

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE B.KEMAL PASHA

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

Crl.MC.No. 6222 of 2015 ()

CRL.MP. NO. 1709/2015 OF ADDITIONAL SESSIONS COURT - VIII, ERNAKULAM.

.....

PETITIONER/COMPLAINANT:

**INTELLIGENCE OFFICER,
NARCOTIC CONTROL BUREAU,
SUB ZONE, KAKKANAD, KOCHI.**

BY ADV. SRI.MVS.NAMBOOTHIRY.

RESPONDENT/3RD ACCUSED:

**LIJO K.JOSE, AGED 36 YEARS,
S/O.JOSE, KOMBAN HOUSE, MURIYAD P.O.,
IRINJALAKUDA, THRISSUR DISTRICT, PIN-680 683.**

**BY ADVS. SRI.K.N.CHANDRABABU,
SMT.K.RAJESWARY.**

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 17-11-2015, ALONG WITH CRL.MC. NO.4917 OF 2015 AND
CONNECTED CASES, THE COURT ON THE SAME DAY PASSED
THE FOLLOWING:**

rs.

Crl.MC.No. 6222 of 2015

APPENDIX

PETITIONER'S ANNEXURES:-

**ANNEXURE A1 : CERTIFIED COPY OF ORDER DATED 31-07-2015 IN
CRL.M.P.NO.1709/2015 IN SC.357/2015 OF THE VIII
ADDITIONAL SESSIONS COURT, ERNAKULAM.**

RESPONDENT'S ANNEXURES:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

[CR]

B. KEMAL PASHA, J.

.....
CRL.M.C. Nos. 4917, 5095, 5210 & 6222 of 2015
.....

Dated this the 17th day of November, 2015

ORDER

- 1) Whether the powers, which can be exercised by the Sessions Court under Section 439(2) Cr.P.C. and the powers which can be exercised by the High Court under Section 439(2) Cr.P.C., are the same?
- 2) Whether, under the guise of powers under Section 439(2) Cr.P.C., the Sessions Court, or under Section 437(5) Cr.P.C., a court of a Magistrate, can review its orders granting bail?

3) Can the grounds for inviting the intervention of Sessions Court and the High Court under Section 439(2) Cr.P.C. be the same, as those available to challenge the validity of an order granting bail?

4) What are the matters to be considered for enlarging an accused on bail under Section 37(1)(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985(hereinafter referred to as the 'NDPS Act')?

2. Alleging that the application for bail in an NDPS case filed as CrI.M.P.No.1455/2015 was allowed by the learned Additional Sessions Judge-VIII, Ernakulam, without giving an opportunity of being heard to the Special Public Prosecutor for the 'Narcotic Control Bureau'(hereinafter referred to as 'the NCB'), thereby totally disregarding the mandatory procedure contemplated under Section 37(1)(b) (i) of the NDPS Act, the NCB had approached the said court under Section 439(2) Cr.P.C. through CrI.M.P.No.1560/15 in

S.C.No.357/15, seeking the cancellation of bail. Through Annexure A2 order in CrI.M.C.No.5210/15, the court below dismissed the said CrI.M.P. Presently, the NCB has approached this Court, challenging the said order through CrI.M.C.No.5210/15. Sessions Case No.357/2015 is pending for the offence punishable under Section 8(c) read with Sections 21(c), 23(c), 25, 28 and 29 of the NDPS Act. The same has arisen from O.R No. 5/2014 registered by the NCB, Sub Zone, Kochi.

3. Similarly, A1 to A4 in S.C.No.338/15 were granted bail by the Additional Sessions Court-VII, Ernakulam, allegedly, without giving an opportunity of being heard to the Special Public Prosecutor for NCB, thereby totally disregarding the mandatory procedure under Section 37(1) (b) (i) of the NDPS Act. A1 and A4 were enlarged on bail through CrI.M.P.No.1477/15, and A2 and A3 were enlarged on bail through CrI.M.P.No.1454/15. Challenging those orders, CrI.M.P.No.1497/15 and CrI.M.P.No.1498/15 were

filed by the NCB, before the court below, under Section 439 (2) Cr.P.C., seeking the cancellation of bail. Through common order dated 04.08.2015, the court below allowed Crl.M.PNo.1497/15 and Crl.M.PNo.1498/15. Challenging the said order, the said accused persons have filed Crl.M.C.No.5095/15. Sessions Case No.338/2015 has arisen from O.R No.4/2014, for the offence under Section 8 (c) read with Sections 21(c), 23(c), 27A, 28 and 29 of the NDPS Act.

4. The Additional Sessions Court-VIII, Ernakulam granted bail to the 3rd accused in S.C.No.357/15 through the order in Crl.M.P.No.1709/15. It is by challenging the said order, the NCB has approached this Court through Crl.M.C.No.6222/15 under Section 439(2) Cr.P.C. read with Section 482 Cr.P.C.

5. The 2nd Additional Sessions Court, granted bail to the 3rd accused in S.C.No.337/15 through Annexure A3 in Crl.M.C.No.4917/15. The NCB has approached this Court by

challenging the said order under Section 439(2) Cr.P.C. read with Section 482 Cr.P.C. Sessions Case No.337/2015 has arisen from O.R No.2/2014, for the offence under Section 8 (c) read with Sections 21(c), 23(c), 27A, 28 and 29 of the NDPS Act.

6. According to the NCB, A1 and A3 in Sessions Case No.357/2015 were granted bail by the court below through Crl.M.P.No.1455/2015, without giving an opportunity of being heard to the Special Prosecutor of the NCB and even without serving copies on the NCB. Similarly, the court below has granted bail to A1 and A4 in Sessions Case No.338/2015 through Crl.M.P.No.1477/2015, even without serving a copy of that petition on the NCB and without hearing the Special Prosecutor of the NCB.

7. Courts below have granted bail to the 3rd accused in S.C.No.357/15, and to the 3rd accused in Sessions Case No.337/2015, after hearing both sides. Dissatisfied with the said orders, the Intelligence Officer, NCB has come up

through Crl.M.C.No.6222/15 and Crl.M.C.No.4917/2015 under Section 439(2) read with Section 482 Cr.P.C.

8. Heard Sri. MVS Nampoothiry, learned Special Public Prosecutor for NCB, and learned counsel Sri. K.N. Chandrababu, Sri.T.K. Kunhabdulla and Sri.P.A. Martin Roy.

9. The learned counsel for the petitioners in Crl.M.C.No.5095/2015 has argued that the NCB ought not to have approached the court below under Section 439(2) Cr.P.C to get the bail granted to those petitioners cancelled. According to the learned counsel for the petitioners, the matters to be considered for challenging an order granting bail are on a different footing than the matters to be considered while dealing with an application under Section 439(2) Cr.P.C. The argument is that only on the occurrence of some supervening circumstances or violations of bail conditions after the passing of the order enlarging the accused on bail, the provisions under Section 439(2) Cr.P.C can be invoked. Same is the argument taken up by the

respondent in Crl.M.C.No.5210/2015 also.

10. The learned Special Prosecutor for the NCB has argued that when there is total violation of the statutory provisions in passing an order enlarging the accused on bail, there is nothing wrong in invoking the provisions under Section 439(2) Cr.P.C for getting the bail cancelled. It is argued that, when the court below has given a go-by to the mandatory provisions contained in Section 37(1)(b) of the NDPS Act, the NCB can have recourse to the provisions under Section 439(2) Cr.P.C to get the bail cancelled.

11. *Per contra*, the learned counsel for the respondent in Crl.M.C.No.4917/2015 has argued that there is no reason for the NCB to challenge Annexure-A3 order which was passed on merits after hearing both sides. It is further argued that matters like the possibility of the commission of other offences while on bail, a probable chance to abscond etc. are matters alien for consideration at the time of enlarging an accused on bail; if not, that will result in a

situation wherein the court is inviting grounds for passing an order of preventive detention. In short, the learned counsel for the respondent is supporting the order passed by the court below.

12. Section 37 of the NDPS Act says that:-

“Offences to be cognizable and non-bailable - (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974) -

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for [offences under Section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is

satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

13. As per Section 37(1)(b), it is a mandatory procedure that the Public Prosecutor should be given an opportunity to oppose the application. As per Section 37(1)(b)(ii), in case, where the Public Prosecutor opposes the application, the court has to consider two aspects for enlarging the accused on bail. The first one is that the court below should be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. The second ground is that the court below should be satisfied that there are reasonable grounds for believing that he is not

likely to commit any offence while on bail. Only on the satisfaction of those two aspects, it can be said that the court has the power to enlarge an accused on bail.

14. Even though Section 37(1)(b)(ii) of the NDPS Act says that, the aforesaid two grounds arise for consideration only when the Prosecutor opposes the application, I am of the firm view that in appropriate cases, the said two grounds arise even when the Public Prosecutor does not oppose the application. The same is evident from Section 37(2) of the NDPS Act. As per Section 37(2) of the NDPS Act, the limitations contained in Section 37(1)(b) are in addition to the limitations under the Code of Criminal Procedure, 1973. Therefore, even when the Prosecutor does not oppose the petition, the court is not bound to enlarge an accused on bail. Even when the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail, if there are some other grounds, normally available

to the court to deny bail to an accused under the Cr.P.C, the court is not expected to enlarge the accused on bail.

15. In such case, we will have to think about a situation wherein notice is not served on the Public Prosecutor or a case wherein the Prosecutor does not get an opportunity to oppose the application. Even in such circumstances, the court concerned is duty bound to examine those grounds; and in such cases, the court has to examine whether there are reasonable grounds for believing that the accused is not guilty of such offence and that there are reasonable grounds for believing that he is not likely to commit any offence while on bail. Over and above it, the court is duty bound to consider whether there are limitations, in addition to the aforesaid limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force, in granting bail.

16. When there is a mandatory provision to give an opportunity to the Public Prosecutor to oppose the granting

of bail by the court, this Court is of the firm view that it will pave way for raising a genuine ground to challenge the order granting bail, in case bail is granted to the accused without giving such an opportunity to the Public Prosecutor. In cases wherein bail is denied, then the prosecution need not challenge the said order.

17. Now, the question to be considered is whether such statutory violations in granting bail pave way to the prosecution to challenge the order as such or to have recourse to Section 439(2) Cr.P.C. and to seek the cancellation of bail under that provision?

18. This Court had an occasion to consider the aspect as to whether the provisions contained under Section 439(2) Cr.P.C. are relating to cancellation of bail? Still, this Court is of the view that the said provision contained in the Code of Criminal Procedure is not for cancellation of bail in all matters. The powers granted to Magistrates under Section 437(5) Cr.P.C. and the power granted to the

Sessions Court as well as the High Court under Section 439 (2) Cr.P.C. are not for cancellation of bail in all circumstances. Of course, when those powers are lawfully exercised within the meaning and spirit of those provisions, it may result in a situation wherein such an order has the effect of an order of cancellation of bail. The impact of orders under the said provision may result in an order which is having an impact of the cancellation of bail. When the legislature does not specifically show that those powers are powers for cancellation of bail, this Court is of the firm view that the said provision may not be made use of in all circumstances, for cancellation of bail.

19. Section 437(5) Cr.P.C. says:

“Any Court which has released a person on bail under sub-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.”

Section 439(2) Cr.P.C. Says:

“A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.”

20. Apart from the provisions contained under Section 446A Cr.P.C., the Code does not give any indication regarding the circumstances in which the bail can be cancelled. Section 446A Cr.P.C. says:

*“Cancellation of bond and bailbond-
Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition—*

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before

whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition;

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient.”

21. As per the said provision, where a bond under the Code is for appearance of a person in a case, and it is forfeited for breach of a condition, the powers under Section 446A (a) as well as (b) can be invoked. It may not be understood that the breach of that condition which results in forfeiture of the bond and bail bond is not confined to the breach of the condition for appearance only. The wordings of the provision “*where a bond under this Code is for appearance of a person in a case and it is forfeited for*

breach of a condition” clearly indicates that the forfeiture will result even in violation of conditions other than the conditions for appearance also. At the same time, such a forfeiture of a bond under Section 446A should be one executed for the appearance of a person in a case. Therefore, it is evident that in cases wherein an accused who is enlarged on bail, executes a bond for appearance in a case, commits breach of any of those conditions contained in the order granting bail, forfeiture of the bond as well as bail bond is possible. At the same time, in all such cases, it may not be just, in forfeiting the bonds of the sureties also.

22. Let us take a case wherein a condition has been incorporated in the order granting bail that he shall not involve in any offence while on bail. In such a case, even if such an accused who is enlarged on bail through that order happens to become an accused in another case, it will not be just in forfeiting the bond executed by the sureties and

asking them to pay the penalty. There can be breach of other similar conditions also. Except the violation of the condition for the appearance of the accused in that case, the sureties cannot be called upon to pay the penalty after forfeiting their bonds. At the same time, on account of the violation of any of such conditions, the bail of the accused happens to be cancelled and in such case, the accused fails to appear before the court in the case, it paves the way for the forfeiture of the bonds of the sureties, and it will ultimately entail in an order for payment of penalty by the sureties also.

23. Now, the next question to be decided is as to how such bail can be cancelled. If it is a violation of any of the conditions in the bail bond, necessarily the courts have to exercise the powers conferred under Section 437(5) or Section 439(2) Cr.P.C., as the case may be, and can order that such person be arrested and committed to custody. Even in the circumstances in which a bond executed by the

accused is cancelled and forfeited under Section 446A Cr.P.C., and he fails to appear in the case or even otherwise, the prosecution or the investigating officer can point out such a situation to the courts concerned, inviting the concerned courts to exercise the powers conferred under Sections 437(5) and 439(2) Cr.P.C. That does not mean that the said powers conferred under Section 437(5) and Section 439(2) Cr.P.C. can be made use of as a provision for deciding the validity of an order enlarging the accused on bail, or to review an order passed by those courts enlarging those accused on bail.

24. In ***Abdul Basit v. Md. Abdul Kadir Chaudhary*** [2014 (4) KLT SN 88 (C.No.111) SC], it was held:

“The concept of setting aside an unjustified, illegal or perverse order is different from the concept of cancellation of a bail on the ground of accused's misconduct or new adverse facts having surfaced after the grant of bail which require such cancellation and a perusal of the

aforesaid decision would present before us that an order granting bail can only be set aside on grounds of being illegal or contrary to law by the Court superior to the Court which granted the bail and not by the same Court.”(Emphasis supplied)

It has been further held:

“Under Chapter XXXIII, S.439(1) empowers the High Court as well as the Court of Session to direct any accused person to be released on bail. S.439(2) empowers the High Court to direct any person who has been released on bail under Chapter XXXIII of the Code be arrested and committed to custody, i.e., the power to cancel the bail granted to an accused person. Generally the grounds for cancellation of bail, broadly, are, (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation, (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v)

there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive.”

25. In **Kanwar Singh Meena v. State of Rajasthan**

[2012 (4) KLT SN 105 (C.No.93) SC], it was held:

“While cancelling bail under S.439(2) of the Code, the primary considerations which weigh with the court are whether the accused is likely to tamper with the evidence or interfere or attempt to interfere with the due course of justice or evade the due course of justice. But, that is not all. The High Court or the Sessions Court can cancel bail even in cases where the order granting bail suffers from serious infirmities resulting in miscarriage of justice. If the court granting bail ignores relevant materials indicating prima facie involvement of the accused or takes into account irrelevant material, which has no

relevance to the question of grant of bail to the accused, the High Court or the Sessions Court would be justified in cancelling the bail. Such orders are against the well recognized principles underlying the power to grant bail. Such orders are legally infirm and vulnerable leading to miscarriage of justice and absence of supervening circumstances such as the propensity of the accused to tamper with the evidence, to flee from justice, etc., would not deter the court from cancelling the bail. The High Court or the Sessions Court is bound to cancel such bail orders particularly when they are passed releasing accused involved in heinous crimes because they ultimately result in weakening the prosecution case and have adverse impact on the society. Needless to say that though the powers of this court are much wider, this court is equally guided by the above principles in the matter of grant or cancellation of bail.”

26. In ***Rizwan Akbar Hussain Syyed v. Mehmood Hussain and another*** [(2007) 10 SCC 368], it was held in

paragraph 7:

“Cancellation of bail should not be done in a routine manner. Where it appears to the superior court that the court granting bail acted on irrelevant materials or there was non application of mind or where court does not take note of any statutory bar to grant of bail, order for cancellation of bail can be made.”

27. What is discernible from ***Abdul Basit***(supra), ***Kanwar Singh***(supra) and ***Rizwan Akbar Hussain Syied*** (supra) is that the orders granting bail by a subordinate court can be cancelled by the Sessions Court as well as the High Court with the aid of Section 439(2) Cr.P.C. Even in cases wherein the orders granting bail suffers from serious infirmities resulting in miscarriage of justice or bail has been granted by ignoring relevant materials and by taking into account irrelevant materials, such powers can be exercised. When the court of a Magistrate is passing such an order of bail under Chapter XXXIII of the Code, the Sessions Court

can also pass orders cancelling the bail by invoking the power under Section 439(2) Cr.P.C. Similarly, if the Sessions Court is passing an order enlarging bail which suffers from serious infirmities or by ignoring relevant materials or by taking into account irrelevant materials, the High Court can pass orders cancelling the bail by having recourse to the provisions contained under Section 439(2) Cr.P.C.

28. In ***Union of India v. Hassan Ali Khan*** [2011 (4) KLT SN 86 (C.No.94) SC], it was held:

“We cannot ignore the distinction between an application for cancellation of bail and an appeal preferred against an order granting bail. The two stand on different footings. While the ground for cancellation of bail would relate to post-bail incidents, indicating misuse of the said privilege, an appeal against an order granting bail would question the very legality of the order passed.”

29. In ***Savitri Agarwal and others v. State of Maharashtra and another*** [(2009) 8 SCC 325], the

distinction between the aforesaid two aspects has been made clear in paragraph 29 that-

“Merely because the High Court had a different view on same set of material which had been taken into consideration by the Sessions Judge, in our view, was not a valid ground to label the order passed by the Sessions Judge as perverse. It also appears to us that the High Court has overlooked the distinction of factors relevant for rejecting bail in a non-bailable case in the first instance and the cancellation of bail already granted.”(Emphasis supplied)

It was further held-

“Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted, which, in our opinion, were missing in the instance case. Nothing was brought to our notice from which it could be inferred that the appellants have not cooperated in the investigations or have in any manner, abused

the concession of bail granted to them.”

30. The said finding was entered by the Apex Court based on the decision in ***Dolat Ram and others v. State of Haryana*** [(1995) 1 SCC 349], wherein it was held that “*the rejection of bail in a non bailable case at the initial stage and the cancellation of bail have to be considered and dealt with on a different basis*”.

31. In ***State of U.P. v. Amarmani Tripathi*** [(2005) 8 SCC 21], it was held in paragraph 17 that-

“In an application for cancellation, conduct subsequent to release on bail and the supervening circumstances alone are relevant. But in an appeal against grant of bail, all aspects that were relevant under Section 439 read with Section 437, continue to be relevant. We, however, agree that while considering and deciding the appeals against grant of bail, where the accused has been at large for a considerable time, the post-bail conduct and supervening circumstances will

also have to be taken note of. But they are not the only factors to be considered as in the case of applications for cancellation of bail.”(Emphasis supplied)

32. In **Kalyan Chandra Sarkar v. Rajesh Ranjan**

[(2004 7 SCC 528)], it was held-

“The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail;

they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge.”

33. By relying **Kalyan Chandra Sarkar** (*supra*), the Apex Court has held in **Amarmani Tripathi** (*supra*) in paragraph 18-

“It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) character, behaviour, means, position and standing of

the accused; (vi) likelihood of the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted by grant of bail.”

34. In ***Dolat Ram*** (*supra*), it was held-

“Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail already granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying

the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. (Emphasis supplied)

35. In **Subhendu Mishra v. Subrat Kumar Mishra and another** [2000 SCC (Cri)1508], it was held:

“Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of justice or evasion or attempt to evade the due course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the basis of material placed on the record of the possibility of the accused absconding is yet

another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial.”(Emphasis supplied)

36. Both the learned counsel Sri.Chandrababu and Sri.MVS Namboothiry have relied on ***Gurcharan Singh and others v. State (Delhi Administration)*** [(1978) 1 SCC 118], wherein it was held in paragraph 16 that-

“Section 439 of the new Code confer special powers on High Court or Court of Session regarding bail. This was also the position under Section 498 Cr.P.C. of the old Code. That is to say, even if a Magistrate refuses to grant bail to an accused person, the High Court or the Court of Session may order for grant of bail in appropriate cases. Similarly under Section 439(2) of the new Code, the

High Court or the Court of Session may direct any person who has been released on bail to be arrested and committed to custody. In the old Code, Section 498(2) was worded in somewhat different language when it said that 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. In other words, under Section 498(2) of the old Code, a person who had been admitted to bail by the High Court could be committed to custody only by the High Court. Similarly, if a person was admitted to bail by a Court of Session, it was only the Court of Session that could commit him to custody. This restriction upon the power of entertainment of an application for committing a person, already admitted to bail, to custody, is lifted in the new Code under Section 439(2). Under Section 439(2) of the new Code a High Court may commit a person released on bail under Chapter XXXIII by any Court including the Court of Session to custody, if it thinks appropriate to do so. It

must, however, be made clear that a Court of Session cannot cancel a bail which has already been granted by the High Court unless new circumstances arise during the progress of the trial after an accused person has been admitted to bail by the High Court. If, however, a Court of Session had admitted an accused person to bail, the State has two options. It may move the Sessions Judge if certain new circumstances have arisen which were not earlier known to the State and necessarily, therefore, to that Court. The State may as well approach the High Court being the superior Court under Section 439(2) to commit the accused to custody. When, however, the State is aggrieved by the order of the Sessions Judge granting bail and there are no new circumstances that have cropped up except those already existed, it is futile for the State to move the Sessions Judge again and it is competent in law to move the High Court for cancellation of the bail. This position follows from the subordinate position of the Court of Session vis-a-vis the High

Court.”(Emphasis supplied)

37. In **Puran v. Rambilas** [(2001) 6 SCC 338], it was held-

“Further, it is to be kept in mind that the concept of setting aside the unjustified illegal or perverse order is totally different from the concept of cancelling the bail on the ground that the accused has misconducted himself or because of some new facts requiring such cancellation.”

The same was based on the decision in **Gurcharan Singh** (*supra*).

38. In **Puran** (*supra*), it was held-

“In the hierarchy of courts, the High Court is the superior court. A restrictive interpretation which would have the effect of nullifying Section 439(2) cannot be given. Whey Section 439(2) grants to the High Court the power to cancel bail, it necessarily follows that such powers can be exercised also in respect of orders passed by the Court of Session. Of

course cancellation of bail has to be on principles set out herein above and only in appropriate cases.”

39. In ***Aslam Babalal Desai v. State of Maharashtra***

[(1992) 4 SCC 272], it was held-

“Bail granted under Section 437(1) or (2) or Section 439(1) can be cancelled under Sections 437(5) and 439(2) where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation (iii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (v) there is likelihood of his fleeing to another country, (vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. Rejection of bail stands on one footing but cancellation of bail is a harsh order because it interferes with the

liberty of the individual and hence it must not be lightly resorted to.”(Emphasis supplied)

It was further held in paragraph 21 that-

“The power of the High Court or Court of Session to cancel bail is exercisable vis-a-vis an order passed by the High Court or the Court of Session under sub-section (1) of Section 439, as the case may be, as also to an order of bail passed by a Court other than the High Court or the Court of Session under sub-sections (1) and (2) of Section 437 of the Code. Bail orders under the aforesaid provisions by the very nature are decisions on merit and if a review is attempted a strong case has to be mad out so as to secure cancellation of bail. Hence the apparent distinction in the approach of the Court while granting bail and cancelling bail. This field is covered entirely by judge-made law.” (Emphasis supplied)

40. In ***Dinesh M.N. (S.P) v. State of Gujarat*** [(2008)

5 SCC 66], it was held in paragraph 23-

“Even though the re-appreciation of the evidence as done by the court granting bail is to be avoided, the court dealing with an application for cancellation of bail under Section 439(2) can consider whether irrelevant materials were taken into consideration. That is so because it is not known as to what extent the irrelevant materials weighed with the court for accepting the prayer for bail.”

41. It was also held that even if the order is interlocutory in nature, the High Court's inherent jurisdiction under Section 482 is not affected by the provisions of Section 397(3) Cr.P.C. The High court may refuse to exercise its jurisdiction under Section 482 Cr.P.C. on the basis of self-imposed restriction is a different aspect. It cannot be denied that for securing the ends of justice, the High Court can interfere with the order which causes miscarriage of justice or is palpably illegal or is unjustified. It was so decided by the Apex Court in ***Madhu Limaye v.***

State of Maharashtra [(1977) 4 SCC 551] and in **Krishnan v. Krishnaveni [(1997) 4 SCC 241]**. Therefore, it is evident that even without the aid of Section 439(2) Cr.P.C., the High Court is fully empowered under Section 482 Cr.P.C. to cancel an order passed by the subordinate court when such orders result in miscarriage of justice, or it is palpably illegal or unjustified.

42. In **Mehboob Dawood Shaikh v. State of Maharashtra [2004 (2) KLT 812 (SC)]**, it was held in paragraph 8-

“It is, therefore, clear that when a person to whom bail has been granted either tries to interfere with the course of justice or attempts to tamper with evidence or witnesses or threatens witnesses or indulges in similar activities which would hamper smooth investigation or trial, bail granted can be cancelled. Rejection of bail stands on one footing, but cancellation of bail is a harsh order because it takes away the liberty of an

individual granted and is not to be lightly resorted to.”

43. A three Judge Bench of the Apex Court headed by **Justice V.R.Krishna Iyer** had dealt with the matter in ***Mohan Singh v. Union Territory, Chandigarh* [AIR 1978 SC 1095]**. In that case, the bail granted by the Sessions Court was cancelled by the High Court on the ground that the accused did not disclose to the Sessions Court at the time of passing the order granting bail that he had moved for bail at the High Court also. It was held that even then, refusal of bail is not an indirect process of punishing an accused person before he is convicted. Their Lordships had relied on ***Gurucharan Singh’s case* (supra)**. It was further held that there was no allegation against the appellant of interference with the course of justice or other well-established grounds for refusal of bail. The Apex Court allowed the appellant to continue on bail until further orders, to the contrary passed by the Sessions Court, if good

grounds are made out to its satisfaction.

44. The tenor of the decision in **Mohan Singh** (*supra*) clearly indicates that the grounds to be taken up for the cancellation of bail are subsequent events happened after the enlargement of the accused on bail. It indicates that in case wherein the accused is indulging in interference with the course of justice or makes out other good grounds, the bail can be cancelled.

45. In **Ramcharan v. State of M.P.** [(2004) 13 SCC 617], it was held that the order of bail can be cancelled on existence of cogent and overwhelming circumstances, but not on a re-appreciation of the evidence. Relying on **Dolat Ram's case** (*supra*), the Apex Court further held that some supervening circumstances should be made out warranting the recalling of the order granting bail.

46. In **Subodh Kumar Yadav v. State of Bihar and Another** [(2009) 14 SCC 638], it was held in paragraph 16 that:

“In fact it is now well settled that if a superior court finds that the court granting bail had acted on irrelevant material, or if there was non-application of mind or failure to take note of any statutory bar to grant bail, or if there was manifest impropriety as for example failure to hear the Public Prosecutor/complainant where required, an order for cancellation of bail can in fact be made. Further, while cancelling bail, the superior court would be justified in considering the question whether irrelevant materials were taken into consideration by the court granting bail.”

47. In **Narendra K. Amin (Dr.) v. State of Gujarat and Another [(2008) 13 SCC 584]**, a three Judge Bench of the Apex Court has held in paragraph 18 that:

“As is evident from the rival stands, one thing is clear that the parameters for grant of bail and cancellation of bail are different. There is no dispute to this

position. But the question is if the trial court while granting bail acts on irrelevant materials or takes into account irrelevant materials whether bail can be cancelled. Though it was urged by learned counsel for the appellant that the aspects to be dealt with while considering the application for cancellation of bail and on appeal against the grant of bail, it was fairly accepted that there is no scope for filing an appeal against the order of grant of bail. Under the scheme of the Code the application for cancellation of bail can be filed before the Court granting the bail if it is a Court of Session or the High Court.”

It was held in paragraph 20 that:

“It has been fairly accepted by the learned counsel for the parties that in some judgments the expression “appeal in respect of an order of grant of bail” has been used in the sense that the

State can move the higher court.”

48. From a conjoined reading of the precedents rendered by the Apex Court above, it can be concluded that, in a case wherein the order enlarging the accused on bail in a non bailable offence suffers from any statutory bar, or it manifests impropriety as for example; failure to hear the Public Prosecutor, the power to order the said accused be arrested and committed to custody shall be exercised by the ‘Superior Court’, under Section 439(2) Cr.P.C. Of course, such an order passed by such ‘Superior Court’ shall have the effect of the cancellation of bail. Further, in such case, while considering the matter under Section 439(2) Cr.P.C., the ‘Superior Court’ can also consider the question whether irrelevant materials were taken into account by the court for granting bail. Therefore, it is evident that when the order suffers from any statutory bar, or impropriety, as noted above, or in cases wherein relevant materials were not considered and irrelevant materials were taken into account,

the Superior Court can pass such an order, which has the effect of cancellation of bail.

49. Factors to be considered at the time of granting bail are totally different from the matters to be considered while cancelling a bail already granted. Supervening circumstances, the violation of statutory provisions, non-consideration of relevant materials, consideration of irrelevant materials in granting bail and violations of bail conditions are matters that can be considered for ordering the arrest of the concerned accused, and for his committing to custody under Section 439(2) Cr.P.C. In such cases, on all the aforesaid grounds, except the ground of violation of bail conditions, the Superior Court alone has the power to pass an order, which has the effect of cancellation of bail. If the bail is granted by the court of a Magistrate under Chapter XXXIII of the Code, and such order suffers from statutory bar, non-consideration of relevant materials, consideration of irrelevant materials and also when it suffers

from impropriety in the sense that the Prosecutor was not heard in matters in which the Prosecutor has to be heard, either the Sessions Court or the High Court under Section 439(2) Cr.P.C. can pass orders, which has the effect of cancellation of bail. In cases wherein, the orders passed by the Sessions Court under Section 439(1) Cr.P.C. suffer from such defects, it is for the High Court being the Superior Court alone can be approached, for such an order of arrest under Section 439(2) Cr.P.C.

50. In cases wherein, there is violation of bail conditions, even the court of the Magistrate has the power to order arrest of the accused and his/her committing to custody under Section 437(5) Cr.P.C., in cases wherein bail was granted under Section 437(1) or 437(2) Cr.P.C. If bail is granted under Section 436 Cr.P.C. in bailable offences, the courts of the Magistrates have no such power under Section 437(5) Cr.P.C.; whereas even in such case, the Sessions Court or the High Court can exercise such power under

Section 439(2) Cr.P.C. When violation of bail conditions are there, the court which passes the order, has the power to cancel the bail by invoking the provisions under Section 446A Cr.P.C. read with Section 437(5) as well as 439 (2) Cr.P.C. When there is violation of bail conditions, the prosecution or the aggrieved need not rush to the Superior Courts; whereas they can approach the very same court under Section 437(5) Cr.P.C. as well as under Section 439 (2) Cr.P.C. for getting the accused arrested. True that, the arrest of the accused and his/her committing to custody as contained in Sections 437(5) Cr.P.C. and 439(2) Cr.P.C. has the effect of cancellation of bail.

51. As this Court has already found, in cases covered by Section 37(1)(b) of the NDPS Act, 1985, the court has a duty to hear the Public Prosecutor concerned. The Public Prosecutor shall be given an opportunity to oppose the application seeking the enlargement of the accused on bail. Sri.MVS Namboothiry has invited the attention of this Court

to the decision in ***Intelligence Officer, Narcotics Control Bureau v. Sambhu Sonkar and another*** [(2001) 2 SCC 562], wherein it was held in paragraph 9-

“The contention that the liberal interpretation given by the High Court to Section 37 is justified as it affects personal liberty of a citizen who is yet to be tried is not acceptable. Considering the legislative intent of curbing the practice of giving bail on technical ground in a crime which adversely affects the entire society including the lives of a number of persons and the object of making stringent provisions or control of illicit traffic in narcotic drugs and psychotropic substances, there is no reason to accept the construction of the section which its language can hardly bear.”

52. In the case of Crl.M.C.No.5210 of 2015 and Crl.M.C.No.5095 of 2015, it seems that when the court below has chosen to enlarge the concerned accused persons on bail, the Special Public Prosecutor of the NCB was not heard. It seems that an opportunity of being heard

was not extended to the Special Public Prosecutor of the NCB. Thereafter, it seems that in Crl.M.C.No.5210 of 2012 and Crl.M.C.No.5095 of 2015, the NCB has approached the court below with a petition to cancel the bail under Section 439(2) Cr.P.C. The said applications were dismissed by the court below. It seems that when the court below had chosen to grant bail to the said accused persons by overlooking the statutory mandate of giving an opportunity of being heard to the Public Prosecutor, the NCB ought to have challenged the order granting bail before this Court under Section 482 Cr.P.C. or ought to have approached this Court seeking the arrest of the said accused and their committing to custody, under Section 439(2) Cr.P.C. Instead of that, the NCB has approached the court below through an application under Section 439(2) Cr.P.C., which reflects the request for review. The criminal courts subordinate to the High Courts have no power of review and, therefore, such an application ought to have been preferred before the High Court. Matters being

so, this Court is of the view that the impugned order in Crl.M.C.No.5210 of 2015 is not liable to be interfered with.

53. In the case of Crl.M.C.No.5095 of 2015, the NCB has approached the court below under Section 439(2) Cr.P.C. seeking the cancellation of bail. It seems that the court below has by invoking the provision under Section 439 (2) Cr.P.C. has cancelled the bail of the said accused persons through the impugned order. As held above, when the court below has exercised such a power under Section 439(2) Cr.P.C., it seems that the court below has gone to the extent of reviewing its earlier order, which was not at all permissible under law. As I have held earlier, under the cover of Section 437(5) Cr.P.C. or 439(2) Cr.P.C., the courts of the Magistrates or the Sessions Judges cannot exercise the power of review. In such case, the NCB ought to have approached this Court either under Section 439(2) or under Section 482 Cr.P.C. When the Superior Court was not approached for getting such orders, the impugned order

passed by the court below in Crl.M.C.No.5095 of 2015 is not legally sustainable, and the same is liable to be quashed under Section 482 Cr.P.C.

54. The matter in Crl.M.C.No.4917 of 2015 and Crl.M.C.No.6222 of 2015 stand on a different footing. In that case, it was after hearing both sides, the courts below have chosen to pass orders for enlarging the accused on bail. According to the NCB, the courts below have not considered the relevant materials and the courts below have exercised the power to enlarge the accused on bail by considering irrelevant materials.

55. The learned counsel for the respondent in Crl.M.C.No.4917 of 2015 Sri.T.K.Kunhabdulla has invited the attention of this Court to ***Pullachi Chandu v. State of Kerala*** reported in [1978 KLT 665]; wherein it was held that:

“The mere fact that an accused may feel free to commit an offence again if he is released cannot be a reason for

detaining him in custody, for, such an approach will result in using the power to keep an accused in judicial custody for a different objective, that of preventive detention.”

I fully agree with the said observation made by the learned Judge.

56. The 2nd limb of the restrictions contained in Section 37(1)(b)(ii) of the NDPS Act should not be understood to mean in all cases under the NDPS Act, there are reasonable grounds for believing that the accused is likely to commit any offence while on bail, when there are no criminal antecedents on the part of that accused. When there are criminal antecedents on the part of such an accused, after considering the facts and circumstances of those cases, it may be possible for the court to entertain a view that there reasonable grounds exist for believing that the accused is likely to commit any offence while on bail.

57. It is possible to incorporate a condition in an order

enlarging an accused on bail that the accused shall not involve in any offence while on bail. At the same time, bail cannot be denied unnecessarily to an accused by foreseeing that there is possibility of the accused involving in other offences while on bail, when there are no criminal antecedents on the part of such an accused. In cases wherein no criminal antecedents are alleged, it should not be a reason to deny bail to an accused on the ground that there is chance of his involvement in other offences in case he is enlarged on bail. The reasonable grounds for believing that he is likely to commit any offence while on bail depends on the existence of criminal antecedents on the part of the said accused. In cases wherein no criminal antecedents are alleged on the part of such an accused, it cannot be said that there are reasonable grounds for believing that he is likely to commit any offence while on bail. A speaking order is required in the matter with regard to the said ground also.

58. It seems that in Annexure-A3 order in CrI.M.C.No.4917 of 2015, the court below has adverted to the rival contentions. At the same time, it seems that the court below has not stated anything with regard to the matters to be decided while granting bail, as per Section 37 (1)(b)(ii) of the NDPS Act. Therefore, this Court is of the view that the matter requires re-consideration by the court below.

59. The learned Special Prosecutor of the NCB has pointed out that the respondent in CrI.M.C.No.6222 of 2015 has antecedents of similar nature, and the said objection was raised before the court below. From the order impugned in CrI.M.C.No.6222 of 2015, it is discernible that such a specific objection was raised by the prosecution while opposing the application for bail. It seems that the court below has not considered and discussed anything about that aspect. The court below has not entered any finding or observation with regard to the 2nd limb of Section 37(1)(b)(ii)

of the NDPS Act. Therefore, this Court is of the view that the said matter also requires re-consideration by the court below.

60. This Court may not be understood to mean that bail cannot be granted to the respondents in Crl.M.C.No.4917 of 2015 and Crl.M.C.No.6222 of 2015. At the same time, the courts below have to pass speaking orders by considering the grounds enumerated under Section 37(1)(b)(ii) of the NDPS Act, for which the impugned orders in Crl.M.C.No.4917 of 2015 and Crl.M.C.No.6222 of 2015 have to be set aside and the said matters have to be remitted to the court below.

In the result,

(1) Crl.M.C.No.5210 of 2015 stands dismissed.

(2) Crl.M.C.No.5095 of 2015 stands allowed.
Annexure-A5 common order impugned in Crl.M.C.No.5095 of 2015 is quashed.

(3) Crl.M.C.No.4917 of 2015 and Crl.M.C.No.6222 of 2015 are allowed. Annexure-A3 order in Crl.M.C.No.4917 of 2015 and Annexure-A1 order in Crl.M.C.No.6222 of 2015 are set aside. Crl.M.P.No.1625 of 2015 in SC No.337 of 2015 and Crl.M.P.No.1709 of 2015 in SC No.357 of 2015 are remitted to the courts below for passing speaking orders as aforesaid, as expeditiously as possible. The parties shall appear before the court below on 30.11.2015.

Sd/- B. KEMAL PASHA, JUDGE.

ul/aks/dsv/stu/-

[True copy]

P.S. to Judge