

HIGH COURT OF GUJARAT

MANAGER, B O B HOUSING FINANCE LIMITED

Versus

BHASKARCHANDRA MAHENDRAPRASAD JOSHI

Date of Decision: 29 September 2004

Citation: 2004 LawSuit(Guj) 601

Hon'ble Judges: [Jayant Patel](#)

Eq. Citations: 2005 3 GLR 1954, **2005 2 GLH 102**, 2005 4 RCR(Cri) 966, 2005 2 GCD 1376, 2005 36 AllIndCas 728

Case Type: Misc Criminal Application; Misc Criminal Application; Misc Criminal Appea

Case No: 8791 of 2004; 4059 of 2003; 8810 of 2004

Subject: Criminal

Editor's Note:

Criminal Procedure Code, 1973 - Sec 439(2) - Application for Cancellation of bail -Ground - Undertaking give before this Court is not complied - Undertaking which is accepted by the Court for purpose of exercising discretion and for taking action for breach of undertaking is a matter between Court and one who is alleged to have committed breach of undertaking - Scope and ambit f role of original - Complainant in a matter of granting bail can not be equated with scope and ambit of right of Bank to recover outstanding dues under Civil law - Held, No Substance in this petition.

Acts Referred:

[Code of Criminal Procedure, 1973 Sec 439\(2\)](#)

Final Decision: Application dismissed

Advocates: [R C Jani](#)

JAYANT PATEL, J.

[1] The applicant, who is the original-complainant has preferred the application for cancellation of the bail on the ground that the undertaking given before this Court in the proceedings of Misc. Criminal Application No. 4059 of 2003 is not complied with.

[2] Upon hearing Mr. Jani, learned Counsel for the applicant/complainant, Mr. Majmudar, learned Counsel for the original petitioner of Misc. Criminal Application No. 4059 of 2003 accused, and Mr. Kogje, learned A.P.P. for the State Government, it appears that the undertaking was given for handing over the possession of five tenements and for regularization of the account of Smitaben, who is wife of the accused. Thereafter, when the order dated 11-12-2003 came to be passed by this Court in addition to five tenements, the tenement held by the wife of the accused, Smitaben B. Joshi is also ordered to be handed over to the applicant-Bank, and therefore, the contention of the Bank, who is the original-complainant is that even if the additional tenement is given, the wife of the accused, Smitaben must abide by the undertaking for making the payment of outstanding amount of her account, whereas the case of the accused and the wife of the accused is that as the tenement is handed over to the Bank in addition to the five tenements, and therefore, the Bank cannot insist for recovery of the amount and also the tenement, by way of compliance of the undertaking and Misc. Criminal Application No. 8810 of 2004 in Misc. Criminal Application No. 4059 of 2004, is therefore, preferred for modification of the order in response to application of the Bank.

[3] Mr. Majmudar, learned Counsel appearing for the accused submitted that even as on today, if the Bank is ready to return the tenement which has been handed over by Smitaben Joshi, the accused will see to it that all outstanding amount is paid as per the undertaking given prior to the order dated 11-12-2003 passed by this Court in Misc. Criminal Application No. 4059 of 2003.

[4] However, Mr. Jani, learned Counsel appearing for the Bank submitted that once the undertaking was given, it would be obligatory on the part of Smitaben, wife of the accused to abide by the undertaking and in his submissions, the subsequent aspect which has been recorded for additionally handing over one tenement cannot be considered as a defence for the purpose of non-compliance of the condition or on such ground the bail deserves to be cancelled.

[5] Considering the above, it appears that firstly it is not a matter where the complainant can be said to have been directly concerned for asserting the right of recovery under the civil law when the matter is pertaining to the grant of bail. It is a different thing that the Court, while exercising the discretion for releasing the accused on bail may put conditions to the accused to deposit the amount concerning to the subject-matter of the offence, keeping in view the larger interest of the Society including the complainant and keeping in view the principle that one who resorts to the proceedings of the Court for exercise of the discretion to be released on bail, must show the bona fide in the best possible manner concerning to the nature and gravity of the offence alleged. Therefore, the undertaking is accepted by the Court for the

purpose of exercising the discretion and for taking action for breach of undertaking is a matter between the Court and one who is alleged to have committed the breach of undertaking and the original-complainant who is a Bank cannot assert the right in the proceedings of bail in the manner as sought to be canvassed by the applicant, who is already pursuing the right under the civil law. The scope and ambit of the role of the original-complainant in a matter of grant of bail cannot be equated with the scope and ambit of the right of the Bank to recover outstanding money under the civil law. If the Court upon the application of the complainant, in a given case for considering the facts and circumstances find that the alleged breach is such which deserves cancellation of bail then in that case, the Court may take action.

[6] Apart from the above, it appears that the undertaking was for handing over the possession of five tenements, one tenement more, which was held by Smitaben, wife of the accused is also handed over to the Bank and the natural course and normal construction of the aforesaid would be to appropriate the amount, which may be realised by the Bank out of the disposal of tenements, towards the outstanding amounts to be paid by the wife of the accused, Smitaben. As observed earlier, even as on today, Mr. Majmudar has declared before the Court that if the tenement which is handed over is returned to Smitaben by the Bank, his client is ready to clear all outstanding amount towards the account of Smitaben upto September, 2004. Further, it may be recorded that Smitaben B. Joshi was not the accused in the proceedings for bail when this Court considered the matter on 11-12-2003 for releasing the husband of Smitaben on bail. Smitaben being wife of the accused, has made declaration before this Court with a view to see that the accused who is her husband is released on bail. All other five tenements are handed over and Bank is given authority to sell in all six tenements. The outstanding amount in the account of Bharatbhai Dave is also paid.

[7] Mr. Majmudar, learned Counsel appearing for the accused has made statement at the Bar that the civil suits for recovery of outstanding amount as per Bank are filed by the Bank and the same are pending before the appropriate Court. Therefore, the Bank may pursue the rights in accordance with law in the appropriate proceedings of civil suit.

[8] So far as the breach of the undertaking is concerned, as Mr. Jani, learned Counsel appearing for the Bank is unable to declare before the Court as to whether the Bank is ready to surrender the additional tenement to Smitaben, which has been taken over as per the order dated 11-12-2003, and therefore, I find that it is not required to take such a serious view against the wife of the accused for breach of the undertaking and to cancel the bail, which consequently, may result into putting her husband into custody.

[9] If the Bank chooses, the Bank may opt for surrendering the tenement of Smitaben and if the tenement is surrendered, within a period of one month of surrendering the tenement, Smitaben shall abide by the declaration made by Mr. Majmudar, learned Counsel for clearance of the outstanding amount upto September, 2004.

[10] Subject to the aforesaid observations and the directions, the application for cancellation of bail being Misc. Criminal Application No. 8791 of 2004 is dismissed. Rule discharged.

[11] In view of the order passed by this Court in Misc. Criminal Application No. 8791 of 2004 and in view of the observations made and directions given hereinabove, Misc. Criminal Application No. 8810 of 2004 shall also stand disposed of accordingly.

Application dismissed.

