

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

WEDNESDAY, THE 23RD DAY OF DECEMBER 2015/2ND POUSHA, 1937

Bail Appl..No. 6990 of 2015 ()

CRIME NO. 1036/2015 OF ADIMALY POLICE STATION, IDUKKI DISTRICT

PETITIONER/ACCUSED :

**SHIAZ,
AGED 34 YEARS, S/O.ASHRAF MAMMU,
KURIAPPARAMBIL HOUSE, KUDAPUZHA
CHALAKUDY, THRISSUR.**

**BY SENIOR ADVOCATE SRI.K.GOPALAKRISHNA KURUP
BY ADV. SRI.ABHISHEK KURIAN**

RESPONDENTS & STATE :

**1. STATE OF KERALA
REP. BY PUBLIC PROSECUTOR
HIGH COURT OF KERALA
ERNAKULAM 682 031.
(CRIME NO. 1036/2015 OF ADIMALI POLICE STATION
IDUKKI DISTRICT.)**

**2. STATION HOUSE OFFICER
ADIMALI POLICE STATION, IDUKKI DISTRICT- 685561
(CRIME NO. 1036/2015 OF ADIMALI POLICE STATION
IDUKKI DISTRICT.)**

***ADDL. R3 IMPEADED**

***ADDL.R3. MUHAMMED ZAKEER
S/O. LATE K. MOIDEENKUTTY
AGED 46 YEARS, KOONARI HOUSE
ADIMALI P.O., IDUKKI DISTRICT.**

***ADDL. R3 IS IMPEADED AS PER ORDER IN CRL.M.A. NO. 11103/2015
DATED 23/12/2015.**

**R1 & R2 BY DIRECTOR GENERAL OF PROSECUTION SRI. K.I. ABDUL RASHEED
ADDL.R3 BY ADVS. SRI.S.U.NAZAR
SRI.MANSOOR.B.H.**

**THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 17-12-2015,
ALONG WITH BA NO. 7555/2015, THE COURT ON 23-12-2015 PASSED THE
FOLLOWING:**

Mn

A.HARIPRASAD, J.

B.A. Nos.6990 & 7555 of 2015

Dated this the 23rd day of December, 2015

COMMON ORDER

Accused 2 and 3 in Crime No.1036 of 2015 of Adimali Police Station seek pre-arrest bail under Section 438 of the Code of Criminal Procedure.

2. Heard the learned Senior Counsel for the second accused and the learned counsel for the third accused. Learned Additional Director General of Prosecution also advanced arguments. Perused the case diary.

3. Prosecution case, in nut shell, is as follows: Kenariveettil Sakeer is the defacto complainant. His brothers, Mohammed Imran and Mohammed Yusuff along with himself owned 27 cents of land at Adimali. Due to financial constraints, they mortgaged 8.5 cents of property for Rupees twenty lakhs in favour of Selin Kathamala about 1 ½ years before the incident. As they could not pay back money within the stipulated time, they entered into an agreement with the first accused in the crime. Accordingly, he advanced an amount of Rupees twenty lakhs to the defacto complainant and others for clearing the liability towards Selin Kathamala. An assignment deed was executed by the defacto complainant in favour of the first accused for securing the amount advanced by him. The

understanding between the defacto complainant and the first accused was that when he paid back money, the first accused should re-transfer the property in the name of the defacto complainant. 18 ½ cents of property belonged to the defacto complainant and others was also assigned to the first accused on condition that a commercial building will be constructed on the land by executing a joint agreement. It is interesting to note that all these collateral agreements were only parole ones and no document was created. It is the case of the defacto complainant that although the first accused initially agreed to build on the land, later he resiled from the agreement and asserted ownership over the land. It appears that the case of the defacto complainant is that he did not assign the land with absolute title and possession to the first accused. There was only a loan transaction for which the documents were executed to secure the amount. It is evident from the materials that there were disputes between the first accused and the defacto complainant in respect of the land deal. Second accused is the power of attorney holder of the first accused. While so, on 17.10.2015 at about 2 O' clock in the night, the accused persons, about 13 in number, came to the property of the defacto complainant, armed with deadly weapons. They pulled down the structures by using an earth moving machine (JCB) and damaged vehicles kept in the workshop set up in the premises. They scared away the inhabitants of a building and employees

in the workshop. They also attacked the defacto complainant in Crime No.1035 of 2015 of the same Police Station. It is further alleged that for demolishing the structures the accused persons, in addition to the JCB, used explosive substances and thereby committed the offences punishable under Sections 143, 147, 148, 120B, 452, 506(ii), 427, 386 read with Section 149 of the Indian Penal Code and Section 3(a) of Explosive Substances Act, 1908.

4. Learned Senior Counsel appearing for the second accused contended that the prosecution case is totally unbelievable and improbable. Second accused produced documents (Annexures-A1 to A17) to advance his contentions. Learned Senior Counsel contended that the prosecution developed a story which is at variance from the version of the defacto complainant in Annexure-A3 first information statement. It is seen from Annexure-A3 that the statement of the defacto complainant was recorded at 11.30 a.m. On 17.10.2015. Annexure-A2 is the first information statement in Crime No.1035 of 2015 of the same Police Station. That first information statement was recorded from a hospital wherein the injured defacto complainant was admitted. It is contended on behalf of the second accused that none of these first information statements revealed the factum of financial transactions between the first accused and the defacto complainant. Learned Senior Counsel also relied on copy of registered

documents executed by the defacto complainant and others in favour of the first accused to contend that the disputed property and the structures thereon now exclusively belonged to the first accused. Extortion being an aggravated form of theft cannot be committed by the owner of the property. Therefore, the foundation of the prosecution case is weak.

5. Section 383 of the Indian Penal Code defines extortion. It says that whoever intentionally puts any person in fear of any injury to that person or to any other person and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security commits extortion. It is the argument advanced by the learned Senior Counsel that even going by the prosecution case, the accused persons did not cause the defacto complainant deliver any property either by putting him in fear of any injury or by dishonestly inducing him. Section 386 of the Indian Penal Code is charged against the accused persons. Learned Senior Counsel contended that since the offence of extortion is not attracted, the accused cannot be held criminally liable under Section 386 of the Indian Penal Code. In order to buttress these contentions, reliance is placed on **Chandi Kumar Das Karmarkar and another v. Abanidhar Roy (AIR 1965 SC 585)**, **Ramchandra Govind Take and others v. The State (1969 Cri.L.J. 112)** and **Manikchand Birdhichand Sharma v. The State**

of Maharashtra and another (1975 Cri.L.J. 1044). It is contended that an act does not amount to theft or aggravated form of theft unless there be not only no legal right but no appearance or colour of a legal right. By the expression "colour of a legal right" is meant not a false pretence but a fair pretence, not a complete absence of claim but a bonafide claim, however weak. Learned Senior Counsel therefore contended that the documents produced would show prima facie that the first accused is the owner of the land and structures thereon and it cannot be legally said that he had committed the offences. The nature and character of the documents is seriously disputed by the defacto complainant. According to him, the documents only evidence a monetary transaction and there was no intention for the parties at the time when the documents were executed that they should convey title to the first accused. However, that is a matter to be decided by a competent civil court and it falls beyond the jurisdiction of a court dealing with bail. Therefore, I do not intend to pronounce on the rival legal rights claimed by the parties. Fact remains that the statements of witnesses in the case diary show that many masked persons with deadly weapons vandalised the entire property and pulled down the structures. They caused excessive damage to the vehicles parked in the workshop. All these happened in the dead of night. Even if it is assumed that the first accused acquired right over the property, no court can justify the method

adopted for evicting a person occupying the property. Use of criminal force for terrorising the occupants of property, even under the colour of a right, certainly will amount to commission of an offence. Further contention of the second accused that no explosive substance was used is also a matter requiring a detailed investigation.

6. Learned counsel for the third accused contended that he is an autorickshaw driver and he was nowhere present in the area. His name was not mentioned at the initial stage and only in a subsequent remand report, his complicity was mentioned for the first time. It is also contended that the name of third accused is a common name prevalent in the locality and without any other identifying features, he cannot be implicated in the case.

7. Learned Additional Director General of Prosecution contended that both the second and third accused are involved in the offence. In the course of investigation perhaps an identification parade may be necessary. At this stage, it may be too early to find either that the petitioners were present or not present.

8. Considering the nature of allegations and materials in the case diary, I am not inclined to grant pre-arrest bail to the petitioners. Hence the applications are disposed of as follows:

Petitioners shall surrender before the investigating officer

within a period of two weeks from today and after questioning them the officer concerned shall produce them before the court on the same day. In that event the petitioners are free to move for regular bail and the learned Magistrate shall consider the application on merits and pass appropriate orders as expeditiously as possible. If petitioners do not surrender before the investigating officer within the said time, the investigating officer is free to arrest them, as if no order is passed in this case by this Court.

Applications are disposed of.

A. HARIPRASAD, JUDGE.

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