

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

CRIMINAL APPLICATION (BA) NO.123 OF 2016

(Dilipkumar s/o Gokulchand Sananda ..vs.. State of Maharashtra, through PSO, PS (City) Khamgaon,
District Buldhana)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

CORAM : Z.A. HAQ, J.

DATED : 03-03-2016

Criminal Application (APPP) No.292/2016.

Heard.

The complainant is permitted to assist the
prosecution.

The application is disposed accordingly.

Criminal Application (BA) No.123/2016.

Heard Shri S.V. Manohar, learned Senior Advocate assisted by Shri J.B. Gandhi, Advocate for the applicant, Shri A.S. Jaiswal, learned Senior Advocate (Special Public Prosecutor) assisted by Shri N.B. Jawade, Additional Public Prosecutor for the non-applicant and Shri S.V. Sirpurkar, learned Advocate for the complainant.

2. Shri S.V. Sirpurkar, learned Advocate has submitted that earlier application filed by the applicant under Section 438 of the Code of Criminal Procedure is decided by Shri A.B. Chaudhari, J. and as he is available, this application is required to be placed before the same

learned Judge. Shri A.S. Jaiswal, learned Senior Advocate has supported the submission made by Shri S.V. Sirpurkar, however, he has not made any independent submissions on the point.

3. The relevant judgments which are required to be considered while adverting to the issue raised by the learned Advocate for the complainant, are :

- i) Judgment given by the Hon'ble Supreme Court in the case of *Jagmohan Bahl and another vs. State (NCT of Delhi) and another* in *Criminal Appeal No.2335/2014*.
- ii) Judgment given by the Hon'ble Supreme Court in the case of *Shahzad Hasan Khan vs. Ishtiaq Hasan Khan and another* reported in (1987) 2 SCC 684.
- iii) Judgment given by the Hon'ble Supreme Court in the case of *Harjeet Singh Alias Seeta vs. State of Punjab and another* reported in (2002) 1 SCC 649.
- iv) Judgment given by the Full Bench of Gujarat High Court in the case of *Babubhai Bachubhai Bhabhor vs. State of Gujarat* reported in 2005 Cri.L.J. 1618.

In the judgment given in the case of *Shahzad Hasan Khan vs. Ishtiaq Hasan Khan and another*, the earlier application filed by the accused under Section

437 of the Code of Criminal Procedure was rejected by the Additional Sessions Judge “A” and subsequent application filed again under Section 437 of the Code of Criminal Procedure was allowed by the Additional Sessions Judge “B” In these facts, it was recorded that the subsequent application ought to have been placed before the same Judge.

4. The proposition laid down in the judgment given in the case of *Shahzad Hasan Khan vs. Ishtiaq Hasan Khan and another* is also same that the subsequent application filed by the accused at the same stage of investigation should be placed before the same Judge who has dealt with the earlier application.

5. The present application is under Section 439 of the Code of Criminal Procedure. The point which is required to be considered is that the present application filed by the same applicant under Section 439 of the Code of Criminal Procedure should be placed before the same learned Judge who rejected the earlier application filed by the applicant under Section 438 of the Code of Criminal Procedure. The point is covered by the judgment given by the Full Bench of Gujarat High Court in the case of *Babubhai Bachubhai Bhabhor vs. State of Gujarat*, in paragraph No.10 of which it is recorded as follows :

“10. Even in cases where the earlier application for anticipatory bail filed under Section 438 of the Code of Criminal Procedure is rejected, similar repeated application under Section 438 will have to be placed before the same Bench that passed the earlier order. However, an application under Section 439, made after the rejection of an application under Section 438, would lie only when the person is accused of an offence and is in custody which is entirely a different situation. An application under Section 438 is filed by a person on an apprehension of arrest on an accusation of a non-bailable offence, while an application under Section 439 has to be made where a person is already accused of a non-bailable offence and is in custody. Therefore, the application under Section 439 would be of a different nature and will not be a “successive” or “repeated” application in the context of the earlier application made under Section 438 by the same person. The decisions of the Apex Court in *Shahzad Khan and Buddhikota (supra)* (1987 Cri.L.J. 1872): (1989 Cri.LJ 2317) do not require subsequent bail applications under Section 439 to be placed before the Bench that had decided earlier application for anticipatory bail of the same applicant under Section 438 of the Code.”

6. Considering the proposition laid down in the judgment given in the case of ***Babubhai Bachubhai Bhabhor vs. State of Gujarat***, in my view, this application will have to be considered by this Court as per roster assignment.

7. The applicant is arrested on 31-01-2016 in Crime No.M-06/2014 for the offences punishable under

Sections 403, 406, 408, 409, 417, 418, 465, 466, 468 read with Section 34 of the Indian Penal Code. The accusations against the applicant are that during the course of investigation pursuant to directions given under Section 156(3) of the Code of Criminal Procedure, it transpired that loss of Rs.39,42,169/- is caused to the State exchequer while allotting tender for preparing the map and constructing building of Municipal Council and the applicant was President of the committee which scrutinized the bids submitted by the Architects pursuant to the tender notice. It is stated that the applicant was not member of Municipal Council and is not having any expertise in the field of construction and inspite of it he became member of the committee using his political power and is responsible for appointment of Architects inspite of objection from the complainant. It is alleged that the Architects are paid certain amounts for which they are not entitled. It is alleged that the Municipal Council is required to spend Rs.1,57,686/- more, as the lowest bid is not accepted. It is alleged that loss of Rs.39,42,169/- is caused by the Tender Selection Committee of which the applicant was a member. The allegation is that this loss is caused because of escalation of 9.90% over the estimated costs. Shri S.V. Manohar, learned Senior Advocate has submitted that the applicant was not member of the Tender Selection Committee which finalised the estimate regarding construction of building of Municipal Council.

It is submitted that the custody of the applicant is required as certain relevant documents necessary for investigation are to be seized.

8. The submission made on behalf of the non-applicant that the custody of the applicant is required as certain relevant documents are yet to be seized, cannot be accepted as the documents would be available in the office of Municipal Council or the other authorities connected with the work of construction of building of Municipal Council. Considering the nature of allegations and the fact that the non-applicant has not been able to show that custody of the applicant is required for further investigation, in my view, the applicant is entitled to be released on bail.

9. Hence, the following order :

- i) The applicant having been arrested in Crime No.M-06/2014 registered by the non-applicant, he be released on bail, on furnishing P.R. Bond for Rs.25,000/- and one solvent surety in the like amount.
- ii) The applicant shall surrender his Passport within three days to the Investigating Officer.
- iii) The application is allowed in the above terms.

JUDGE