

JINOFER KAWASJI BHUJWALA

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v.

THE STATE OF GUJARAT

(Criminal Appeal No. 460 of 2020)

JUNE 19, 2020

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**[ASHOK BHUSHAN, M.R. SHAH AND
V. RAMASUBRAMANIAN, JJ.]**

Bail – A Company ‘ANL’ was issued a Letter of Intent for Construction and development of Vessels Traffic and Port Management System (VTPMS) in the Gulf of Khambhat, on Build Own Operate and Transfer basis – It was followed by a Concession Agreement, entered into between the Gujarat Maritime Board, ANL and the Government of Gujarat – Dispute arose regarding the Capital Cost incurred by ANL – On basis of a preliminary inspection report, the Gujarat Maritime Board claimed that ANL made an extra income of Rs. 134.38 crores – ANL moved the Commercial Court u/s.9 of the Arbitration and Conciliation Act, 1996 as there was threat of termination of the Concession Agreement and thereafter matter was referred to Arbitration – The Gujarat Maritime Board lodged a complaint and on basis of the said complaint FIR was registered against 8 accused, including A-1, A-2 and A-3 u/ss. 406, 409, 420, 465, 468, 471 and 120 B IPC and s. 13(1)(d) of the Prevention of Corruption Act – A-1(Appellant) and A-2 his son were arrested – Ever since then, the appellant is in judicial custody – His bail application was rejected several times – However, the High Court gave liberty to the appellant to file a fresh application before the trial Court if the trial could not commence within a period of six months – Incidentally, this period of six months has expired and trial has not commenced yet – Also, the Arbitral Tribunal passed interim measures and financial interests of the Maritime Board were protected – In the background of the above facts, the appellant sought bail – Per contra, the respondent-State contended that the matter involved national security, which stands threatened by the activities of the appellant – Held: The potential threat to national security, cannot be sustained, for two reasons – The first reason is that the project became operational in August 2010 and the disputes

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- A *started between the parties in 2018 that too with regard to financial matters – The second reason, by virtue of interim measures of protection granted by the Arbitral Tribunal u/s. 17, the termination of Concession Agreement stands stayed – Therefore, the Company of which the appellant is the head, continues to operate the VTPMS Project – The Arbitral Tribunal has also permitted the State Police*
- B *to be there at the Project and allowed Maritime Board to depute a competent person, familiar with the project in question, to supervise and monitor the functioning of the Project – Also, the period of six months within which the High Court hoped the trial to commence, has expired as on date – Therefore, appellant is entitled to bail and*
- C *is directed to be released on bail.*

Allowing the appeal, the Court

- HELD: 1. The period of six months within which the High Court hoped the trial to commence, has expired as on date. The appellant, who is admittedly 62 years of age has already spent**
- D **nearly a year in judicial custody. A period of nine months has passed from the date of filing of the charge sheet. Though the Solicitor General contended that the sanction to prosecute has already been issued as against Government Officials, the fact remains that charges have not been framed and the trial has not**
- E **commenced as yet. [Para 20][389-F]**

- 2. The arguments revolving around the potential threat to national security, cannot be sustained, for two reasons. The first reason is that the project became operational in August-2010 and the disputes between the parties started only in 2018 and that too with regard to financial matters. The second reason is**
- F **that by virtue of the interim measures of protection granted by the Arbitral Tribunal (comprising of a former Judge of this court, a former Judge of the High court and a Senior Advocate) in terms of section 17 of the Arbitration and Conciliation Act, 1996, the termination of the Concession Agreement stands stayed.**
- G **Therefore, the Company of which the appellant is the head, continues to operate the VTPMS Project. In any case, the Arbitral Tribunal has not merely protected the economic interests of the State, but also permitted the State Police to be there at the project site. The Tribunal has also allowed the Maritime Board to depute**

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a competent person, familiar with the project in question, to supervise and monitor the functioning of the project. Therefore, this contention cannot be accepted blind fold. [Para 21] [389-G-H; 390-A-B]

3. Though much is said about the tempering of witnesses, it is seen from the material on record that the prosecution rests mainly on documents. In any case, the prosecution is not remedyless, if a person enlarged on bail, indulges in certain activities. [Para 22][390-C]

4. Therefore, this Court is of the view that the appellant is entitled to bail. Hence, the appeal is allowed and the appellant is directed to be released on bail, subject to such terms and conditions as the Sessions Court may deem fit and appropriate in the facts and circumstances of the case, including a condition for the surrender of the passport, which shall be subject to orders passed by the Trial Court from time to time. [Para 23][390-D]

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 460 of 2020.

From the Judgment and Order dated 09.12.2019 of the High Court of Gujarat at Ahmedabad in CRLMA No. 19125 of 2019.

Tushar Mehta, SG, Harish Salve, Siddhartha Dave, Mukul Rohatgi, Sr. Advs., A.R. Gupta, Mohit Chaudhary, Aditya A. Gupta, Kunal Sachdeva, Ms. Puja Sharma, Omar Ahmad, Jaspal Singh, Balwinder Singh Suri, Anup Kumar Mishra, M/s. Kings and Alliance Llp, Aniruddha P. Mayee, Gursharan H. Virk, Ms. Misha Rohatgi, Nakul Mohta, Ms. Shubhangi Rathore, Advs. for the appearing parties.

The Order of the Court was passed by

V. RAMASUBRAMANIAN. J.

1. Leave granted.

2. Aggrieved by the dismissal of his bail application by the High Court of Gujarat at Ahmedabad, a person who is cited as A-1 in the First Information Report in Crime No.I-I/5/2019 dated 26.06.2019 for alleged offences under Sections 406, 409, 420, 465, 468, 471 and 120B of the

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- A Indian Penal Code and Section 13(1)(d) of the Prevention of Corruption Act, 1988, has come up with the above appeal.

3. We have heard Mr. Harish Salve and Mr. Siddhartha Dave, learned Senior Counsel appearing for the appellant; Mr. Tushar Mehta, learned Solicitor General appearing for the State of Gujarat and
B Mr. Mukul Rohatgi, learned Senior Counsel appearing for Gujarat Maritime Board.

4. Pursuant to an invitation to offer floated in November-2006 and the assessment of the proposals received from interested parties, a company by name Aatash Norcontrol Limited (for short “ANL”), was
C issued with a Letter of Intent on 26.02.2007 for the construction and development of Vessels Traffic and Port Management System (hereinafter referred to as “VTPMS”) in the Gulf of Khambhat, on Build Own Operate and Transfer (BOOT) basis. It was followed by a Concession Agreement dated 30.09.2007 entered into between the Gujarat Maritime Board, ANL and the Government of Gujarat.
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5. As per the Concession Agreement, Aatash Norcontrol Limited is obliged to install Key Radar Stations at 7 places in the Gulf of Cambay and repeater Radar Stations at 2 places, with the master control being set up at Dumas. The object of setting up the Radar Stations is to monitor the vessels entering the Gulf of Khambhat and to ensure Coastal and
E National Security.

6. VTPMS for the Gulf of Khambhat became operational in August, 2010 after a completion certificate was issued by the Gujarat Maritime Board. But in 2018 disputes arose regarding the capital cost incurred by ANL. An expert committee was appointed under Clause 18
F of the agreement and they submitted a report indicating a particular amount as the capital cost.

7. But Gujarat Maritime Board claimed, on the basis of a preliminary inspection report of the Principal Accountant General that ANL made an extra income of Rs. 134.38 crores during the financial
G years 2015-16 and 2017-18 and that the said amount should be paid by ANL.

8. ANL moved the commercial court at Ahmedabad under section 9 of the Arbitration and Conciliation Act, 1996, as there was a threat of termination of the Concession Agreement. The disputes were also referred
H to arbitration. Before the Arbitral Tribunal constituted on 01.03.2019,

both parties (ANL and Gujarat Maritime Board) moved applications under section 17 of the Arbitration and Conciliation Act. A

9. However, on 01.05.2019, the Gujarat Maritime Board lodged a complaint with the CID Crime, Gandhi Nagar Zone, alleging that ANL was guilty of (1) inflation of cost (2) non execution of certain works (3) creation of shell companies and carrying out work through them (4) siphoning and round tripping of funds through those companies (5) not carrying out construction on the lands allotted for Master Control Room (6) raising of false bills and forged invoices (7) managing the issue of completion certificate through the then Superintending Engineer and Chief Nautical Officer of the board and (8) entering into a conspiracy with each other to exceed the expenditure of the project upto Rs. 100 crores and committing criminal breach of trust. B C

10. On the basis of the above complaint, a FIR bearing no. I-I/5/2019 was registered on 26.6.2019 against eight named accused, for alleged offences under sections 406, 409, 420, 465, 468, 471 and 120B of IPC and section 13(1)(d) of the Prevention of Corruption Act. The appellant herein and his son and daughter were cited as A-1, A-2 and A-3 respectively, as they happen to be the Directors of the Companies. D

11. On 27.6.2019, the appellant and his son were arrested. After being in police custody under orders of court, the appellant was sent to judicial custody on 2.7.2019. Ever since then, the appellant is in judicial custody. His bail application was first rejected by the Sessions Court on 6.7.2019. Though the appellant moved the High Court, he withdrew the application on 6.8.2019 with liberty to move a fresh application after the filing of the charge sheet. But, it is relevant to note that the two officers of the Maritime Board who were also implicated, were granted bail by the High Court. E F

12. A charge sheet was filed by the Investigating Officer on 21.9.2019, as against the appellant and the others. However, no charge sheet was filed against the Officers of the Maritime Board, as orders of sanction from the Government were awaited at that time. G

13. In view of the filing of the charge sheet, the appellant moved a bail application before the Sessions Court but the same was rejected on 3.10.2019. Therefore, the appellant moved the High Court of Gujarat, which, by the order impugned in the appeal, dated 09-12-2019, dismissed the application. However, the High Court gave liberty to the appellant to H

- A file a fresh application before the Trial Court if the trial could not commence within a period of six months. Incidentally, this period of six months has now expired and the trial has not commenced as yet.

14. Before proceeding further, it is to be noted that on 7.8.2019, the Arbitral Tribunal passed orders on the applications under section 17 of the Arbitration Act (1) granting a stay of the termination notice (2) directing ANL to deposit the entire amount generated out of the VTPMS project in an escrow account and to file a monthly report regarding the details of deposits so made (3) permitting ANL to withdraw 25% of the gross amount so deposited, to meet the overheads and to run the project (4) permitting the State Police Personnel deputed at the project site to continue without any interference with the day to day functioning of the project except overseeing safety aspects (5) permitting the Maritime Board to depute a competent person to supervise and monitor the functioning of the project (6) directing ANL not to encumber or dispose of the plant and machinery and other valuable items and (7) directing ANL to pay Rs. 16,43,44,227/- to the Maritime Board payable for the month of July, 2019.

15. As a result of the aforesaid interim measures ordered by the Arbitral Tribunal, ANL continues to operate the project under the Concession Agreement and the financial interests of the Maritime Board stand protected by those directions.

16. In the background of the above facts, it is contended by the learned Senior Counsel appearing for the appellant (1) that a cloak of criminality has been given to a dispute of purely civil nature (2) that the economic interests of the Board stand protected by the interim measures granted by the Arbitral Tribunal (3) that the appellant is a senior citizen having medical complications and (4) that since the charge sheet has been filed and the trial has not commenced, the continued incarceration of the appellant is unjustified.

17. The prayer for bail is opposed by the State and the Maritime Board, on the ground inter alia (1) that the very object of the Concession Agreement was to establish Radar Stations to monitor and identify infiltration by non-State vessels involved in anti-national activities (2) that what is on hand is not just a civil dispute but a huge financial scam (3) that the appellant is the brain behind such a scam involving round tripping of funds through a maze of shell companies (4) that the matter

involves national security, which now stands threatened by the activities of the appellant and the companies managed by him (5) that the appellant has already started influencing the witnesses, by sending gifts to the senior officers of the Maritime Board (6) that under his pressure, two Chartered Accountants who had earlier given statements, retracted (7) that even before the report of the Forensic Sciences Laboratory could reach the Investigating Officer, the appellant exhibited knowledge of its contents, thereby showing his influence and power (8) that one of the co accused is absconding and (9) that since many witnesses for the prosecution are either the former or present employees of the appellant or retired Government Officials, they are vulnerable and hence the appellant's request for bail should be rejected.

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18. We have carefully considered the pleadings, the documents, the written notes of submissions and the issues involved.

19. At the outset, we should point out that the impugned order of the High Court is dated 9.12.2019. The operative portion of the order of the High Court is extracted as follows:

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“In view of the aforesaid discussion, I am not inclined to exercise the discretion in favour of the present applicant. Application is, therefore, dismissed. However, liberty is reserved to the applicant to file fresh application before the concerned trial Court if the trial is not commenced within a period of six months”.

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20. Obviously, the period of six months within which the High Court hoped the trial to commence, has expired as on date. The appellant, who is admittedly 62 years of age has already spent nearly a year in judicial custody. A period of nine months has passed from the date of filing of the charge sheet. Though the learned Solicitor General contended that the sanction to prosecute has already been issued as against Government Officials, the fact remains that charges have not been framed and the trial has not commenced as yet.

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21. The arguments revolving around the potential threat to national security, cannot be sustained, for two reasons. The first reason is that the project became operational in August-2010 and the disputes between the parties started only in 2018 and that too with regard to financial matters. The second reason is that by virtue of the interim measures of protection granted by the Arbitral Tribunal (comprising of a former Judge

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A of this court, a former Judge of the High court and a Senior Advocate) in terms of section 17 of the Arbitration and Conciliation Act, 1996, the termination of the Concession Agreement stands stayed. Therefore, the Company of which the appellant is the head, continues to operate the VTPMS Project. In any case, the Arbitral Tribunal has not merely protected the economic interests of the State, but also permitted the State Police to be there at the project site. The Tribunal has also allowed the Maritime Board to depute a competent person, familiar with the project in question, to supervise and monitor the functioning of the project. Therefore, we cannot accept this contention blind fold.

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C 22. Though much is said about the tempering of witnesses, it is seen from the material on record that the prosecution rests mainly on documents. In any case, the prosecution is not remedyless, if a person enlarged on bail, indulges in certain activities.

D 23. Therefore, we are of the view that the appellant is entitled to bail. Hence, the appeal is allowed and the appellant is directed to be released on bail, subject to such terms and conditions as the Sessions Court may deem fit and appropriate in the facts and circumstances of the case, including a condition for the surrender of the passport, which shall be subject to orders passed by the Trial Court from time to time.

Ankit Gyan

Appeal allowed.