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CRL OP(MD).



22

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

( Criminal Jurisdiction )

RESERVED ON : 13/04/2022

PRONOUNCED ON : 19/04/2022

PRESENT

**The Hon`ble Mr.Justice K.MURALI SHANKAR**

CRL OP(MD). No.6833 of 2022  
and  
Crl.M.P. (MD)No.4716 of 2022  
in  
Crl.O.P. (MD)SR No.13013 of 2022

1. Ganapathy  
2. Muthupandi  
3. Vicky @ Vignesh ... Petitioners/Accused No.1 to 3

Vs

State Rep.by  
The Inspector of Police,  
Karaikudi South Police Station,  
Sivagangai District.  
Crime No.47 of 2022.. ... Respondent/Complainant

For Petitioner : M/s. Banumathy.A.,  
Advocate.  
For Respondent : Mr.E.Antony Sahaya Prabahar  
Additional Public Prosecutor  
: Mr.K.S.Durai Pandian, Advocate  
for Defacto complainant

PETITION FOR BAIL Under Sec.439 of Cr.P.C.

**PRAYER :-**

For Bail in Crime No.47 of 2022 on the file of the Respondent Police.

**ORDER :** The Court made the following order :-

"A person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by society, has a right to be defended in a court of law and, correspondingly, it is the duty of the lawyer to defend him." It is apt to begin with the words of Clarence Darrow, who is widely renowned as the Attorney for the Damned.

<https://www.mhc.tn.gov.in/judis>



2.The petitioners/Accused 1 and 2 and 3 who were summoned and remanded to judicial custody on 21.03.2022 and 26.03.2022 respectively for the offences punishable under Sections 294(b), 427, 448, 324, 307, 506(ii) I.P.C., and Section 4 of TN Prohibition of Harassment of Women Act, 2002, in Cr.No.47 of 2022, on the file of the respondent police, seeks bail.

3.Admittedly, the defacto complainant and his wife are practising advocates in the Courts at Karaikudi. It is not in dispute that the first petitioner's brother Kasi is residing in a house just opposite to the house of the defacto complainant, that there existed matrimonial disputes between the said Kasi and his wife Rani and that they were living separately.

4.The case of the prosecution is that the said Kasi had previous motive with the defacto complainant and his wife as he believed that the defacto complainant and his wife were responsible for his separation from his wife, that they had hatched a plan to take revenge on the defacto complainant, that on 21.03.2022 at about 08.30p.m., the accused 1 to 3 had trespassed into the defacto complainant's house and abused him in filthy language and attacked the defacto complainant and his wife with knife, sword and wooden logs and caused serious injuries and that the accused have also threatened them with dire consequences. When the defacto complainant was taking treatment as inpatient at Government Hospital, Karaikudi, the respondent police, after recording a complaint statement, registered the case in Cr.No.47 of 2022 for the offences under Sections 94(b), 427, 448, 324, 307, 506(ii) I.P.C., and Section 4 of TN Prohibition of Harassment of Women Act, 2002.

5.It is also not in dispute that the petitioners 1 and 2 have surrendered on 21.03.2022 and the third petitioner has surrendered on 26.03.2022 before the respondent police and that they were remanded to judicial custody.

6.The petitioners' case is that on 22.03.2022, Karaikudi Bar Association has passed a resolution stating that no one should file bail application in Cr.No.47 of 2022 before the Karaikudi Judicial Magistrate Court and Sessions Court at Sivagangai, that an advocate from other District filed a bail petition on 01.04.2022 in Crl.M.P.No.47 of 2022 before the Court of Judicial Magistrate, Karaikudi, that the members of the Bar Association have prevented the petitioners' Counsel to appear before the concerned Court and hence, the bail application of the petitioners was dismissed for non-prosecution on 04.04.2022, that the Bar members have also prevented the petitioners' Counsel to file a copy application for getting dismissal order and thereby prevented them from filing any bail petition before the District Court, Sivagangai and that therefore, the petitioners with no other option, have approached this Court directly for bail and they have filed the bail application along with a petition seeking permission to move bail



petition before this Court without moving concerned Sessions

7. When the matter was taken up on 11.04.2022, considering the submission made by the learned Counsel for the petitioners that the Karaikudi Bar Association has passed a resolution directing the members not to appear for the petitioners herein, since the defacto complainant is an advocate practising in Karaikudi Court and a member of Karaikudi Bar Association, this Court directed the Registry to call for a report from the Karaikudi Bar Association as to whether any resolution was passed or direction was issued by the Association directing its members not to appear on behalf of the petitioners.

8. The learned Principal District Judge, Sivagangai has submitted a letter dated 12.03.2022 stating that the Bar Association of Karaikudi resolved on 22.03.2022 not to file any bail petition to the accused in Cr.No.47 of 2022 of Karaikudi South Police Station and also enclosed a copy of the resolution dated 22.03.2022.

9. Though this Court has called for a report from the Bar Association, the President and the Secretary of the Karaikudi Bar Association have sent a reply dated 12.04.2022, addressed to the Judicial Magistrate, Karaikudi, wherein they have admitted the passing of resolution dated 22.03.2022 and further stated that the resolution was passed unanimously, that they have not compelled the advocates not to appear for the petitioners and that request alone was made in the resolution.

10. In the meanwhile, the defacto complainant has entered into appearance and filed a counter affidavit, wherein, he has raised two fold objections and the first one is that the bail application filed directly before this Court is not maintainable and the second one is that the petitioners 1 and 2 along with the third accused who is a hooligan, had attacked the defacto complainant and his wife brutally and caused serious injuries and as such, they are not entitled to be released on bail.

11. Let us take the technical objection raised by the defacto complainant at first. No doubt, even according to the petitioners, without filing any bail petition before the Principal Sessions Court, they have approached this Court for bail directly. A cursory perusal of the provisions of Section 438 and 439 of the Code of Criminal Procedure would reveal that the jurisdiction conferred on the High Court and the Sessions Court for entertaining prayer for bail or anticipatory bail is concurrent in nature.

12. No doubt, under the Code of Criminal Procedure, the concurrent powers have been given under Section 438 for anticipatory bail and under Section 439, for regular bail and also in Constitution of India with regard to the writ jurisdiction, under Article 226, the Hon'ble Supreme Court and under Article 226, before



the High Courts, but at the same time, it is an accepted principle that lower forum alone is to be approached at the first instance. It is pertinent to note that when two Forums are available, then certainly it is a matter of propriety for the party first to approach the lower Forum, except in rare and special circumstances.

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13. In *Vinod Kumar Vs. State of U.P., and another*, reported in **2019 SCC Online ALL. 482**, the Allahabad High Court has held that an application can be filed directly before the High Court with a rider that strong, cogent, compelling and special circumstances must necessarily be found to exist in justification of the High Court being approached first without the avenue as available before the Court of Sessions being exhausted.

14. It is pertinent to mention that catena of judgments follow the common thread that albeit Section 439 / 438 Cr.P.C., confers jurisdiction on the High Court and the Sessions Court, an application should be ordinarily filed before the Sessions Court at the first instance and not directly before the High Court. But at the same time that for filing an application directly before the High Court, the applicant has to demonstrate and satisfy the High Court that there exists exceptional, rare or unusual reasons for him to approach the High Court directly.

15. In the case on hand, as already pointed out, it is the specific case of the petitioners that the petitioners' Counsel was prevented to argue before the Court of Judicial Magistrate and thereafter for filing the bail application before the Sessions Court.

16. In the counter affidavit, the defacto complainant has alleged that the petitioners have already filed bail application in Crl.M.P.No.160 of 2022 on 01.04.2022 and the same came to be dismissed on 04.04.2022 and that they have suppressed that their bail application was dismissed.

17. As already pointed out, the petitioners' bail application filed before the Court of Judicial Magistrate, Karaikudi in Crl.M.P.No.160 of 2022 was ordered to be dismissed for non-prosecution. It is the specific contention of the petitioners that their Counsel was not even allowed to file copy application for getting the dismissal order copy, so as to enable them to move the Sessions Court and that thereby the petitioners' Counsel was prevented from filing any bail petition before the Sessions Court.

18. As already pointed out, the learned Principal District Judge, Sivagangai has stated that the Bar Association has passed the resolution. More importantly, the Bar Association itself has admitted that they have passed such resolution. Considering the above facts and circumstances, this Court is satisfied that there



existed unusual and exceptional reason for moving the Court directly and accordingly, permission sought for, is granted.

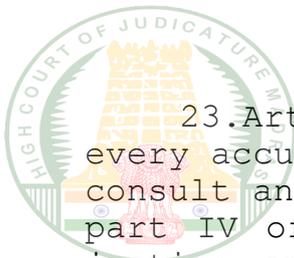
19. When the matter was taken up on 12.04.2022, the learned Counsel for the defacto complainant submitted that the petitioners 1 and 2 had engaged hooligan and the third accused is a hooligan, that they have hatched a pre-plan and by removing a fuse carrier they have trespassed into the house of the defacto complainant and damaged the lights of the two wheeler parked in the front yard of the house and that thereafter, they have attacked them brutally with knife, sword and wooden logs.

20. When the matter was taken up on 13.04.2022, the learned Additional Public Prosecutor appearing for the State, on instructions, would submit that third accused is a B.E., graduate and he is having one previous case for murder, that he is not having any other previous cases and that the contention of the defacto complainant's side that the third accused is a hooligan is incorrect.

21. Considering the facts that there existed previous enmity between the defacto complainant's family and the family of the first petitioner's brother Kasi, that the injured have been discharged from the hospital, that the petitioners 1 and 2 are not having any bad antecedents, that the third accused is not a hooligan as stated by the learned Additional Public Prosecutor and also taking note of the fact that the petitioners 1 and 2 are in custody from 21.03.2022 and the third accused from 26.03.2022, this Court is inclined to grant bail to the petitioners.

22. Now turning to the next aspect, it is necessary to quote the speech delivered by Sir Thomas Erskine, who had accepted the retainer to defend Thomas Paine in 1792 when he was tried for treason.

*"From the moment that any advocate can be permitted to say, that he will—or will not—stand between the Crown and the subject arraigned in the court where he daily sits to practise, from that moment the liberties of England are at an end. If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the judge; nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation, puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principle of English law makes all presumptions, and which commands the very judge to be his counsel."*



23. Article 22(1) of the Constitution of India contemplates that every accused has a fundamental right, not to be denied the right to consult and to be defended by a legal practitioner of his choice. In part IV of the Constitution, Article 39(A) speaks about the equal justice and free legal aid and requires the State to secure the operation of the legal system which promotes justice, on a basis of equal opportunity and in particular, to provide free legal aid by suitable legislature, or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

24. Considering the above provisions, it can easily be observed that any fetter placed on the fundamental right of the accused, to be defended by a lawyer of his choice, be it for any reason, is illegal and is against the Constitution of India.

25. In the case on hand, as already pointed out, the Bar Association has passed the resolution directing its members not to file any bail application in the case concerned in Cr.No.47 of 2022. As already pointed out, the Bar Association has not only restrained its members, but also the Advocate who has come from the other District, was also prevented from appearing for the petitioners before the Magistrate Court and even for applying for the certified copies of the dismissal order.

26. At this juncture, it is necessary to refer the decision of the Hon'ble Supreme Court in **A.S.Mohammed Rafeeq Vs. State of Tamil Nadu rep. by Home Department and others** in **Crl.A.No. 2310 of 2010**, dated 06.12.2010 and the relevant passages are extracted hereunder:

*"14. Before parting with this case, we would like to comment upon a matter of great legal and constitutional importance which has caused us deep distress in this case. It appears that the Bar Association of Coimbatore passed a resolution that no member of the Coimbatore Bar will defend the accused policemen in the criminal case against them in this case.*

15. Several Bar Association all over India, whether High Court Bar Associations or District Court Bar Associations have passed resolutions that they will not defend a particular person or persons in a particular criminal case. Sometimes there are clashes between policemen and lawyers, and the Bar Association passes a resolution that no one will defend the policemen in the criminal case in court. Similarly, sometimes the Bar Association passes a resolution that they will not defend a person who is alleged to be a terrorist or a person accused of a brutal or heinous crime or involved in a rape



case.

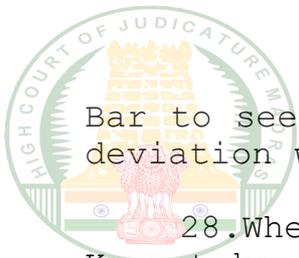
16. In our opinion, such resolutions are wholly illegal, against all traditions of the bar, and against professional ethics. Every person, however, wicked, depraved, vile, degenerate, perverted, loathsome, execrable, vicious or repulsive he may be regarded by society has a right to be defended in a court of law and correspondingly it is the duty of the lawyer to defend him.

.....

32. Professional ethics requires that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the Statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of the Gita.

33. *The Registry of this Court will circulate copies of this judgment/order to all High Court Bar Associations and State Bar Councils in India. The High Court Bar Associations are requested to circulate the judgment/order to all the District Court Bar Associations in their States/Union territories."*

27. In **Francis Thomas Vs. State of Haryana**, similar resolution passed by the District Bar Association, Gurgaon, not to represent the accused in the Court, was challenged before the Hon'ble Supreme Court. The Hon'ble Apex Court, though the said resolution was later withdrawn, has held that an accused, whatever the offence may be, had the inherent right to be represented by a Counsel of his choice; the traditions of the Bar, and the fundamental concept pertaining to access to justice does not permit any Bar Association to pass such a resolution; despite the assurance, that none of the members of the Bar Association would create any kind of hindrance or obstruction for the smooth hearing of the case, they were obliged to hold that none of the members of the Bar should create any kind of impediment in the ingress and regress of any Counsel representing the petitioner; it shall be the responsibility of the office-bearers of the



Bar to see that the order was complied with in its entirety, any deviation would be seriously dealt with.

28. When a similar resolution was challenged before the Karnataka High Court, a Division Bench headed by the Hon'ble Chief Justice in **B.T.VENKATESH and others Vs. State of Karnataka represented by the Chief Secretary and Others** in W.P.NO.4095 OF 2020, dated 17.03.2020 has observed as follows:

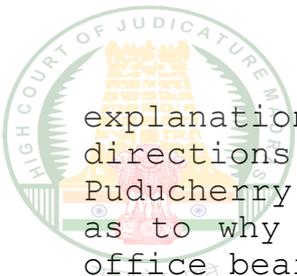
"11. As far as the criminal justice delivery system in our country is concerned, one can proudly say that Kangaroo trials are not conducted and even foreign nationals, against whom there is an allegation of commission of a serious offence, are given a fair trial. Only by way of example, we may refer to the case of Ajmal Kasab.

12. The minimum which we expect is that considering the presumption of innocence which still exists (barring exceptional cases where negative burden is on the accused), at least the members of the Bar should not be branding the persons who are named as accused in FIR as criminals and anti-nationals though the charges against them are not proved in the Court. The law requires that the three accused against whom serious charges have been levied should be given a fair trial.

13. The second disturbing feature is that so far none of the local lawyers have come forward to represent the accused. If such a situation is created and if lawyers practicing outside the district do not come forward to represent the accused, even the Courts will find it difficult to give legal aid by appointing local lawyers. This situation is not conducive for a healthy justice delivery system. Such a situation will have to be avoided. Ultimately it is the duty and responsibility of every stake holder in the legal system to ensure that the accused gets fair trial and his rights under the Constitution of India are not violated."

29. Considering the legal dictum laid down by the Hon'ble Supreme Court, this Court has no hesitation to hold that the resolution passed by the Karaikudi Bar Association dated 22.03.2022 restraining its members not to appear for the petitioners is illegal and null and void and the same has no force of law. No doubt, any attack on the advocates can't be viewed lightly and the same is to be condemned sternly and that the attackers are to be dealt with iron hands. But at the same time, the Bar Association is not expected to pass such a resolution, violating the Constitution and the Law of the land declared by the Hon'ble Supreme Court.

30. Since the Karaikudi Bar Association has themselves admitted the passing of resolution, this Court is constrained to call for an



explanation from the Karaikudi Bar Association as to why necessary directions should not be issued to the Bar Council of Tamil Nadu and Puducherry for taking action to de-recognise the Bar Association and as to why contempt proceedings should not be initiated against the office bearers of the Karaikudi Bar Association.

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31. In the result, the Criminal Original Petition is ordered and the petitioners are granted bail subject to the following conditions:

32. Accordingly, the petitioners shall deposit a sum of **Rs.30,000/- (Rupees Thirty Thousand only) to the credit of Government of Tamil Nadu, CMPRF (Chief Minister Public Relief Fund) in IOB, Secretariat Branch, Chennai-9 (Account No.11720 10000 00070, IFSC Code: IOBA0001172)**, without prejudice to their rights and contentions before the trial Court and produce the receipt/acknowledgment before the learned Judicial Magistrate, Karaikudi.

33. On production of such receipt/acknowledgment, the petitioners are ordered to be released on bail on their executing a bond for a sum of Rs.25,000/- (Rupees Twenty Five Thousand only) each with two sureties each for a like sum to the satisfaction of the learned Judicial Magistrate, Karaikudi.

(i) the sureties shall affix their photographs and left thumb impression in the surety bond and the Magistrate/concerned court may obtain a copy of their Aadhar card or Bank Pass Book to ensure their identity;

(ii) **the petitioners shall stay at Chengalpattu and report before the Chengalpattu Town Police Station daily at 10.30a.m., for a period of 15 days and thereafter before the respondent police daily at 10.30a.m., until further orders;**

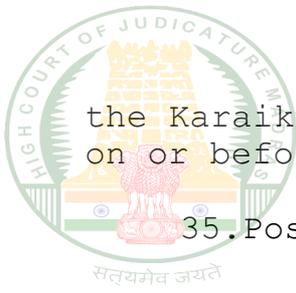
(iii) the petitioners shall not tamper with evidence or witness;

(iv) the petitioners shall not abscond during trial;

(v) On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioners in accordance with law as if the conditions have been imposed and the petitioners released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in **P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560]**.

(vi) If the accused / petitioners thereafter abscond, a fresh FIR can be registered under Section 229A IPC.

34. The Registry is directed to call for explanation from the Karaikudi Bar Association as to why necessary directions should not be issued to the Bar Council of Tamil Nadu and Puducherry for taking action to de-recognise the Bar Association and as to why contempt proceedings should not be initiated against the office bearers of



the Karaikudi Bar Association and directed to submit the explanation on or before 27.04.2022.

35. Post the matter on 27.04.2022.

sd/-  
19/04/2022

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20/04/2022

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

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

TO

- 1 THE JUDICIAL MAGISTRATE,  
KARAIKUDI.
- 2 DO THROUGH THE CHIEF JUDICIAL MAGISTRATE,  
SIVAGANGAI DISTRICT.
- 3 THE OFFICER INCHARGE,  
SUB JAIL, THIRUPPATHUR.
- 4 THE INSPECTOR OF POLICE  
KARAIKUDI SOUTH POLICE STATION,  
SIVAGANGAI DISTRICT.
- 5 THE INSPECTOR OF POLICE,  
CHENGALPATTU TOWN POLICE STATION,  
CHENGALPATTU DISTRICT.
- 6 THE OFFICER INCHARGE,  
CHIEF MINISTER PUBLIC RELIEF FUND,  
GOVERNMENT OF TAMILNADU,  
SECRETARIAT, CHENNAI-9.
- 7 THE PRESIDENT,  
KARAIKUDI BAR ASSOCIATION,  
KARAIKUDI.



8 THE SECRETARY,  
KARAIKUDI BAR ASSOCIATION,  
KARAIKUDI.

9 THE PRESIDENT,  
BAR COUNCIL OF TAMIL NADU AND PUDUCHERRY,  
CHENNAI AND PUDUCHERRY.

10 THE SECRETARY,  
BAR COUNCIL OF TAMIL NADU AND PUDUCHERRY,  
CHENNAI AND PUDUCHERRY.

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

COPY TO

1 THE REGISTRAR (JUDICIAL),  
MADURAI BENCH OF MADRAS HIGH COURT,  
MADURAI.

2 THE SECTION OFFICER,  
CRIMINAL SECTION,  
MADURAI BENCH OF MADRAS HIGH COURT,  
MADURAI.

+1 CC to M/s.A.BANUMATHY, Advocate ( SR-3556[I] dated 20/04/2022 )

ORDER

IN

CRL OP(MD) No.6833 of 2022

Date :19/04/2022

RS/PN/SAR.4 (20.04.2022) 11P-15C