

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ALEXANDER THOMAS

TUESDAY, THE 9TH DAY OF JUNE 2015/19TH JYAISHTA, 1937

Crl.MC.No.3408 of 2015

**CRIME NO.3/2014 OF EXCISE ENFORCEMENT AND ANTI NARTOTIC SPECIAL
SQUAD,ERNAKULAM.
CRL.MP NO.1152/2015 IN S.C NO.519/2014 OF IIND ADDITIONAL SESSIONS
JUDGE,ERNAKULAM.**

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PETITIONER'S/ACCUSED NO.1&2.:

1. **MUHAMMED ALAMGHEER MANDEL,
S/O.FARON MANDEL,DHOLOVADI POST,
DOMCKAL P.S.,NAKIRAJ VILLAGE,MURASHIDABAD DIST,
WEST BENGAL.**
2. **AKBAR SHAIK,S/O.NUJU SHAIK,NOTTIYAL POST,
JALAMGI P.S.,KUMARAPUR KHOLANI VILLAGE,
MURSHIDABAD DIST.,WEST BENGAL.**

BY ADV.SRI.M.J.SANTHOSH

RESPONDENT/COMPLAINANT:

**STATE OF KERALA,
REPRESENTED BY THE EXCISE CIRCLE INSPECTOR,
EXCISE ENFORCEMENT AND ANTI NARCOTIC SPECIAL SQUAD,
ERNAKULAM,REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,ERNAKULAM.**

**BY SRI.TOM JOSE PADINJARECKARA
(ADDL.DIRECTOR OF PROSECUTION).**

**THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 09-06-2015, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:**

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CrI.MC.No.3408 of 2015

APPENDIX

PETITIONER'S ANNEXURES:

**ANNEXURE-A1:THE TRUE COPY OF PETITION IN CRL.M.P.NO.1152/2015
DATED 1/6/2015.**

ANNEXURE-A2:THE TRUE COPY OF OBJECTIOIN IN CRL.M.P.NO.1152/2015.

**ANNEXURE-A3:THE CERTIFIED COPY OF ORDER CRL.M.P.NO.1152/2015 IN
S.C.NO.519/2014 DATED 5/6/2015.**

RESPONDENT'S ANNEXURES:

NIL

//TRUE COPY//

P.S. TO JUDGE

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ALEXANDER THOMAS, J.

Crl.M.C No. 3408 of 2015

Dated this the 9th day of June, 2015.

O R D E R

The order under challenge is the impugned Annexure A3 order rendered on 5.6.2015 by the Court of Second Additional Sessions Judge, Ernakulam on Crl.M.P No.1152 of 2015 in S.C No. 519 of 2014. The said impugned order was passed on Annexure A1 in Crl.M.P No.1152 of 2015 filed before the court below wherein the prosecutor made an application which reads as follows:

“I am the Public Prosecutor appearing in the above case. The charge leveled against the accused persons for the offences punishable under Section 21(b) of NDPS Act. Today the above case stands posted for evidence. In this case, on the side of prosecution CW1 is the detecting officer. CW1 was examined of 26.05.15 as PW1 in the above case. Prosecution was omitted to mark some material documents which includes confession statements and two other statements which was recorded and produced by the PW1 in the above case. Those documents are essential and material evidences to prove the prosecution case. The marking of those documents are inevitable omission on the part of prosecution while examining the witness PW1. It is not willful latches on the part of the prosecution.

2. The further examination of PW1 is highly necessary and to mark the documents, without examining the PW1 the prosecution could not succeed the case. Hence it is highly necessary to reopen the evidence in the above case for the examination of PW1, to mark the document which are already produced by the PW1 before the court. If the witness is not examine

it will cause irreparable injury hardship and loss to the prosecution. There is no willful negligence or latches on my part.

In these circumstances it is most humbly prayed that this Hon'ble Court may pleased to reopen the evidence for adducing evidence of CW8 in the interest of justice."

2. The petitioners herein who are the accused in the said Sessions case for the offences under Section 21(b) of the NDPS Act, had filed objections thereto as evidenced by Annexure A2. The court below after consideration of the rival case allowed the plea of the prosecution as per the impugned Anneuxre A3 order and it was held therein that the accused will be at liberty to argue about the evidentiary value of the same based on the well settled legal principles referred to in the court rulings mentioned by the petitioners.

3. Heard Sri. M.J Santhosh, learned counsel for the petitioner and Sri. Tom Jose Pandinjarekkara, learned Additional Director General of Prosecution and Additional State Public Prosecutor for the respondent, State of Kerala. The learned counsel for the petitioner referred to various rulings of the court in aid of his contentions. In Ram Singh V. Central Bureau of Narcotics [2011 (11) SCC 347] the Hon'ble Supreme Court has relied the dictum laid down in Kanhaiyalal V Union of India [2008 (4) SCC 668] and held that the confession statement recorded by

the officer U/s 53 of the NDPS Act cannot be treated as a 'police officer' and that confession statement is admissible in evidence. However in the case Noor Aga V State of Punjab [2008 (16) SCC 417 (para 76)], the Hon'ble Supreme Court held that the officer empowered Under Section 53 of the NDPS Act should be deemed to be a police officer. In Nirmal Singh Pehlwan v Inspector Customs [2011 (12) SCC 298] the Supreme Court held that in Noor Aga case (Supra) the division bench of the Apex Court has doubted the dictum laid down in Kanhaiyalal case (Supra), and that the court has not considered this issue in detail but that in Noor Aga case (Supra) this matter was considered elaborately, and that it would be proper to follow the ratio of the judgment in Noor Aga case (Supra). Still later in Tofan Singh V. State of Tamilnadu [(2013 (16) SCC 31] the Apex Court considered the evidentiary value of the confession statement recorded by the officers empowered U/s 42 and 53 of the NDPS Act and referred the issue for the consideration of a larger bench for deciding the said issue with an observation that the ratio in Noor Aga case (Supra) is the correct law. These are the rulings of the Apex court which has been relied on by the learned counsel for the

petitioner before the court below. The Sessions Case is now under trial and the challenge made against the impugned order is one raised by invoking the jurisdiction conferred on this Court under Section 482 of the Cr.P.C. The Apex Court in the case *Umesh Kumar v. State of Andrapradesh* [2013(4) KLT SN 4 (C.No.2)SC] in Crl.A. No.1305 of 2013 held that the scope of Section 482 Cr.P.C is well defined and inherent powers could be exercised by the High Court to give effect to an order under the Cr.P.C, and to prevent abuse of the process of court; and to otherwise secure the ends of justice. However, in exercise of such powers, it is not permissible for the High Court to appreciate the evidence as it can only evaluate material documents on record to the extent of its prima facie satisfaction about the existence of sufficient ground for proceedings against the accused and the court cannot look into materials, the acceptability of which is essentially a matter for trial etc. Therefore, considering the fact that the Sessions case in an offence alleged under Section 21(b) of the NDPS Act, is under trial before the Sessions Court concerned, and in view of the specific observations made by the court below in the last paragraph of

the impugned Annexure A3 order granting liberty to the accused to argue all contentions about the evidentiary value of the matters sought to be now adduced by the prosecutor in the impugned application, this Court is of the considered opinion that the extra ordinary discretion conferred under Section 482 Cr.P.C may not be exercised. Sri. Tom Jose Padinjarekkara, learned Additional Director General of Prosecution and Additional State Public Prosecutor for the respondent, State of Kerala submits that it will be open to the accused to raise all contentions even about the very admissibility of the new oral and documentary evidence that is sought to be let him by the prosecution on the basis of the impugned order, at the time of arguments in the trial and the accused will also be equally at liberty to raise their contentions against not only the acceptability but also the reliability and the evidentiary value of such oral and documentary evidence. He would further submit that as the prosecution evidence is not yet closed, the accused would also be equally at liberty to let him any relevant defence evidence in aid of the contentions as against the proposed new oral and documentary evidence. Therefore in view of this

submissions made by the learned State Prosecutor as well as the specific observations made by the court below in the last paragraph of the impugned Annexure A3 order, this Court is of the considered opinion that any exercise of discretion under Section 482 Cr.P.C is not called for, especially at this late stage of the trial. Therefore recording the specific undertaking made by the learned Additional Director General of Prosecution and in view of the specific liberty granted by the court below, this court is of the considered opinion that this application under Section 482 Cr.P.C need not be entertained and that the matter could be closed.

In the light of these observations, the Crl.M.C stands disposed of.

ALEXANDER THOMAS
JUDGE

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