

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

Crl.MC.No. 2947 of 2015 ()

**-----
CMP. NO.1023/2015 IN C.C. NO.66/2012 OF JUDICIAL FIRST CLASS
MAGISTRATE COURT-II, ATTINGAL.**

.....

PETITIONER/ACCUSED:

**SIVAKUMAR,
SON OF THULASIDHARAN PILLAI,
S.K. VILASAM, PALLICKAL, MOOTHALA POST,
KILIMANOOR, THIRUVANANTHAPURAM.**

**BY ADVS.SRI.K.L.NARASIMHAN,
SRI.N.KRISHNA PRASAD.**

RESPONDENT(S):

**STATE OF KERALA,
REPRESENTED BY ITS PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.**

BY PUBLIC PROSECUTOR SMT.SAREENA GEORGE.

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 09-06-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

rs.

APPENDIX

PETITIONERS' ANNEXURES:

- A1: TRUE COPY OF THE ORDER DATED 10/12/2012 IN CMP NO.5935/2012.**
- A2: TRUE COPY OF THE RELEVANT EXTRACT OF THE PASSPORT AND RESIDENCE PERMIT OF THE PETITIONER.**
- A3: TRUE COPY OF THE AFFIDAVIT ALONG WITH THE APPLICATION SEEKING EXEMPTION FROM THE OPERATION OF SECTION 6(2) (F) OF PASSPORTS ACT, 1967.**
- A4: TRUE COPY OF THE ORDER DATED 07/05/2015 OF THE HONOURABLE JUDICIAL FIRST CLASS MAGISTRATE COURT, ATTINGAL- II.**
- A5: TRUE COPY OF THE E-MAIL COMMUNICATION ISSUED TO THE PETITIONER.**

RESPONDENTS' ANNEXURE: NIL.

//TRUE COPY//

PA. TO JUDGE

rs.

ALEXANDER THOMAS, J.

Crl.M.C. No.2947 of 2015

Dated this the 9th day of June, 2015

ORDER

The order under challenge is Annexure A4 rendered on 07/05/2015 on CMP No.1023/2015 in CC No.66/2012 of Judicial First Class Magistrate's Court-II, Attingal. By the said order the court below has rejected the plea of the petitioner seeking permission to travel abroad. The petitioner is sole accused in Crime No.1083/2011 of Kilimanoor Police Station for offences registered under Sections 279, 337, 338 and 304-A of the Indian Penal Code. During pendency of the investigation, the court below as per Annexure A1 order dated 10/12/2012 had granted exemption to the petitioner for appearance and it was ordered therein that the petitioner/accused shall appear before the court below as and when required. In pursuance of Annexure A1 order the petitioner had travelled abroad in connection with his employment in Dubai. Thereafter he returned back to Kerala from Dubai and at this juncture his passport was seized by the

officials in the Airport and it is in these circumstances that the petitioner was constrained to approach the court below by filing Annexure A3 application which led to the passing of the impugned Annexure A4 order. During the pendency of the present criminal investigation, the petitioner was abroad during the period from 29/09/2014 onwards and he had voluntarily come back to India. Therefore it cannot be presumed that the petitioner is a person who misuses any beneficial orders that were earlier passed by the criminal court concerned. It is stated by Sri.N.Krishna Prasad learned counsel appearing for the petitioner that the petitioner is aged 39 and that his right will be detrimentally affected if he is interdicted from travelling abroad in connection with the foreign employment. This Court in Mohammed Rafeek v. The Union of India 2011 (3) KLT 117 held in paragraph 11 and 12 as follows:

"11. Even after enactment of the Act, in view of the Art.21 of the Constitution as explained in Maneka Gandhi's case (supra) the right to travel abroad is encompassed in the right to personal liberty which cannot be deprived except according to procedure established by the law. The right to travel abroad could be deprived by a procedure established by the law. S.437(3) of the Code required and enabled the criminal court while releasing a person accused or suspected of commission of a non bailable offence (case against petitioner herein came within that provision) to impose a condition that such person shall attend in accordance with the conditions of the bond executed under Chapter XXXIII of

the Code. I stated that even in the matter of non bailable offences not falling within sub-s.(3) of S.437 of the Code, the Magistrate or Court has the discretionary power to impose condition while granting bail. The person to whom bail is granted has to execute a bond in Form No.45 given in the second schedule of the Code. The relevant provision of the bond in Form No.45 States,

“..... and required to give security for any attendance before such officer or court on condition that I shall attend such officer or court on every day on which any investigation or trial is held with regard to such charge, and in case of my making default therein.....”

The function of the criminal court under S.437 of the Code is not merely to impose a condition in the bond that the person accused or suspected of commission of a non bailable offence and to whom bail is granted attended before the officer or court. The court has to ensure that the condition is complied. The court has to enforce it. The court has to ensure that the accused who is released on bail and who has a passport does not flee from justice. The “majesty of the law is affected when a wrong doer escapes its mighty clutches—whether arising out of a voluntary or involuntary situation.” (See *Bijayaketan Mohanty v. State of Orissa* (1982 Crl. L.J. 1954). The court has to preserve the majesty of the law. That could be done, in the case of a person holding a valid passport by directing him to surrender the same in court. That the passport authority may, if proceeding in respect of an offence alleged to have been committed by the holder of the passport or travel document are pending before a criminal court in India impound or cause to be impounded or revoked such document under S.10(3)(e) of the Act does not deprive the power and duty of the criminal court to enforce its order by appropriate direction. The Supreme Court in *Hazarilal Gupta v. Rameswar Prasad & Anr.* (AIR 1972 SC 484) has held that Ss.496, 497 and 498 of the (old) Code are not exhaustive of powers of the court in regard to terms and conditions of bail particularly when the High Court dealt with cases of that type, it was within the power of court to direct surrender of passport and that if the appellant (in that case) wanted to retain the passport the court might not have granted him bail. Viewed in that line, I am to hold that it is within the power of the criminal court while releasing a person accused or suspected of commission of a non bailable offence on bail under S.437 of the Code to impose a condition that such person shall surrender his passport in court. The power granted by the Code under S.437 of the Code to impose conditions including restriction on movement while granting bail in non bailable offence can be taken as procedure established by law as stated in Art.21 of

the Constitution. In that view, with great respect I disagree with the view expressed in Pushpal Swarnkar's case.

12. But the criminal courts have to take extreme care in imposing such condition. It cannot mechanically, and in every case where an accused has a passport impose a condition for its surrender. Law presumes an accused to be innocent till he is declared guilty. As a presumably innocent person he is entitled to all the fundamental rights guaranteed to him under the Constitution. At the same time, interest of the society has also to be protected. The court has to strike a balance between personal liberty of the accused guaranteed under Art.21 of the Constitution, investigation rights of the police and the interest of the society. The criminal court has to consider possibility of the accused if released on bail, fleeing justice and thereby thwarting the course of justice which affects the majesty of the law, as also the individual rights of the accused. The court has to consider antecedents of the person accused or suspected of commission of the offence, nature of the offence he is said to have committed, necessity for his presence for investigation, duration of investigation and such other relevant factors. The court has to decide whether notwithstanding the personal liberty of the accused, interest of justice required that his right of movement should be restricted during the pendency of the case by directing him to surrender his passport. If necessary, it is open to the criminal court direct the accused to execute bond in case he has to go abroad for any purpose, for appropriate amount with sureties undertaking to appear before the Investigating Officer or court as the case may be as and when required to do so. These are though not exhaustive, some of the matters to be borne in mind by the court while deciding whether there should be a condition to surrender the passport or when there is a request to release the passport already surrendered in court."

2. In the light of these aspects, this Court is of the considered opinion that the court below has not considered all relevant aspects of the matter while passing the impugned injunction order. In these circumstances the impugned Annexure A4 order is set aside and the petitioner will be granted necessary short term permission to travel abroad subject to any

conditions that may be imposed by the court below keeping in view the total pendency of the cases and the likely scheduling of the trial in this case. For this purpose the matter is remitted to the Judicial First Class Magistrate's Court-II, Attingal for passing necessary orders imposing sufficient conditions and safeguards that are necessary and found to be just by the court below for regulating the permission given to the petitioner to travel abroad. Orders in this regard may be passed by the court below concerned within a period of one week from the date of production of certified copy of this order. Permission is granted subject to the condition that petitioner shall swear to an affidavit before the court below undertaking that he would appear before the court below as and when required and the petitioner would also deposit cash security for Rs.1 Lakh before the court below and such other conditions as may be found necessary by the learned Magistrate to impose in the facts of this case.

The Crl.M.C. stands finally disposed of.

Sd/-ALEXANDER THOMAS
JUDGE

MJL