2018:GUJHC:51069

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**
**R/CRIMINAL MISC.APPLICATION NO. 3023 of 2018**

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OLEH AKIMO (DIRECTORUKRENERGY LTD), THROUGH ANASTASIA AKIMOVA
Versus
STATE OF GUJARAT

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Appearance:
MS SM AHUJA(118) for the PETITIONER(s) No. 1
MR BHAVIN S RAIYANI(3855) for the RESPONDENT(s) No. 3
MR K S CHANDRANI(6674) for the RESPONDENT(s) No. 2
MS MAITHILI MEHTA, ADDL. PUBLIC PROSECUTOR(2) for the RESPONDENT(s) No. 1

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CORAM: **HONOURABLE MS JUSTICE SONIA GOKANI**

**Date : 24/09/2018**

**ORAL ORDER**

1. This is an application under Section 439 (2) of the Code of Criminal Procedure, 1973, for cancellation of bail of Respondent Nos.2 and 3 granted by the learned Additional Sessions Judge, Court No.7, in connection with the FIR registered as I-C.R. No. 131 of 2017, with Rajkot Taluka Police Station.

2. It is the grievance on the part of the original complainant that, though, respondent Nos. 2 and 3 are habitual offenders, having a number of criminal antecedents, they have been bailed out by order dated 06.12.2017, passed in Criminal Misc. Application No. 2713 of 2017.

3. The applicant is the original complainant and

the Director of a Company doing the business of import and export. This application is filed by the first informant through his daughter, as she being the joint signatory to the FIR and a witness in the prosecution case.

4. Respondent Nos.2 and 3 claim to be the partners of the of Hallo Import and Export Firm, situated at Rajkot. They have claimed to be engaged in the business of export and import and having good business status, which was later on found to be an un-registered firm. They had also displayed in detail, the certificate issued by the Director General of Foreign Trade, Government of India, and on the strength of the said certificate, respondent Nos. 2 and 3 are alleged to have cheated off shore people.

5. The representatives of the applicant company, including the Director, Mr.Olai were invited by respondent Nos. 2 and 3 for a business deal and to workout everything personally. Therefore, the Director, Mr.Olai, visited Rajkot

and met Respondent Nos.2 and 3. The firm of Respondent Nos. 2 and 3 came to be certified by import and export certification issued by the Director of Foreign Trade, Government of India, as they were found to be carrying out export of chickpeas and accordingly, an agreement had been entered into. A promise was made and accordingly the amount was paid with the assurance that the goods were to be supplied on 14.02.2017.

6. It is alleged that respondent Nos. 2 and 3 from the outset had ill-design to defraud the complainant and they had criminally induced the applicant Company to pay far more initially and then trap them into net of forgery. Since, the applicant company had already paid 50% of the total amount, it was pressurized by respondent Nos. 2 and 3 that, if, the remaining amount was not paid, the goods shall not be transported. Accordingly, a total sum of Rs.1,10,91,080/- (Rupees One Crore Ten Lakh Nienty One Thousand Eighty Only) had been paid on different dates,

the details of which have been specified at Paragraph-5 of the application. Therefore, a detailed FIR came to be filed, when no goods were dispatched by respondent Nos. 2 and 3 as promised and on finding that there being no intention on the part of respondent Nos. 2 and 3 to send the agreed goods, the complainant went on demanding back the money. Respondent Nos. 2 and 3, therefore, are alleged to have criminally misappropriated the funds. On inquiry, the applicant came to know that respondent Nos. 2 and 3 had no stock of chickpeas nor had they purchased any such item from any other person nor they had any such goods with them. Thus, by mis-representing the purchase and dispatch of the goods, the applicant has been criminally induced to pay the amounts, and thereby, cheating and the forgery has taken place.

7. It is alleged that the applicant subsequently came to know that respondent No.2 along with his accomplices had indulged into similar kind of

offences against many other persons and he also had been convicted in some of the cases for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ('the N.I.Act' hereinafter).

8. It is the say of the applicant that the respondent Nos.2 and 3 after being arrested had applied for bail before the Court of learned Sessions Judge, Rajkot which came to be rejected by a detailed order and they were in judicial custody during the investigation.

8.1 However, before filing of the chargessheet, respondent Nos.2 and 3 applied for bail before this Court by way of preferring Criminal Misc. Application No.23105 of 2017. Since, the Court was disinclined to grant bail, they both had not pressed the application on 28.09.2017 thus, the application came to be dismissed.

9. After completion of investigation when the police filed the final report under Section 173 (2) of the Code of Criminal Procedure, the

accused-respondents once again moved an application for regular bail under Section 439 of the Code of Criminal Procedure. Written objections were made by the present applicant. However, learned 7th Additional Sessions Judge, Rajkot without considering the entire set of facts, and without also considering the fact that they are habitual offenders indulging into organized crime of cheating people under the garb of doing business, granted bail to them on the ground of parity without looking into the particular role played by them. It is also the grievance on the part of the applicant that the parity was insisted with accused No.5-Vishal Omprakash Joshi. However, he was not the main accused, in fact, his role was as scripted by these respondents No.2 and 3.

9.1 These accused are also in alleged offence indulging in serious crime of FEMA violation, Havala Trading and other acts of forgery and cheating. The respondent No.2 had also travelled to Dubai in the month of March, 2017 and shifted the money misappropriated from the petitioner. He also received cash amount in foreign currency from the foreign traders. Other co-accused, who were released by the Court were the puppets of respondent Nos.2 and 3.

10. It is also further averred that the respondent Nos.2 and 3 also delivered one container of Chickpeas to Tariq Al Rehann Company and received the cash amount in form of foreign currency from the director of the said company Mr.Zaid Ali. He sent the forged bill of lading and receipt of container which were in all nine containers. Upon inquiry, the director Mr.Zaid Ali of Tariq Al Rahann Company wrote a letter to the Investigating Officer of Rajkot Taluka Police Station to take stringent action against these persons. Moreover, the shipping line M/s.OSL from Hongkong also wrote a letter to the Investigating Officer in relation to the I-C.R.No.131 of 2017 of Taluka Police Station, Rajkot stating about

the conduct of these respondents as they are bent upon committing forgery and cheating. They are indulging in series of such cases of this criminal misappropriation of money, the details of which are as follow:

| **Criminal Case Number** | **Alleged amount (Rs.)** | **Status remark** |
|---|---|---|
| 2728 of 2016 | 7,00,000/- | Conviction for the period of six months is awarded |
| 9148 of 2018 | 5,50,000/- | Complaint under the N.I.Act is pending before the Court conducting the cases of N.I.Act where the arrest warrant is continued. |
| 924 of 2017 | 5,50,000/- | Complaint under the N.I.Act is pending before the Court conducting the cases of N.I.Act where the arrest warrant against the present respondents is already issued. |
| 702 of 2016 | 23,59,876/- | Complaint under the N.I.Act is pending before the Court conducting the cases of N.I.Act where the nonbailable warrant against the present respondents is issued since long time. |
| 6987 of 2017 | 2,00,000/- | Complaint under the |

| | | |
|---|---|---|
| | | N.I.Act is pending before the Court conducting the cases of N.I.Act where the arrest warrant is issued. |
| 945 of 2017 | 3,00,000/- | Complaint under the N.I.Act is pending before the Court conducting the cases of N.I.Act where the arrest warrant is issued. |

11. Thus it is urged that they are chronic cheaters and every time they are released on bail and they are cheating the persons.

12. The respondent Nos.2 and 3 thus are alleged to have made false representation to the applicant after receiving more than 50% of the amount as per proforma invoice. They had already loaded the goods before the shipping agent and the goods were likely to be dispatched and thereafter they forwarded a fake bill of lading and sent fabricated booking containers details. They have been induced to pay additional amount of U.S. $ 34,995/- on 29.03.2017 but, the goods have never been dispatched. It is urged that

therefore, when the order has been passed disregarding such repeated conduct of cheating and fraud on the part of the respondents-accused, the bail deserves to be cancelled.

13. The applicant further submits that after the respondents were released, they started threating the applicant by giving phone calls and trying to contact the daughter of the complainant, who was residing in India in the month of January, 2018. One of the conditions was not to contact the witnesses and that has been breached. Another condition No.5 of furnish address and not to change the residence also has been breached. The applicant also approached Director General of Foreign Trade ('the D.G.F.T.' hereinafter) which has suspended the licence of Ollo Import Export Company.

14. Thus, on the ground of these submissions regular bail having been granted on merit without considering the criminal antecedents of the respondent-accused and by wrongly applying the

principles of parity and also on the ground that there having breach of some of the conditions, this application for cancellation of bail is moved with the following prayers:

*"28...*

*(A) Your Lordships may be pleased to admit and allow this application;*

*(B) Your Lordships may be pleased to quash and set aside the order passed by the Ld.Additional Sessions Judge, Court No.7, Rajkot in Criminal Misc. Application No.2713 of 2017 (Wrongly stated 2713 of 2007) of dated 06.12.2017 and be pleased to cancel the bail of the respondent Nos.2 and 3 in connection with the F.I.R. being I.C.R.No.131 of 2017 registered at Rajkot Taluka Police Station for the offences punishable under Section 120B, 406, 409, 420, 467 and 468 of the Indian Penal Code and Section 66 (D) of the Information Technology Act, 2008 in the interest of justice;*

*(C) Pending hearing and final disposal of this application, your Lordships may be pleased to issue non-bailable warrant against the respondent Nos.2*

*and 3 and be pleased to direct the Police Inspector of Rajkot Taluka Police Station to take the respondent Nos.2 and 3 in custody in the interest of justice;*

*(D) Your Lordships may be pleased to direct the respondent Nos.2 and 3 to personally remain present before this Hon'ble Court on each and every date of hearing of the present application to secure the presence of the accused persons in the interest of justice;*

*(E) Be pleased to pass other and further relief/s as may be deemed fit and proper in the interest of justice."*

15. Additional affidavit has been filed by the original complainant in support of cancellation of bail by repeating gists of the aforementioned details. It is reiteratively emphasized that various FIRs and criminal prosecutions have been initiated against these respondents-accused and as and when the case is initiated, they make frenzy efforts to settle the matter here and there. The modus operandi had been to find

another person, who would be defrauded and cheated and the money taken from that person (newly made victim) is used for settling the dispute with the first person. They also have tendency of pressurizing the person, who complained against them to settle the dispute. Merely because the accused settled other complaints according to the applicant, the same would not diminish the seriousness of the conduct and modus operandi.

16. The applicant after scrutinizing the record of police investigation as have found illegality and irregularity in the management of fund, they have complained to the directorate of Enforcement Department, Government of India for which action is already initiated against the accused persons and they are found by the office of Enforcement Department, Ahmedabad. It is alleged that it is a gang which is active in committing cheating with various decent persons in India and also in abroad, allowing them to continue the business

activity would tantamount to permitting them to indulge into the crime repeatedly.

17. Affidavit-in-reply has been filed by the respondent No.2 opposing the application for cancellation of bail, whereby he has denied all contentions and allegations.

18. It is contended that the cancellation of bail is on the ground of merit as well as the breach of conditions. The applicant ought to have approached the Sessions Court for the said purpose. It is further contended that on the ground that the respondents-accused did not remain present before the concerned Court despite the issuance of warrant that per say cannot be the ground for cancellation of bail when the bail has been granted on merit. For non marking the presence before the concerned Court the warrants even if are issued by the learned Judicial Magistrate First Class, after imposing certain fines or by sending the accused behind the bar. However, only on the ground of issuance of the

warrant, the respondents-accused cannot be penalized for cancellation of bail. It is further his say that the respondents-accused were facing financial hardship and were not in a position to pay fees to the learned advocate. Therefore, he stopped representing the respondents-accused. The bail cannot be cancelled, moreover with regard to the six cases of N. I. Act, no specific dates are stated nor copies of the orders are made available and hence, wild statements were made for cancellation of bail should not be taken into consideration. It is denied that in Criminal Case No.2728 of 2016, Criminal Case No.9148 of 2016, Criminal Case No.924 of 2017, Criminal Case No.702 of 2016 all for that matter Criminal Case NO.6987 of 2017, the respondents-accused have been absconding. It is denied in some of the matters that in such transactions have been entered into and moreover in pending case, the Court concerned also has power to get the nonbailable warrant issued. That per se cannot be the ground for cancellation of bail. It is further urged that the applicant had preferred an application for cancellation of bail granted to the wife of the respondent No.2 when he filed Criminal Misc. Application No.6658 of 2018 and nonbailable warrant when was pending against his wife, the Coordinate Bench had kept it open for the trial Court to decide the same and the bail had not been cancelled, they were asked to mark the presence before the concerned police station.

19. So far as his nonpresence before the Investigating Officer itself said that he (respondent No.2) was admitted in the Zydus Hospital on 15.02.2018, rest of all aspects have been denied on merit. It is contended that the respondent authorities are attempting to frustrate the order of this Court of grant of bail. They are desirous of detaining the respondent under the PASA Act. It is alleged that in couple of matters, he has been granted anticipatory bail.

20. The written submissions have also been made

for and on behalf of the respondent No.2 pursuant to the rejoinder filed by the applicant on 17.07.2018. It is further urged that detention order has been passed by the Detaining Authority after going through the criminal record of the accused. He has approached this Court by way of filing Special Civil Application No.1411 of 2018 and Special Civil Application No.6762 of 2018 apprehending his detention and these petitions are pending and no affidavit has been filed by the State. Rest of the aspects have been denied *in toto*. There has been a rejoinder of the applicant against the reply of the respondent No.2 and detailed oral submissions have been made by the learned advocate, Ms.S.M.Ahuja, appearing for the applicant, who has argued both on merits as well as on default made by the respondents in complying with the directions and order of this Court.

21. Learned Additional Public Prosecutor, Ms.Maithili Mehta for respondent State has

supported the case of the applicant-original complainant, who has urged that the issuance of nonbailable warrant and nonobservance of the conditions, which had been laid by the Court concerned are also valid grounds for the Court to interfere and cancel the bail. She has also urged on merits that if this Court finds that the bail granted had been without due application of mind and on being unmindful of huge number of similar offences against the respondents-accused, this Court needs to consider any interference on its part would be valid.

22. It has been resisted by learned advocate, Mr.K.S.Chandrani appearing for respondent No.2 along the line of submissions given in writing.

23. So far as the respondent No.3 is concerned, who is represented by learned advocate, Mr.Bhavin Raiyani, who is urged that the respondent No.3 had been arrested by the Investigating Officer for nonobservance of some of the conditions and he had been in jail. This had been confirmed in

case of the respondent No.2 also by learned advocate, Mr.K.S.Chandrani. However, it is urged that subsequently he had been released after spending about one month in the jail.

24. This Court has heard learned advocates on both the sides and upon considering the details which have been placed on record, this Court finds that the challenge to the order of the trial Court is both on the ground of merit as well as for breach of conditions not observed by the respondents.

25. Having duly considered the pleading, written submissions as well as the documentary evidences placed on record, it emerges very clearly that both the respondents are facing many cases either for the alleged cheating and fraud in relation to the business transactions or under Section 138 of the N.I.Act where had been the cheuqes have been dishonoured and therefore, the prosecution under Section 138 of the N.I. Act.

25.1 It is also further emerging that during the pendency of this application also both the respondents-accused have been arrested by the police for noncompliance of the conditions, which had been laid by the Court and later on after about the period of four weeks or so on, certain terms and conditions they have been released.

25.2 The question, therefore, would be as to whether on the ground of any breach of conditions whether there will be a requirement for this Court to interfere, warranting cancellation of bail. As is evident from the record and from the submissions of the learned advocates for respondents, for such breach of conditions appropriate Court had already taken actions and thereafter, on duly considering their plea, they have also released the respondents-accused. Therefore, if at all against that subsequent release on the part of the Court concerned after having sent them recently in the prison for breach of condition, the applicant would have independent right to approach the Court concerned or this Court. So far as cancellation of bail in the instant case on that ground is concerned, this Court is not inclined to consider such a request for there being a separate independent channel and effective alternative remedy which has been pursued by the Investigating Agency. With regard to their having approached the daughter of the original complainant over the telephone for the purpose of attempting the compromise, no serious submissions have been made in that regard to point out that there was any attempt to win over the witness in a criminal trial.

25.3 This Court notices that in Criminal Misc. Application No.6658 of 2018 with Criminal Misc. Application No.6660 of 2018, the applications were made for cancellation of bail granted to the respondents for their having committed breach of condition of failing to mark their presence before the concerned Investigating

Agency. Considering the overall facts instead of cancelling the bail, this Court (Coram: Justice A.Y.Kogje) on 29.06.2018 had made the condition stringent bearing in mind the nature of offence and the fact that one of the accused who is a lady accused and apology unconditionally was expressed.

25.4 The Court does not find any separate complaint with regard to any such attempt of threat also. Be that as it may, what culls out clearly from the pleadings is that the thrust is upon the cancellation of bail on merit.

26.The Apex Court in case of ***ANIL KUMAR YADAV VS. STATE (NCT OF DELHI), reported in (2018) 12 SCC 129*** has held thus:

> *"32. It was repeatedly urged that the High Court misdirected itself in interfering with the discretionary order of the Sessions Court granting bail to the accused and there was absolutely nothing to show that the appellants are likely to abuse the bail or tamper with evidence. The Court while granting bail*

*should exercise its discretion in a judicious manner. Of course, once discretion is exercised by the Sessions Court to grant bail on consideration of relevant materials, the High Court would not normally interfere with such discretion, unless the same suffers from serious infirmities or perversity.While considering the correctness of the order granting bail, the approach should be whether the order granting bail to the accused is vitiated by any serious infirmity, in which case, the High Court can certainly interfere with the exercise of discretion. The material available on record prima facie indicating the involvement of the accused, possibility of accused tampering with witnesses and the gravity of the crime were not kept in view by the Sessions Court. Since the Sessions Court granted bail to the appellants on irrelevant considerations and the same suffered from serious infirmity, the High Court rightly set aside the order of grant of bail to the accused. The impugned orders do not suffer from any infirmity warranting interference."*

27.The Apex Court in case of ***STATE OF BIHAR VS. RAJBALLAV PRASAD @ RAJBALLAV PRASAD YADAV @ RAJBALLABH YADAV,*** *reported in* ***(2017) 2 SCC 178*** has held thus:

> *"14. We may observe at the outset that we are conscious of the limitations which bind us while entertaining a plea against grant of bail by the lower court, that too, which is a superior court like High Court. It is expected that once the discretion is exercised by the High Court on relevant considerations and bail is granted, this Court would normally not interfere with such a discretion, unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be taken into account while exercising such a discretion are ignored or bypassed. In the judgments relied upon by the learned counsel for the respondent, which have already been noticed above, this Court mentioned the considerations which are to be kept in mind while examining as to whether order of bail granted by the court below was justified. There have to be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in granting the bail. These material considerations are also spelled out in the aforesaid judgments, viz. whether the accused would be readily available for his trial and whether he is likely to abuse the discretion granted in his*

*favour by tampering with the evidence. We have kept these very considerations in mind while examining the correctness of the impugned order.*

*15. We may also, at this stage, refer to the judgment in the case of Puran v. Rambilas & Anr. [5], wherein principles while dealing with application for bail as well as petition for cancellation of bail were delineated and elaborated. Insofar as entertainment of application for bail is concerned, the Court pointed out that reasons must be recorded while granting the bail, but without discussion of merits and demerits of evidence. It was clarified that discussing evidence is totally different from giving reasons for a decision. This Court also pointed out that where order granting bail was passed by ignoring material evidence on record and without giving reasons, it would be perverse and contrary to the principles of law. Such an order would itself provide a ground for moving an application for cancellation of bail. This ground for cancellation, the Court held, is different from the ground that the accused misconducted himself or some new facts call for cancellation.*

*16. The present case falls in the former category as the appellant is not seeking cancellation of bail on the ground that the respondent misconducted himself after the grant of bail or new facts have emerged which warrant cancellation of bail. That would be a case where conduct or events based grant of bail are to be examined and considered. On the other hand, when order of grant of bail is challenged on the ground that grant of bail itself is given contrary to principles of law, while undertaking the judicial review of such an order, it needs to be examined as to whether there was arbitrary or wrong exercise of jurisdiction by the Court granting bail. If that be so, this Court has power to correct the same."*

28. It can be noticed that the trial Court to take into consideration the fact that earlier application being Criminal Misc. Application No.1910 of 2017 had been cancelled by the Court. Thereafter, three of the co-accused namely Dharmeshbhai Pravinbhai Kotadiya, Nitaben Khodabhai and Vishal Omprakash Joshi had been granted regular bail by the High Court. The chargesheet had also been laid therefore, there

was no question of any tampering with the evidence. Drawing from the principles of parity and also on the ground that there is no likelihood of any tampering with the chargesheet had been filed, the Court had granted regular bail. It also held that in a matter where partnership firm is alleged to have defrauded the complainant, being three of the partners already granted regular bail, there is identical responsibility of all other partners under the law and hence, the case of the present applicant also deserved to be considered. The factum of long pendency of other such cases before the Court and the trial not likely to be over in a near future, are some of the considerations which have weighed with the Court.

29. In the opinion of this Court all the parameters which have been taken into consideration by the trial Court are as required under the law for any court considering the regular bail after filing of the chargesheet have

been regarded. The trial Court, of course, could have taken note of the fact that there were criminal antecedents against these applicants and of many others pending criminal cases under Section 138 of the N.I.Act and also of the similar nature. The same could have been brought to the notice of the trial Court by the Investigating Agency. At the same time, this Court cannot be oblivious of the fact that wife of the respondent No.2, who is one of the co-accused in this matter has also two offences and hence, the issue of criminal antecedents in her case has not weighed with the Court. The aspect of her being a lady and regular bail in a case of women accused ordinarily regarded with an additional liberal approach at the same time.

30. From overall circumstances and consideration, this Court finds that instead of cancellation of bail, the case is made out by the applicant to further make the conditions stringent so far as both the respondents are concerned. Over and

above the other conditions which have been imposed, shall remain as it is. Therefore, while disposing of this application further stringent conditions are imposed as follow:

(A) The respondents-accused shall pay additional surety of Rs.25,000/- (Rupees Twenty Five Thousand Only) each;

(B) The respondents-accused shall continue to mark their presence before the concerned Police Station till the disposal of the case.

(C) Any breach of the condition laid down by the Court or any other offence subsequent to this order, if is noticed, the Investigating Officer or for that matter, the complainant would be entitled to move for the cancellation of bail for misusing their liberty;

(D) In carrying on national or international business, if such business is done without licence or any contravention of any of the Government licence Rules, Regulations and

Notifications, the same would also entitle the Investigating Officer to move for their cancellation of bail treating the same as misuse of the liberty.

31. Let the trial be completed within a period of six months from the date of receipt of a copy of this order. Both the sides shall cooperate with the Investigating Agency.

32. Let the copy of this order also be sent to D.G.F.T. and all such authorities, for them to be cautioned while granting any licence or permission to the present respondents.

33. With the above, present applications is disposed of. Direct Service is permitted.

**(MS SONIA GOKANI, J)**

M.M.MIRZA / UMESHBHAI