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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 14TH DAY OF MARCH 2025 / 23RD PHALGUNA, 1946

BAIL APPL. NO. 3089 OF 2025

CRIME NO.911/2024 OF WADAKKANCHERY POLICE STATION, THRISSUR
AGAINST THE ORDER/JUDGMENT DATED 24.01.2025 IN CRMP
NO.418 OF 2025 OF ADDITIONAL SESSIONS COURT (ADHOC) III,
THRISSUR

PETITIONER(S)/ACCUSED NO.5:

JOMON
AGED 34 YEARS
S/O VARGHESE, KATTILPARAMBIL HOUSE, KODANCHERY
VILLAGE, THAMARASSERY, KOZHIKODE DISTRICT,
PIN - 673580

BY ADV. SUNEESH KUMAR R.

RESPONDENT(S)/STATE & COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, PIN - 682031
- 2 THE STATION HOUSE OFFICER
WADAKKANCHERY POLICE STATION, THRISSUR DISTRICT,
PIN - 680582

BY ADV.
SRI.NAUSHAD K.A., SR PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
14.03.2025, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:



CR

P.V.KUNHIKRISHNAN, J

B.A.No.3089 of 2025

Dated this the 14th day of March, 2025

O R D E R

The short point to be decided in this case is that, whether the bail court should scrupulously consider to find out the violation of the mandatory provisions in the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. The petitioner is the 5th accused in Crime No. 911/2024 of Wadakkanchery Police Station, Thrissur. The above case is registered against the petitioner and others alleging offences punishable under Sections 20(b)(ii)(C) and 29 of the NDPS Act.

3. The Prosecution case is that on 05.12.2024 at 10:50 p.m., the police party led by the Sub Inspector of Police, Wadakkanchery Police Station was conducting vehicle checking along the Wadakkanchery-Kunnamkulam Public Road. At that



time, a pick-up van bearing Registration No. TN-29CW-6229 came from the Wadakkanchery side and the driver of the said pickup van stopped the vehicle before the police party, when the Sub Inspector showed a signal to stop the vehicle. It is further alleged that while the said vehicle was stopped and on seeing the police party, two persons travelling in the carriage body of the said pickup van ran away. On questioning the driver and two others travelling in the cabin of the said pickup van, as to why the said two persons travelling in the carriage body had fled upon seeing the police, they got perplexed and told that they did not know the reason. Accordingly, the Sub-Inspector of Police inspected the carriage body of the said pickup van and found two bikes bearing Registration Nos. KL-48P-2034 and KL-49K-9669. They also saw travel bags covered with plastic sheets. It is further alleged that on removing the plastic sheets, a severe smell of ganja was emanating from the travel bags. Accordingly, the Sub Inspector of Police opened the said travel bag in the presence of witnesses present there and found that the said travel bags contained ganja. It is further alleged that, after recording the arrest of accused No. 1 to 3, a personal search was conducted in the presence of



Gazetted Officer and recovered money and mobile phones. It is alleged that 83.83 Kilograms of ganja were recovered. Hence it is alleged that the accused committed the offence under Sections 20(b)(ii)(C) and 29 of the NDPS Act. Annexure A1 is the First Information Report (FIR) registered as Crime No.911/2024 by the Wadakkanchery Police. The petitioner, who is the 5th accused was arrested on 18.12.2024, and he has been in custody from that date onward.

4. Heard counsel for the petitioner and the Public Prosecutor.

5. Counsel appearing for the petitioner submitted that the 5th accused is innocent and he was falsely implicated in this case. The counsel also submitted that the alleged seizure of the contraband article is illegal and the police have not complied with the mandatory provisions under Sections 42 and 50 of the NDPS Act. According to the counsel, a perusal of Annexure A1 FIR would show that the Detecting Officer noticed through smell that the travel bags contained ganja. Thus, before opening the alleged travel bags itself, the Detecting Officer noticed that the alleged travel bags contained ganja. Hence, the Sub Inspector of Police,



who received such knowledge should have taken down that information in writing under Sub-Section 1 of Section 42 of the NDPS Act, and he should have forthwith sent a copy thereof to his immediate superior officer. It is also submitted that the Detecting Sub-Inspector of Police is not authorised under Section 42(1) of the NDPS Act to conduct search, between sunset and sunrise without recording his grounds for belief under Second Proviso of Section 42 of the NDPS Act. Since there is a violation of mandatory provisions, the prosecution case will not be sustained. Therefore, for that simple reason, the petitioner is entitled to bail, is the submission.

6. The Public Prosecutor seriously opposed the bail application. The Public Prosecutor submitted that it is a chance recovery and hence, there is no question of compliance with Sections 50 and 42 of the NDPS Act. In addition to that, the Public Prosecutor also submitted that the police party seized the ganja first from the carriage body of the pick-up van and not from the body of the accused. In such circumstances, the compliance of Section 50 of the NDPS Act is not necessary at that stage. Subsequently, before searching the body, Section 50 of the NDPS Act was complied, is the submission.



7. This Court considered the contention of the petitioner and the Public Prosecutor. First of all, this Court is of the considered opinion that violation of the mandatory provisions of the NDPS Act need not be looked into by the bail court, while considering a bail application of an accused involved in the NDPS Act. At the stage of bail, the court only has the FIR, seizure mahazar and statement of the witnesses recorded by the police. Therefore, there cannot be any prima facie finding based on these records at the stage of bail. Unless the entire case is not known, the contention regarding the legality or validity of the action taken by the Detecting Officers, while conducting the search need not be examined in depth by the bail court. Even if the final report is filed, it is not desirable to go into detail about the violation of the statutory provision at the bail stage because any prima facie finding on it will prejudice the interest of either the accused or the prosecution. Regarding the non-compliance of mandatory provisions, the prosecution can explain the same by adducing evidence before the trial court at the appropriate stage. Whether such explanations are to be accepted or not is to be considered by the trial court at the appropriate stage.



8. This Court conveyed this proposition to the counsel for the petitioner. But the counsel for the petitioner insists for a consideration of the above contention at the bail stage itself. When a counsel insists on considering a point in a bail application, this Court is bound to consider the same in the light of the principle laid down by this Court in **Anzar Azeez v. State of Kerala [2025 SCC OnLine Ker 1260]**.

9. Keeping in mind the above principle, this Court considered the contention of the petitioner because of the insistence from the part of the counsel for the petitioner. The first point is whether there is any violation of Section 50 of the NDPS Act. It is a settled position that, if the recovery was not from the person and was from a bag carried by him, the procedure formalities prescribed under Section 50 of the NDPS Act were not required to be complied with. The Apex Court in **State of Kerala v. Prabhu [2024 KHC OnLine 8332]** observed like this:

"7. Thus, it is evident that the exposition of law on the question regarding the requirement of compliance with S.50 of the NDPS Act is no more res integra and this Court in unambiguous term held that if the recovery was not from the person and whereas from a bag carried by him, the procedure formalities prescribed under S.50 of the NDPS Act was not



required to be complied with. It is to be noted that in the case on hand also the evidence indisputably established that the recovery of the contraband was from the bag which was being carried by the respondent.”

10. Admittedly, in this case, the Ganja was seized not from the accused persons, but from the bag kept in the vehicle. Therefore, there is no question of compliance with Section 50 of the NDPS Act at that stage. Subsequently, before searching the accused persons, the detecting officer complied with the procedure under Section 50 of the NDPS Act. Therefore, I am of the *prima facie* opinion that there is no violation of Section 50 of the NDPS Act.

11. The next contention raised by the petitioner is regarding the violation of Section 42 of the NDPS Act. Counsel for the petitioner relied on the judgment of the Apex Court in ***Amit Rajak v. State of Madhya Pradesh [2025 Supreme (Online) (SC) 692]***. That was a case in which one of the accused was acquitted by the trial court stating that there was a violation of the mandatory provisions under Sections 42 and 52 of the NDPS Act. The other accused, who did not appear before the trial court at the



time of trial, filed an anticipatory bail application which was dismissed by the High Court. In such circumstances, the Apex Court relied on the finding of the trial court regarding the violation of Sections 42 and 52 of the NDPS Act which stands as on the date of the order of the Apex Court. Based on the same, the Apex Court granted anticipatory bail. It will be better to extract the above judgment:

- "1. Leave granted.
2. By the impugned judgment and order dated August 02, 2024, the High Court has declined the appellant's prayer for bail in anticipation of arrest.
3. We have heard learned counsel appearing for the appellant as well as the respondent-State.
4. The appellant, along with several co-accused, figured as an accused in First Information Report No. 32/2021 dated 28.08.2021 registered with Police Station STF Bhopal, Madhya Pradesh. It is alleged in the FIR that the appellant committed offence(s) punishable under Section(s) 8 and 20 of the Narcotics Drugs and Psychotropic Substances Act, 1985 and Section 25 of the Arms Act, 1959.
5. The FIR reveals that Ganja weighing 51 kgs. was recovered from the appellant's car and that the appellant had fled while the co-accused were apprehended in course of a raid. Since the appellant absconded, the trial was split up and the co-accused were tried. The co-accused have since been acquitted by the Special Court (NDPS Act) inter alia owing to omission



to follow the mandatory provisions of Sections 42 and 52 of the NDPS Act. There is one crucial observation in the judgment of the special court which is quoted hereunder:

“...Keeping all the above facts in mind, it can be concluded that the investigating officer of the case, Ketan Adlak, influenced his subordinates and fabricated a fictitious incident against the named accused and made the named accused guilty of a serious crime like NDPS despite the named accused being innocent, due to which the named accused are continuously in judicial custody since 19.08.2021 and are also deprived of their basic human rights.”

6. The acquittal recorded by the special court has been carried in appeal before the High Court, and the appeal is reportedly pending.

7. It was also submitted on an earlier occasion before us by the respondent-State that the investigating officer of the case, Ketan Adlak, has filed an application before the High Court in the pending appeal seeking expunction of the adverse remarks made against him by the special court. Such application is also stated to be pending.

8. By an order dated January 9, 2025, we had called upon the State to indicate departmental action has been taken against the investigating officer. Such affidavit is not forthcoming.

9. Be that as it may, having regard to the observations made by the special court and acquittal having been recorded upon disbelieving the entire prosecution case, which has not been disturbed till date, there is no question of the appellant being detained in custody in connection with the same case. Should the High Court reverse the finding of the special court upon believing the prosecution case, the necessity of the appellant



standing trial would arise.

10. We are, thus, of the considered opinion that this appeal should be accepted and the order of the High Court set aside. Ordered accordingly.

11. It is directed that in the event of the appellant being arrested in connection with proceedings arising out of the aforesaid FIR, he shall be released on bail by the arresting/investigating officer/trial court on terms and conditions to be fixed by the trial court.

12. It is made abundantly clear that depending upon the result of the appeal before the High Court, further proceedings may be continued against the appellant in accordance with law.

13. We clarify that the observations made in this order and grant of bail will not be treated as findings on the merits of the case.

14. The appeal is allowed in the above terms.

15. Pending application(s), if any, stand disposed. "

12. Therefore, the Apex Court was considering a case in which there is a finding by the trial court as far as the co-accused is concerned that there is a violation of Sections 42 and 50 of the NDPS Act. In such circumstances, the Apex Court observed that the case against the appellant in that case is unsustainable in light of the acquittal of the co-accused, even though an appeal is pending against the acquittal order. That cannot be taken as a



dictum to decide that in all bail applications, the violation of the mandatory provisions is to be discussed in detail.

13. Moreover, in the ***Union of India through Narcotics Control Bureau, Lucknow v. Md. Nawaz Khan [2021 KHC 6503]***, the Apex Court observed like this:

"29. In the complaint that was filed on 16 October 2019 it is alleged that at about 1400 hours on 26 March 2019, information was received that between 1500-1700 hours on the same day, the three accused persons would be reaching Uttar Pradesh. The complaint states that the information was immediately reduced to writing. Therefore, the contention that S.42 of the NDPS Act was not complied with is prima facie misplaced. The question is one, that should be raised in the course of the trial."

[underline supplied]

14. Therefore the question of violation of Section 42 of the NDPS Act need not be considered by this Court in a bail application. Even then, the counsel appearing for the petitioner insists that the same should be considered by this Court. Since there is an insistence from the counsel for deciding the same, this Court perused the First Information Statement. A perusal of the same would show that it was a chance recovery of Ganja. The contention raised by the petitioner is that, when the detecting



officer came to know through smell that it was Ganja, at that stage, Section 42 of the NDPS Act ought to have been complied with. I cannot agree with the same at this stage. It will be better to extract Section 42 of the NDPS Act:

"42. Power of entry, search, seizure and arrest without warrant or authorisation.-

(I) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including para-military forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,-



- (a) enter into and search any such building, conveyance or place;
- (b) in case of resistance, break open any door and remove any obstacle to such entry;
- (c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and
- (d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior."

15. A perusal of the above Section would show that, if the detecting officer has reason to believe from personal knowledge or information given by any person and taken down in writing that



any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property can enter into and search any such building, conveyance or place. Section 42(2) says that, if an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior. In this case, the Ganja was seized as a chance recovery. In chance recovery, I am of the *prima facie* opinion that, Section 42 violation need not be considered strictly. Moreover, whether Section 42 violation is there or not, is a matter of evidence. A bail court need not consider the same in detail. Therefore, that contention is also unsustainable.

16. A lawyer represents his client. When he takes contentions in bail applications, which may affect his client's interest in the trial, he should not take such contentions thinking his client behind him. In this case, this court repeatedly requested the lawyer not to



force the court to decide the points raised by him observing that, it will prejudice the interest of his client. However, the lawyer insisted on an order on merits. In such a situation, there is no other way except to decide the point raised by the lawyer on merit. But I cannot ignore the face of the client behind him. Therefore, I make it clear that the observation and finding in this order are only for the purpose of deciding this bail application, and the petitioner is free to raise all these contentions before the trial court at the appropriate stage. The principle laid down by this Court in **Anzar Azeez v. State of Kerala** [2025 SCC OnLine Ker 1260] is applicable in this case also.

With the above observation, this bail application is dismissed.

Sd/-

P.V.KUNHIKRISHNAN, JUDGE