BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Reserved on	Pronounced on
08.04.2021	26.04.2021

PRESENT

The Hon`ble Mr.Justice G.CHANDRASEKHARAN

CRL OP(MD). 208 of 2021

1 K.SUBBURAJ
2 N.K.POTHIRAAJ ... PETITIONERS/ACCUSED

Vs

THE ASSISTANT DIRECTOR(PMLA),
DIRECTORATE OF ENFORCEMENT
OFFICE OF THE JOINT DIRECTOR,
CHENNAI ZONE-II, SHASTHRI BHAVAN, III BLOCK,
III AND IV FLOOR, 26, HADDOWS ROAD,
CHENNAI-600 006.
(File No.ECIR/CEZ0-II/04/2019/LKV/AD) ... RESPONDENT/COMPLAINANT

For Petitioners : Mr.B.Kumar
Senior Counsel
for M.Jeyakumar, Advocate

For Respondent : Mr.N.Ramesh
Special Public Prosecutor

PETITION FOR ANTICIPATORY BAIL Under Sec.438 of Cr.P.C

PRAYER :-

For Anticipatory Bail in File No.ECIR/CEZO-II/04/2019/LKV/AD on the file of the respondent police.

ORDER : The Court made the following order :-

The petitioners/Accused, apprehending arrest at the hands of the respondent for the alleged offences punishable under section 3 of the Prevention of Money Laundering Act, 2002, in File No.ECIR/CEZO-II/04/2019/LKV/AD on the file of the respondent police, seek anticipatory bail.

2. The case of the prosecution is that on 16.10.2018, the Zonal Manager of Indian Bank preferred a complaint against the petitioners/A.2 and A.3, who are the Chairman and Managing Director of M/s Cethar Ltd., alleging, among other things, that the accused caused wrongful loss to the extent of Rs.530.90 Crores, by cheating the public sector Bank.

3.The sum and substance of the complaint is as follows:

After a detailed investigation by the Bank, it is known that the accused and various unknown persons committed fraud and cheated Indian Bank which had financed M/s Cethar Limited (the Company) under a Consortium arrangement with other Banks. The loan facilities availed by the accused was to the tune of Rs.1344.96 Crores. The said loan facilities with Indian Bank slipped to NPA (Non-Performing Asset) on 31.12.2012 and classified as NPA as per laid down procedures stipulated by Reserve Bank of India. The present position of loss caused to the Indian Bank is to the extent of Rs.530.96 crores. This is a loss to the public sector Bank and unlawful gain to the accused and unknown persons. Therefore, the account was classified as fraud and reported to Reserve Bank of India. The Directors of the Company dishonestly diverted the fund so as to get monetary gain to themselves at the cost of causing loss to the bank.

4. The grounds for declaring the account as fraud are as follows:

(a) Unsustainable expansion of the company without proper technical know-how transfer and lack of financial discipline and corporate governance.
(b) Unproductive investment in projects and diversion of funds.
(c) Aged receivables depicting poor quality of customers and possible overstatement of sales.
(d) Over valuation of stock and aged inventory adversely impacting liquidity.
(e) Disposal of fixed assets without documented intimation to Bank.
(f) Land and building accounted as Company's fixed asset though sale/title deed has not been executed in company's name.
(g) Business receipts routed through banks other than consortium members.
(h) Cash credit facility utilized for meeting capital expenses.
(i) Violations of law in transaction of share sale where Rs.224 Cr. loss is incurred.
(j) Undervaluation of company's properties while doing sale transactions..

The detailed narrations of these grounds are given in the complaint. The Central Bureau of Investigation, Banks Securities &

Fraud Cell (BS&FC), Bangalore had registered FIR in Cr.No.20 of 2018 for the offences under Sections120-B, 406, 420, 468 and 471 I.P.C..

5. The learned Counsel for the petitioners submitted that this is purely a false case filed against the petitioners only with an intention to harass the petitioners. It is further submitted that this case is not maintainable either in law or on facts for the reasons that,

(i) the investigation conducted by the Enforcement Directorate is premature and is contrary to the provisions of Prevention of Money Laundering Act. (in short "PMLA");

(ii) PMLA will come into force only when existence of the proceeds of crime within the meaning of Section 2(u) of PMLA is certain and determined after investigation in to a scheduled offence;

(iii) the investigation in the case registered by the CBI has not been completed and no final report is filed and the petitioners appeared before the CBI for more than one occasion and explained the case and the petitioners have not been arrested by the CBI sofar.

(iv)Section 2(u) of PMLA deals with the proceeds of crime " as result of criminal activity relating to scheduled offence".

(v) The proceeds of crime relating to scheduled offence cannot be determined by Enforcement Directorate (ED) under PMLA.

(vi)The National Company Law Tribunal has seized of the matter and proceedings have been taken under Insolvency and Bankruptcy Code 2016. A resolution professional has been appointed, who has taken over the entire assets and the company itself, as early as on 16.07.2017.

(vii) There is no scope for any investigation as to how the assets were spent by the company and the petitioners. That enquiry is to be done under NCLT and by the resolution processional /liquidator.

(viii)It is seen from the FIR that the offences were committed between 2005 and 2018. The resolution professional had been appointed even in June 2017 and taken over the management of the entire company and its assets. The question of arresting the petitioners after three years of investigation would be unjustified.

(ix) A genuine loss of money in the business cannot be recorded as proceeds of crime.

(x) Till the year 2009, the schedule to the PMLA did not contain any of the offences under Sections 420, 465, 471 etc., These Sections are included in the scheduled offence only from 01.06.2009.

(xi) It is evident from the FIR that most of the loss was on account of "unsustainable expansion of the company" without proper technical know-how transfer coupled with adverse regulatory policies of the Government and lack of financial discipline.

6. It is further submitted by the learned Counsel for the petitioners that the company was doing very well till March 2012. Thereafter, M/s Beta Holding Limited located at Mauritius came forward to invest in equity. The investor company paid a sum of Rs.370 Crores as investment in consideration of equity shares of 17.20% of the post paid up share capital of the company. The Enforcement Directorate without justification doubting the infusion of capital by foreign entity. The company went into problem due to various adverse business factors and one of the creditors moved the National Company Law Tribunal, Chennai. A Resolution Professional was appointed on 19.07.2017 and thereafter, the company went into liquidation and a liquidator was appointed on 25.04.2018.

7.Arguing further, the learned counsel for the petitioner submitted that during the investigation by the CBI, the petitioners submitted Income Tax returns, copies of bank account, Assets and Liabilities details of movable properties of the petitioners, their wives, daughters and son for the years from 2005-2006 to till last year. There was no diversion of funds of M/s Cethar Limited as claimed in the FIR. M/s Cethar Energy is 100% subsidiary of M/s Cethar Limited and it had not borrowed funds from the Bank. M/s Cethar Limited invested equity capital raised through public participation. In fact, the transfer of funds of Rs.100 Crores by M/s Cethar Limited through Indian Bank to M/s Cethar Energy Limited is the contribution from private equity raised by the company.Cethar Energy Limited,Cethar Constructions Limited and Cethar Consultancy Limited are subsidiaries of Cethar Limited with a share holding of 99% or more. The alleged diversion of funds is unsustainable due to the extent of ownership in these companies by Cethar Limited. Voluntarily infused funds as equity and profits to a smaller extent were used to promote these subsidiaries. Cethar Energy Limited had funded about Rs.86 crores to Cethar Liited out of a total equity of about Rs.126 crores. It invested with M/s.Maadurga, a client of parent company, to the extent of Rs.15 crores to get orders.

8.It is submitted that a sum of 244 Crores were written off out of the company's turnover of about Rs.9,434 Crores which amounts to only to the tune of 2.6% of the total turn over. The company initiated arbitration proceedings with regard to the payment of Rs.557 Crores payable by certain customers. The Liquidator has to take up the arbitrary proceedings. Mr.V.Nagarajan is appointed as Resolution Professional and he had taken possession of the entire factory and its assests and also he is in possession of all the documents. M/s Cethar Limited did not purchase any lands in the name of third parties.

9.It is submitted further that the allegation in FIR by CBI that amount due to the consortium of banks was to the tune of

Rs.1344.96 crores is not entirely correct. The principal amount is only Rs.564 crores and the rest is interest. Company's Balance Sheet and Profit and Loss Account statements depicts a cumulative cash profit of Rs.919.09 crores for the financial years from 2005-06 to 2011-12. The company failed due to the impact of the power sector issues related to company and inabiity to get timely need based viable restructuring. It has given an income of about Rs.479.57 crores to banks, about Rs.220 crores as Income Tax, about Rs.741 crores as Excise duty, Central and State duties and taxes, employment to about 7000 people in central part of Tamil Nadu. This statistics shows that the complaint against the company is false. The principal loan amount is only about Rs.564 crores and the rest is interest. The fixed assets were valued at Rs.700 crores in the year 2012-13. The company is one of the two leading industrial boiler manufacturers in the country. With all these credentials and past performance of the company and promoter, Indian bank's delayed and un-implementable restructuring resulted in failure of the company which resulted in a loss to the banks and share holders to the extent of Rs.2500 crores based on the valuation of the company in December 2010.

10.Finally it is submitted that the petitioners had been regularly appearing before the respondent for enquiry whenever they called to appear. The first petitioner is aged about 70 years and underwent a total colectamy surgery with ilum anestomosis and his large intestine has been totally removed and he is a diabetic patient. The second petitioner is aged about 64 years. The petitioners are co-operating with the respondent in the investigation process and their arrest is not necessary. Therefore, they prayed for anticipatory bail.

11.. In support of his arguments, the learned Counsel appearing for the petitioners relied on the decision rendered by the Honourable Supreme Court of India in ***Manish Kumar Vs. Union of India (UOI) and Ors***, dated 19.01.2021 for the proposition that once NCLT is seized of the matter under section 32A of the Insolvency and Bankruptcy Code 2016, the liability of the corporate debtor for an offence committed prior to the commencement of the corporate insolvency process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved and it results in change in management.

12. In response, the learned Special Public Prosecutor appearing for the respondent strongly opposed this anticipatory bail on the ground that the accused including these petitioners systematically committed criminal breach of trust, cheating, using forged document as genuine and thereby induced Indian Bank and other member Banks to grant various credit facilities. By suppressing various relevant facts from the knowledge of the Banks, availed the credit facilities and subsequently misappropriated the funds by causing loss to the extent of Rs.1344.96 Crores to the consortium of

banks. The accused had involved in huge fund diversion from M/s Cethar Ltd., to its subsidiaries and related entities in the name of Cethar Energy Ltd., Cethar Construction Ltd, CEthar Consultancy Ltd., Cethar Holdings Private Ltd., Dynepro Private Ltd., (earlier known as Pipelines and Process Equipment Pvt Ltd.,), Cethar Healthcare Services Private Ltd., Metso Power India Pvt Ltd., and Cethar Chemical Pvt. Ltd., without any economic rational, contrary to the terms and conditions under which the consortium of banks have extended the credit facilities. Similarly Cethar Ltd., made investment in land in third party names. The offences under Sections 120-B, 420 and 471 IPC, are scheduled offences and an ECIR bearing No.ECIR/04/CEZO-II/2019, dated 07.08.2019 was recorded at Chennai Zonal Office-II of the Directorate of Enforcement, Chennai, against the aforesaid company and the petitioners for the commission of offence under Section 3 of PMLA, 2002, punishable under Section 4 of PMLA, 2002. The case was taken up for investigation. During the investigation, the petitioners were examined and their residential premises and their bank lockers were searched. The investigation revealed that the petitioners after availing the loan of Rs.1344.96 Crores for working capital purpose in the name of M/s Cethar Ltd., diverted the funds to other entities controlled by the petitioners within India as well as in other Countries. That apart, the petitioners received Foreign Direct Investment (FDI) from M/s Beta Nepthol Ltd., located at Mauritius which is considered to be a tax haven. The petitioners could not vouch for the diversion of funds within India as well as outside India and the receipt of FDI, in the complex web of financial transactions. During the course of search, the jewelleries worth about Rs.4.44 Crores were found in their possession, for which, the petitioners yet to give purchase bills and the bank account through which the payments were settled. Company has written off Rs.244 crores of their customers dues. The details of invoice under which goods were supplied, acknowledgment of the recipient of goods in the delivery challan for the receipt of goods,follow-up action taken by the petitioners with the customers to recover their dues before such write-off have not been produced by the petitioners sofar. Petitioners have also not produced the details of invoice for Rs.557 crores payable by certain customers under which goods were supplied, acknowledgment of the recipient of the goods in the delivery chalan for receipt of the goods, follow-up action taken by the petitioners with the customers to recover their dues through the Arbitration Proceedings, so as to find out genuineness of such write-off or find the source of money laundering. The investigation is still incomplete.

13. The learned Special Public Prosecutor further submitted that the investigation under the PMLA is distinct and different from the investigation undertaken by the CBI in the matter of IPC offences. PMLA 2002, empowers search of any building where the authorised officer has reason to believe that any person has committed any act which constitutes money-laundering or is in possession of any proceeds of crime or is in possession of any

records relating to money laundering or is in possession of any records relating to money laundering or is in possession of any property related to crime. It is the duty of the respondent to determine the proceeds of crime on completion of investigation. The respondent will take every care not to encroach into the domain of Insolvency and Bankruptcy Code, 2016, but confine only to the offence money laundering and its projection as untainted money in the name of the Director or their family members or money syphoned off by other business entities either within the Country or outside the Country. In case of genuine business loss, the petitioners have the liberty to produce all the documents and explain the circumstances under which the Industry alone became sick, though the promoters/Directors did not become sick. The arrest cannot be made merely on suspicion under PMLA, 2002. The law maker put a higher standard to the Investigating Officer to make arrest, only after making substantial progress in the investigation and giving opportunity of being heard to the suspect and that too only on a finding that any person is guilty of offence punishable under the PMLA, 2002. The receipt of FDI from M/s Beta Holdings Ltd., is also subject matter of investigation. There is an apprehension that the petitioners with the money parked outside the country may abscond once for all and may not be available for further investigation. Petitioners are highly qualified and influential persons. With the support of 1433.96 crores swindled from the bank, petitioners are capable of inducing all person acquainted with the facts of the case to dissuade them from disclosing material facts to the investigating officer. The anticipatory bail application filed by the petitioners is a premature one and in the case of Economic Offences, the Courts have always refused to grant anticipatory bail to the accused. Therefore, he prayed for the dismissal of this petition. In support of his arguments, the learned Special Public Prosecutor appearing for the respondent relied on the decision rendered by the Honourable Supreme Court of India in ***P.Chidambaram Vs. Directorate of Enforcement*** reported in ***(2019)9 Supreme Court Cases 24.***

14. Considered the rival submissions and also typed set of documents filed by the petitioners. The petitioners filed documents with regard to the investors agreement between M/s Beta Holding Limited and M/s Cethar Limited represented by the petitioners; orders passed by the NCLT, Chennai in C.A.No.166 of 2018; the interim orders passed by this Court in W.P.No.3112 of 2019, summons issued by the respondent; replies along with annextures, explanations. They have also filed additional typed set of papers containing documents with regard to the Cash Profit statement, Balance sheet and Profit and Loss statement, statement relating to share holding in subsidiaries, Income source of family members, Bank statement showing Rs.370 Crore infusion,monthly LC development statement,invocation of bank guarantee etc.,

15. It is seen from the complaint that the main allegations are,

(i) diversion of funds sanctioned for M/s Cethar Limited to other subsidiary companies. The investment of Rs.100 Crores is said to have been diverted to M/s Cethar Energy Limited during the financial year 2010-2011, which in turn made a trade advance to the tune of Rs.77.27 crores and it is lying as receivables for the last 6 years

(ii)M/sCethar Limited had diverted funds to the tune of 46.54 Crores as on March 31, 2016 for the purpose of purchase of land and building in third party individual's names. The property was not registered in the name of M/s Cethar limited

(iii)A sum of Rs.28.10 Crores is outstanding from subsidiary and other related companies as on 31.03.2016. Out of this, M/s Cethar Constructions limited owes Rs.27.36 Crores, M/s Dynepro Private Limited has to pay Rs.2 Crores as on 16.03.2017. M/s Dynepro Private Limited is a related company, wherein Mrs.Subburaj Srisharanya, D/o K.Subburaj is one of the Directors. The petitioner N.K.Pothiraj is also one of the Directors of M/s Dynepro Primate limited. Both petitioners are shareholders of M/s Dynepro Private Limited holding 67% of the total shares. The petitioner Subburaj transferred 20,84,681, shares to his daughter Subburaj Srisharanya on 20.04.2015

(iv) receivables to the tune of Rs.3.33 crores from related companies such as, M/s.Mesto Power India Private Limited (Rs.1.65 crores), M/s.Cethar Industries Limited(Rs.9.93 lakhs), M/s. Cethar Chemicals Private Limited(Rs.6.71 lakhs),M/s. Pipelines and Process Equipments Private Limited(0.89 lakhs) had been written off from from the books of accounts as bad debt.

(v)receivable balance of Rs.8.92 lakhs as on 31.03.2009 from M/s. Cethar Constructions Limited was converted as investment in M/s.Cethar Constructions Limited by M/s.Cethar Limited; as on 29.03.2011, the receivable balance from M/s.Cethar Construction Limited was Rs.9.24 crores, out of this, Rs.5 crores were converted into investment in shares of M/s.Cethar Constructions Limited, thus the recivables was reduced to Rs.4.24 crorers;as on 02.05.2005, a sum of Rs.33.75 was receivable from M/s.Cethar Consultancy Services Limited and it was brought down to 9.75 lakhs by converting the receivables worth Rs.24 lakhs to investment in shares of M/s.Cethar Consultancy Services Limited;as on 29.03.2011, a sum of Rs.75 lakhs was converted from receivables to investment in the shares of M/s.Cethar Consultancy Services Limited, thus reducing the receivables balance from Rs.1.19 crores to 0.44 crores; in case of M/s.Cethar Elecricals Limited, a sum of Rs.29.52 lakhs were converted from receivables into investment in shares of M/s.Cethar Electricals Limited as on 31.03.2009. Thus a total of 6.37 crores receivables from related companies were converted as investment in shares without any movement of funds through bank/cash.

(vi)M/s.Cethar Limited had written off as bad debt a sum of Rs.305.00 crores during financial years 2011-12 to 2016-17.

(vii) As on 31.03.2016, there exists trade receivable to the tune of Rs.435.34 crores. 72% of the total receivables are more than 3 years old as on 31.03.2016 and it has been written off as bad debts year after year. That apart, the receivable from 40 debtors valued at Rs.147.60 Crores as on 31.03.2016 either remained the same or increased year after year from financial year 2010-11 to 2015-16. The company has not taken any effective steps for recovery of the retention money or other receivable amounts

(viii) There is a possible over valuation of stock.As on 31.05.2016, the company has an inventory of Rs.317.4 crores. As per stock audit dated,27.062016,the realiazability of of a substantial portion of stock at the site of projects on hold amounting to Rs.139.65 crores are doubtful. Out of the remaining stock of Rs.177.39 crores,the value of non moving/obsolete stock is Rs.37.98 crore. Realizability of 56% of the stock is doubtful and it is not correctly disclosed in the statement.

(ix) The company has disposed fixed assets, both movable and immovable assets to the tune of Rs.27.34 Crores during the period from 01.04.2010 to 31.03.2016, without intimation to the bank;

(x)The company has accounted in its books of accounts immovable property in the form of land and building which belongs to another party. It accounted 15.30 Crores as its fixed assets under freehold land and building based on a mere sale agreement during the financial year 2010-11. Title was not transferred to M/s.Cethar Limited as on 31.03.2011.

(xi)The business transactions to the tune of Rs.219.44 crores were routed through banks other than consortium members during the financial year 2010-11. In the financial year 2013-14, a sum of Rs.193.28 Crores were routed through other than consortium branch.

(xii)Cash credit facility should be utilized for working capital requirements of the organisation and it should not be utilised for acquiring /construction of capital assets or any similar capital transactions. However, the first accused had utilized cash credit limits for capital purposes by making payment to M/s Kirby Building Systems to the tune of Rs.30.02 Lakhs, M/s Praxair India Pvt Litd., to the tune of Rs.103.62 lakhs and to M/s NSK Builders to the tune of Rs.107.92 Lakhs;

(xiii). The first accused applied for obtaining external credit rating from ICRA Limited. Even after multiple reminders of the bank, a report from ICRA is not submitted. If the report of ICRA is furnished indicating the poor external rating, the loan enhancement could not have been sanctioned.

(xiv) The property valued to the tune of Rs.30 Crores was sold to one Muthiah for Rs.15 Crores on 30.05.2016.

16. When deciding the relief of anticipatory bail, the Honourable Supreme Court in ***P.Chidambaram Vs. Directorate of Enforcement*** reported in ***(2019)9 Supreme Court Cases 24,*** *discussed the histroy behind the enactment of Prevention of Money -Laundering*

Act,2002 , its statement of objects and reasons and the scope of granting anticipatory bail as follows:

"23. Prevention of Money-laundering Act, 2002 - Special Enactment:- Money-laundering is the process of concealing illicit sources of money and the launderer transforming the money proceeds derived from criminal activity into funds and moved to other institution or transformed into legitimate asset. It is realised world around that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty. The Prevention of Money-laundering Act, 2002 was enacted in pursuance of the Political Declaration adopted by the Special Session of the United Nations General Assembly held in June 1998, calling upon the Member States to adopt national money-laundering legislation and programme, primarily with a view to meet out the serious threat posed by money laundering to the financial system of the countries and to their integrity and sovereignty.

24.Statement of Objects and Reasons to the Prevention of Money- laundering Act, 2002 recognises that money laundering poses a serious threat not only to the financial systems of the countries but also to their integrity and sovereignty. PMLA is a special enactment containing the provisions with adequate safeguards with a view to prevent money- laundering. The Preamble to the Prevention of Money-Laundering Act, 2002 states that "An Act to prevent money-laundering and to provide for confiscation of property derived from, or involved in, money-laundering and for matters connected therewith or incidental thereto."

When considering the scope of Article 20(1) of the Constitution of India, Prevention of Corruption Act and Prevention of Money Laundering Act, it is observed as follows;

"41. Under Article 20(1) of the Constitution, no person shall be convicted of any offence except for violation of law in force at the time of commission of that act charged as an offence. FIR for the predicate offence has been registered by CBI under Section 120B IPC, 420 IPC and Section 13 of the Prevention of Corruption Act and also under Section 8 of the Prevention of Corruption Act. As discussed earlier, Section 120B IPC and Section 420 IPC were included in Part A of the Schedule only by Amendment Act 21 of 2009 w.e.f. 01.06.2009. Section 13 of the Prevention of Corruption Act was included in Part A of the Schedule by Amendment Act 16 of 2018 w.e.f. 26.07.2018. Section 8 of the Prevention of Corruption Act is punishable with imprisonment extending upto seven

years. Section 8 of the Prevention of Corruption Act was very much available in Part A of the Schedule of PMLA at the time of alleged commission of offence in 2007-2008. It cannot therefore be said that the appellant is proceeded against in violation of Article 20(1) of the Constitution of India for the alleged commission of the acts which was not an offence as per law then in existence. The merits of the contention that Section 8 of the Prevention of Corruption Act cannot be the predicate offence qua the appellant, cannot be gone into at this stage when this Court is only considering the prayer for anticipatory bail.

42.Yet another contention advanced on behalf of the appellant is that minimum threshold for the Enforcement Directorate to acquire jurisdiction at the relevant time was Rs.30 lakhs whereas, in the present case, there is no material to show any payment apart from the sum of Rs.10 lakhs (approximately) allegedly paid by INX Media to ASCPL with which the appellant is said to be having no connection whatsoever. The merits of the contention that Section 8 of the Prevention of Corruption Act (then included in Schedule A of the PMLA in 2007-08) whether attracted or not and whether the Enforcement Directorate had the threshold to acquire jurisdiction under PMLA cannot be considered at this stage while this Court is considering only the prayer for anticipatory bail".

With regard to grant of pre-arrest bail, it is held that,

"67. Ordinarily, arrest is a part of procedure of the investigation to secure not only the presence of the accused but several other purposes. Power under Section 438 Cr.P.C. is an extraordinary power and the same has to be exercised sparingly. The privilege of the pre-arrest bail should be granted only in exceptional cases. The judicial discretion conferred upon the court has to be properly exercised after application of mind as to the nature and gravity of the accusation; possibility of applicant fleeing justice and other factors to decide whether it is a fit case for grant of anticipatory bail. Grant of anticipatory bail to some extent interferes in the sphere of investigation of an offence and hence, the court must be circumspect while exercising such power for grant of anticipatory bail. Anticipatory bail is not to be granted as a matter of rule and it has to be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

70. We are conscious of the fact that the legislative intent behind the introduction of Section 438 Cr.P.C. is to safeguard the individual's personal liberty and to protect him from the possibility of being humiliated and *from being subjected to unnecessary police custody. However, the court must also keep in view that a criminal offence is not just an offence against an individual, rather the larger societal interest is at stake. Therefore, a delicate balance is required to be established between the two rights - safeguarding the personal liberty of an individual and the societal interest. It cannot be said that refusal to grant anticipatory bail would amount to denial of the rights conferred upon the appellant under Article 21 of the Constitution of India.*

72. Ordinarily, arrest is a part of the process of the investigation intended to secure several purposes. There may be circumstances in which the accused may provide information leading to discovery of material facts and relevant information. Grant of anticipatory bail may hamper the investigation. Pre-arrest bail is to strike a balance between the individual's right to personal freedom and the right of the investigating agency to interrogate the accused as to the material so far collected and to collect more information which may lead to recovery of relevant information.

76. Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain (1998) 2 SCC 105, it was held that in economic offences, the accused is not entitled to anticipatory bail."

81. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

82. In a case of money-laundering where it involves many stages of "placement", "layering i.e. funds moved to other institutions to conceal origin" and "interrogation i.e. funds used to acquire various assets", it requires systematic and analysed investigation which would be of great advantage. As held in Anil Sharma, success in such *interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 Cr.P.C. is to be invoked only in exceptional cases where the case alleged is frivolous or groundless. In the case in hand, there are allegations of laundering the proceeds of the crime. The Enforcement Directorate claims to have certain specific inputs from various sources, including overseas banks. Letter rogatory is also said to have been issued and some response have been received by the department. Having regard to the nature of allegations and the stage of the investigation, in our view, the investigating agency has to be given sufficient freedom in the process of investigation. Though we do not endorse the approach of the learned Single Judge in extracting the note produced by the Enforcement Directorate, we do not find any ground warranting interference with the impugned order. Considering the facts and circumstances of the case, in our view, grant of anticipatory bail to the appellant will hamper the investigation and this is not a fit case for exercise of discretion to grant anticipatory bail to the appellant."*

17.With regard to the submission of the learned counsel for the petitioners that that once NCLT is seized of the matter, the liability of the corporate debtor for an offence committed prior to the commencement of the corporate insolvency process shall cease, and the corporate debtor shall not be prosecuted for such an offence from the date the resolution plan has been approved and it results in change in management. It is pertinent here to refer the relevant portion of the judgment in ***Manish Kumar Vs. Union of India (UOI) and Ors.***

"It must be remembered that the immunity is premised on various conditions being fulfilled. There must be a resolution plan. It must be approved. There must be a change in the control of the corporate debtor. The new management can not be the disguised avatar of the old management. It can not be even be the related party of the corporate debtor. The new management cannot be the subject matter of an investigation which has resulted in material showing abetment or conspiracy for the commission of the offence and the report or complaint filed thereto. These ingredients are also insisted upon for claiming exemption of the bar from actions against the propery. Significantly every person who was associated with the corporate debtor in any manner and who was directly or indirectly involved in the commission of the offence in terms of the report submitted continues to be liable to be prosecuted and punished for the offence committed by the corporate debtor. The corporate debtor and its property in the context of the scheme of the code constitute a distinct

> subject matter justifying the special treatment accorded to them. Creation of a criminal offence as also abolishing criminal liability must be ordinarily be left to the judgment of the legislature. Erecting a bar against action against the property of the corporate debtor when viewed in the larger context of the objectives sought to be achieved at the forefront of which is maximization of the value of the assests which again is to be achieved at the earliest point of time cannot become subject of judicial veto on the ground of violation of Article 14. We would be remiss if we did not remind ourselves that attaining public welfare very often needs delicate balancing of conflicting interests. As to what priority must be accorded to which interest must remain a legislative value judgment and if seemingly the legislature in its pursuit of the greater good appears to jettison the interests of some it cannot unless it strikingly ill squares with some constitutional mandate suffer invalidation"

18.It is seen from this judgment that there must be a resolution plan and it must be approved. Not only that, there must be a change in the control of the corporate debtor before claiming immunity from prosecution. It is not clear in this case as to whether there is a resolution plan? If there is one, whether it is approved? And whether there is change in the control of corporate debtor? Moreover, these questions cannot be gone into while considering the anticipatory bail.

19.The learned Counsel appearing for the petitioners sought to give explanations for the allegations made in the complaint to CBI. Whatever the explanation given, it has to be scrutinized by checking books of accounts of the first accused company, subsidiaries and related companies and other who have had business transactions with the first accused. It is a lengthy process. As per the submissions of the learned Special Public Prosecutor and also the counter affidavit filed, the investigation is on. It is seen from the submissions by the learned Special Public Prosecutor that the petitioners have not produced any supporting documents for the written off amount of Rs.244 crores,, the details of invoice for Rs.557 crores payable by certain customers to the first accused, the payment details for the purchase of jeweleries worth Rs.4.44 crores. It is also seen that they had diverted the fund of Rs.100 Crores to M/s Cethar Energy Ltd. as equity contribution. There are also allegations of converting the receivables from the subsidiaries and related companies as share investment without movement of funds through bank or cash, purchase of land and building in third party individual's names, receivables from subsidiaries and related companies had been written off from from the books of accounts as bad debt. improper selling of properties of the company, showing third party's property as the property of the company,over statement of stocks, movement of funds through banks other than consortium banks, use of credit facilities to invest in share capital in subsidiaries and related companies. Certainly these aspects have to be enquired by the respondent.

20.The contention of the learned counsel for the petitioners that the offences under sections 420,465,471 were included as schedule offences only from 01/06/2009 and therefore, no investigation is permissible for the offences alleged to have been committed under these sections prior to 01/06/2009 is not a matter for consideration in this anticipatory bail petition. This issue can be taken up only during trial. Assuming that, the petitioners can not be prosecuted for the offences alleged to have been committed under sections 420,465,471 prior to 01/06/2009 under PMLA, there is no prohibition for the prosecution for the offences alleged to have been committed under sections 420,465,471 after 01/06/2009.

21. Yet another important contention of the learned counsel for the petitioner is that CBI has not arrested the petitioners so far. It presupposes that there is no case made out for warranting the arrest of the petitioners. Therefore, in this case also arrest of the petitioners is not necessary. CBI has been entrusted with the task of investigation of scheduled offence. Merely because, the CBI has not arrested the petitioners, it cannot be concluded that the petitioners are exonerated from the case registered by the CBI. Therefore, they cannot take advantage of the fact that the CBI has not arrested them and therefore, they are entitled to be released on anticipatory bail.

22. It is held in ***P.Chidambaram Vs. Directorate of Enforcemen by the Apex Court that,*** *"Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. In a case of money-laundering where it involves many stages of "placement", "layering i.e. funds moved to other institutions to conceal origin" and "interrogation i.e. funds used to acquire various assets", it requires systematic and analysed investigation which would be of great advantage. As held in Anil Sharma, success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 Cr.P.C. is to be invoked only in exceptional cases where the case alleged is frivolous or groundless. Considering the facts and circumstances of the case, in our view, grant of anticipatory bail to the appellant will hamper*

the investigation and this is not a fit case for exercise of discretion to grant anticipatory bail to the appellant."

23. Taking note of the facts and circumstances of this case and the wrongful loss alleged to have been caused by the petitioners to the public sector Bank to the tune of Rs.530.96 Crores and the allegations that the petitioners have made wrongful gain and this being the economic offence and the observations made by the Honourable Supreme Court of India in the aforesaid judgment, this Court is of the considered view that the petitioners are not entitled for the grant of anticipatory bail. Accordingly, this Criminal Original Petition is dismissed.

sd/-
26/04/2021

/ TRUE COPY /

/ /2021
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

TO

1. THE ASSISTANT DIRECTOR(PMLA),
   DIRECTORATE OF ENFORCEMENT,
   OFFICE OF THE JOINT DIRECTOR,
   CHENNAI ZONE-II, SHASTHRI BHAVAN, III BLOCK,
   III AND IV FLOOR, 26, HADDOWS ROAD,
   CHENNAI-600 006.

2. THE SPECIAL PUBLIC PROSECUTOR,
   MADURAI BENCH OF MADRAS HIGH COURT,
   MADURAI.

+1. CC to M/S.JAYAKUMAR.M. Advocate SR.No.3367

ORDER
IN
CRL OP(MD) No.208 of 2021
Date :26/04/2021

ssl
JM/VR/SAR IV/17.05.2021/16P/4C