

Thomas Daniel vs Enforcement Directorate

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Court : Kerala

Decided On : Sep-14-2023

Judge : Honourable Mr. Justice Bechu Kurian Thomas

Appeal No. : Bail Appl./5921/2022

Appellant : Thomas Daniel

Respondent : Enforcement Directorate

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS THURSDAY, THE 14TH DAY OF SEPTEMBER 2023 / 23TH BHADRA, 1945 BAIL APPL. NO. 5921 OF 2022 CRIME NO.ECIR NO.KCZO/32/2020 OF ENFORCEMENT DIRECTORATE, COCHIN PETITIONER/ACCUSED NO.1: THOMAS DANIEL AGED 65 YEARS, PERMANENTLY RESIDING AT INCHIKATTIL HOUSE, P.O. VAKAYAR, KONNI, PATHANAMTHITTA, PIN - 686698 BY ADVS. SRI.C.S.MANU SRI.C.A.ANUPAMAN SRI.T.B.SIVAPRASAD SRI.C.Y.VIJAY KUMAR SMT.MANJU E.R. ADV.DILU JOSEPH SRI.ANANDHU SATHEESH ADV.ALINT JOSEPH RESPONDENTS/COMPLAINANT: 1 ENFORCEMENT DIRECTORATE REPRESENTED BY ITS DEPUTY

DIRECTOR, DIRECTORATE OF ENFORCEMENT, GOVERNMENT OF INDIA, MINISTRY OF FINANCE, DEPARTMENT OF REVENUE, ERNAKULAM, PIN - 682011 *2 ANIAMMA KOSHY W/O GEORGE BABU KIDANGIL HOUSE ATHIRUMKAL P.O., PATHANAMTHITTA 689693. *(ADDL. R2 IS IMPEADED AS PER ORDER DATED 30-08-2022 IN CRL.MA NO.1/2022) B.A. No.5921/22 -:2:-

*3 POPULAR FINANCE DEPOSITORS ASSOCIATION, ABOVE RAJ AIR TRAVELS, CHANDANAPALLY P.O., PATHANANDINITTA DISTRICT 689 648 REPRESENTED BY ITS GENERAL SECRETARY SHRI THOMAS VARGHESE *(ADDL.R3 IS IMPEADED AS PER ORDER DATED 28-09-2022 IN CRL.MA NO.2/2022) BY ADVS. SRI.S.MANU, DSGI SRI.JAISHANKAR V.NAIR SRI.T.K.RAJESHKUMAR SRI.G.HARIKUMAR (GOPINATHAN NAIR) SRI.AKHIL SURESH SMT.ANU BALAKRISHNAN NAMBIAR SRI.ATHUL M.V. SRI.MANOJ V GEORGE SRI.ASWIN K.R. SRI.MATHEWS BENNY SMT.KEERTHANA.V SMT.THUSHARA PAILY SMT.APARNA SOMARAJAN SMT.ARCHANA KRISHNAN K.R.

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 25.08.2023, THE COURT ON 14.09.2023 PASSED THE FOLLOWING: B.A. No.5921/22 -:3:- C.R.

BECHU KURIAN THOMAS, J.

----- B.A. No.5921 of 2022
----- Dated this the 14th day of September,
2023

ORDER

The constitutional courts are entrusted with the solemn function

of protecting the liberty of the individual, which manifests as fundamental rights. Punishment before conviction is the antithesis of the rule of law. When the liberty

of an individual is pitted against the remote possibility of a conviction much later, the scales of balance must lean in favour of the former. The above prefatory observations are necessary in this case.

2. Petitioner is the accused in Crime No.ECIR

No.KCZO/32/2020 on the files of the Directorate of Enforcement, Kochi, alleging offences punishable under section 4 of the Prevention of Money Laundering Act, 2002 (for short PML Act). Petitioner seeks regular bail under section 45 of the PML Act. B.A. No.5921/22 -:4:-

3. Prosecution alleges that petitioner and the other accused

had cheated many depositors by collecting fixed deposits without authority, after promising to pay interest and failed to pay either the interest or repay the amounts collected and thereby committed the offence of breach of trust and cheating. The amounts so collected were allegedly used as untainted money for the acquisition of property and has thus committed an offence under section 3 of the PML Act.

4. Crime No.1740 of 2020 of Konni Police Station was initially

registered, and petitioner was arrested on 29.08.2020. Later, as many as 1368 crimes were registered against the accused. Those crimes form the basis for the predicate offences. Petitioner continued in custody till 11-03-2021. Thereafter, based on the directions of this Court, the crimes were transferred to the Central Bureau of Investigation, which registered Crime No. RC 1/2021/CBI/Cochin of 2021 alleging offences under the Banning of Unregulated Deposit Schemes Act, 2019 apart from sections 406 and 420 of the Indian Penal Code 1860 (for short, the IPC). The investigation by the CBI is still proceeding, and no final report has been filed for the alleged predicate offences. While so, the Enforcement Directorate (for short,

B.A. No.5921/22 -:5:-

the ED) filed ECIR No.32/2020, initiating proceedings under sections 3 and 4 of the PML Act and arrested the petitioner on 09.08.2021. Thereafter, on 07.10.2021,

i.e. on the 58 th day after arresting the petitioner by ED, a complaint under section 44 of the PML Act was filed. Thus, the accused is alleged to have committed the offence of money laundering under the PML Act.

5. The bail application filed earlier before this Court was

dismissed by order dated 05-05-2022, in B.A No. 7709/2021. Thereafter, petitioner filed an application for grant of default bail under section 167(2)(i)(a) of Cr.P.C before the Sessions Court, Ernakulam. After the application claiming default bail was filed on 15-06-2022, the learned Sessions Judge took cognizance of the

offence on 20-06-2022 and dismissed the bail application by order

dated 30-06-2022.

6. This application is preferred by the petitioner pleading that

he is innocent of the allegations and that he has not committed any offence of money laundering. Petitioner alleges that from the year 1965 onwards he had been conducting the business without any complaint and that not a single penny had been siphoned off by him. Petitioner also alleged that the fixed deposits given by the

B.A. No.5921/22 -:6:- complainants had not become repayable, that only the interest became payable, and that he could not cater to the interests due on the deposits from April 2020 onwards due to the lockdown imposed on account of the outbreak of the COVID-19 pandemic and not due to any fraudulent act.

7. Petitioner further alleged that he has been falsely implicated

upon misconceptions and that despite investigation by the local police and even by the CBI, no offence has been made out, which is the reason for them not even filing a final report till date. Petitioner has pleaded that all documents, computers, servers, statements and books of account kept in all the branch offices as well as the head office have been seized. Further, all bank accounts and properties of the petitioner and other accused have either been frozen or attached by the

competent authority and therefore, there is no possibility of the petitioner fleeing from the country or conducting any further business. Petitioner has also alleged that discussions are going on with other potential business concerns to restructure the business and to repay the deposits of the investors under a settlement scheme to be worked out, and therefore petitioners presence is extremely essential for the negotiations.

B.A. No.5921/22 -:7:-

8. Arguments were addressed by various counsels spread

over several months. Due to the inconvenience of the respective counsel and the Court holidays, the arguments could not be completed. Attempts to hold hearings during court vacations also did not fructify.

9. Sri.C.S.Manu, the learned counsel for the petitioner,

contended that the continued detention of the petitioner is unauthorised and illegal for various reasons. The learned counsel based his arguments on the following points:

(i) The complaint filed under section 44 of the PML Act on 07.10.2021 is only for the purpose of defeating the provisions of section 167(2) of the Cr.P.C and to deny the default bail to the petitioner.

(ii) The investigation into the complaint has not yet been completed, which is evident from the complaint filed on the 58th day, which specifically mentions that further investigation is still going on.

(iii) The predicate offences for which the petitioner is proceeded

against under the PML Act are still under investigation by the CBI, and the final report has not even been filed after three years of investigation. Since the predicate offences have not even been charged against the petitioner, it is B.A. No.5921/22 -:8:- impermissible to proceed under the PML Act.

(iv) The allegation for registering the crime under the PML Act

was that the petitioner had siphoned off the proceeds of crime to Australia which issue, as is evident from the complaint, is still under investigation and hence the final report in respect of the crime cannot be deemed to have been filed within 60 days of the arrest of the petitioner.

(v) The petitioner had been in custody from 29.08.2020 till

11-03-2021 and again from 09-08-2021 till 27-08-2022 when this Court directed release of the petitioner on interim bail noticing that his continued detention was illegal without an order of remand. Considering the period of detention already undergone, no purpose would be achieved by further detention, especially since the petitioner had surrendered his passport and is willing to abide by any condition that may be imposed.

(vi) For the last 67 years since the petitioner and his family

have been carrying on the business, no offence has been alleged against them by any depositor, and the first complaint that arose against them was during the COVID times when due to circumstances beyond their control, they could not cater to the interest due to the depositors.

(vii) The first complainant Smt. Annamma had been a depositor with the petitioner for decades and to whom not even once had there been any default in payment of interest or failure B.A. No.5921/22 -:9:-

to return the deposit, and her complaint triggered all other depositors to demand return of their money. Due to Covid-19 pandemic, the entire country was reeling under financial difficulty, and hence petitioner could not recover the money invested in the market to repay the depositors who demanded, which triggered the slide. There was never any dishonest or fraudulent intention to cheat any person and that petitioner was only a victim of the circumstances. (viii) The only predicate offence that can be charged against the petitioner is under section 420 IPC but

the ECIR was registered for offences which were not even predicate offences.

(ix) The offence under section 420 IPC is not at all made out

as there was never any intention to cheat from the inception, and therefore, the petitioner can never be guilty of the predicate offence under any circumstances. The ingredients of the offence of cheating are totally absent, and none of the alleged predicate offences are supported by any material.

(x) The offence of accepting deposits without a license under

section 45S of the Reserve Bank of India Act 1934 or under the BUDS Act or even under the Kerala Protection of Interests of Depositors in Financial Establishments Act, 2013, are not scheduled offences, and hence the complaint registered under the PML Act is malafide. B.A. No.5921/22 -:10:-

(xi) The statement purported to have been obtained under

section 50 of the PML Act cannot strictly be treated as a statement under the said provision. The precautions required to be followed under section 50 of the PML Act was not observed and further, a reading of the statement will reveal that it was not a voluntary statement at all.

(xii) Petitioner is almost a septuagenarian and is in the process

of identifying potential investors to take over the liabilities and clear the dues to all the depositors and his presence is very essential for that purpose. Reliance was placed on W.P.(C) No. 15846/2023 filed by the investors association seeking directions to explore the possibilities of such settlement, including its authenticity. In the counter affidavit filed by the petitioner, he asserted that the proposal and attempts to repay the amounts due to the depositors are genuine, and the draft scheme for take- over and revival of the companies of the petitioner was produced as Exhibit R3(a).

10. Contradicting the contentions addressed on behalf of the

petitioner, Sri.S.Manu, the learned Deputy Solicitor General of India, and Sri. Jaishankar V. Nair, the learned Standing Counsel for the ED submitted that petitioner had committed a serious offence and had laundered the money collected from the public. It was contended that the intention of the legislature in restricting the right of courts to grant

B.A. No.5921/22 -:11:-

bail is clearly expressed in section 45 of the Act, and therefore, in the absence of any finding by the court that the petitioner is not guilty of the offence, bail ought not to be granted. Learned DSGI also submitted that in view of the filing of the complaint on 07.10.2021, section 167(2) Cr.P.C does not apply to the case. According to the learned Counsel, as per Explanation (ii) of section 44 of PML Act, subsequent complaints or additional complaints can also be treated as a new complaint, and in such circumstances, the further investigation, which is still continuing, is not a step unknown to law. The learned DSGI also submitted that since the petitioner had defrauded a large number of investors and the proceeds of crime runs into more than rupees thousand crores, releasing him on bail at this juncture would prejudice the prosecution as well as the investors. It was submitted that petitioner had collected money from depositors and, without their knowledge, treated those deposits as investments in Limited Liability Partnerships, giving shares in those firms to the prejudice of the investors and against their wishes.

11. The learned Deputy Solicitor General of India asserted, after referring to the various provisions of the Statute, that, under section 45 of the Act, twin conditions are required to be satisfied B.A. No.5921/22 -:12:-

before a court can grant bail. Referring to the decision in Vijay Madanlal Choudhary and Others v. Union of India and Others 2022 SCC OnLine SC 929, it was argued that in the instant case, both the twin conditions are not satisfied since there are explicit materials to come to the conclusion that the petitioner is guilty of the offences alleged. The learned counsel further argued, referring to the statements given under section 50 of the PML Act, that petitioner had practically

admitted the commission of offence under the said statute and therefore he deserves no lenient approach.

12. Sri. Manoj V. George, learned counsel, appearing for the

second respondent - defacto complainant and Sri. G. Harikumar learned counsel, appearing on behalf of the third respondent depositors association, also addressed the court exhaustively. The learned Counsel contended that the petitioner ought not to be released on bail and submitted that the total amount defrauded by the petitioner and laundered by him runs into a few thousand crores, and therefore, the intention of the legislature, which is evident from section 45 of the PML Act, ought not to be ignored while considering the application for bail. The learned Counsel also submitted that petitioner had amassed huge wealth by dishonestly and fraudulently

B.A. No.5921/22 -:13:-

cheating the general public and purchasing properties and other assets and failed to return the deposit or pay the interest. It was also submitted that petitioner had utilized the deposits illegally collected to start partnership businesses and even allotted shares to depositors in firms started by him, without the consent of the depositors.

13. The learned Counsel pointed out that earlier, while considering B.A. No.7709/2021, a learned single Judge of this Court had found that there are prima facie materials to come to the

conclusion that the petitioner is guilty of the offences alleged. It was

argued that in the absence of any change in the circumstances or on any of the twin conditions, the satisfaction of this Court expressed in the aforementioned bail order stares at the face of the petitioner. It was contended that for the said reason also, this application is liable to be rejected. Several decisions were referred to by the learned Counsel in support of their contentions.

14. I have considered the rival contentions and also perused the materials handed over across the Bar, especially those that were attached along with the complaint filed by the ED.

15. The predicate offences alleged against the accused are B.A. No.5921/22 -:14:- under sections 420, 406, 409, 421, 465 and 471, read with section 120B of IPC. The offences under sections 406, 409 and 465 IPC are not predicate offences, and their reference in some of the paragraphs of the complaint can only be treated as inadvertent errors.

16. The issue for consideration is whether the petitioner should be released on regular bail. The learned Counsel on either side also addressed arguments about petitioners claim to statutory bail under the provisions of section 167 Cr.P.C.

17. Tracing the history and the principles behind default bail, the Supreme Court had, in a recent decision in Ritu Chhabria v. Union of India [2023 INSC 436], noticed how the Constitutional Courts had decried the attempt of investigating agencies in filing incomplete final reports or complaints and to later file additional or supplementary charge sheets as a method of defeating the concept of statutory bail. The Court observed that the question of resorting to a supplementary charge sheet u/s 173(8) of the Cr.P.C only arises after the main charge sheet has been filed, and as such, a supplementary charge sheet, wherein it is explicitly stated that the investigation is still pending, cannot under any circumstances be used to scuttle the right of default bail, for then the entire purpose of default bail is defeated and the purpose of filing of a charge sheet or

B.A. No.5921/22 -:15:- a supplementary charge sheet becomes a mere formality and a tool to ensure that the right of default bail is scuttled.

18. Though the above observations may have relevance in the instant case, considering the nature of the order that is being rendered and taking into reckoning the period of 19 months of custody already undergone by the

petitioner, the said question has become academic and is therefore not being adverted to.

19. Petitioner was initially arrested on 29-08-2020 and

continued in custody until 11-03-2021 for cheating and criminal breach of trust alleged in Crime No. 1740/2020 of Konni Police Station and other connected crimes. Later, under the direction of this Court, the investigation into the crimes registered with the local police was transferred to the CBI, which registered a crime as RC1/2021/CBI/Cochin on 01-02-2021. By then, ED had registered ECIR No. 32/2020 on 17-09-2020.

20. After petitioner was released on bail on 11-03-2021 for the

crimes registered by the local police/CBI, he and his family were arrested by the ED on 09-08-2021. Petitioner continued in custody till 27-08-2022 when this Court granted interim bail on noticing that he B.A. No.5921/22 -:16:-

was continuing in illegal detention from 09.08.2022 without any orders of the Special Court extending his remand in custody. The remand of the petitioner as ordered by the Special Court was only till 09.08.2022 and thereafter, the said remand was not extended. When the failure to extend the remand was brought to the notice of this court on 26.8.2022, after ascertaining the veracity of the said submissions, petitioner was directed to be released on interim bail forthwith, subject to the condition that he shall not leave Ernakulam District.

21. While considering the prayer for regular bail, this Court

bears in mind the views of the Supreme Court in P. Chidambaram v. Directorate of Enforcement [(2020) 13 SCC 791] that one of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed and that in Vijay Madanlal Choudharys case (supra) that The punishment provided for the offence is certainly one of the principles in deciding the gravity of the offence, however, it cannot be said that it is the sole factor in deciding the severity of the offence as contended by the petitioners. Money laundering is one of the heinous crimes, which not only affects

the social and economic fabric of the nation but also tends to promote other heinous offences, such as terrorism, offences related to NDPS Act, etc . Both decisions were

B.A. No.5921/22 -:17:-

rendered by coordinate Benches and state that one of the principles to decide the gravity of the offence can be the sentence. When the money laundering activity is done to promote activities related to terrorism and NDPS offences, it certainly partakes the character of a heinous crime. Concededly, there is no allegation in the instant case that petitioner had used any of the alleged proceeds of crime for activities like terrorism or for committing NDPS offences. Hence the maximum punishment prescribed for the offence allegedly committed by the petitioner is a period of seven years imprisonment, along with fine as per section 4 of the PML Act.

22. In this context, it is apposite to bear in mind the

observations of the Supreme Court in Vijay Madanlal Choudharys case (supra) that the 2002 Act (PML Act) is intended to initiate action in respect of money laundering activity which necessarily is associated with the property derived or obtained by any person, directly or indirectly, as a result of specified criminal activity. The prosecution under this Act is not in relation to the criminal activity per se but limited to property derived or obtained from specified criminal activity.

23. As far as the claim for regular bail is concerned, this Court bears in mind the rigour of the twin conditions under section 45, B.A. No.5921/22 -:18:-

which stares at the face of the petitioner. However, the said provision stipulates that if the court is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence and that there is no possibility of the accused committing similar offences again, then the court will be justified in granting bail. The Supreme Court, in Vijay Madanlal Choudharys case (supra), had upheld the constitutionality of the said provision. In view of the said judgment, this Court has to first consider whether there are reasonable grounds to believe that the accused

is not guilty in the present circumstances.

24. As mentioned earlier, the predicate offences charged

against the petitioner are under sections 420, 120B, 421, and 471 IPC. Though FIR has been registered against the petitioner for the offences under the BUDS Act and under the Kerala Protection of Interests of Depositors in Financial Establishments Act, 2013 as well, those offences are not scheduled offences under the PML Act and cannot hence be termed as predicate offences. There is nothing to indicate how the offence under section 471 IPC applies to the petitioner's case. Therefore, the main predicate offences charged against the petitioner are under sections 420 and 421 IPC.

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25. From 2020 onwards, the investigation is continuing for the

predicate offences. Though registration of an FIR by itself is sufficient to attract the offence of PML Act, the decision in Vijay Madanlals case (supra) has held that if the predicate offences are quashed, or the accused is discharged, or the predicate offence is not made out, the offence under the PML Act will not lie. Therefore, the question is whether the petitioner can be regarded as guilty of the predicate offence under sections 420 and 421 IPC so as to attract the offence of Money Laundering.

26. To attract section 420 IPC, dishonesty or fraudulent

intention from the beginning is essential. There is no presumption under the PML Act that an accused is guilty. Of course, section 24 of the PML Act provides for the burden of proof and directs that the court shall presume that the proceeds of crime are involved in money laundering. The PML Act has not created a presumption of guilt of the predicate offences on the accused. Section 24 of the PML Act, refers to the burden of proof and states that the court shall presume that the proceeds of crime are involved in money laundering. In Vijay Madanlal Choudharys case, (paragraph 346) it was explained that the burden on the accused under section 24 of the PML Act is an

evidentiary burden and can be discharged at the time of evidence as it is only a rule of evidence. The Court also explained that the legal presumption is about the involvement of proceeds of crime in money laundering, which becomes relevant only after establishing three basic or foundational facts. The foundational facts are:

(i) The criminal activity relating to a scheduled offence has been committed,

(ii) the property in question has been derived or obtained directly or

indirectly, by any person as a result of that criminal activity, and (iii) the person concerned is directly or indirectly involved in any process or activity connected with the said property being proceeds of crime. Therefore, section 24 of PML Act cannot be utilized to presume the guilt of the accused for the predicate offences alleged.

27. Thus, in the absence of any presumption of guilt for the

predicate offences, this Court has to consider whether there are reasonable grounds to believe that petitioner is not guilty of the offence of money laundering as alleged.

28. For the last three and a half years, the predicate offence

has been under investigation. No charge sheet has been filed for the predicate offences. Neither the local police nor the CBI has been able to file a final report regarding the predicate offences alleged. B.A. No.5921/22 -:21:- The said circumstance assumes significance while considering the bail application of an accused who was in custody for more than a year and seven months.

29. Petitioner is alleged to have collected deposits under the

name of different entities without any permission from the RBI. Petitioner is also alleged to have collected deposits and used the same for allotting shares in various partnership firms started by him. Collecting deposits by individuals or firms or by unincorporated associations from the public without permission from the RBI is an offence under section 45S of the Reserve Bank of India Act, 1934. However,

the lack of authorisation to collect deposits by itself will not, prima facie, make it an offence under section 420 of the IPC in the absence of an element of dishonesty or fraud existing from the inception. Collection of deposits through unregulated schemes may fall foul of an offence under other statutes perhaps, but not necessarily the predicate offences, without something more. The very purpose of the BUDS Act was to prohibit the collection of deposits under any unregulated schemes. However, the offence under the BUDS Act is not a predicate offence. Similarly, the offence under the Kerala Protection of Interests of Depositors in Financial

B.A. No.5921/22 -:22:- Establishments Act, 2013, is also not a predicate offence.

30. It is elementary that all deceptions do not amount to

cheating under law. To constitute cheating, the deception must be done with a dishonest or fraudulent intent. Section 415 of the Indian Penal Code, 1860 deals with cheating. The offence of cheating is made up of two ingredients: deception of any person and fraudulently and dishonestly inducing that person to deliver any property. The word dishonestly and fraudulently are defined in sections 24 and 25 of IPC. To establish the offence of cheating, it must be evident that the accused had fraudulent or dishonest intentions when making the promise or the representation. Merely because there was a failure to keep a promise subsequently, culpability in the intention cannot be presumed to exist from the beginning.

31. Reference to the decision in *Hira Lal Hari Lal Bhagwati v. CBI, New Delhi* [(2003) 5 SCC 257] will be sufficient in this context. It was observed in the said decision that:

To hold a person guilty of cheating as defined under section 415 of the Indian Penal Code, it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise with an intention to retain the property. It is settled law, by catena of decisions, that for establishing the offence of cheating,

B.A. No.5921/22 -:23:- the complainant is required to show that the accused had fraudulent or dishonest intention at the time of making the promise or representation. From his mere failure to keep promise subsequently, such a culpable intention right at the beginning, that is, at the time when the promise was made, cannot be presumed.

32. Thus, to attract the offence under section 420 IPC, the dishonest intention must exist from the very beginning. The principles stated in the aforesaid decision are applicable in the instant case.

33. As mentioned earlier, the offences under the BUDS Act

and the Kerala Protection of Interests of Depositors in Financial Establishments Act, 2013 may all be attracted since the accused as a financial establishment had collected money from the public and failed to repay the deposit or pay interest after Covid-19 pandemic rocked the economy of the country. However, the same is not a reason to assume that the offence of cheating under section 420 IPC was committed. The only materials collected by the ED so far are statements purported to have been given under section 50 of the PML Act. However, those statements cannot be relied upon for the purpose of establishing the guilt of an accused under section 420 IPC. Those statements are inadmissible as per the Indian Evidence Act, 1872 for the purpose of arriving at a finding of guilt for the

B.A. No.5921/22 -:24:-

offences under the Indian Penal Code. Even if those statements are assumed to be admissible under the PML Act, those statements cannot be used to justify the guilt of the accused for the predicate offences. In this context, The question of treating the statements as those recorded under section 50 of PML Act, though raised by the counsel for the petitioner, the same is left open for consideration at the appropriate stage.

34. The burden of proving the predicate offence of section 420

IPC thus stands entirely on the prosecution. The offence under section 420 IPC has to be independently established. When the investigation into the predicate

offence has been continuing for the last more than three and a half years, and a final report has not been able to be filed till date, it goes without saying that it cannot be assumed that the accused can be said to be guilty of the offence under section 420 IPC.

35. The offence of cheating based on allotting shares to

depositors, making them partners in the firm, is yet another allegation. Even in the said allegation, the depositors have allegedly received either a share of profits or interest until March 2020, when COVID-19 struck the country. Irrespective of the terminology used, B.A. No.5921/22 -:25:-

the depositors had no objection to the amount received by them until that month. Bearing in mind the adversarial system of criminal jurisprudence and the presumption of innocence of an accused under the general law as far as the predicate offence of section 420 IPC is concerned, this Court is of the considered view that, at this stage when even the final report has not yet been filed, it is difficult to conclude that the accused is guilty of the offence of section 420 IPC. The corollary is that the petitioner can only be held to be not guilty at this juncture.

36. At this juncture, the contention of the learned Counsel for

the petitioner that for the last more than five decades petitioner had been indulging in the business of financing and had never ever cheated a single depositor and that he could not cater to the interest due to the Covid-19 pandemic assumes relevance. His further contention that failure to pay interest for one depositor triggered a chaotic situation when all the depositors started demanding immediate repayment, resulting in the crimes being registered, also cannot be shrugged aside as irrelevant. The materials collected by the ED itself show that amounts as interest or under other

terminologies have already been received by the defacto B.A. No.5921/22 -:26:- complainant and other depositors till March 2020 - the month the nation went into a lockdown. Thus, though the failure to repay the deposits may attract offences under various statutes, however, the offence of cheating under section 420 cannot

be attracted, atleast prima facie.

37. The aforestated principle applies equally to the offence

under section 421 IPC. The said predicate offence has not been charge sheeted yet. There is nothing to indicate at present that there was any dishonest or fraudulent removal, concealment or delivery of any property without adequate consideration to prevent the distribution of property to creditors.

38. The contention of the counsel for the respondents that the

findings in B.A. No.7709/2021, that the accused is prima facie guilty, will bind this Court, though impressive at first blush, on deeper scrutiny, it is clear that the findings in the order in a bail application cannot have a binding effect in the subsequent application. Though on 05.05.2022, this Court had observed that there are prima facie materials to come to the conclusion that the accused is guilty, I am of the opinion that since even after the lapse of more than one year and three months, the investigation into the predicate offence has not

B.A. No.5921/22 -:27:- been completed the said conclusion arrived at by this Court in the earlier bail application cannot be held as binding in the subsequent bail applications.

39. Moreover, in *Shri.Gurbaksh Singh Sibbia and Others v.*

State of Punjab [(1980) 2 SCC 565], the Constitution Bench of the Supreme Court had approved the observation that the object of bail is to secure the attendance of the accused at the trial and the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial or not. It was categorically observed that bail is not to be withheld as a punishment. Further, an accused person who enjoys freedom is in a much better position to look after his case and to properly defend himself than if he is in custody. As a presumably innocent person, an accused is entitled to freedom and every opportunity to look after his own case. It was also observed that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the

judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail."

40. In this context, this Court bears in mind the principles laid down in the decision in *Satender Kumar Antil v. Central Bureau of Investigation and Another* [(2022) 10 SCC 51] and also the B.A. No.5921/22 -:28:-

salutory principle laid down in the decision in *Sanjay Chandra v. Central Bureau of Investigation* [(2012) 1 SCC 40] that In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it is required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty. .. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances. Apart from the question of prevention being the object of a refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

41. As noticed earlier, the petitioner is about 69 years old, and B.A. No.5921/22 -:29:-

all his properties have been attached. He has already spent more than one year and seven months in custody, and his passport has also been surrendered. All his businesses have been closed down, and entire properties attached. There is absolutely no possibility of the petitioner committing further offences of a similar nature. The prefatory statement to this judgment that punishment before conviction

is the antithesis of the rule of law, and when the liberty of an individual is pitted against a future possible conviction, the scales of balance must lean in favour of the former, has utterance at this juncture.

42. Bearing in mind the principles culled out from the decisions

referred to earlier and in view of the discussion mentioned above, this Court is of the considered view that the twin conditions stipulated under section 45 of the PML Act are satisfied, entitling the petitioner to be released on regular bail. It is clarified that the findings entered into in this order are purely for the purpose of this bail application and shall not affect the validity of any other proceedings under the PML Act or the investigation into the predicate offences.

43. In this context, it is necessary to observe that the submission of the learned counsel for the petitioner that there have B.A. No.5921/22 -:30:-

been earnest attempts by the petitioner to clear the liabilities as mentioned in the bail application is found to be of some substance on perusing the pleadings in W.P.(C) No.15846 of 2023. The said writ petition filed by the Popular Group Investors Association, which was impleaded as additional respondent No.3 in this bail application, seeks for a direction to verify the authenticity and to proceed with the proposed settlement. In the said writ petition, a counter affidavit has been filed by the third respondent producing the draft of the scheme of proposal for takeover and revival to clear the liabilities of the depositors. The presence of the petitioner in jail would not benefit the investors, and on the other hand, if at all there is any proposal for such settlement, the petitioners continued presence in jail would

destroy such attempts. In this context, the decision in P.Chidambaram v. Directorate of Enforcement [(2020) 13 SCC 791] and that of Krishna Mohan Tripathi v. State through Enforcement Directorate (AIR 2021 SC 2929) are also relevant.

44. Considering the above circumstances, I am of the view that the petitioner is entitled to be released on bail on the following conditions: B.A. No.5921/22 -:31:-

(a) Petitioner shall be released on bail on him executing a bond for Rs.2,00,000/- (Rupees Two Lakhs only) with two solvent sureties each for the like sum to the satisfaction of the court having jurisdiction.

(b) Petitioner shall co-operate with the continuing investigation and even the trial of the case.

(c) Petitioner shall not attempt to influence the witnesses, nor shall he attempt to tamper with the evidence.

(d) Petitioner shall not commit any similar offences while he is on bail.

(e) Petitioner shall not leave the State of Kerala without the permission of the Trial Court dealing with the case under the PML Act, nor shall he leave the country. In case of violation of any of the above conditions, the

jurisdictional Court shall be empowered to consider the application for cancellation, if any, and pass appropriate orders in accordance with the law, notwithstanding the bail having been granted by this Court. Sd/- BECHU KURIAN THOMAS JUDGE vps

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