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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.1341 OF 2019

Areeb Ejaz Majeed] .. Appellant
vs.
The National Investigation Agency & Anr.] .. Respondents

Appellant in person present.
Mr.Anil C. Singh, Advocate General a/w Aditya Thakkar,
Ms.Taralgatti and Mayur Jaisingh for Respondent No.1.
Dr.F.R. Shaikh, APP for the State.

**CORAM : B.P.DHARMADHIKARI &
N.R.BORKAR, JJ.**

DATE : 4TH FEBRUARY, 2020.

JUDGMENT : (PER : B.P.DHARMADHIKARI, J)

1] The appellant behind bar since 28th November, 2014 is before this court challenging the order on Bail Application (Exhibit 445) dated 19th September, 2019 passed by the learned Special Judge under NIA Act for Greater Mumbai. Exhibit 445 is the third Bail Application moved by the appellant.

2] The appellant appears in person and Registry of this Court has permitted him to do so.

3] For the purposes of convenience, after brief hearing the appellant, this Court had directed him to prepare a chart pointing out the sum and substance of the evidence of 45 witnesses till then examined. The appellant has accordingly prepared a chart and submitted it, but till that time, three more witnesses have been examined.

4] Submission of the appellant before this Court is that in earlier orders, his request for bail was considered on the basis of charge-sheet and material accompanying to it produced by the prosecution.

5] Exhibit 445 was moved after prosecution had completed examination of about 36 witnesses, and appellant there had submitted that these witnesses are not supporting the case of prosecution at all. The contention is, when their deposition as recorded is perused, it militates with charge-sheet and other

material. It is urged that other witnesses still to be examined are on other aspects and cannot bring home the alleged guilt.

6] The matter was accordingly taken up today for final hearing when learned Senior Advocate appearing for respondent has submitted that effort being made before this Court in the appeal was not put before the trial Court for its consideration. Support is drawn from observations made by that Court in Paragraph 9 of the impugned order.

7] By placing reliance upon the judgment of Hon'ble Apex Court reported at **(2008) 2 SCC 95, Para 14, in the case of Mohd. Akram Ansari vs. Chief Election Officer & Others**, learned Senior Advocate for respondent submitted that if said finding of fact recorded by the learned trial Court is to be questioned, the appellant has to first approach that Court only with proper request and as this course has not been followed, in appeal, that statement of fact needs to be accepted and acted upon.

8] The appellant in person has submitted that the impugned order cannot be viewed in isolation and must be read alongwith application Exhibit 445 moved by him. He states that in Exhibit 445, only effort is to demonstrate how the witnesses whose statements in support of charge-sheet were relied upon, have contradicted it. The appellant submits that Paragraph 5 of the impugned order itself takes note of this change in circumstances and therefore the observations in Paragraph 9 made by that Court, cannot be seen as correct one. The trial Court has proceeded further to examine the situation in the light of changed circumstances and in course of that consideration, has contracted itself in Paragraph 9.

9] The appellant further contends that such confusion appears when ground of slow pace of trial was considered. Without prejudice to these arguments, appellant also has stated that if this court is convinced with the arguments of learned Senior Advocate for the respondent, the entire impugned order may be quashed and set aside and application at Exhibit 445 may be placed back before trial Court for its fresh consideration.

10] Learned Senior Advocate, in brief reply, submitted that the appellant has to make proper application as laid down by the Hon'ble Apex Court in its Judgment *supra* and course of action to be followed by trial Court cannot be preempted now. Trial Court must be left free to apply its mind and to evolve further course of action.

11] Perusal of Paragraph 14 of Judgment cited *supra* shows that whenever a superior court comes across a finding of fact on business transacted before trial court and that finding is assailed, the right course is to permit person aggrieved thereby to approach trial Court only pointing out the alleged mistake to it. Such a mistake cannot be corrected by superior Court.

12] The perusal of Exhibit 445 no doubt shows an effort made by the appellant to invite attention of trial Court to material which has come on record through oral evidence and to contend that oral evidence militates with charge-sheet. The trial Court while considering the said application in Paragraph 5 has

observed that after rejection of previous applications, prosecution had examined more than 36 witnesses in support of charge framed and therefore the change in circumstances was evident. It has taken note of fact that request in earlier Bail Applications were based only on record and proceedings contained in the charge-sheet, while Exhibit 445 is based upon deposition of witnesses examined by prosecution.

13] However, in Paragraph 6 after some application of mind trial Court has observed that in the changed circumstance, the only relevant ground raised before it was about slow pace of trial. It has then noted that the said ground was also raised in Bail Application at Exhibit 66.

14] In Paragraph 7, the trial Court has looked into its orders on earlier Bail Application at Exhibit 66 and 84 and concluded that both those orders show that case of prosecution based upon charge-sheet was thoroughly scrutinized and at that time there was sufficient material on record to show prima-facie case as required by Section 43(D)(5) of Unlawful Activities (Prevention) Act.

15] In Paragraph 9 the learned trial Court while dealing with Exhibit 445 has expressly observed that application was materially based on grounds raised on the basis of charge-sheet and prosecution statements of witnesses recorded during the investigation and not on the basis of deposition of witnesses before the Court. It has then observed that those grounds and concerned material was looked into in earlier two orders and therefore to that extent the appellant did not succeed in showing any change in circumstance. It has then expressly observed that

"It is also not the case of accused that depositions of witnesses examined by prosecution deviate from their statements in chargesheet"

This line of application of mind and specific finding in Paragraph 9, therefore, raises a doubt as to whether the exercise as is sought to be attempted before this court, was undertaken before the learned trial court or not. As this line extracted *supra* needs to be accepted as correct statement of fact, it appears that such an exercise may not have been undertaken.

16] As observed by the Hon'ble Apex Court in the judgment *supra*, in this situation, the appellant has to move trial Court only pointing out the efforts made by him.

17] During hearing our attention was invited to a fact that earlier appeal vide Criminal Appeal No.10 of 2018 was disposed of by Division Bench of this Court on 1st February, 2018 after noticing that NIA made a categorical statement that trial had already commenced.

18] The slow pace of trial is also a contention being raised before us and in our order dated 5th December, 2019, we have taken note of the fact that in last 5 years about 42 witnesses have been examined. Total number of witnesses to be examined is about 200. However, the appellant then had insisted that the impugned witnesses who could have assisted the prosecution are already examined.

19] Considering the total number of witnesses to be examined and the fact that the present appellant is in jail for over five

years, we are inclined to quash the impugned order and to pass following order :

ORDER

i] Application at Exhibit 445 is restored back to the file of trial Court for its consideration afresh in accordance with law, preferably within six weeks from today.

ii] Parties to appear before that Court for this purpose on 10th February, 2019, which is already the date scheduled by that Court for recording of evidence.

iii] We, accordingly, allow the appeal partly and dispose it of.

[N.R.BORKAR, J.]

[B.P.DHARMADHIKARI, J.]