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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

FRIDAY, THE 11TH DAY OF APRIL 2025 / 21ST CHAITHRA, 1947

BAIL APPL. NO. 5295 OF 2025

CRIME NO.1/2024 OF Palakkad Excise Range Office, Palakkad

AGAINST THE ORDER/JUDGMENT DATED IN Bail Appl. NO.7643 OF 2024 OF HIGH COURT OF KERALA

PETITIONER/S:

ABDUL RAZIK
AGED 26 YEARS
S/O KABEER, PARAKKASSERRI VEETTIL, MANNANCHERRY VILLAGE, MANNANCHERRY POST, AMBALAPUZHA TALUK, ALAPPUZHA DISTRICT, KERALA, PIN - 688538

BY ADVS.
SARATH BABU KOTTAKKAL
AKSHAY BABURAJ
ARCHANA VIJAYAN
SUJITH A.

RESPONDENT/S:

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

OTHER PRESENT:

SRI G SUDHEER, PP

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON 11.04.2025, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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P.V.KUNHIKRISHNAN, J

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B.A. No.5295 of 2025

Dated this the 11th day of April, 2025

O R D E R

This Bail Application is filed under Section 483 of Bharatiya Nagarik Suraksha Sanhita.

2. Petitioner is an accused in Crime No.01/2024 of Palakkad Excise Range Office. The above case is registered against the petitioner alleging offences punishable under Sections 22(b)(ii)(C) and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act).

3. The prosecution case is that on 13.01.2024, the accused Nos. 1 and 2 were found in possession of 48.7 kgs of Ganja from Palakkad Junction Railway Station. The petitioner was arrested on 13.01.2024.

4. Heard counsel for the petitioner and the Public

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Prosecutor.

3. Heard counsel for the petitioner and the Public Prosecutor for the respondent.

4. The counsel appearing for the petitioner raised a short point. The counsel relied on the judgment of the Apex Court in **Ankur Chaudhary v. State of Madhya Pradesh [2024 Live Law (SC) 416]** and **Nitish Adhikary @ Bapan v. The State of West Bengal [SLP to Appeal (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 petitioner is in custody from 13.01.2024 and therefore the petitioner is entitled bail.

5. The Public Prosecutor seriously opposed the Bail Application. The Public Prosecutor submitted that the allegation against the petitioner is very serious and the quantity

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of contraband seized is commercial quantity.

6. This Court considered the contentions of the petitioner 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) case the Apex Court observed like this:-

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> "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] this Court 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

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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 seized is commercial quantity. The petitioner in this case is in custody for more than 1 year and 2 months. In such circumstances, I am of the considered opinion that the petitioner 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 principle laid down by the Apex Court and this Court in the

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above judgments.

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

1. The petitioner is free to file a bail application before the Jurisdictional Court within one month raising all the contentions raised in this bail application.

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 principle laid down by 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 (Crl.) No.5769 of 2022], **Hasanujjaman and others v. The State of West Bengal** [SLP to Appeal (Crl.) No.3221 of 2023] and also the principle laid down by this

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Court in **Shuaib A.S v. State of Kerala** [2025 SCC Online 618], within two weeks from the date of receipt of the application.

Sd/-

P.V.KUNHIKRISHNAN
JUDGE

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