

Director of Enforcement

Vs

P.V. Prabhakar Rao

(M.K. Mukherjee, S.P. Kurdukar, K.T. Thomas JJ)

05.08.1997

ORDER

1. Leave granted

2. The respondent apprehended that he would be arrested in connection with "Urea Scan". He approached the High Court of Andhra Pradesh for an order under Section 438 of the Code of Criminal Procedure (for short "the Code"). A Single Judge of the High Court initially granted an interim order in his favour and finally passed the impugned order making the interim order absolute. The Chief Enforcement Officer, Directorate of Enforcement ("Enforcement Director" for short) has filed this Special Leave Petition.

3. It is not necessary to set out details of the case, yet we give a brief sketch of it. A fraud costing a whopping sum of Rs. 133 crores was perpetrated by some individuals after hatching a criminal conspiracy. A company by name M/s. National Fertilizers Ltd., entered into a deal with a Turkish Company known as M/s. Karsans Inc for the supply of urea worth 38 million US Dollars. The entire amount was paid to the Turkish Company through the country's foreign exchange reserve without getting even an ounce of urea in return. It was later discovered that the siphoning of such a huge foreign exchange was the result of a well orchestrated conspiracy hatched by some individuals in and out of India. The Turkish Company in return paid a substantial amount to "middlemen" as "kickbacks". The recipients of such kickbacks included those in India and abroad.

4. When the print media highlighted the large dimension of the fraud Central Bureau of Investigation was authorised to investigate into it. It was revealed that kickbacks were received by some middlemen in India in violation of the provisions of the Foreign Exchange Regulation Act, 1973, (for short "FERA"). It was then that the Enforcement Directorate also came into the picture and stated investigation into offences involving FERA.

5. Some persons were already arrested including one Sambasiva Rao, who was Director of M/s. Sai Krishna Impex Ltd., Hyderabad. During investigation it appeared to the Enforcement Directorate that the respondent is also involved in this fraud and hence efforts were made to question him but the respondent avoided such interrogation by the officials of the Directorate, on more than one occasion. In the meanwhile the respondent, on his own, approached the High Court with a petition for an order under Section 438 of the Code.

6. Learned Single Judge, who granted the order to the respondent, pointed out that interim order was passed on 16-3-1996 on medical grounds. In the final order also learned Single Judge gave much leverage to the physical condition of the respondent. We may mention here that the physical

impairment of the respondent which was pointed out was "soonoylitis". Learned counsel for the respondent has fairly admitted that, by now, lapse of time and medical care have helped the respondent to get rid of the ailment considerably. So we need not vex our mind whether that was a germane ground to be considered for granting anticipatory bail.

7. Learned counsel for the enforcement Director forcefully attacked the reasoning of the learned Single Judge of the High Court and contended that the discretion under Section 438 of the Code was very improperly exercised in this case. Learned counsel for the respondent on the contrary defended the impugned order. Excerpts from Gurbaksh Singh Vs. State of Punjab [1980(2) SCC 565] have been quoted in support of it.

8. Legal position concerning the grant of anticipatory bail required no repetition particularly in view of the decision of the Constitution Bench of this Court in Gurbaksh Singh (supra) which has settled the position well neign. Nonetheless, we remind ourselves that the order contemplated under Section 438 of the Code is to be granted or refused by the High Court or a court of sessions, after exercising its judicial discretion wisely. The constitution Bench in Gurbaksh Singh said thus:

"A wise exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of Judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use is the hallmark of a prudent exercise of judicial discretion. One ought not to make a bugbear of the power to grant anticipatory bail."

9. After hearing both sides and after perusing the case records which was submitted to us in a sealed cover by the Enforcement Director, on our request we have no doubt that the learned Single Judge of the High Court went wrong in exercising his discretion by granting anticipatory bail to the respondent in this case. Learned Single Judge has observed:

"I have examined the material in order to satisfy myself whether the apprehension of the petitioner is well-founded or not. Suffice it say that the files which are made available by the Enforcement Directorate would disclose an accusing finger against the petitioner. Be it noted that this is not the stage when this Court can apply any test for its acceptability and hence a superficial examination is gone. It is also not necessary to see whether this material is sufficient to file a complaint against the petitioner or not."

10. When we perused the records we felt that learned Single Judge has euphemistically stated that the files disclosed "an accusing finger" against the respondent. We, however, refrain from saying anything more at this stage.

11. Learned Single Judge has taken into account the fact that all other accused arrested in connection with this case have been released on bail. But they were released on bail only on the failure of the investigating agency to complete the investigation within the time prescribed in the proviso to Section 167(2) of the Code. How could this respondent take advantage of that fact? We cannot overlook that the respondent too has contributed to the non-completion of the investigation. Completion of investigation could be achieved only by interrogating all the persons involved as well as acquainted with the matter and after collecting all material evidence procurable. So learned

Single Judge should never have counted this point in favour of granting anticipatory bail to the respondent.

12. The most glaring feature which even the respondent did not repudiate is the magnitude of the criminal conspiracy hatched, the ingenuity with which the cabal was orchestrated and the meticulousness with which it was implemented and the colossal amount of foreign exchange signaned off from the country. It is not disputed that whomsoever perpetrated this grave economic offence deserved to be dealt with sternly under law.

13. When the learned Single Judge himself felt, after going through the records in this case, that the materials already collected were capable of stretching accusing finger towards the respondent, it was not at all a proper exercise of the discretion by favouring him with in order of anticipatory bail under Section 438 of the Code.

14. For the aforesaid reasons we allow this appeal, upset the impugned order and dismiss the application of the respondent filed under Section 438 of the Code.