

SUPREME COURT OF INDIA

Lt.Col.Prasad Shrikant Purohit

Vs.

State of Maharashtra

CrI.A.No.1448 of 2017

(R.K.Agrawal and Abhay Manohar Sapre,JJ.,)

21.08.2017

JUDGMENT

R.K.Agrawal,J.,

SLP(CrI.)No.3716 of 2017

1. Leave granted.

2. This appeal is directed against the judgment and order dated 25.04.2017 passed by the High Court of Judicature at Bombay in Criminal Appeal No. 664 of 2016 whereby the Division Bench of the High Court dismissed the bail application filed by the appellant herein.

3. Brief facts:

“On 29.09.2008, at around 9:35 p.m., a bomb explosion took place at Malegaon, District Nasik, opposite Shakil Goods Transport Company between Anjuman Chowk and Bhiku Chowk. The said blast was caused by explosive device fitted in LML Freedom Motor Cycle bearing Registration No. MH-15-P-4572. As a result of the said explosion, six persons were killed and about 100 persons had received injuries of various nature. Damage to the property was also caused.

(b) The offence came to be registered under CR No. 130/2008 in Azad Nagar Police Station, Malegaon under Sections 302, 307, 326, 324, 427, 153-A and 120-B of the Indian Penal Code, 1860 (in short ‘the IPC’) read with Sections 3, 4, 5 and 6 of the Explosive Substances Act read with Sections 3, 5 and 25 of the Arms Act, 1959.

(c) During the course of investigation, the samples collected from the place of offence were sent to the Forensic Science Laboratory at Nasik and the same were found to be containing Cyclonite (RDX) and Ammonium Nitrate. On 18.10.2008, the provisions of Sections 15, 16, 17, 18, 20 and 23 of the Unlawful Activities

(Prevention) Act, 1967 (Amended) 2004, (in short 'the UAP Act') were invoked and the case was entrusted to Deputy Superintendent of Police, (HQ), Nasik Rural. On 26.10.2008, the Anti-Terrorist Squad (ATS), Mumbai took charge of the investigation and on 29.11.2008, the provisions of Maharashtra Control of Organized Crime Act, 1999 (in short 'the MCOC Act) were added.

(d) During investigation, it was found that the appellant herein, along with other co-accused in the case, entered into a criminal conspiracy between January, 2008 to October, 2008 with a common object and intention to strike terror in the minds of people caused bomb blast at Malegaon by using explosive substances to cause damage to life and property and to create communal rift. According to ATS, the appellant herein had brought RDX with him from Kashmir for the purpose of Bomb Blast at Malegaon.

(e) During investigation, it has been further revealed by the ATS that the appellant herein was a serving Army Officer and was associated with Military Intelligence and Interior Terrorism (Insurgency Activities). The appellant herein floated 'Abhinav Bharat' organization in the year 2007 inspite of being serving as a Commissioned Officer in Armed Forces. The other co-accused in the case were also the members of the said organization. The object of the Organization was to turn India into a Hindu Rashtra called as 'Aryavrat' . They had planned to train persons for guerrilla war and had also decided to kill the persons opposing their object of formation of a Hindu Rashtra. As per the investigation, it has also come out that the appellant herein along with other persons had participated in various meetings of the said Organization to discuss various aspects for achieving their goals. Further, it is the case of the ATS that the organization, viz., 'Abhinav Bharat' is an Organized Crime Syndicate and its members including the appellant herein were active since 2003. In one of the meetings at Bhopal, on 11/12 April, 2008, the criminal conspiracy to cause bomb blast at Malegaon was hatched. In the said meeting, the appellant herein took the responsibility of providing explosives for the common object in order to take revenge of 'Jihadi' activities by Muslim community.

(f) After completion of the investigation, on 20.01.2009, the ATS, Mumbai, filed charge sheet under Sections 302, 307, 326, 324, 427, 153A read with Section 120B of the IPC and Sections 3, 5 and 25 of the Arms Act and Sections 15, 16, 17, 18, 20 and 23 of the UAP Act, Sections 3(1)(i), 3(1)(ii), 3(2), 3(3), 3(5) of the MCOC Act, Sections 3, 4, 5 and 6 of the Explosive Substances Act.

(g) The appellant came to be arrested on 05.11.2008 in connection to the said offence. The appellant herein preferred a Bail Application being No. 42 of 2008 before the Special Judge under MCOCA for Greater Mumbai. By order dated 31.07.2009, the Special Judge discharged the appellant and other co-accused from the offences under MCOC Act and directed to transfer the case to the regular court at Nasik. The State Government, being aggrieved by the order dated 31.07.2009, filed an appeal being

866 of 2009 before the High Court. A Division Bench of the High Court, vide order dated 19.07.2010, set aside the order dated 31.07.2009 and restored the bail application filed by the appellant herein for hearing on merits. The appellant herein went in appeal before this Court and filed Criminal Appeal Nos. 1969-1970 of 2010. It would be appropriate to mention here that after filing of the charge sheet by ATS, Mumbai, the investigation of the same was started by the National Investigation Agency, (NIA), New Delhi as per the order of the Government of India dated 01.04.2011 and on 13.04.2011, the NIA re-registered the offence in respect of the said incident as CR No. 5/11.

(h) This Court, in *Prasad Shrikant Purohit vs. State of Maharashtra and Another*¹, dismissed the criminal appeals filed by the appellant herein while restoring the Bail Application No. 42 of 2008 to the file of the Special Judge for passing orders on merits. On the question of applicability of the MCOCA Act, this Court has observed as under:-

“95. In the light of our above conclusions on the various submissions, we are convinced that in respect of the appellant in Criminal Appeal No. 1971 of 2010, namely, A-7, there is no scope even for the limited purpose of Section 21(4)(b) to hold that application of MCOCA is doubtful. We have held that the said appellant A-7 had every nexus with all the three crimes, namely, Parbhani, Jalna and Malegaon and, therefore, the bar for grant of bail under Section 21 would clearly operate against him and there is no scope for granting any bail. Insofar as the rest of the appellants are concerned, for the purpose of invoking Section 21(4)(b), namely, to consider their claim for bail, it can be held that for the present juncture with the available materials on record, it is not possible to show any nexus of the appellants who have been proceeded against for their involvement in Malegaon blast with the two earlier cases, namely, Parbhani and Jalna. There is considerable doubt about their involvement in Parbhani and Jalna and, therefore, they are entitled for their bail applications to be considered on merits.”

Vide order dated 12.10.2015, the Special Judge, rejected the bail application of the appellant herein. Aggrieved by the decision dated 12.10.2015, the appellant herein preferred a Criminal Appeal being No. 138 of 2016 before the High Court. During the pendency of the aforesaid appeal before the High Court, the NIA submitted supplementary charge sheet dropping the charges under MCOCA against all the accused persons including the appellant herein. In view of the supplementary charge sheet by the NIA, the High Court permitted the appellant herein to file fresh bail application.

(i) The appellant herein filed a fresh bail application before the Court of Special Judge under MCOCA Act, 1999 and NIA Act, 2008 for Greater Mumbai. The Special Judge, vide order dated 26.09.2016, denied the bail to the appellant herein. Being aggrieved by the order dated 26.09.2016, the appellant herein went in appeal before the High

Court and filed Criminal Appeal No. 664 of 2016. The NIA resisted the bail application of the appellant herein on various grounds before the High Court. On 25.04.2017, a Division Bench of the High Court, dismissed the bail application of the appellant herein. Aggrieved by the order dated 25.04.2017, the appellant has filed this appeal before this Court by way of special leave.”

4. Heard Mr. Harish Salve, learned senior counsel for the appellant herein and Mr. Maninder Singh, learned Additional Solicitor General for the respondent-State and Mr. Amarendra Sharan, learned senior counsel for the intervenor-Nisar Ahmed Haji Sayed Bilal, who is the father of one of the deceased. Point(s) for consideration:-

5. The only point for consideration before this Court is whether in the present facts and circumstances of the case, the appellant has made out a case for grant of bail or not? Rival contentions:-

6. Mr. Harish Salve, learned senior counsel for the appellant herein contended before this Court that in view of the supplementary report filed by the NIA, dropping the charges in respect of the offences under the MCOC Act, it has to be held that there is no prima facie case against the appellant herein. Learned senior counsel further contended that earlier, the bail applications were rejected mainly on the basis of the confessional statements of the co-accused under the MCOC Act and now, as the charges under the MCOC Act have been dropped, the confessional statements of the co-accused are required to be excluded from consideration and in their absence thereof, there is no incriminating material against the appellant herein so as to deny him the benefit of bail. Learned senior counsel further contended that during investigation by NIA, PW-79, PW-112 and PW-55 have retracted their previous statements made before the ATS. The fact that the material witnesses have retracted from their statements while complaining about the harassment and torture meted out by the officers of the ATS, clearly indicate that the investigation carried out by the ATS was not fair but it was tainted. The statements and confessions have been extracted subjecting the witness and co-accused to the torture and duress, under the threats of implicating them falsely. Learned senior counsel contended that in view of the withdrawal of those statements and confessions, there remains nothing on record to implicate the appellant herein with the alleged offence.

7. Learned senior counsel further contended that the appellant was a Military Intelligence Officer at the relevant time and had participated in the meetings held at various places like Faridabad, Bhopal etc. in discharge of his duties as such for collecting intelligence and creating new sources and the said fact has also been revealed in the Report of Court of Inquiry (CoI) conducted by the Army Officers against him as well as in the reply filed by the Ministry of Defence and the documents filed by the said Ministry in the Special Court. Learned senior counsel further contended that there was no sufficient material to show that in the said meetings, any conspiracy was hatched to commit the bomb blast at Malegaon.

8. Learned senior counsel vehemently contended the statement of PW-21 that immediately after the alleged conspiracy meeting, he found the appellant herein disclosing the details of the said meeting to his superior officers in Military Intelligence in order to suggest that no conspirator will ever divulge the details of the conspiracy to the superior officers in Military Intelligence. Even the appellant herein also informed that it was a 'covert operation' of Military Intelligence.

9. Learned senior counsel further contended that the Report of Inquiry (RoI) also reveals that the RDX was planted by the ATS officer in the house of Sudhakarn Chaturvedi (A-11). The statements of PW-180 and PW-183 also indicate the same but the courts below disbelieved the version of NIA in this regard.

10. Further, learned senior counsel strenuously contended that whether the amended provision of Section 43(D)(5) of the UAP Act be applied retrospectively to the appellant herein. The said provision had been amended on 31.12.2008 while the incident had taken place on 29.09.2008. He further contended that the High Court was not right in holding that the right of bail of the accused is a procedural right and cannot be considered as a substantive right for retrospective applicability of the provision. Further, the sanction granted for prosecution of the appellant under Section 45(1) of the UAP Act was not valid. He further stressed upon the point that the High Court erred in ignoring the Doctrine of Parity while granting bail to Pragya Singh Thakur (A-1) wherein the court has taken into account the changed circumstances in the charge sheet filed by the NIA but the very same facts have been ignored in the case of the appellant herein. Learned senior counsel finally submitted that the appellant is in jail since last about eight years and eight months and the delay is on account of the prolonged time taken by the investigation agencies and the appellant herein has a good prima facie case to succeed for grant of bail before this Court.

11. Learned Additional Solicitor General (ASG) for the respondent-State strongly controverted the contentions raised by learned senior counsel for the appellant herein by submitting that he was the main conspirator and prima facie there is sufficient material on record to prove his involvement in the alleged offence. Merely because the charges have been dropped under the MCOC Act, it does not mean that there is no material against the appellant herein in respect of other charges. The NIA has given clean chit to Pragya Singh Thakur (A-1) and some other accused person but it has not exonerated the appellant herein from the charges leveled against him which clearly proves that the NIA has also found sufficient material to implicate the appellant.

12. Learned ASG finally submitted that the conclusions about involvement of the appellant herein in the offences alleged against him as drawn by the ATS are supplemented and supported by the NIA officers in their detailed investigation. Having regard to the gravity and seriousness of the offence, which were in the nature of waging war against the unity and integrity of the Nation, and, that too, by violent means, the bail application of the appellant could not have been allowed and it has rightly been rejected by the courts below and no interference is sought for by this Court.

13. Mr. Amarendra Saran, learned senior counsel for the intervenor submitted that there are sufficient material and evidence on record to establish a prima facie case of the involvement of the appellant herein in the criminal offence and the report of the Court of Inquiry (CoI) submitted by the Military authorities cannot be taken into consideration for deciding the question of grant of bail.

Discussion :-

14. In order to prove the prima facie case against the appellant, the prosecution has relied upon the transcription of the conversations of the meetings obtained from the laptop of Swami Amrutanand (A-10), statement of prosecution witnesses recorded under Sections 161 and 164(5) of the Code of Criminal Procedure, 1973 (in short 'the Code'), intercepted telephonic conversations between the appellant herein and co-accused persons and lastly the finding of traces of RDX in the house of co-accused Sudhakar Chaturvedi (A-11). With regard to the transcription of the conversations of the meetings, it was urged from the side of the appellant that there was no such conspiracy hatched between the persons present in the meeting to commit bomb blasts at Malegaon and the persons present have expressed their general opinion about the then prevailing political and social situation. In this backdrop, it is relevant to note that the appellant herein was a serving Army Officer and was associated with Military Intelligence and Interior Terrorism (Insurgency Activities). In the statement of PW-21, it has been revealed that immediately after the alleged conspiracy meeting, he found the appellant herein disclosing the details of the said meeting to his superior officers in Military Intelligence. Even the appellant herein also informed that it was a 'covert operation' of Military Intelligence and he attended the said meetings to create the counter intelligence and no conspirator will ever divulge the details of the conspiracy to the superior officers in Military Intelligence. Besides this, the documents filed by the Ministry of Defence and the papers of the Court of Inquiry also substantiate the claim of the appellant herein. Similarly, intercepted telephonic conversations between the co-accused and the appellant herein were supported as part of duty.

15. The NIA started the investigation on the basis of the facts stated in the FIR and the evidence collected by the ATS, Mumbai. During investigation, it was found that there were contradictions with regard to the evidence led in the charge sheet by the ATS. On the basis of the specific points covered during the investigation conducted by the NIA, it was concluded that no offence under the MCOC Act was attracted and the confessional statements recorded under the provisions of the said Act by ATS Mumbai were not being relied upon by the NIA in the charge sheet against the accused persons. In fact, on evaluation of the evidence against Pragya Singh Thakur (A-1), the evidence on record were not found sufficient by the NIA to prosecute her as all the witnesses had retracted from their statements and thus no case was made out against her.

16. As regards the other parameters to be considered while deciding the application of bail, like, reasonable apprehension of the witnesses being tampered with and danger, of-course, of

justice being thwarted by grant of bail, needless to state that already some of the witnesses have retracted their statements made before the ATS. A perusal of the statements of various prosecution witness recorded under Section 164 of the Code by the NIA, it was revealed that the ATS, Mumbai forced them to make the statements under the aforesaid Section by threatening them to falsely implicate them in the case. In other words, witnesses retracted from their statements recorded by the ATS, Mumbai at Mumbai. Even during re-examination of PW-79 recorded under Section 164 of the Code, he deposed that he did not attend any meeting of 'Abhinav Bharat' held at Bhopal and he had never visited Bhopal until ATS took him to Ram Mandir, Bhopal in the month of May, 2009. The very same statement was again recorded at Delhi by learned Metropolitan Magistrate, where he confirmed the same.

17. In view of the above, it would be relevant to quote the retracted statement of PW-55, mentioned in the charge sheet filed by the NIA, wherein he stated that he did not retract in front of the Magistrate while his statement was being recorded under Section 164 of the Code due to threat and pressure of the ATS. However, he sent one complaint to Maharashtra State Human Rights Commission, Mumbai on 05.10.2009 stating that he was forced to give the confessional statement as dictated to him by the ATS Mumbai that too before transfer of the investigation of the case to the NIA. He further alleged that the following lies were dictated to him to depose before the Magistrate by the ATS which he also incorporated in the complaint sent to State Human Rights Commission which are as under:-

“(1) That Lt. Col. Prasad Purohit gave him 3 weapons and ammunition to be kept in his house for a month sometime in 2006. The description of the weapons was also dictated to him.

(2) That he saw RDX in the house of Lt. Col. Prasad Purohit in a green sack at Devlali.

(3) That Lt. Col. Purohit confessed to him about having supplied RDX for Samjhauta Express Blast.

(4) That Lt. Col. Purohit told him in the early 2008 that something was planned to be done soon. He further told him that an action was planned in Nashik District in Oct/Nov. 2008.

(5) That he was asked to say that Lt. Col. Purohit had confessed to him about planning and executing the Malegaon blast along with his accomplices.”

18. Apart from the above, during the investigation by the NIA, it was revealed that the Army authorities had conducted a Court of Inquiry (CoI) against the appellant herein. During scrutiny of the proceedings of the CoI, a different story of assembling of IED in the House of Sudhakar Chaturvedi (A-11) came to light. During re-examination of the witnesses by the NIA who deposed before the Court of Inquiry (CoI), it was revealed that they suspiciously found API Bagde of ATS in the house of A-11 when A-11 was not present in the house. On

considering the facts narrated by the witnesses, the question arises here as to why API Bagde visited the house of A-11 in his absence. It is also pertinent to mention here that the ATS conducted the search of the house of A-11 on 25.11.2008 wherefrom they had taken the swab of RDX which creates a doubt on the recovery of RDX keeping in view the examination of the witnesses. Even in the charge sheet filed by the ATS, it has been very specifically mentioned that the recovery itself becomes suspect on the ground that the ATS Mumbai may have planted the RDX traces to implicate him and the other accused persons in the case.

19. Further, with regard to the contention of learned senior counsel as to the non-applicability of Section 43-D(5) of the UAP Act or want of valid sanction for the prosecution, it was rightly suggested by the learned ASG that it can be considered at the time of trial and not at this stage.

Conclusion:-

20. In our considered opinion, there are material contradictions in the charge sheets filed by the ATS Mumbai and the NIA which are required to be tested at the time of trial and this Court cannot pick or choose one version over the other. Liberty of a citizen is undoubtedly important but this is to balance with the security of the community. A balance is required to be maintained between the personal liberty of the accused and the investigational rights of the agency. It must result in minimum interference with the personal liberty of the accused and the right of the agency to investigate the case.

21. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider, among other circumstances, the following factors also before granting bail; they are:

“(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge.”

22. Before concluding, we must note that though an accused has a right to make successive applications for grant of bail, the court entertaining such subsequent bail applications has a duty to consider the reasons and grounds on which the earlier bail applications were rejected.

In such cases, the court also has a duty to record the fresh grounds which persuade it to take a view different from the one taken in the earlier applications.

23. At the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merits of the case has not to be undertaken. The grant or refusal to grant bail lies within the discretion of the court. The grant or denial is regulated, to a large extent, by the facts and circumstances of each particular case. But at the same time, right to bail is not to be denied merely because of the sentiments of the community against the accused.

24. In view of the foregoing discussion, we are of the considered opinion that there are variations in the charge sheets filed by ATS Mumbai and NIA. Further, the appellant herein, who was at the relevant time was an Intelligence officer of the Indian Army has refuted the claim of conspiracy on the ground of Intelligence inputs which he informed to his superior officers as well and the alleged role of ATS officials in the planting of RDX at the residence of A-11 clearly indicate the fresh grounds which persuade the appellant herein to take a view different from the one taken in the earlier applications. As mentioned earlier, at the stage of granting bail, a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken. However, keeping in view the fact that NIA has submitted the supplementary charge-sheet which is at variance with the charge-sheet filed by the ATS and that the trial is likely to take a long time and the appellant has been in prison for about 8 years and 8 months, we are of the considered view that the appellant has made out a prima facie case for release on bail and we deem it appropriate to enlarge the appellant herein on bail, subject to the following conditions:

“(i) On his furnishing personal security in the sum of Rs 1 (one) lakh with two solvent sureties, each of the like amount, to the satisfaction of the trial court.

(ii) The appellant herein shall appear in court as and when directed by the court.

(iii) The appellant herein shall make himself available for any further investigation/interrogation by NIA as and when required.

(iv) The appellant herein shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade that person from disclosing such facts to the court or to the investigating agency or to any police officer.

(v) The appellant herein shall not leave India without the previous permission of the trial court.

(vi) In case the appellant herein is in possession of a passport, the same shall be deposited with the trial court before being released on bail.

(vii) We reserve liberty to the respondents to make an appropriate application for modification/recalling the order passed by us, if for any reason, the appellant herein violates any of the conditions imposed by this Court.

25. It is further made clear that the grant of bail to the appellant herein shall be no consideration for grant of bail to other accused persons in the case and the prayer for bail by other accused persons (not before us) shall be considered on its own merits. We also make it clear that the Special Court shall decide the bail applications, if filed by the other accused persons, uninfluenced by any observation made by this Court. Further, any observations made by us in this order shall not come in the way of deciding the trial on merits.

26. In view of the above, we set aside the judgment passed by the High Court dated 25.04.2017 and grant bail to the appellant herein on the conditions mentioned above. Intervention Application is allowed. The appeal is allowed.

Judgment Referred.

¹(2015) 7 SCC 0440