



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE BECHU KURIAN THOMAS

THURSDAY, THE 18TH DAY OF JANUARY 2024 / 28TH POUSHA, 1945

CRL.MC NO. 5301 OF 2022

AGAINST CRL.MP 1260/2022 OF SESSIONS COURT, ERNAKULAM

OR 5/2021 OF NARCOTICS CONTROL BUREAU, SUB ZONE, KOCHI

PETITIONER/5TH ACCUSED:

DAVOOD
AGED 32 YEARS, S/O SHAMSUDHEEN,
RAYMMARAKKAR HOUSE,
MULLASSERY VILLAGE,
PADOOR DESOM, CHAVAKKAD TALUK,
THRISSUR DISTRICT - 680509

BY ADVS.
SRI.V.V.JOY
SRI.RAJIT
SRI.RAMAKRISHNAN M.N.

RESPONDENT/STATE:

- 1 STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA
ERNAKULAM - 682031
- 2 INTELLIGENCE OFFICER,
NARCOTICS CONTROL BUREAU,
SOUTH-ZONE, COCHIN
REPRESENTED BY PROSECUTOR
HIGH COURT OF KERALA
ERNAKULAM-682031



CrI.M.C. No.5301/22

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BY ADVS.
SMT.V.SREEJA, PUBLIC PROSECUTOR
SRI.K.R.RAJAGOPALAN NAIR
SRI.NAVANEETH N. NATH

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 18.01.2024, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:



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“C.R.”

BECHU KURIAN THOMAS, J.-----
Crl.M.C. No. 5301 of 2022
-----Dated this the 18th day of January, 2024**ORDER**

Petitioner's passport was seized by the Intelligence Officer of the Narcotics Control Bureau alleging commission of an offence under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'). Petitioner's application for interim custody of his passport filed under section 451 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') was dismissed by the impugned order and hence this challenge under section 482 Cr.P.C.

2. On 12.09.2021, a parcel was allegedly received at a Cargo office at Kochi and on verification it was found that the parcel contained 3.500 kgs of hashish oil in 8 containers and the consignee's address and the mobile number was that of the petitioner. For the last ten years, petitioner had been working in Bahrain and he came down to India only on 11.03.2022. He was interrogated, and arrested on 02.04.2022, and his passport, identity



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card issued by the Kingdom of Bahrain and his mobile phone were seized. Petitioner was later released on bail on 09.05.2022.

3. In the meantime, petitioner filed CrI.M.P. No.1260 of 2022 before the Sessions Court, Ernakulam, under section 451 Cr.P.C. seeking release of his passport, ID card and mobile phone, which were all seized by the police at the time of his arrest. The learned Sessions Judge by the impugned order, dismissed the application after observing that since there is a condition in the bail order that he shall not leave the State of Kerala without the permission of the trial court, the release of his passport will not serve any purpose. It was further observed that if the identity card and other materials are returned, he may misuse the same.

4. Sri. Arjun, the learned counsel for the petitioner contended that the materials seized cannot be retained by the respondents since they are unconnected with the crime. It was also contended that the seizure of the passport by the second respondent itself was done without authority of law as it was not at all involved in the crime. The articles seized ought to have been released to the petitioner, argued the learned Counsel. In support of his contentions, he referred to the decisions in **Sunderbhai Ambalal Desai v. State of**



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Gujarat (2002) 10 SCC 283 as well as the decision in **Suresh Nanda v. Central Bureau of Investigation** (2008) 3 SCC 674.

5. Sri. Navneeth N.Nath, learned counsel for the second respondent on the other hand, contended that the petitioner's involvement in the trafficking of drugs has been identified, and his involvement with other accused is also evident from the records. The petitioner, according to the learned counsel, is working as a Security Guard in the Bahrain jail, and the Whatsapp chats have revealed that he and the other accused had discussed the case and the related legal issues. According to the second respondent, the mobile phone is required to be sent for forensic analysis and data extraction and if the passport is released, he will flee away from the clutches of law apart from misusing his identity card and, therefore the impugned order needs no interference.

6. The main question to be considered is whether the passport, the mobile phone and the identity card of the petitioner can be retained by the second respondent during the course of the investigation.

7. The contraband items were seized on 12.09.2021 while the petitioner was arrested on 02.04.2022. At the time of his arrest,



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petitioner's passport, identity card and mobile phone were seized from him. While releasing the petitioner on bail on 09.05.2022, a condition was imposed that he shall not leave the State of Kerala without the permission of the trial court. There was no condition directing the deposit of the passport with the court or with the investigating officer. Therefore, the passport seized from the petitioner is not subject to any condition for retention with the second respondent, even in the order granting bail.

8. The passport of an individual is an important document and is issued under the provisions of the Passports Act, 1967. In the absence of any crime committed or suspected to have been committed with the said document, a passport cannot be seized or retained by the investigating agencies. The seizure of a document, if it can be treated as a property, has to be under section 102 of the Cr.P.C and the conditions stipulated therein ought to be satisfied. A document is generally subjected to impounding under section 104 Cr.P.C and this can only be done by the Court.

9. In this context, it is apposite to refer to the decision in **Suresh Nanda v. CBI** (2008) 3 SCC 674, wherein, the Supreme Court considered a case of CBI seizing the passport of an accused during



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a search, which was refused to be released to him despite an application under section 451 of Cr.P.C. Referring to the provisions of the Passport Act and the law on the issue, it was held that though the police may have the power to seize a passport under section 102(1) of Cr.P.C., it does not have the power to impound the passport, which can be done only by the Passport Authority under section 10(3) of the Passports Act, 1967.

10. Elaborating on the aforesaid proposition, it was held in **Suresh Nanda's** case (supra) that there is a difference between the seizure of a document and the impounding of a document and that after the seizure of a document, if the property is retained for some period of time, the said retention amounts to impounding of the property or document. The Supreme Court also observed that even the court cannot impound a passport despite section 104 of Cr.P.C., as the said provision will enable the court to impound any document or thing, other than a passport. The observations in paragraphs 13 and 15 are relevant and the same are extracted as below:

“13. Hence, while the police may have power to seize a passport under Section 102 Cr.P.C. if it is permissible within the authority given under Section 102 of Cr.P.C., it does not have power to retain or impound the same, because that can only be done by the passport authority under Section 10(3) of the Passports Act, Hence, if the police seizes a passport (which it has power to do under Section 102 Cr.P.C.), thereafter the police must send it



along with a letter to the passport authority clearly stating that the seized passport deserves to be impounded for one of the reasons mentioned in Section 10(3) of the Act. It is thereafter the passport authority to decide whether to impound the passport or not. Since impounding of a passport has civil consequences, the passport authority must give an opportunity of hearing to the person concerned before impounding his passport. It is well settled that any order which has civil consequences must be passed after giving opportunity of hearing to a party vide State of Orissa Vs. Binapani Dei [Air 1967 SC 1269].

*15. In our opinion, even the Court cannot impound a passport. Though, no doubt, Section 104 Cr.P.C. states that the Court may, if it thinks fit, impound any document or thing produced before it, in our opinion, this provision will only enable the Court to impound any document or thing other than a passport. This is because impounding passport is provided for in Section 10(3) of the Passports Act. The Passports Act is a special law while the Cr.P.C. is a general law. It is well settled that the special law prevails over the general law vide G.P. Singh's Principles of Statutory Interpretation (9th Edition pg. 133). This principle is expressed in the maxim *Generalia specialibus non derogant*. Hence, impounding of a passport cannot be done by the Court under Section 104 Cr.P.C. though it can impound any other document or thing.”*

11. In the instant case, there is no condition in the order granting bail to the petitioner directing him to deposit the passport. The restriction that petitioner shall not travel outside Kerala without permission from the Court cannot be a reason to retain his passport. The contention of the learned counsel for the second respondent that if the passport is returned to the petitioner, he will leave the country and abscond, is, according to me, an untenable contention since the court has already imposed a condition that he shall not travel outside Kerala. If the said condition is violated, appropriate proceedings will



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have to be initiated by the Competent Authority. The said contention cannot be a reason to illegally withhold the passport of the petitioner. The long retention of a passport without even a condition in the bail order will amount to impounding, which is opposed to law. In view of the above, retention of the passport is illegal and it has to be released to the petitioner.

12. In **Sunderbhai Ambalal Desai's** case (supra) the Supreme Court had observed that section 451 empowers the court to pass appropriate orders with regard to the property for its proper custody and the said power should be exercised expeditiously and judiciously so that the owner would not suffer because of it remaining unused and the court or the police would not be required to keep the article in safe custody and that if a proper panchanama before handing over possession of article is prepared, even that can be used in evidence instead of production of article before the court during the trial. The Supreme Court even held that whatever the situation, it is of no use to keep the seized articles or vehicles at the police stations for a long time and it is for the Magistrate to pass appropriate orders immediately by taking appropriate bond and guarantee as well as security for its return.



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13. The passport, the mobile phone and the identity card of the petitioner were seized on the date of his arrest. If the mobile phone was required to be subjected to forensic analysis, the same should have been done by now. If forensic analysis has been done already, there is no purpose in retaining the mobile phone with the second respondent. Similarly, the identity card of the petitioner has no use in the investigation and therefore that document is also required to be returned to the petitioner immediately.

14. In the result, the impugned order dated 07.07.2022 in Crl.M.P. No.1260/2022 on the files of the Sessions Court, Ernakulam is set aside. The respondents are directed to release the passport, the personal ID card and the mobile phone of the petitioner to him immediately.

This Crl.M.C. is allowed as above.

Sd/-

BECHU KURIAN THOMAS
JUDGE

vps



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APPENDIX

PETITIONER'S/S' ANNEXURES

- ANNEXURE A A TRUE COPY OF THE ORDER OF THE HON'BLE SESSIONS COURT, ERNAKULAM DATED 09.05.2022 IN CRL.M.C. NO.939/2022 IN OR NO.5/2021 OF THE NCB SUB ZONE, KOCHI
- ANNEXURE B A TRUE COPY OF THE APPLICATION DATED 24.05.2022 IN CMP NO.1260/2022 IN OR.NO.5/2021 OF THE NCB SUB ZONE, KOCHI
- ANNEXURE C CERTIFIED COPY OF THE ORDER OF THE HON'BLE SESSIONS COURT, ERNAKULAM, DATED 07.07.2022 IN CMP. NO.1260/2022 IN OR.NO.5/2021 OF THE NCB SUB ZONE, KOCHI