

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 22<sup>ND</sup> DAY OF APRIL 2022 / 2ND VAISAKHA, 1944

CRL.MC NO. 1387 OF 2022

AGAINST THE ORDER IN CRL.MC 179/2022 OF SESSIONS COURT,  
ERNAKULAM

PETITIONER/DE FACTO COMPLAINANT:

XXXXXXXXXX  
XXXXXXXXXX XXXXXXXXXXXX

BY ADVS.  
BLAZE K.JOSE  
URMILA ZACHARIA  
GAUTHAM KRISHNAN

RESPONDENTS/PETITIONER & 1ST RESPONDENT/ACCUSED:

1 STATE OF KERALA , REPRESENTED BY PUBLIC  
PROSECUTOR, HIGH COURT OF KERALA,  
ERNAKULAM  
REPRESENTING STATION HOUSE OFFICER, ERNAKULAM TOWN  
SOUTH POLICE STATION, PIN - 682031

2 XXXX, AGED 31 YEARS,  
XXXXX

R2 BY ADVS.RAMEEZ NOOH, MILLU DANDAPANI,  
SRI.SANGEETHA RAJ, PP

THIS CRIMINAL MISC. CASE HAVING COME UP FOR  
ADMISSION ON 5.04.2022, THE COURT ON 22.04.2022 PASSED  
THE FOLLOWING:

**O R D E R**

Dated this the 22<sup>nd</sup> day of April, 2022

This Criminal Miscellaneous Case has been filed to set aside the order granting anticipatory bail by the Sessions Court, Ernakulam (for short, ‘the court below’) to the accused in Crime No.83/2022 of Ernakulam Town South Police Station.

2. The petitioner is the de facto complainant and the 2<sup>nd</sup> respondent is the accused in Crime No.83/2022 of Ernakulam Town South Police Station. The crime was registered against the 2<sup>nd</sup> respondent based on the statement given by the petitioner on 19/1/2022 to the SI of Police, Ernakulam Town South Police Station u/s 376(1) of IPC.

3. The allegation of the prosecution is that the petitioner and the 2<sup>nd</sup> respondent came to know each other through a matrimonial website ([www.keralachristianmatrimony.com](http://www.keralachristianmatrimony.com)) in the month of April 2020. Thereafter, in the month of August 2020, when the petitioner visited Kerala to attend the court in

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connection with her divorce case, the 2<sup>nd</sup> respondent visited room No.207 in Park Residency Luxury Business Hotel at Kadavanthra where she was staying and committed rape on her against her will on 25/8/2020.

4. The 2<sup>nd</sup> respondent moved an application for anticipatory bail on 22/1/2022 at the court below as Cr1.M.C.No.179/2022. The petitioner herein got herself impleaded in the bail application. The court below after hearing both sides including the petitioner herein granted anticipatory bail to the 2<sup>nd</sup> respondent as per the order dated 14<sup>th</sup> February 2022. The said order is under challenge in this Cr1. M.C.

5. I have heard Sri.Blaze K.Jose, the learned counsel for the petitioner, Sri.Millu Dandapani, the learned counsel for the 2<sup>nd</sup> respondent and Sri.Sangeetha Raj, the learned Public Prosecutor.

6. The learned counsel for the petitioner Sri.Blaze K.Jose submitted that the court must be cautious and circumspect in exercising power u/s 438 of Cr.P.C which is discretionary in nature and that if the discretionary power to grant anticipatory bail was

exercised without any valid reason or on considerations irrelevant or not germane to the determination, such order could not be sustained. The learned counsel further submitted that even though all the documents, facts and arguments were urged in detail before the court below, it failed to take notice of those relevant documents or any of the contentions of the petitioner and without bearing in mind the relevant aspects to be considered in an application for anticipatory bail and on a wrong understanding of facts, circumstances and the law on the point granted relief of pre-arrest bail to the 2<sup>nd</sup> respondent by making perverse and unwarranted findings. According to the counsel, the impugned order suffers from serious infirmities and would prejudicially affect the investigation as well as the trial resulting in serious miscarriage of justice to the petitioner. The counsel also submitted that even though the prosecution case is that the 2<sup>nd</sup> respondent committed rape on the petitioner against her will, the court below viewed the case on the wrong premises that the 2<sup>nd</sup> respondent had sexual intercourse with the petitioner after obtaining her consent by giving a false promise of marriage. The

finding of the court below that the petitioner did not obtain divorce legally and thus not competent to enter a valid marriage is against the evidence on record, added the learned counsel. He also relied on the decisions of the Apex Court in **Muraleedharan v. State of Kerala** [(2001) 4 SCC 638] and **P.Chidambaran v. Directorate of Enforcement** [(2019) 9 SCC 24] to buttress his contention that anticipatory bail should not be granted mechanically and it can be granted only when the court is convinced that exceptional circumstances exist to resort to that extraordinary remedy.

7. *Per contra*, the learned counsel for the 2<sup>nd</sup> respondent submitted that the court below did not commit any error as alleged by the petitioner and that it was only after considering the entire facts and relevant records and on hearing the petitioner passed the order granting anticipatory bail to the 2<sup>nd</sup> respondent. The Counsel submitted that the 2<sup>nd</sup> respondent is cooperating with the investigation and did not violate the bail conditions.

8. This is not a petition u/s 439(2) of Cr. P.C seeking

cancellation of bail in the strictest sense. It actually calls in question the legality of the order granting bail invoking Section 482 of Cr.P.C. The basic assail is the manner in which the High Court has exercised its jurisdiction under S.438 of CrPC while admitting the accused to bail.

9. Even though an order granting bail would not, under normal circumstances, be interfered with by the superior Courts, there is no legal embargo against such intervention. It is not as if once a bail is granted by any Court, the only way is to get it cancelled on account of its misuse. An order granting bail, though a discretionary order, calls for the exercise of discretion in a judicious manner and not as a matter of course, and shall be supported by cogent reasons. If the order granting bail is vitiated by the wrong exercise of discretion by the Court or is patently perverse, due to non - consideration of relevant and crucial factors, the superior Courts can definitely set right the illegality. The three Judges' Bench of the Supreme Court has held that if the order granting bail is perverse for the reason that irrelevant material of substantial nature was taken into account or relevant material omitted from consideration, the Superior Court would be

justified in cancelling the bail. [See -- **Dinesh M. N. (S.P.) v. State of Gujarat** (2008 KHC 4583) and **Narendra K. Amin v. State of Gujarat and Another** (2008 KHC 4584)].

10. Section 439(2) of Cr. P.C provides that the High Court or Court of Session may direct that any person who has been released on bail under Chapter XXXIII be arrested and commit him to custody. The said provision empowers the Court concerned to cancel bail though the phrase 'cancel the bail' is not mentioned in it. The inherent power under S.482 Cr.PC of the High Court is not affected by the provisions under S.439(2) Cr.PC as the power under S.482 is available to interfere with an order if it causes miscarriage of justice or if it is palpably illegal or unjustified and based on absolutely irrelevant materials. Inherent powers of the High Court acknowledged in S.482 of CrPC could always be invoked in the aid of an order required to secure the ends of justice and for preventing abuse of the process of any court. The Apex Court in **Puran v. Rambilas** (2001 KHC 640) has held that the High Court in the exercise of power under section 482 can set aside the perverse order granting bail.

11. The considerations that guide the power of the High

Court u/s 482 of Cr. P.C in assessing the correctness of an order granting bail stand on a different footing from an assessment of an application for the cancellation of bail u/s 439(2). An application for cancellation of bail u/s 439 (2) is generally examined on the anvil of the existence of supervening circumstances or violations of the conditions of bail by a person to whom bail has been granted. If in a case, the relevant factors which should have been taken into consideration while dealing with the application for bail have not been taken note of or it is founded on irrelevant considerations, then also the superior court can cancel the bail. The correctness of an order granting bail u/s 482 is tested on the anvil of whether there was an improper or arbitrary exercise of discretion in the grant of bail. The test is whether the order granting bail is perverse, illegal or unjustified. In **Puran** (supra), the Apex Court pointed out that where an order granting bail was passed by ignoring material evidence on record and without giving reasons, it would be perverse and contrary to the principles of law and such an order would itself provide a ground for moving an application for cancellation of bail. In **Neeru Yadav v. State of U.P.** (2015 KHC 4650), it was held that

when the order granting bail is perverse, due to non-consideration of relevant and crucial factors, the superior Courts can definitely set right the illegality. Thus, if the order granting bail by the Court of Session is patently perverse, illegal, unjustified, suffers from serious infirmities resulting in miscarriage of justice or is vitiated by the arbitrary and wrong exercise of discretion by the Court or if there is manifest impropriety, the same can be set at naught by the High Court u/s 482 of Cr.P.C.

12. Now, let me examine whether the impugned order is perverse or is vitiated by the arbitrary and wrong exercise of discretion by the Court below warranting interference by this Court under Section 482 of Cr.P.C.

13. The case of the petitioner as revealed from her statements u/s 161 and 164 of Cr.P.C. are as follows: The marriage of the petitioner was solemnized in the year 2008. Due to the difference of opinion, she and her husband mutually decided to dissolve their marriage in 2020 and approached the court. During the pendency of the divorce proceedings, the petitioner registered herself on [www.keralachristian](http://www.keralachristian)

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[matrimony.com](http://matrimony.com) to find a better partner. Then the 2<sup>nd</sup> respondent approached her introducing him as a native of Kottayam and stating that his divorce proceedings are in process and that the papers to be obtained from the court are delayed due to covid. Thereafter the 2<sup>nd</sup> respondent constantly called the petitioner over the phone, WhatsApp and Botim and promised marriage. He also introduced her to relatives and friends. Thereafter on 16/8/2020 the petitioner who was employed at U.A.E came to Kerala for her divorce case and stayed in a hotel at Panampilly Nagar. At that time, 2<sup>nd</sup> respondent came and visited her and shifted her to Park Residency Luxury Business Hotel at Kadavanthra on 23/8/2020. The petitioner thereafter stayed in room No.207 at the said hotel from 23/8/2020 to 4/9/2020. While so, on 25/8/2020 at 11.00 a.m., the 2<sup>nd</sup> respondent came to the room and requested some money. Since the 2<sup>nd</sup> respondent gave the impression that he was going to marry her, she gave a debit card from the Federal Bank to him. Thereafter the 2<sup>nd</sup> respondent told her that it was four years since he had sexual intercourse with his ex-wife and therefore he badly wants to marry the

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petitioner at the earliest and requested the petitioner to have sexual intercourse with him which was turned down by her. The 2<sup>nd</sup> respondent then threatened her that he would publish her photos and videos and committed rape on her. Later, she came to know that the 2<sup>nd</sup> respondent is in a live-in relationship with another lady and the promise of marriage was made by him to her only to satisfy his sexual lust.

14. The allegation of sexual assault/rape levelled against the 2<sup>nd</sup> respondent is a single incident which is alleged to have taken place at room No.207 in Park Residency Luxury Business Hotel at Kadavanthra at 11 am on 25/8/2020 mentioned above. The version of the petitioner would show that she was staying in another hotel, and she accepted the request of the 2<sup>nd</sup> respondent and voluntarily moved to the said hotel room. In the statement u/s 161 as well as u/s 164 of Cr.P.C., the only allegation is that the 2<sup>nd</sup> respondent had sexual intercourse with her forcefully and against her will at the hotel room on the said day. At the same time, all along the petitioner has also maintained a case that she was sexually assaulted by giving a

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false promise of marriage. It is to be noted that even after the alleged incident on 25/8/2020, she continued her stay in the very same hotel and in the very same room till 4/9/2020. The FIS was given, and the crime was registered only on 19/1/2022. The statements of the petitioner would reveal that even after the alleged act of rape, she gave money to the 2<sup>nd</sup> respondent believing his words that he would marry her. The documents produced by the 2<sup>nd</sup> respondent as well as the materials on record would show that between 25/8/2020 and 19/1/2022, the petitioner came to Kochi and stayed in the very same hotel. But no complaint was preferred during those periods. Annexure II tax invoices produced by the 2<sup>nd</sup> respondent would show that the petitioner stayed at the very same hotel and in the very same room where allegedly the rape was committed for 21 days from 31/10/2020 to 20/11/2020 and for two days from 6/2/2021 to 8/2/2021. The forceful argument of the learned counsel for the 2<sup>nd</sup> respondent that had there been rape as alleged by the petitioner on 25/8/2020 at the room No.207 in Park Residency Luxury Business Hotel at Kadavanthra, it was quite unlikely that

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she would again come and stay in the very same room for days together cannot be brushed aside lightly while considering the question whether the 2<sup>nd</sup> respondent has made out a case for anticipatory bail. That apart, Annexure III is a complaint given by the petitioner to the District Police Chief, Kochi against the 2<sup>nd</sup> respondent on 10/7/2021 through e-mail. In the said complaint also, there was no allegation of rape. It appears that thereafter the 2<sup>nd</sup> respondent filed a police complaint against the petitioner before the Cyber Crime Police, Kochi city and before the City Police Office, Kochi on 22/9/2021 as evident from Annexure IV alleging that the petitioner posted abusive and threatening language about him and his relatives in social media. Thereafter again the 2<sup>nd</sup> respondent filed a private complaint against the petitioner before the Judicial First Class Magistrate Court- VIII Ernakulam as CMP 2036/2021. The Magistrate forwarded the said complaint u/s 156(3) of Cr.P.C and an FIR has been registered as Crime No.1729/2021 against the petitioner u/s 406, 420, 504 of IPC and S.66D of the IT Act as evident from Annexure V. It was thereafter the FIS was given by the petitioner against the 2<sup>nd</sup>

respondent on 19/1/2022 and a crime was registered against him. It was considering all this sequence of events and facts and circumstances, the court below granted anticipatory bail to the 2<sup>nd</sup> respondent. It is true that the court below entered a wrong finding that the marriage of the petitioner was not dissolved. But it was not based on the said finding alone that the bail was granted.

15. The cancellation of bail interferes with the liberty of the individual and hence it must not be lightly resorted to. Where the discretion of the Court to grant bail has been exercised on relevant considerations and bail is granted, this Court would normally not interfere with such discretion unless it is found that the discretion itself is exercised on extraneous considerations and/or the relevant factors which need to be taken into account while exercising such discretion are ignored or bypassed. There have to be very cogent and overwhelming circumstances that are necessary to interfere with the discretion in granting the bail.

There is nothing on record to suggest that the impugned order granting bail to the 2<sup>nd</sup> respondent passed by the court

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below is perverse, unjustified, illegal or is vitiated by the arbitrary and wrong exercise of jurisdiction warranting interference by this Court exercising jurisdiction u/s 482 of Cr.P.C. Accordingly, the Criminal Miscellaneous Case stands dismissed.

Sd/-

**DR. KAUSER EDAPPAGATH  
JUDGE**

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**APPENDIX**

PETITIONER'S EXHIBITS

ANNEXURE 1                    CERTIFIED COPY OF THE ORDER IN  
CRL.M.C.NO.179/2022 OF THE DISTRICT &  
SESSIONS COURT, ERNAKULAM DATED  
14.12.2022

ANNEXURE 2                    A TRUE COPY OF THE ORDER IN OP  
NO.2412/2020 DATED 29.7.2021 OF THE  
FAMILY COURT, ERNAKULAM.