BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

RESERVED ON : 02/11/2021
PRONOUNCED ON : 30/11/2021

PRESENT

The Hon`ble Mr.Justice B.PUGALENDHI

CRL OP(MD) No.14192 & 14204 of 2021

M.SHAHUL HAMEED ... PETITIONER/INTERVENER/DE-FACTO COMPLAINANT IN BOTH PETITIONS

Vs

1 STATE REP.BY
THE INSPECTOR OF POLICE
DISTRICT CRIME BRANCH,
SIVAGANGAI.
CR.NO.16 OF 2021 ... 1ST RESPONDENT/1ST RESPONDENT/COMPLAINANT IN BOTH PETITIONS

2 D.ROSHINI

3 K.VIJAYALAKSHMI ... 2&3rd RESPONDENTS/PETITIONERS/ACCUSED NOS.2&4 IN CRL OP(MD) No.14192 of 2021

2 P.KAMARAJ

3 K.SATHISKUMAR ... RESPONDENTS/PETITIONERS/ACCUSED NOS.3&5 IN CRL OP(MD) No.14204 of 2021

IN BOTH PETITION'S

For Petitioner : MR.Isaac Mohanlal, Senior Counsel for M/s.Thayumana Swamy
For Respondent-1 : Mr.P.Kottai Chamy, Government Advocate (Crl.Side)
For Respondents-2 & 3 : Mr.R.Anand for Mr.S.Thangaraj

PETITION FOR CANCELLATION OF BAIL Under Sec. 439(2) Cr.P.C.

Prayer in CRL OP(MD). 14192/ 2021 :

To cancel the Anticipatory bail granted by the Learned Principal District and Sessions Judge, Sivagangai to the 3 and 5 respondents / accused in Crl.M.P.No.2158 of 2021 dated 29/07/2021 in Crime No.16 of 2021.

Prayer in CRL OP(MD). 14204/ 2021 :

To cancel the Anticipatory Bail granted by the Learned Principal District and Sessions Judge, Sivagangai to the 3 and 5 respondents / accused in Crl.M.P.No.2894 of 2021 dated 13/09/2021 in Crime No.16 of 2021.

COMMON ORDER : The Court Made the following order :-

These petitions have been filed under Section 439(2) of Cr.P.C, to cancel the anticipatory bail granted by the learned Principal Sessions Judge, Sivagangai to the accused Nos.2 to 5 in Crl.M.P.Nos.2158 & 2894 of 2021.

2.The respondents/accused have floated an Agency in the name of D.K Commodities Trading as if it is a Franchise of Bullion Box and assured people that if they deposit lump sum amount, the depositors will get lump sum returns. They informed the people that the investments would be deposited in gold, silver and crude oil and the returns would be paid to them on monthly basis. Based on the assurance given by the respondents/accused, the defacto complainant, his family members and other persons deposited huge amount in the accused Company. The defacto complainant and his family members alone have deposited a sum of Rs.80,00,000/- and as monthly return, a sum of Rs.1,50,000/- has been paid to them as profit. The defacto complainant suspected their business and on verification, it was found that in order to cheat the public, the accused have started this Company and defrauded the public money to the tune of Rs.10,77,55,000/-. Hence, the defacto complainant and other persons, who are the investors in the Company, have lodged a complaint before the Superintendent of Police, Sivagangai District on 08.07.2021 and the same was forwarded to the respondent Police. Thereafter, the case was registered as against the respondents/accused in Crime No.16 of 2021 for the offence punishable under Sections 406, 414, 420, 425 and 506(ii) of IPC r/w Section 120(b) of IPC.

3.The accused Nos.2 and 4 have filed an application for anticipatory bail before the Principal District and Sessions Court, Sivagangai in Crl.M.P.No.2158 of 2021 and the said application was allowed by the learned Sessions Judge, by order dated 29.07.2021, as follows:

> *On perusal of the records it could be seen that the present petitioners and other accused were committed the offence of criminal breach of trust and forgery for the purpose of cheating and using as genuine a forged documents and cheated Rupees Ten Crores and Seventy Seven Lakhs. Thus, a case has been registered against the petitioners along with other accused.*
>
> *It is seen from the records that there is no previous*

case is pending against the petitioners/A2, A4 and the petitioner/A2, A4 are the women and petitioner/A4 aged about 60 years and on the basis of said complaint, A3 has filed a petition before the Hon'ble High Court of Madurai Bench against the respondent Police and defacto complainant in CRL.O.P.(MD).No.9340 of 2021 dated 12.07.2021, for seeking direction not to harass the petitioners and his family members and same was conceded by the learned Public Prosecutor. Hence, on considering the above merits and pandemic situation Covid-19 2nd wave threat and petitioners/A2, A4 are the women and petitioner/A4 aged about 60 years, this Court is inclined to grant anticipatory bail to the petitioners/accused persons with following conditions.

4.The accused Nos.3 and 5 have filed similar application for anticipatory bail before the Principal Sessions Court, Sivagangai, in Crl.M.P.No.2320 of 2021 and the learned Principal Sessions Judge, by order dated 31.08.2021, dismissed the application as follows:

"*the cheated amount is very huge and also the other accused has to be arrested in order to secure the amount deposited by the investors, and the investigation is in preliminary stage and many persons raised complaints about the Cheating and Criminal Breach of trust committed by the accused in this case. Further, in the objection submitted by the prosecution, it is mentioned that the petitioners along with other accused were cheated almost 113 persons. Out of them, many of complainants are Senior Citizens especially ladies. On perusal of the case on hand many more persons they have invested their life long earning amounts in their institution and out of complainant most of their ladies and senior citizens and if the petitioners/A3 and A5 were enlarged on Anticipatory bail, in all probability they might abscond and also influence the investigation, thereby changing the course of the entire case.*

Further, in the Bail petition itself, the petitioners/Accused No.A3 and A5 mentioned that A1 in this case has filed Insolvency petition before the 3rd Additional Sub-Court, Madurai and the same is in adjudication. Further in this initial stage this Court need not go into the merit of the case and also regarding the Insolvency petition filed before the 3rd Additional Sub-Court, Madurai. Further, the learned Public Prosecutor argued that some more persons are come forward to give complainant about the Criminal Breach of Trust and forgery alleged to have been committed by the Accused.

Further the counsel for the petitioner argued that already A2 and A4 are released on Anticipatory Bail and hence to enlarge this petitioners/accused on Anticipatory bail. Releasing of the co-accused is not a ground for enlarging the other accused on bail. While determining the Bail petition, the velocity and Gravity of the offences and the roll of the accused in such offence should be taken into account. In the case on hand, this petitioners/A3 and A5 have played a vital role in the alleged offence and, if the petitioners enlarged on anticipatory bail, it would affect the further course of investigation, and the remedy to the investors will be hugely affected, and this petitioners have a way to tamper, and hamper the witness and investigation.

Furthermore, this Court considering the vehement objection raised by the learned Public Prosecutor and learned counsel for the intervenor/defacto complainant and also considering the nature of offence, which is grave in nature and the properties are yet to be recovered and the amount involved in this case is very huge one and as discussed supra, this Court is of the considered view that it may not be ideal to enlarge the petitioners/A3 and A5 on Anticipatory bail at this nascent stage of investigation. Thus, it is decided.

5.Within 10 days, the accused Nos.3 and 5 moved second application for anticipatory bail in Crl.M.P.No.2894 of 2021 and the same was allowed by the learned Principal Sessions Judge, Sivagangai, as follows:

On perusal of the records it could be seen that the present petitioners and other accused were committed the offence of criminal breach of trust and forgery for the purpose of cheating and create some forged documents and cheated the amount of Rs.10,77,00,000/- (Rupees Ten Crores and Seventy Seven Lakhs). Thus, a case has been registered against the petitioners along with other accused.

It is seen from the records that there is no previous case is pending against the petitioners/A3, A5 and petitioner/A3 aged about 64 years and same was conceded by the learned Public Prosecutor. Even though, the learned Public Prosecutor contended that the investigation is in nascent stage but on considering the pandemic situation COVID-19 3rd wave threat and also on considering the age of the petitioners, this Court is inclined to grant anticipatory bail to the petitioners/accused persons with following conditions.

6.In the above applications, the defacto complainant has also filed the applications to intervene and raised an objection that the amount involved in this case is Rs.10,77,50,000/-, which was also taken note of by the learned Sessions Judge. However, the learned Sessions Judge, who dismissed the very same application filed by the accused Nos.3 to 5 that the accused are not entitled for anticipatory bail, considered the anticipatory bail of the accused Nos.3 and 5 on 13.09.2021 on the ground of COVID-19 third wave threat. However, the learned Sessions Judge has failed to assign any reason for changing his decision taken on 31.08.2021 and simply granted anticipatory bail on the ground of COVID-19 third wave threat, when there is no such symptom prevailing in the State.

7.Mr.R.Anand, the learned counsel appearing for the respondents submits that while granting anticipatory bail under Section 438 of Cr.P.C, the Court need not assign any reason in detail. He further submits that the defacto complainant has acted as agent and collected deposits on behalf of the other accused. Therefore, he is also liable to be added as co-accused and the co-accused cannot lodge a complaint as well as file application for cancellation of anticipatory bail as against the co-accused. According to the learned counsel for the respondents/accused, none of the investors have come forward to lodge any complaint. The accused No.1 is still absconding. The respondents are the father, mother, brother and sister of A1 and they have been unnecessarily roped in as accused in this case. The learned counsel has relied on the decisions of the Hon'ble Apex Court of India in the case of ***Susil Akarval vs STATE (NCT OF DELHI) reported in 65 2008 (1) SCC 632 133*** and the relevant portion in paragraph No.7 is extracted hereunder:-

> 7.*We have heard the learned counsel for the respective parties at length.*
> In the light of the conflicting views of the different Benches of varying strength, the following questions are referred for consideration by a larger Bench:
> *"(1)Whether the protection granted to a person under Section 438 Cr.P.C. should be limited to a fixed period so as to enable the person to surrender before the Trial Court and seek regular bail.*
> *(2) Whether the life of an anticipatory bail should end at the time and stage when the accused is summoned by the court." 7.1 At the outset, it is required to be noted that as such the expression "anticipatory bail" has not been defined in the Code. As observed by this Court in the case of Balchand Jain (supra), "anticipatory bail" means "bail in anticipation of arrest". As held by this Court, the expression "anticipatory bail" is a misnomer inasmuch as it is not as if bail is presently granted by the Court in anticipation of arrest. An application for "anticipatory*

bail" in anticipation of arrest could be moved by the accused at a stage before an FIR is filed or at a stage when FIR is registered but the charge sheet has not been filed and the investigation is in progress or at a stage after the investigation is concluded. Power to grant "anticipatory bail" under Section 438 of the Cr.P.C. vests only with the Court of Sessions or the High Court. Therefore, ultimately it is for the concerned court to consider the application for "anticipatory bail" and while granting the "anticipatory bail" it is ultimately for the concerned court to impose conditions including the limited period of "anticipatory bail", depends upon the stages at which the application for anticipatory bail is moved. A person in whose favour a prearrest bail order is made under Section 438 of the Cr.P.C. has to be arrested. However, once there is an order of prearrest bail/anticipatory bail, as and when he is arrested he has to be released on bail. Otherwise, there is no distinction or difference between the prearrest bail order under Section 438 and the bail order under Section 437 &439 of the Cr.P.C. The only difference between the prearrest bail order under Section 438 and the bail order under Sections 437 and 439 is the stages at which the bail order is passed. The bail order under Section 438 of the Cr.P.C. is prior to his arrest and in anticipation of his arrest and the order of bail under Sections 437 and 439 is after a person is arrested. A bare reading of Section 438 of the Cr.P.C. shows that there is nothing in the language of the Section which goes to show that the prearrest bail granted under Section 438 has to be time bound. The position is the same as in Section 437 and Section 439 of the Cr.P.C.

7.2 While considering the issues referred to a larger Bench, referred to hereinabove, the decision of the Constitution Bench of this Court in Gurbaksh Singh Sibbia (supra) is required to be referred to and considered in detail. The matter before the Constitution Bench in the case of Gurbaksh Singh Sibbia (supra) was arising out of the decision of the Full Bench of the Punjab and Haryana High Court.

The High Court rejected the application for bail after summarising, what according to it was the true legal position, thus, "(1) The power under Section 438, Criminal Procedure Code, is of an extraordinary character and must be exercised sparingly in exceptional cases only;

(2) Neither Section 438 nor any other provision of the Code authorises the grant of blanket anticipatory bail for offences not yet committed or with regard to accusations not so far levelled.

(3) The said power is not unguided or uncanalised but all

the limitations imposed in the preceding Section 437, are implicit therein and must be read into Section 438.
(4) In addition to the limitations mentioned in Section 437, the petitioner must make out a special case for the exercise of the power to grant anticipatory bail.
(5) Where a legitimate case for the remand of the offender to the police custody under Section 167(2) can be made out by the investigating agency or a reasonable claim to secure incriminating material from information likely to be received from the offender under Section 27 of the Evidence Act can be made out, the power under Section 438 should not be exercised.
(6) The discretion under Section 438 cannot be exercised with regard to offences punishable with death or imprisonment for life unless the court at that very stage is satisfied that such a charge appears to be false or groundless.
(7) The larger interest of the public and State demand that in serious cases like economic 30 offences involving blatant corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised; and
(8) Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

7.3 After considering the scheme of "anticipatory bail" under Section 438, Cr.P.C. and while not agreeing with the Full Bench, this Court has observed and held as under:
"12. …..By any known canon of construction, words of width and amplitude ought not generally to be cut down so as to read into the language of the statute restraints and conditions which the legislature itself did not think it proper or necessary to impose. This is especially true when the statutory provision which falls for consideration is designed to secure a valuable right like the right to personal freedom and involves the application of a presumption as salutary and deep grained in our criminal jurisprudence as the presumption of innocence. Though the right to apply for anticipatory bail was conferred for the first time by Section 438, while enacting that provision the legislature was not writing on a clean slate in the sense of taking an unprecedented step, insofar as the right to apply for bail is concerned. It had before it two cognate provisions of the Code: Section 437 which deals with the power of courts other than the Court of Session and the High Court to grant bail in nonbailable cases and

Section 439 which deals with the "special powers" of the High Court and the Court of Session regarding bail…..

The provisions of Sections 437 and 439 furnished a convenient model for the legislature to copy while enacting Section 438. If it has not done so and has departed from a 31 pattern which could easily be adopted with the necessary modifications, it would be wrong to refuse to give to the departure its full effect by assuming that it was not intended to serve any particular or specific purpose. The departure, in our opinion, was made advisedly and purposefully: Advisedly, at least in part, because of the 41st Report of the Law Commission which, while pointing out the necessity of introducing a provision in the Code enabling the High Court and the Court of Session to grant anticipatory bail, said in para 39.9 that it had "considered carefully the question of laying down in the statute certain conditions under which alone anticipatory bail could be granted" but had come to the conclusion that the question of granting such bail should be left "to the discretion of the court" and ought not to be fettered by the statutory provision itself, since the discretion was being conferred upon superior courts which were expected to exercise it judicially. The legislature conferred a wide discretion on the High Court and the Court of Session to grant anticipatory bail because it evidently felt, firstly, that it would be difficult to enumerate the conditions under which anticipatory bail should or should not be granted and secondly, because the intention was to allow the higher courts in the echelon a somewhat free hand in the grant of relief in the nature of anticipatory bail. That is why, departing from the terms of Sections 437 and 439, Section 438(1) uses the language that the High Court or the Court of Session "may, if it thinks fit" direct that the applicant be released on bail. Subsection (2) of Section 438 is a further and clearer manifestation of the same legislative intent to confer a wide discretionary power to grant anticipatory bail. It provides that the High Court or the Court of Session, while issuing a direction for the grant of anticipatory bail, "may include such conditions in such directions in the light of the facts of the particular case, as it may think fit", including the conditions which are set out in clauses (i) to (iv) of subsection (2). The proof of legislative intent can best be found in the language which the legislature uses.

Ambiguities can undoubtedly be resolved by resort to extraneous aids but words, as wide and explicit as have been used in Section 438, must be given their full effect, *especially when to refuse to do so will result in undue impairment of the freedom of the individual and the presumption of innocence. It has to be borne in mind that anticipatory bail is sought when there is a mere apprehension of arrest on the accusation that the applicant has committed a non bailable offence. A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, insofar as one may, and to give full play to the presumption that he is innocent. In fact, the stage at which anticipatory bail if generally sought brings about its striking dissimilarity with the situation in which a person who is arrested for the commission of a nonbailable offence asks for bail. In the latter situation, adequate data is available to the court, or can be called for by it, in the light of which it can grant or refuse relief and while granting it, modify it by the imposition of all or any of the conditions mentioned in Section 437.*

8.In reply to the same, Mr.Isaac Mohanlal, the learned Senior Counsel appearing for the petitioners submits that all these respondents have actively participated in the commission of offence and the learned Senior Counsel has drawn the attention of this Court on the pamphlet issued by the accused on behalf of D.K.Commodities Trading Private Limited. In the said pamphlet, the names of the respondents are also mentioned as the persons to be contacted for deposits and their phone numbers were also furnished. In the pamphlet, it has been stated that they are having different establishments at Madurai, in which, one establishment is namely P.K Oil Stores that is in the name of the accused No.1 and another establishment is in the name of the accused No.4. The accused No.2 is the wife of the accused No.1 and the accused No.5 is the brother of the accused No.1. Their names are also available in the pamphlet along with their contact numbers. The accused through the pamphlet have collected amounts from the general public and assured the depositors that on single deposit, they will get monthly income regularly.

9.This is a case of fraud committed by the accused to an extent of Rs.10,77,50,000/- and more than 600 persons have been cheated by the respondents/accused. The amount is yet to be recovered. The case was registered only on 16.07.2021. The accused No.1 is yet to be secured by the Investigation Agency and the amounts which were collected by the accused have been transferred to various other places. The accused No.1 has also filed an Insolvency petition before the Sub-Court, Madurai. Though this Court provided an opportunity to the accused to produce the materials as to how they conducted this scheme, the accused have not produced any document in support of their contention. Further, the learned Principal Sessions

Judge, who dismissed the earlier application filed by the accused Nos.3 and 5 on the ground that if the accused are released on anticipatory bail, it would affect the further course of investigation and the remedy to the investors will be hugely affected, granted anticipatory bail to the accused persons on the ground of COVID-19 third wave threat. Hence, considering the gravity of offence, the volume of fraud committed, the manner in which the anticipatory bail has been granted on the ground of COVID-19 second wave threat and third wave threat , this Court is prima facie satisfied that the anticipatory bail granted by the learned Principal Sessions Judge is liable to be cancelled. Accordingly, these Criminal Original Petitions are allowed and the anticipatory bail granted to the private respondents/accused Nos.2 to 5 by the learned Principal District and Sessions Judge, Sivagangai, in Crl.M.P.Nos.2158 & 2894 of 2021 dated 29.07.2021 and 13.09.2021 stand cancelled.

sd/-
30/11/2021

/ 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 PRINCIPAL DISTRICT AND SESSIONS JUDGE,
SIVAGANGAI.

2 THE INSPECTOR OF POLICE
DISTRICT CRIME BRANCH,
SIVAGANGAI.

3 THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT,
MADURAI.

+1. CC to M/S.THAYUMANA SWAMY Advocate SR.No.8715
+1. CC to M/s.S.THANGARAJ Advocate SR.No.36538

ORDER IN
CRL OP(MD) No.14192 & 14204 of 2021
Date :30/11/2021

RS/JC/SAR.1(28.12.2021) 10P-6C