IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 13.07.2023

DATE OF DECISION : 01.08.2023

CORAM :

The Hon'ble Mr.JUSTICE M.SUNDAR
and
The Hon'ble Mr.Justice R.SAKTHIVEL

Criminal O.P.No.12229 of 2023,
Criminal Appeal No.678 of 2023
and
H.C.P.No.1114 of 2023
and
Crl.M.P.No.7402 of 2023 in Crl.O.P.No.12229 of 2023
and
Crl.M.P.No.8903 of 2023 in HCP No.1114 of 2023

**Crl.O.P.No.12229 of 2023** :

M.Mohamed Abbas .. Petitioner

Vs.

1.The State represented by
The Superintendent of Police,
National Investigation Agency,
NIA, Police Station,
Ministry of Home Affairs,
Government of India,
New Delhi.

2.The Inspector of Police,
National Investigation Agency,
Chennai Branch,
Chennai
(RC-42/2022/NIA/DLI)'

3.Shri Vipul Alok,
Under Secretary,
CTCR Division,
Ministry of Home Affairs,
North Block, New Delhi. .. Respondents

**Criminal Appeal No.678 of 2023** :

M.Mohamed Abbas .. Appellant

Vs.

Union of India,
represented by
The chief Investigating Officer,
The Inspector of Police,
National Investigation Agency,
Chennai Branch,
Chennai
(RC-42/2022/NIA/DLI) .. Respondent

**H.C.P.No.1114 of 2023** :

M.Syed Mohamed Abuthahir .. Petitioner

Vs.

1.Union of India, represented by
Chief Investigation Officer/

The Inspector of Police,
National Investigation Agency,
Branch Office, Chennai
in RC No.42/2022/NIA/DLI

2.The Superintendent of Prison,
Central Prison, Puzhal,
Chennai. .. Respondents

**Criminal Original Petition No.12229 of 2023** has been filed under Section 482 of Criminal Procedure Code seeking to call for the records in Crime No.RC-42/2022/NIA/DLI on the file of the second respondent police and quash the same as against the petitioner and thus render justice.

**Criminal Appeal No.678 of 2023** has been filed under Section 21 of the National Investigation Agency Act, 2008 to call for the records and set aside the order dated 20.06.2023 in Crl.M.P.No.893/2023 on the file of learned Special Court under National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Case) Poonamallee, Chennai in Crime No.RC-42/2022/NIA/DLI on the file of the respondent police and enlarge the appellant on bail and thus render justice.

**H.C.P.No.1114 of 2023** has been filed under Article 226 of the Constitution of India seeking direction to respondents 1 and 2 to produce the body or person of the petitioner's brother namely M.Mohamed Abbas, S/o Mohamed Zakaria aged about 44 years before this Hon'ble Court and

set him at liberty by quashing the impugned remand order dated 09.05.2023 so far as him concerned passed by learned Special Court NIA Cases (Sessions Court Exclusive Trial of Bomb Blast Cases, Chennai) Poonamallee, Chennai in R.C.No.42/2022/NIA/DLI dated 19.09.2022 on the file of the first respondent and pass such further and other orders as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice.

For Petitioner
in Crl.OP No.12229 of 2023 /
For Appellant
in Crl.A.No.678 of 2023 : Mr.R.Vivekananthan
Mr.S.Jim Raj Milton
Ms.M.Krithika
Mr.S.Parthasarathy

For Petitioner
in HCP No.1114 of 2023 : Mr.M.Ajmal Khan,
Senior Advocate
instructed by
Mr.C.M.Arumugam
Mr.S.Senthil Murugan
Mr.N.M.Shajahan

For all Respondents : Mr.Tushar Mehta,
in Crl.O.P., Solicitor General of India
for sole respondent Mr.S.V.Raju,
in Crl.A. and Addl. Solicitor General of India
for first respondent in HCP :Mr.AR.L.Sundaresan,
Addl. Solicitor General of India
for High Court of Madras
Mr.R.Karthikeyan,
Special Public Prosecutor (NIA)

Mr.B.Mohan,
Special Public Prosecutor (NIA)
Mr.N.Baaskaran
Special Public Prosecutor (NIA)

For 2nd Respondent in HCP : Mr.E.Raj Thilak,
Additional Public Prosecutor

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COMMON ORDER

**M.SUNDAR, J**.

Captioned matters will be governed by this common order.

**FACTUAL MATRIX** :

2 Factual matrix in a nutshell, i.e., facts that are essential for appreciating this common order are that the petitioner Mr.M.Mohamed Abbas is a practicing Advocate [to be noted, Mr.M.Mohamed Abbas is the petitioner in captioned Crl.O.P.No.12229 of 2023, appellant in captioned Crl.A.No.678 of 2023 and Mr.M.Syed Mohamed Abuthahir (Mr.M.Mohamed Abbas's brother) is the petitioner in captioned HCP No.1114 of 2023 but this court shall be referring to him as 'petitioner' in this common order for the sake of convenience and clarity]; that petitioner enrolled as an Advocate in the Bar Council of Tamil Nadu on 01.11.2006; that the petitioner has been practicing as a Lawyer for over

16 ½ years now predominantly in Madurai Bench of Madras High Court and in the District & Sessions Courts, Madurai; that petitioner's father-in-law Mr.Mohamed Ali Jinnah is also a practicing Advocate in Madurai; that on 16.09.2022, Under Secretary with the Ministry of Home Affairs, New Delhi directed the 'National Investigation Agency' [hereinafter 'NIA' for the sake of brevity] to register a 'First Information Report' ['FIR' for the sake of brevity] based on what is described as credible information; that pursuant to such directive, NIA registered FIR No.RC-42/2022/NIA/DLI against 13 named individuals and other unknown persons for suspected offences under Sections 120B, 153A and 153AA of 'The Indian Penal Code (45 of 1860)' [hereinafter 'IPC' for the sake of brevity] and Sections 13, 17, 18, 18B, 38 and 39 of 'the Unlawful Activities (Prevention) Act, 1967 [Act 37 of 1967]' {hereinafter 'UAPA' for the sake of brevity}.

3 The crux and gravamen of the aforementioned FIR is, the accused persons are office bearers of 'Popular Front of India' ('PFI' for the sake of brevity) which is registered as a society under the Societies Registration Act, 1860 (Act 21 of 1860) vide Registration No.S/226/Dist.South/2010 in Delhi; that extremist ideology is being

spread; that alleged activities include planning of unlawful acts, planning of terrorist acts, organising marches, raising of funds for committing terrorist activities and recruitment of members for such activities; that the FIR goes on to say that such activities inter-alia cause communal disharmony and ill feelings among members of different religions; that there is credible information that PFI has been clandestinely associated and is extending support to another terrorist organization; that thereafter, i.e., post FIR, on 28.09.2022, the Central Government declared PFI as a 'unlawful association' within the meaning of Section 2(1)(p) of UAPA; that such declaration is under Section 3(1) of UAPA, for a period of five years; that RC No.42/2022/NIA/DLI (CNR No.TNCH06-000894-2023) {hereinafter 'said case' for the sake of brevity and convenience} is now on the file of 'The Special Court under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases) Chennai at Poonamallee, Chennai-56' ['hereinafter 'trial court' for the sake of convenience and clarity]; that one Thiru Jinnah was summoned by NIA on 05.03.2023 in said case; that on 06.03.2023, petitioner made a post in a social media platform (Face Book) inter-alia alleging that Thiru Jinnah was subjected to custodial torture and condemned the same; that the

petitioner filed a memo of appearance for Thiru Jinnah in said case; that on the very next day, i.e., 07.03.2023, NIA sought permission from authorities concerned for intercepting petitioner's phone conversations; that on 17.03.2023 NIA had filed a final report in trial court against 10 out of 13 named accused in the FIR (after completion of investigation).

4 On 30.03.2023, based on a complaint from Superintendent of Police, NIA, a case vide Crime No.293 of 2023 on the file of Thallakulam Police Station, Madurai City came to be registered against the petitioner for an alleged offence under Section 505(1)(b) of IPC qua the aforementioned social media post on 06.03.2023; that on 27.04.2023, NIA had filed a petition before trial court under Section 173(8) of 'the Code of Criminal Procedure, 1973 (2 of 1974)' [hereinafter 'Cr.P.C' for the sake of brevity and convenience] vide Crl.M.P.No.749 of 2023 for further investigation as against accused persons, namely O/o PFI at Delhi and Purasaiwakkam, Chennai (A-10), A.S.Ismail @ Appamma Ismail (A-11), M.Mohammed Ali Jinnah (A-12), Advocate Mohammed Yusuf (A-14) and others; that on 04.05.2023, 'Investigation Officer' (hereinafter 'IO' for the sake of brevity and convenience) [to be noted, Inspector of Police Mr.V.Arun Magesh, NIA is the IO] filed a memo in trial court arraying

the petitioner and others as accused persons; that on the same day, i.e., on 04.05.2023, IO filed a petition in trial court requesting for search warrants qua petitioner; that on 05.05.2023, search warrants were issued by trial court; that on obtaining search warrants, NIA conducted searches in the residence and farm house of petitioner; that on 08.05.2023, on receipt of final report / charge sheet, trial court had taken cognizance of the same and assigned Special S.C.No.1 of 2023; that on 09.05.2023, the petitioner was arrested; that a remand prayer was made by NIA in trial court qua petitioner and four others (five in all); that trial court acceded to the remand request; that trial court vide order dated 09.05.2023 remanded the petitioner till 23.05.2023; that petitioner filed a bail petition dated 16.05.2023 vide Crl.M.P.No.893 of 2023 inter-alia under Section 439 of Cr.P.C read with Section 43D of UAPA; that NIA filed objections dated 08.06.2023; that trial court in and by 'order dated 20.06.2023 in Crl.M.P.No.893 of 2023' dismissed the bail plea after hearing both sides (hereinafter 'impugned order' for the sake of brevity, convenience and clarity); that captioned criminal appeal (Crl.A.No.678 of 2023) has been filed in this Court on 23.06.2023 under section 21(4) of 'The National Investigation Agency Act, 2008 [Act 34 of 2008]' {hereinafter 'NIA Act'

for the sake of convenience}; that aforementioned 'FIR No.RC-42/2022/NIA/DLI dated 19.09.2022' is sought to be quashed (insofar as the petitioner is concerned) in captioned Crl.O.P.No.12229 of 2023 and therefore, the aforementioned FIR shall hereinafter be referred to as 'impugned FIR' for the sake of convenience; that in the interregnum, on 22.05.2023, captioned HCP No.1114 of 2023 has been filed in this court by brother of the petitioner [Thiru M.Syed Mohamed Abuthahir] inter-alia saying that the remand order dated 09.05.2023 made by the trial court is bad; that this HCP before being assigned a number was listed before this Court for orders regarding maintainability; that this Court in and by order dated 21.06.2023 directed the Registry to assign a number if otherwise in order, preserving rights of respondents (State) to raise the issue of maintainability; that this maintainability order was made by this court inter-alia on a prima facie view that paragraph 71 of ***Gautam Navlakha*** case being ***Gautam Navlakha Vs. National Investigation Agency*** reported in ***2021 SCC OnLine SC 382*** carved out two exceptions qua ***Serious Fraud Investigation Office*** principle [***Serious Fraud Investigation Office Vs. Rahul Modi*** reported in ***(2019) 5 SCC 266***] more particularly paragraphs 19 and 21 thereat; that captioned

matters were tagged considering the common factual matrix and owing to many arguments advanced being either dovetailed or intertwined on facts and law.

**PREFACE** :

5 At the outset, it is deemed appropriate to set out that this court is conscious of the obtaining legal position that determinants / parameters qua a quash plea under Section 482 of Cr.P.C. (to be noted, quash of FIR) and determinants / parameters qua a bail plea more particularly bail plea under section 439 of Cr.P.C read with Section 43D of UAPA are vastly different, the dynamics and dimensions of tests also being so different that some are almost bipolar opposites. It is deemed appropriate to further set out that all the parties before this Court (both sides) also made it clear that this is the obtaining position qua legal drill on hand and arguments were advanced on this platform. Be that as it may (as already alluded to supra) owing to common factual matrix and several legal propositions being dovetailed and some being inextricably intertwined, captioned matters were tagged.

**SUBMISSIONS OF PETITIONER** :

6 The adding (by taking the further investigation route, i.e., section 173(8) of Cr.P.C) and arraying of petitioner as A-17 in impugned FIR is actuated by mala fide and malice as it was solely owing to the post made by the petitioner in social media, i.e., 'Face Book' [hereinafter 'FB' for the sake of brevity] on 06.03.2023 about alleged mistreatment / custodial torture of a accused in said case; that FIR is very generic and does not disclose any specific act much less overt act qua petitioner (now A-17) and that the malice theory is buttressed by plain chronology itself, i.e., NIA seeking permission to intercept petitioner's phone calls on 07.03.2023 immediately after the FB post on 06.03.2023. It was pointed out that the Superintendent of Police (NIA) had lodged a complaint regarding the FB post with the jurisdictional police which had taken the same on file vide Crime No.293 of 2023 for an alleged offence under Section 505(1)(b) of IPC. It was pointed out that further investigation under Section 173 of Cr.P.C was sought only on 27.04.2023 after the face book post, after seeking permission to intercept petitioner's phone calls and after alleged complaint with the jurisdictional police on 30.03.2023.

7 It was argued that another Advocate has also been roped in and that mala fide theory is buttressed by this factum which demonstrates that the intention is to intimidate, harass and instill fear in the minds of members of the Bar who appear in PFI and like matters. In support of this argument, learned counsel gave a list of as many as 10 cases in which the petitioner has entered appearance and is defending various accused in PFI / UAPA matters. It was pointed out and emphasized by learned counsel for petitioner that while originally the petitioner was not even named in the impugned FIR but post FB post further investigation route was taken and NIA has come up with a completely new theory that the petitioner is an important core team leader of PFI and that he had worked for organising training camps for PFI cadres to target persons who are against the ideology of PFI. The crux and gravamen of this limb of argument is, if arraying the petitioner as A-17 in trial court is not a product of malice, such a wholly new theory would not have propped up as the impugned FIR would not have been filed without even knowing about a person who is the core team leader. To put it differently, the crux of the argument is, while the impugned FIR does not even mention the name of A-17, post FB post and criminal complaint by Superintendent of

Police of NIA, the petitioner who is a lawyer and who is defending other accused has been portrayed as a important core team leader.

8 It was also submitted that there is no fresh material and there is literally no material on record to connect the petitioner with other accused persons in said case (RC No.42/2022/NIA/DLI). It was argued that there is no material as regards Section 13 of UAPA and as regards Section 18, it relates to conspiracy and there is no material qua petitioner and in this regard, it was urged that the petitioner is a lawyer and he had only expressed his opinion besides assisting the accused but arraying the Advocate as co-accused by taking the further investigation route is intolerant intimidation by prosecution and is a infraction of sanctus constitutional safeguards.

9 On bail plea, it was argued that Section 43D(5) proviso of UAPA becomes inapplicable when there is violation of Part III of the Constitution and in the case on hand, there is violation of Part III as grounds of arrest had not been informed to the petitioner and his right to consult a legal practitioner had been denied. In this regard, it was pointed out that though it is now contended by NIA that grounds of arrest were informed, there is no mention about when and where it was informed.

10 It was emphasized that a careful perusal of the objections of NIA will make it clear that there is no incriminating material as against the petitioner. The factum that the President of Madurai Bench High Court Advocates Association and Secretary of the Madurai Bar Association, Madurai both being duly recognised Bar Associations came before the Court and put it in writing that the petitioner is a member of their respective associations, a regular practicing lawyer seen in the context of unanimous resolutions condemning arrest of the petitioner have been made by respective Bar associations itself will demonstrate intolerant intimidation by prosecution is learned counsel's say.

**SUBMISSIONS OF RESPONDENTS** :

11 The contention that arraying petitioner as A-17 in said case is actuated by malice is unfounded. In any event, on a demurrer, malice is a weak ground when it comes to a FIR quash plea. It was emphasised that malice can be resorted to as a ground only if it is demonstrated that no case has been made out. As a buttressing argument, it was submitted that when a plea of FIR quash is predicated on malice / mala fide, the officer concerned should have been arrayed as one of the respondents by

name. Absent such arraying, a FIR quash plea cannot be predicated on malice is learned Solicitor's say. As another buttressing alternate argument, it was submitted that if malice is pleaded, the accused should only seek transfer of investigation. It was also emphasized that adequate material is available, i.e., material in the nature of audio clips (intercepts of petitioner's phone conversation) [one with his client A-3 and another with a counsel], 2 pen drives, a cell phone seized from petitioner's residence and sharp weapons (Knives) seized from petitioner's farm house.

12 As regards the bail plea, it was contended that there is no violation of Part III of the Constitution as Article 22(1) talks about 'grounds for such arrest' and 'being informed'. It was contended that petitioner was informed but he refused to sign the search warrant and arrest memo. In this regard, it was submitted that grounds of arrest were informed to the petitioner in the presence of independent witnesses and the same was also videographed. Reliance was placed on proviso to Section 43D(5) and it was contended that bail shall not be granted as the accusation against the petitioner is true as would be evident from perusal of case diary. It was also pointed out that the petitioner has not

cooperated with search, he is likely to abscond and also tamper with witnesses. Reliance was placed on audio clips referred to supra and it was emphasized that the same form part of the case diary. In this view of the matter, learned Solicitor requested this court to hear the audio clips (but in the chambers) saying that investigation is progressing and it cannot be disclosed to the accused at this stage. A further request made with specificity in this regard is that the contents of audio clips may please not be set out in order of this court. Further request made by learned Solicitor with specificity is to ensure that there is no whisper about audio clips in the order of this Bench. The respondent in captioned Criminal Appeal has filed its objections wherein it has inter-alia been contended that investigation qua petitioner is in initial stages, placing reliance on ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali*** reported in ***(2019) 5 SCC 1***, it has been contended that all matters (8 in number) to be considered for deciding a bail application (restated therein) when applied to case on hand point towards rejection of bail plea and that the allegations of mala fide / malice are made by the petitioner with ulterior motives.

13 To be noted, the above paragraphs under the captions 'Submissions of Petitioner' and 'Submissions of Respondents' capture the broad summation of rival submissions. Therefore, the case laws cited for propositions and principles by both sides will be adverted to and discussed while setting out discussion and dispositive reasoning (infra). Likewise, a little more elaboration / granular particulars regarding some of the arguments captured supra will also be adverted to in the course of discussion and dispositive reasoning.

**DISCUSSIONS AND DISPOSITIVE REASONING** :

14 As would be evident from the submissions set out supra, the sheet anchor of petitioner's plea to quash the impugned FIR is mala fide. To put it differently, the petitioner's campaign against the impugned FIR is predicated on the sole ground that he has been added as A-17 post further investigation maliciously with ulterior motive for wrecking vengeance for the FB post made by him on 06.03.2023. In legal parlance, this sheet anchor argument is predicated on one of the seven illustrations adumbrated in oft quoted ***Bhajan Lal*** case being ***State of Haryana Vs. Bhajan Lal*** reported in ***1992 Supp (1) SCC 335***. There is no disputation

or contestation before this Court that ***Bhajan Lal*** principle qua FIR quash holds the field (albeit with some evolved views) and seven illustrations adumbrated in paragraph 102 thereat continue to operate when it comes to testing a plea for quash of FIR. In this view of the matter, we deem it appropriate to extract and reproduce illustration No.(7) as set out by Hon'ble Supreme Court in ***Bhajan Lal*** in paragraph 102 and the same reads as follows:

> '(7)Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.'

15 We are conscious of the factual matrix scenario that on facts, in ***Bhajan Lal***, the plea of mala fide / malice pertains to alleged false, vexatious charges of corruption, venality against a person holding a high office, enjoying a respectable status with the intention of sullying his character, injuring his reputation and exposing him to social ridicule with a view to spite him on account of some personal rancour, predilections and past prejudices. To be noted, though ***Bhajan Lal*** is a oft quoted case

law, we have referred to facts (albeit very briefly) in the light of time honoured declaration of law by a Constitution Bench in the celebrated ***Padma Sundara Rao*** case [***Padma Sundara Rao Vs. State of Tamil Nadu*** reported in ***(2002) 3 SCC 533***] wherein there was declaration of law as regards how a citation / case law should be referred to by a Court. In ***Padma Sundara Rao***, Hon'ble Supreme Court declared that ideally Courts should refer to the facts while referring to case laws, as a change in few facts or some times even a word can make a world of difference to applying the ratio. Be that as it may, it may not be necessary to be detained further on this aspect of the matter as in the case on hand, there is no disputation that mala fide / malice is available as a ground for a FIR quash plea. However, the contestation is on different facets and it is two fold. One is, mala fide is a weak ground and in any event, it can be pressed into service only after demonstrating that no case has been made out. The second facet of contestation (on a demurrer) is, mala fide is also a matter for trial and therefore, a FIR quash plea cannot be predicated on malice / mala fide as sole ground. This Bench deems it appropriate to record that while learned Additional Solicitor General projected the second facet in this form, when put to him, learned Solicitor submitted

that he would take a slightly nuanced approach and submitted that mala fide or animus qua prosecution is not relevant if on the basis of the allegations in the complaint, a prima facie case is made out.

16 In support of this argument, learned Solicitor pressed into service ***P.P.Sharma*** case [***State of Bihar Vs. P.P.Sharma*** reported in ***1992 Supp (1) SCC 222***]. Facts in ***P.P.Sharma*** case are, P.P.Sharma was the Managing Director of 'Bihar State Cooperative Marketing Union Limited' ['BISCO' for the sake of brevity] its function is to supply fertilisers to farmers through its depots and godowns. One Rajasthan Multi Fertiliser Pvt. Ltd. had supplied fertiliser to BISCO. Later, fertilizer supplied was found to be sub-standard. In this regard, a FIR came to be registered against P.P.Sharma, who filed writ petition before Patna High Court with a prayer to quash the FIR and police reports. The writ petitions filed by the accused persons in the said case were allowed by Patna High Court, against which State approached Hon'ble Supreme Court. Our attention was drawn to paragraphs 24 and 55 of ***P.P.Sharma*** to say that an IO adopting a threatening posture from the very beginning, allowing informant to withhold relevant files and other attendant facts do not tantamount to mala fide. As regards paragraph 55, the same was

adverted to say that officer concerned should have been made a Eo-nomine party respondent to canvass mala fide.

17 ***State of Maharashtra Vs. Ishwar Piraji Kalpatri*** reported in ***(1996) 1 SCC 542*** was pressed into service to say that exercise of jurisdiction under Section 482 of Cr.P.C to quash prosecution should not be resorted to except in extraordinary circumstances. The facts in this case are, the respondent in the said case was serving in police force, he joined as a PSI Cadet in 1966, held various posts and in 1981, he was promoted to the post of Assistant Commissioner of Police. A FIR was registered against him under the Prevention of Corruption Act, 1947 and investigation was on. Government of Maharashtra had accorded sanction for prosecution of respondent. A charge sheet was filed against him. The respondent filed a Writ Petition (Criminal) before the High Court which was allowed despite objection by the appellant. Challenging the order of High Court, State approached Hon'ble Supreme Court.

18 It is reiterated that factual matrix in case laws are set out (albeit in a nutshell) owing to ***Padma Sundara Rao*** principle which has been alluded to and delineated elsewhere supra in this order.

19 Reverting to case laws / mala fide, ***Monica Kumar (Dr.) Vs.***

***State of Uttar Pradesh*** reported in ***(2008) 8 SCC 781*** was relied on and our attention was drawn to paragraph 37 thereat to say that if the complaint is correct, offence has to be established in a Court of law and therefore, it is the correctness of the complaint which is to be tested. The facts in ***Monica Kumar*** case are that appellants' father Dr.Narendra Kumar was working as Professor/Medical Director of Neonatal Intensive Care Unit [NICU] and also having medical practice at California. Both the appellants were born in California and completed their schooling. They got admission in MBBS course in the year 1996 in Santosh Medical College, Ghaziabad in NRI quota, after remitting necessary fees towards capitation fees, additional hostel fees and security deposits for one year. College took a loan of Rs.25 lakhs on interest from the father of the appellants and its payment was assured by a handwritten slip. When father of the appellants demanded repayment of loan from the second respondent, a dispute arose between them because of which second respondent started harassing the appellants and in the results declared in July 2000, the first appellant failed in both theory papers of Pharmacology and she was not allowed to appear in two subsequent supplementary examinations as well as in Final Professional MBBS Part-I

Examination. Thereafter, there were some legal proceedings between parties, having failed in all his attempts, second respondent in collusion with concerned SHO got false and frivolous FIRs registered against appellants. The appellants preferred two separate petitions before the High Court under Section 482 of Cr.P.C to quash the FIRs and to entrust the further investigation to CBI. As the High Court dismissed the petitions, the appellants were before Hon'ble Supreme Court which allowed the appeal.

20 Learned Solicitor with the intention of not pressing into service multiple case laws for the same proposition, pressed into service case laws alluded to supra for mala fide point though learned Prosecutors in the compilation have placed before this Bench many other case laws for the same proposition.

21 This Court reminds itself that test in quash proceedings is to see uncontroverted allegations in the FIR / complaint without adding or subtracting to the same without looking into extraneous material and examining whether a case has been made out. This court also deems it appropriate to adopt the principle that quashing of FIR should be resorted to only in extraordinary and exceptional circumstances as the plea of

quash in the case on hand is predicated solely on mala fide / malice. In this view of the matter, it may not be necessary to be detained further in this aspect of the discussion. It will suffice to say that from the narrative thus far, the rival submissions and the discussions supra, this is a fit case to leave the question of mala fide open to be tested in trial. As an illustration in support of this view which we are taking, one point urged is that the request for intercepting petitioner's phone conversations itself was made only on 07.03.2023, a day after the aforesaid FB post was made by the petitioner on 06.03.2023 and this was followed by a criminal complaint lodged in the jurisdictional police station (Thallakulam Police Station, Madurai City) vide Crime No.293/2023 for an alleged offence under Section 505(1)(b) of IPC and that the sequence itself shows that adding of petitioner smacks of mala fide. Learned Solicitor submitted to the contrary by saying that the prosecution had enough material even prior to this but was going slow as the petitioner is an Advocate and therefore, it cannot be gainsaid that adding of the petitioner as A-17 was actuated solely by FB post. In this regard, it is also important to notice that learned Solicitor very fairly submitted that the picture is hazy at the moment and therefore, mala fide / malice is too weak a ground and it was

further submitted that mala fide is a last resort of a losing litigant. Though we refrain ourselves from expressing any opinion on this last point (submission), i.e., submission that mala fide is the last resort of a losing litigant, as regards other disputations, it emerges clearly that it turns heavily on factual contestations which need to be examined only in trial. It has been made clear that determinants / parameters for a FIR quash plea and a bail plea are vastly different, dynamics and dimensions of tests are diverse. To be noted, as regards the submission that accusation against petitioner is hazy at the moment has been accepted for negativing the quash plea and relegating the petitioner to raise the same in trial but the same point has operated very differently in the bail plea legal drill as would be evident from allusion and delineation elsewhere infra in this order. Likewise, while uncontroverted reading of FIR in quash plea has gone against the petitioner and we have said that he has to stand trial, when it comes to prima facie truth of accusation, i.e., reasonable grounds for believing that there is prima facie truth in the accusation against the petitioner, on a perusal of case diary (to be noted, FIR forms part of case diary and there is no section 173 report qua petitioner as charge sheet against the petitioner who is A-17 is yet to be filed), the same works

differently in the bail plea as would be evident from discussion and dispositive reasoning in the latter part of this order infra.

22 As regards petitioner being a practicing Advocate, it was submitted by learned Solicitor that the petitioner would not get any immunity or special treatment. In this regard, it was made clear in the hearing that the argument is not tested on the basis of any immunity for a lawyer but on the question as to whether the petitioner is being intimidated for appearing in PFI matters and making a FB post regarding alleged mistreatment / custodial torture of one of the accused in the case in which he is appearing as counsel for some of the accused. It was further made clear that Bar is the mother of the Bench and a fearless Bar is imperative for an independent judiciary and this is the principle on which the argument is being tested (to be noted, the principle is not in dispute and it is only intimidation / malice that is being subjected to contestations / disputations). This is another reason why we deem it appropriate to leave the question of mala fide open when the petitioner stands trial. In this view of the matter, while we negative the prayer for quashing the impugned FIR and while we refuse to quash the FIR, we make it clear that the plea of mala fide / malice raised in the captioned

Criminal O.P. (Crl.O.P.No.12229 of 2023) is left open to be tested in trial, untrammeled by this order refusing to acceded to the quash plea. To put it differently, it will be open to the petitioner to set up mala fide / malice as one aspect of defence and if done so, trial court shall test the same on its own merits as this order neither impedes nor serves as a impetus to either side in deciding the malice issue by the trial court. Be that as it may, for the sake of specificity, we make it clear that all questions are left open qua mala fide / malice.

23 Reverting to three case laws pressed into service by prosecution, namely ***P.P.Sharma***, ***Ishwar Piraji Kalpatri*** and ***Monica Kumar (Dr.)***, this Court has set out short facts and the principles supra but this Court refrains from any discussion on the same so that the field is wide open for the legal drill of testing mala fide as part of trial in the trial court. This Court is of the considered view that this course would pave way for trial court to test the matter untrammeled by this order. We are adopting this approach as the quash plea is being tested not by negativing or sustaining mala fide plea but by adhering to the principle that uncontraverted averments in the complaint do not warrant quash of FIR on the ground of mala fide at this stage.

24 This takes the discussion to captioned criminal appeal which pertains to bail.

25 As regards bail, a careful perusal of proviso to Section 43D(5) of UAPA besides sub sections (6) and (7) thereat make two aspects of the matter clear. One aspect is, on a perusal of case diary or report under Section 173 of Cr.P.C, i.e., charge sheet, if this court forms a opinion that there are reasonable grounds for believing that accusations against a person is prima facie true, bail plea should be negatived. To be noted, in the instant case, there is no report under Section 173 Cr.P.C., charge sheet as against the petitioner (A-17 in trial court) is yet to be filed. The charge sheet has been filed only against 10 out of 13 named accused in the impugned FIR. Therefore, in the case on hand, it is perusal of case diary alone. Be that as it may, it is deemed pertinent to mention that this Court did peruse the final report (section 173 Cr.P.C) as against the 10 named accused also as a matter of abundant caution though further investigation itself was sought only after filing of this charge sheet. To be noted, petition under Section 173(8) of Cr.P.C seeking permission to conduct further investigation was filed on 27.04.2023 after filing final report, i.e., charge sheet against 10 named accused on

17.03.2023.

26 The second aspect is, aforementioned condition is in addition to the other restrictions in Cr.P.C. It is clear from sub section (6) of Section 43D that the restrictions qua granting of bail specified in sub section (5) and proviso thereat is in addition to other restrictions qua a regular Section 439 Cr.P.C (bail) legal drill. Sub Section (7) does not come into play in the case on hand as that pertains to a person who is not a Indian citizen and who has entered the Country unauthorisedly.

27 Reverting to the case on hand, we find that no overt act with specificity has been set out qua petitioner. It has been averred that during investigation of the case, it was revealed that the accused persons (petitioner and four others who were added pursuant to further investigation under section 173(8) Cr.P.C) hatched a criminal conspiracy to commit certain acts preparatory to the commission of a terrorist act. It has been averred that as a result of conspiracy, they conducted physical efficiency classes to cadres, new recruits of PFI and that preparatory acts qua commission to train PFI cadre and recruits to do away with persons belonging to a particular religious group which is opposed to PFI ideology. It has also been averred that investigation has also revealed that

members of PFI organization raised funds with the intention to further the activity of terrorist organization. The allegations are broad, generic and no overt act qua petitioner has been set out with specificity. This has to be seen in the context of the factum that recovery has been only long knives and axe, that too not from residence but from farm house and petitioner is contending that they are only agro / gardening equipments. To be noted, contents of pen drive is not known, it has been sent for forensic examination and nothing has brought out as regards the cellular phone (described as cell phone).

28 As regards petitioner being a practicing lawyer, we find there is no disputation or contestation on this factum. In this regard, the President of a recognised Bar Association in Madurai Bench of Madras High Court and Secretary of the recognised Bar Association in the District and Sessions Court in Madurai have filed statements saying that the petitioner is a regular practitioner with over 16 ½ years standing at the Bar and that his father-in-law is also a very established lawyer. Respondents have filed objections but a careful perusal of the two objections filed by respondents brings to light that respondents have only denied and disputed the averment that the petitioner is being victimised

and is being framed for appearing in PFI cases. In other words, the factual averments that the petitioner enrolled with the Bar Council of Tamil Nadu on 01.11.2006, he is a regular practitioner and that his father-in-law is a established Advocate are not subjected to disputation. In this view of the matter, the regular parameters under Cr.P.C. and more particularly parameters articulated by Hon'ble Supreme Court in ***Hussainara Khatoon case {(1980) 1 SCC 81}***, reiterated and restated in ***Antil*** case being ***Satender Kumar Antil Vs. Central Bureau of Investigation*** reported in ***(2022) 10 SCC 51*** do not pose much of a problem. In this regard, before going into the parameters adumbrated in ***Hussainara Khatoon***, we respectfully remind ourselves of paragraph 95 of ***Antil*** case where ***Arnab Manoranjan Goswami*** case [***(2021) 2 SCC 427***] and paragraph 67 thereat has been reiterated by Hon'ble Supreme Court as it emphasizes Constitutional value of liberty which runs through the fabric of Constitution, balancing of societal interest and investigation of crime. Paragraph 95 of ***Antil*** case reads as follows:

> 95. This Court in *Arnab Manoranjan Goswami* v. *State of Maharashtra* [*Arnab Manoranjan Goswami* v. *State of Maharashtra*, (2021) 2 SCC 427 : (2021) 1 SCC (Cri) 834] ,

has observed that : (SCC pp. 471-72, para 67)

> "*67. Human liberty is a precious constitutional value, which is undoubtedly subject to regulation by validly enacted legislation. As such, the citizen is subject to the edicts of criminal law and procedure*. Section 482 recognises the inherent power of the High Court to make such orders as are necessary to give effect to the provisions of CrPC 'or prevent abuse of the process of any court or otherwise to secure the ends of justice'. Decisions of this Court require the High Courts, in exercising the jurisdiction entrusted to them under Section 482, to act with circumspection. In emphasising that the High Court must exercise this power with a sense of restraint, the decisions of this Court are founded on the basic principle that the due enforcement of criminal law should not be obstructed by the accused taking recourse to artifices and strategies. The public interest in ensuring the due investigation of crime is protected by ensuring that the inherent power of the High Court is exercised with caution. That indeed is one—and a significant—end of the spectrum. The other end of the spectrum is equally important : the recognition by Section 482 of the power inhering in the High Court to prevent the abuse of process or to secure the ends of justice is a valuable safeguard for protecting liberty. *The Code of Criminal Procedure, 1898 was enacted by a legislature which was not subject to constitutional rights and limitations; yet it recognised the inherent power in Section 561-A. Post-Independence, the recognition by Parliament [ Section 482CrPC, 1973] of the inherent power of the High Court must be construed as an aid to preserve the constitutional value of liberty. The writ of liberty runs through the fabric of the Constitution. The need to ensure the fair investigation of crime is undoubtedly important in itself, because it protects at one level the rights of the victim and, at a more fundamental level, the societal interest in ensuring*

*that crime is investigated and dealt with in accordance with law. On the other hand, the misuse of the criminal law is a matter of which the High Court and the lower courts in this country must be alive*. In the present case, the High Court could not but have been cognizant of the specific ground which was raised before it by the appellant that he was being made a target as a part of a series of occurrences which have been taking place since April 2020. The specific case of the appellant is that he has been targeted because his opinions on his television channel are unpalatable to authority. Whether the appellant has established a case for quashing the FIR is something on which the High Court will take a final view when the proceedings are listed before it but we are clearly of the view that in failing to make even a prima facie evaluation of the FIR, the High Court abdicated its constitutional duty and function as a protector of liberty. *Courts must be alive to the need to safeguard the public interest in ensuring that the due enforcement of criminal law is not obstructed. The fair investigation of crime is an aid to it. Equally it is the duty of courts across the spectrum —the district judiciary, the High Courts and the Supreme Court—to ensure that the criminal law does not become a weapon for the selective harassment of citizens. Courts should be alive to both ends of the spectrum—the need to ensure the proper enforcement of criminal law on the one hand and the need, on the other, of ensuring that the law does not become a ruse for targeted harassment. Liberty across human eras is as tenuous as tenuous can be. Liberty survives by the vigilance of her citizens, on the cacophony of the media and in the dusty corridors of courts alive to the rule of (and not by) law. Yet, much too often, liberty is a casualty when one of these components is found wanting*."

(emphasis supplied)

Hon'be Supreme Court in ***Antil*** case, in paragraph 51, has reiterated and restated ***Hussainara Khatoon*** case principles to say that to determine whether the accused has his roots in the community which would deter him from fleeing, the court should take into account following factors concerning the accused :

> (i)The length of his residence in the community,
>
> (ii)his employment status, history and his financial condition,
>
> (iii)his family ties and relationships,
>
> (iv)his reputation, character and monetary condition,
>
> (v)his prior criminal record including any record of prior release on recognizance or on bail,
>
> (vi)the identity of responsible members of the community who would vouch for his reliability,
>
> (vii)the nature of the offence charged and the apparent probability of conviction and the likely sentence insofar as these factors are relevant to the risk of non-appearance, and
>
> (viii)any other factors indicating the ties of the accused to the community or bearing on the risk of wilful failure to appear.

To be noted, the aforementioned eight determinants / parameters have been applied and we are returning a finding in favour of the petitioner. It is further to be noted that this is articulated infra in the latter part of this order while discussing the trial court's order for the sake of a cogent

narrative and convenience. This leaves us with proviso to Section 43D(5) of UAPA.

29 As regards Section 43D(5) proviso of UAPA, we had the benefit of perusing the case file including transcript of one telecon between petitioner and A-3 and another telecon between the petitioner and another person (in 3 folders). To be noted, one telecon was on 23.04.2023. As already alluded to supra, in the case on hand, we only have the case diary to peruse as Section 173 Cr.P.C final report has not been filed with regard to petitioner (A-17) and section 173 Cr.P.C report has been filed only with regard to named 10 persons out of 13 named persons in the FIR. In any event, we did peruse Section 173 statement qua 10 persons named in the original impugned FIR also as alluded to in earlier part of this order. We find that the case on hand does not pass muster qua reasonable grounds for believing that accusation against the petitioner is prima facie true, to put it differently, the case diary before us (specifically the portions including audio clips to which our attention was drawn) does not cut ice qua proviso to section 43D(5) of UAPA and reasons are as follows:

(a)As already alluded to supra, specific overt act has

not been attributed to the petitioner;

(b)The materials seized are (i) two pen drives (ii) a cell phone from the residence and (i) knives, (ii) axe recovered from farm house which are described as farm / gardening equipments by petitioner. To be noted, contents of pen drives are not known and it has been sent for forensic examination;

(c)As regards the contents in the pen drives, it was submitted that it has been sent for forensic analysis and nothing is available as of today. Therefore, the pen drives seized from the Advocate's residence (when contents are not known) cannot be construed as material that is good enough qua truth of accusation;

(d)As regards sharp weapons, even according to the seizure report, it has been seized from the farm house. Considering the nature of the weapons (long knives and axe) and the place from which it has been seized is not good enough as it can well be a farm equipment as contended by learned counsel for petitioner;

(e)Owing to the request of learned Solicitor to not to capture even a thumbnail sketch of audio clips, i.e., not to make even a whisper in the order, we refrain from doing so as as we have listened to the same at the request of learned Solicitor whose submission was that audio clips also form part of the case diary and we are of the view that it does not pass muster qua Section 43D(5) proviso. However, it is subject to being proved in trial as a valid piece of evidence pursuant to the Information Technology Act, 2000 and also subject to the privileged communication argument predicated on Section 126 of the Indian Evidence Act, 1872. To be noted, one of the conversations is between the petitioner and A-3 who is his client. This Court without setting out the contents and without hearing both sides deems it proper to refrain from expressing any opinion and suffice to say that it does not cut ice qua accusation being prima facie true rigour ingrained in proviso to section 43D(5) of UAPA;

(f)The trial court has recorded in sub paragraph 13

of paragraph VII of the impugned order that on 28.09.2022, petitioner has filed a memo of appearance for accused Nos.1, 3 to 6, 8 and 9 and on 25.01.2023, he has filed memo of appearance for accused No.2.

30 Proviso to Section 43D(5) of UAPA came up for consideration of Hon'ble Supreme Court in ***Union of India Vs. K.A.Najeeb*** reported in ***(2021) 3 SCC 713***, ***Thwaha Fasal Vs. Union of India*** reported in ***2021 SCC OnLine SC 1000*** and ***Yedala Subba Rao Vs. Union of India*** reported in ***2023 SCC OnLine SC 426***.

31 In ***K.A.Najeeb*** case, on facts, it is alleged that one Professor was attacked by members of PFI, a FIR was lodged against the alleged attackers. It was alleged that the respondent in ***K.A.Najeeb*** case was one of the main conspirators and he was arrested later. The respondent approached the Special Court and the High Court for grant of bail multiple times and respondent was granted bail and the same was sustained by Hon'ble Supreme Court. In ***K.A.Najeeb***'s case, Hon'ble Supreme Court made it clear that restrictions under a statute as well as power exercisable under constitutional jurisdiction can be well

harmonized. Hon'ble Supreme Court went on to hold that presence of statutory restrictions like Section 43D(5) of UAPA per se does not oust the ability of the Constitutional courts to grant bail on grounds of violation of Part III of the Constitution. In the case on hand, even according to remand report dated 09.05.2023, the petitioner refused to sign the arrest memo, even according to prosecution at the time of search the petitioner was taken away at 6.30 a.m but it is now being contended that he resisted search, refused to sign arrest memo and therefore, the same was read out to him in the presence of independent witnesses and it has been video graphed. In the light of the prima facie violation, we find that ***K.A.Najeeb*** principle applies and if it is read in conjunction with our view that prima facie truth qua accusation in the matter on hand does not pass muster / cut ice for bail qua Section 43D(5) proviso. Therefore, the argument that Article 22(1) talks of 'grounds for such arrest' and 'being informed' and the same have been met does not hold water. To be noted, in this regard, we shall be referring to ***R.Gurusamy***'s case infra in the latter part of this order.

32 As regards ***Thwaha Fasal*** case, it is one where a student of law and two others were arrested and on the basis of materials seized

from them, it was alleged that they were members of Communist Party of India (Maoist) which is a 'terrorist organisation' within the meaning of Section 2(m) of UAPA (listed as item No.34 in the First Schedule to UAPA). The trial court granted bail and on statutory appeal under Section 21 of NIA Act, Kerala High Court confirmed the trial court's order. The appeal preferred by Union of India in Hon'ble Supreme Court was dismissed and order granting bail was confirmed. In our considered view, two paragraphs in ***Thwaha Fasal*** case are of great significance and they are paragraphs 36 and 26 which reads as follows:

> '36.Taking the charge sheet as correct, at the highest, it can be said that the material *prima facie* establishes association of the accused with a terrorist organization CPI(Maoist) and their support to the organisation.
>
> 26.While we deal with the issue of grant of bail to the accused nos.1 and 2, we will have also to keep in mind the law laid down by this Court in the case of *K.A.Najeeb* (supra) holding that the restrictions imposed by sub-section (5) of Section 43D *per se* do not prevent a Constitutional Court from granting bail on the ground of violation of Part III of the Constitution.'

33 As regards ***Yedala Subba Rao*** case, two accused were

alleged to be members of Communist Party of India (Maoist) and they were alleged to be part of a team of 45 others which stopped the convoy of a sitting MLA and Ex.MLA, both were taken towards a Y-Junction and they were thereafter taken in two separate directions and were killed with three gunshots. The trial court refused bail and the same was confirmed by Hon'ble jurisdictional High Court in appeal under section 21(4) of NIA. In ***Yedala Subba Rao*** case, Hon'ble Supreme Court reiterated ***K.A.Najeeb*** principle and after examining the materials which included seizure of certain materials pertaining to plantation of landmine, Hon'ble Supreme Court came to the conclusion that the embargo for grant of bail vide proviso to Section 43D(5) will not apply.

34 As regards grounds of arrest not being intimated to the accused, we respectfully follow the ratio laid down by a coordinate Hon'ble Division Bench of this Court in ***R.Gurusamy Vs. State represented by the Deputy Superintendent of Police CB CID*** reported in ***2003 SCC OnLine Mad 1193 : (2004) 1 LW (Cri) 418***. In ***Gurusamy*** case also, the contention of the prosecution was that the detenu refused to receive the arrest memo and that refusal is recorded in the arrest memo. After perusing the arrest memo, Court came to the conclusion that it

cannot be gainsaid that reasons or grounds have been given to the detenu. Owing to the request of the learned Solicitor, we refrain from setting out the details of arrest memo showed to us to be form part of the case file. Be that as it may, suffice to say that ***R.Gurusamy*** principle will apply and more importantly ***R.Gurusamy*** ratio would not just be a ratio of Hon'ble coordinate Bench of this Court but it has attained the status of the ratio of Hon'ble Supreme Court as an appeal against the same vide Criminal Appeal No(s).1057-1058 of 2005 to Hon'ble Supreme Court came to be dismissed on 27.10.2010. A careful perusal of the order of Hon'ble Supreme Court in this criminal appeal makes it clear that it is not a dismissal at SLP stage and it is a criminal appeal. Therefore, the doctrine of merger laid down in ***Kunhayammed and others Vs. State of Kerala and another*** reported in ***(2000) 6 SCC 359*** applies. It is in this view of the matter we have no hesitation in saying that the ratio has now attained the status of the ratio of Hon'ble Supreme Court. Therefore, *R.Gurusamy* principle read in the context of *K.A.Najeeb* ratio brings to light that the case on hand turns on Part III of Constitution violation and therefore, it clears the fence qua Section 43D(5) proviso UAPA.

35 This Section 43D(5) and proviso thereat was tested by this

Court on a demurrer scenario. Demurrer scenario is, even if there is no Part III [Constitution] violation and if it cannot be said that 'all' accusations qua 3 IPC and 6 UAPA provisions against the petitioner are such that there are no reasonable grounds for believing them to be prima facie true, the accusations qua 5 UAPA sections pertaining to Chapter IV and Chapter VI of UAPA (Sections 17, 18, 18B, 38 and 39 of UAPA in the case on hand) in the considered view of this Court are such that it is clear as day light that there are no reasonable grounds for believing the accusations against the petitioner to be prima facie true. The reason is all these provisions are anchored on 'terrorist act' and 'terrorist organisation' and specific accusations in this regard are absent. To be noted, both these terms are defined under UAPA vide Sections 2(1)(k) and 2(1)(m) respectively. In this regard, Section 2(1)(k) has to be read with Section 15 captioned 'Terrorist Act'. Before embarking upon discussion and dispositive reasoning on this aspect of the matter, it is apposite to look at the relevant provisions.

36 Sections 2(1)(k), 2(1)(m), 15, 17, 18, 18B, 38 and 39 of UAPA read as follows:

**2.Definitions**

(1)In this Act, unless the context otherwise requires,---

x x x x

(k)'terrorist act' has the meaning assigned to it in section 15, and the expressions “terrorism” and “terrorist” shall be construed accordingly;

(m)'terrorist organisation' means an organisation listed in the First Schedule or an organisation operating under the same name as an organisation to listed;

**15.Terrorist Act**.

Whoever does any act with intent to threaten or likely to threaten the unity, integrity, security [,economic security] or sovereignty of India or with intent to strike terror or likely to strike terror in the people or any section of the people in India or in any foreign country,—

(a) by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisonous or noxious gases or other chemicals or by any other substances (whether biological radioactive, nuclear or otherwise) of a hazardous nature or by any other means of whatever nature to cause or likely to cause—

(i)death of, or injuries to, any person or persons; or

(ii)loss of, or damage to, or destruction of, property; or

(iii)disruption of any supplies or services

essential to the life of the community in India or in any foreign country; or

[(iiia)damage to, the monetary stability of India by way of production or smuggling or circulation of high quality counterfeit Indian paper currency, coin or of any other material; or]

(iv)damage or destruction of any property in India or in a foreign country used or intended to be used for the defence of India or in connection with any other purposes of the Government of India, any State Government or any of their agencies; or

(b)overawes by means of criminal force or the show of criminal force or attempts to do so or causes death of any public functionary or attempts to cause death of any public functionary; or

(c)detains, kidnaps or abducts any person and threatens to kill or injure such person or does any other act in order to compel the Government of India, any State Government or the Government of a foreign country or [an international or inter-governmental organisation or any other person to do or abstain from doing any act; or]

commits a terrorist act.

[Explanation.—For the purpose of this sub-section,—

(a)“public functionary” means the constitutional authorities or any other functionary notified in the

Official Gazette by the Central Government as public functionary;

(b)"high quality counterfeit Indian currency" means the counterfeit currency as may be declared after examination by an authorised or notified forensic authority that such currency imitates or compromises with the key security features as specified in the Third Schedule.]

[(2) The terrorist act includes an act which constitutes an offence within the scope of, and as defined in any of the treaties specified in the Second Schedule.]

**17.Punishment for raising funds for terrorist act**

Whoever, in India or in a foreign country, directly or indirectly, raises or provides funds or collects funds, whether from a legitimate or illegitimate source, from any person or persons or attempts to provide to, or raises or collects funds for any person or persons, knowing that such funds are likely to be used, in full or in part by such person or persons or by a terrorist organisation or by a terrorist gang or by an individual terrorist to commit a terrorist act, notwithstanding whether such funds were actually used or not for commission of such act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

Explanation : For the purpose of this section, -

(a) participating, organising or directing in any of the

acts stated therein shall constitute an offence;

(b) raising funds shall include raising or collecting or providing funds through production or smuggling or circulation of high quality counterfeit Indian currency; and

(c) raising or collecting or providing funds, in any manner for the benefit of, or, to an individual terrorist, terrorist gang or terrorist organisation for the purpose not specifically covered under section 15 shall also be construed as an offence.

**18.Punishment for conspiracy, etc**.

Whoever conspires or attempts to commit, or advocates, abets, advises or [incites, directs or knowingly facilitates] the commission of, a terrorist act or any preparatory to the commission of a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

**18B.Punishment for recruiting of any person or persons for terrorist act**

Whoever recruits or causes to be recruited any person or persons for commission of a terrorist act shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine.

**38.Offence relating to membership of a terrorist organisation**

(1)A person, who associates himself, or professes to be associated, with a terrorist organisation with intention to further its activities, commits an offence relating to membership of a terrorist organisation:

PROVIDED that this sub-section shall not apply where the person charged is able to prove—

(a)that the organisation was not declared as a terrorist organisation at the time when he became a member or began to profess to be a member; and

(b)that he has not taken part in the activities of the organisation at any time during its inclusion in the [First Schedule] as a terrorist organisation.

(2)A person, who commits the offence relating to membership of a terrorist organisation under sub-section (1), shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

**39.Offence relating to support given to a terrorist organisation**

(1)A person commits the offence relating to support given to a terrorist organisation,—

(a)who, with intention to further the activity of a terrorist organisation,—

(i)invites support for the terrorist organization; and

(ii)the support is not or is not restricted to provide money or other property within the meaning of section 40; or

(b)who, with intention to further the activity of a terrorist organisation, arranges, manages or assists in arranging or managing a meeting which he knows is —

(i)to support the terrorist organization; or

(ii)to further the activity of the terrorist organization; or

(iii)to be addressed by a person who associates or professes to be associated with the terrorist organisation; or

(c)who, with intention to further the activity of a terrorist organisation, addresses a meeting for the purpose of encouraging support for the terrorist organisation or to further its activity.

(2)A person, who commits the offence relating to support given to a terrorist organisation under sub-section (1) shall be punishable with imprisonment for a term not exceeding ten years, or with fine, or with both.

37 Embarking upon discussion on the above aspect, it is to be noted that the crux and gravamen of the prosecution case turns on petitioner's association / membership with / in PFI. In the case on hand,

the Government notification regarding PFI being notification dated 28.09.2022 is one declaring PFI, its associates or affiliates or fronts as 'unlawful association' and not as 'terrorist organisation'. 'Unlawful association' is defined under Section 2(1)(p) of UAPA, which reads as follows:

> '(p) “unlawful association” means any association,—
>
> (i)which has for its object any unlawful activity, or which encourages or aids persons to undertake any unlawful activity, or of which the members undertake such activity; or
>
> (ii)which has for its object any activity which is punishable under section 153A or section 153B of the Indian Penal Code (45 of 1860), or which encourages or aids persons to undertake any such activity, or of which the members undertake any such activity:
>
> Provided that nothing contained in sub-clause (ii) shall apply to the State of Jammu and Kashmir; '

38 The definition of 'terrorist organisation' has already been set out supra and PFI does not find place in the First Schedule of UAPA. There is no disputation or disagreement on this. Further more, the FIR itself is prior to even this notification as unlawful association. Absent accusations with specificity qua petitioner pertaining to terrorist act or

terrorist organisation, Sections 17, 18, 18B, 38 and 39 of UAPA get shorn of. Except broad averments in the nature of suspicion of involvement of what is described as other members of 'banned terrorist organisation of PFI' in further investigation application there is no accusation with specificity qua petitioner and as already alluded to supra, PFI has not been listed as 'terrorist organisation' in the First Schedule but has been declared vide Government of India notification as 'unlawful association'. This means that there are effectively no Chapter IV and Chapter VI accusations with specificity qua petitioner. The sequitur, is Section 43D(5) and proviso thereat does not operate or come into play at all. It is therefore axiomatic that it can be gainsaid (on demurrer) that there are (at the highest) reasonable grounds for believing that accusations qua Section 13 of UAPA and Sections 120B, 153A and 153AA of IPC are prima facie true. Ideally this court would have preferred to set out the transcript, audio clips as well as other essentials of case diary, set out discussion and dispositive reasoning as to how and why as regards Chapter IV and Chapter VI of UAPA sections there is no bona fide grounds to believe accusations to be prima facie true but we have refrained from doing so owing to specific request of learned Solicitor

and learned Prosecutor to not to mention these details in the order as it is not desirable to put it in public domain. Therefore, suffice to say that on perusal we have satisfied ourselves on this aspect of the matter.

39 The prosecution has to show that there is prima facie material available to negative the bail plea and the activities committed by the petitioner would attract Section 43D(5) and proviso thereat. In the case on hand, a perusal of the case diary shows that there is no specific overt act against the petitioner and only a cell phone, two pen drives (from the residence of petitioner) and long knives and axe (from the farm house of petitioner) were recovered. The contents of pen drives are not known. Charge sheet as regards the petitioner is yet to be filed. Further, the trial court in its impugned order has categorically said that the question of absconding of the petitioner may not arise since he is an Advocate. All this put together, if the eight factors mentioned in ***Hussainara Khatton*** case (to determine whether the accused has his roots in the community which would deter him from fleeing) which were reiterated in ***Antil*** case are applied, this Court is of the view that a finding has to be rendered in favour of the petitioner regarding bail plea.

40 As regards ***Zahoor Ahmad Shah Watali*** case adverted to by

the respondents in the objection (i) reasonable ground to believe that the petitioner has committed offence, (ii) nature and gravity of the charge and (iii) severity of the punishment have been answered supra while dealing with Section 43D(5) and proviso thereat. As regards (iv) regarding danger of accused absconding or fleeing, as already alluded to supra, the trial court itself has rendered a categoric finding that the question of petitioner absconding does not arise at all and this has not been assailed by the prosecution. Regarding (v) turning on character and behaviour, the same is subjected to disputation / contestation and in any event the petitioner should cooperate with the investigation is now one of the conditions for bail. As regards other points, appellant threatening witnesses on social media, FB, there is no material. As regards other points turning on tampering with witnesses and danger of justice being thwarted, the objections are broad and generic which can be said against any person. In this regard, we respectfully follow the course adopted and principle laid down by Hon'ble Supreme Court in *Tawaha Fasal* case. Paragraph 20 of this case law is relevant and the same reads as follows:

> '**20.** The stringent conditions for grant of bail in sub-section (5) of Section 43D will apply only to the offences punishable

only under Chapters IV and VI of the 1967 Act. The offence punishable under Section 13 being a part of Chapter III will not be covered by sub-section (5) of Section 43D and therefore, it will be governed by the normal provisions for grant of bail under the Criminal Procedure Code, 1973. The proviso imposes embargo on grant of bail to the accused against whom any of the offences under Chapter IV and VI have been alleged. The embargo will apply when after perusing charge sheet, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true. Thus, if after perusing the charge sheet, if the Court is unable to draw such a *prima facie* conclusion, the embargo created by the proviso will not apply. '

41 Likewise, ***Kekhriesatuo Tep and others Vs. National Investigation Agency*** reported in ***(2023) 6 SCC 58*** which reiterates *Zahoor Ahmad Shah Watali* case is relevant. In *Kekhriesatuo Tep* case, the appellant was granted bail by the Special Court which was reversed by Guwahati High Court. The appellant moved Hon'ble Supreme Court which has allowed the appeal and set aside the order passed by the High Court. Paragraph 13 of ***Kekhriesatuo Tep*** case is most relevant and the same reads as follows:

**'13.** The provisions of Section 43-D(5) of the said Act have

been considered by this Court in *Thwaha Fasal* [*Thwaha Fasal* v. *Union of India*, (2022) 14 SCC 766 : 2021 SCC OnLine SC 1000] . The Court, after reproducing the provisions of Section 43-D(5) and after considering the judgment of this Court in *NIA* v. *Zahoor Ahmad Shah Watali* [*NIA* v. *Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] and *Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra* [*Ranjitsing Brahmajeetsing Sharma* v. *State of Maharashtra*, (2005) 5 SCC 294 : 2005 SCC (Cri) 1057] , held that while deciding a bail petition filed by the accused against whom offences under Chapters IV and VI of the said Act have been made, the court has to consider as to whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. It will be worthwhile to note that this Court, in *Zahoor Ahmad Shah Watali* [*NIA* v. *Zahoor Ahmad Shah Watali*, (2019) 5 SCC 1 : (2019) 2 SCC (Cri) 383] , has distinguished the words “not guilty” as used in TADA, MCOCA and NDPS Act as against the words “prima facie” in the present Act. The Court has held that a degree of satisfaction required in a case of “not guilty” is much stronger than the satisfaction required in a case where the words used are “prima facie”.'

42 Learned Additional Solicitor General relied on the following case laws:

(i)***P.Vijayan Vs. State of Kerala*** reported in ***(2010) 2 SCC 398***,

(ii)***State of Tamil Nadu Vs. N.Suresh Rajan*** reported in ***(2014) 11 SCC 709***; and

(iii)***Tarun Jit Tejpal Vs. State of Goa*** reported in ***(2020) 17 SCC 556***.

Aforementioned case laws arise out of discharge applications under Section 227 of Cr.P.C and therefore, we are of the view that it does not help the prosecution in the case on hand.

43 The trial court in the impugned order, i.e., order dated 20.06.2023 in Crl.M.P.No.893 of 2023 in RC No.42/2022/NIA/DLI (CNR No.TNCH06-000894-2023) vide which the bail plea of the petitioner was dismissed has set out seven points for consideration after capturing averments in the petition and brief averments in the counter (objections of Special Public Prosecutor). Point No.1 pertains to whether the petitioner was informed about the grounds of arrest, i.e., compliance with Section 41 and 41-A of Cr.P.C, whereas Point No.2 as formulated is, whether the petitioner has immunity from prosecution. The trial court has chosen to answer these two question on one go though they turn on different principles. Be that as it may, as regards point No.2 (point for

consideration), the question has been formulated by the trial court in the following manner:

> '2.Whether the Petitioner / accused No 17 has been an advocate for the accused instant case and he is immuned from prosecution?

44 A careful perusal of the rival stated position of the petitioner and the prosecution (even as captured by trial court) makes it clear that neither side has raised the point that petitioner has immunity from prosecution being an Advocate but contestation and disputation turn on mala fide / malice, i.e., while the petitioner contends inter-alia that he is being intimidated with the intention of dissuading him from appearing for some of the accused in case on hand and other PFI matters [to be noted, as per sub paragraph 13 of paragraph VII, the trial court has recorded that the case records show that on 28.09.2022 the petitioner has filed memo of appearance for accused Nos.1, 3 to 6, 8 and 9 and on 25.01.2023 the petitioner has filed memo of appearance for accused No.2]. On the contrary, even according to what has been captured by trial court, the petitioner has only contended that he has equal protection in

law as regards right to life and liberty enshrined in the Constitution and the FB post is the trigger. The prosecution on the contrary submitted that the FB post is not the trigger and therefore, it is not intimidation, unfair investigation or overzealous conduct of the IO to browbeat the defence and snatch away the right of the accused to engage a lawyer of his choice as alleged by the petitioner. Therefore, in our considered view, the point for consideration should have been whether further investigation adding of petitioner as A-17 and propping up new theory that petitioner is a core team leader is actuated by mala fide / malice and as to whether the FB post is the trigger. The reason is it is nobody's case that an Advocate has immunity from prosecution. Therefore, we find that the point for consideration No.2 as framed and answered by trial court point towards erroneous appreciation of rival contentions.

45 Be that as it may, the trial court in the impugned order in sub paragraph 2 of paragraph IX, while answering one limb of point No.6 as to whether petitioner may abscond if let out on bail, has returned a categoric finding that the question of absconding may not arise since the petitioner is a Advocate. This sub paragraph 2 of paragraph IX of the impugned order reads as follows :

'2.There may be chances of tamper or threat the witnesses in this case. The question of absconding may not arise since he is an Advocate. Accordingly point No.6 is answered.'

(*Underlining made by this court for ease of reference*)

Further, mere FB post is not good enough to say that the petitioner will tamper with witnesses. Father-in-law of the petitioner is a established lawyer and therefore petitioner has his roots in the community which would deter him from fleeing. FIR in the case on hand came to be registered on 19.09.2022 and post FIR, i.e., on 28.09.2022, the Central Government declared PFI as a 'unlawful association' within the meaning of Section 3(1) of UAPA. After the FB post made by petitioner on 06.03.2023, the very next day, i.e., on 07.03.2023, NIA sought permission to intercept petitioner's phone calls. This discussion thus far including discussion regarding trial court order in our view makes it clear that all the eight determinants / parameters adumbrated in ***Hussainara Khatoon*** case, reiterated / restated in ***Antil*** case stand answered in favour of the petitioner or in other words they enure to the benefit of the

petitioner regarding his bail plea. Suffice to say that these are points which have impelled us to interfere with the trial court order.

46 Before concluding, this Court reiterates what it had said in the 'PREFACE' paragraph supra, i.e., that parameters and determinants for quash of FIR under Section 482 and grant of bail under Section 439 of Cr.P.C read with Section 43D(5) proviso of UAPA are vastly and hugely different. In this regard, for an illustration, while we have accepted the fair submission of learned Solicitor that accusation and details (specificity of material) are hazy in the quash plea, we have applied the same in favour of the petitioner for grant of bail in the bail plea.

47 As regards HCP, it would be evident from the allusion supra that maintainability has to be tested on whether the order of remand is bad. It will also be clear from what has been captured supra that Crl.O.P and Criminal appeal were heard out and the question of taking up HCP for hearing can be considered subject to outcome of the Crl.O.P and Criminal appeal. Now that we are granting bail in the Criminal appeal, we deem it appropriate to not to embark upon the legal drill of examining the HCP. Therefore, HCP is closed without expressing any view or opinion either on merits of the matter or on maintainability. However, we

make it clear that all questions are left open and all rights and contentions of both sides in the HCP are preserved including rights of HCP petitioner or any one concerned for the petitioner to come up with another HCP with similar / same prayer if the need arises depending on the development and further trajectory the matter takes.

48 Ergo, sequitur of narrative, discussion and dispositive reasoning is set out infra under the caption 'CONCLUSION'.

**CONCLUSION** :

49 The following order is passed :

(a)Crl.O.P.No.12229 of 2023 is dismissed albeit, leaving the plea of mala fide / malice raised in the captioned Criminal O.P. open for being tested in trial by the trial court untrammelled by this order. It is made clear that this order neither impedes nor serves as an impetus to either side in deciding the issue by the trial court. For the sake of specificity, we make it clear that all questions are left open qua mala fide / malice. Though obvious, it is made clear that the findings recorded in this order are only prima facie view and trial court shall decide the issue on its own merits

untrammeled by the observations made in this order. Consequently, connected Crl.M.P seeking to stay all further proceedings in RC No.42/2022/NIA/DLI is also dismissed.

(b)Crl.A.No.678 of 2023 is allowed setting aside the order passed by the trial court on 20.06.2023 in Crl.M.P.No.893 of 2023 in RC No.42/2022/NIA/DLI. The Petitioner /Accused No.17 is granted bail on the following conditions:

(i)Petitioner shall execute a bond and furnish two sureties for a likesum of Rs.1,00,000/- [Rupees One Lakh only] each and one of the sureties should be a blood relative to the satisfaction of the learned Special Court under the National Investigation Agency Act, 2008 (Sessions Court for Exclusive Trial of Bomb Blast Cases) Chennai at Poonamallee, Chennai-56;

(ii)After coming out from jail, the petitioner shall stay at Chennai and shall not leave the Chennai city without the permission of the trial

court;

(iii)The petitioner shall appear and sign before the trial court every day at 10.30 a.m. until further orders;

(iv)The petitioner shall surrender his Passport (if any) before the trial court and if he does not hold a passport, he shall file an affidavit to that effect in the form that may be prescribed by the trial court. In the latter case the trial court will if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said period, the trial court will be entitled to act on the statement of the petitioner;

(v)The petitioner shall cooperate with the investigation;

(vi)The petitioner shall not tamper with evidence and indulge in any other activities which

are in the nature of preventing the investigation process;

(vii)The petitioner shall inform the trial court the address where he resides and if changes his address, it should be informed to trial court;

(viii)The petitioner shall use only one mobile phone during the time he remains on bail and shall inform the trial court his mobile number;

(ix)The petitioner shall also ensure that his mobile phone remains active and charged at all times so that he remains accessible over phone throughout the period he remains on bail;

(x)The trial court will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out.

(c)Captioned H.C.P.No.1114 of 2023 is closed albeit preserving all rights and contentions of both sides in the HCP including rights of HCP petitioner or any one concerned for the petitioner (detenu) to come

up with another HCP with similar / same prayer if the need arises depending on the development and further trajectory the matter takes. Consequently, connected Crl.M.P.No.8903 of 2023 seeking for interim bail is closed.

**(M.S., J.) (R.S.V., J.)**
**01.08.2023**

Index : Yes
Speaking Order
Neutral Citation : Yes
vvk

To

1.The Superintendent of Police,
National Investigation Agency,
NIA, Police Station,
Ministry of Home Affairs,
Government of India,
New Delhi.

2.The Chief Investigating Officer,
The Inspector of Police,
National Investigation Agency,
Chennai Branch,
Chennai

3.Under Secretary,
CTCR Division,
Ministry of Home Affairs,
North Block, New Delhi.

4.The Superintendent of Prison,
Central Prison, Puzhal,
Chennai.

5.Special Public Prosecutor,
National Investigation Agency

6.Public Prosecutor,
High Court, Madras.

**M.SUNDAR, J.**
and
**R.SAKTHIVEL, J.**

vvk

**common order in**

Criminal O.P.No.12229 of 2023,

Criminal Appeal No.678 of 2023
and
H.C.P.No.1114 of 2023
and
Crl.M.P.No.7402 of 2023 in
Crl.O.P.No.12229 of 2023
and
Crl.M.P.No.8903 of 2023 in
HCP No.1114 of 2023

**Dated : 01.08.2023**

**ADDENDA**
in
Criminal O.P.No.12229 of 2023,
Criminal Appeal No.678 of 2023
and
H.C.P.No.1114 of 2023
and
Crl.M.P.No.7402 of 2023 in Crl.O.P.No.12229 of 2023
and
Crl.M.P.No.8903 of 2023 in HCP No.1114 of 2023

**M.SUNDAR, J**.
and
**R.SAKTHIVEL, J**.

(Order of the Court was made by M.SUNDAR, J.)

Captioned matters are listed under the cause list caption 'FOR PRONOUNCING ORDERS'.

2 After pronouncing of the common order, Mr.N.Baaskaran, learned Special Public Prosecutor for NIA Cases (hereinafter 'learned SPP' for the sake of brevity, convenience and clarity) who was present in Court made a oral application seeking Certificate for appeal to Hon'ble Supreme Court.

3 Aforementioned oral application is obviously under Article 134-A(b) of the Constitution of India. Article 134-A provides for determining a question as to whether a Certificate for appeal to Hon'ble Supreme Court may be given vide three circumstances adumbrated therein and they are as follows:

(a)Where the case involves a substantial question of law as to the interpretation of Constitution [Article 132(1)];

(b)Where a substantial question of law of general importance in regard to civil matters which in the opinion of the High Court has to be decided by Hon'ble Supreme Court [Article 133(1)];

(c)Where the High Court certifies that the case is a fit one for appeal to Hon'ble Supreme Court [Article 134(1)(c)].

4 As regards the ground on which Section 134-A oral application was made by learned SPP, it was submitted that Section 43D of 'the Unlawful Activities (Prevention) Act, 1967 [Act 37 of 1967]' (hereinafter 'UAPA' for the sake of brevity) requires to be interpreted by Hon'ble Supreme Court. To be noted, this is the ground on which learned SPP made the oral application under Article 134-A(b).

5 We carefully considered the oral application. We find that Section 43D of UAPA has been elucidated and interpreted by Hon'ble Supreme Court in a long line of judgments i.e., a catena of case laws and we have respectfully referred to many of these case laws in our aforesaid common order. Therefore, we find that the ground projected by learned SPP does not really arise as Hon'ble Supreme Court has rendered many orders and judgments qua Section 43D as well as Section 43D(5) and proviso thereat and we have respectfully alluded to the same in our

common order. Oral application seeking Certificate for appeal to Hon'ble Supreme Court does not fit into adumbration qua Article 134-A(b) set out supra. We are informed by both sides that no matter pertaining to constitutional validity, i.e., vires in this regard is pending in Hon'ble Supreme Court. Therefore, the request for oral leave seeking Certificate for appeal to Hon'ble Supreme Court is negatived.

6 This order made in open Court will now be uploaded along with the common order in captioned matter as addenda to the common order pronounced in the Court today.

7 We also make it clear that the common order together with this addenda uploaded in the official website of this Court (Madras High Court) will be good enough for any Court (including the Trial Court) to act on the same (if approached by any of the parties) without insisting on certified copy of the same.

(M.S., J.) (R.S.V., J.)
01.08.2023

vvk

M.SUNDAR, J.
and
R.SAKTHIVEL, J.

vvk

Criminal O.P.No.12229 of 2023,
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Dated : 01.08.2023