

W.P.(Crl.) No. 363 OF 2025



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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 27TH DAY OF MARCH 2025 / 6TH CHAITHRA, 1947

WP (CRL.) NO. 363 OF 2025

PETITIONER:

AJIKUMAR K.K
AGED 52 YEARS, ADVOCATE,
S/O KARUNAKARAN PILLAI K,
KUNDOOR, CHENGAMANAD POST,
NEAR ST ANTONYS CHURCH, CHENGAMANAD,
KUNNUKARA, ERNAKULAM, PIN - 683578

BY ADVS.
K.R.RAJKUMAR
JAGADEESH LAKSHMAN
AROMALUNNI M.S.
R.K.RAKESH
NANDANA BABU T.
SREELAKSHMI P.S.
NANDIDA SEBASTIAN
NAVEEN P. MATHEW
S.RAJEEV (K/000249/1993)
V.VINAY (K/355/2009)
M.S.ANEER (K/644/2013)
SARATH K.P. (K/001467/2021)
ANILKUMAR C.R. (K/001190/2020)
K.S.KIRAN KRISHNAN (K/3514/2022)
DIPA V. (K/003785/2024)
RAAJESH S.SUBRAHMANIAN (K/396/2004)
VISHNU T.C. (K/326/2019)

RESPONDENTS:

- 1 THE STATE OF KERALA
REPRESENTED BY THE SECRETARY,
DEPARTMENT OF HOME, SECRETARIAT,

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THIRUVANANTHAPURAM, PIN - 695001

2 THE STATION HOUSE OFFICER
NJARAKKAL POLICE STATION, NJARAKKAL,
ERNAKULAM DISTRICT, PIN - 682505

SMT.SREEJA V., SR. PP

THIS WRIT PETITION (CRIMINAL) HAVING BEEN FINALLY HEARD
ON 27.03.2025, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

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"C.R."

J U D G M E N T

The petitioner, a practising advocate, was served with a notice under Section 35(3) of the Bharatiya Nagarik Suraksha Sanhita, 2023 (for short 'BNSS'), calling upon him to appear before the investigating officer in a crime in which he represented the accused at the Magistrate Court in a hearing on the bail application - a strange procedure unheard of in criminal investigation.

2. The Njarakkal Police registered a crime as Crime No.157 of 2025 against a husband and wife, alleging that they are Bangladeshi nationals and do not have proper documents to prove their citizenship. It is alleged that the couple fabricated and forged the documents such as their Aadhar Cards, Election Identity Cards, Driving Licence etc., to falsely establish their Indian citizenship and thus committed

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the offences punishable under Sections 336(2) and 340(2) of the Bharatiya Nyaya Sanhita, 2023 (for short 'BNS'), as well as Sections 14A, 14(b) and 14(c) of the Foreigners Act. The petitioner filed a bail application for the accused before the Judicial First-Class Magistrate Court, Njarakkal. The bail application was dismissed.

3. According to the petitioner, Aadhar Cards, Election Identity Cards, Driving Licence etc., of his clients were handed over to him by his clients to produce before the court. Accordingly, he produced 20 documents in originals, including the documents mentioned above with a memo before the court on 15.02.2025. On the previous day, i.e., on 14.02.2025, the Inspector of Police, Njarakkal Police Station, issued Ext.P1 notice under Section 94 of BNSS to the petitioner, calling upon him to produce the documents before the police on 17.02.2025 at 10.00 a.m. The petitioner gave Ext.P2 reply on 17.02.2025 to Ext.P1 notice stating that he had already produced all the documents before the court.

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Thereafter, the Sub Inspector of Police, Njarakkal Police Station, who is the investigating officer of Crime No.157 of 2025, issued Ext.P3 notice under Section 35(3) of BNSS to the petitioner to appear before him at the police station in order to question him as part of the investigation in Crime No.157 of 2025. It is also stated in the notice that if the petitioner does not comply with the direction, he will be arrested in terms of the sub-sections (5) & (6) of Section 35. Being aggrieved by Ext.P3 notice, the petitioner has approached this Court to quash the same.

4. I have heard Sri. S. Rajeev, the learned counsel for the petitioner and Smt.V.Sreeja, the learned Senior Public Prosecutor.

5. The learned counsel for the petitioner submitted that Ext.P3 notice issued by the Sub Inspector of Police, Njarakkal Police Station, is ultra vires in character, illegal and sheer abuse of the process of law. The learned counsel

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further submitted that the petitioner has only acted in the best interest of his clients, and the police have no authority to summon the petitioner in connection with the investigation of a case wherein his clients were accused. The counsel also submitted that the issuance of Ext. P3 notice to the petitioner was retaliatory since his client/accused made a complaint before the Magistrate against the Sub Inspector alleging custodial torture. The Advocates Act, 1961 and Article 19(1) (g) of the Constitution of India protect an advocate's right to practice and the police's action violated confidentiality under Section 132(1) of the Bharatiya Sakshya Adhiniyam, 2023 (for short, 'BSA'), added the Counsel.

6. In the notice issued by respondent No.2 to the petitioner under Section 94 of the BNSS, the petitioner was directed to produce the Aadhaar Card, other documents etc., before the police. However, before the receipt of the said notice, the petitioner had already submitted all those

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documents before the Court. The petitioner gave Ext.P2 reply to respondent No.2 stating all these facts on 17.02.2025. However, subsequently, Ext.P3 notice under Section 35(3) of BNSS was issued to him stating that, as part of the investigation, he has to be questioned, failing which, the consequences, including his arrest, would follow.

7. Section 35 of BNSS outlines the circumstances under which police can arrest a person without a warrant for cognizable offences and mode of issuance of notice in case his arrest is not required. Sub-section (3) of Section 35, which is relevant for the purpose of this case, provides that the police officer shall, in all cases where the arrest of a person is not required under sub-section (1), issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before the officer or at a place

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specified in the notice. A reading of the said provision makes it clear that a notice under sub-section (3) of Section 35 can only be issued to a person when there is reasonable suspicion that he has committed a cognizable offence. In other words, before issuing a notice to a person under sub-section (3) of Section 35, the police officer must have subjective satisfaction that the person against whom the notice is to be issued has committed a cognizable offence. A notice under Section 35(3) is issued to an accused or suspect of attendance in lieu of arrest. The police officer has a duty to apply his mind to the case before him and ensure that the conditions in Section 35 of BNSS are met before effecting arrest under sub-section (1) or issuing notice under sub-section (3) in lieu of arrest. No notice under Section 35(3) can be issued in a routine manner. Criminal law and its process ought not to be instrumentalized as a tool of harassment. In ***Arnesh Kumar v. State of Bihar and Another*** [(2014) 8 SCC 273], the Supreme Court has emphasized that

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the investigating agencies and their officers are duty-bound to comply with the mandate of Section 41 and 41 A of Cr.PC (Section 35(1) and (3) of BNSS). In ***Satender Kumar Antil v. Central Bureau of Investigation & Another*** [(2022) 10 SCC 51], the Supreme Court reiterated the importance of doing so and held that any dereliction on the part of the police officers to comply with the mandate of those provisions would be met with appropriate action. It was observed that Sections 41 and 41 A of Cr.P.C are facets of Article 21 of the Constitution.

8. In Ext. P3 notice, it has been stated that the police were convinced that the petitioner has to be questioned to ascertain certain facts and circumstances as part of the investigation in Crime No.157 of 2025 of Njarakkal Police Station. As per Section 179(1) of BNSS (Section 160(1) of Cr.P.C), any police officer making an investigation has the power to require the attendance before himself of any person who appears to be acquainted with the facts and

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circumstances of the case. Notice under Section 35(3) of BNSS is issued to a suspect, whereas the notice under Section 179(1) of BNSS is issued to a witness. Here Ext. P3 notice was issued under Section 35(3) of BNSS.

9. While the police can issue a summons to a suspect or witness, they cannot summon an advocate to the police station in his professional capacity. The power of the police under Section 179(1) of BNSS cannot be stretched to call for an advocate who is appearing for the accused in the crime to divulge communication between him and the client. Summoning an advocate representing his client potentially infringes the client's right to represent and violates the constitutional rights of the legal practitioners besides impinging upon the stature of an advocate.

10. As rightly argued by the learned counsel for the petitioner, it appears that the police, by issuing Ext.P3 notice, were trying to involve the petitioner in the investigation of

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the crime alleged against his clients without having any material fact that he has been instrumental in making the fake documents. Ext.P3 notice issued by the police is, in one way, asking the petitioner to be present before the police to be interrogated regarding the information, if at all any, with the petitioner, which has been communicated between his client and himself in his professional capacity. It is a privileged communication protected under Section 132 (1) of BSA. No advocate can be compelled to disclose any communication made to him by his client in the course of their professional relationship under Section 132(1) of BSA. The said provision protects the confidentiality of communication between an advocate and his client. The petitioner, as an advocate, has the right not to participate in the proceedings where he should divulge any communication which he had made with his client in the course of defending his client.

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11. In the criminal justice system, the police and the defence advocate play a pivotal role. While the police investigate the crimes, the defence advocate ensures fair legal representation. As part of the investigation, the police have wide powers to summon and interrogate witnesses and suspects to obtain information related to the investigation. However, the said power should not be used as a weapon for the selective harassment of the citizens. As stated already, the police have absolutely no authority to issue notice under Section 35(3) of BNSS to the advocate of an accused to summon him for the purpose of an investigation involving his client. Nor do they have any power to summon an advocate to disclose privileged client communication. The action on the part of the police in issuing Ext.P3 notice is an infringement of the petitioner's right to practice the profession as envisaged in the Advocates Act, 1961 and Article 19(1)(g) of the Constitution of India. Ext.P3 is, thus, illegal, *ultra vires* in character and cannot be sustained.

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12. Pursuant to the order of this Court, the Sub Inspector of Police, Njarakkal Police Station appeared before me yesterday. He submitted that Ext.P3 notice issued was already withdrawn. The Sub Inspector of Police has also handed over a copy of the letter withdrawing Ext.P3 before me. Since Ext.P3 has already been withdrawn, the prayer sought to quash the same need not be granted.

13. In ***Arnesh Kumar*** (supra) and ***Satender Kumar Antil*** (supra), the Supreme Court has given direction to all the State Governments to instruct the police officers to strictly follow Section 41 and 41A of Cr.P.C. (Section 35(1) and (3) of BNSS) while effecting arrest of a person. Needless to say, the police officers who exercise the power under Section 35(3) of BNSS are bound to act in strict compliance with the provisions of the Statute. Under no circumstances will the police have any authority to interfere with the freedom of any individual, much less an advocate of an accused, by serving

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notice under Section 35(3). The power given to the police under Section 35(3) is for the sake of preventing abuse of powers and cannot be used to intimidate, threaten and harass a person (***Unnimon K.A. v. State of Kerala and Others***, 2020 (6) KHC 53). The Kerala State Police Chief is directed to give direction to all the police officers in the State to strictly comply with the statutory provisions under Section 35(3) of BNSS if the presence of any person is required in connection with a crime involving a cognizable offence.

The original petition is disposed of as above.

Sd/-
DR. KAUSER EDAPPAGATH
JUDGE

AS/APA

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APPENDIX OF WP(CRL.) 363/2025

PETITIONER EXHIBITS

- EXHIBIT P1 THE TRUE COPY OF THE NOTICE ISSUED BY THE INSPECTOR/SHO, NJARAKKAL POLICE STATION TO THE PETITIONER DATED 14-02-2025
- EXHIBIT P2 THE TRUE COPY OF THE REPLY TO EXHIBIT P1 NOTICE GIVEN BY THE PETITIONER TO THE INSPECTOR/SHO OF NJARAKKAL POLICE STATION DATED 17-02-2025
- EXHIBIT P3 THE TRUE COPY OF THE NOTICE ISSUED BY THE SUB INSPECTOR OF POLICE, NJARAKKAL POLICE STATION DATED 19-03-2025 (DATE OF THE NOTICE WRONGLY SHOWN AS 19-03-2024)
- EXHIBIT P4 THE TRUE COPY OF THE SWORN STATEMENT OF MR. DASHARATH BANERJEE U/S 223 OF BNSS, 2023 IN CMP 263/2025 BEFORE THE HON'BLE JUDICIAL FIRST CLASS MAGISTRATE COURT, NJARAKKAL
- EXHIBIT P5 THE TRUE COPY OF THE STATEMENT OF 1ST ACCUSED RECORDED IN CMP NO.263 OF 2025 OF JFCM, NJARAKKAL IN CRIME NO. 157 OF 2025 OF NJARAKKAL POLICE STATION DATED 07.02.2025
- EXHIBIT P6 THE TRUE COPY OF THE STATEMENT OF THE 1ST ACCUSED IN CRIME NO. 157 OF 2025 OF NJARAKKAL POLICE STATION BEFORE THE JFCM, NJARAKKAL DATED 20.03.2025
- EXHIBIT P7 THE TRUE COPY OF THE VAKALATH SUBMITTED BY THE PETITIONER ON 07.02.2025