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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

THURSDAY, THE 10TH DAY OF APRIL 2025 / 20TH CHAITHRA, 1947

BAIL APPL. NO. 5163 OF 2025

CRIME NO.1404/2023 OF Kundara Police Station, Kollam

AGAINST THE ORDER/JUDGMENT DATED IN Bail Appl. NO.1709 OF 2024 OF HIGH COURT OF KERALA

PETITIONER(S)/ACCUSED 1 AND 2:

1 VISHNU VIJAYAN
AGED 22 YEARS, S/O VIJAYAKUMAR, SINDU BHAVANAM CHANDANATHOPE P.O., KUZHIYAM SOUTH CHERRY, PERINAD VILLAGE, KOLLAM., PIN – 691014

2 PRAKHIL
AGED 23 YEARS, S/O MADANAN VATTATHRAMALAVILA, KIZHAKKATHIL, KUZHIYAM, CHANDANATHOPE P.O., PERINAD, KOLLAM., PIN – 691014

BY ADV C.S.SUMESH

RESPONDENT(S)/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM., PIN - 682031

BY ADV.:

SRI HRITHWIK C S, SR.PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 10.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.V.KUNHIKRISHNAN, J

B.A.No.5163 of 2025

Dated this the 10th day of April, 2025

O R D E R

The petitioners are accused in Crime No.1404 of 2023 of Kundara Police Station, Kollam. The above case is registered against the petitioners and others alleging offences punishable under Sections 8, 22(c) and 29 of the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985.

2. The prosecution case is that, on 14/07/2023 at around 10.50 a.m., the petitioner No.1/accused No.1 is found to have in possession of MDMA to the quantity of 4.680 gm in the back pocket of his pant and the petitioner No.2/accused No.2 was found to have carried MDMA to the quantity of 4.660 in the back pocket of his pant, while travelling in a vehicle bearing Reg. No.KL-02-AD-0004 near to Ambi Poika canal ground in Elampallor vilage, Kollam. In the said vehicle, along with the petitioners herein there

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were 3 other persons who are also alleged to have possessed with MDMA in the pocket of their pants. It is further stated that beneath to the front left seat of the said vehicle MDMA to the quantity of 63.400 gm were kept in a brown parcel cover by the accused persons. In short, the prosecution would allege that the accused no.1 to 5 in the said crime is said to have engaged in drug trafficking (MDMA) to the quantity of 85.250 for the purpose of sale and the said contraband is alleged to have bought from Thiruvananthapuram. Hence, it is alleged that the accused committed the offence. The petitioners were arrested on 14.07.2023.

3. Heard the learned counsel appearing for the petitioners and the learned Prosecutor.

4. The counsel for the petitioners submitted that the petitioners are in custody for the last one year and eight months. The counsel relied on the judgments of the Apex Court in **Ankur Chaudhary v. State of Madhya Pradesh [2024 Live Law (SC) 416], Nitish Adhikary @ Bapan v. The State of West Bengal [SLP to Appeal**

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(Crl.) No.5769 of 2022] and also **Hasanujjaman and others v. The State of West Bengal [SLP to Appeal (Crl.) No.3221 of 2023]** and submitted that when there is incarceration for more than one year and four months, the rigour under Section 37 of the NDPS Act can be diluted. The counsel submitted that, in this case the petitioners are in custody from 14.07.2023 and therefore the petitioners are entitled bail.

5. The Public Prosecutor opposed the bail application. Public Prosecutor submitted that the quantity of contraband seized from the petitioners is commercial quantity and hence Section 37 of the NDPS Act is attracted.

6. This Court considered the contentions of the petitioners and the Public Prosecutor. In **Ankur Chaudhary's case** (Supra) the Apex Court observed like this:-

> "6. Now, on examination, the panch witnesses have not supported the case of prosecution. On facts, we are not inclined to consider the Investigation Officer as a panch witness. It is to

> observe that failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act may, in such circumstances, be considered."

7. In **Hasanujjaman's case** (supra), the Apex Court considered a case in which the accused were in custody for one year and four months. In that case also the contraband seized is commercial quantity. Even then the Apex Court granted bail.

8. In **Nitish Adhikary's case** (supra), the Apex Court observed like this:-

> "During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents."

9. This Court in **Shuaib A.S v. State of Kerala** [2025 SCC Online 618], observed like this:-

> "10. Anyhow, as of now, Crl.M.C.No.8400/2024 filed by the NCB seeking to examine certain

witnesses, was disposed on 06.01.2025 by another learned Single Judge. As per the order, even though the learned Single Judge found the reason for dismissal of the earlier petition, viz., CrlM.P.No.4651/2024, without assigning reasons for summoning the additional witnesses was to be justified, one more opportunity was given to the prosecution to file a fresh 311 petition clearly stating the reasons for examining the additional witnesses in consideration of the seriousness of the offences and this Court also observed that the time limit for disposal issued by this Court in the earlier bail application of the accused need not deter the court from exercising the power under Section 311 of Cr.P.C. As of now, the Special Court has to consider a fresh 311 petition to be filed within one week from 06.01.2025 to proceed further in this matter. It is worthwhile to note that Section 37 of the NDPS Act is a special provision which would deal with grant of bail to the accused persons where commercial quantity of contraband was involved. But as per the decision cited by the Apex Court, it was observed that, failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India and as such conditional liberty overriding the

statutory embargo created under Section 37(1)(b) of the NDPS Act be considered. Going by the observation of the Apex Court, in cases where prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, it overrides Section 37(1)(b) of the NDPS Act. In order to hold that Article 21 of the Constitution of India overrides Section 37(1)(b) of the NDPS Act, the delay in trial at the instance of the prosecution is the `decisive factor'. That is to say, the delay should be the sole contribution of the prosecution and the accused has no role in getting the matter prolonged, in any manner. In cases, where dilatory tactics even in remote possibility, negligible liability, bare minimum or mere impossibility is the volition, hand out or benefactum of the accused, it could not be held in such cases that personal liberty under Article 21 of the Constitution of India overrides Section 37(1)(b) of the NDPS Act. Thus in cases where commercial quantity of contraband is involved and the accused continues in custody for years, say for example, for more than 3 years in the instant case, where the laches on the part of the prosecution alone is the reason in finalising the trial, continuous incarceration shall be addressed so as to protect liberty of an individual embodied under Article 21 of the

Constitution, which overrides the embargo created under Section 37(1)(b) of the NDPS Act. That is to say, in a case where trial could not be completed due to the absolute laches on the part of the prosecution, bail plea at the instance of the accused on the said ground is liable to be considered in suppression of the rider under Section 37(1)(b) of the NDPS Act, in tune with Article 21 of the Constitution of India.

11. In the instant case, it is emphatically clear that the prosecution failed to incorporate all the necessary witnesses in the report and after having examined all the witnesses already cited, the prosecution filed a petition under Section 311 of Cr.P.C to summon additional witnesses, without showing the purpose of their examination. The same was dismissed by the trial court holding so, as the prime ground. This Court also was not inclined to interfere with the finding of the Special Court, though in the said order, one more opportunity was provided to the prosecution to file a fresh petition under Section 311 of Cr.P.C with reasons in consideration of the gravity of the offences alleged to be committed. Thus it is evident that the lethargy on the side of the prosecution is the reason for non disposal of the matter as directed by this Court within the time frame and the petitioner in no way has played anything which would

> stand in the way of trial even on remote possibility or mere impossibility. In such a case, in consideration of the personal liberty of the petitioner guaranteed under Article 21 of the Constitution of India which overrides the effect of Section 37(1)(b) of the NDPS Act, the petitioner, who has been in custody from 29.01.2022 is liable to be released on bail.
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> (underline supplied)

10. Admittedly, in this case the quantity of contraband seized is commercial quantity. The petitioners in this case are in custody from 14.07.2023. In such circumstances, I am of the considered opinion that the petitioners can file a fresh bail application before the trial court and there can be a direction to consider that bail application in the light of the principles laid down by the Apex Court and this Court in the above judgments.

Therefore, this bail application is disposed of with the following directions:-

1. The petitioners are free to file a bail application before the Jurisdictional Court within two weeks raising all the contentions raised in this bail application.

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2. If such a bail application is received, the Jurisdictional Court will consider the same and pass appropriate orders in it, in the light of the principles laid down by the Apex Court in **Ankur Chaudhary's** case (supra), **Nitish Adhikary's** case (supra), **Hasanujjaman's** case (supra) and also the principle laid down by this Court in **Shuaib's** case (supra), within two weeks from the date of receipt of the application.

Sd/-
P.V.KUNHIKRISHNAN,
JUDGE

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