રી આવાસ યોજના - ગ્રામીણ દ્વારા અરજી કરવામાં આવી હતી. પ્રકૃતિમાં – કોર્ટે નોંધ્યું કે અરજદારે ભંડોળનો દુરુપયોગ કર્યો હતો અને ખાલી કરાવવા છતાં વારંવાર પંચાયતની જમીન પર અતિક્રમણ કર્યું હતું – ચાર્જશીટ પહેલેથી જ દાખલ કરવામાં આવી હતી, અને FIR રદ કરવાનો કોઈ આધાર નહોતો – અરજી નામંજૂર

કાયદાનો મુદ્દો: જ્યારે ભંડોળના દુરુપયોગ અને અતિક્રમણના સ્પષ્ટ આરોપો હોય અને આરોપીઓ સામે પ્રાથમિક દૃષ્ટિએ કેસ કરવામાં આવે ત્યારે એફઆઈઆર અને ચાર્જશીટ રદ કરી શકાતી નથી.

Acts Referred:

Indian Penal Code, 1860 Sec. 420, Sec. 427, Sec. 506, Sec. 447, Sec. 406

Code of Criminal Procedure, 1973 Sec. 482

Counsel:

Shaunak R Dave, Ronak Raval

JUDGEMENT

Umesh A Trivedi, J.- [1] Heard Mr. Shaunak R. Dave, learned advocate for the applicant.

[2] This is an application filed under Section 482 of the Code of Criminal Procedure, 1973 praying for quashing of an FIR registered at Dahegam Police Station, Gandhinagar bearing C.R.No.11216005200719 of 2020, for the alleged offences punishable under Sections 406, 420, 447, 427 and 506(2) of the Indian Penal Code.

[3] Mr. Shaunak R. Dave, learned advocate for the applicant submitted that as per the Pradhan Mantri Awaas Yojana -Gramin, Panchayat has to assist the applicant accused who is beneficiary of the scheme to construct house over his land. He has further submitted that the dispute involved in the present case is of purely civil nature and therefore, no FIR could have been registered and subsequent charge-sheet be filed. Therefore, he has requested that FIR as also the consequent charge-sheet qua the present applicant be quashed.

[4] Drawing attention of the Court to the role of the Gram Panchayat, as enumerated in the scheme in paragraph 7.5 of the Framework for implementation, more particularly paragraph 7.5.1 sub-clause (g), it is submitted that Gram Panchayats should discuss the progress in the scheme in their scheduled meetings and help resolve the problems being faced by the beneficiaries. The Gram Panchayats should also proactively assist the social Audit Teams to conduct Social Audit. He has further

submitted that no such Social Audit Teams have been constituted by the Gram Panchayat and Social Audit is done. Therefore, he has submitted that no offence as such is made out and therefore, complaint / FIR against the present applicant is required to be quashed and set aside.

[5] Having heard the learned advocate for the applicant and going through the allegations made in the FIR itself, it appears that applicant had obtained an amount of Rs.30,000/- i.e. first installment under the scheme for construction of his house at an open place owned by him in property No.842 in replacing his temporary roof. That place was shown to Gram Rojgar Sevak and it was also earmarked. Pursuant thereto, he obtained Rs.30,000/- as first installment and instead of putting up any construction at that place, on the northern side of the compound of a Government School and western side of Water Tank, in a land of Panchayat unauthorized construction started by the applicant accused. Therefore, as averred in the FIR, not only he mis-utilized the funds but encroached upon the Panchayat land to have the house constructed over the same, that too, by the amount of cash assistance obtained under the Pradhan Mantri Awaas Yojana -Gramin.

[6] His submission is that at the time of bail, he deposited Rs.30,000/- to show his bonafides. Be that as it may, it being in consideration of bail, repayment of the amount misappropriated or mis-utilized for the purpose other than for which it was granted, it cannot be said that no offence is made out.

[7] Not only that, after filing of the FIR, investigation was conducted and a charge-sheet has already been filed against the present applicant. A document annexed with the petition reflects that applicant has filed even a Regular Civil Suit bearing No.121 of 2020 against the Sarpanch of Hilol Gram Panchayat, however, case status annexed with the application shows that said suit is disposed of as the applicant has withdrawn the suit. Not only that, as coming out from the FIR itself, the residential unit to be constructed was cancelled under the scheme and the applicant was asked to repay the amount of cash assistance obtained and under a Police Bandobast, while removal of encroachment was going on, applicant preferred appeal before Appellate Committee and Deputy D.D.O. and obtained temporary injunction and vide final order dated 17.10.2020, stay granted by it came to be vacated and thereafter, on 03.11.2020, under a Police Escort, in presence of Taluka Panchayat Officer, encroachment made over the land of panchayat came to be removed. Thereafter, encroached land was properly fenced vide Government Resolution dated 11.11.2020. Thus, on 13.11.2020 wire-fencing was done over the said land after removing the encroachment of the applicant. Despite that, after 13.11.2020, the applicant is alleged to have broken the fencing and entered into the land again and utilized the same by placing certain belongings and again encroached upon the said land.

[8] Considering the allegations made in the FIR, prima facie, offence is made out against the present applicant for the offence alleged and therefore, FIR can never be quashed. From the copy of rojkam of the case, it appears that accused is not appearing before the Court and therefore, a warrant has come to be issued against him. Over and above that, in a case filed in the year 2020, a charge-sheet also came to be filed in the year 2021 and the present application praying for quashing of an FIR has come to be filed in the year 2023. Be that as it may, neither the FIR nor charge-sheet pursuant to it can be quashed and therefore, this application being without any merits, it is hereby rejected. Notice is discharged

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2024(2)GCRJ548

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Ilesh J Vora; Vimal K Vyas]

Criminal Appeal (Against Conviction) No 1390 of 2014 **dated 17/09/2024**

Shardaben Babubhai Hathila

Versus

State of Gujarat

CONVICTION QUASHED

Indian Penal Code, 1860 Sec. 504, Sec. 114, Sec. 307, Sec. 326, Sec. 323, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 313 - Conviction Quashed - Appellant was convicted under Sections 323 and 326 IPC for allegedly aiding in grievous injury caused to the complainant by pressing his face during an assault - Appellant argued there was no direct evidence of her involvement - Court found that neither the injured nor witnesses had mentioned her role in the incident during the investigation or trial - Conviction based solely on a stray reference during cross-examination, which was insufficient - Court quashed the conviction and set aside the sentence - Appeal Allowed

Law Point: Conviction cannot be sustained when there is no substantive evidence linking the accused to the alleged offense, and the judgment is based on conjecture or stray remarks

ભારતીય દંડ સંહિતા, 1860 કલમ 504, કલમ 114, કલમ 307, કલમ 326, કલમ 323, કલમ 506 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 313 – દોષિત ઠરાવવામાં આવ્યો – ફરિયાદીને હુમલો દરમિયાન ચહેરો દબાવીને થયેલી ગંભીર ઈજામાં કથિત રીતે મદદ કરવા બદલ કલમ 323 અને 326 આઈ. પી. સી. હેઠળ અપીલ કરનારને દોષિત ઠેરવવામાં આવ્યો હતો – અપીલકર્તાએ દલીલ કરી હતી કે તેણીની સંડોવણીના કોઈ સીધા પુરાવા નથી – અદાલતે શોધી કાઢ્યું હતું કે ઈજાગ્રસ્ત વ્યક્તિ ના તો કે ન તો તપાસ અથવા ટ્રાયલ દરમિયાન સાક્ષીઓએ ઘટનામાં તેણીની

ભૂમિકાનો ઉલ્લેખ કર્યો હતો – ઉલટતપાસ દરમિયાન માત્ર છૂટાછવાયા સંદર્ભના આધારે દોષિત ઠરાવવામાં આવ્યો હતો, જે અપર્યાપ્ત હતો – કોર્ટે દોષિત ઠરાવવાની સજા રદ કરી હતી – અપીલની મંજૂરી.

કાયદાનો મુદ્દોઃ જ્યારે આરોપીને કથિત ગુના સાથે જોડતો કોઈ ઠોસ પુરાવો ન હોય અને ચુકાદો અનુમાન અથવા છૂટાછવાયા ટીપ્પણીઓ પર આધારિત હોય ત્યારે દોષિત ઠરાવી શકાય નહીં.

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 114, Sec. 307, Sec. 326, Sec. 323, Sec. 506
Code of Criminal Procedure, 1973 Sec. 313

Counsel:

Gajendra P Baghel, Shruti Pathak

JUDGEMENT

Ilesh J. Vora, J.- [1] This conviction appeal is being filed by the State of Gujarat against the judgment and order of conviction and sentence dated 18.12.2013 passed by the learned 2nd Additional Sessions Judge, Dahod in Sessions Case No.26/2012, wherein the appellant came to be tried for offences punishable under Sections 323 and 326 read with Section 114 of the Indian Penal Code (hereinafter referred to as "the IPC" for short). At the end of the trial, the accused came to be convicted for offences punishable under Sections 323 and 326 of the IPC and sentenced as under:

Accused	Sections	Punishment	Fine	In default
Appellant Accused no. 2 - Shardaben Badubhai Hathila (present appellant herein)	Section 323 and 326 of IPC	SI for two years	Rs. 5000/-	SI for two months.

[2] Facts and circumstances giving rise to file this conviction appeal are that, the appellant original accused no.2 Shardaben Hathila was the second wife of the injured Ramsingh Bariya and due to matrimonial dispute, since last two years from the date of incident i.e. 08.08.2011, she had left the house of the injured and went to her brother's house viz. Ramesh Hathila accused no.1. On the day of incident i.e. 08.08.2011, the injured had gone to the house of accused no.1 Ramesh Hathila where on the issue of taking the accused appellant Shardaben to take her back with the injured, this scuffle took place, as a result of which, accused no.1, with the aid of accused no.4 viz. Kamlesh Hathila, caused a grievous injuries with the weapon axe on both the hands of the injured Ramsingh which has resulted into amputation from below elbow. After the incident, the injured was taken to private hospital of Dr.Sameer Hathila PW:7. The complainant PW:1 Galabhai Bariya joined with the injured when he was taken to hospital. He lodged an FIR against five persons. So far as appellant accused Shardaben is concerned, it is alleged that at the time of incident, she has pressed the face of the injured Ramsingh who happened to be her husband. The accused were chargesheeted

and accordingly, the case was committed to the Sessions Court, Dahod. The charges under Sections 307, 326, 323, 504, 506(2) and 114 of the IPC were framed by the Additional Sessions Judge, Dahod.

[3] In order to prove the case against the accused, prosecution has examined 8 witnesses and exhibited 8 documents to prove its case as per the following table:

Oral evidence:

PW 1 ñ Exh. 19	Galabhai Parthibhai Bariya, complainant
PW 2 ñ Exh. 21	Ramsingbhai Parthibhai Bariya
PW 3 ñ Exh. 22	Maniben Ramsingbhai Bariya
PW 4 ñ Exh. 23	Manubhai Dalabhai Khaped, panch witness
PW 5 ñ Exh. 28	Abhesingbhai Punabhai Bhabhor, panch witness
PW 6 ñ Exh. 31	Kalubhai Bhatlabhai Harijan, panch witness
PW 7 ñ Exh. 32	Samirbhai Navalsingbhai Hathila, medical officer
PW 8 ñ Exh. 35	Rayjibhai Melabhai Vasava, investigating officer

Documentary evidence:

Exh. 20	Copy of complaint
Exh. 24	Panchanama of place of incident
Exh. 30	Search Panchanama
Exh. 34	Panchanama of recovery of blood sample of injured person
Exh. 33	Medical certificate of injured
Exh. 36	Primary report of FSL mobile van
Exh. 38	FSL report
Exh. 39	Police report for addition of charge

[4] The accused upon being questioned under Section 313 of the Cr.P.C. with regard to incriminating circumstances made against her in the evidence rendered by the prosecution and she denied it and not lead any evidence in defence.

[5] The learned Additional Sessions Judge, after hearing the parties and upon analysis of the evidence on record, convicted and sentenced the appellant accused to suffer two years rigorous imprisonment with amount of fine.

[6] Being aggrieved and dissatisfied with the conviction and sentence, the appellant has preferred this appeal for conviction appeal.

[7] Mr.Gajendra Baghel, learned advocate, assailing the judgment of the conviction, has submitted that the learned Trial Court, without any evidence, convicted

the appellant accused, and therefore, it is a case of no evidence and the judgment is not sustainable in eye of law. He would further urge that neither the complainant nor the injured has stated on oath that appellant Shardaben caused any kind of injury or abetted in the commission of the alleged offence. The learned Trial Court has taken into consideration the cross- examination of the injured, wherein without any reference to the appellant, he referred the name of the appellant that she has pressed her face when assault was done by the principal accused. In such circumstances, so far as conviction qua the appellant is concerned, the same is erroneous and based on the surmises and conjunctures, which has resulted into miscarriage of justice.

[8] On the other hand, opposing the contentions, learned APP Ms.Shruti Pathak, has submitted that the presence of the appellant, at the scene of offence, is not doubted, and therefore, the clarification in the cross-examination made by the injured could be taken into consideration, and therefore, the learned Trial Court did not commit any error while recording the findings of the guilt of the present appellant.

[9] In the facts of present case, it is no doubt true that appellant Shardaben was the second wife of the injured Ramsingh Bariya PW:2. The incident took place at the farm of accused no.1 Ramesh Hathila. It is also not in dispute that since long, due to matrimonial dispute, the appellant left the company of injured Ramsingh and living at her brother's house. As per the prosecution case and the oral version of the witness Ramsingh Bariya PW:2, on the day of incident, he was called upon to stay at the farm of accused no.1 and during the discussion, the accused refused to send back the appellant with Ramsingh Bariya. On this aspect, as per the version of injured witness, scuffle took place. Both the brothers viz. accused no.1 Ramesh Hathila and accused no.4 Kamlesh Hathila, by using weapon axe, caused grievous injuries over both the forearms, which resulted into amputation of both the hands below elbow. So far as role attributed of the present appellant is concerned, nothing being alleged against her that while assault was committed, she has pressed her face. The complainant PW:1 Galabhai Bariya in his deposition at Exh.19, did not allege anything against her nor disclose anything in the FIR Exh.20. The injured Ramsingh Bariya PW:2 also did not utter a word against the appellant about the pressing of his face by her. Even before the doctor PW:7, the name of the appellant was not disclosed. The learned Trial Court, without appreciating the evidence in its true perspective, picked up a single word referring the name of the appellant in a cross-examination of Ramsingh Bariya PW:2. Thus, therefore, after reanalysis of the oral as well as documentary evidence, we are of the view that the prosecution has miserably failed to prove its case beyond reasonable doubt against the appellant. The findings recorded by the Trial Court holding guilty the appellant are wholly unreasonable, unsustainable and against the evidence on record, and therefore, the conviction qua the appellant accused is not sustainable in law and is liable to be quashed and set aside.

[10] For the reasons recorded, the appeal is **allowed.** The judgment of the conviction and sentence dated 18.12.2013 rendered in Sessions Case No.26 of 2012 by the 2nd Additional Sessions Judge, Dahod is quashed and set aside. The appellant accused is on bail. Bail and bail bonds of the accused, if any, stands cancelled. Fine amount deposited if any, be refunded to the appellant accused. R & P be sent to the Trial Court concerned henceforth

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2024(2)GCRJ552

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Ilesh J Vora; Vimal K Vyas]

Criminal Appeal (For Enhancement) No 242 of 2014 **dated 17/09/2024**

State of Gujarat

Versus

Rameshbhai Badubhai Hathila & Ors

SENTENCE ENHANCEMENT REJECTED

Indian Penal Code, 1860 Sec. 504, Sec. 114, Sec. 307, Sec. 326, Sec. 323, Sec. 506 - Code of Criminal Procedure, 1973 Sec. 313, Sec. 377 - Sentence Enhancement Rejected - State sought enhancement of sentence against respondents convicted under Sections 323 and 326 IPC, arguing the punishment was inadequate given the grievous nature of the offense, including amputation - Court upheld the sentence of 7 years' imprisonment, noting the trial court had provided adequate reasons for the sentence - Appeal for enhancement dismissed

Law Point: Appellate courts should not interfere with sentencing decisions unless there are compelling reasons to justify the enhancement, especially when the trial court has provided sound reasoning for its decision

ભારતીય દંડ સંહિતા, 1860 કલમ 504, કલમ 114, કલમ 307, કલમ 326, કલમ 323, કલમ 506 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 313, કલમ 377 – સજામાં વધારો નકારવામાં આવ્યો – રાજ્યએ કલમ 323 અને 326 IPC હેઠળ દોષિત ઠરેલા પ્રતિવાદીઓ સામે સજા વધારવાની માંગણી કરી, એવી દલીલ કરી કે અંગવિચ્છેદન સહિતના ગુનાની ગંભીર પ્રકૃતિને જોતાં સજા અપૂરતી હતી – કોર્ટે 7 વર્ષની કેદની સજાને માન્ય રાખી, કોર્ટે નકારી કાઢયુ કે સજા માટે પર્યાપ્ત કારણો પૂરા પાડ્યા હતા – વૃદ્ધિ માટેની અપીલ બરતરફ.

કાયદાનો મુદ્દો: અપીલ દરમ્યાન અદાલતોએ સજાના નિર્ણયોમાં દખલ કરવી જોઈએ નહીં સિવાય કે સુધારણાને યોગ્ય ઠેરવવાના અનિવાર્ય કારણો હોય, ખાસ કરીને જ્યારે ટ્રાયલ કોર્ટે તેના નિર્ણય માટે યોગ્ય તર્ક પૂરો પાડ્યો હોય.

Acts Referred:

Indian Penal Code, 1860 Sec. 504, Sec. 114, Sec. 307, Sec. 326, Sec. 323, Sec. 506
Code of Criminal Procedure, 1973 Sec. 313, Sec. 377

Counsel:

Shruti Pathak, M A Chauhan

JUDGEMENT

Ilesh J. Vora, J.- [1] This enhancement appeal is being filed by the State of Gujarat under Section 377 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "the Cr.P.C." for short) against the judgment and order of conviction and sentence dated 18.12.2013 passed by the learned 2nd Additional Sessions Judge, Dahod in Sessions Case No.26/2012, wherein the respondents - original accused nos. 1, 2 and 4 came to be tried for offences punishable under Sections 307, 323, 326, 504 and 506(2) read with Section 114 of the Indian Penal Code (hereinafter referred to as "the IPC" for short). At the end of the trial, the accused came to be convicted for offences punishable under Sections 323 and 326 of the IPC and sentenced as under:

Accused	Sections	Punishment	Fine	In default
Respondent Accused no. 1 ñ Rameshbhai Badubhai Hathila	Section 323 and 326 of IPC	RI for seven years	Rs.30,000/-	SI for six months.
Respondent Accused no. 2 - Shardaben Badubhai Hathila	Sectin323 and 326 of IPC	SI for two years	Rs. 5000/-	SI for two months.
Respondent Accused no. 4 ñ Kamleshbhai Badubhai Hathila	Section 323 and 326 of IPC	RI for seven years	Rs.30,000/-	SI for six months.

[2] Facts and circumstances giving rise to file this appeal are that injured Ramsingh Bariya PW:2 got the second marriage with respondent no.2 accused Shardaben Hathila. After the said relationship, due to matrimonial dispute, she came to her brother's house and since last two years from the date of incident, she was living with her brother. On 08.08.2011, the injured was called upon by the respondents accused for religious rituals at their home. When he came at the home of the respondents accused, on the issue of matrimonial dispute with her wife, heated exchange of words being taken place between the parties, as a result of which, the scuffle took place and accused Ramesh Hathila took his axe lying in the nearby area and with the help of coaccused, both the hands have been cut down by inflicting repeated blows. Injured Ramsingh was taken to the nearby private hospital. The complainant PW:1, who is brother of the injured, after receiving the message, went to

the hospital and was informed by the injured about the incident. He lodged an FIR against the five persons. Pursuant to the said FIR, the accused were arrested. The weapon axe was seized by the police. The Investigating Agency, thereafter, filed the chargesheet against the respondents accused and accordingly, the case was committed to the Sessions Court, Dahod. The charges, under Sections 307, 326, 323, 504, 506(2) and 114 of the IPC, were framed by the Additional Sessions Judge, Dahod.

[3] In order to prove the case against the accused, prosecution has examined 8 witnesses and exhibited 8 documents to prove its case as per the following table:

Oral evidence:

PW 1 ñ Exh. 19	Galabhai Parthibhai Bariya, complainant
PW 2 ñ Exh. 21	Ramsingbhai Parthibhai Bariya
PW 3 ñ Exh. 22	Maniben Ramsingbhai Bariya
PW 4 ñ Exh. 23	Manubhai Dalabhai Khaped, panch witness
PW 5 ñ Exh. 28	Abhesingbhai Punabhai Bhabhor, panch witness
PW 6 ñ Exh. 31	Kalubhai Bhatlabhai Harijan, panch witness
PW 7 ñ Exh. 32	Samirbhai Navalsingbhai Hathila, medical officer
PW 8 ñ Exh. 35	Rayjibhai Melabhai Vasava, investigating officer

Documentary evidence:

Exh. 20	Copy of complaint
Exh. 24	Panchanama of place of incident
Exh. 30	Search Panchanama
Exh. 34	Panchanama of recovery of blood sample of injured person
Exh. 33	Medical certificate of injured
Exh. 36	Primary report of FSL mobile van
Exh. 38	FSL report
Exh. 39	Police report for addition of charge

[4] The accused upon being questioned under Section 313 of the Cr.P.C. with regard to incriminating circumstances made against them in the evidence rendered by the prosecution and they denied it and not lead any evidence in defence.

[5] The learned Additional Sessions Judge, after hearing the parties and upon analysis of the evidence on record, convicted and sentenced the respondents accused for the offences, as recorded above.

[6] Being aggrieved and dissatisfied with the quantum of sentence, the State has preferred this appeal for enhancement of sentence.

[7] Ms.Shruti Pathak, learned APP appearing for and on behalf of the State, has submitted that, the learned Trial Court has awarded inadequate sentence that too without recording special reasons. It is the duty of the Court to impose appropriate punishment. In the facts of present case, both the hands have been cut down by using dangerous weapon axe, and therefore, the learned Trial Court failed to consider the nature of offence, the manner in which, the offence alleged has been committed by the accused. The sentence of seven years directing accused no.1 - Ramesh Hathila and Kamlesh Hathila is too meager, which is disproportionate to the gravity of the offence. In that view of the matter, she would urge that the meager punishment has resulted into travesty of justice as allowing the accused with such punishment would be counterproductive in the long run and against the interests of the society.

[8] In the aforesaid submissions, learned APP would urge that the punishment under Section 326 of the IPC would be imprisonment for life or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine, and therefore, once the offence is proved, it is imperative on the part of the Trial Court to award punishment proportionate to the gravity of the offence, and therefore, the order of sentence be modified and maximum punishment be awarded.

[9] On the other hand, learned advocates Mr.M.A. Chauhan and Mr.Gajendra Baghel appearing for and on behalf of the respondents accused opposing the contentions, have submitted that the accused persons belong to tribal area and having no any past antecedent of like nature and the reason behind the incident, was matrimonial dispute, and therefore, the learned Trial Court, after considering the attending the circumstances, has rightly exercised the discretion and awarded the reasonable sentence, which does not require any interference.

[10] Having regard to the facts and circumstances of present case and upon perusal of the proceedings and case records as well as reasons recorded by the Trial Court while awarding sentence, we are of the considered view that the learned Trial Court in Paras-22, 23, 25 and 26 of the judgment, assigned adequate, sufficient and sound reasons while awarding the sentence to the accused. It needs to be noted that the appeal has been filed by the State against the acquittal under Section 307 of the IPC and the Division Bench of this Court, vide its order dated 25.03.2014, did not grant leave to appeal. In the facts of present case, there was amputation of both the arms below the elbow. Thus, therefore, considering the medical evidence and oral evidence of the witnesses, the learned Trial Court has rightly arrived at a conclusion that, the

accused shall have to suffer 7 years imprisonment and accordingly, they are directed to suffer 7 years imprisonment with fine.

[11] We deem it fit to refer the principles laid down by the Supreme Court in **Bed Raj Vs. State of U.P.**, 1955 AIR(SC) 778. The Supreme Court, in a matter of enhancement of sentence imposed by the Trial Court, has held and observed that, "A question of sentence is a matter of discretion and when it has been exercised properly, the Appellate Court should not interfere to the detriment of the accused person, except for very strong reason, which must be disclosed on the face of the judgment."

[12] In light of the dictum of law and applying the same to the facts of present case, the substantial question of 7 years is being awarded to the accused and it cannot be said that the learned Trial Court did not impose adequate sentence.

[13] For the reasons recorded and considering the peculiar facts and circumstances of present case, we do not find any grounds warranting interference with the order of sentence awarded by the Trial Court against the respondents accused.

[14] Resultently, the appeal fails and is hereby **dismissed**

2024(2)GCRJ556

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Hasmukh D Suthar]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 16671 of 2020 **dated 12/09/2024**

Nasimben @ Nasimaben Sadikbhai Lulaniya & Ors

Versus

State of Gujarat & Anr

FIR QUASHED

Indian Penal Code, 1860 Sec. 114, Sec. 294, Sec. 498A, Sec. 323 - Code of Criminal Procedure, 1973 Sec. 482 - FIR Quashed - Applicants sought quashing of an FIR under IPC Sec. 498A for harassment allegations by respondent, the complainant's relatives - Applicants argued that the allegations were general and similar complaints against the co-accused were already quashed by the court - Court found the allegations vague and noted the lack of specific evidence against the applicants - Held that continuation of proceedings would cause unnecessary harassment and quashed the FIR and all related proceedings - FIR Quashed

Law Point: FIR under Sec. 498A IPC can be quashed when the allegations are vague, unsupported by specific evidence, and continuation of proceedings would cause undue harassment

ભારતીય દંડ સંહિતા, 1860 કલમ 114, કલમ 294, કલમ 498A, કલમ 323 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 482 – એફ. આઈ. આર. રદ કરવામાં આવી – અરજદારોએ આઈ. પી. સી. હેઠળ એફ. આઈ. આર. રદ કરવાની માંગ કરી. પ્રતિવાદી, કલમ 498A ફરિયાદીના સંબંધીઓ દ્વારા સતામણીના આરોપો માટે – અરજદારોએ દલીલ કરી હતી કે આરોપો સામાન્ય હતા અને સહ - આરોપીઓ સામેની સમાન ફરિયાદો કોર્ટ દ્વારા પહેલાથી જ રદ કરવામાં આવી હતી – કોર્ટને આક્ષેપો અસ્પષ્ટ જણાયા હતા અને અરજદારો સામે ચોક્કસ પુરાવાના અભાવની નોંધ લીધી હતી – ધરપકડ કે કાર્યવાહી ચાલુ રાખવાથી બિનજરૂરી હેરાનગતિ થશે અને એફ. આઈ. આર.અને તમામ સંબંધિત કાર્યવાહી રદ કરવામાં આવશે – એફ. આઈ. આર. રદ.

કાયદા નો મુદ્દોઃ એફ. આઈ. આર. IPC કલમ 498A રદ કરી શકાય છે જ્યારે આરોપો અસ્પષ્ટ હોય, ચોક્કસ પુરાવાઓ દ્વારા અસમર્થિત હોય અને કાર્યવાહી ચાલુ રાખવાથી અયોગ્ય ઉત્પીડન થાય.

Acts Referred:

Indian Penal Code, 1860 Sec. 114, Sec. 294, Sec. 498A, Sec. 323
Code of Criminal Procedure, 1973 Sec. 482

Counsel:

Devansh Kakkad, Ma Bukhari, Hardik Dave

JUDGEMENT

Hasmukh D Suthar, J.- [1] Rule. Learned advocates waive service of notice of rule on behalf of the respective respondents.

[2] By way of this application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."), the applicants have prayed to quash and set aside the complaint being **FIR being CR No.11213022201526 of 2020 registered with Jetpur City Police Station, Rajkot**, for the offences under Sections 498(A), 323, 294(b) and 114 of the IPC and all the consequential proceedings arising therefrom.

[3] Going through the compilation of the petition, it appears that complaint is filed at the instance of respondent No.2 against the petitioner Nos.1 and 4, who are mother-in-law, father-in-law, brother-in-law and sister-in-law respectively. In the present case, it appears that marriage of the respondent No.2 was solemnized on 26.111.2017 with the accused No.1 It is alleged in the complaint that after the marriage, the disputes arose between the respondent No.2 and accused No.1. The allegations levelled against the petitioners is that the petitioners were harassing the complainant mentally and physically. In this regard, the complaint came to be filed.

[4] Learned advocate for the applicants submits that the complainant and accused No.1 Sameera F.Mulla against whom proceedings are quashed by this Court vide order dated 9.4.2024 passed in Criminal Misc. Application No.14180 of 2020. He has further submitted that impugned complaint is is nothing but abuse of process of law. He has further submitted that the petitioners have been falsely implicated in the alleged offence. He has further submitted that when no case is made out against the present petitioners, the continuation of proceeding but a sheer harassment. He has therefore requested this Court to allow this application and quash the set aside the impugned FIR.

[5] Learned advocate for the respondent No.2 has strongly objected the present petition and submits that prima facie case is made out against the present petitioners and they have abated the accused No.1. He has therefore requested to dismiss the present petition.

[6] Learned APP appearing for the respondent No.1 has opposed the present petition and submits that prima facie the allegations levelled against the present petitioners are that they are relatives of the respondent No.2 and they have harassed and abated the accused No. 1. Therefore, he has requested this Court to dismiss the present application.

[7] Having heard learned advocates for the respective parties and considered the material available on record, in the complaint, it is alleged that petitioner Nos.1 and 4 have mentally and physically harassed the complainant. It appears that the marriage of the respondent No.1 with accused No.1 was solemnized in the year 2017, the husband is not before this Court. It also appears in the complaint that all the allegations against the present petitioners are general in nature. It also appears that the Co-ordinate Bench of this Court has quashed the complaint against the accused No.2 vide order dated 9.4.2024 passed in Criminal Misc. Application No. 14180 of 2020. It appears that the petitioners are facing charge of Section 498A of IPC. Therefore, as per the allegations made in the complaint, ingredient of Section 498A is made out. In this regard, it would be apposite to refer the decisions of the Apex Court in case of **Abhishek vs. State of Madhya Pradesh reported in 2023INSC779 / (Criminal Appeal No. 1457 of 2015); Preeti Gupta and another vs. State of Jharkhand and another**, 2010 7 SCC 667; **Achin Gupta vs. State of Haryana**, 2024 INSC 369; **Geeta Mehrotra and Anr. vs. State of Uttar Pradesh & Anr.**, 2012 10 SCC 741 and vs. The State of Karnataka & Anr. reported in 2023 INSC 1050, it is observed that "this Court noted that the tendency to implicate the husband and all his immediate relations is also not uncommon in complaints filed under Section 498A IPC. It was observed that the Courts have to be extremely careful and cautious in dealing with these complaints and must take pragmatic realities into consideration while dealing with matrimonial cases, as allegations of harassment by husband's close relations, who were living in different cities and never visited or rarely visited the place where the complainant resided,

would add an entirely different complexion and such allegations would have to be scrutinised with great care and circumspection"

[8] . It is necessary to consider whether the power conferred by the High Court under section 482 of the Code of Criminal Procedure is warranted. It is true that the powers under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage as the Hon'ble Supreme Court has decided in the case of **Central Bureau of Investigation vs. Ravi Shankar Srivastava IAS & Anr.**, 2006 AIR(SC) 2872 and in case of **State of Haryana v. Bhajan Lal**, 1992 Supp1 SCC 335, the Apex Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised and held in para 102 as under:

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Art. 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

[9] Having heard learned advocates on both the sides and considering the facts and circumstances of the case as also the principle laid down by the Apex Court in the cases of (i) **Gian Singh Vs. State of Punjab & Anr.**, 2012 10 SCC 303, (ii) **Madan Mohan Abbot Vs. State of Punjab**, 2008 4 SCC 582, (iii) **Nikhil Merchant Vs. Central Bureau of Investigation & Anr.**, 2009 1 GLH 31, (iv) **Manoj Sharma Vs. State & Ors.**, 2009 1 GLH 190 and (v) **Narinder Singh & Ors. Vs. State of Punjab & Anr.**, 2014 2 Crimes(SC) 67, in the opinion of this Court, the further continuation of criminal proceedings against the petitioners in relation to the impugned FIR would cause unnecessary harassment to the petitioners. Hence, to secure the ends of justice, it would be appropriate to quash and set aside the impugned FIR and all consequential proceedings initiated in pursuance thereof under Section 482 of the Cr.P.C..

[10] In the result, the petition is **allowed.** The impugned complaint being **CR No.11213022201526 of 2020 registered with Jetpur City Police Station, Rajkot**, as well as all consequential proceedings initiated in pursuance thereof are hereby quashed and set aside qua the petitioner Nos.1 and 4 herein. Rule is made absolute accordingly. Direct service is permitted. If the petitioners is in jail, the jail authority concerned is directed to release the petitioners forthwith, if not required in connection with any other case

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2024(2)GCRJ560

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Hasmukh D Suthar]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 2527 of 2020 **dated 12/09/2024**

Pravinchandra Premjibhai Raninga

Versus

State of Gujarat & Anr

FIR QUASHED

Indian Penal Code, 1860 Sec. 415, Sec. 405, Sec. 420, Sec. 406 - Code of Criminal Procedure, 1973 Sec. 482 - FIR Quashed - Petitioner sought quashing of an FIR alleging cheating and criminal breach of trust under Sections 406 and 420 of IPC related to a commercial dispute - Petitioner argued that the dispute was civil in nature, involving failure to supply goods despite receiving payment - Court found no criminal intent or entrustment of property as required under Sections 406 and 420 IPC - Held

that giving the dispute a criminal angle amounted to abuse of legal process - FIR and related proceedings quashed - FIR Quashed

Law Point: Commercial disputes should not be given a criminal angle under Sections 406 and 420 IPC when there is no evidence of entrustment or criminal intent, as it constitutes an abuse of legal process

ભારતીય દંડ સંહિતા, 1860 કલમ 415, કલમ 405, કલમ 420, કલમ 406 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 482 – FIR રદ કરવામાં આવી – અરજદારે વ્યાપારી વિવાદ સંબંધિત IPC ની કલમ 406 અને 420 હેઠળ છેતરપિંડી અને વિશ્વાસના ફોજદારી ભંગનો આરોપ મૂકતી FIR રદ કરવાની માંગ કરી – અરજદારે દલીલ કરી કે વિવાદ દિવાની પ્રકૃતિનો હતો, જેમાં ચુકવણી પ્રાપ્ત કરવા છતાં માલ સપ્લાય કરવામાં નિષ્ફળતા સામેલ હતી – કોર્ટને કલમ 406 અને 420 આઈ. પી. સી. હેઠળ આવશ્યકતા મુજબ કોઈ ગુનાહિત ઈરાદો અથવા મિલકતની સોંપણી મળી નથી – એવું માનવામાં આવે છે કે વિવાદને ફોજદારી એંગલ આપવાથી કાનૂની પ્રક્રિયાનો દુરુપયોગ થાય છે – એફ. આઈ. આર. અને સંબંધિત કાર્યવાહી રદ કરવામાં આવી – એફ. આઈ. આર. રદ કરવામાં આવી

કાયદા નો મુદ્દો : જ્યારે સોંપણી અથવા ગુનાહિત ઈરાદાનો કોઈ પુરાવો ન હોય ત્યારે કલમ 406 અને 420 IPC હેઠળ વાણિજ્યિક વિવાદોને ફોજદારી એંગલ આપવો જોઈએ નહીં, કારણ કે તે કાનૂની પ્રક્રિયાનો દુરુપયોગ કરે છે.

Acts Referred:

Indian Penal Code, 1860 Sec. 415, Sec. 405, Sec. 420, Sec. 406
Code of Criminal Procedure, 1973 Sec. 482

Counsel:

Bhaumik Dholariya, H K Patel

JUDGEMENT

Hasmukh D Suthar, J.- [1] Rule returnable forthwith. Learned APP waives service of notice of Rule for and on behalf of respondent No.1 - State of Gujarat. Considering the facts and circumstances of the case, the matter is taken up for final disposal forthwith.

[2] By way of this petition under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "CrPC"), the petitioner has prayed to quash and set aside the FIR being **C.R. No.I-37 of 2019** registered with **DCB Police Station, Ahmedabad City** for the offence punishable under Sections 406 and 420 of Indian Penal Code, 1860 (for short "IPC") and all other consequential proceedings arising therefrom qua the present petitioner.

[3] Heard learned advocate Mr. Bhaumik Dholariya for the petitioner and learned APP Mr. H.K. Patel for respondent No.1 State of Gujarat.

[4] Learned advocate for the petitioner has submitted that the petitioner is the Director of company namely Raninga Ispact Private Limited (hereinafter referred to as "said Company") and has been falsely enroped in the alleged offence. Further, the petitioner had supplied goods i.e. pig iron worth Rs.10,01,339 (Rs.4,85,185 + Rs.5,16,154) in July 2014 to the complainant in connection with which Invoice cum Excise Invoice was issued on 09.07.2014 and 11.07.2014. That, outstanding amount i.e. Rs.22 lakh has been shown in the Sundry Creditors and Balance Sheet of the said company and therefore, ingredients of the offence under Sections 406 and 420 are totally absent in the present case. He has submitted that after receiving the money from the complainant, the petitioner had supplied the goods and in this regard he has also produced on record the invoice also and subsequently due to financial crunch, the petitioner asked an amount of Rs.50 lakh from the complainant to purchase raw material pursuant to which the complainant gave Rs.32,50,000/- to the petitioner in lieu of which it was agreed between the parties that the petitioner will supply 150 Metric Ton of raw material to the complainant and in this regard, a notarized agreement was executed on 15.12.2013 but the petitioner neither paid the money nor supplied the goods. Further, after expiry of limitation period, for the purpose of recovery of money, cloak of criminality is given to a civil dispute. Hence, he has requested to allow the present petition and quash and set aside the impugned proceedings.

[5] Learned APP has vehemently opposed the present petition and submitted that after completion of investigation, chargesheet has been filed and prima facie evidence collected during investigation reveals that the present petitioner has pocketed the money and thereafter neither returned the money nor supplied the goods as promised and therefore, offence of criminal breach of trust punishable under Section 406 of the IPC is made out. Further, the petitioner was having intention of cheating the complainant since inception and therefore, offence under Section 420 of the IPC is also made out. He has submitted that whatever defences raised by the petitioner are required to be dealt with during the trial and at this stage exercise of powers under Section 482 of the CrPC is not warranted. Hence, he has requested to dismiss the present petition.

[6] Having heard learned advocate for the petitioner and learned APP for the respondent No.1 State of Gujarat and going through the allegations levelled against the petitioner, it appears that the petitioner demanded Rs.50 lakh to purchase raw material but at that time the complainant was having only Rs.32,50,000/- which was lent to the petitioner and towards the said transaction, one notarized agreement was executed. Pursuant to the said agreement, petitioner had agreed to supply 1.50 Metric Ton of goods i.e. pig iron to the complainant within two months or to return the money

borrowed from the complainant. That, initially the petitioner had supplied goods i.e. pig iron worth Rs.10,01,339 (Rs.4,85,185 + Rs.5,16,154) in July 2014 to the complainant in connection with which Invoice cum Excise Invoice was issued on 09.07.2014 and 11.07.2014, which are produced at Annexure-C Collectively with the petition and outstanding amount i.e. Rs.22 lakh has been shown in the Sundry Creditors and Balance Sheet of the said company, which is produced at Annexure-D to the petition. Though the petitioner neither supplied the goods nor repay the amount but issued a cheque and in this regard also, on 22.05.2019, one affidavit was executed by the petitioner in favor of the complainant. Further, the said Company i.e. Raninga Ispat Private Limited was facing proceedings under the Insolvency and Bankruptcy Code, 2016 before the National Company Law Tribunal and vide judgment dated 21.02.2018, moratorium was ordered and prohibition was issued as per paragraph No.22 of the order and power of the Board of Directors of the petitioner's company were suspended and management was vested with Insolvency Resolution Professional. The said order was challenged by the petitioner before the NCLAT and order dated 21.02.2018 was quashed and set aside. Therefore, the petitioner could not make the payment of outstanding dues as the matter was sub-judice and there was an order of status quo.

[6.1] In the present case, FIR is filed for the offence punishable under Sections 406 and 420 of the IPC. To make out an offence under Sections 406 and 420 of the IPC, it is worth to refer to provisions of sections 405, 406, 415 and 420 of the IPC, which read as under:

> "405. Criminal breach of trust.- Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".

The essential ingredients of the offense of criminal breach of trust are: (1) The accused must be entrusted with the property or with dominion over it, (2) The person so entrusted must use that property, or; (3) The accused must dishonestly use or dispose of that property or wilfully suffer any other person to do so in violation, (a) of any direction of law prescribing the mode in which such trust is to be discharged, or; (b) of any legal contract made touching the discharge of such trust.

[6.2] "Entrustment" of property under Section 405 of the IPC is pivotal to constitute an offence under this. The words used are, 'in any manner entrusted with property. So, it extends to entrustments of all kinds whether to clerks, servants, business partners or other persons, provided they are holding a position of 'trust'. A person who dishonestly misappropriates property entrusted to them contrary to the

terms of an obligation imposed is liable for a criminal breach of trust and is punished under Section 406 of the Penal Code. The definition in the section does not restrict the property to movables or immoveable alone.

[6.3] Section 415 of IPC define cheating which reads as under: -

> **"415. Cheating.** -Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".
>
> The essential ingredients of the offense of cheating are:
>
> 1.Deception of any person
>
> 2. (a) Fraudulently or dishonestly inducing that person- (i) to deliver any property to any person: or (ii) to consent that any person shall retain any property; or (b) intentionally inducing that person to do or omit to do anything which he would not do or omit if he were no so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.
>
> A fraudulent or dishonest inducement is an essential ingredient of the offence. A person who dishonestly induces another person to deliver any property is liable for the offence of cheating.
>
> **"420. Cheating and dishonestly inducing delivery of property.-** Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of s valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Thus, Section 420 IPC is a serious form of cheating that includes inducement (to lead or move someone to happen) in terms of delivery of property as well as valuable securities. This section is also applicable to matters where the destruction of the property is caused by the way of cheating or inducement. Punishment for cheating is provided under this section which may extend to 7 years and also makes the person liable to fine.

[7] Considering the offence under Sections 406 and 420 of the IPC, it appears that there is no iota of evidence under Sections 406 and 420 of IPC and if he accept whatever allegations levelled against the present petitioner, it may be considered as

there is a civil dispute pertaining to recovery of money between the parties. Therefore, no offence is made out under Sections 406 and 420 of the IPC and there was no any intention since inception of cheating on part of the petitioner.

[7.1] Considering the fact that there is not an iota of element, which satisfy or could be said that offence under Sections 406 and 420 of IPC is made out. This Court is of the view that herein civil dispute has been given the cloak of criminality.

[8] To make out the offence under Section 406 of IPC, prosecution must have to prove that the accused was entrusted property or with any dominion or power over it and there was dishonest intention, misappropriation or dishonest conversion or disposal of property in violation of directions of law or legal contract by the accused himself. Here in the case on hand, no any iota of evidence or allegation, which suggests entrustment of the property to the petitioner and dishonest intention on the part of the accused. In absence of any such contract of transaction or any breach of terms of agreement between the complainant and petitioner, no offence is made out. It is needless to say that liability recommends difference between the simple payment of investment of money and entrustment of the property. In absence of any fraudulent entrustment or dishonest intention as well as in absence of contractual relationship for the obligation between the accused and complainant, no offence is made out.

[9] In view of the above, this Court is of considered view that without any nexus or relationship between the petitioner and complainant, the petitioner has been arraigned as accused only with an intention to recover the outstanding money. Therefore, if the proceedings are allowed to continue against the petitioner, the same will be nothing but abuse of process of law and travesty of justice and therefore, this is a fit case to exercise inherent power under Section 482 of the CrPC for quashing of criminal proceedings.

[10] Considering the fact that petitioner facing charge under Sections 406 and 420 of the IPC, it would be apposite to refer the decision of the Hon'ble Apex Court in case of (i) **Sarabjit Kaur vs. State of Punjab and Another**, 2023 5 SCC 360 (ii) Rekha jain vs. The State of Karnataka & Anr.,2022 LiveLaw(SC) 468, (iii) **Jay Shri & Anr. vs. State of Rajasthan**, 2024 INSC 48 passed in Criminal Appeal (arising out of SLP(Crl.) No. 14423 OF 2023), (iv) Syed Yaseer Ibrahim vs. State of U.P.,2022 SCCOnline(SC) 271 and (v) **A.M. Mohan vs. The State represented By SHO and Another**, 2024 INSC 233, passed in Criminal Appeal (Arising out of SLP(Criminal) No. 9598 of 2022), wherein the Hon'ble Apex Court has observed as under:

> "9. The law with regard to exercise of jurisdiction under Section 482 of Cr.P.C. to quash complaints and criminal proceedings has been succinctly summarized by this Court in the case of **Indian Oil Corporation v. NEPC India Limited and Others**, 2006 6 SCC 736 after considering the earlier

precedents. It will be apposite to refer to the following observations of this Court in the said case, which read thus:

"12. The principles relating to exercise of jurisdiction under Section 482 of the Code of Criminal Procedure to quash complaints and criminal proceedings have been stated and reiterated by this Court in several decisions. To mention a few - **Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrojirao Angre**, 1988 1 SCC 692: 1988 SCC (Cri) 234] , **State of Haryana v. Bhajan Lal**, 1992 Supp1 SCC 335: 1992 SCC (Cri) 426] , **Rupan Deol Bajaj v. Kanwar Pal Singh Gill**, 1995 6 SCC 194: 1995 SCC (Cri) 1059] , **Central Bureau of Investigation v. Duncans Agro Industries Ltd.**, 1996 5 SCC 591: 1996 SCC (Cri) 1045] , **State of Bihar v. Rajendra Agrawalla**, 1996 8 SCC 164: 1996 SCC (Cri) 628], **Rajesh Bajaj v. State NCT of Delhi**, 1999 3 SCC 259: 1999 SCC (Cri) 401] , **Medchl Chemicals & Pharma (P) Ltd. v. Biological E. Ltd.**, 2000 3 SCC 269: 2000 SCC (Cri) 615] , **Hridaya Ranjan Prasad Verma v. State of Bihar**, 2000 4 SCC 168: 2000 SCC (Cri) 786] , **M. Krishnan v. Vijay Singh**, 2001 8 SCC 645: 2002 SCC (Cri) 19] and **Zandu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque**, 2005 1 SCC 122: 2005 SCC (Cri) 283] . The principles, relevant to our purpose are:

(i) A complaint can be quashed where the allegations made in the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out the case alleged against the accused.

For this purpose, the complaint has to be examined as a whole, but without examining the merits of the allegations. Neither a detailed inquiry nor a meticulous analysis of the material nor an assessment of the reliability or genuineness of the allegations in the complaint, is warranted while examining prayer for quashing of a complaint.

(ii) A complaint may also be quashed where it is a clear abuse of the process of the court, as when the criminal proceeding is found to have been initiated with mala fides/malice for wreaking vengeance or to cause harm, or where the allegations are absurd and inherently improbable.

(iii) The power to quash shall not, however, be used to stifle or scuttle a legitimate prosecution. The power should be used sparingly and with abundant caution.

(iv) The complaint is not required to verbatim reproduce the legal ingredients of the offence alleged. If the necessary factual foundation is laid in the complaint, merely on the ground that a few ingredients have not been stated in detail, the proceedings should not be quashed. Quashing of the complaint is

warranted only where the complaint is so bereft of even the basic facts which are absolutely necessary for making out the offence.

(v) A given set of facts may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence. A commercial transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature and scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract, for which a civil remedy is available or has been availed, is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not. "

[11] Further, in the case of **Lalit Chaturvedi & Others vs. State of Uttar Pradesh & Another** rendered in **Criminal Appeal arising out of SLP (Cri.) No.13485 of 2023**, the Hon'ble Supreme Court has observed as follows:

"18. Let us now examine whether the ingredients of an offence of cheating are made out. The essential ingredients of the offence of "cheating" are as follows: (i) deception of a person either by making a false or misleading representation or by dishonest concealment or by any other act or omission; (ii) fraudulent or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or to intentionally induce that person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived; and (iii) such act or omission causing or is likely to cause damage or harm to that person in body, mind, reputation or property.

19. To constitute an offence under section 420, there should not only be cheating, but as a consequence of such cheating, the accused should have dishonestly induced the person deceived (i) to deliver any property to any person, or (ii) to make, alter or destroy wholly or in part a valuable security (or anything signed or sealed and which is capable of being converted into a valuable security)."

[12] In the opinion of this Court, further continuation of criminal proceedings under Sections 406 and 420 of the IPC against the present petitioner in relation to the impugned FIR would cause unnecessary harassment to the petitioner. Hence, to secure the ends of justice, it would be appropriate to quash and set aside the impugned FIR and all consequential proceedings initiated in pursuance thereof under Section 482 of the CrPC.

[12.1] Considering the aforesaid fact also it appears that with a view to recover the money, the impugned FIR is filed by giving cloak of criminality to civil dispute. This

is only a case, wherein civil wrong is committed by the petitioner and he has not committed any offence of cheating or criminal breach of trust.

[13] It would be further apposite to refer the decision of the Hon'ble Apex Court in case of (I) **V.P. Shrivastava vs. Indian Explosives Limited and Others**, 2010 10 SCC 361 and in case of (ii) **Delhi Race Club (1940) Ltd. & Ors. vs. State of Uttar Pradesh & Anr.**, 2024 INSC 626 (CRIMINAL APPEAL NO. 3114 OF 2024), wherein the Hon'ble Apex Court has observed as under:

> "30. There is a distinction between criminal breach of trust and cheating. For cheating, criminal intention is necessary at the time of making a false or misleading representation i.e., since inception. In criminal breach of trust, mere proof of entrustment is sufficient. Thus, in case of criminal breach of trust, the offender is lawfully entrusted with the property, and he dishonestly misappropriated the same. Whereas, in case of cheating, the offender fraudulently or dishonestly induces a person by deceiving him to deliver any property. In such a situation, both the offences cannot co-exist simultaneously.
>
> 31. . "The reason being that indisputably there is no entrustment of any property in the Criminal Appeal No. 3114 of 2024 Page 25 of 31 case at hand. It is not even the case of the complainant that any property was lawfully entrusted to the appellants and that the same has been dishonestly misappropriated. The case of the complainant is plain and simple. He says that the price of the goods sold by him has not been paid. Once there is a sale, Section 406 of the IPC goes out of picture. According to the complainant, the invoices raised by him were not cleared. No case worth the name of cheating is also made out.
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> 36. From the aforesaid, there is no manner of any doubt whatsoever that in case of sale of goods, the property passes to the purchaser from the seller when the goods are delivered. Once the property in the goods passes to the purchaser, it cannot be said that the purchaser was entrusted with the property of the seller. Without entrustment of property, there cannot be any criminal breach of trust. Thus, prosecution of cases on charge of criminal breach of trust, for failure to pay the consideration amount in case of sale of goods is flawed to the core. There can be civil remedy for the non-payment of the consideration amount, but no criminal case will be maintainable for it."

[14] Reference is also required to be made to the decisino of Hon'ble Supreme Court in the case of **State of Haryana v. Bhajan Lal**, 1992 Supp1 SCC 335 wherein the Apex Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised and held in para 102 as under:

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by

this Court in a series of decisions relating to the exercise of the extraordinary power under Art. 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

[15] For the foregoing reasons and observations, prima facie, it appears that cloak of criminality is given to civil dispute and therefore, the present petition is allowed. The impugned FIR being **C.R. No.I-37 of 2019** registered with **DCB Police Station, Ahmedabad City** as well as all consequential proceedings initiated in pursuance thereof qua the present petitioner are hereby quashed and set aside. Rule is made absolute to the aforesaid extent. Direct service is permitted

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2024(2)GCRJ569

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Hasmukh D Suthar]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 1822 of 2020 **dated 11/09/2024**

Irfanbhai @ Appu Rafikbhai Fatehmamad Shaikh & Anr

Versus

State of Gujarat & Anr

QUASHING OF FIR

Code of Criminal Procedure, 1973 Sec. 482 - Evidence Act, 1872 Sec. 26, Sec. 25 - Gujarat Prohibition Act, 1949 Sec. 98, Sec. 81, Sec. 65, Sec. 99, Sec. 116B, Sec. 83 - Quashing of FIR - FIR filed under Gujarat Prohibition Act against applicants for possession of Indian Made Foreign Liquor - Applicant No.2 sought quashing, arguing charges based only on co-accused's statement, without corroborating evidence - Court held co-accused's statement inadmissible under Evidence Act - No other evidence linked applicant to offence - FIR quashed against Applicant No.2. - Petition Allowed

Law Point: A co-accused's statement, without independent corroborative evidence, is insufficient to support prosecution, and proceedings can be quashed under Section 482 of CrPC.

ફોજદારી કાર્યવાહીની સંહિતા, ૧૯૭૩ સેક. ૪૮૨ - એવિડન્સ એક્ટ, ૧૮૭૨ સેક. ૨૬, સેક. ૨૫ - ગુજરાત પ્રોહિબિશન એક્ટ, ૧૯૪૯ સેક. ૯૮, સેક. ૮૧, સેક. ૬૫, સેક. ૯૯, સેક. ૧૧૬બી, સેક. ૮૩ - એફઆઇઆર ૨૬ કરવી - ભારતીય બનાવટનો વિદેશી દારૂ રાખવા બદલ અરજદારો સામે ગુજરાત પ્રોહિબિશન એક્ટ હેઠળ એફઆઇઆર દાખલ - અરજદાર નંબર ૨ એ પુરાવા વગર માત્ર સહ-આરોપીના નિવેદનના આધારે આરોપોને રદબાતલ કરવાની માંગ કરી હતી. - કોર્ટે એવિડન્સ એક્ટ હેઠળ સહ-આરોપીના નિવેદનને અસ્વીકાર્ય ગણાવ્યું - અન્ય કોઈ પુરાવા અરજદારને ગુના સાથે જોડે તેવા નથી - અરજદાર નંબર ૨ સામે એફઆઇઆર ૨૬ કરવામાં આવી. - અરજી મંજૂર

કાયદાનો મુદ્દો : સહ-આરોપીનું નિવેદન, સ્વતંત્ર સમર્થનાત્મક પુરાવા વિના, કાર્યવાહીને સમર્થન આપવા માટે અપૂરતું છે, અને સીઆરપીસી ની કલમ ૪૮૨ હેઠળ કાર્યવાહી ૨૬ કરી શકાય છે.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 482
Evidence Act, 1872 Sec. 26, Sec. 25
Gujarat Prohibition Act, 1949 Sec. 98, Sec. 81, Sec. 65, Sec. 99, Sec. 116B, Sec. 83

Counsel:

Tejas M Barot, Trupesh Kathiriya

JUDGEMENT

Hasmukh D Suthar, J.- [1] Rule. Learned APP waives service of notice of rule on behalf of respondent-State.

[2] Heard learned advocates for the respective parties.

[3] Learned advocate for the applicants does not press the present application qua applicant No.1 viz. Irfanbhai @ Appu Rafikbhai Fatehmamad Shaikh with a liberty to raise all available contentions during the trial. Hence, the present application stands disposed of qua applicant No.1 with above liberty. Rule is discharged qua applicant No.1. This Court has not examined the merits of the case.

[4] So far as applicant No.2 is concerned, this matter is taken up for final disposal only qua **applicant No.2 viz. Arifmiya Yusufmiya Malek.**

[5] By way of this application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."), the applicant/s has prayed to quash and set aside the proceedings of FIR being **C.R. No.III-C.R. No.579 of 2019 registered with Anand Town Police Station, District: Anand,** for the offence under Sections 65-E, 81, 83, 98(2), 99 and 116-B of the Gujarat Prohibition Act and all the consequential proceedings arising therefrom.

[5.1] The brief facts of the case are that the informant and other police personnel were on night patrol on December 2, 2019, around 6:00 a.m., when they noticed vehicles in an open plot emitting a smell of foreign liquor. Upon investigation, it was discovered that the vehicles contained fodder and cotton, with Indian Made Foreign Liquor (IMFL) hidden among the cargo. Additional staff from the LCB and two panchas were called to assist. The investigation revealed that truck No. RJ-19-GF-8437 contained 52 boxes, each with 12 bottles of 750 ML IMFL, valued at Rs. 1,87,200. Nearby, a pickup vehicle No. GJ-23-Y-6489 was found with 43 boxes of similar IMFL, valued at Rs. 1,54,800. Next to this, a blue Baleno No. GJ-06-JQ-0306 contained 15 boxes of IMFL, valued at Rs. 54,000. A white Swift car, further away, had 12 boxes of IMFL, valued at Rs. 43,200. In total, contraband IMFL valued at Rs. 4,39,200 was seized from four vehicles, which were collectively valued at Rs. 25,00,000, along with other articles. An FIR was filed against the unknown drivers and owners of these vehicles. However, the petitioners claim they have been falsely implicated. Imtiyaz alias Datro Karimbhai Vohra, arrested on January 11, 2020, reportedly identified the petitioners and others as being present at the scene, but the petitioners argue that they are innocent and have been unfairly targeted based on Vohra's statement.

[6] It is submitted that the applicant No.2 was not initially arraigned as an accused in the FIR; however, prosecution is now sought based on the statement of one of the accused. Other accused were involved in illegal activities and were charged due to their connection with the seized liquor and the co-accused's statement. According to this statement, the present applicant No.2 along with other accused were present with vehicles at the place, when the police came at the spot, they fled away from the scene. It is submitted that the complaint was filed against unknown drivers and owners of the

vehicles and others. However, with oblique motive, the present applicant No.2 has been dragged into the alleged offence. Apart from this, no additional allegations have been made, and nothing was recovered from the applicant's conscious possession. In view of above, the present application deserves consideration.

[7] Per contra, Mr.Kathiriya, learned Additional Public Prosecutor for the respondent State has opposed the application and submitted that the offence is committed at the instance of accused i.e. present applicant No.2 and he is having criminal antecedents and 9 offences are registered against him. Going through the record, the muddamal was intercepted. Therefore, he has requested to dismiss the present application.

[8] Having heard learned advocates for the parties, prima facie it appears that the present applicant No.2 is arraigned by the police on the basis of the statement made by the co-accused. It is true that the statement of the co-accused provides the clue to the Investigating Officer but nothing based on the said statement. No any allegations is collected during the investigation except the statement of the co-accused. In absence of any legal evidence, the statement of the co-accused, which is even otherwise not admissible in the evidence. Considering the provision of Sections 25 and 26 of the Indian Evidence Act, the said statement is not sufficient and in absence of legal evidence, no case is made out and this is not a fit case to continue such proceedings against the present accused.

[8.1] Considering the fact that the allegation against applicant No.2 is that he is friend of accused - Irfanbhai @ Appu Rafikbhai Fatehmamad Shaikh and he was in a company of the accused Irfanbhai @ Appu, except this, no any direct evidence, which connect the accused with the offence is collected. Even nothing is found from the conscious possession of the present applicant No.2, except the confessional statement made by the co-accused and no any cogent or reliable material is collected during the investigation. During the police investigation, the said statement being recorded, which is not a legal evidence as per Sections 25 and 26 of the Indian Evidence Act and the same is tented in nature in the eye of law. Even, present applicant No.2 is having past antecedents is not a ground, which is merely based on the presumption and conjectures and surmises to arraign as an accused the applicant No.2 in similar nature of the offence to bring guilt of whom or to prosecute the accused. There must be some legal evidence or the material, which substantiate the charge or allegations levelled against the present applicant No.2, except the statement of co-accused, no evidence, much less legal evidence is available to continue such proceedings against the present applicant No.2. Aside from this, no further allegations have been made, and nothing has been recovered from the conscious possession of the present applicant. The co-accused's statement is weak evidence. In absence of any involvement or abetment, no proceedings can be continued against the present applicant No.2.

In view of above, the present petition deserves consideration.

[9] It is necessary to consider whether the power conferred by the High Court under section 482 of the Code of Criminal Procedure is warranted. It is true that the powers under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. The Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. The High Court being the highest court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard-and-fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage as the Hon'ble Supreme Court has decided in the case of **State of Haryana v. Bhajan Lal**, 1992 Supp1 SCC 335, the Apex Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised and held in para 102 as under:

> "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Art. 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for

wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

[10] In the result, the petition is allowed qua applicant No.2. The impugned FIR being **C.R. No.III-C.R. No.579 of 2019 registered with Anand Town Police Station, District: Anand** and all the consequential proceedings arising therefrom are hereby quashed and set aside qua the present **applicant No.2 viz. Arifmiya Yusufmiya Malek.** Rule is made absolute to the aforesaid extent. Direct service is permitted

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2024(2)GCRJ574

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Hasmukh D Suthar]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order) No 14788 of 2021 **dated 10/09/2024**

Mohamadmunaf Mahamaddhanif Pathan

Versus

State of Gujarat & Anr

FIR QUASHED

Code of Criminal Procedure, 1973 Sec. 482, Sec. 195 - Disaster Management Act, 2005 Sec. 54, Sec. 60 - FIR Quashed - Applicant sought quashing of an FIR filed under the Disaster Management Act for allegedly spreading false information during the COVID-19 pandemic - FIR was based on a Facebook post with unauthorized contact numbers for food assistance - Applicant argued that the complaint was filed without proper authorization as required under Sec. 60 of the Disaster Management Act and Sec. 195 CrPC - Court found that the FIR did not meet the criteria for false alarm under Sec. 54 of the Act, and the process lacked proper authorization - FIR and all related proceedings quashed - FIR Quashed

Law Point: FIR under Disaster Management Act must be filed with proper authorization, and actions must meet the legal threshold for false alarm under Sec. 54

ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 482, કલમ 195 – ડિઝાસ્ટર મેનેજમેન્ટ એક્ટ, 2005 કલમ 54, કલમ 60 – એફ. આઈ. આર. રદ કરવામાં આવી – અરજદારે કોવિડ-19 રોગચાળા દરમિયાન કથિત રીતે ખોટી માહિતી ફેલાવવા બદલ ડિઝાસ્ટર મેનેજમેન્ટ એક્ટ હેઠળ દાખલ કરવામાં આવેલી એફ. આઈ. આર.ને રદ કરવાની માંગ કરી – એફ. આઈ. આર. ખોરાક સહાય માટે અનધિકૃત સંપર્ક નંબરો સાથેની ફેસબુક પોસ્ટ પર આધારિત હતી – અરજદારે દલીલ કરી કે ફરિયાદ કલમ હેઠળ આવશ્યકતા મુજબ યોગ્ય અધિકૃતતા વિના દાખલ. ડિઝાસ્ટર મેનેજમેન્ટ

એક્ટની કલમ 60 અને કલમ 195 CrPC – કોર્ટે શોધી કાઢ્યું કે FIR કલમ હેઠળ ખોટા એલાર્મ માટેના માપદંડને પૂર્ણ કરતી નથી. એક્ટની કલમ 54, અને પ્રક્રિયામાં યોગ્ય અધિકૃતતાનો અભાવ હતો – એફ. આઈ. આર. અને તમામ સંબંધિત કાર્યવાહી રદ કરવામાં આવી – એફ. આઈ. આર. રદ કરવામાં આવી.

કાયદા નો મુદ્દો: આપત્તિ વ્યવસ્થાપન અધિનિયમ હેઠળ એફ. આઈ. આર. યોગ્ય અધિકૃતતા સાથે દાખલ થવી જોઈએ, અને કલમ 54 હેઠળ ખોટા એલાર્મ માટે કાનૂની મર્યાદાને પૂર્ણ કરવી આવશ્યક છે.

Acts Referred:
Code of Criminal Procedure, 1973 Sec. 482, Sec. 195
Disaster Management Act, 2005 Sec. 54, Sec. 60

Counsel:
Anik E Shaikh, Trupesh Kathiriya

JUDGEMENT

Hasmukh D Suthar, J.- [1] Rule. Learned APP waives service of notice of rule on behalf of respondent-State.

[2] By way of this application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."), the applicant has prayed to quash and set aside the complaint being **FIR No.11196010200027 of 2020 registered with D.C.B. Police Station, Vadodara City**, for the offences punishable under the Disaster Management Act, 2005 and all the consequential proceedings arising therefrom.

[3] The brief facts of the case are that the FIR in question was filed by Kartiksinh Chandrasinh Rathod, a Police SubInspector at the Cyber Crime Police Station in Vadodara. The complaint, lodged on April 8, 2021, was prompted by a Facebook post from Munaf Pathan dated April 6, 2021, which incorrectly listed phone numbers for food assistance during the Covid-19 pandemic. Rathod, who was assigned to monitor social media for misinformation during the crisis, alleged that the phone numbers were not authorized and that the post was misleading and potentially harmful. The FIR was filed under The Disaster Management Act, 2005, to address the spread of false information and its potential impact during the pandemic.

[4] Heard learned advocate for the applicationer and learned APP for respondent No.1 State of Gujarat.

[5] Learned advocate for the applicant has submitted that applicant is innocent and has been falsely enroped in the present offence. Learned advocate for the applicant has submitted that the complaint is filed at the instance of respondent No.2 without

following due procedure and taking the bar under Section 60 of the Disaster Management Act and Section 195 of the Cr.P.C. It is submitted that the offence is non-cognizable, therefore, the complaint is filed and this proceeding is hit by Section 195 of Cr.P.C. In this regard, private complaint is required to be filed by the authorized officer. In view of above, to continue of such proceeding is nothing but an abuse of process of law. Even other-wise if he considered the allegations levelled in the complaint, the allegations are that during the time of Pandemic of Covid-19, as per the case of the prosecution, the applicant has also circulated the message on three Mobile Numbers that if anyone is need of food, they have to contact on the said mobile numbers, except this no allegation is levelled against the present applicant. It is alleged that the said mobile numbers are nothing but an intention to spread rumour in the social media. In this regard, the offence is registered. Even in absence of any food, the said rumor is spread by the applicant and as to whether the said messages are spread and he has requested to allow the present application. It is submitted that the present applicant has not posted any thing in the form of threat or creating any panic situation in the COVID-19 pandemic period and the FIR is nothing but an attempt to suppress the voice of the public.

[6] Learned APP has vehemently opposed the present application and submitted that the impugned complaint is filed due to spread the rumour during the Covid-19 period and due to this false circulation of message and the rumour, the offence was registered. It is further submitted that the investigation is over and charge-sheet is filed and the matter is pending for the trial before the concerned Judicial Magistrate. Hence, he has requested to dismiss the present application.

[7] Having heard learned advocates for the respective parties and having considered the materials available on record, it appears that it is undisputed and an admitted fact that the complaint is filed under Section 54 of the Disaster Management Act and no any offence is registered against the present applicant. It appears that the complaint is filed before the Cyber Crime Police Station and there is no authorization of the complaint and no any written complaint is filed.

[8] Insofar as offence under Section 54 of the Disaster Management Act is concerned, provision of section 54 reads as under:

> "54. Punishment for false warning.- Whoever makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic, shall on conviction, be punishable with imprisonment which may extend to one year or with fine.
>
> Herein, as discussed in earlier part, applicant has not circulated any false alarm or warning qua disaster or its severity or magnitude, leading to panic and due to such alleged message, no panic or rumour has been spread by the applicant. Even otherwise, to invoke the provision of section 54 of the

Disaster Management Act, the compliance of section 195(1)(a) of the CrPC is mandatory and complaint is required to be filed by the superior public servant under the statutory requirement. The Hon'ble Supreme Court in the case of Vinod Dua vs. Union of India and others,2021 SCCOnLine(SC) 414 observed in paragraph No.51(B) as follows:

"Section 52 of the DM Act deals with the lodging of a false claim by a person for obtaining any relief, assistance, etc., which provision has nothing to do with the present fact situation. Section 54 deals with cases where a person makes or circulates a false alarm or warning as to disaster or its severity or magnitude, leading to panic. We have already held that the statements made by the petitioner were within the limits prescribed by the decision of this Court in Kedar Nath Singh and that the statements were without any intent to incite people for creating public disorder. It was not even suggested that as a result of statements made by the petitioner any situation of panic had resulted in any part of the country."

Hence, offence under Section 54 of the Disaster Management Act is also not made out.

[9] Even keeping in mind the provisions of Section 60 of the 60 of the Disaster Management Act, the Court is having no power to take cognizance. It would be further apposite to refer Section 60 of the Disaster Management Act, which reads thus:

"60. Cognizance of offences .- No Court shall take cognizance of an offence under this Act except on a complaint made by-

(a) the National Authority, the State Authority, the Central Government, the State Government, the District Authority or any other authority or officer authorised in this behalf by that Authority or Government, as the case may be; or

(b) any person who has given notice of not less than thirty days in the manner prescribed, of the alleged offence and his intention to make a complaint to the National Authority, the State Authority, the Central Government, the State Government, the District Authority or any other authority or officer authorised as aforesaid."

Considering the fact that if the sake of argument was accepted, the message was spread or circulated by the present applicant, it was only qua help to provide food during the pandemic of Covid-19, suppose to contact on the said mobile number if contact is not available, due to such rumour there should be leading to panic and due to such alleged message, no panic or rumour has been spread by the applicant. Suppose the food was available, at the relevant time, making call due to whatever reason the food is not available, which is not amounts to an offence.

[10] In case of **State of Haryana v. Bhajan Lal**, 1992 Supp1 SCC 335, the Apex Court has set out the categories of cases in which the inherent power under Section 482 CrPC can be exercised and held in para 102 as under: "102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Art. 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised:

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a noncognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under sec. 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

[11] Considering the aforesaid proposition in consonance with the facts of the case on hand, to continue such proceeding against the present applicant would be abuse of process of law and hence, present is a fit case to exercise powers under Section 482 of the CrPC.

[12] In wake of aforesaid discussion, present application is allowed. The impugned complaint being **FIR No.11196010200027 of 2020 registered with D.C.B. Police Station, Vadodara City** as well as all consequential proceedings initiated in pursuance thereof are hereby quashed and set aside qua the applicant herein. Rule is made absolute. Direct service is permitted

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2024(2)GCRJ579

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Miscellaneous Application (For Condonation Of Delay); Criminal Revision Application No 11707 of 2024; 22428 of 2024 **dated 10/09/2024**

Vishalkumar Laxamanbhai Dhangan

Versus

State of Gujarat & Anr

DELAY CONDONED

Indian Penal Code, 1860 Sec. 283 - Code of Criminal Procedure, 1973 Sec. 204 - Delay Condoned - Applicant, a police officer, sought condonation of a 436-day delay in filing a revision application - Delay was attributed to the applicant's transferable job, which prevented him from knowing about a warrant issued under Sec. 204 CrPC - Court applied principles of substantial justice and condoned the delay, emphasizing that the applicant's duty status required consideration and technical delays should not obstruct justice - Application Allowed

Law Point: Delays caused by professional duties, especially in public service, can be condoned if sufficient cause is shown and justice would be served by considering the merits of the case

ભારતીય દંડ સંહિતા, 1860 કલમ 283 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 204 – વિલંબને માફ કર્યો – અરજદાર, એક પોલીસ અધિકારીએ રિવિઝન અરજી દાખલ કરવામાં 436-દિવસના વિલંબ માટે માફી માંગી – વિલંબ અરજદારની બદલીપાત્ર નોકરીને આભારી હતો, જેણે તેને CrPC કલમ 204 હેઠળ જારી કરાયેલ વોરંટ વિશે જાણવાથી અટકાવ્યું. – કોર્ટે નોંધપાત્ર ન્યાયના સિદ્ધાંતો લાગુ કર્યા અને વિલંબને માફ કર્યો, ભારપૂર્વક જણાવ્યું કે અરજદારની ફરજની સ્થિતિને ધ્યાનમાં લેવી જરૂરી છે અને તકનીકી વિલંબ ન્યાયમાં અવરોધ ન આવે – અરજીની મંજૂરી

કાયદા નો મુદ્દો: વ્યાવસાયિક ફરજોને કારણે થતો વિલંબ, ખાસ કરીને જાહેર સેવામાં, જો પૂરતું કારણ બતાવવામાં આવે તો તેને માફ કરી શકાય છે અને કેસની યોગ્યતાને ધ્યાનમાં લઈને ન્યાય આપવામાં આવશે.

Acts Referred:

Indian Penal Code, 1860 Sec. 283

Code of Criminal Procedure, 1973 Sec. 204

Counsel:

Shweta Lodha, Virat G Popat, Jay K Koshti, K R Koshti, Jyoti Bhatt

JUDGEMENT

Gita Gopi, J.- [1] Heard the learned advocates appearing for the respective parties.

[2] By way of this application, the applicant has prayed for condonation of delay of 436 days occurred in preferring the application.

[3] Learned advocate for the applicant submits that the applicant is a police and the complaint has been filed by the local advocate but since the applicant is in transferable job, the applicant did not have the knowledge of the warrant issued in view of the complaint filed by the advocate as the process was under Section 204 of Cr.P.C. Learned advocate submitted that the matter requires consideration as the applicant was on his duty and thus, learned advocate submitted that the maintainability of the complaint itself would become questionable.

[4] Learned advocate Mr. Koshti submitted that the applicant has failed to specify as to when did he had the knowledge of issuance of warrant, in the end of May 2023 or prior. Mr. Koshti submitted that though everyday delay has not been explained, but being a police who is duty bound to respect law has to provide sufficient cause for such a long delay of 436 days.

[5] Learned APP for the respondent State submits that as per the facts, the police appears to be on duty and thus, stated that the question would now be required to be considered as to whether the process is required to be issued against the police performing his duties and submitted that on facts of the matter, necessary order be passed.

[6] In the case of **Collector Land Acquisition, Anantnag and Another v. Mst. Katiji and Others**, 1987 AIR(SC) 1353, it has been observed as under:-

> "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic

to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties. 3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

[7] It is stated that at the time of offence, he was on official duty and therefore, Section 283 of IPC should not be attributed against him and further he has stated that the delay has been caused because of his transferable job and being a private matter, he himself could not remain present for the hearing of the case and thus, that had led delay which has been sufficiently explained.

[8] In view of the principles laid down in the abovereferred decision, considering the averments made in the application and as the delay is sufficiently explained, the delay of 436 days occurred in filing the application deserves to be condoned and is hereby condoned.

[9] Accordingly, the present application is allowed

2024(2)GCRJ582

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Revision Application (Against Conviction - Negotiable Instrument Act) No 1365 of 2024 **dated 06/09/2024**

Bhavesh Nandkishor Rathod

Versus

State of Gujarat & Anr

APPEAL DISMISSAL REVERSED

Code of Criminal Procedure, 1973 Sec. 395, Sec. 357, Sec. 389 - Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 438, Sec. 442 - Appeal Dismissal Reversed - Appellant's criminal appeal dismissed for default due to non-appearance and failure to deposit 20% compensation as directed by court - Court held dismissal for default and insistence on compensation deposit unjustified - Remanded appeal for hearing on merits without compensation payment condition - Appellant ordered to be released from jail - Appeal Restored

Law Point: Courts cannot dismiss appeals for nonappearance or nonpayment of compensation without considering merits.

ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 395, કલમ 357, કલમ 389 ભારતીય નાગરિક સુરક્ષા સંહિતા, 2023 કલમ 438, 442-બરતરફી ઉલટાવી દેવાઈ – અરજદારની ફોજદારી અપીલ ગેર-હાજરી અને કોર્ટ દ્વારા નિર્દેશિત 20% વળતર જમા કરાવવામાં નિષ્ફળતાને કારણે ડિફોલ્ટ માટે બરતરફ કરવામાં આવી, કોર્ટ ડિફોલ્ટ માટે બરતરફી અને વળતર ડિપોઝિટનો આગ્રહ ગેરવાજબી રાખ્યો- વળતર વિના યોગ્યતા પર સુનવાણી માટે રિમાન્ડની અપીલ શરત – અપીલકર્તાને જેલમાંથી મુક્ત કરવાનો આદેશ આપ્યો – અપીલ પુનઃ સ્થાપિત.

કાયદા નો મુદ્દો: અદાલતો યોગ્યતાને ધ્યાનમાં લીધા વિના ગેરહાજર રહેવા અથવા વળતરની ચૂકવણી ન કરવા માટેની અપીલને ફગાવી શકતી નથી.

Acts Referred:

Code of Criminal Procedure, 1973 Sec. 395, Sec. 357, Sec. 389

Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 438, Sec. 442

Counsel:

Vedant D Gaikwad, Hardik Mehta

JUDGEMENT

Gita Gopi, J.- [1] Learned advocate Mr. Vedant D.Gaikwad for the applicant submits that the challenge has been given to the order dated 29.07.2024 passed by 3rd

Additional District and Sessions Judge, Vadodara below Exh.1 in Criminal Appeal No.84 of 2024 dismissing the appeal, as dismissed for default.

[2] The revision has been filed under section 438 and 442 of the Bharatiya Nagarik Suraksha Sanhita, 2023 (hereinafter referred to as 'BNSS' for short). The order, which has been passed is as under:

> "On perusal of record, it transpires that the applicant has remained absent since last may adjournments. The applicant has not fulfilled the condition as per order below Ex.4 and not paid the entire 20% amount of Rs.3,10,000/- till today. Today also, this Court has repeatedly called out the applicant, but, neither the applicant nor his learned advocate is present before this Court. So, this Court believes that the applicant and/or his Learned Advocate are not vigilant and not interested in the matter. Therefore, there is no need to list this matter on further date and no fruitful purpose would be served. Hence, the matter is dismissed for default.
>
> The order passed below stay application Exh.4 in this matter, is vacated."

[3] Learned advocate Mr. Gaikwad referring to the judgment of **Dhananjay Rai @ Guddu Rai Vs. State of Bihar**, 2022 14 SCC 95, and the judgment of **K. Muruganandam & Ors. Vs. State Res. By the Deputy Superintendent of Police & Anr.,** rendered in Criminal Appeal No.809 of 2021 on 12.08.2021, submitted that the appeal cannot be dismissed for default on any of the ground after its admission.

3.1 Referring to the judgment of Dhananjay Rai @ Guddu Rai (supra), Advocate Mr. Gaikwad submitted that even if the accused is absconding, the same also could not be made a ground in dismissing the appeal.

3.2 Advocate Mr. Gaikwad stated that the order of deposit of 20% cannot be made in section 138 proceedings, as laid down in the case of **Jamboo Bhandari Vs. Madhya Predesh State Industrial Development Corporation Ltd. And Ors.**, 2023 10 SCC 446, unless the order is made giving reasons, where the Court has to consider and to decide about the merits of the matter and having found the exceptional case, no such order ought to have been made.

3.3 Mr. Gaikwad, learned advocate submitted that the condition for depositing compensation/fine amount of Rs.3,10,000/- would amount to denial of valuable right of the revisionist to continue with his appeal, as he would not be in a position to pay the amount. Such condition would be onerous leading to denial of statutory right of appeal.

[4] Since the matter requires immediate recourse, this Court does not feel necessary to hear the other side, which option can be exercised by the Court under section 444 of the BNSS.

4.1 In Dhananjay Rai @ Guddu Rai (supra), the Hon'ble Supreme Court in paragraph no.8 had observed as under:

> **"8.** The anguish expressed by the Division Bench about the brazen action of the appellant of absconding and defeating the administration of justice can be well understood. However, that is no ground to dismiss an appeal against conviction, which was already admitted for final hearing, for nonprosecution without adverting to merits. Therefore, the impugned judgment will have to be set aside and the appeal will have to be remanded to the High Court for consideration on merits."

4.2 In K. Muruganandam & Ors. (supra), while noting that if the accused does not appear through counsel appointed by him/her, the Court is obliged to proceed with the hearing of the case even after appointing an amicus curiae, but cannot dismiss the appeal merely because of nonrepresentation or default of the advocate for the accused. The Hon'ble Apex Court has relied upon the judgment of **Kabira Vs. State of Uttar Pradesh**, 1981 Supp1 SCC 76 and **Mohd. Sukur Ali Vs. State of Assam**, 2011 4 SCC 729.

[5] Here, in the present matter, the learned Judge has noted that the applicant has remained absent since long, nor the Advocate was present. The learned Judge has also noted that the applicant has not fulfill the condition as per order below Exh.4, where he was ordered to pay 20% amount of Rs.3,10,000/-. When the matter was called out, neither the Advocate nor the applicant appeared and on that ground the matter was dismissed for default.

[6] In Jamboo Bhandari (supra), the Hon'ble Apex Court has observed that deposit of minimum 20% amount as laid down in **Surinder Singh Deswal Vs. Virender Gandhi**, 2019 11 SCC 341, is not an absolute rule. It was further held that it is not mandatory for accused to specifically plead that the case falls in exception to the 20% minimum deposit rule, since when accused applies under section 389 Cr.P.C. for suspension of sentence, he normally applies for grant of relief of suspension of sentence without any condition.

6.1 The Hon'ble Supreme Court further held that, in Surinder Singh Deswal (supra), it was held that a purposive interpretation should be made of section 148 of N.I. Act, and, hence, normally appellate court will be justified in imposing condition of deposit as provided in section 148 of N.I. Act; however, in a case where appellate court is satisfied that condition of deposit of 20% will be unjust or imposing such a condition will amount to deprivation of right of appeal of appellant, exception can be made for reasons specifically recorded. It was, therefore, held that when appellate Court considers prayer under section 389 Cr.P.C. of an accused who has been convicted for offence under section 138 N.I. Act, it is always open to appellate court to

consider whether it is an exceptional case which warrants grant of suspension of sentence without imposing condition of deposit of 20% of fine/compensation amount.

[7] Non-Deposit of the compensation or fine amount cannot be made a ground for dismissal of the appeal, since under section 389 of Cr.P.C., when the sentence is suspended and appeal is admitted, where as provided under section 357(2), and if the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented before the decision of appeal.

[8] Here, in this case, when the appeal has been admitted, the learned appellate Court cannot insist for order to pay compensation amount, when the order has been made by the trial Court to pay the compensation in accordance to section 357 of Cr.P.C., the appellate Court ought not to have passed any such order, as hearing of the appeal with insistence for deposit of fine amount under section 357 of Cr.P.C., would obstruct the valuable right of the revisionist, where in the present BNSS, such corresponding provision is made under section 395(2) of BNSS, which is reproduced hereunder:

> **"Section 395(2)** - If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal."

[9] In view of the provision of law, insistence for payment of compensation/fine amount before the decision in the appeal as contemplated under section 357 Cr.P.C. (395 of BNSS) is an order suffering from illegality, further dismissal of appeal for default without hearing on merits is also bad in law.

[10] In the result, the order impugned dated 29.07.2024 passed by 3rd Additional District and Sessions Judge, Vadodara below Exh.1 in Criminal Appeal No.84 of 2024. It is ordered that Criminal Appeal No.84 of 2024 be restored on the file of the learned 3rd Additional District and Sessions Judge, Vadodara with direction to the concerned Judge that a notice be issued to the appellant and his Advocate to remain present before the Court for hearing.

[11] Advocate Mr. Gaikwad, at this stage, submitted that the applicant is in jail.

11.1 In view of the same, the applicantaccused is ordered to be released forthwith.

[12] In view of the above observations and directions, the present application stands disposed of.

Direct service today is permitted

2024(2)GCRJ586

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Ilesh J Vora; Vimal K Vyas]

Special Criminal Application No 11097 of 2024 **dated 06/09/2024**

Ragbirsingh Dhansingh Bavri (Sikligar) Thro Soniya S/o Sakunsing Tilpitiya

Versus

State of Gujarat & Ors

PREVENTIVE DETENTION LEGALITY

Gujarat Prevention of Anti-Social Activities Act, 1985 Sec. 3, Sec. 2 - Bharatiya Nyaya Sanhita, 2023 Sec. 331, Sec. 54, Sec. 305 - Preventive Detention Legality - Petitioner challenged preventive detention order under Gujarat Prevention of Anti-Social Activities Act, 1985 claiming actions affect law and order not public order - Court observed activities alleged do not impact public order but relate to law and order - Subjective satisfaction of authority for detention was incorrect - Detention order quashed, and petitioner to be released if not required in other cases - Petition Allowed

Law Point: Preventive detention under public order must be distinguished from actions affecting law and order only.

ગુજરાત પ્રિવેન્શન ઓફ એન્ટિ-સોશિયલ એક્ટિવિટીઝ એક્ટ, 1985 કલમ 3, કલમ 2 – ભારતીય ન્યાય સંહિતા, 2023 કલમ 331, કલમ 54, કલમ 305 – નિવારક અટકાયતની કાયદેસરતા – અરજદારે ગુજરાત પ્રિવેન્શન ઑફ એન્ટિ-સોશિયલ એક્ટિવિટીઝ એક્ટ, 1985 હેઠળ નિવારક અટકાયતના આદેશને પડકાર્યો હતો અને દાવો કર્યો હતો કે પગલાં કાયદો અને વ્યવસ્થાને અસર કરે છે જાહેર વ્યવસ્થાને નહીં – કોર્ટે અવલોકન કર્યું કે કથિત પ્રવૃત્તિઓ જાહેર વ્યવસ્થાને અસર કરતી નથી પરંતુ કાયદો અને વ્યવસ્થા સાથે સંબંધિત છે – વ્યક્તિલક્ષી સંતોષ અટકાયત માટેની સત્તા ખોટી હતી – અટકાયતનો હુકમ રદ કરવામાં આવ્યો, અને જો અન્ય કિસ્સાઓમાં જરૂરી ન હોય તો અરજદારને મુક્ત કરવામાં આવશે – અરજી મંજૂર

કાયદા નો મુદ્દો : જાહેર વ્યવસ્થા હેઠળ નિવારક અટકાયત માત્ર કાયદો અને વ્યવસ્થાને અસર કરતી ક્રિયાઓથી અલગ હોવી જોઈએ.

Acts Referred:

Gujarat Prevention of Anti-Social Activities Act, 1985 Sec. 3, Sec. 2
Bharatiya Nyaya Sanhita, 2023 Sec. 331, Sec. 54, Sec. 305

Counsel:

Dipesh D Soni, S S Pathak

JUDGEMENT

Ilesh J. Vora, J.- [1] The petitioner herein namely Ragbirsingh Dhansingh Bavri (Sikligar) came to be preventively detained vide the detention order dated 21.08.2024 passed by the Police Commissioner, Vadodara, as a "dangerous person" as defined under Section 2(c) of the Gujarat Prevention of Anti-social Activities Act, 1985 (herein after referred as 'the Act of 1985).

[2] By way of this petition, the petitioner has challenged the legality and validity of the aforesaid order.

[3] This Court has heard learned counsel Mr. Dipesh Soni and Ms. S.S. Pathak, learned Additional Public Prosecutor for the respondent State.

[4] Learned advocate for the detenue submits that the grounds of detention has no nexus to the "public order", but is a purely a matter of law and order, as registration of the offence cannot be said to have either affected adversely or likely to affect adverse the maintenance of public order as contemplated under the explanation sub-section (4) of Section 3 of the Act, 1985 and therefore, where the offences alleged to have been committed by the detunue have no bearing on the question of maintenance of public order and his activities could be said to be a prejudicial only to the maintenance of law and order and not prejudicial to the maintenance of public order.

[5] On the other hand, learned State Counsel opposing the application contended that, the detenue is habitual offender and his activities affected at the society at large. In such set of circumstances, the Detaining Authority, considering the antecedents and past activities of the detenue, has passed the impugned order with a view to preventing him from acting in any manner prejudicial to the maintenance of public order in the area of Vadodara.

[6] Having considered the facts as well as the submissions made by the respective parties, the issue arise as to whether the order of detention passed by the Detaining Authority in exercise of his powers under the provisions of the Act of 1985 is sustainable in law?

[7] The order impugned was executed upon the applicant and presently he is in Jail. In the grounds of detention, a reference of one criminal case registered against the applicant for the offence punishable under Sections 331(3), 331(4), 305(A) and 54 of BNS Act dated 01.08.2024 registered with Karelibaug Police Station was made and further it is alleged that, the activities of the detenue as a "dangerous person" affects adversely or are likely to affect adversely the maintenance of public order as explained under Section 3 of the Act of 1985. Admittedly, in all the said offences, the applicant was granted bail.

[8] After careful consideration of the material, we are of the considered view that on the basis of one criminal case, the authority has wrongly arrived at the subjective

satisfaction that the activities of the detenue could be termed to be acting in a manner 'prejudicial to the maintenance of public order'. In our opinion, the said offence does not have any bearing on the maintenance of public order. In this connection, we may refer to the decision of the Apex Court in the case of **Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad**, 1989 Supp1 SCC 322, wherein, the detention order was made on the basis of the registration of the two prohibition offences. The Apex Court after referring the case of **Pushkar Mukherjee Vs. State of Bengal**, 1969 1 SCC 10 held and observed that mere disturbance of law and order leading to detention order is thus not necessarily sufficient for action under preventive detention Act. Paras-17 & 18 are relevant to refer, which read thus:

> "17. In this connection, we may refer to a decision of this Court in Pushkar Mukherjee v. State of West Bengal, where the distinction between 'law and order' and 'public order' has been clearly laid down. Ramaswami, J. speaking for the Court observed as follows:
>
> 10. "Does the expression 'public order' take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act."
>
> 18. In the instant case, the detaining authority, in our opinion, has failed to substantiate that the alleged anti- social activities of the petitioner adversely affect or are likely to affect adversely the maintenance of public order. It is true some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents, in our view, do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning

of section 2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-section (4) of section 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order We have carefully considered the offences alleged against the petitioner in the order of detention and also the allegations made by the witnesses and, in our opinion, these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of the area in question giving rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld."

[9] For the reasons recorded, we are of the considered opinion that, the material on record are not sufficient for holding that the alleged activities of the detenue have either affected adversely or likely to affect adversely the maintenance of public order and therefore, the subjective satisfaction arrived at by the detaining authority cannot be said to be legal, valid and in accordance with law.

[10] Accordingly, this petition stands allowed. The order impugned dated 21.08.2024 passed by the respondent authority is hereby quashed. We direct the detenue to be set at liberty forthwith, if he is not required in any other case. Rule is made absolute accordingly. Direct service permitted

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2024(2)GCRJ589

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Revision Application (Against Conviction); Criminal Miscellaneous Application (For Condonation Of Delay); Criminal Revision Application; Criminal Miscellaneous Application (For Bringing Heirs) No 84 of 2017; 2 of 2024; 1 of 2024 **dated 04/09/2024**

Tejas Dineschandra Kansara

Versus

State of Gujarat & Anr

DELAY CONDONED

Limitation Act, 1963 Sec. 5 - Delay Condoned - Applicant sought condonation of 2273 days' delay in filing an application for bringing legal heirs on record in a case under Negotiable Instruments Act - Delay was explained as due to lack of knowledge about case pendency until informed by their advocate - Court applied the principles of justice, condoned the delay, and allowed legal heirs to be joined in the case - As the matter had been settled, the conviction and sentence from the lower courts quashed based on the settlement, with the offence compounded - Application Allowed

Law Point: Delay in legal proceedings can be condoned if justified by sufficient cause, particularly in cases where parties seek to settle disputes amicably

સમય મર્યાદા અધિનિયમ, 1963 કલમ 5 – વિલંબને માફ કર્યો – અરજદારે નેગોશિયેબલ ઈન્સ્ટ્રુમેન્ટ્સ એક્ટ હેઠળના કેસમાં કાનૂની વારસદારોને રેકોર્ડ પર લાવવા માટે અરજી દાખલ કરવામાં 2273 દિવસના વિલંબ માટે માફી માંગી – તેમના એડવોકેટ દ્વારા જાણ ન થાય ત્યાં સુધી કેસ પેન્ડન્સી વિશે જાણકારીના અભાવને કારણે વિલંબ સમજાવવામાં આવ્યો – કોર્ટ ન્યાયના સિદ્ધાંતો લાગુ કર્યા, વિલંબને માફ કર્યો, અને કાનૂની વારસદારોને કેસમાં જોડાવાની મંજૂરી આપી – જેમ કે મામલો પતાવટ થઈ ગયો હતો, નીચલી અદાલતોમાંથી દોષિત ઠરાવ અને ગુનાના સંયોજન સાથે સજા સમાધાનના આધારે રદ કરવામાં આવી હતી,– અરજીની મંજૂરી

કાયદા નો મુદ્દો: જો પૂરતા કારણથી વાજબી ઠેરવવામાં આવે તો કાનૂની કાર્યવાહીમાં વિલંબને માફ કરી શકાય છે, ખાસ કરીને એવા કિસ્સાઓમાં કે જ્યાં પક્ષકારો વિવાદોને સુમેળપૂર્વક ઉકેલવા માગે છે

Acts Referred:
Limitation Act, 1963 Sec. 5

Counsel:
Shrikar H Bhatt, Hardik Bhatt

JUDGEMENT

Gita Gopi, J.- [1] Order in Criminal Misc. Application No.2 of 2024

1. The present application has been filed for condonation of delay of 2273 days caused in filing the application for legal heirs.

[2] Learned advocate for the applicant states that since the original complainant is no more and the heirs have now made a prayer to join them as legal heirs and condoned the delay of 2273 days, stating that they were not having specific knowledge about the pendency of the case and only on information from the Advocate, after getting the pedigree executed, a prayer has been made to join them as parties by condoning the delay.

[3] Learned APP for the respondent State submitted that though each day delay has not to be explained, but sufficient explanation is required to be placed on record for consideration of the Court, and, thus urged to reject the application.

[4] In the case of Collector, Land Acquisition, **Anantnag and Another v. Mst. Katiji and Others**, 1987 AIR(SC) 1353 it has been observed as under:-

> "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic

to enable the courts to apply the law in a meaning- ful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-

1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

[5] In view of the principle laid down in the above referred judgment and considering the averments made in the application and as the delay is sufficiently explained, the matter requires decision on merits. Hence, delay of 2273 days caused in filing the application for legal heirs is condoned. The application is allowed.

[6] The application for legal heirs be listed today itself.

Order in Criminal Misc. Application No.1 of 2024

1. Advocate Mr. Chinmay Trivedi submits that he has instruction to appear on behalf of the legal heirs.

2. In view of the aforesaid, the present application for legal heirs is allowed. The heirs are permitted to be joined in Criminal Revision Application No.84 of 2017. The necessary amendment be made accordingly.

Order in Criminal Revision Application

1. Advocate Mr. Chinmay Trivedi submits that he has instruction to appear on behalf of the legal heirs and seeks permission to file Vakalatnama. Permission to file Vakalatnma is granted; the same be taken on record.

2. By way of this application, the applicant revisionist challenges the judgment of conviction and sentence dated 04.11.2015 passed by the learned Additional Chief Judicial Magistrate, Bharuch in Criminal Case No.449 of 2013 under Section 138 of the Negotiable Instruments Act, 1881, which came to be confirmed by order dated 12.01.2017 by the learned 3rd Additional Sessions Judge, Bharuch in Criminal Appeal No.83 of 2015.

4. Mr. Shirikar H.Bhatt, learned advocate for the applicant revisionist stated that the matter has been settled between the parties. It is stated that the all the cheque amount has been paid.

4.1 The wife of the complainant, Kusumben Kamalkant Chokshi is before this Court with affidavit, who has been identified by Advocate Mr.Chinmay Trivedi. Kusumben Kamalkant Chokshi, wife of the complainant, stated that Rs.6,00,000/- has been received and to that effect receipt of payment has been executed. The affidavit of the original complainant is on record, who affirms that the the matter has been settled between the parties out side the Court and she has received the amount of Rs.6,00,000/- and has given consent for compounding the offence.

5. Since the complainant has given consent for compounding the offence, keeping in mind the object of Section 147 of the NI Act, which is an enabling provision which provides for compounding the offence and may require the consent of the aggrieved for compounding the offence, however, the specific provision under Section 147, inserted by way of amendment towards special law, would give overriding effect to sub-section (1) of Section 320 Criminal Procedure Code, 1973 (CrPC) as has been observed in the case of **Damodar S. Prabhu v. Sayed Baba Lal**, 2010 AIR(SC) 1907. Accordingly, as the dispute has been resolved and the entire amount has been paid to the complainant, in consonance with the object of the N.I. Act and the provisions under Section 147 thereof, the matter is considered as compounded.

6. In aforesaid view of the matter, the judgment and order dated 04.11.2015 passed by the learned Additional Chief Judicial Magistrate, Bharuch in Criminal Case No.449 of 2013, which came to be confirmed by order dated 12.01.2017 by the learned 3rd Additional Sessions Judge, Bharuch in Criminal Appeal No.83 of 2015t, are quashed and set aside.

[7] Accordingly, the present application stands disposed of in the above terms. Rule is made absolute to the aforesaid extent. Direct service is permitted

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2024(2)GCRJ593

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Miscellaneous Application (For Condonation Of Delay); Criminal Revision Application No 13618 of 2024; 15246 of 2024 **dated 02/09/2024**

Jigar Sevantilal Mehta

Versus

State of Gujarat & Anr

CONDONATION OF DELAY

Indian Penal Code, 1860 Sec. 420, Sec. 468, Sec. 465, Sec. 471, Sec. 467 - Code of Criminal Procedure, 1973 Sec. 204 - Delay Condonation - Application to condone 368-day delay in filing a revision against an order issuing process under sections of IPC - Applicant cited lack of knowledge about co-accused proceedings - Opponent argued insufficient cause for delay - Delay condoned based on principles allowing liberal interpretation to serve justice - Courts aim to dispose of cases on merits and avoid rejecting appeals due to procedural delays - Delay Condoned - Application allowed

Law Point: Courts adopt liberal approaches in condoning delays to ensure matters are heard on merit rather than dismissed on procedural technicalities.

ભારતીય દંડ સંહિતા, 1860 કલમ 420, કલમ 468, કલમ 465, કલમ 471, કલમ 467 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 204 – વિલંબ માફી – આઈ. પી. સી. ની કલમો હેઠળ ઓર્ડર જારી કરવાની પ્રક્રિયા સામે રિવિઝન દાખલ કરવામાં 368 - દિવસના વિલંબને માફ કરવાની અરજી – અરજદારે સહ-આરોપીની કાર્યવાહી વિશે જ્ઞાનનો અભાવ દર્શાવ્યો – વિરોધીએ વિલંબ માટે અપૂરતું કારણ દલીલ કરી – પરવાનગી આપતા સિદ્ધાંતોના આધારે વિલંબને માફ કરવામાં આવ્યો ન્યાય પ્રદાન કરવા માટે ઉદાર અર્થઘટન – અદાલતોનો હેતુ યોગ્યતાના આધારે કેસોનો નિકાલ કરવાનો છે અને પ્રક્રિયાગત વિલંબને કારણે અપીલને નકારી કાઢવાનું ટાળે છે – વિલંબ માફ કરવામાં આવ્યો – અરજીને મંજૂરી.

કાયદા નો મુદ્દો: અદાલતો વિલંબને માફ કરવા માટે ઉદાર અભિગમ અપનાવે છે. તેની ખાતરી કરવા માટે કે પ્રક્રિયાગત તકનીકી બાબતો પર બરતરફ કરવાને બદલે યોગ્યતા પર સુનાવણી થાય છે.

Acts Referred:

Indian Penal Code, 1860 Sec. 420, Sec. 468, Sec. 465, Sec. 471, Sec. 467
Code of Criminal Procedure, 1973 Sec. 204

Counsel:

Sudhanshu A Jha, Prashanth S Undurti, Hardik Mehta

JUDGEMENT

Gita Gopi, J.- [1] Heard the learned advocates appearing for the respective parties.

[2] By way of this application, the applicant has prayed for condonation of delay of 368 days occurred in preferring the application.

[3] Learned advocate for the applicant submits that the order under challenge is the one where the process has been issued under Section 204 of Cr.P.C. under Section 420, 465, 467, 468 and 471 of the IPC against accused no.1 and 3. Learned advocate Mr. Sudhanshu Jha for the applicant submitted that the Revision Application of Sanyambhai Rupeshbhai Shah being Criminal Revision Application no.1329/2023 is admitted and states that the issue raised by the present applicant as well as Sanyambhai Rupeshbhai Shah would require joint consideration of the Court.

[4] Learned advocate Mr. Shyamal Bhimani has objected to the application stating that the delay of 368 days has not been sufficiently explained and no sound grounds have been raised.

[5] Learned advocate Mr. Sudhanshu Jha submitted that the applicant could move this Court only after having knowledge that the co-accused Revision Application wherein notice was issued and hence, on consideration and after legal advise and making arrangement for the funds, the present Revision Application has been filed.

[6] Learned APP for the respondent State submits that the delay in filing the application is not sufficiently explained and therefore, the present application may be rejected.

[7] In the case of **Collector Land Acquisition Anantnag and Another v. Mst. Katiji and Others**, 1987 AIR(SC) 1353, it has been observed as under:-

> "3. The legislature has conferred the power to condone delay by enacting Section 5 of the Indian Limitation Act of 1963 in order to enable the Courts to do substantial justice to parties by disposing of matters on 'merits'. The expression "sufficient cause" employed by the legislature is adequately elastic to enable the courts to apply the law in a meaningful manner which subserves the ends of justice that being the life-purpose for the existence of the institution of Courts. It is common knowledge that this Court has been making a justifiably liberal approach in matters instituted in this Court. But the message does not appear to have percolated down to all the other Courts in the hierarchy. And such a liberal approach is adopted on principle as it is realized that:-
>
> 1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.

2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.

3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."

[8] In view of the principles laid down in the abovereferred decision, considering the averments made in the application and as the delay is sufficiently explained, the delay of 368 days occurred in filing the application deserves to be condoned and is hereby condoned.

[9] Accordingly, the present application is allowed

2024(2)GCRJ595

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Ilesh J Vora; Vimal K Vyas]

Special Criminal Application No 10640 of 2024 **dated 02/09/2024**

Sanjay S/o Nana Sonvane Thro Nirmala Nana Sonvane

Versus

State of Gujarat & Ors

PREVENTIVE DETENTION

Gujarat Prevention of Anti-Social Activities Act, 1985 Sec. 2, Sec. 3 - Gujarat Prohibition Act, 1949 Sec. 98, Sec. 65, Sec. 81, Sec. 116B, Sec. 83 - Preventive Detention - Petitioner preventively detained under detention order passed by Police Commissioner Surat as a bootlegger under Gujarat Prevention of Anti-Social Activities Act - Petitioner challenged the legality of the detention order arguing his

activities were not prejudicial to public order but only to law and order - State Counsel contended that petitioner's activities affected society at large - Court considered whether the detention order was valid - Detention was based on prohibition cases for which petitioner was granted bail - Court found that petitioner's activities did not affect public order but were only law and order issues - Detaining authority's subjective satisfaction was held to be wrongly arrived at - Court quashed the detention order and directed petitioner's immediate release - Petition Allowed

Law Point: Preventive detention cannot be justified if the alleged activities do not affect public order and merely concern law and order issues

ગુજરાત પ્રિવેન્શન ઓફ એન્ટિ - સોશિયલ એક્ટિવિટીઝ એક્ટ, 1985 કલમ 2, કલમ 3 – ગુજરાત પ્રોહિબિશન એક્ટ, 1949 કલમ 98, કલમ 65, કલમ 81, કલમ 116B, સેકસન 83 – નિવારક અટકાયત – ગુજરાત પ્રિવેન્શન ઓફ એન્ટી-સોશિયલ એક્ટિવિટી એક્ટ હેઠળ બુટલેગર તરીકે પોલીસ કમિશનર સુરત દ્વારા પસાર કરાયેલ અટકાયતના આદેશ હેઠળ અરજદારની અટકાયતમાં અટકાયત કરવામાં આવી હતી – અરજદારે અટકાયતના હુકમની કાયદેસરતાને પડકારી દલીલ કરી હતી કે તેની પ્રવૃત્તિઓ જાહેર વ્યવસ્થા માટે પ્રતિકૂળ નથી પરંતુ માત્ર લો એંડ ઓર્ડર માટે છે. – રાજ્યના વકીલે દલીલ કરી હતી કે અરજદારની પ્રવૃત્તિઓ સમાજને મોટા પ્રમાણમાં અસર કરે છે – અટકાયતનો આદેશ માન્ય હતો કે કેમ તે કોર્ટે ધ્યાનમાં લીધું – અટકાયત પ્રતિબંધના કેસ પર આધારિત હતી જેના માટે અરજદારને જામીન આપવામાં આવ્યા હતા – કોર્ટે શોધી કાઢ્યું કે અરજદારની પ્રવૃત્તિઓ જાહેર વ્યવસ્થાને અસર કરતી નથી પરંતુ માત્ર લો એંડ ઓર્ડર ના મુદ્દાઓ છે – અટકાયત સત્તાધિકારનો વ્યક્તિલક્ષી સંતોષ ખોટી રીતે પહોંચ્યો હોવાનું માનવામાં આવતું હતું – કોર્ટે અટકાયતના આદેશને રદ કર્યો હતો અને અરજદારને તાત્કાલિક મુક્ત કરવાનો નિર્દેશ આપ્યો હતો – અરજીની મંજૂરી.

કાયદા નો મુદ્દો: જો કથિત પ્રવૃત્તિઓ જાહેર વ્યવસ્થાને અસર કરતી ન હોય અને માત્ર કાયદો અને વ્યવસ્થાના મુદ્દાઓની ચિંતા કરતી હોય તો નિવારક અટકાયતને ન્યાયી ઠેરવી શકાય નહીં.

Acts Referred:

Gujarat Prevention of Anti-Social Activities Act, 1985 Sec. 2, Sec. 3

Gujarat Prohibition Act, 1949 Sec. 98, Sec. 65, Sec. 81, Sec. 116B, Sec. 83

Counsel:

Nitin C Chavda, L B Dabhi

JUDGEMENT

Ilesh J. Vora, J.- [1] The petitioner herein namely Sanjay S/o. Nana Sonvane came to be preventively detained vide the detention order dated 10.08.2024 passed by the Police Commissioner, Surat, as a bootlegger as defined under Section 2(b) of the Gujarat Prevention of Anti-social Activities Act, 1985 (herein after referred as 'the Act of 1985).

[2] By way of this petition, the petitioner has challenged the legality and validity of the aforesaid order.

[3] This Court has heard Mr.Nitin Chavda learned counsel for the petitioner and Mr.L.B. Dabhi, learned APP for the respondent-State.

[4] Learned advocate for the detenue submits that the grounds of detention has no nexus to the "public order", but is a purely a matter of law and order, as registration of the offence cannot be said to have either affected adversely or likely to affect adverse the maintenance of public order as contemplated under the explanation sub-section (4) of Section 3 of the Act of 1985 and therefore, where the offences alleged to have been committed by the detunue have no bearing on the question of maintenance of public order and his activities could be said to be a prejudicial only to the maintenance of law and order and not prejudicial to the maintenance of public order.

[5] On the other hand, learned State Counsel opposing the application contended that, the detenue is habitual offender and his activities affected at the society at large. In such set of circumstances, the Detaining Authority, considering the antecedents and past activities of the detenue, has passed the impugned order with a view to preventing him from acting in any manner prejudicial to the maintenance of public order in the area of Surat.

[6] Having considered the facts as well as the submissions made by the respective parties, the issue arise as to whether the order of detention passed by the Detaining Authority in exercise of his powers under the provisions of the Act of 1985 is sustainable in law?

[7] The order impugned was executed upon the petitioner and presently he is in Jail. In the grounds of detention, a reference of criminal case i.e. for the offences punishable under Sections 65(A)(E), 81, 83, 98(2) and 116(B) of the Prohibition Act, registered against the petitioner under the Prohibition Law was made and further it is alleged that, the activities of the detenue as a "bootlegger" affects adversely or are likely to affect adversely the maintenance of public order as explained under Section 3 of the Act of 1985. Admittedly, in said offences, the applicant was granted bail.

[8] After careful consideration of the material, we are of the considered view that on the basis of prohibition case, the authority has wrongly arrived at the subjective satisfaction that the activities of the detenue could be termed to be acting in a manner 'prejudicial to the maintenance of public order'. In our opinion, the said two offences do not have any bearing on the maintenance of public order. In this connection, we may refer to the decision of the Apex Court in the case of **Piyush Kantilal Mehta Vs. Commissioner of Police, Ahmedabad**, 1989 Supp1 SCC 322, wherein, the detention order was made on the basis of the registration of the two prohibition offences. The Apex Court after referring the case of **Pushkar Mukherjee Vs. State of Bengal**, 1969 1 SCC 10, held and observed that mere disturbance of law and order leading to

detention order is thus not necessarily sufficient for action under preventive detention Act. Paras-17 & 18 are relevant to refer, which read thus:

> "17. In this connection, we may refer to a decision of this Court in Pushkar Mukherjee v. State of West Bengal, where the distinction between 'law and order' and 'public order' has been clearly laid down. Ramaswami, J. speaking for the Court observed as follows:
>
> 10. "Does the expression 'public order' take in every kind of infraction of order or only some categories thereof? It is manifest that every act of assault or injury to specific persons does not lead to public disorder. When two people quarrel and fight and assault each other inside a house or in a street, it may be said that there is disorder but not public disorder. Such cases are dealt with under the powers vested in the executive authorities under the provisions of ordinary criminal law but the culprits cannot be detained on the ground that they were disturbing public order. The contravention of any law always affects order but before it can be said to affect public order, it must affect the community or the public at large. In this connection we must draw a line of demarcation between serious and aggravated forms of disorder which directly affect the community or injure the public interest and the relatively minor breaches of peace of a purely local significance which primarily injure specific individuals and only in a secondary sense public interest. A mere disturbance of law and order leading to disorder is thus not necessarily sufficient for action under the Preventive Detention Act but a disturbance which will affect public order comes within the scope of the Act."
>
> 18. In the instant case, the detaining authority, in our opinion, has failed to substantiate that the alleged anti- social activities of the petitioner adversely affect or are likely to affect adversely the maintenance of public order. It is true some incidents of beating by the petitioner had taken place, as alleged by the witnesses. But, such incidents, in our view, do not have any bearing on the maintenance of public order. The petitioner may be punished for the alleged offences committed by him but, surely, the acts constituting the offences cannot be said to have affected the even tempo of the life of the community. It may be that the petitioner is a bootlegger within the meaning of section 2(b) of the Act, but merely because he is a bootlegger he cannot be preventively detained under the provisions of the Act unless, as laid down in sub-section (4) of section 3 of the Act, his activities as a bootlegger affect adversely or are likely to affect adversely the maintenance of public order We have carefully considered the offences alleged against the petitioner in the order of detention and also the allegations made by the witnesses and, in our opinion, these offences or the allegations cannot be said to have created any feeling of insecurity or panic or terror among the members of the public of

the area in question giving rise to the question of maintenance of public order. The order of detention cannot, therefore, be upheld."

[9] For the reasons recorded, we are of the considered opinion that, the material on record are not sufficient for holding that the alleged activities of the detenue have either affected adversely or likely to affect adversely the maintenance of public order and therefore, the subjective satisfaction arrived at by the detaining authority cannot be said to be legal, valid and in accordance with law.

[10] Accordingly, this petition stands allowed. The order impugned dated 10.08.2024 passed by the respondent authority is hereby quashed. We direct the detenue to be set at liberty forthwith, if he is not required in any other case. Rule is made absolute accordingly. Direct service permitted

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2024(2)GCRJ599

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Divyesh A Joshi]

Criminal Miscellaneous Application (For Quashing & Set Aside Fir/Order); Criminal Miscellaneous Application No 5798 of 2017; 6103 of 2017 **dated 28/08/2024**

Dr Rajeshkumar Somabhai Katara, Asst Professor Microbiology

Versus

State of Gujarat & Anr

ABETMENT OF SUICIDE

Indian Penal Code, 1860 Sec. 114, Sec. 107, Sec. 306 - Code of Criminal Procedure, 1973 Sec. 482 - Abetment of Suicide - Petition seeking quashing of FIR alleging abetment of suicide due to extramarital affair - Court found no prima facie evidence of abetment under Section 306 - Mental distress alone does not establish abetment without direct instigation - FIR quashed

Law Point: Mere extramarital affairs without direct instigation or aiding do not constitute abetment of suicide under Section 306 IPC. Mental distress does not meet abetment standards.

ભારતીય દંડ સંહિતા, 1860 કલમ 114, કલમ 107, કલમ 306 – ફોજદારી કાર્યવાહીની સંહિતા, 1973 કલમ 482 – આત્મહત્યાની ઉશ્કેરણી – લગ્નેત્તર સંબંધને કારણે આત્મહત્યા માટે ઉશ્કેરવાનો આરોપ લગાવતી એફ. આઈ. આર. રદ કરવાની અરજી – કોર્ટને કલમ 306 હેઠળ ઉશ્કેરવાના કોઈ પ્રથમદર્શી પુરાવા મળ્યા નથી – માત્ર માનસિક તકલીફ સીધી ઉશ્કેરણી વિના ઉશ્કેરણી સ્થાપિત કરતી નથી – એફ. આઈ. આર. રદ કરવામાં આવી.

કાયદા નો મુદ્દો: સીધી ઉશ્કેરણી અથવા સહાય વિના માત્ર લગ્નેત્તર સંબંધો કલમ 306 આઈ.પી.સી. હેઠળ આત્મહત્યા માટે ઉશ્કેરવાનું નથી. માનસિક તકલીફ ઉશ્કેરણીનાં ધોરણોને પૂર્ણ કરતી નથી.

Acts Referred:

Indian Penal Code, 1860 Sec. 114, Sec. 107, Sec. 306

Code of Criminal Procedure, 1973 Sec. 482

Counsel:

Bhavik R Samani, H K Nayak, R J Goswami, Monali Bhatt, A J Yagnik, Manoj Shrimali

JUDGEMENT

Divyesh A. Joshi, J.- [1] As both the petitions arise out of the same FIR, with consent of learned advocates appearing for the parties, they are heard together and disposed of by this common judgment and order.

[2] For deciding these petitions, the facts of Criminal Misc. Application No.6103 of 2017 are taken into consideration.

[3] By way of preferring present application under section 482 of the Code of Criminal Procedure, 1973, the applicant-original accused No.1, seek to invoke the inherent powers of this Court, inter alia, praying for the following main reliefs:

> "(A) Your Lordships be pleased to admit and allow this Criminal Misc. Application;
>
> (B) Your Lordships further be pleased to quash and set aside the complaint being C.R.No. I20/2017 registered with Chandkheda Police Station, Ahmedabad - Annexure-A for the offences alleged therein, filed by the respondent no.2 - original complainant, in the facts and circumstances of the case and in the interest of justice."

[4] The brief facts as narrated in the FIR can be summarized thus:

4.1. That the accused no.1, who is the wife of the deceased, is having extramarital affairs with accused no.2 and the said fact has come to the notice of the deceased son of the complainant, due to which, the deceased son of the complainant was upset. The deceased warned the accused No.1 to cut her relations with accused No.2 otherwise he will commit suicide. Inspite of that, the accused No.1 continued her relations with accused No.2 and thereby both the accused persons have abetted and instigated the deceased to commit suicide.

[5] Heard learned advocates Mr. A. J. Yagnik and Mr. Bhavik Samani for the applicants and learned APP Ms. Monali Bhatt for the respondent - State and learned advocate Mr. R. J. Goswami for respondent No.2 - complainant.

[6] Learned advocate Mr. A. J. Yagnik has submitted that as per the case of the prosecution, the socalled incident is occurred on 11.01.2017 and FIR is filed on 30.01.2017. Thus, there is gross delay of 19 days in registering the FIR and complainant has not mentioned any reason for such delay in registering the FIR. He has further submitted that complainant is the mother-in-law of the accused No.1. He has further submitted that generally in matrimonial lief, wife commits suicide and husband is shown as an accused but the case on hand is a case wherein the husband has committed suicide and wife has been shown as an accused. It is the specific case of the prosecution that the span of marriage life of the accused No.1 - applicant with the deceased is of 13 years and due to the said wedlock one baby girl born and at present the said girl is residing with the accused No.1 - wife. It is alleged in the FIR that the accused No.1 - wife of the deceased had developed extramarital relations with her paramour i.e. accused No.2 and due to the said relations, the husband had gone into depression and ultimately committed suicide and therefore FIR has been registered against the accused persons.

[7] Learned advocate Mr. Yagnik has further submitted that if this Hon'ble Court would make cursory glance upon the body of the FIR, in that event, it would be found out that applicant - accused No.1 has neither abetted, instigated and/or aided in any form, which ultimately drive the deceased to commit suicide by leaving him with no other option than to take the said extreme step. It is the settled proposition of law that abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. By bare perusal of the impugned FIR, it is found out that the same is registered with mala fide intention and oblique motive to harass and pressurize the applicant and her family members and the said FIR is nothing but sheer abuse of process of law and therefore the same is required to be quashed in the interest of justice. Learned advocate Mr. Yagnik has further submitted that it is found out from the material available on record that four months before the date of incident the deceased has lost his job due to some injury sustained by him and since then he was jobless. He has further submitted that the deceased was very much sceptical about his wife's relationship with accused No.2 and he has taken data of call recordings from the mobile of his wife and after going through the WhatsApp chat he had gone into depression and ultimately committed suicide. He has further submitted that for the sake of arguments, if the WhatsApp chats and call recordings are believed to be true and correct, even though the same cannot constitute any offence as alleged in the FIR. It is the specific case of the prosecution that accused No.1 - wife of the deceased is serving in B. J. Medical College, Civil Hospital, Ahmedabad since last three years and before that she was serving as laboratory technician at Community Health Center, Adalaj and at that relevant point of time accused No.2 was posted there as a Doctor and thereafter they had developed relations with each other and as soon as the said fact has come to the notice of the

deceased husband, he remained upset and he has gone through the conversations made by the accused through WhatsApp chat and call recording and after going through certain WhatsApp chats and call recordings made between his wife and accused No.2, the deceased has committed suicide. Learned advocate Mr. Yagnik has submitted that a CD was also supplied by the prosecution and he had gone through the conversations made in the said CD but he did not find any objectionable conversations in the said CD. He has further submitted that though the applicant has not developed any relations with accused No.2, however, for the sake of arguments, if the allegation levelled against the applicant - wife is to be accepted as it is that she had developed extramarital affair with any third person then also the said act of the wife would not fall under the act of abetment and/or instigation to the deceased to commit suicide and therefore it can safely be said that the offences alleged in the FIR are not made out against the applicant - wife.

[8] Learned advocate Mr. Yagnik has put reliance upon the decision of the Hon'ble Apex Court in the case of **K. V. Prakash Babu v. State of Karnataka**, 2016 LawSuit(SC) 1103 and submitted that the ratio laid down by the Hon'ble Apex Court in the said decision would squarely applicable to the case on hand. He has further submitted that in the said case, wife has committed suicide as the husband has developed extramarital relations with another woman. Learned advocate Mr. Yagnik has submitted that in the aforesaid decision, the Hon'ble Apex Court has held that husband is not guilty of abetment but that can be a ground for divorce or other reliefs in a matrimonial dispute under other enactments. Mental cruelty varies from person to person, depending upon intensity and degree of endurance, some may meet with courage and some others suffer in silence, to some it may be unbearable and a weak person may think of ending ones life. He has further submitted that keeping in mind the aforesaid observations made by the Hon'ble Apex Court, if this Hon'ble Court would make cursory glance upon the contents of the FIR in question, in that event, no offence is made out against the applicant - wife of the deceased. Learned advocate Mr. Yagnik has further submitted that the charge of adultery under Section 497 IPC is not levelled against the applicant - wife but if the said charge would have been levelled against her, in that event, as per the decision of the Hon'ble Apex Court in the case of **Joseph Shine v. Union of India**, 2019 3 SCC 39, the Constitution Bench of Hon'ble Apex Court held Section 497 as unconstitutional. Learned advocate Mr. Yagnik has further submitted that immediately after the registration of the FIR, applicant - wife of the deceased has approached this Court and considering the allegations levelled in the impugned FIR, averments made in the memo of the application as well as arguments canvassed by learned advocate, the Coordinate Bench of this Court has found substance in the application and protected the applicant and therefore since then the investigation is stayed. He, therefore, urged that the FIR impugned may be quashed qua the applicant - accused no.1.

[9] In support of his submissions, learned advocate Mr. Yagnik has put reliance upon the following case laws:

1. In the case of **Pinakin Mahipatray Rawal v. State of Gujarat**, 2013 10 SCC 48;

2. In the case of **Ghusabhai Raisangbhai Chorasiya v. State of Gujarat**, 2015 11 SCC 753;

3. In the case of Lalitbhai Vikramchand Parekh v. State of Gujarat rendered in Criminal Misc. Application No.16032 of 2014;

4. In the case of Dakshaben Rajeshbhai Gadvi v. State of Gujarat rendered in Criminal Misc. Application No.33263 of 2016;

5. Joseph Shine v. Union of India,2019 3 SCC 19; and

6. **Gurjit Singh v. State of Punjab**, 2020 14 SCC 264.

[10] Learned advocate Mr. Bhavik Samani for applicant of Criminal Misc. Application No.5798 of 2017 has adopted the arguments canvassed by learned advocate Mr. A. J. Yagnik. However, in addition to that, he has submitted that it is the specific case of the prosecution that applicant - original accused no.2 and wife of the deceased were working together at CHC, Adalaj. But, in fact applicant was never posted at the said Community Health Center. He has further submitted that the applicant was serving at Government Medical College, Bhavnagar and thereafter transferred to B. J. Medical College in the year 2011. He has further submitted that applicant - accused No.2 was knowing the wife of the deceased as she was serving staff in the department. He has further submitted that for the purpose of proving the charge of guilt against the accused persons, the prosecution has to prove the mens rea on the part of the applicants accused to commit the said offence. He has further submitted that in the instant case, the important ingredient of mens rea so as to bring home the charges of Section 306 and 107 IPC is missing in the instant case. It is an admitted position of fact that applicant has never come into contact with the deceased and there was no communication and discussion between them regarding the issue involved in this matter and in absence of any communication between the applicant and deceased, applicant accused cannot be held liable for the commission of crime. He has further submitted that in the case of **M. Mohan v. State Represented the Deputy Superintendent of Police**, 2011 3 SCC 626, the Hon'ble Apex Court has held that, 'Abetment involves mental process of instigating or intentionally aiding a person in doing of a thing. There should be clear mens rea to commit offence under Section 306. It requires commission of direct or active act by accused which led deceased to commit suicide seeing no other option and such act must be intended to push victim into a position that he commits suicide.' He has further submitted that the deceased was mentally disturbed and he was a patient of depression. It is specifically stated in

the FIR that the deceased was a qualified engineer and he was unemployed for last four months as he lost his job and there were frequent quarrels between the husband and wife. He, therefore, urged that the FIR in question may be quashed qua the applicant - accused No.2.

[11] Learned advocate Mr. R. J. Goswami for respondent No.2 - original complainant has objected present applications with vehemence and submitted that it is the specific case of the prosecution that accused No.1 - wife of the deceased has developed extra-marital affairs with her paramour i.e. accused No.2 and said fact has come to the notice of the deceased husband as accused No.1 was in regular touch with accused No.2 and there were WhatsApp chats between the accused No.1 and accused no.2. It is the case of the prosecution that the said fact has come to the notice of the complainant after the death of the deceased. A CD containing all those data has been collected by the brother of the deceased which was sent to the FSL and as per the opinion of FSL analyst the data preserved in the CD are genuine. Learned advocate Mr. Goswami has submitted that the entire case of the prosecution hinges upon the documentary evidence i.e. the conversations took place between the wife of the deceased and accused No.2 and therefore the evidence is required to be led in that regard and without leading the evidence, the prosecution would not be in a position to prove those facts. Thus, this is the premature stage to decide the applications of the applicants - accused. Learned advocate Mr. Goswami has further submitted that immediately after the registration of the FIR, within no time, applicants have approached this Court and and obtained the order of stay and therefore the investigation could not have been reached to its logical conclusion. He has further submitted that the facts of the present case are quite different, distinct and dissimilar than the facts of the case laws relied on by the learned advocates appearing for the applicants. He has further submitted that the socalled incident is occurred in the year 2017 and we are in the year 2024 and during the interregnum period, nothing has happened and therefore free hand is required to be given to the investigating officer to carry out the investigation and submit report to the appropriate authority. Thus, this is a fit case where this Hon'ble Court may not have to exercise its inherent powers in favour of the applicants. He, therefore, urged that these applications may be dismissed at threshold.

[12] Learned APP Ms. Monali Bhatt has objected present applications with vehemence and submitted that this is a unique case, where, instead of wife, husband has committed suicide and immediately after the occurrence of the incident husband was shifted to the hospital where he declared as dead by the hospital authority. Thereafter, after some time, phone of the deceased was checked by the brother of the deceased wherein a particular folder in the name of Preeti is uploaded and upon opening the said folder, conversations took place between the wife of the deceased and accused No.2 were found and after going through the said conversations, the

complainant has thought it fit to register the FIR. At the time of registration of the FIR, complainant has already supplied CD of the said conversations which were taken place between the accused persons. The CD is also sent to the FSL and as per the opinion of the FSL analyst, prima facie, the contents of the CD are found to be genuine. She has further submitted that the investigating officer has already prepared the transcript of the said CD. Learned APP Ms. Bhatt has tendered the transcript of the correspondence took place between the accused persons as well as statement of the witnesses and submitted that if this Hon'ble Court would make cursory glance upon the contents of the said documents, in that event, it would be found out that wife of the deceased has developed extra-marital affairs with accused No.2 and said fact has come to the notice of the deceased. Learned APP Ms. Bhatt has further submitted that accused No.2 - wife has specifically mentioned in the chat that her husband (deceased) has told her that if she would not make change in her behaviour then he has to separate from her. Therefore, wife was well within the knowledge of the said fact that if she will not cut her relations with accused No.2, in that event, some untoward incident would have been occurred and even though she had continued her relations with the accused no.2. Therefore, on the basis of the documents collected by the investigating officer it can safely be said that there was mens rea on the part of the accused persons and therefore the said set of evidence is required to be led before the Court by leading evidence. Learned APP Ms. Bhatt has submitted that in fact during the interregnum period, Investigating Officer has recorded statements of certain witnesses and if this Hon'ble Court would make a cursory glance upon the said statements, in that event, it would be found out that all the witnesses have supported the case of the complainant and entire sequence of events of incident clearly goes on show that due to illicit relations developed by the wife, husband has committed suicide. Learned APP Ms. Bhatt, therefore, submitted that considering the aforesaid factual aspects of the matter, the applications may be dismissed.

[13] Having heard the learned counsel appearing for the parties and having gone through the material placed on record, it is found out from the record that applicants have been arraigned as accused in connection with FIR being C.R.No.I-20/2017 registered with Chandkheda Police Station, Ahmedabad for the offence punishable under Sections 306 and 114 of the Indian Penal Code. It is the specific case of the prosecution that the son of the complainant committed suicide on account of the fact that his wife - accused No.1 was having extramarital relations with accused No.2 and as soon as he came to know about the said fact, he was upset and ultimately he took an ultimate decision of committing suicide.

[14] At this juncture, before adverting to the issue involved in the matter, I would like to refer to certain case laws wherein the Hon'ble Apex Court as well as different High Courts have very succinctly crystallized the position of law so far as Sections 306 and 107 of the Indian Penal Code are concerned. The Hon'ble Supreme Court, in

the case of **Geo Verghese v. State of Rajasthan**, 2021 AIR(SC) 4764, observed and held as under:

> "13. In our country, while suicide in itself is not an offence as a person committing suicide goes beyond the reach of law but an attempt to suicide is considered to be an offence under Section 309 IPC. The abetment of suicide by anybody is also an offence under Section 306 IPC. It would be relevant to set out Section 306 of the IPC which reads as under:-
>
> "306. Abetment of suicide.-If any person commits suicide, whoever abets the commission of such suicide, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."
>
> 14. Though, the IPC does not define the word 'Suicide' but the ordinary dictionary meaning of suicide is 'self-killing'. The word is derived from a modern latin word 'suicidium' , 'sui' means 'oneself' and 'cidium' means 'killing'. Thus, the word suicide implies an act of 'selfkilling'. In other words, act of death must be committed by the deceased himself, irrespective of the means adopted by him in achieving the object of killing himself.
>
> 15. Section 306 of IPC makes abetment of suicide a criminal offence and prescribes punishment for the same. Abetment is defined under Section 107 of IPC which reads as under:-
>
> "107. Abetment of a thing - A person abets the doing of a thing, who-
>
> First.-Instigates any person to do that thing; or
>
> Secondly.-Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> Thirdly.-Intentionally aids, by any act or illegal omission, the doing of that thing.
>
> Explanation 1.-A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.
>
> Explanation 2.-Whoever either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."
>
> 16. The ordinary dictionary meaning of the word 'instigate' is to bring about or initiate, incite someone to do something. This Court in the case of Ramesh Kumar Vs. State of Chhattisgarh1 has defined the word 'instigate' as under:-

"Instigation is to goad, urge forward, provoke, incite or encourage to do an act."

17. The scope and ambit of Section 107 IPC and its co-relation with Section 306 IPC has been discussed repeatedly by this Court. In the case of S.S.Cheena Vs. Vijay Kumar Mahajan and Anr.2 , it was observed as under:-

"Abetment involves a mental process of instigating a person or intentionally aiding a person in doing of a thing. Without a positive act on the part of the accused to instigate or aid in committing suicide, conviction cannot be sustained. The intention of the legislature and the ratio of the cases decided by the Supreme Court is clear that in order to convict a person under Section 306 IPC there has to be a clear mens rea to commit the offence. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and that act must have been intended to push the deceased into such a position that he committed suicide."

18. In a recent pronouncement, a two-Judge Bench of this Court in the case of Arnab Manoranjan Goswami Vs. State of Maharashtra & Ors.3 , while considering the co-relation of Section 107 IPC with Section 306 IPC has observed as under:-

"47. The above decision thus arose in a situation where the High Court had declined to entertain a petition for quashing an FIR under Section 482 of the 14 (2014) 4 SCC 453 PART I 33 CrPC. However, it nonetheless directed the investigating agency not to arrest the accused during the pendency of the investigation. This was held to be impermissible by this Court. On the other hand, this Court clarified that the High Court if it thinks fit, having regard to the parameters for quashing and the self restraint imposed by law, has the jurisdiction to quash the investigation ?and may pass appropriate interim orders as thought apposite in law. Clearly therefore, the High Court in the present case has misdirected itself in declining to enquire prima facie on a petition for quashing whether the parameters in the exercise of that jurisdiction have been duly established and if so whether a case for the grant of interim bail has been made out. The settled principles which have been consistently reiterated since the judgment of this Court in State of Haryana vs Bhajan Lal(Bhajan Lal) include a situation where the allegations made in the FIR or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused. This legal position was recently reiterated in a decision by a two-judge Bench of this Court in Kamal Shivaji Pokarnekar vs State of Maharashtra.

48. The striking aspect of the impugned judgment of the High Court spanning over fifty-six pages is the absence of any evaluation even prima facie of the most basic issue. The High Court, in other words, failed to apply its mind to a 15 1992 Supp. 1 SCC 335 16 (2019) 14 SCC 350 PART I 34 fundamental issue which needed to be considered while dealing with a petition for quashing under Article 226 of the Constitution or Section 482 of the CrPC. The High Court, by its judgment dated 9 November 2020, has instead allowed the petition for quashing to stand over for hearing a month later, and therefore declined to allow the appellant's prayer for interim bail and relegated him to the remedy under Section 439 of the CrPC. In the meantime, liberty has been the casualty. The High Court having failed to evaluate prima facie whether the allegations in the FIR, taken as they stand, bring the case within the fold of Section 306 read with Section 34 of the IPC, this Court is now called upon to perform the task."

19. In the case of M. Arjunan Vs. State, Represented by its Inspector of Police4 , a twoJudge Bench of this Court has expounded the ingredients of Section 306 IPC in the following words:-

"The essential ingredients of the offence under Section 306 I.P.C. are: (i) the abetment; (ii) the intention of the accused to aid or instigate or abet the deceased to commit suicide. The act of the accused, however, insulting the deceased by using abusive language will not, by itself, constitute the abetment of suicide. There should be evidence capable of suggesting that the accused intended by such act to instigate the deceased to commit suicide. Unless the ingredients of instigation/abetment to commit suicide are satisfied, accused cannot be convicted under Section 306 I.P.C." xxx xxx xxx

23. In the backdrop of the above discussion, we may now advert to the facts of the present case to test whether the ingredients of offence under Section 306 IPC exist, even prima-facie, to continue with the investigations.

24. The FIR recites that victim boy was under deep mental pressure because the appellant herein had harassed and insulted him in the presence of everyone and he was not willing to go to school on 25.04.2018 but was persuaded to go to school by the complainant. When he returned from the school, again he was under very much pressure and on being enquired told that today again he was harassed and insulted by the GEO, PTI Sir (the appellant). The boy was informed that the parents have been called to school next day and this brought him under further severe pressure and tension."

[15] In the facts of the present case, second and third clauses of Section 107 will have no application. Now, the question remains is as to whether the applicants instigated the deceased to commit suicide. To attract the first clause, there must be

instigation in some form on the part of the accused to cause the deceased to commit suicide. Hence, the accused must have 'mens rea' to instigate the deceased to commit suicide. The act of instigation must be of such intensity that it is intended to push the deceased to such a position under which he or she has no choice but to commit suicide. Such instigation must be in close proximity to the act of committing suicide. In the present case, taking the contents of the FIR as correct, it is impossible to conclude that the applicants have instigated the deceased to commit suicide. By no stretch of imagination, the alleged act of the applicants can amount to instigate the deceased to commit suicide.

[16] At this stage, I would like to refer and rely upon the decision of the Hon'ble Apex Court in the case of **K. V. Prakash Babu (supra)**, wherein, the Hon'ble Apex Court has observed and held as under:

> "19. Having said that we intend to make it clear that if the husband gets involved in an extra-marital affair that may not in all circumstances invite conviction under Section 306 of the IPC but definitely that can be a ground for divorce or other reliefs in a matrimonial dispute under other enactments. And we so clarify."

[17] As observed by the Hon'ble Apex Court in the aforesaid decision, the involvement of accused No.1 in an extra-marital affair with accused No.2 may not invite conviction under Section 306 IPC. Even for the sake of arguments, if the contents of the FIR are to be accepted as it is, it cannot be said that there was any intention on the part of the applicants to abet the commission of suicide by the deceased, who is the husband of accused No.1 and therefore no mens rea can be attributed. Thus, in the opinion of this Court, the very element of abetment is missing from the allegations levelled in the FIR and in absence of the element of abetment from the allegations, the offence under Section 306 IPC would not be attracted.

[18] Now, I would like to refer the decision rendered by this Court in the case of **Lalitbhai Vikramchand Parekh v. State of Gujarat,** Criminal Misc. Application No.16032 of 2014 and allied matters decided on 10th April, 2015, wherein the following observations were made:

> "25. Taking note of various earlier judgments, in **M. Mohan u. State Represented the Deputy Superintendent of Police**, 2011 3 SCC 626. the Supreme Court held that "Abetment involves mental process of instigating or intentionally aiding a person in doing of a thing. There should be clear mens rea to commit offence under Section 306. It requires commission of direct or active act by accused which led deceased to commit suicide seeing no other option and such act must be intended to push victim into a position that he commits suicide."

26. On a close reading of the above provisions of the IPC, and the principles laid down by the Supreme Court in various decisions, it is apparent that in a case under Section 306 IPC, there should be clear mens-rea to commit the offence under this Section and there should be direct or active act by the accused, which led the deceased to commit suicide, that is to say that there must be some evidence of "instigation", "cooperation" or "initial assistance" by the accused to commit suicide by the victim/deceased.

27. In **Madhavrao Jiwajirao Scindia v. Sambhajirao Chandrajirao Angre**, 1988 1 SCC 692 the Supreme Court observed vide Para 7 that:

"7. The legal position is well settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilized for any oblique purpose and where in the opinion of the court chances of an ultimate conviction are bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

It was a proposition relating to criminal prosecution.

28. In **Madan Mohan Singh v. State of Gujarat**, 2010 8 SCC 628. the Supreme Court quashed the proceedings under Section 306 IPC on the ground that the allegations were irrelevant and baseless and observed that the High Court was in error in not quashing the proceedings.

29. Accepting the allegations made against the applicants by the prosecution as it is, they do not constitute the offence of abetment. I am conscious of the fact that five persons of one family lost their lives on account of drastic step taken by them for no reason. It is very difficult to understand the mental state of mind of such persons who take an extreme step of putting an end to their life voluntarily by committing suicide."

[19] Having regard to the provisions of Sections 107 and 306 of the Indian Penal Code and the principle laid down by the Hon'ble Apex Court in various decisions referred to in the case of Lalitbhai Vikramchand Parekh (supra), it is apparent that in a case under Section 306 of the Indian Penal Code, there should be correct mens rea to commit the offence under this section and there should be direct and active role by the accused, which led the deceased to commit the suicide.

[20] The Hon'ble Apex Court in the recent decision in case of **Mahmood Ali & Ors. v. State of U.P. & Ors.**, rendered in **Criminal Appeal No.2341 of 2023**, observed and held as under:

> "11. The entire case put up by the first informant on the face of it appears to be concocted and fabricated. At this stage, we may refer to the parameters laid down by this Court for quashing of an FIR in the case of **State of Haryana v. Bhajan Lal**, 1992 AIR(SC) 604. The parameters are:-
>
> "(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.
>
> (2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.
>
> (3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.
>
> (4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.
>
> (5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.
>
> (6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.
>
> (7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."
>
> We are of the view that the case of the present appellants falls within the parameters Nos. 1, 5 and 7 resply of Bhajan Lal (supra).

12. At this stage, we would like to observe something important. Whenever an accused comes before the Court invoking either the inherent powers under Section 482 of the Code of Criminal Procedure (CrPC) or extraordinary jurisdiction under Article 226 of the Constitution to get the FIR or the criminal proceedings quashed essentially on the ground that such proceedings are manifestly frivolous or vexatious or instituted with the ulterior motive for wreaking vengeance, then in such circumstances the Court owes a duty to look into the FIR with care and a little more closely. We say so because once the complainant decides to proceed against the accused with an ulterior motive for wreaking personal vengeance, etc., then he would ensure that the FIR/complaint is very well drafted with all the necessary pleadings. The complainant would ensure that the averments made in the FIR/complaint are such that they disclose the necessary ingredients to constitute the alleged offence. Therefore, it will not be just enough for the Court to look into the averments made in the FIR/complaint alone for the purpose of ascertaining whether the necessary ingredients to constitute the alleged offence are disclosed or not. In frivolous or vexatious proceedings, the Court owes a duty to look into many other attending circumstances emerging from the record of the case over and above the averments and, if need be, with due care and circumspection try to read in between the lines. The Court while exercising its jurisdiction under Section 482 of the CrPC or Article 226 of the Constitution need not restrict itself only to the stage of a case but is empowered to take into account the overall circumstances leading to the initiation/registration of the case as well as the materials collected in the course of investigation. Take for instance the case on hand. Multiple FIRs have been registered over a period of time. It is in the background of such circumstances the registration of multiple FIRs assumes importance, thereby attracting the issue of wreaking vengeance out of private or personal grudge as alleged.

13. In **State of Andhra Pradesh v. Golconda Linga Swamy**, 2004 6 SCC 522, a two-Judge Bench of this Court elaborated on the types of materials the High Court can assess to quash an FIR. The Court drew a fine distinction between consideration of materials that were tendered as evidence and appreciation of such evidence. Only such material that manifestly fails to prove the accusation in the FIR can be considered for quashing an FIR. The Court held:-

"5. Authority of the court exists for advancement of justice and if any attempt is made to abuse that authority so as to produce injustice, the court has power to prevent such abuse. It would be an abuse of the process of the court to allow any action which would result in injustice and prevent promotion of justice. In exercise of the powers court would be justified to quash any

proceeding if it finds that initiation or continuance of it amounts to abuse of the process of court or quashing of these proceedings would otherwise serve the ends of justice. When no offence is disclosed by the complaint, the court may examine the question of fact. When a complaint is sought to be quashed, it is permissible to look into the materials to assess what the complainant has alleged and whether any offence is made out even if the allegations are accepted in toto.

6. In **R.P. Kapur v. State of Punjab**, 1960 AIR(SC) 866: 1960 Cri LJ 1239, this Court summarised some categories of cases where inherent power can and should be exercised to quash the proceedings: (AIR p. 869, para 6)

(i) where it manifestly appears that there is a legal bar against the institution or continuance e.g. want of sanction;

(ii) where the allegations in the first information report or complaint taken at its face value and accepted in their entirety do not constitute the offence alleged;

(iii) where the allegations constitute an offence, but there is no legal evidence adduced or the evidence adduced clearly or manifestly fails to prove the charge.

7. In dealing with the last category, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is clearly inconsistent with the accusations made, and a case where there is legal evidence which, on appreciation, may or may not support the accusations. When exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge. Judicial process, no doubt should not be an instrument of oppression, or, needless harassment. Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, lest it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time the section is not an instrument handed over to an accused to short-circuit a prosecution and bring about its sudden death .."

(Emphasis supplied)

[21] The scope and ambit of inherent powers of the Court under Section 482 Cr.P.C. or the extra-ordinary power under Article 226 of the Constitution of India, now stands well defined by series of judicial pronouncements. Undoubtedly, this Court has inherent power to do real and substantial justice, or to prevent abuse of the process of the Court. At the same time, the Court must be careful to see that its decision in

exercise of this power is based on sound principles. The inherent power vested in the Court should not be exercised to stifle a legitimate prosecution. However, this Court can exercise its inherent power or extra-ordinary power if the Court comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the Court, or the ends of justice require that the proceeding ought to be quashed. Thus, I am of the considered view that the allegations in the first information report if taken at its face value and accepted in their entirety, they do not constitute the offence alleged and the chances of an ultimate conviction after full-fledged trial are bleak and continuation of criminal prosecution against the applicants accused is merely an empty formality and wastage of prestigious time of the Court.

[22] I am conscious of the pain and suffering of the complainant, who is the mother of the deceased. It is also very unfortunate that the deceased has lost his life but as observed by the Hon'ble Apex Court in the case of Geo Verghese (supra), the sympathy of the Court and pain and suffering of the complainant, cannot translate into a legal remedy, much less a criminal prosecution.

[23] In the result, the applications succeed and are hereby allowed. Accordingly, the FIR being C.R.No. I20/2017 registered with Chandkheda Police Station, Ahmedabad for the offence punishable under Sections 306 and 114 of the Indian Penal Code and consequential proceedings arising out of the said FIR are hereby quashed and set aside qua the applicants

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2024(2)GCRJ614

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

[Before Gita Gopi]

Criminal Revision Application (Against Conviction) No. 1188 of 2024

dated 14/08/2024

Meghaben Bharatbhai Patel

Versus

State of Gujarat & Anr

NON-BAILABLE WARRANT

Negotiable Instruments Act, 1881 Sec. 138 - Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 438, Sec. 442 - Non-bailable Warrant - Application filed challenging issuance of non-bailable warrant under Bharatiya Nagarik Suraksha Sanhita - Petitioner convicted under Negotiable Instruments Act for cheque dishonour with imprisonment and compensation order - Petitioner absent during judgment pronouncement - Non-bailable warrant issued for failure to be present - Petitioner contended violation of natural justice and public policy - Argued right to appeal affected due to warrant - Pleaded for conversion of warrant to bailable to facilitate

filing appeal - Respondent opposed arguing petitioner's knowledge of proceedings and non-surrender - Court held issuance of warrant stayed - Petitioner allowed to file appeal with delay condonation application. - Petition Allowed

Law Point: Non-bailable warrant issuance stayed to protect convicted person's right to appeal against conviction and sentence - Delay condonation permitted for filing appeal.

નેગોશિયેબલ ઈન્સ્ટ્રુમેન્ટ્સ એક્ટ, 1881 કલમ 138-ભારતીય નાગરિક સુરક્ષા સંહિતા, 2023 કલમ 438, કલમ 442-બિન-જામીનપાત્ર વોરંટ – ભારતીય નાગરિક સુરક્ષા સંહિતા અરજદાર હેઠળ બિનજામીનપાત્ર વોરંટ જારી કરવાને પડકારતી અરજી દાખલ કરી કેદ અને વળતરના હુકમ સાથે ચેક અનાદર માટે નેગોશિયેબલ ઈન્સ્ટ્રુમેન્ટ એક્ટ હેઠળ દોષી ઠરાવવામાં આવેલ અરજદાર ચુકાદા દરમિયાન ગેરહાજર રહેલ – હાજર રહેવા માટે બિન-જામીનપાત્ર વોરંટ જારી કરવા માં આવેલ – અરજદારે કુદરતી ન્યાય અને જાહેર નીતિના ઉલ્લંઘનની દલીલ કરી – વોરંટને કારણે અસરગ્રસ્ત અપીલના અધિકારની દલીલ કરી અપીલ ફાઇલિંગની સુવિધા માટે વોરંટને બેલેબલમાં રૂપાંતરિત કરવા માટે વિનંતી કરી પ્રતિવાદીએ દલીલ કરી અરજદારની કાર્યવાહી અને શરણાગતિની જાણ ન હોવાનો વિરોધ કર્યો – કોર્ટે વોરંટ ઈશ્યુ કરવા પર રોક લગાવી – પીટીશનર વિલંબની માફીની અરજી સાથે અપીલ દાખલ કરવાની મંજૂરી. – અરજી મંજૂર

કાયદાનો મુદ્દો: દોષિત ઠરાવેલ વ્યક્તિના દોષિત ઠરાવ્યા અને સજા સામે અપીલ કરવાના અધિકારના રક્ષણ માટે બિન-જામીનપાત્ર વોરંટ ઈશ્યુ કરવાનો સ્ટે – અપીલ દાખલ કરવા માટે વિલંબની માફી.

Acts Referred:

Negotiable Instruments Act, 1881 Sec. 138

Bharatiya Nagarik Suraksha Sanhita, 2023 Sec. 438, Sec. 442

Counsel:

Vaibhav N Sheth, Hardik Mehta

JUDGEMENT

Gita Gopi, J.- [1] Present application under Section 438 read with Section 442 of Bharatiya Nagrik Suraksha Sanhita, 2023 (For short 'the BNSS') has been preferred challenging the order dated 14/02/2024 qua issuance of non-bailable warrant by the learned Additional Chief Judicial Magistrate, Ankleshwar below Exh.30 in Criminal Case No.3490 of 2022 filed under Section 138 of the Negotiable Instruments Act, 1881.

[2] Mr. Vaibhav Sheth, learned advocate for the petitioner submitted that it was matter of dishonour of the cheque of Rs.5,00,000/-, where upon conclusion of the trial, the applicant-accused came to be convicted with a sentence of one year simple imprisonment along with order of compensation of Rs.5,00,000/- to be granted to the complainant within a period of sixty days from the date of order and in default two

months simple imprisonment with further direction of issuance of non-bailable warrant since he remained absent on the date of pronouncement of the order.

[3] Mr.Sheth, learned advocate submitted that issuance of non-bailable warrant would be illegal, irrational, unlawful, unjust, unreasonable, perverse and would be in complete violation of principle of natural justice and against the public policy.

[4] Mr. Sheth, learned advocate submitted that the right of the petitioner to prefer an appeal gets frustrated because of the order of issuance of the warrant and submitted that such order of conviction in her absence should have granted an opportunity for preferring an appeal against the conviction judgment and the sentence.

[5] Mr. Sheth, learned advocate submitted that, at the first instance, the Court ought not to have pass a judgment in absence of the petitioner. The petitioner was under the bonafide impression that since she is been represented by advocate on record, she would be informed about the final judgment. Now, the order is required to be challenged, the petitioner is before this Court making a prayer that she be permitted to file an appeal.

[6] Mr. Sheth, learned advocate submitted that the petitioner would have a right to agitate before the appellate court and make a prayer for suspension of sentence. The petitioner has gone thrice before the registry but because of issuance of the non-bailable warrant, the appeal was not accepted by the registry and, thus, made a prayer to convert the non-bailable warrant into bailable warrant to enable her to prefer the appeal before the concerned Sessions Court, Bharuch.

[7] Mr. Hardik Mehta, learned APP submitted that the applicant was having the knowledge of the proceeding and was required to present the appeal during the period granted by the trial Court, and when the applicant has failed to do so, no concession could be allowed to her, and has requested to observe the conduct of the applicant who failed to surrender submitting that the application be rejected.

[8] The petitioner lady has been convicted by the Negotiable Instrument Court. The conviction order was in her absence and she now wants to challenge the conviction and the sentence.

[9] In the case of Lallan Singh and others Vs. State of Uttar Pradesh,2015 3 SCC 362, the Hon'ble Supreme Court made the observations in paras 10, 10.1, 10.2 and 10.3, which are elicited as under:

> "10. The legal position as to the process that should follow an order or conviction is much too clear to require any special emphasis. We say so because Chapter XXXII of the Code of Criminal Procedure, 1973, prescribes the process and the procedure to be followed for execution of sentence of death and/or other sentences awarded to convicts. We may in particular refer to Sections 417, 418, 472 and 420 CrPC which deal with the power to appoint

place of imprisonment of the convict, the execution of sentence of imprisonment and the direction of warrant for execution as also the persons with whom the same has to be lodged:

10.1 Section 418 of the Code in particular deals with execution of sentence imprisonment and inter alia empowers and obliges the court passing the sentence to forthwith forward a warrant to the jail or other place in which he is, or is to be, confined, and, unless the accused is otherwise confined in such jail or other place to forward him to such jail or other place with a warrant. In terms of sub-section (2) of Section 418, where the accused is not present in the court when sentence of imprisonment as is mentioned in subsection (1) is pronounced, the court is required to issue a warrant for his arrest for the purpose of forwarding him to jail or other place in which he is to be confined and in such cases the sentence shall commence on the date of his arrest. There is thus no gainsaying that upon conviction of an accused and sentence of imprisonment awarded to him, the court concerned is expected to commit him to jail in terms of a warrant that would authorities him confinement for the period he is to undergo such imprisonment. We have no reason to believe that this procedure is not followed invariably in all such cases where the convict is not present before the court concerned and is required to be committed to imprisonment for undergoing the sentence.

10.2 We also believe that the process of issuing warrant to apprehend the convict is followed diligently in keeping with the spirit underlying Section 418 CrPC.

10.3 The difficulty, in our opinion, arises when the warrants so issued by the court concerned remain unexecuted. This happens not only in cases where the accused has been convicted and sentenced by the trial court but also where an appeal or revision preferred against the conviction is eventually dismissed by the High Court. There is no manner of doubt that even in such cases the court is under an obligation after receipt of an intimation about the dismissal of the appeal or revision preferred by the convicts, to follow the procedure under Section 418 CrPC for apprehension of the accused, in case he has not surrendered voluntarily, and to commit him to jail to undergo the sentence awarded to him. Experience, however, shows that when warrants are forwarded to the police for execution the same remain unexecuted for years as noticed by us in the case at hand where despite the dismissal of the appeal filed by two of the life convicts, held guilty of a double murder, had remained at large for considerably long period."

[10] Filing of an appeal is substantial right of a convicted person and when the petitioner wants to move the appellate court making a prayer for suspension of sentence and granting bail and in that circumstances for stay on the execution of the

sentence, an opportunity would become necessary to be provided so that the substantial right of filing of appeal does not gets frustrated.

[11] In the result, taking into consideration the facts and circumstances of the case, warrant issued against the present petitioner is ordered to be stayed and the petitioner is permitted to file an appeal with a delay condonation application before the concerned appellate court impugning the conviction judgment and sentence.

[12] In view of the above, present petition is disposed of as allowed in aforesaid terms.

Direct service is permitted
