

Nibin Khan vs State Of Kerala on 5 November, 2024

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 5TH DAY OF NOVEMBER 2024 / 14TH KARTHIKA, 1946

CRL.MC NO. 7638 OF 2024

CRIME NO.258/2022 OF Kottayam West Police Station, Kottayam
AGAINST THE ORDER DATED 29.08.2024 IN CMP.NO.216/2024
IN SC NO.675 OF 2022 OF FAST TRACK SPECIAL COURT, ERATTUPETTA
PETITIONER/RESPONDENT IN CMP:

NIBIN KHAN, AGED 25 YEARS
S/O. YOOSUF, KAROTTUPARAMBIL HOUSE,
ARUVITHARA P.O., ERATTUPETTA,
KOTTAYAM DISTRICT, PIN - 686122.

BY ADVS.
JAISON JOSEPH
AKHIL S.VISHNU
M.N.SANJITH
JIMMY JOSEPH
VEENA VALLIKANTHAN

RESPONDENTS/STATE:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.
- 2 INSPECTOR OF POLICE
KOTTAYAM WEST POLICE STATION, KOTTAYAM, PIN -
686013.

SENIOR PUBLIC PROSECUTOR SRI RENJIT GEORGE

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
24.10.2024, THE COURT ON 05.11.2024 PASSED THE FOLLOWING:

2024:KER:82238

CrL.M.C.No.7638/2024

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A. BADHARUDEEN, J.

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Dated this the 5th day of November, 2024 This Criminal Miscellaneous Case has been filed under

Section 528 of the Bharatiya Nagarika Suraksha Sanhita, 2023 ('BNSS' for short) challenging Annexure A8 order dated 29.08.2024 in CMP No.216/2024 in SC.No.675/2022, on the files of the Special Court for trial of Protection of Children from Sexual Offences (POCSO) Act, Erattupetta, and petitioner is the sole accused in the above case.

2. Heard Advocate P.Vijayabhanu, the learned Senior Counsel appearing for the petitioner, and the learned Public Prosecutor in detail.

3. In this matter, crime was registered alleging commission of offences punishable under Sections 376, 376(2)(n), 109, 312 r/w 34 of the Indian Penal Code ('IPC' for short), by the accused. The petitioner moved anticipatory bail application before this Court with other accused and this Court dismissed the anticipatory bail plea of the petitioner while allowing the same as against the other accused as per Annexure-A1 order 2024:KER:82238 in B.A.No.1318/2022 dated 30.06.2022. Later the petitioner surrendered before the Investigating Officer and was remanded to judicial custody. As per Annexure-A2 order dated 22.08.2022 in B.A.No.6372 of 2022, this Court granted regular bail to the petitioner by imposing conditions. Condition No.(c) imposed in the bail order is that "the petitioner shall not intimidate or attempt to influence the witnesses; nor shall he tamper with the evidence or contact the victim or her family members". While continuing on bail, the petitioner took the defacto complainant with intention to persuade her to withdraw from the clutches of prosecution in S.C.No.675/2022 and sexually abused her during the period from 01.09.2023 to 11.10.2023. Thus another Crime No.2378/2023 of Kalamassery Police Station, Ernakulam District, was registered alleging commission of offences punishable under Sections 354, 376(2)(n) and 195A of the Indian Penal Code ('IPC' for short) as well as Section 66E of the Information Technology Act ('IT Act' for short).

4. While assailing Annexure A8 order cancelling the bail by the Special Judge, it is submitted by the learned Senior Counsel that in the second crime as per Annexure-A5 order in B.A.No.10423/2023 2024:KER:82238 dated 14.12.2023 this Court granted anticipatory bail to the petitioner as it is pointed out by the learned counsel for the petitioner that the defacto complainant and the petitioner fell in love and in consequence thereof the first crime was registered. According to the learned counsel for the petitioner, even though he was released as per Annexure-A2 by imposing condition (c) that "he shall not intimidate or attempt to influence the witnesses; nor shall he tamper with the evidence or contact the victim or her family members", in continuation of the love affair, the petitioner and the defacto complainant decided to live together with intention to solemnise their marriage and notice of marriage had also been given as per Annexure-A3. But the marriage could not be solemnised. According to the learned counsel for the petitioner, when this Court granted bail as per Annexure-A2 initially and in the second crime also, the cancellation of bail ought not have been done by the trial Court as per Annexure A8.

5. In this connection the learned Public Prosecutor pointed out the last sentence of Annexure-A2 wherein it has been provided that, in case of violation of any of the above conditions, the jurisdictional court shall be empowered to consider the application for cancellation, if any, 2024:KER:82238 and pass appropriate orders in accordance with law, notwithstanding the bail having been granted by this Court. Thus as per Annexure-A2 order, this Court permitted the trial

court to consider cancellation of bail and thereby the Special Judge considered Annexure-A6 petition and passed Annexure-A8 order therein.

6. Now the question poses for consideration herein is that whether the Special Court cancelled the bail as per Annexure-A8 for justifiable reasons and the same would require interference?

7. In so far as the legal question as to whether what are the contingencies under which bail can be cancelled the law is well settled. In the decision reported in [2022 (7) KHC 109 : 2022 KHC OnLine 883 :

2022(6) KLT OnLine 1129], Sreeja Mannangath v. State of Kerala, this Court considered the parameters governing cancellation of bail referring the decisions of the Apex Court and observed in paragraphs 8 to 15 as under:

"8. In the latest decision of the Apex Court reported in (2022 KHC 6496: 2022 (2) KLD 49 : 2022 KHC OnLine 6496 : 2022 SCC OnLine SC 552 : 2022 (7) SCALE 411 : AIR 2022 SC 2183), P. v. State of Madhya Pradesh and Another, three bench decision of the Apex Court considered some of the circumstances where bail granted to the accused 2024:KER:82238 can be cancelled under S.439(1) of the Cr.P.C.. It has been held as under:

- a) If he misuses his liberty by indulging in similar / other criminal activity;
- b) If he interferes with the course of investigation;
- c) If he attempts to tamper with the evidence;
- d) If he attempts to influence / threaten the witnesses;
- e) If he evades or attempts to evade Court proceedings.
- f) If he indulges in activities which would hamper smooth investigation;
- g) If he is likely to flee from the country;
- h) If he attempts to make himself scarce by going underground and / or becoming unavailable to the investigating agency;
- i) If he attempts to place himself beyond the reach of his surety;
- j) If any facts may emerge after the grant of bail which are considered unconducive to a fair trial.

We may clarify that the aforesaid list is only illustrative in nature and not exhaustive.

9. The learned counsel for the second respondent placed a decision of this Court reported in (2022 (4) KLJ 150), Godson (Represented by, M. H. Hanis (Adv.) v. State of Kerala (Represented by, Prasanth M. P. (Sr.PP) & C. S. Hrithwik (Sr.PP)), to contend that mere violation of the condition of bail not to involve in similar offences during the period of bail is not sufficient to cancel the bail granted by the Court. In Godson's case (supra), this Court considered the decision of the Apex Court in Dolat Ram and Others v. State of Haryana, 1995 (1) SCC 349 :

1994 ICO 4306, Dataram Singh v. State of Uttar Pradesh, 2018 (3) SCC 22 : 2018 ICO 103 and in X1, Victim SC No.211 of 2018 of POCSO Court v. State of Kerala and Others, 2019 (3) KHC 26 : 2019 ICO 809.

10. In Dolat Ram's case (supra), the Apex Court has observed as 2024:KER:82238 follows:

"Rejection of bail in a non - bailable case at the initial stage and the cancellation of bail so 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. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non - bailable case in the first instance and the cancellation of bail already granted."

Thus, it is clear that abuse of concessions granted to the accused in any manner is a ground to cancel the bail.

11. In Dataram Singh's case (supra), it was observed by the Apex Court in the manner as follows:

It is also relevant to note that there is difference between yardsticks for cancellation of bail and appeal against the order granting bail. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of bail already granted. Generally speaking, the grounds for 2024:KER:82238 cancellation of bail 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 concessions granted to the accused in any manner. These are all only few illustrative materials. The satisfaction of the Court on the basis of the materials placed on record

of the possibility of the accused absconding is another reason justifying the cancellation of bail. In other words, 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.

12. In Dataram Singh's case (supra) also, abuse of concessions granted to an accused in any manner is a ground to cancel the bail.

13. In X1's case (supra), it was observed as under:

"9. But in a case where the victim or the witnesses specifically complains of threat and intimidation and the said aspects are projected either by victim or by the prosecution before the Bail Court through an application as referred to in Ext P5, then it is bounden duty of the Bail Court to consider the correctness or otherwise of the allegations in a summary manner after affording an opportunity of being heard to the prosecution as well as to the affected accused concerned whose bail is ought to be cancelled and if possible to the victim as well, in a case like this. In such process of enquiry, the Bail Court could call for the records if any in relation to those allegations and if a separate crime has been registered in that regard, the records in those crimes should also be perused by the Bail Court in order to make an enquiry in a summary manner as to the truth or otherwise of the allegations therein, and after affording reasonable opportunity of being heard to the prosecution, 2024:KER:82238 accused and the victim, the Bail Court is expected to discharge its solemn duty and function to decide on the correctness or otherwise of the allegations in such a summary manner and the evidentiary assessment thereof could be on the basis of the overall attendant circumstances as well as the attendant balance of probabilities of the case. Based on such a process, the Bail Court is obliged to take a decision whether the bail conditions have been so violated and if it is so found that the bail conditions has been violated then it is the duty of the Bail Court to cancel the bail, but certainly after hearing the affected party as aforestated. So also, if the said enquiry process reveals that the truth of the above said allegations has not been established in a convincing manner in such enquiry process, then the Bail Court is to dismiss the application to cancel the bail. But the Bail Court cannot evade from the responsibility by taking up the specious plea that since the very same allegations also form subject matter of a distinct crime then the truth or otherwise of the allegations is to be decided by the Criminal Court which is seisin of that crime through the process of finalisation of said impugned criminal proceedings by the conduct and completion of trial therein."

14. In P. v. State of Madhya Pradesh's case (supra), the Apex Court referred the earlier decisions inclusive of Dolat Ram's case (supra). But the said decision in Dataram Singh's case (supra) was not considered. In fact, the judgment in Dataram Singh's case (supra) was rendered by a two Bench of the Apex Court. Similarly, the judgment in Dolat Ram's case (supra) also was rendered by two Bench of the Apex Court.

15. When the three Bench decision of the Apex Court in P. v. State of Madhya Pradesh's case (supra) held that misuse of liberty by 2024:KER:82238 the accused by indulging in similar / other criminal activity is a reason for cancellation of bail, the said ratio shall be the binding precedent. It is true that in Godson's case (supra), the judgment was rendered by this Court on 10/08/2022 and during the relevant time also, the decision in P. v. State of Madhya Pradesh's case (supra) rendered on 05/05/2022 would hold the field. Therefore, the ratio in P. v. State of Madhya Pradesh's case (supra) rendered by the three Bench of the Apex Court shall govern the principles regarding cancellation of bail. The ratio has been followed in another three Bench decision reported in (2022 KHC 6591), Deepak Yadav v. State of Uttar Pradesh and Another. Since the law is settled as discussed above, it has to be held that, if the accused misuses his liberty by indulging in similar/other criminal activity violating condition/conditions imposed in the bail order, the same is a supervening circumstances to cancel the bail."

8. Recently, in the decision reported in 2024 KHC OnLine 6302 : 2024 INSC 438 : 2024 LiveLaw (SC) 392], Ajwar v. Waseem, the Apex Court considered this question after referring its earlier judgments and affirmed the principles in paragraphs 27 and 28 as under:

"27. It is equally well settled that bail once granted, ought not to be cancelled in a mechanical manner. However, an unreasoned or perverse order of bail is always open to interference by the superior Court. If there are serious allegations against the accused, even if he has not misused the bail granted to him, such an order can be cancelled by the same Court that has granted the bail. Bail can also be revoked by a superior Court if it transpires that the courts below have ignored the relevant material available on record or not looked into the gravity of the offence or the impact on the society resulting in such an order. In P v. State of Madhya Pradesh and Another (supra) decided by a three judges bench 2024:KER:82238 of this Court [authored by one of us (Hima Kohli, J)] has spelt out the considerations that must weigh with the Court for interfering in an order granting bail to an accused under S.439(1) of the CrPC in the following words:

"24. As can be discerned from the above decisions, for cancelling bail once granted, the court must consider whether any supervening circumstances have arisen or the conduct of the accused post grant of bail demonstrates that it is no longer conducive to a fair trial to permit him to retain his freedom by enjoying the concession of bail during trial [Dolat Ram v. State of Haryana, 1995 (1) SCC 349 : 1995 SCC (Cri) 237] . To put it differently, in ordinary circumstances, this Court would be loathe to interfere with an order passed by the court below granting bail but if such an order is found to be illegal or perverse or premised on material that is irrelevant, then such an order is susceptible to scrutiny and interference by the appellate court."

28. CONSIDERATIONS FOR SETTING ASIDE BAIL ORDERS The considerations that weigh with the appellate Court for setting aside the bail order on an application being moved by the aggrieved party include any supervening circumstances that may have occurred after granting relief to the accused, the conduct of the accused while on bail, any attempt on the part of the accused to

procrastinate, resulting in delaying the trial, any instance of threats being extended to the witnesses while on bail, any attempt on the part of the accused to tamper with the evidence in any manner. We may add that this list is only illustrative and not exhaustive. However, the court must be cautious that at the stage of granting bail, only a prima facie case needs to be examined and detailed reasons relating to the merits of the case that may cause prejudice to the accused, ought to be avoided. Suffice it is to state that the bail order should reveal the factors that have been considered by the Court for granting relief to the accused."

9. Thus the legal position is well settled. When a Court grants bail after imposing conditions, violation of any of the conditions in 2024:KER:82238 a bail order would lead to cancellation of bail by invoking power under Section 439 (2) of Cr.P.C. Section 439 (2) Cr.P.C reads as under:

"439. Special powers of High Court or Court of Session regarding bail.

xxxx xxxx xxxx (2) 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."

10. Here evidently the petitioner was released on bail as per Annexure-A2 order by imposing condition `c' with specific direction that he shall not contact the victim or her family members during currency of the bail. In gross violation of the said condition, the petitioner brought the defacto complainant with him and lived together and subjected her to sexual intercourse on the premise of marriage and even on giving notice for registering the marriage under the Special Marriage Act, and thereafter he retracted from the marriage. In such a case, even though this Court granted anticipatory bail to the petitioner, in the second crime the same has no bearing when considering cancellation of bail on the ground of violation of condition `c' in Annexure-A2. No doubt, when a person misuses the liberty granted by the order of bail by violating the contention/s thereof, the same alone is a reason to cancel the bail. In such 2024:KER:82238 view of the matter, the order cancelling the bail order impugned herein is only to be justified and accordingly the order impugned is found to be sustainable. Consequently this petition is liable to be dismissed.

11. This Crl.M.C accordingly stands dismissed, with direction to the petitioner to surrender before the jurisdictional court forthwith, failing which the jurisdictional court is directed to proceed with coercive steps to secure his presence, as per law.

12. Interim order already granted stands dismissed. Registry shall forward a copy of this order to the jurisdictional court for information and further steps through e-mail today itself.

Sd/-

A. BADHARUDEEN, JUDGE rtr/ 2024:KER:82238 PETITIONER'S ANNEXURES Annexure A1 TRUE PHOTOCOPY OF THE ORDER IN B.A. NO.1318 OF 2022 ON THE FILES OF THIS COURT DATED 30.06.2022.

Annexure A2 TRUE COPY OF THE ORDER IN B.A. NO.6372 OF 2022 ON THE FILE OF THIS COURT DATED 22.08.2022.

Annexure A3 PHOTOCOPY OF THE REPLY OBTAINED AS PER THE RIGHT TO INFORMATION ACT FROM THE SUB REGISTRAR OFFICE, ETTUMANOOR ALONG WITH THE APPLICATION.

Annexure A4 TRUE COPY OF FIR ALONG WITH THE FI STATEMENT IN CRIME NO.2378/2023 OF KALAMASSERY POLICE STATION.

Annexure A5 THE TRUE COPY OF THE ORDER IN B.A. NO.10423 OF 2023 ON THE FILE OF HON'BLE HIGH COURT OF KERALA DATED 14.12.2023.

Annexure A6 THE TRUE COPY OF THE PETITION FILED BEFORE THE FAST TRACK SPECIAL COURT, ERATTUPETTA, AS C.M.P. NO.216/2024, TO CANCEL THE BAIL GRANTED TO THE PETITIONER.

Annexure A7 THE TRUE PHOTOCOPY OF THE OBJECTION FILED BEFORE THE FAST TRACK SPECIAL COURT, ERATTUPETTA IN C.M.P. NO.216 OF 2024.

Annexure A8

THE CERTIFIED COPY OF THE ORDER DATED
29.08.2024 IN C.M.P. NO.216 OF 2024 IN S.C.
NO.675 OF 2022 ON THE FILE OF FAST TRACK
SPECIAL COURT, ERATTUPETTA.