

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.ABRAHAM MATHEW

THURSDAY, THE 29TH DAY OF OCTOBER 2015/7TH KARTHIKA, 1937

Cri.MC.No. 6065 of 2015 ()

**-----
AGAINST THE ORDER/JUDGMENT IN Bail Appl. 598/2014 of HIGH COURT OF
KERALA DATED 19-02-2014**

**-----
CRIME NO. 127/2015 OF BEKAL POLICE STATION , KASARGOD
-----**

PETITIONER(S)/DEFACTO COMPLAINANT:

**-----
NOUSHAD AGED 27 YEARS
S/O.KAIS, R/AT BANDIHAL (H), THEKKIL PO
KASARAGOD DISTRICT**

BY ADV. SRI.KODOTH SREEDHARAN

RESPONDENT(S)/COMPLAINANT/ACCUSED:

-
- 1. STATE OF KERALA
THROUGH THE STATION HOUSE OFFICER BEKAL POLICE STATION
REPRESENTED BY ITS PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682031.**
 - 2. MUHAMMED HANEEFA @ CHIMMINI HANEEFA, AGED 34 YEARS
S/O.MOIDU, K.M HOUSE, TRIKKANNAD
PALLIKKARA VILLAGE, KASARAGOD DISTRICT-671125.**
- R2 BY ADV. SRI.SOJAN MICHEAL
R2 BY ADV. SRI.NISHIL.P.S.
R1 BY SRI.PRASHEED, PUBLIC PROSECUTOR**

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
29-10-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

**ANNEXURE I:TRUE COPY OF THE ORDER IN BA.NO.4031/2015 DATED 13.07.2015
BY THIS HON'BLE COURT**

**ANNEXURE II:TRUE COPY OF THE ORDER IN BA.NO.598/2014 DATED 19.12.2014
BY THIS HON'BLE COURT**

RESPONDENT(S)' EXHIBITS

**ANNEXURE R2(A)- TRUE COPY OF THE REPRESENTATION DATED 05.02.2015
ALONG WITH POSTAL RECEIPTS.**

R.AV

//True Copy//

PA to Judge

'C.R'

K.ABRAHAM MATHEW, J

CRL.M.C.NO.6065 OF 2015

Dated this the 29th day of October 2015

O R D E R

On the information given by the petitioner that the second respondent along with the some others, armed with deadly weapons, formed themselves into an unlawful assembly, abducted, wrongfully confined and assaulted him, the police registered a case against the second respondent and others for the offences under Sections 109, 143, 147, 148, 323, 324, 342, 364A, read with 149 of IPC. The application for bail filed by the second respondent under Section 439 (1) of Cr.P.C was allowed by this court by Annexure-1 order. Accordingly, he was released on bail.

2. Now, the petitioner has filed this application to cancel the bail on two grounds. First, the order for bail was obtained suppressing some material facts; Secondly, after he was released on bail, the second respondent threatened the petitioner.

3. Heard.

4. The request to cancel the bail on the ground that it was obtained by suppressing material facts is not pressed.

5. By Annexure-1 order this court has empowered the court of enquiry or the trial court to cancel the bail in accordance with the law, which was done in view of the Supreme Court decision in ***Shaji Vs State of Kerala (AIR 2006 SC 100)***.

6. A learned Single Judge of this court in **James George @ Basaliyos Marthoma Yakob-Pradaman Vs. State of Kerala (2015(4) KHC 943=2015(4) KLT 310)** has held:

"Much discussion is not required to conclude that the Court below, being a Sessions Court, has no power to 'cancel the bail' by invoking the power under Section 439(2) Cr.P.C. The provisions contained under Sections 439(2) Cr.P.C and 437(5) Cr.P.C are not meant for cancellation of bail; whereas those provisions are meant for arrest of an accused who was enlarged on bail. For such an arrest under Section 437(5) Cr.P.C as well as under Section 439(2) Cr.P.C sufficient grounds should be there. It seems that the Court below has gone to the extent of cancelling the bail granted to the petitioner, which was quite uncalled for under Section 439(2) Cr.P.C".

This appears to be the reason for the petitioner's approaching this court for cancellation of the bail granted to the second respondent.

7. Section 439(2) of the Code provides that a High Court or Court of Session may direct that any person who has been released on bail under Chapter 33 be arrested and commit him to custody. An identical provision is seen in Section 437(5) of the Code, which provides that any court which has released a person on bail under Section (1) or sub Section (2) may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody. This is applicable to magistrates only.

8. The question is whether Section 437(5) or Section 439 (2) empowers the court concerned to cancel bail.

9. Section 498(2) which was the provision in the Code of 1898 corresponding to Section 439(2) of the Code of 1973 ran as follows:-

"A High Court or Court of Session may cause any person who has been admitted to bail under sub Section (1) to be arrested and may commit him to custody".

Section 437(5) of the present Code corresponds to the Section 497(5) of the old Code.

10. The scope of Section 498(2) of the old Code came up for consideration before a three Bench of the Supreme Court in ***Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another (AIR 1958 SC 376)***.

11. The main question that required consideration in that case was whether the High Court had inherent power to cancel the bail granted to an accused in a bailable offence case on the basis of his subsequent conduct. In paragraph 6 the court held:

"There cannot be possible doubt that if any conduct on the part of an accused person is likely to obstruct a fair trial, there is occasion for the exercise of the inherent power of the High Courts to secure the ends of justice. In other words, if the conduct of the accused person subsequent to his release on bail puts in jeopardy the progress of a fair trial itself and if there is no other remedy which can be effectively used against the accused person, in such a case the inherent power of the High Court can be legitimately invoked. In regard to non-bailable offences there is no need to invoke such power because S.497(5) specifically deals with such cases".

The observation relevant to the case on hand appears in paragraph 7:

"In other words, the effect of the order passed under Section 497(5) and Section 498(2), would be not only that the bail is cancelled but that the accused is ordered to be arrested and committed to custody".

12. After referring to Subsection 498(2) of the old Code, the court made this explicit observation:

"..... and under these provisions the High Court or the Court of Session is expressly empowered to cancel the bail granted by it and to arrest the accused and commit him to custody".

(emphasis supplied)

13. In ***Gurucharan Singh and others Vs State-Delhi Administration (AIR 1978 SC 179)*** the Supreme Court considered the scope of Section 439(2) of the new Code and it held:

"The question of cancellation of bail under Section 439(2) of the new Code is certainly different from admission to bail under Section 439(1) of Cr.P.C."

(underling mine).

Yet another decision relevant in this context is ***R.Rathinam Vs State and Another (AIR 2000 SC 1851)***. After referring to Section 439(2) of the new Code

the Supreme Court observed:

“If the High Court considers that there is no need to cancel the bail for the reasons stated in such petition, after making such considerations it is open for the High Court to dismiss the petition. If that is the position, it is also open to the High Court to cancel the bail if the High Court feels that the reasons stated in the petition are sufficient enough for doing so”.(underling mine).

14. All the above decisions lay down that Section 439(2) of the Code empowers the court concerned to cancel bail though the phrase 'cancel the bail' is not mentioned in it. So I am compelled not to follow the decision in **James George's** case (supra).

15. Section 437(5) and Section 439(2) of the new Code empowers magistrates and Sessions Courts respectively to cancel the bail granted to an accused on the basis of his subsequent conduct. Since this court has empowered the Sessions Court to cancel the bail in case of violation of the conditions, the petitioner shall approach the Sessions Court for cancellation of the bail granted to the second respondent.

In the result, this Cr.M.C is disposed of with a direction to the petitioner to approach the Sessions Court

concerned for cancellation of bail granted to the second respondent if he is so advised.

sd/-
K. ABRAHAM MATHEW
JUDGE

R.AV

//True Copy//

PA to Judge