

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

MONDAY, THE 14TH DAY OF DECEMBER 2020/ 23RD AGRAHAYANA, 1942

Bail Appl..No.8209 OF 2020

CRIME NO.1/2019 OF VACB, ERNAKULAM , Ernakulam

PETITIONER:

V.K.EBRAHIM KUNJU
AGED 68 YEARS
RESIDENT OF PERIYAR CRESCENT, BY LANE-3,
SIVA TEMPLE ROAD, THOTTAKKATTUKARA, ALUVA,
ERNAKULAM DISTRICT
PIN-683108

BY ADVS.

SRI.B.RAMAN PILLAI (SR.)
SRI.M.SUNILKUMAR
SRI.SUJESH MENON V.B.
SRI.T.ANIL KUMAR
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SRI.THOMAS SABU VADAKEKUT
SHRI.MAHESH BHANU S.
SMT.S.LAKSHMI SANKAR
SHRI.RESSIL LONAN
SRI.R.ANIL

RESPONDENT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA
ERNAKULAM- 682031

BY K.V.SOHAN, STATE ATTORNEY

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
11-12-2020, THE COURT ON 14-12-2020 PASSED THE FOLLOWING:

P.V.KUNHIKRISHNAN, J

B.A.No.8209 of 2020

Dated this the 14th day of December 2020

O R D E R

The Palarivattom flyover, which reduced the traffic problem in Cochin city to some extent, is now unpopular because of the alleged corruption in its construction. The name Palarivattom has evolved from the word 'Pagalnarivattom'. 'Pagalnarivattom' means a place where jackal roams even in the day time. Now Keralites suspect that it is not jackals but corrupt people wandering through this area. The vigilance must find out the truth by conducting a fair and impartial investigation and restore the name of Palarivattom connected with that of jackals instead of corrupt people. Jackals are better than corrupt people.

2. The petitioner is a Member of the Legislative assembly (MLA) and a former minister in Kerala. He is now implicated as

the 5th accused in V.C.No.1/2019, VACB, Ernakulam. He is now in custody in connection with the above case from 18.11.2020. This bail application filed by him under Section 439 of the Criminal Procedure Code was heard through Video Conference.

3. The above case is registered based on an enquiry conducted by the Vigilance Department of the State. Based on the letter No.141/M(PWD&R)/2019 dated 3.5.2019 of the Hon'ble Minister of PWD and Registration, the Government of Kerala ordered a vigilance enquiry vide letter No.156/E(2)/2019/Vig. dated 6.5.2019 regarding the irregularities committed in constructing the Palarivattom Fly Over, which is situated at NH66 in Ernakulam District. The Director, VACB, Thiruvananthapuram forwarded the same vide letter No.C-(VE 01/2019/ CRE)14247/2019 dated 7.5.2019 to the Superintendent of Police VACB, Central Range, Ernakulam for conducting the Vigilance Enquiry. As per order No.VE01/2019/CRE dated 7.5.2019 of Superintendent of Police, VACB, CRE; the enquiry was entrusted to the Deputy Superintendent of Police VACB, Ernakulam unit. The enquiry revealed that the Government of Kerala directed the Kerala Road Fund Board (KRFB) to provide financial assistance

for implementing the Palarivattom Fly Over at NH66 in Ernakulam District during the period from 2013 to 2017. The work was entrusted to the Roads and Bridges Development Corporation of Kerala Ltd (RBDCK) under SPEEID Kerala Project of PWD. M/s.Kerala Industrial and Technical Consultancy Organization Ltd (KITCO) was appointed as the project's design and supervision consultant. The technical sanction for the work was issued for an amount of Rs.47.70 Crores. The work was awarded to M/S. RDS Project Ltd, on Engineering, Procurement and Construction (EPC) mode. The design and drawing were prepared by M/s.Nagesh Consultant, Bangalore on behalf of the contractor, and the work was executed as per the drawings and design approved by the consultant M/s.KITCO Ltd. After the flyover's opening, within a few weeks, damages like potholes are seen. Now the bridge is closed, and the rectification work is going on. The hairline cracks were found on the girders and piers during the inspection. It may be due to several reasons such as improper structure design, lack of quality of the concrete, and lack of proper supervision of the work. According to the vigilance, all the agencies involved in implementing the flyover's

work are responsible for its distress. As part of the vigilance enquiry, documents were perused, a site inspection was conducted, and a lab report was obtained. From these, it was revealed that the Palarivattom Flyover's work is a substandard one and thereby caused financial loss to the public exchequer. As financial loss sustained to the Government exchequer was due to the substandard work executed, the vigilance concluded that accused persons ie, A1 Shri.Sumeet Goyal, M.D, RDS Project Ltd. (Contractor), A2 M/s.Nagesh Consultancy, Bangalore (Designer), A3 officials of KITCO (consultant), A4 officials of RBDCK (implementing agency), and unknown others are responsible for it. From the enquiry conducted, it is revealed that A1 to A5 conspired together, and as a result of this conspiracy A3 and A4 abused their official position as public servants and by corrupt or illegal means acted without any public interest thereby caused to obtain pecuniary advantage to A1. Hence, the vigilance concluded that there is every reason to believe that all the accused persons gained an undue pecuniary advantage. Accordingly, V.C 1/2019 was registered by the VACB Unit, Ernakulam, on 3.6.2019.

4. The initial investigation of this case was conducted by the Deputy Superintendent of Police, Ernakulam Unit of VACB. Subsequently, the Deputy Superintendent of Police, VACB, SIU-1 took over the investigation of the case as Chief Investigation Officer vide Order No.C-(VC 01/2019/EKM)17865/2019 dated 10.10.2019 of the Director of VACB. According to the vigilance, investigation revealed that A1 to A4 were involved in this case. Accordingly, they were arrested on 30.8.2019. Subsequently, they were released on bail. According to the vigilance on the investigation conducted in this case, the 5th accused, who is the petitioner herein, is also involved. Hence approval under Section 17A of the Prevention of Corruption Act was obtained from the Government of Kerala vide GO(Rt) NO.19/2020/Vigilance dated 5.2.2020. The petitioner was the Minister for PWD, Government of Kerala from May, 2011 to May 2016. According to the vigilance, the 5th accused, being a public servant, conspired with A1, A4, and A10 in connection with the construction of Palarivattom Flyover. As a result of that criminal conspiracy, an illegal Administrative sanction order was issued by the 4th accused to start the construction of Palarivattom Flyover,

violating the Rules of Business and Delegation of Powers. In addition to this, he conspired with other accused for selecting RDS Project Ltd. as the successful bidder for constructing the flyover. According to the vigilance, one Thankachan, a retired Superintending Engineer from PWD, was appointed as Additional General Manager in Roads and Bridges Corporation of Kerala during the petitioner's tenure as Minister for PWD. The vigilance says that the investigation so far conducted revealed that a meeting was convened and presided by the petitioner at Muscat Hotel, Thiruvananthapuram on 17.6.2013. According to the prosecution, it is in the above meeting RBDCK was authorised as the implementing agency in total violation of the conditions specified in G.O(P) No.408/2007/Fin dated 7.9.2007 of the Finance (IND&PW-B) Department. The vigilance further revealed that the petitioner had conspired with the other accused, A1, Sri.Sumeeth Goyal, (Contractor), A2 Sri.M.T.Thankachan, AGM, RBDCK, A3, Sri.Benny Paul, Principal Consultant, KITCO, A4 Sri.T.O Sooraj, Secretary, PWD and A10 Sri.Muhammed Hanesh, IAS, Managing Director of the RBDCK, and in pursuance of that conspiracy, RDS was selected as the successful bidder.

5. It is also alleged that the 5th accused, in the capacity as the Chairman of the Board of Directors RBDCK, ratified the decision taken by A10 regarding the signing of the agreement on 4.3.2014. Thereafter, an application submitted by the 1st accused was accepted and the 5th accused illegally sanctioned an amount of Rs.8,25,59,768/- as mobilisation advance, fully knowing that no mobilisation advance was allowable as per the existing rules, procedure and also as per the tender conditions. According to the vigilance, A5 has no authority to sanction such an advance. It is the further case of the vigilance that the 4th accused illegally fixed an interest @7% on the mobilisation advance. According to the vigilance, the investigation revealed that the 1st accused had obtained a working capital loan from the South Indian Bank @ 14.75% interest in connection with the construction of Palarivattom Flyover. According to the vigilance, the 1st accused gained an undue favour of Rs.85,41,680.92, being the difference between the rate of interest at 14.75% and the amount actually received @7%. The main allegation against the 5th accused is that the 5th accused received bribe from the 1st accused company, ie. M/s.RDS Project Ltd., in connection with the construction work of

Palarivattom Flyover. The vigilance suspect that the amount deposited in the bank account at Punjab National Bank, Market Road, Ernakulam branch maintained for Muslim Printing and Publishing Company Ltd. is the bribe received by the 5th accused. This is the sum and substance of the case of the vigilance.

6. Heard the learned counsel for the petitioner and the State Attorney K.V.Sohan, who appeared for the respondent. Senior Counsel Sri.B.Raman Pillai appeared for the petitioner as instructed.

7. The Senior Counsel, Advocate B.Raman Pillai argued that even if the entire allegations are accepted, there is no prima facie case made out against the petitioner. The Senior Counsel submitted that Annexure 1 FIR was registered by the Vigilance Department on 3.6.2019. After that, the petitioner was summoned by the Vigilance Department on two or three occasions. They interrogated the petitioner for a long time. After interrogation, the petitioner was released. Now the election to local bodies in Kerala is declared. At that stage, because of political enmity towards the petitioner and his political party, the petitioner is implicated in this case and arrested. According to

the Senior Counsel, a search was conducted in the house of the petitioner, and nothing was seized from the house. As per the search list, a letter issued by the Income Tax Department to the Punjab National Bank is seized. That has no relevance in the facts and circumstances of the case. The counsel submitted that the petitioner is arrested after about 1½ years from the date on which the case is registered. The Senior Counsel also submitted that the main allegation against the petitioner is that he sanctioned mobilisation fund to the 1st accused. According to the Senior Counsel, he acted only in accordance to law. He takes me through Annexure 5, a letter from KRFB to the Secretary to Government, Public Works (C) Department. The request in that letter is to release the mobilisation fund to M/s.RDS Project Ltd. According to the Senior Counsel, Annexure 6 is the note submitted by the Under Secretary, PWD, State of Kerala in which it is requested that the sanction may be accorded to CEO, KRFB to release an amount of Rs.8,25,59,768/- to RBDCK for construction of Palarivattom Flyover. The submission of the Senior Counsel is that the petitioner only signed in it based on the recommendations of the Secretary, PWD Department, and other

officers. The petitioner was acting strictly in accordance with the law. The Senior Counsel also submitted that the petitioner has no connection to Muslim Printing and Publishing Company Ltd. till 24.2.2017 as evident by Annexure 7, which is a Company/LLP master data. According to the Senior Counsel, the alleged deposit of money in Muslim Printing and Publishing Company Ltd., is before 24.2.2017, and therefore, the petitioner is not responsible for any amount deposited in that account.

8. The Senior Counsel also submitted that the petitioner is suffering from a serious illness. Annexure 2 is a certificate issued by the doctor who is treating the petitioner. In Annexure 2, it is stated that the petitioner is suffering from multiple myeloma with renal failure, IPSS stage I, KAPPA disease, post RT C6 to D1 vertebrae cervical radiculopathy C6-D1, currently on treatment with weekly Bortezomib + Dexamethasone and Denosumab-post 13 dose inj. The other treatment details are also there in it. The counsel submitted that the petitioner was admitted to the hospital on 17.11.2020 in connection with his treatment. On 18.11.2020, the vigilance arrested him from the hospital. The Senior Counsel also submitted that, when an

application for police custody was filed before the jurisdictional court, the jurisdictional Judge directed the officer concerned to constitute a medical board to examine the petitioner. In compliance with the order, the District Medical Officer, Ernakulam forwarded a report prepared by the Medical Board consisting of seven members. The Senior Counsel submitted that the details of the illness found by the Medical Board is narrated in Annexure 8 order passed by the learned Enquiry Commissioner and Special Judge (Vigilance), Muvattupuzha. The same will show the seriousness of the illness of the petitioner. Therefore, the counsel submitted that the petitioner is entitled to the benefit under the 1st proviso of Section 437(1) Cr.P.C.

9. The State Attorney submitted that this is a case in which the allegation against the petitioner is very serious. A statement is also filed by the investigating officer, narrating the details. The State Attorney submitted that this is a case in which wide conspiracy is involved and further questioning of the petitioner is necessary. The State Attorney submitted that the award of the contract to the 1st accused itself is doubtful. According to the State Attorney, before starting the tendering

process, a meeting was convened and presided over by the petitioner at Muscat Hotel, Thiruvananthapuram, on 17.6.2013. According to the State Attorney, it is revealed that the petitioner had conspired with other accused namely A1, A2, A3, A4 and A10 and in pursuance of that conspiracy, M/s.RDS Project Ltd., was selected as the successful bidder. Since there is a clear involvement of the petitioner in this case, the State Attorney submitted that he was arrayed as an accused, and a report was filed before the court concerned. According to the State Attorney, the Managing Director of RBDCK issued a letter to the Member Secretary of the KRFB on 13.6.2016 stating that the contractor has requested to grant an advance of 25% of the contract value and recommended that 20% of the contract amount can be sanctioned against the bank guarantee and against the tender conditions. Based on the above letter, the Chief Executive Officer of the KRFB addressed the Secretary, PWD, Government of Kerala requesting to release Rs.8,25,59,768/- being 20% of the contract amount as advance to the contractor. Subsequently, GO(Ms) No.57/2014/PWD dated 15.7.2014 was issued as ordered by the petitioner, the then Minister for PWD to release an amount of

Rs.8,25,59,768/-. The payment of the advance of 20% of the contract amount was in total violation of the relevant Rules and the Government orders and against the provisions of tender conditions, the State Attorney submitted. According to the State Attorney, the 1st accused company had obtained a working capital loan from the South Indian Bank at 14.75% interest rate in connection with the Palarivattom Flyover. It was also revealed that the Finance Department of the State had issued Circular No.40/2013/Fin. Dated 27.4.2013 in which it was explained that the working capital loans to public sector undertakings would attract an interest rate 13.5%. In addition to the above, it was also revealed that the Accountant General made an audit observation about the sanctioning of mobilisation advance in which it was stated that the Government had sustained a loss of Rs.51,37,261/- in the form of reduce rate of interest till the payment of the Xth part Bill. The State Attorney submitted that during investigation, it is revealed that an amount of Rs.10 Crore was deposited in the account of M/s.Muslim Printing and Publishing Company Ltd. The Income Tax Department had taken action on it and as such penalty was remitted. According to the

vigilance, the petitioner was a member and Chairman of the Governing body of Chandrika daily, Cochin. An amount of Rs.4.5 crores for which source was undisclosed was deposited in the account of Chandrika daily on which Rs.1,12,50,000/- deposited in Pradhan Manthri Garib Kalyan Deposit Scheme 2016, which will be refunded by 30.3.2021. According to the State Attorney, the investigation conducted revealed a link between the above transactions and illegal gratification paid by RDS Company to the petitioner. Hence the disclosure of black money to the IT Department is strongly suspected to be coupled with this undue pecuniary advantage obtained by the petitioner/5th accused while he was the PWD Minister. This is the submission of the State Attorney. According to the Vigilance, a copy of the prohibitory order issued by the Income Tax Department in this regard was seized from the house of the petitioner during the search conducted on 9.3.2020 in this case. The hard disc contents and CCTV Footages of the person who came to Punjab National Bank, Market Road, Ernakulam Branch to deposit Rs.10 crores in the account of Muslim Printing and Publishing Company Ltd., is also seized, and the inventory is submitted before the court

concerned.

10. According to the vigilance, the petitioner, who was aware of the facts stated above, had a suspicion that he may be further interrogated and arrested; he got admitted in Lakeshore Hospital, Ernakulam on 17.11.2020. The petitioner was arrested on 18.11.2020. The State Attorney argued that the petitioner may not be released on bail now. The petitioner is a politician and may influence the witnesses in this case. Moreover, the State Attorney also submitted that an application for custody is already filed before the court concerned. The Vigilance Department wants to question the petitioner based on several documents and also based on the statement given by the other witnesses. According to the State Attorney, the petitioner may not be released on bail at this stage.

11. I considered the contentions raised by the petitioner and the respondent in detail. If the allegations raised against the petitioner are correct, it is very serious. According to the Vigilance Department, the investigation, in this case, is going on. In such circumstances, this Court cannot decide the contentions raised by the petitioner on merit at this stage. These are matters

to be investigated by the investigating officer. Any conclusions by this court at this stage will prejudice not only the petitioner but the prosecution also. Therefore, I don't want to make any observation about the merit of the case. Similarly, I don't want to discuss the materials collected by the investigating authority against the petitioner during the course of the investigation. It is true that the Senior Counsel argued the case on merit. But I restrain myself from deciding these contentions raised by the petitioner at this stage. I am doing so because that will prejudice the interest of the petitioner and also the investigating agency. After considering the entire contentions of the petitioner and the Vigilance Department, in my opinion, this is not a fit case in which the petitioner can be released on bail at this stage. The investigation is going on. Very serious allegations are there against a former minister of the state. Therefore, in my opinion, the petitioner is not entitled bail on merit at this stage.

12. Then the question is whether the petitioner is entitled bail on medical ground. The 1st proviso to Section 437(1)Cr.P.C indeed says that the court may direct that a person referred to in clause (i) or clause (ii) of that Section be released on bail if such

person is under the age of sixteen years or is a woman or is sick or infirm. But this Court in **Jolyamma vs. State of Kerala** (2020(5)KLT 75) considered this point and held that the 1st proviso to Section 437(1) Cr.P.C is not a mandatory provision. It is a discretionary power of the court. Therefore, the petitioner cannot argue as of right that he is entitled bail as per the first proviso to Section 437(1) Cr.P.C because he is a sick person.

13. The learned Enquiry Commissioner and Special Judge (Vigilance), Muvattupuzha while considering the custody application, directed the District Medical Officer to constitute a Medical Board. A Medical Board was constituted and a report was submitted to the court. In Annexure 8 order of the special judge, the report of the Medical Board is narrated in detail, which is extracted hereunder:

"5. In compliance of the order, DMO, Ernakulam forwarded the report prepared by the medical board consisting of 7 members, to this court. In the report it is stated that the 5th accused has been suffering from multiple myeloma a type of cancer affecting the bone marrow. Referring to the hospital reports it is reported that the 5th accused had multiple hospital admissions (33 times) including day care chemotherapy/targeted therapy from 04.04.2020 to 14.11.2020. As per the Medical Board report the patient will be highly prone to various infections, especially when the absolute neutrophil count is low. Due to the disease his cervical vertebrae has got

fracture following which he has been suffering from neuropathic pain and weakness of both upper limbs. He received treatment with Bortezomib Lnalidomide and Dexamethasone for Multiple Myeloma followed by a reassessment in October 2020 which showed persistent disease for which he is on maintenance treatment with Bortezomib every two weekly. Last dose of Bortezomib was received on 19.11.2020 and the next dose is due on 03.12.2020. In the report it is clarified that Bortezomib is a kind of chemotherapy. Medical report suggests that he is suffering from insulin dependent Diabetes Mellitus, Coronary Artery disease with previous Myocardial infraction, Hyper tension and obstructive Sleep Apnea. In the report medical board expressed its opinion that it is better to have a hospital care until his clinical and hematological parameters improve, especially in view of his immune compromised state.”

14. A perusal of the above details, it is clear that the petitioner is suffering from different illness. It is also revealed from the above report that the petitioner had multiple hospital admissions (33 times), including daycare chemotherapy/targeted therapy from 4.4.2020 to 14.11.2020. As per the Medical Board report the patient will be highly prone to various infections, especially when the absolute neutrophil count is low. A reading of the above medial board report, it is clear that the petitioner needs serious treatment from a hospital. The report suggests that it is better to have hospital care until his clinical and hematological parameters improve, especially because of his

immune-compromised state. Then what is the purpose of releasing the petitioner on bail? The Medical Board says that the patient will be highly prone to various infections. During this pandemic period, what is the purpose of releasing the petitioner on bail and asking him to go to his house is the question. The petitioner was admitted to a hospital of his choice on 17.11.2020. He was arrested on 18.11.2020. He is now treated by a doctor of his choice. He is now in hospital. Let the treatment continue. Once the treatment is over, and the doctors suggest that he can be discharged, he will be removed to jail. At that stage, the petitioner can file a bail application. At that stage, the bail application can be considered on merit also if necessary. The contention raised by the petitioner based on the first proviso to section 437(1) Cr.P.C is left open. A person who admitted to a hospital one day before the arrest and that also a hospital of his choice and he is being treated by a doctor of his choice is not entitled the benefit the first proviso to section 437(1) Cr.P.C, especially when the treatment is going on. Therefore, in my opinion, on medical ground also the petitioner is not entitled bail at this stage. Once the petitioner is removed to the jail from the

hospital, after improving his clinical and hematological parameters as opined by the medical board, the petitioner is free to move a fresh bail application. This will take care of the prosecution's apprehension that he will influence the witness once he is released on bail. The Senior Counsel today at 10.15 am submitted that an objection is filed controverting the contentions in the statement filed by the investigating officer. I perused the same also. Since, I have not considered the contentions raised by the prosecution on merit, I think, it is not necessary to deal the contentions in the objections filed by the petitioner to the statement of the investigating officer.

Therefore, this bail application is dismissed, granting liberty to the petitioner to move a fresh bail application once the petitioner is discharged from the hospital and removed to jail.

Sd/-
P.V.KUNHIKRISHNAN
JUDGE

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