HIGH COURT OF GUJARAT

STATE OF GUJARAT
Versus
KANAKSINH MOHANSINH MANGROLA

Date of Decision: 11 October 2004

Citation: 2004 LawSuit(Guj) 625

Hon'ble Judges: R P Dholakia

Eq. Citations: 2005 1 GLH 665, 2005 2 GCD 1170

Case Type: Criminal Revision Application

Case No: 567 of 2004

Subject: Criminal

Acts Referred:
Indian Penal Code, 1860 Sec 380, Sec 408, Sec 420, Sec 409, Sec 120(b), Sec 406
Code of Criminal Procedure, 1973 Sec 438, Sec 397(1), Sec 401

Final Decision: Appeal dismissed

Advocates: P R Abichandani, Sudhir I Nanavati, Nanavati Associates, Dharmesh V Shah

Cases Cited in (+): 3

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[1] The State has preferred the present Criminal Revision Application against the judgment order dated 16-7-2004 passed by the learned Sessions Judge, Surat, in Cri.Misc.Appln.No.917 of 2004 whereby the application for anticipatory bail preferred by the present respondent no.1-accused in connection with the offence registered as I.C.R.No.8 of 2003 with the DCB Police Station, Surat, was allowed.

[2] The complainant, Shri Babubhai Somabhai Gamit, the then Chairman of the Suryapur Co-Operative Bank Ltd. filed a written complaint to the Commissioner of Police, Surat, on 29-1-2003 for the offence under Secs.406, 408, 409, 420 and 380 of the Indian Penal Code against 60 persons for misappropriating huge amounts initially estimated to be more than Rs.44.00 crores. The Commissioner of Police directed the complaint to be registered with DCB Police Station, Surat and it was registered as DCB

Police Station, Surat, vide C.R.No.I-8 of 2003 and started investigation. During the course of investigation, Secs.465, 468, 471 and 120-B of IP code were added, various persons were interrogated and some persons were arrested and sent to judicial custody. Since name of the present respondent No.1 was disclosed as one of the accused and as he was not available for interrogation, the investigating agency obtained order from the learned Chief Judicial Magistrate, Surat, for issuing warrant under Sec.70 of the Code of Criminal Procedure (hereinafter referred to as 'the Code' for brevity) against him. Instead of remaining present before the investigating agency, the respondent no.1 preferred Cri.Misc.Appln.No.478 of 2003 under Sec.438 of the Code before learned Addl. Sessions Judge, Surat. After giving opportunity to the concerned parties, learned Addl. Sessions Judge, Surat, rejected the same on 22-9-2003. Against the said order of rejection, he preferred Cri.Misc.Appln.No.7822 of 2003 in the High Court. In pursuance of issuance of notice, State appeared and said application was withdrawn by the respondent No.1-accused vide order dated 10-11-2003 passed by this Court (Coram: A.L.Dave,J.) which runs as under:

> "Mr.k.j.shethna, learned advocate for the applicant seeks permission to withdraw the present application. Permission as prayed for is granted. Present application is disposed of as withdrawn. Notice discharged."

[3] The matter was not carried further by the accused and therefore, the above order has become final between the parties. Instead of remaining present before the investigating agency, the respondent No.1-accused again preferred Cri.Misc.Appln.No.227 of 2004 for anticipatory bail before the court below as a successive application on the ground of change in circumstance. On perusal of said application, it appears that all possible grounds taken in earlier application have been taken as is reflected in the said application running into 37 pages which is a part of the present proceedings. Said successive application for anticipatory bail was entertained by the learned Sessions Judge on 11-2-2004 and same was allowed by the learned Sessions Judge, Surat, on merits on 23-3-2004.

[4] Being aggrieved by the said order, State preferred Criminal Revision Appln.No.250 of 2004 before the High Court for cancellation of anticipatory bail wherein rule was issued and stay of the impugned order was granted. In pursuance of that, Mr.Kunan B.Naik, learned advocate appeared on behalf of the respondent No.1. As the said period of anticipatory bail for 90 days was already over, revision application was disposed of by this Court (Coram: A.L.Dave,J.) on 1-7-2004 by passing the following order:

> "This application challenging the order passed by the Sessions Court, Surat, granting anticipatory bail to the respondent by order dated 23rd March, 2004. 2. It

is submitted by the learned advocate for the respondent that the matter has become infructuous as the period during which the anticipatory bail order was valid has expired. Under these circumstances, this application deserves to be disposed of as having become infructuous. The earlier interim order passed by this Court staying the operation of the order would stand vacated as the time has already expired. 3. Rule is discharged. Interim relief, if any, is vacated."

[5] Before this Court could finally dispose of the said Cri. Revision Appln. No.250 of 2004 on 1-7-2004 wherein protection was granted to the accused till final disposal, second successive anticipatory bail application under Sec.438 of the Code was preferred by the respondent No.1-accused in the Court of learned sessions Judge, Surat, being Cri.Misc.Appln.No.917 of 2004 on 19-6-2004. In pursuance of issuance of notice by the learned Sessions Judge, Surat, State appeared through learned P.P., Shri Gandhi. It is required to be made clear that above referred Cri.Misc.Appln.No.917 of 2004 is not the petition based only on change in circumstances but a full-fledged petition filed by the present respondent no.1 as a second successive anticipatory bail application. Said application was finally disposed of on 16-7-2004 whereby anticipatory bail was granted in favour of the respondent no.1-accused. Hence, the present Criminal Revision Application by the State.

[6] Initially, notice was issued vide order dated 17-8-2004 which was made returnable on 30-8-2004 and this Court (Coram: A.L.Dave,J.) stayed the implementation and enforcement of the judgment and order dated 16-7-2004 passed by the learned Sessions Judge, Surat, in Cri.Misc.Appln.No.917 of 2004. In the said revision application, Cri.Misc.Appln.No.7994 of 2004 was filed by the accused for vacating the interim relief granted by the Court vide order dated 17-8-2004 in Cri. Revision Appln.No.567 of 2004. It reflects from the order dated 19-4-2004 passed in Cri.Misc.Appln.No.7994 of 2004 that direction was given to the investigating agency not to arrest the accused in connection with C.R.No.I-8 of 2003. Thereafter, in place of Mr.Naik, the respondent no.1-accused appeared through M/s Nanavati & Nanavati. As my Brother Judge, Mr.Justice D.N.Patel, is not taking up the matter pertaining to M/s Nanavati & Nanavati, an endorsement was made as "not before me". In pursuance of that, matters went to the office and Hon'ble the Chief Justice ordered for placing the matters before this Court to dispose of the same on merits.

[7] I have heard learned Addl. Public Prosecutor, Mr.P.R.Abichandani, for the petitioner-State, Mr.S.I.Nanavati for M/s Nanavati & Nanavati for the respondent no.1-accused and Mr.Dharmesh V.Shah, learned counsel appeared for the respondent no.2, the complainant bank.

[8] It is mainly contended by learned Addl. Public Prosecutor, Mr.P.R.Abichandani, that the impugned order by the learned Sessions Judge under Sec.438 of the Code was passed in the successive application on the alleged ground of change in circumstance i.e. submission of report by the Special Auditor wherein, according to the accused, no direct or indirect involvement was shown against him in the crime in question as appeared in the FIR. It is further contended that Cri.Misc.Appln.No.478 of 2003 initially filed under Sec.438 of the Code was disposed of on merits vide detailed reasoned order running into 69 pages and when said order was taken into High Court by way of Cri.Misc.Appln.No.7822 of 2003 by the accused, at the end of arguments, it was disposed of as withdrawn which amounts to rejection and, therefore, court below ought not to have considered the successive application on all grounds which have been dealt with by the court by way of change in circumstance that too during the pendency of application in the High Court. A show has been made that said application was filed only on change in circumstance but, as such, all possible grounds were taken and it was decided again on merits. It is further contended that even the second successive application filed by the respondent no.1-accused was on the same alleged ground of change in circumstance of non-involvement of the accused in the audit report. Drawing my attention towards the record, it is contended that on the day on which successive application was filed, neither the audit work was completed nor the report submitted and in these circumstances, court below ought not to have allowed the successive application on that ground and ought not to have dealt with other grounds which were dealt with once in the first anticipatory bail application. According to him, Special Auditor was appointed not for the purpose of complaint in question. The act of the accused is such which would not be apparently visible either by the auditor during the course of audit or the investigating agency because of smart act of the accused wherein huge amounts of the bank have been siphoned off. Initially Rs.8.11 crores were transferred by G.L.No.156 of Ram Chowk Branch of the complainant bank (sundry account). Out of which, Rs.7.50 crores were transferred in G.L.No.155 Majura Gate Head Office of the bank on 30-8-2002. Taking me through page nos.29, 30, 37 and 38 of the compilation, it is contended that out of Rs.7.50 crores transferred to two different accounts, Rs.5.62 crores have been transferred in the account of Sitaram Seva Trust by O.D.No.89 on 30-8-2002 and Rs.1.88 crores in the account of Sitaram Corporation by C.C.No.85 on 30-8-2002. Since above referred amounts were directly transferred from the sundry account of the bank, neither the auditor nor the investigating agency can find it out through common eye and, therefore, if it has not been reflected in the accounts, it cannot be said that amounts have not been misappropriated by the present respondent no.1-accused which admittedly was after the closure of functioning of the bank on 30-8-2002 and all moneys have gone to the accused on that day. It is further contended that though same arguments advanced in the first anticipatory bail application by the learned Public Prosecutor were advanced by

Mr.Gandhi, learned P.P., who appeared on behalf of the State in the successive application, and also shown evidence to that effect, same were not properly dealt with by the court below. It is also contended that the learned Sessions Judge has also not considered the reasoned order passed by the learned Addl. Sessions Judge in the first application. If the learned Sessions Judge in the successive application wants to reverse the finding given by the Addl. Sessions Judge in the first anticipatory bail application, the reasons given in the first application ought to have been properly dealt with justifying findings. 8.1. In this connection, learned Addl. Public Prosecutor, has drawn my attention towards the principles laid down by the Apex Court in the case of Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and another, reported in 2004(3) Crimes 63 (SC) more particularly towards para 19 which reads as under:

> "Though an accused has a right to make successive applications for grant of bail the court entertaining such subsequent bail application has a duty to consider the reasons and grounds on which the earlier bail applications were rejected. In such cases, the court also has a duty to record what are the fresh grounds which persuade it to take a view different from the one taken in the earlier applications. In the impugned order we do not see any such fresh ground recorded by the High Court while granting bail. It also failed to take into consideration that at least on favour occasions order refusing bail has been affirmed by this Court and subsequently when the High Court did grant bail, this Court by its order dated 26th July, 2000 cancelled the said bail by a reasoned order. From the impugned order, we do not notice any indication of the fact that the High Court took note of the grounds which which persuaded this Court to cancel the bail. Such approach of the High Court, in our opinion, is violative of the principle of binding nature of judgments of superior court rendered in a lis between the same parties, and in effect tends to ignore and thereby render ineffective the principles enunciated therein which have a binding character."

[9] It is also contended by Mr.Abichandani that during the course of investigation since name of the present accused was disclosed as one of the prime accused, investigating agency has started search and as he was not available, warrant was obtained by the investigating agency under Sec.70 of the Code from the learned Chief Judicial Magistrate. Since he was not available thereafter also, proceedings under Sec.82 of the code were initiated and even proclamation was issued to that effect. Same was challenged by the respondent no.1-accused in the court of law and as the required period was not provided in the proclamation, it was directed to issue a fresh proclamation. Even thereafter also, he was not available for investigation. According to him, the respondent no.1-accused was knowing from very beginning that his presence is required for interrogation and that his request under sec.438 of the Code was turned

down by the trial court and confirmed by the High Court and hence, he ought to have appeared before the investigating agency. Instead, he has obtained the above referred order in a successive application and, therefore, it is requested that the impugned order be quashed and set aside. Taking me through various orders passed by the concerned Courts, affidavits, counter affidavits, documentary evidence and statements of witnesses, it is contended that once the order passed by the court below was confirmed by the High Court, it has become final and when it has not been carried further, learned Sessions Judge should not have entered into successive application especially when there is no change in circumstance.

[10] It is also contended that FIR filed by the then Chairman to the Commissioner of Police was a well designed typed FIR and, therefore, obviously, names of present accused, other Directors and office bearers of the bank would not appear as accused. To save them, it was mentioned in para 14 of the FIR that all office bearers and directors are innocent and affidavits sworn by each one of them to that effect are annexed with the complaint and, therefore, according to him, on the one hand, a well designed typed complaint was filed and on the other hand, the respondent no.1-accused is stating that his name has not been mentioned in the FIR which leads to the only conclusion that he wants to take disadvantage of his own wrong. It is also contended that later on, during the course of investigation, the complainant himself was made as an accused along with other Directors wherein name of the present accused was disclosed as one of the accused and hence also, learned Sessions Judge ought not to have placed any weight on the aforesaid complaint. Moreover, the accused was absconding and was not available for investigation though complaint was registered in the year 2002.

[11] It is the first argument advanced by the learned Senior Counsel, Mr.S.I.Nanavati for M/s Nanavati & Nanavati appearing on behalf of the respondent no.1, that the order passed by the learned Sessions Judge under Sec.438 of the Code is an interlocutory order and, therefore, this revision is not maintainable. In this regard, he has placed reliance on the cases reported in AIR 1977 S.C. 2185 more particularly paras 6 and 9 and AIR 1988 S.C. page 922 and argued that this revision is not maintainable and, therefore, it may be rejected only on that ground. Learned Addl. Public Prosecutor has submitted that the nature of the matter is such that it is maintainable and does not require to be disposed of on this point.

[12] As regards maintainability of the revision, the Apex Court in the case of Krishnan & Anr. Vs. Krishnaveni & Anr., 1997(1) Supreme 628 has held in para 10 as under:

> "Ordinarily, when revision has been barred by Sec.397(3) of the Code, a person-accused/ complainant cannot be allowed to take recourse to the revision to the

High Court under Sec.397(1) of the Code, since it may amount to circumvention of the provisions of Sec.397(3) or Sec.397(2) of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the Courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Sec.397(1) read with Sec.401 of the Code."

[13] The aforesaid judgment has been followed by this Court in the case of Jagdishbhai Dharamsi Thakore Vs. State of Gujarat reported in 1997(2) G.L.R. 1553. In view of these reported judgments, this Court is vested with inherent power and even revisional power under Sec.397(1) read with Sec.401 of the Code to entertain the present revision when it is found that there is grave miscarriage of justice or abuse of process of the Court. I am of the opinion that this revision is maintainable.

[14] Taking me through the affidavit filed by the respondent no.1 more particularly towards paras 6 to 10, Mr.S.I.Nanavati has submitted that the respondent no.1 is a permanent resident of Bharuch district and is in active politics and, therefore, to settle the internal rivalry, he has been involved in criminal case by the investigating agency at the instance of his rivals in politics. The respondent no.1 was the Chairman of the Suryapur Co-operative Bank and was also a member of Rajya Sabha from 1994 for a period of six years. He worked as a Chairman of the Gujarat State Fertilizer Corporation for the period 1996-97 and was also the Chairman of the Sardar Sarovar Narmada Nigam Ltd. in the year 1998. He was performing his duty very efficiently, honestly and diligently while holding public posts. He is actively involved in various activities in the Bharuch district and also runs various trusts, colleges, hospital and medical colleges. He is totally innocent and has resigned from the bank as Chairman and Director on 26-2-2002 and though he has not taken any direct or indirect interest in the affairs of the bank, he was falsely involved in the crime in question. It is submitted that in the body of the complaint in question i.e. C.R.No.I-8 of 2003 registered with DCB Police Station, Surat, against 60 persons on 29-1-2003, name of the present respondent no.1-accused was not shown as an accused nor any allegation has been made against him in the entire FIR. It is submitted that the charge-sheet submitted by the investigating agency on 24-4-2003 shows no evidence worth the name connecting the accused with the crime except showing his name in column no.2 of the first page of the charge-sheet as an absconding accused along with other

accused and, therefore, at the end of investigation, as there is no evidence against the present accused connecting him with the crime in question, court below has rightly granted anticipatory bail and hence, it is requested that same may not be interfered with.

[15] It is further submitted by Mr.Nanavati that merely because the respondent no.1-accused is a trustee in the trust in which Rs.7.50 crores have been diverted, he should not be held responsible. The audit report was in favour of the respondent accused and hence, court below has rightly considered the same as a change in circumstance. It is further submitted that one more complaint was lodged by DCB Police, Surat, against the present respondent no.1-accused for the offences punishable under Secs.406, 408, 409, 418, 420, 467, 468, 471, 120-B and 34 of the Indian Penal Code on 29-1-2003 registered as C.R.No.I-52 of 2004. As he was falsely involved in said case also, he has obtained bail. The said order was also challenged by the State and now it is pending in the High Court. It is submitted that the criteria for grant or rejection of anticipatory bail will be quite different. Once anticipatory bail was granted by the court below, this Court should be slow in rejecting the same. If at all any interference is required, same can be done by dealing with the reasons assigned by the court below. 15.1 Mr.Nanavati has placed reliance on the case of Dolatram and Others Vs. State of Haryana, (1995) 1 S.C.C. 349. It has been held by the Apex Court in para 4 of the judgment as under:

> "4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding, is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial."
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> 15.2 He has also relied on the case of Subhendu Mishra Vs. Subrat Kumar Mishra and another, AIR 1999 S.C. 3026 more particularly towards head note which reads as under:
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> "Criminal P.C. (2 of 1974), S.439--Cancellation of bail--High Court overlooked distinction of factors relevant for rejecting bail at initial stage and cancelling bail

once granted--Cancellation of bail done in mechanical manner--Order not sustainable."

15.3 Reliance was also placed by him on Ghanchi Rubina Salimbhai Vs. Metubha Diwansingh Solanki, (2003) 7 S.C.C. 183 towards head note which reads thus:

"Criminal Procedure Code, 1973--S.439-Bail--Grant of--After denial by trial court, High Court granting bail must record reasons--Held, where the trial court found material to establish a prima facie case against the respondent-accused and denied bail, High Court ought to at least briefly indicate reasons for reversing the trial court's findings and granting bail--Order of grant of bail by High Court set aside."

He has drawn my attention towards para 5 of the aforesaid reported judgment which is as follows:

"5. Since the trial court has assigned reasons for refusing bail which includes availability of material to establish prima facie case against the respondent-accused, and looking to the gravity of the offence as also the apprehension of the complainant as to the possibility of interference by the accused with the investigation and threat to the prosecution witnesses in the event of they being enlarged on bail, it would have been more appropriate if the High Court could have at least briefly indicated the reasons which it thought entitled the respondent-accused to bail. It may be that any strong expression of opinion in the nature of a finding in a bail application by the High Court though not binding on the trial court, could influence the mind of the trial court since such observation comes from the High Court, yet it is appropriate that some indication of the grounds on which the High Court rejected the findings recorded by the trial court, should have been reflected in the order by which the High Court reversed such findings."

15.4 He has also relied on Mahant Chand Nath Yogi Vs. State of Haryana, AIR 2003 S.C. 18 more particularly para 16. Para 16 reads as under:

"16. After perusing the orders of the learned Addl. Sessions Judges dated 9-4-2001 and 5-6-2001 and records, we do not get any impression that the judicial discretion, in granting anticipatory bail was exercised either erroneously or on an irrelevant consideration. The serious contention advanced before us by the learned Public Prosecutor is that for further investigation of the case, custodial interrogation of the appellant is very much required. While stating the facts in the beginning, we have noticed that the appellants joined investigation whenever required and as a matter of fact they were interrogated on two occasions for sufficient time. The appellants were named as accused for committing offence under Section 120-B, IPC almost after a period of four and half months from the date of the murder, that

too based on the disclosure statement of hardened criminal, the statement of Kishan on whose statement the appellants were involved in the offence was proved to be false and police got him discharged. The submission of the learned Public Prosecutor that earlier investigation made by the police officers and scrutinized by the superiors was faulty and mala fide, is not a ground to put against the appellants at this stage. The appellant NO.1 has also alleged that he is falsely involved in the case because of political rivalry and he was threatened for extracting money; in that regard he had also made complaint to the police seeking protection. Unfortunately, the High Court in the impugned order dated 21-12-2001, cancelling the anticipatory bail granted to the appellants and in the subsequent order dated 22-2-2002, did not consider the contentions raised on behalf of the parties objectively and in proper perspective and did not deal with the reasons recorded and consideration made by the learned Addl. Sessions Judges in the orders dated 9-4-2001 and 5-6-2001 granting anticipatory bail. The High Court has simply observed in the order dated 21-12-2001 that the learned Addl. Sessions Judge, Rewari, had not taken all facts into account and that he granted anticipatory bail to the appellants on 9-4-2001 when the case was at initial stage. We find this statement is factually incorrect looking to the order of the learned Addl. Sessions Judge and the records of the case. The learned Sessions Judge had taken pains to notice the relevant facts and circumstances of the case and that the case was not at the initial stage. The High Court has simply stated that the order of the learned Sessions Judge is based on exercise of judicial discretion in erroneous manner without considering the material on the file. It is strange that the High Court has made such an observation without showing how the judicial discretion exercised by the learned Addl. Sessions Judge was erroneous. A considered order of the learned Addl. Sessions Judge supported by reasons. The High Court has observed "it is alleged in the present case that the appellant NO.1 wielded great influence and had obtained bail by dubious means". This observation is not based on any finding. When the learned Addl. Sessions Judges have passed the orders granting anticipatory bail exercising judicial discretion, there is no warrant to say that such an order of bail is obtained by dubious means. The High Court, except referred to two decisions as to the position of law, failed to notice the facts and relevant aspects of the case on hand to apply them."

15.4.1 There cannot be any dispute regarding the principles laid down by the Apex Court in the aforesaid reported cases. The fact before the Apex Court in Mahant Chand Nath (supra) was that offence of conspiracy of murder recorded after about four and half months based on the disclosure of statement of hardened criminal was proved to be false. At the end of investigation, the appellant was not involved and found to be innocent on verification of investigation by the Superior Officer. In

pursuance of that, CJM, Rawari, passed the order of discharge on 3-11-1999. Thereafter, in the month of February, 2001, the appellant no.1 received threatening demand over phone to pay Rs.10.00 crores by March, 2001 failing which he would be kidnapped and murdered. Hence, he filed a complaint and security was again provided upon request. Upon the I.O. recording statement of another hardened criminal in the same case, the appellant apprehended arrest and hence, he preferred application under Sec.438 of the Code. Said application was granted by the learned District Judge. However, the High Court cancelled the same and when the matter went to the Apex Court, the Apex Court has allowed the appeals. 15.4.2In view of the aforereferred judgment of the Apex Court, the High Court can interfere with the order passed below under sec.438 of the Code mainly on the ground of judicial discretion in granting anticipatory bail is exercised either erroneously or of any irrelevant consideration. The Apex Court in the said case has taken notice that appellants gave co-operation in investigation whenever required and he was interrogated on two occasions for sufficient time and he was involved in the incident in question on the basis of disclosure statement of hardened criminal. At the end of investigation, as the offence was proved to be false, police got him discharged. However, as the High Court while cancelling the bail has simply stated that the order of the learned sessions Judge is based on exercise of judicial discretion in erroneous manner without considering the material on file, it has been observed that it is strange that the High Court has made such an observation without showing how the judicial discretion exercised by the learned Addl. Sessions Judge was erroneous. In view of the above observation, if the court wants to cancel the bail, court should consider the material on file and show how judicial discretion exercised by the learned Sessions Judge was erroneous. 15.5 Learned counsel for the respondent no.1-accused has also relied on the case of State of Gujarat Vs. Ashokbhai Nanjibhai Vaghani, 2004(2) G.L.H. 64 towards head note which reads as under:

"Code of Criminal Procedure, 1973--S.439--Cancellation of bail--Sessions Court did not give proper reasoning to release accused on bail in serious offence of S.302, etc.--Only aspects of charge-sheet having been filed and accused being local residents were considered--Since the prim facie case was not considered on merits, order of bail quashed--However, according to 2003(7)S.C.C. 183 and since accused are already on bail for 7 months, they are allowed to continue on bail till Sessions Court decides the application afresh within 15 days--Accused directed to mark presence before police every alternate day in the meantime."

15.5.1 In the aforereferred reported case, this High Court, while deciding the matter of cancellation of bail, has remanded the matter to the trial court for a

decision afresh on the ground of the trial court having given improper reasons in releasing the accused on bail in a serious offence. The principle enunciated in the said judgment is that while dealing with the cancellation of bail, court should not do the same mechanically and while grant or rejection of bail, proper reasons are required to be assigned. 15.5.2 It is required to be noted that after remanding the matter by the High Court in the aforesaid reported judgment, the trial court has again granted bail. However, same was cancelled by the High Court vide order dated 18-3-2004 passed in Cri.Misc.Appln.No.726 of 2004 which is reported in 2004(6) G.H.J. 112.

[16] Keeping in mind the law laid down by the Apex Court and the High Court in the aforesaid reported cases and also keeping in mind the documentary evidence, statements of witnesses and impugned order, I am proceeding with the matter.

[17] The complaint in question was filed by the then Chairman of the bank registered with DCB Crime Police Station, Surat, on 29-1-2003 against 60 persons alleging misappropriation of huge amounts initially estimated to be more than Rs.44.00 crores of the bank bringing to a halt the entire functioning of the bank. The FIR clearly discloses the names of 60 persons as accused having direct or indirect connection with the accused No.1, Shri Mukesh Desai and no others have been involved. Sufficient care has been taken in para 14 in giving clean chit to all office bearers i.e. directors etc. of the bank and their nearer and dearer stating that their affidavits are annexed with the complaint. Hence, initially investigation was directed towards above referred accused only. Since involvement of the present respondent no.1-accused and others was found during the course of investigation, it was directed towards them also. However, as the accused was not available for interrogation, warrant under sec.70 of the Code was obtained against the present accused from the court of learned Chief Judicial Magistrate on 1-4-2003. The accused was not available even thereafter also and hence, proceedings under Sec.82 of the Code were initiated against him. Meanwhile, the respondent no.1-accused preferred Cri.Misc.Appln.No.478 of 2003 under Sec.438 of the Code in the Court of learned Sessions Judge, Surat. Same was transferred to the Court of learned Addl. Sessions Judge, Surat, who, upon affording opportunity of hearing to the learned advocates appearing for the respective parties, rejected the same on merits by exhaustive reasons running into 69 pages. Being aggrieved and dissatisfied with the said order, the accused preferred Cri.Misc.Appln.No.7822 of 2003 in the High Court. Said application was disposed of by this Court as withdrawn vide order dated 10-11-2003 which reads as order:

"Mr.k.j.shethna, learned advocate for the applicant seeks permission to withdraw the present application. Permission as prayed for is granted. Present application is disposed of as withdrawn. Notice discharged."

It appears that said order was not carried further by the accused and, therefore, it has become final between the parties.

[18] The accused thereafter preferred Cri. Misc. Appln. No.227 of 2004 under Sec.438 of the Code in the Court of learned Sessions Judge, Surat, on the ground of change in circumstance more particularly that the report of the Special Auditor does not involve him. Though it was stated to be a successive application on the ground of change in circumstance, all possible grounds taken at the time of filing the first application under Sec.438 of the Code were again taken. Said successive application was allowed by the learned Sessions Judge, Surat, vide order dated 23-3-2004 whereby accused was granted anticipatory bail for a period of 90 days. It is required to be noted that the first successive anticipatory bail application in the court below was filed on the ground of chance in circumstance of non-involvement of the accused in the audit report. As such, on that day, audit work was not completed nor the report submitted. Hence, that ground of change in circumstance was not available to the respondent no.1-accused. In short, it can be said that a show has been made that audit work was completed and report submitted. Not only that, the learned Sessions Judge has taken into consideration initiation of proceedings under Secs.70 and 82 of the Code by the prosecution as the important grounds on being felt that the prosecution is after the accused and therefore, it was ordered that the accused was required to be protected. Instead of treating it as one of the important grounds in rejecting the successive application of the accused, it was considered as the important ground for granting said application which is contrary to the settled law. Allowing of said application gave rise to file Criminal Revision Application No.250 of 2004 in the High Court by the State. In the said revision, initially notice was issued and impugned order was stayed.

[19] Before the said revision was finally disposed of on 1-7-2004, the respondent no.1-accused preferred second successive anticipatory bail application on 19-6-2004 being Cri.Misc.Appln.No.917 of 2004 before the court below. Said application was allowed by the learned Sessions Judge, Surat, vide order dated 16-7-2004 which is impugned in the present revision.

[20] An argument has been advanced by the learned counsel for the accused that just to involve the accused with the crime in question, statements of various witnesses were recorded by the investigating agency later on. However, it appears that documents shown and arguments advanced by the learned P.P. during the course of arguments before the court below about the material fact of diverting Rs.7.50 crores into two accounts namely, Sitaram Seva Trust under O.D.No.89 and Sitaram Corporation under C.C.No.85 by the accused where the respondent no.1-accused got interest that too also after closure of functioning of the bank were not considered but were completely ignored. Firstly amounts have been transferred from Ram Chowk

Branch of the bank into Majura Gate Main Branch and from there to the above referred accounts. Mr.Abichandani has taken me through the documentary evidence namely, the bank record pertaining to the aforesaid transactions and also the statements of witnesses recorded by the investigating agency during the course of investigation such as Abdul Sattar Ushmanbhai Meman; Artiben Shah, the Branch Manager of the complainant bank; Shailendra Harivadan Bhelvana; Hitendrabhai Ishwarsinh Mangrola; Jagdish Chandulal; Pradipbhai Mohanlal Mangrola; Ranjibhai Jivrajbhai Desai; Shaileshbhai Bhurabhai Desai; Naginbhai Narsinhbhai Patel and Jivrambhai Vastabhai Desai and contended that though they were shown by his counterpart before the court below, same were not taken into consideration. It is to be noted that some of the witnesses are bank employees who have explained about the banking transactions prima-facie involving the accused with the crime in question. However, they have been deliberately ignored and were not given proper weight by the court below. Court below should not have ignored the evidence of Artiben Shah, the Manager of the bank. Learned Sessions Judge has also not taken into consideration various accounts shown to her forming part of the investigation namely, Lakhia Brothers, Bapunagar Automobiles, Milin R. Patel, Manoj Corporation, Samarpan Seva Trust, Manoj D.Vyas, Sitaram Seva Trust, Mundil Corporation, etc. and has completely ignored the fact of about 20 fictitious being operated prima-facie showing involvement of the respondent no.1-accused. If the statements of aforementioned witnesses are slightly gone through by the learned Sessions Judge, involvement of the accused in the present offence would have been prima-facie satisfied. These statements recorded in explanatory form for the purpose of verifying the documents are there with the bank from very beginning and, therefore, it cannot be said that these statements were recorded later on for the purpose of involving the accused in the crime in question. On the contrary, they have been recorded to show various entries of the bank before involving the accused in the crime in question on prima-facie appearance. If, at relevant time, the person was not serving in the above referred branch but was connected with the banking transaction of the bank, then certainly bank entry can be explained and, therefore, it cannot be said that it is a hearsay evidence. These evidence have some prima-facie values and any grievance in that respect can be made at the time of trial.

[21] Facts remain that although complaint was lodged in the month of January, 2003, name of the respondent no.1-accused was disclosed during the course of investigation, proceedings under Secs.70 and 82 of the Code were initiated and though his name was shown in column no.2 of the charge-sheet filed qua other accused as absconding, till this date, he is not available for interrogation or investigation.

[22] The main points which have been contended and argued in first anticipatory bail application in detail have been finally dealt with by the learned Addl. Sessions Judge by

a reasoned order and when same have been confirmed by the High Court, they have become final between the parties. Then also, the respondent no.1-accused has raised all those contentions in the successive application by way of change in circumstances and same have been dealt with by the learned Sessions Judge though legally impermissible. When they have been raised here also by the learned counsel for the respondent no.1-accused, they are required to be primarily dealt with by me. Firstly, it is the case of the respondent no.1 from very beginning that his name was not shown as an accused in FIR nor any allegation has been made against him in the body of FIR. Secondly, the investigation qua that FIR is over and charge-sheet was filed wherein also, there is no prima-facie evidence to connect the accused with the crime in question and, therefore, again it has been reiterated by the learned counsel for the respondent no.1-accused.

[23] As discussed above, FIR is a well designed and a well planned typed complaint submitted by the then Chairman showing 60 persons as accused sparing other responsible persons including the respondent no.1. Hence, if name of the present accused and his involvement are not shown in said FIR, it does not mean that he is out of investigation and interrogation more particularly when his involvement has been established by way of documentary evidence. Over and above, if there is no allegation against him in the FIR, he should have remained present before the investigating agency and raised his grievance or defence before them. However, he was not available for investigation for a substantial long period of time and hence, to secure his presence for interrogation, proceedings under secs.70 and 82 were initiated. As accused is not available for interrogation, there will not be any material which may reflect in the charge-sheet which has been admittedly filed qua other accused wherein name of the present respondent no.1 was shown as absconding accused. On the one hand, the respondent no.1 is not available for interrogation and investigation and on the other hand, he is asking the evidence to be shown against him in that charge-sheet. Besides, there are prima-facie evidence against the respondent no.1 in the charge-sheet. In these circumstances, these contentions raised by the learned counsel for the respondent no.1 all throughout are not tenable. Moreover, court below has dealt with these points which have become final between the parties. 20. Apart from the above, it was required for the court below to have considered the argument advanced by the learned Public Prosecutor there that lengthy typed FIR was prepared by the then Chairman of the bank involving only 60 people by sparing himself and other persons including directors and office bearers who were controlling the affairs of the bank and are prima-facie appear to have been involved in the crime in question. Not only that, the complainant has clearly stated in para 14 of the complaint that all directors, office bearers and others are innocent and affidavits affirmed by each and every directors are annexed with the complaint. Therefore also, it can be presumed that when the

interested person files the complaint in order to save his skin and that of other real culprits, it is obvious that their names can be neither seen in the body of the FIR or in the entire FIR. Court below ought to have seen that it is during the course of investigation that the involvement of the present respondent no.1-accused and others have been prima-facie appeared.

[24] Another point of the learned counsel for the respondent no.1 has been that name of the present applicant has not been shown in the charge-sheet filed on 24-2-2003 qua C.R.No.8 of 2003 as there is no evidence to connect to him with the crime in question. In this connection, it is required to be noted that when a well planned and well designed typed complaint was lodged by the Chairman, investigation has been done on that basis. Thereafter, when involvement of the respondent no.1-accused was seen during the course of investigation, he did not appear before the investigating agency for interrogation and hence, investigating agency could not investigate further into the matter. Meanwhile, as charge-sheet was required to be filed within the stipulated period qua other accused, it was filed showing the name of respondent no.1-accused and others as absconding which itself means non-availability of the accused for investigation. In this view of the matter, obviously there will not be any name of the present respondent no.1-accused in the charge-sheet showing him as accused but will be shown as absconding. Court below ought to have kept in mind the fact that once the persons were shown as absconding accused, there will not be much material to connect them with the crime in question as they could not collect the same due to non-availability of the accused. As and when accused would be available for investigation, upon interrogation and investigation of the accused, if there are materials to connect him with the offence, the investigating agency may file the supplementary charge-sheet and if there are none, they may even pray for appropriate summary to be filed. In the present case, materials are there on record against the respondent no.1-accused which are ignored by the court below. When cogent prima-facie documentary evidence are on record, court below ought not to have ignored the same without giving opportunity to the I.O. to interrogate or investigate into the matter.

[25] It clearly appears from para 6 of the judgment that arguments have been advanced by learned P.P., Mr.Gandhi, appearing in the court below but same have not been properly dealt with. On the one hand, court below is not providing opportunity to the prosecution to interrogate the accused and on the other hand, it expects in para 8 by observing that court has to mainly see and observe whether any new development or any convincing evidence is gathered or collected so as to link the accused with so-called offence committed by him. Without applying mind, the learned Sessions Judge has given a finding in para 8 that so-called statements of the persons arrested which are recorded by the I.O. during the investigation are vague and have no evidentiary

value. This finding is factually incorrect. The statements relied upon by the prosecution before the court below and this Court are not the statements of arrested accused but of the independent persons and bank employees recorded in explanatory form on factual aspects and, therefore, same cannot be ignored. Court below has also held that the statements relied upon by the prosecution are running contrary to the audit report submitted by Special Auditor and also other record of the bank. With pain, I would like to say that this finding given by the Sessions Judge is also contrary to the evidence on record. Without verifying the facts and going into the statements, learned Sessions Judge has jumped beyond the purview. Hence, said finding of the learned Sessions Judge appears to be perverse. Had the documentary evidence shown by the Public Prosecutor from the charge-sheet papers been taken into consideration, aforereferred conclusion would not have been arrived at by the learned Sessions Judge.

[26] As I have stated earlier, parties are entitled to file and argue the successive application only on the point of change in circumstance and Court has also to deal with the same on the basis of change in circumstance. It appears that the orders passed by the Sessions Judge twice are on the basis of repetition of facts which have been already minutely dealt with by the learned Addl. Sessions Judge and confirmed by the High Court and became final as it has not been carried further and, therefore, learned Sessions Judge ought to have restrained from doing so. If at all convinced, the point of change in circumstance only ought to have been dealt with and then ought to have granted or rejected the successive application. Here in the case, the balance has been tilted in favour of the accused.

[27] It appears that the present respondent no.1-accused has taken disadvantage of the process of law in as much as he being the pioneer of the bank led the bank into liquidation within a period of seven years and all amounts of the bank initially estimated at Rs.44.00 crores have been siphoned off after closure of the functioning of the bank by the respondent no.1-accused, office bearers and others who are closely connected with the bank's activities. This requires serious investigation including the transaction of the complainant bank with the City Co-Operative Bank in presence of persons whose involvement is prima-facie established. It is in these circumstances that a joint interrogation of the accused, staff of the bank and other accused is necessary for reaching the roots of the offence. Whatever arguments advanced by the learned counsel for the respondent no.1 regarding the innocence of the accused and reproduced in the affidavit would be available to the respondent no.1-accused at the time of trial or can be placed before the investigating agency during his interrogation. However, the present accused has used the court machinery in such a manner that though the order has been confirmed by the High Court, instead of making himself

available before the investigating agency, he was able to decide his matter through Court again on merits twice in the guise of change in circumstance.

[28] At this stage of dictation in the open court, Mr.B.B.Naik, learned advocate who was assisting the learned Senior Counsel, Mr.S.I.Nanavati, has placed reliance upon the law laid down by the Apex Court in the judgments viz., AIR 1977 S.C. 2185, AIR 1988 S.C. 922, AIR 2003 S.C. 18, (1995) 1 S.C.C. 349, AIR 1984 S.C. 372, AIR 1978 S.C. 179, AIR 1999 S.C. 3026, AIR 2002 S.C. 1475, (2001) 4 S.C.C. 280, AIR 1997 S.C. 366, AIR 1980 S.C. 1632, 1992(1) G.L.R. 631, 2004 S.C.C (Cri.) 1144, 551, 1981 Cri.L.J. 1808, 1993 Cr.L.J. 3465, 3508, 1986 Cr.L.J. 1303, 1989 Cr.L.J. 252, 1982 CRI.L.J.559, 1986 Cr.L.J.561, 1985 Cr.L.J. 1561, 1664, (1990) 1 Crimes 481, 1994(2) Crimes 355 and (2003)8 S.C.C. 77.

[29] There cannot be any dispute regarding the principles laid down in the aforesaid reported judgments. Here in this case, I am only dealing with the legality of the order on the basis of both facts and law. I am of the opinion that grant or rejection of anticipatory bail can be done looking to the facts and circumstances of each case.

[30] It is required to be mentioned that in this case, while deciding the second successive anticipatory bail application of the respondent no.1-accused, learned Sessions Judge has not taken into consideration the following aspects. Due to change in circumstance, party can approach the court below or the High Court under Sec.438 of the Code and court can deal with that point of change in circumstance only. However, the court cannot enter into the grounds which were previously contested by the parties and have become final. Here in this case, court below has violated the basic principle of law laid down by the Apex Court on this point by dealing with all points raised by the accused in the first application filed under Sec.438 of the Code and which were already decided by the learned Addl. Sessions Judge, Surat, in detail with prima-facie reasons. Said order was carried further by the accused in the High Court and at the end of arguments, it was withdrawn and hence it has become final between the parties and hence, learned Sessions Judge should not have dealt with the same points again in the successive anticipatory applications. The impugned order passed by the learned Sessions Judge also does not disclose as to why and in what circumstances said points were necessary to be dealt with again. Learned Sessions Judge has not properly dealt with the facts on record prima-facie involving the respondent accused in the crime in question namely, bank record and statements of employees of the bank shown by the learned Public Prosecutor. Not only that, no satisfactory reasons have been assigned regarding the change in circumstance. Learned Sessions Judge has also failed to link the investigation with the audit report. It clearly appears that auditor has been appointed by the Government not for the purpose of investigation in question but for the whole scam of the bank to know the financial irregularities and position of the

bank so as to decide about further course of action of the bank wherein complaint has been filed for individual offences which was required to be investigated in that manner. This aspect has also been ignored by the learned Judge. The act of the accused was such which cannot be visualized on plan eye either by the auditor or by any person unless a detailed scrutiny of the transactions is done by the investigating agency and in these circumstances, the audit report cannot tilt the balance in favour of the accused. Even in doing so, learned Judge has not given any cogent and satisfactory reasons. Moreover, reasons assigned by the learned Addl. Sessions Judge in the first order of anticipatory bail have not been properly dealt with. Over and above, court below has ignored various statements recorded by the investigating agency during the course of investigation as they are the statements of arrested persons. Such a baseless finding has been given by the learned Judge. Even if they are the statements of co-accused or arrested persons, same cannot be discarded at this stage as they provide clue only to the investigating agency to proceed further into the matter. Hence, it was required for the learned Judge to have given permission to the investigating agency to proceed further on that basis and if the accused is ultimately found to be innocent at the end of investigation, appropriate summary might be filed. However, investigating agency cannot be restrained by that baseless finding. Learned Sessions Judge has given much weight on the FIR and the charge-sheet submitted in the court qua other accused on the ground of non-involvement of the respondent no.1-accused in the crime in question. As I have discussed earlier, it was a well planned and well designed typed FIR prepared by the then Chairman of the bank submitted to the Commissioner of Police, Surat, for the purpose of diverting the whole investigation for the purpose of saving real culprits as is conspicuous from para 14 of the complaint. Instead of going into the same, it has been used in favour of the accused which is totally unwarranted. Learned Sessions Judge has also ignored the fact that charge-sheet submitted was qua other accused against whom investigation was completed and, therefore, most of the evidence appearing in that charge-sheet will be connecting the accused shown there and not the accused shown in column no.2 of the charge-sheet (summary sheet) as absconding accused. It is thus clear that the accused is not making himself available for investigation by filing various proceedings and is evading investigation to be done qua him. Still, however, he is seeking benefit on the ground that there are no evidence connecting him with the crime in question in the charge-sheet which is contrary to the settled law. Learned Sessions Judge has neglected the basic fact leading to the only conclusion of rejecting the second successive application that the accused is not available for interrogation for a period of more than one year and for the purpose of securing his presence, prosecution has taken sufficient care by obtaining non-bailable warrant from the learned C.J.M., and initiating proceedings under Secs.70 and 82 of the Code. Instead of taking into consideration all these aspects, learned Sessions Judge has interfered with the points which have become final between the parties.

Merely because the respondent no.1-accused is having the political background and is connected with various social activities, learned Sessions Judge should not have exercised discretion in his favour. Learned Sessions Judge should not have taken into consideration the status of the person while passing the order. All these indicate the very act of a senior District and Sessions Judge not being in bone fade exercise of power.

[31] In view of the aforesaid discussion, I am of the opinion that the impugned order passed by the learned Sessions Judge, Surat, is perverse in view of the settled law warranting interference by this Court. The said order is therefore required to be quashed and set aside.

[32] It reflects from the judgment relied upon by the learned counsel for the respondent no.1-accused reported in 2004(2) G.L.H. 64 that in that case also, the learned Sessions Judge, Surat, has acted in this manner though opportunities were given twice. Learned Addl. Public Prosecutor has drawn my attention towards the fact that the whole scam was diverted by the respondent no.1-accused towards Mr.Desai only which was given much weight by the learned Sessions Judge. It may be stated at this stage that in his favour also order under Sec.439 of the Code has been passed by the very same Sessions Judge. Said order has been challenged in High Court by the State which is pending. Keeping in mind all the aspects of the matter, I am of the opinion that the act of the learned Sessions Judge, Surat, would require inquiry.

[33] In view of the above, the Registrar is directed to place this order together with three orders, one passed by the learned Addl. Sessions Judge, and two by the learned Sessions Judge, Surat, as well as the orders passed by the very same Sessions Judge, Surat, in cognate matters of this scam along with the records pertaining thereto wherein order passed by the very same Sessions Judge was cancelled by my Brother Judge, Mr.Justice Jayant Patel, before the Honourable The Chief Justice for holding inquiry against the concerned Sessions Judge, if found fit and proper.

[34] The observations by this Court in this judgment being made for the purpose of deciding the present revision only shall not prejudice the parties in any other proceedings including trial.

[35] The petition is allowed. The order dated 16-7-2004 passed by the learned Sessions Judge, Surat in Cri.Misc.Appln.No.917 of 2004 in connection with the offence registered being I.C.R.No.8 of 2003 with the DCB Police Station, Surat, is hereby quashed and set aside. is made absolute accordingly.

[36] Mr.b.b.naik,learned advocate appearing for the respondent No.1-accused requests for stay of this order. Looking to the facts and circumstances of the case and

seriousness of the offence involved, request is rejected.