IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 29.11.2023

Pronounced on : 12.12.2023

CORAM

THE HONOURABLE MR. JUSTICE S.S.SUNDAR
and
THE HONOURABLE MR. JUSTICE SUNDER MOHAN

Criminal Appeal No.542 of 2023

Asif Musthaheen ...Appellant/A1

Vs.

State represented by:
The Deputy Superintendent of Police,
North Police Station,
Erode Town Sub Division,
Erode District.
(Erode North PS Crime No.355/2022)
...Respondent/Complainant

Criminal Appeal filed u/s.21(iv) of National Investigation Agency Act, 2008, to set aside the impugned order dated 17.04.2023 passed by the learned Principal Sessions Judge of Erode District in CMP No.1328 of 2023 and enlarge the appellant on bail with any stringent conditions which may be imposed by this Court.

For Appellant : Mr.T.Mohan, Sr. Counsel
for Mr.S.Veeraraghavan

For Respondent : Mr.A.Gokulakrishnan
Additional Public Prosecutor

JUDGMENT

(Order of the Court was delivered by **SUNDER MOHAN, J.**)

The instant appeal has been preferred by the accused, challenging the order passed in Crl.M.P.No.1328 of 2023 dated 17.04.2023, by the learned Principal District and Sessions Judge, Erode, dismissing the bail application filed by him.

2. The appeal arises under the following circumstances.

(i) The appellant was arrested on 26.07.2022 at 6.00pm for the offences under Sections 121, 122 and 125 of the IPC r/w 18, 18A, 20, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred to as the UA (P) Act). During the investigation, the appellant had preferred a bail application in Crl.M.P.No.2361 of 2022, which was dismissed on 24.08.2022. Criminal Appeal preferred before this Court in Crl.A.No.999 of 2022, against the said order was dismissed on 20.10.2022. The appellant challenged the order of this Court in SLP No.10980 of 2022 before the Hon'ble Apex Court. The Hon'ble Apex Court dismissed the said

bail application, holding that there was *prima facie* case against the appellant.

(ii) The appellant preferred Crl.M.P.No.4081 of 2022, seeking bail under Section 167(2) of Cr.P.C. The said petition was dismissed on 05.01.2023 by the learned Principal District and Sessions Judge, Erode. Thereafter, the appellant preferred Criminal Appeal before this Court in Crl.A.No.44 of 2023, and the same was dismissed on 03.04.2023. This Court, while dismissing the said appeal, had given liberty to the appellant to file another bail application canvassing changes in circumstances, if any.

(iii) The trial Court dismissed the third bail application in Crl.M.P.No.1328 of 2023 by order dated 17.04.2023, as against which, the appellant has preferred the instant appeal.

3. In the meantime, the prosecution filed the final report on 12.01.2023. It is reported that the learned Magistrate has taken cognizance of the final report only recently.

4. The case of the prosecution as per the final report is that the appellant is a resident of Erode and he is conversant with Tamil, English and Arabic languages; that he is a supporter of Islam Rule in India and he is a staunch supporter of a notorious terrorist viz., Osama-bin-laden; that he always wanted to join Al-Qaeda movement; that for that purpose he has been following the ideology of proscribed terrorist organisation viz., Islamic State of Iraq and Syria (ISIS) and began collecting information through social media about ISIS; that the absconding accused(A2) is the member of ISIS having Head Quarters at Syria; that the appellant gained proximity with the said accused (A2) and wanted to become a member of the said banned organisation for the purpose of causing injury to leaders of Hindu Organisations in and around the area, where the appellant is living; that in order to carry out his plan, the appellant was in constant touch with A2, through an App called Nekogram; that the appellant had chatted with A2 in the said App by using a nick name 'Abu Talha'; that the messages which were in Arabic language and translated in English would show that the appellant intended to cause threat to the unity and integrity of India and had

intended to commit murder of the members of the Hindu Organisations; and that the appellant is guilty of the offences under Sections 18 and 38(2) of the UA (P) Act.

5. (i) Mr.T.Mohan, learned senior counsel appearing for the appellant would submit that the accused has been in custody since July 2022 and that the nature of the allegations is such that it does not warrant a prolonged indefinite pre-trial detention. The respondent had not recovered any incriminating materials except for the mobile phone said to have been used by the appellant to communicate with A2.

(ii) The learned senior counsel submitted that even assuming that the allegations against the appellant that he communicated with A2 are true, that does not constitute the offences alleged against the appellant.

(iii) The learned senior counsel submitted that though the final report was filed on 12.01.2023, the respondent has violated Rule 3 of the Unlawful Activities (Prevention) (Recommendation and Sanction of

Prosecution) Rules, 2008, by which the recommendation for prosecution by the authority should be within seven workings days of the receipt of the evidence gathered by the investigating officer under the Code; that since the recommendation of the authority was only on 23.03.2023, admittedly, which is more than 60 days after the evidence was gathered by the investigating officer, sanction itself gets vitiated and in any case, the continued detention of the appellant would amount to violation of Article 21 of the Constitution of India.

(iv) The learned senior counsel relied upon a Division Bench judgment of the Kerala High Court in Crl.Rev.Pet.No.732 of 2019 in support of his submission and prayed for the grant of bail to the appellant.

6. (i) The learned Additional Public Prosecutor per contra submitted that the application for bail cannot be entertained as the Hon'ble Supreme Court had observed that a *prima facie* case was made out while dismissing the SLP filed by the appellant, challenging the order of dismissal of the bail application filed by the appellant.

(ii) The learned Additional Public Prosecutor pointed out to the translated version of the original conversation between the appellant and A2, which is stated to be in Arabic. He also pointed out portions of the conversation wherein the appellant asked for weapons from A2 and also said that he would take an oath in the presence of an Islamic religious leader, Khalifa Sheik Abul Hasan. The appellant is said to have also expressed his willingness to indulge in criminal activities such as causing the deaths of Hindu religious leaders and attacking temples and police stations. Therefore, the learned Additional Public Prosecutor objected to granting bail to the appellant.

7. We have perused the charge sheet and the available materials on record.

8. The appellant has been charged for the offences that fall under Chapters IV and VI of the UA (P) Act. Therefore, there is a statutory restriction under the proviso to Section 43 – D (5) of the UA (P) Act, while

considering the bail application. Before we analyse the facts to ascertain whether the appellant is entitled to bail in view of the statutory limitations, the nature of the said limitations has to be understood. The Hon'ble Supreme Court had occasion to consider this aspect in a few cases.

(a). In ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali*** reported in (***2019) 5 SCC,*** the Hon'ble Apex Court held as follows:

> *"23.By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation*

*against such person is "prima facie" true. **"By its very nature, the expression "prima facie true" would mean that the materials/evidence collaged by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, (emphasis supplied)** and on the fact of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true," as compared to the opinion of the accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing of charges in relation to offences under the 1967 Act."*

(emphasis supplied)

(b). In Paragraph 24 of the ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali's case*** (cited supra), the Hon'ble Supreme Court held as follows:

"24. A priori, exercise to be undertaken by the Court at this

stage of giving reasons for grant or non - grant of bail is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise."

(c). In the above case, the Hon'ble Supreme Court relied upon the observations made in an earlier three Bench Judgment in ***Ranjitsing Brahmajeetsing Sharma V. State of Maharashtra,*** reported in ***(2005) 5 SCC 294*** while interpreting Section 21(4) of the Maharashtra Control of Organised Crime Act, 1999. It is worthwhile to extract the relevant observations made therein:

"44. The wording of Section 21 (4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the appellant has not committed such an offence. In such an event, it will be possible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature."

(d). Further in ***Thwaha Fasal Vs.Union of India,*** reported in ***(2021) SCC Online SC 1000*** the Hon'ble Supreme Court held as follows:

> *"20. Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the Court is satisfied after examining the material on record that there are no reasonable grounds for believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI.* ***The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the Court while examining the issue a prima facie case as required by sub section (5) of Section 43 D is not expected to hold a mini trial. This Court is not supposed to examine the merits and demerits of the evidence. If a charge sheet is already filed, the Court has to examine the material forming a part of charge sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is.*** *" (emphasis supplied).*

e). This Court also finds that in ***Union of India Vs. K.A.Najeeb***

(Crl.A.No.98 of 2021 decided on 01.02.2021), the Hon'ble Supreme Court observed as follows:

> *"18. It is thus clear to us that the presence of statutory restrictions like Section 43 – D (5) of UAPA per-se does not oust the ability of Constitutional Courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a Statue as well as the powers exercisable under Constitutional Jurisdiction can be well harmonised. Whereas at commencement of proceedings, Courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safegaurd against the possibility of provisions like Section 43 – D (5) of UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."*

9. While considering a similar bail application under the UA(P) Act, in Crl.A.No.340 of 2023, after analysing the judgments of the Hon'ble Supreme Court, in the aforesaid cases, this Court in its order dated 09.11.2023 had made the following observations.

> *"7. Thus, from the observations made in the above*

judgments, it can be seen that in ***National Investigation Agency Vs. Zahoor Ahmad Shah Watali's case*** *(cited supra), the Hon'ble Supreme Court had observed that the degree of satisfaction to hold that there is a prima facie case for denying bail would differ from the degree of satisfaction to dismiss a discharge petition on the ground that there is a prima facie case. While considering a discharge petition and assessing the prima facie case, it is trite law that even grave suspicion is sufficient to frame a charge. However, we are of the view that while denying the liberty of a person, the test to assess the prima facie case would be different. The liberty of a person cannot be denied on grave suspicion alone. The Act specifically employs the words "reasonable grounds for believing that the accusation against such a person is prima facie true". Further, we are of the view that the accusation must be not only grave, but the materials in support of the accusation must be cogent at whatever stage the bail application is considered. Thus, there must be something more than grave suspicion while holding that there is a prima facie case to deny bail. The Judgements referred to above would also indicate that the above restriction in the proviso to Section 43 D (5) of the UA (P) Act is a slight departure from the bail jurisprudence, namely that bail is the rule and the jail is an exception. It only means that while considering a bail application, the Courts cannot grant bail on mere asking, and there must be reasons for the grant of bail. However, the above restriction found in the proviso to 43 (5) of the UA(P) Act cannot be read to mean that the basic human right or the constitutional right of a person is taken away. Pre-trial detention is an anathema*

to the Constitution besides being in violation of the basic human right. The Judgments referred to above would also indicate that where the Constitutional Courts find that there is an infraction of the fundamental right under Article 21 of the Constitution of India, the rigours of the proviso would melt down. As to when pre-trial detention would amount to a violation of Article 21 of the Constitution of India, would depend on the facts and circumstances of each case. In one case, the pre-trial detention, even for six months may be in violation of Article 21 of the Constitution of India. In yet another case, pre-trial detention of even three years would not amount to a violation of Constitutional right. This would depend on the gravity of the offence alleged, the role played by the particular accused, the nature of the evidence relied upon by the prosecution, and the probable punishment that could be imposed on the said accused. The liberty of a person pending trial cannot be ordinarily curtailed unless the law and facts warrant such curtailment.

10. Considering the principles laid down in the aforesaid decisions, we may analyse the facts in the instant case. The appellant has been charged with the offence under Sections 18 and 38(2) of the UA (P) Act. The materials relied upon by the respondent are the details of the

communications made in Arabic language between appellant/A1 and A2 through the App called 'Nekogram'.

11. Apart from the communications, the respondent relied upon the recovery of two knives of about 34 cms in length, and pictures of the appellant holding a knife, and a picture of an unknown person holding a severed head.

12. The Tamil translation of the messages exchanged between the appellant/A1 and A2 have been filed by the respondent along with the final report.

13. The learned Additional Public Prosecutor pointed out certain portions of the conversation that, according to him, would *prima facie* establish the involvement of the appellant/A1 in the offence under Sections 18 and 38(2) of UA (P) Act.

14. At this stage, we are not going into whether these translations are

accurate or whether the messages were sent by the appellant/A1 to A2. Those are matters for trial. Assuming that the messages produced by the respondent are between the appellant/A1 and A2, we find that in a particular message, A1 informed A2 that he had several weapons but did not have a gun and a bomb. He also proclaimed in another message that he had killed several people and that he would send proof for the same. A2 in another message had asked A1 to take an oath, confirming that he would abide by the terms of their leader by name Khalifa Sheik Abul Hasan and A1 also confirmed that he has taken an oath as requested by the A2. A2 also promised A1 that he would make arrangements to send weapons like AK-47 through his men to A1. In another message, A1 stated that he had thought about several places, like Hindu temples, police stations, etc. He also claimed to be responsible for killing a person. However, the prosecution was unable to point out the identity of the said person.

15. The above text messages do not indicate anywhere that the appellant/A1 had joined the proscribed terrorist organisation by name 'ISIS'.

We also do not find any evidence adduced by the prosecution to prove that A2 is a member of ISIS. Even assuming that A2 is a member of ISIS, the text messages only indicate that the appellant/A1 wanted to be close to A2. Proximity to an individual is different from associating oneself with or professing to be associated with the terrorist association to further its activities. The observations made by the Hon'ble Supreme Court in ***Thwaha Fasal's case***, at paragraph No.19, which are extracted hereunder, would squarely apply to the facts of the instant case.

> "19. Thus, the offence under sub-section (1) of Section 38 of associating or professing to be associated with the terrorist organisation and the offence relating to supporting a terrorist organisation under Section 39 will not be attracted unless the acts specified in both the Sections are done with intention to further the activities of a terrorist organisation. To that extent, the requirement of mens rea is involved. Thus, mere association with a terrorist organisation as a member or otherwise will not be sufficient to attract the offence under Section 38 unless the association is with intention to further its activities. Even if an accused allegedly supports a terrorist organisation by committing acts referred in clauses (a) to (c) of sub- section (1) of Section 39, he cannot be held guilty of the offence punishable under Section 39 if it is not established that the acts of support are done with intention to further the activities of a terrorist organisation. Thus, intention to further activities of a terrorist organisation is an essential ingredient of the offences punishable under Sections 38 and 39 of the 1967 Act."

Therefore, we are of the *prima facie* view that the offence under Section 38(2) of the UA (P) Act, has not been made out.

16. As regards the offence under Section 18 of the UA (P) Act, it is the prosecution case in the final report that appellant/A1 and A2 conspired to commit terrorist acts in India against Hindu religious leaders belonging to the BJP and RSS. The evidence discloses that the conspiracy was to attack certain religious leaders. The respondent has not spelt out how, that would amount to a terrorist act as defined under Section 15 of the UA (P) Act. In order to bring an act under Section 15 of the UA (P) Act, the act must be done with an intent to threaten or likely to threaten the unity, integrity, security, economic security, or sovereignty of India or with an 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. The question as to whether the killing of Hindu religious leaders by itself can constitute a terrorist act is debatable. However, considering the broad probabilities of the case from the materials collected by the prosecution, one cannot definitely conclude that there was a conspiracy to commit a terrorist act, though there is a conspiracy to commit

other illegal acts including serious offences.

17. However, we make it clear that our observations with regard to the *prima facie* case under Sections 18 and 38(2) of the UA (P) Act are only made by taking into consideration the broad probabilities of the case and for the purpose of considering the bail application.

18. We may also point out another aspect in this case, which is also relevant in the instant appeal. The final report was filed on 20.01.2023. Rule 3 of the Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008, provides that the authority appointed under Section 45 (2) of the Act by either the Central Government or the State Government, shall recommend to the Central Government or the State Government, as the case may be, within seven working days of the receipt of the evidence gathered by the investigation officer under the Code, for prosecution.

19. Rule 4 of the Unlawful Activities (Prevention) (Recommendation

and Sanction of Prosecution) Rules, 2008, states that the Central Government or the State Government shall take a decision regarding sanction within seven working days after receipt of the recommendations of the Authority.

20. Rules 3 and 4 of the Unlawful Activities (Prevention) (Recommendation and Sanction of Prosecution) Rules, 2008, read as follows:

> "3. Time limit for making a recommendation by the Authority .-The Authority shall, under sub-section (2) of section 45 of the Act, make its report containing the recommendations to the Central Government or, as the case may be, the State Government within seven working days of the receipt of the evidence gathered by the investigating officer under the Code.
>
> 4. Time limit for sanction of prosecution .-The Central Government or, as the case may be, the State Government shall, under sub-section (2) of section 45 of the Act, take a decision regarding sanction for prosecution within seven working days after receipt of the recommendations of the Authority.

21. It is not known on which date the recommending authority received the evidence gathered by the investigating officer. In any case, it

could not have been beyond the date of filing of the final report, and it has to be before the said date.

22. The learned Additional Public Prosecutor, on instructions submitted that the recommending authority sent its recommendation under Rule 3 on 23.03.2023 and the sanction by the State Government was accorded on 01.04.2023. The learned Additional Public Prosecutor submitted that the delay has not caused any prejudice to the appellant/A1, and in any case, there is a restriction in Section 43-D (5) as the appellant/A1 has been nvolved in offences falling under Chapters IV and VI of the Act. We are unable to countenance his arguments. The Rules are mandatory in nature and are intended to ensure a speedy trial of the accused, especially in light of stringent bail provisions.

23. A Division Bench of Kerala High Court in Crl.Rev.Pet.No.732 of 2019, has held that where the sanction is not obtained within the time prescribed under Rule 4, the cognizance by the Special Court would get vitiated. However, we do not wish to dwell on that aspect, as we are not

concerned with that question in this appeal. At the same time, the non-compliance of the mandatory provision would certainly be one of the grounds to hold that the right of the accused to a speedy trial under Article 21 of the Constitution of India is violated, and therefore, the bail application can be considered, not withstanding the restrictions under Section 43-D(5) of the UA (P) Act.

24. It is true that the Hon'ble Supreme Court has dismissed the SLP challenging the dismissal of the bail petition by this Court and also observed that there is no prima facie case made out. However, it has been one year since the Hon'ble Supreme Court dismissed the SLP on 02.12.2022. Further, the prosecution had also filed the final report on 12.01.2023. The accused has been in custody since July 2022. Therefore, we are of the view that, in view of the change in circumstances, this Court can entertain this bail application.

25. Even assuming that the materials collected by the prosecution may ultimately lead to a conviction, the detention pending trial cannot be

indefinite. We have already referred to the observations of the Hon'ble Supreme Court in ***Union of India Vs. K.A.Najeeb's case*** (cited supra), wherein it has been held that the rigours of Section 43 – D (5) of the UA(P) Act would be diluted if the accused had been incarcerated for a long time. In the instant case, since the appellant has been in the custody for nearly 17 months, also considering the allegations in the final report and the materials in support of the same, we are inclined to exercise our powers to grant bail to the accused.

26. Therefore for the above reasons, this appeal deserves to be allowed, and the accused is set at liberty on the following conditions:

(i) The appellant shall execute a bond and furnish two sureties for a likesum of Rs.50,000/- [Rupees Fifty Thousand only] each, and one of the sureties should be a blood relative to the satisfaction of the learned Principal District and Sessions Judge, Erode;

(ii) After coming out from jail, the appellant shall stay at Erode and shall not leave the Erode city without the permission of the trial court;

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

(iv) The appellant 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 appellant;

(v)The appellant shall cooperate with the investigation;

(vi) The appellant shall not tamper with evidence and indulge in any other activities which are in the nature of preventing the investigation process;

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

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

(ix)The appellant 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.

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

12.12.2023

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Neutral citation : yes/no
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S.S. SUNDAR, J.

AND

SUNDER MOHAN, J.

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Copy to:

1. The Principal District and Sessions Judge,
   Erode.

2. The Deputy Superintendent of Police,
   Special Investigation Division CBCID,
   Trichy (Camp),
   Coimbatore.

3. The Deputy Superintendent of Police,
   North Police Station,
   Erode Town Sub Division,
   Erode District.

4. The Public Prosecutor
   High Court of Madras,
   Chennai – 600 104.

Pre-delivery Judgment in
Criminal Appeal No.542 of 2023

Dated: 12.12.2023

Crl.A.No.542/2023

S.S.SUNDAR, J.
AND
SUNDER MOHAN, J.

[Order of the Court was made by S.S.SUNDAR, J.,]

After pronouncement of the judgment in the above criminal appeal, the learned counsel for the appellant requested this Court that a direction may be given to the Trial Court to accept sureties on the basis of the web copy of the judgment.

2.Accordingly, the following direction is given to the Trial Court:-

"The Trial Court, namely, the Principal District and Sessions Court, Erode, shall accept the sureties on the basis of the web copy of the judgment to be produced by the Advocates/parties."

[S.S.S.R., J] [S.M., J]
12.12.2023

AP