IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE ZIYAD RAHMAN A.A.

TUESDAY, THE 10TH DAY OF OCTOBER 2023 / 18TH ASWINA, 1945

CRL.MC NO. 8368 OF 2022

AGAINST THE ORDER/JUDGMENT CMP 496/2022 OF ENQUIRY COMR.& SPECIAL JUDGE,KZD.

PETITIONER/PETITIONER/ACCUSED:

K.M.SHAJI,
AGED 51 YEARS,
S/O.BEERANKUTTY, KALATHODIKA HOUSE, NEAR A.R. CAMP,
NGO QUARTERS, VENGERI P.O., KOZHIKKODE, PIN - 673 010.

BY ADV.BABU S. NAIR

RESPONDENTS/STATE & COMPLAINANT:

1 STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI, PIN - 682 031.

2 THE SUPERINTENDENT OF POLICE,
VIGILANCE AND ANTI CORRUPTION BUREAU, SPECIAL CELL,
KOZHIKKODE, PIN - 673 016.

SRI.A. RAJESH -SPL.GP.VIGILENCE

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON 10.10.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

The challenge in this Crl.M.C is against the Annexure-E order passed by the Court of Enquiry Commissioner and Special Judge, Kozhikode (hereinafter referred to as the Special Judge) in C.M.P.No.496/2022 in V.C.No.2/2021/SCK. As per the said order, the application submitted by the petitioner herein, the accused in the said crime, under Section 451 of Cr. P.C to release amounts seized from his residence as part of the investigation conducted by the 2nd respondent in this case was dismissed.

2. The facts which led to the filing of this Crl. M.C are as follows:

The petitioner is a politician and was elected as a member of the Kerala Legislative Assembly in 2011 and 2016 from the Azheekode constituency. He was also the candidate for the Assembly elections conducted in the year 2021 for the very same constituency. One M.R. Harish filed a complaint before the Court of Special Judge as C.M.P.No.132/2020, alleging that the petitioner had amassed wealth disproportionate to his known and legal sources of income. The Special Judge forwarded the same to the Vigilance and Anti-Corruption Bureau Special Cell, Kozhikode,

for preliminary enquiry. After a preliminary inquiry, a report was submitted with a finding that he amassed wealth beyond his known sources of income by a margin of 166% during the period from 1.6.2011 to 31.10.2020. Based on the said report, the Director Vigilance and Anti-Corruption Bureau Thiruvananthapuram accorded sanction to register a case against the petitioner, and accordingly, the aforesaid crime was registered under Sections 13(2) read with 13(1) (e) of the Prevention of Corruption Act 1988 read with 13(1) (b) of the Prevention of Corruption (Amendment) Act, 2018 on 11.04.2021. As part of the investigation, a search was conducted in the house situated at Ottathengumanal, Alavil, Kannur, owned by the wife of the petitioner by the name “Alliance Green Villa”. During such search, five documents, gold ornaments weighing 16.21 gm, and Indian currency notes worth Rs.47,35,500/- were seized. Out of the said amount, currency notes worth Rs.46,35,500/- was found concealed under a fully covered cot in the bedroom on the ground floor of the house. The remaining amount of Rs.1,00,000/- was found in a cupboard in the very same bedroom. The currency

notes seized were produced before the court on 15.04.2021 and were remitted to the Sub treasury as per the orders passed by the learned Special Judge. The C.M.P.No.496/2022 was filed by the petitioner seeking the release of the said currency notes under Section 451 Cr.P.C.

3. The 2nd respondent objected to the release of the said amount, raising various contentions. Ultimately, after considering the rival contentions, the learned Special Judge rejected the application submitted by the petitioner and this Crl. M.C. is filed in such circumstances.

4. Heard Sri.Babu S. Nair, the learned counsel for the petitioner and Sri.Rajesh A., the learned Special Government Pleader (Vigilance) for the State.

5. The learned counsel for the petitioner contends that the petitioner had properly explained the source of the amount and the purpose for which the same was kept in the house. According to him, he was a candidate for the election conducted on 6.4.2021 to the Legislative Assembly. As part of generating the funds to meet the expenses for the election, a meeting of the United

Democratic Front(UDF), under whose banner the petitioner was the candidate, was convened on 16.03.2021 and decided to collect amounts from the Public. As part of the implementation of the said decision, amounts were collected, and the same was kept in the election camp office of the petitioner, functioning in the house wherein the inspection was conducted. He also produced before the learned Special Judge the receipts evidencing the collection of the said amount from the general public and also pointed out that he also included the said amount in the income tax return submitted by him pertaining to the financial year 2020-2021 by paying Rs.10,47,410/- as the tax. It was contended that despite the aforesaid aspects, the learned Special Judge, without properly examining the same, dismissed the application by citing untenable reasons.

6. On the other hand, the learned Special Government Pleader would stoutly oppose the aforesaid contentions. A detailed statement was also submitted by the learned Special Government Pleader controverting the averments contained in the Crl.M.C. It was pointed out that the receipts furnished by the

petitioner were not properly authenticated, and the amounts claimed to have been collected from the public were not reflected in the statement of election expenditure submitted before the District Election Officer as contemplated under Section 78 of the Representation of People Act. It was also pointed out that there were several discrepancies in the receipts produced. Most of the said receipts are for the amounts of Rs.10,000/-, 15,000/-, 20,000/- etc., and the said amounts should not have been collected by the petitioner in cash, as it was against the norms. It is further submitted that the Government has already initiated proceedings for attaching the aforesaid amounts invoking the provisions contained in the Criminal Law Amendment Ordinance, 1944 and therefore, the release of the said amount at this juncture would adversely affect the said proceedings as it would deprive the Government from invoking the said provisions. Therefore, it was contended by the learned Special Government Pleader that no interference is warranted in the order passed by the learned Special Judge.

7. I have carefully gone through the order impugned in this case and also the relevant materials produced from either side. In the order impugned, the learned Special Judge meticulously examined all the contentions raised by both parties and found several discrepancies in the explanations offered by the petitioner. Most of such findings are in tune with the objections raised by the 2nd respondent. It was found by the learned Special Judge that none of the receipts are properly authenticated, and most of them are dated 04.04.2021, 05.04.2021, 07.04.2021, 08.04.2021 and 09.04.2021. The election was held on 06.04.2021, and thus, it is evident that even after the elections, the petitioner received contributions towards election expenses. The learned Special Judge expressed doubts concerning the same. Similarly, it was also found that the explanation offered by the petitioner that the said amounts were the contribution received from the general public towards election expenses was not tallying with the declaration of the expenses he made before the Election Commission. In the abstract statement of election expenses submitted by the petitioner, it was declared that the lumpsum

amounts received by him from any person/company/firm/associations/body of persons as loan gift or donation, etc., were only Rs.6,09,280/-. He also failed to produce the day-to-day account book, which he was supposed to maintain as per the norms prescribed by the Election Commission, to substantiate the source of Rs.46,35,500/-. Another crucial aspect the learned Special Judge noticed was that the petitioner had not even filed income tax returns till the financial year 2015-2016, and pertaining to the subsequent financial years until 2019-2020 he submitted "nil" returns. Quite surprisingly, in respect of the financial year 2020-21, during the assessment year when the inspection was conducted, he submitted returns, including the amount in question, and paid an amount of Rs.10,47,410/- as the income tax. It is also discernible from the records that the said income tax return was submitted on 03.02.2022, much after the seizure of the amount (The seizure was on 12.04.2021).

8. After carefully examining the findings entered by the learned Special Judge while rejecting the application submitted by the petitioner for the release of the amounts, I am of the view that

such findings on the explanation of the petitioner regarding the source of the amount, cannot be said to be erroneous, *prima facie*. However, the crucial aspect to be considered is whether such findings can be a reason to reject the application for release of the amount to the petitioner herein. At this stage, the aforesaid conclusions arrived by the learned Special Judge can only be treated as *prima facie* findings, and the ultimate finding on the question as to whether the petitioner had amassed wealth disproportionate to known sources of his income, is to be entered after a full-fledged trial. As far as an application under Section 451 of Cr. P.C is concerned, the question that arises relates to the interim custody of the articles seized as part of the investigation, until the guilt of the accused is finally decided by the court concerned after completing the trial. The order to be passed under Section 451 Cr.P.C is only intended to make a provisional arrangement with regard to the interim custody of the articles seized during the pendency of the trial. The purpose of such an order is to protect and preserve the property during the pendency of the trial. Therefore, even if any articles seized during

the investigation are released to the party concerned, the custody of the same is deemed to be retained by the court. While passing an order of release, it is being entrusted to the person to preserve the said article until the trial is over, with an obligation to return the same to the court as and when required. The title or the right of such person on such article is not to be decided. Therefore, the crucial question to be decided while passing orders under Section 451 Cr.P.C. is whether the person can be entrusted with the property during the pendency of the trial and while passing such orders, it should also be ensured that sufficient safeguards are put in place to secure the recovery of the said article when required. In other words, while the entrustment of custody of the article to a person is made as per the orders passed under Section 451 Cr. P.C., such person attains the capacity of the representative of the court only, and he is under a constant obligation to return the same to the court when demanded. In **Smt.Basavva Kom Dyamangouda Patil v. State of Mysore and Anr. [(1977) 4 SCC 358]**, the Honourable Supreme Court explained in detail

the object and scheme of the aforesaid provision, and it was observed as follows:

> “4. The object and scheme of the various provisions of the Code appear to be that where the property which has been the subject-matter of an offence is seized by the police, it ought not to be retained in the custody of the Court or of the police for any time longer than what is absolutely necessary. As the seizure of the property by the police amounts to a clear entrustment of the property to a Government servant, the idea is that the property should be restored to the original owner after the necessity to retain it ceases. It is manifest that there may be two stages when the property may be returned to the owner. In the first place it may be returned during any inquiry or trial. This may particularly be necessary where the property concerned is subject to speedy or natural decay. There may be other compelling reasons also which may justify the disposal of the property to the owner or otherwise in the interest of justice. The High Court and the Sessions Judge proceeded on the footing that one of the essential requirements of the Code is that the articles concerned must be produced before the Court or should be in its custody. The object of the Code seems to be that any property which is in the control of the Court either directly or indirectly should be disposed of by the Court and a

> just and proper order should be passed by the Court regarding its disposal. In a criminal case, the police always acts under the direct control of the Court and has to take orders from it at every stage of an inquiry or trial. In this broad sense, therefore, the Court exercises an overall control on the actions of the police officers in every case where it has taken cognizance."

9. After referring to the aforesaid observations, in **Sundarbai Ambalal Desai v. State of Gujrat [2003 2 KLT 1089 (SC)]** it was observed by the Honourable Supreme Court while dealing with the manner in which the release of the valuable articles, including the currency notes is to be dealt with, following observations were made:

> “With regard to valuable articles, such as golden or sliver ornaments or articles studded with precious stones, it is submitted that it is of no use to keep such articles in police custody for years till the trial is over. In our view, this submission requires to be accepted. In such cases, Magistrate should pass appropriate orders as contemplated under Section 451Cr.P.C. at the earliest.
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> 12. For this purpose, if material on record indicates that such articles belong to the complainant at whose house theft, robbery or dacoity has taken

place, then seized articles be handed over to the complainant after:-

(1) preparing detailed proper panchanama of such articles:

(2) taking photographs of such articles and a bond that such articles would be produced if required at the time of trial; and

(3) after taking proper security.

13. For this purpose, the Court may follow the procedure of recording such evidence, as it thinks necessary, as provided under Section 451 Cr.P.C. The bond and security should be taken so as to prevent the evidence being lost, altered or destroyed. The Court should see that photographs or such articles are attested or countersigned by the complainant, accused as well as by the person to whom the custody is handed over. Still however, it would be the function of the Court under Section 451 Cr.P.C. to impose any other appropriate condition.

14. In case, where such articles are not handed over either to the complainant or to the person from whom such articles are seized or to its claimant, then the Court may direct that such articles be kept in bank lockers. Similarly, if articles are required to kept in police custody, it would be open to the S.H.O. after preparing proper panchnama to keep such articles in a bank locker. In any case, such articles should be

> produced before the Magistrate within a week of their seizure. If required, the Court may direct that such articles be handed over back to the Investigating Officer for further investigation and identification, However, in no set of circumstances, the Investigating Officer should keep such articles in custody for a longer period for the purpose of investigation and identification. For currency notes, similar procedure can be followed."

10. After considering the aforesaid decisions, a Division Bench of this Court in **Suresh Serve V. v. State of Kerala (2020 (3) KLT 395)** formulated certain additional guidelines with regard to the disposal of the articles, including currency seized during the investigation, to be followed by the courts under Section 451 Cr.P.C. and it was observed as follows;

> "22. We are cognizant of the fact that it may be humanly impossible to visualize all probable situations under which the power vested in a criminal court under Section 451 Cr.P.C. could be sought to be invoked. For the same reason, we think that there cannot be any enumeration of straight-jacket formulae suiting all the situations. We, therefore, respectfully following the guidelines in Sunderbhai Ambalal Desai's case frame additional points in respect of disposal of

money and jewellery by invoking Section 451 Cr.P.C. We explicitly clarify that the additional points shown below are intended to supplement the guidelines in Sunderbhai Ambalal Desai's case and not to supplant them.

(i) Normally, currency notes can be returned to a claimant, if, after taking such evidence as the court deems fit in the facts and circumstances in each case, he could establish a *prima facie* right to get the money released. The court shall, in that event, take adequate measures to prevent the evidence being lost, altered or destroyed.

(ii) If, in a given case, currency note/notes happen to be a material piece of evidence, for eg., a blood stained currency note involved in a murder case, its release under Section 451 Cr.P.C. may result in destruction of evidence. In such cases, courts should be cautious to see whether return of the currency note/notes would prejudicially affect trial of the case and it may decline the request, if it is so.

(iii) In the case of jewellery, apart from the preparation of a proper panchanama of the articles, taking photographs, etc., mandated in Sunderbhai Ambalal Desai's case, following aspects also may be considered depending on the facts in each case:

(a) If, in a case, the allegation is that one or two gold ornaments have been stolen or snatched away from the *de facto* complainant, a criminal court invoking

Section 451 Cr.P.C. after taking necessary evidence and following the directions in Sunderbhai Ambalal Desai's case, may release the article under Section 451 Cr.P.C. with the safeguards mentioned in the above decision and also with a direction to produce the same in the same condition as and when directed, especially when there is a rival claimant for the ornaments. If there is no rival claimant and no dispute is raised by the accused regarding the nature, shape, weight, etc. of the ornaments in question, in appropriate cases, the court may even return the same without a condition to produce them in the same condition on a later date.

(b) In a case involving theft of huge quantity of gold ornaments from a jewellery store or from a jewellery manufacturing unit, the court should take extra precautions to see whether the claimant has established, by cogent evidence, a strong prima facie case to show his entitlement for staking the claim. In such cases, there ought to be records to support his claim. If there are sufficient documentary evidence showing his unquestionable entitlement to the articles, especially in a case where there is no rival claimant for the jewellery, we find no reason for imposing a condition that the entire jewellery shall be produced in the same condition, as and when directed. If it is established by evidence that the ornaments claimed by him are stock in trade in the

> jewellery store, no earthly purpose will be served by returning them to the claimant by imposing such restrictions. Hence, such a condition need not be imposed in all cases, disregarding the factual situation in each case. We answer the reference accordingly."

11. Thus, it is evident from the observations made by the Honourable Supreme Court and this Court in the above referred decisions that, it is not necessary to keep the articles in the custody of the court for a period more than required . Of course, in those decisions, what was being dealt with was the claim put forward by the complainants in the respective cases. However, the same principles can be applied to the case when the accused himself comes up for the release of the articles or cash seized from his possession as part of the investigation. Indeed, when it comes to the question of the release of the articles in favour of the accused, the court should adopt a more cautious approach and should ensure that sufficient safeguards are put in place to recover the article or amount when the necessity arises. This is particularly because, until the trial is completed and the accused is found guilty, the allegations based on which the recovery of

such articles was made are mere accusations yet to be proved. Therefore, depriving a person of his articles or amounts on mere accusations until the same are properly proved through the fact-finding mechanism of the trial is not justifiable.

12. In this case, it is evident from the objections raised by the 2nd respondent that they also intend to ensure that the amount seized by them is preserved until the trial is over. The very fact that the 2nd respondent had taken steps to initiate proceedings under the Criminal Law Amendment Ordinance, 1944, would clearly establish the said intention. It is evident from the nature of the provisions contained in the Criminal Law Amendment Ordinance that the purpose of the same is to ensure the preservation of the amount/wealth/properties allegedly procured by the accused by the commission of the crime. Section 3 of the said Ordinance deals with the attachment, Section 4 deals with ad interim attachment, and Sections 5, 6 and 7 deal with the manner in which the attachment is to be made and the objections are to be considered against such attachment. Most importantly, Section 8 permits any person against whom proceedings are initiated, to

offer security in lieu of attachment, and if the court concerned is satisfied that the security offered by such person is reasonable and sufficient, the attachment can be lifted. Thus, the scheme of the said Ordinance would clearly indicate the purpose of the same as the preservation of the property/wealth procured by the person accused of the offences by the commission of the crime. In other words, the attachment is only a method contemplated for preserving the articles seized or to ensure the recovery of the amount/wealth/property procured by the accused through the commission of crime.

13. Thus, it is evident that as the purpose intended by the 2nd respondent is also to ensure that the disproportionate wealth amassed by the petitioner is preserved, the application submitted by the petitioner can be considered from that point of view. In other words, to achieve the said object, it is not necessary that the petitioner should be made deprived of the said amount, but instead, the same can be released to the said person, with appropriate conditions to ensure the recovery of the said amount without any lengthy legal process, if it is found in the trial that the

petitioner is guilty of the offence and he has amassed wealth disproportionate to his known sources.

14. The learned Special Government Pleader relied on a decision rendered by the High Court of Karnataka in **State of Karnataka v. Krishna Gauda and Another [2006 KHC 2075 – 2006 Crl.LJ 259]** wherein the application submitted by the accused under Section 451 Cr.P.C was dismissed considering the fact that offences alleged against him are under the provisions of The Prevention of Corruption Act. However, it is seen from the said decision that, it was a case where the application submitted by the accused was allowed by the learned Magistrate by releasing the amount seized on a simple bond. It was observed in the said decision that even though the court has inherent powers to release the property during the pre-trial stage, it should be kept in mind the nature of the offence, and it should be examined whether it was feasible to release the properties to the accused. However, the said decision does not contain any observation with regard to the release of the article/cash recovered from the accused upon imposing sufficient security to ensure the recovery

of the amount as and when required. Here again, the ultimate purpose is to ensure the preservation of the articles seized as part of the investigation and not to enrich any party or deprive any person, based on the accusations yet to be proved. Therefore, a balanced approach has to be made by keeping in mind the rights and interests of both the parties, i.e., the State and the accused, in equal proportions. If there are means to secure the recovery of the articles or cash, there is nothing wrong in adopting such means without causing any prejudice to the rights and interests of any of the parties.

15. In such circumstances, after carefully examining the materials placed on record, including the circumstances under which the seizure of the articles was effected and the nature of allegations against the petitioner, I am of the view that the release of the amount can be ordered to the petitioner by imposing a condition that he shall furnish a bank guarantee for the amount sought to be released. While arriving at this finding, this court specifically considered the fact that the amounts were seized from the residence of the petitioner, and no one else came up claiming

the said amount. The said amount is included in the income tax return of the petitioner as well, by paying tax for the same, even though such income tax return was filed after the seizure.

16. Accordingly, this Crl. M.C. is allowed by setting aside the Annexure-E order passed by the Court of Enquiry Commissioner and Special Judge, Kozhikode in CMP 496/22 in V.C 02/2021/SCK dt.4.11.2022 and directing the release of Rs.47,35,500/- (Rupees forty-seven lakhs thirty-five thousand five hundred only) to the petitioner subject to following conditions:

> (i) The petitioner shall execute a bond for the said amount with two solvent sureties each for the like sum and also furnish a bank guarantee for the said amount, of a nationalised bank to the satisfaction of the learned Special Judge, which shall be kept valid by the petitioner until the completion of the investigation and in case final report against the petitioner is filed, the validity of the bank guarantee shall be ensured until the completion of the trial.
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> (ii) The learned Special Judge shall ensure that the petitioner keeps the bank guarantee valid until the case is disposed of.
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> (iii) It shall be open for the learned Special Judge to pass appropriate orders regarding the

appropriation of the bank guarantee while passing orders under Section 452 Cr.P.C, when the proceedings are completed.

It is hereby clarified that the findings/observations made by this court in this order regarding the explanations made by the petitioner as to the source of the amount were only for the purpose of this Crl.M.C and under no circumstances the same shall cause any prejudice to the petitioner. The respondents shall investigate, and the learned Special Judge shall consider the petitioner's contentions untrammelled by any observations/findings in this order.

Sd/-

ZIYAD RAHMAN A.A.
JUDGE

DG/7.10.23

APPENDIX OF CRL.MC 8368/2022

PETITIONER ANNEXURES

Annexure A	*A TRUE COPY OF THE PRIVATE COMPLAINT FILED BEFORE THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, KOZHIKKODE DATED, 6-11-2020*
Annexure B	*TRUE COPY OF THE F.I.R. IN CRIME NO.02/2021/SCK OF THE VIGILANCE SPECIAL CELL, KOZHIKKODE DATED, 11-4-2021*
Annexure C	*A TRUE COPY OF THE APPLICATION SUBMITTED BY THE PETITIONER BEFORE THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, KOZHIKKODE DATED, 29-4-2022*
Annexure D	*A TRUE COPY OF THE STATEMENT OF FACTS SUBMITTED BY THE DEPUTY SUPERINTENDENT OF POLICE V &ACB, SPECIAL CELL, KOZHIKKODE DATED, 10-10-2022*
Annexure E	*CERTIFIED COPY OF THE ORDER PASSED BY THE ENQUIRY COMMISSIONER AND SPECIAL JUDGE, KOZHIKKODE IN C.M.P.NO.496/2022 IN V.C.NO.2/2022 DATED, 4-11-2022*