

GAHC010106462023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Bail Appln./1759/2023

MD. RASHID AHMED
S/O- MD. SAMSUL ISLAM, VILL.- MOINA, P.O. KANAIBAZAR, P.S.
PATHERKANDI, DIST. KARIMGANJ, ASSAM, PIN- 788724.

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE P.P., ASSAM

Advocate for the Petitioner : MR. A K TALUKDAR

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

03.08.2023

- 1.** Heard Mr. A. K. Talukdar, learned counsel for the petitioner as well as Mr. K. K. Das, learned Additional Public Prosecutor representing State of Assam.

2. This bail application has been preferred under Section 439 of Code of Criminal Procedure, 1973, praying for bail of petitioner, namely, Md. Rashid Ahmed, who has been arrested on 21.05.2021 in connection with Special (NDPS) Case No. 45/2021 corresponding to Patherkandi P. S. Case No. 298/2021 registered under Section 21(c) of the NDPS Act, 1985 pending in the Court of learned Additional Sessions Judge (FTC), Karimganj.

3. The accusation in this case is that on 21.05.2021 one Bulbul Saikia, SI of Police, Patherkandi Police Station, lodged an FIR before the Officer-in-Charge of Patherkandi Police Station, *inter-alia*, alleging that on receipt of the said information from reliable source on 20.05.2021 at about 3.00pm a naka checking was organized to apprehend drug traffickers, and accordingly at around 4.15 pm one vehicle bearing registration No. AS-10 AC 4893 (Magic Truck) was intercepted at Moina Bazar and 21 Small packets containing 16600 WY tablets were seized and the present petitioner and one Abu Sufian were apprehended. On receipt of the said FIR, Patherkandi P. S. Case No. 298/2021 was registered.

4. Learned counsel for the petitioner has submitted that the petitioner has been falsely implicated in this case and his signatures on the arrest memo and seizure list was taken by police, on being threatened of physical torture. Learned counsel for the petitioner has also submitted that in the instant case charge-sheet was laid against the present petitioner and co-accused Abu Sufian and charges were also

framed on 07.01.2022 under Section 21(c)/29 of the NDPS Act, 1985, however, no evidence has yet been recorded. It is also submitted by learned counsel for the petitioner that a co-accused in the instant case namely, Abu Sufian has already been granted bail by a Co-ordinate Bench of this Court on 11.05.2023 in Bail Application No. 1128/2023 and therefore, on the ground of parity also, the prayer for bail of the instant petitioner is made.

5. The learned counsel for the petitioner has also submitted that though the instant case has been registered under Section 22(C) of the NDPS Act, 1985 for possession of commercial quantity of contraband by the petitioner, however, rigors of Section 37 of the NDPS Act, 1985 cannot abridge the right to life and personal liberty to which the petitioner is entitled to under Article 21 of the Constitution of India and in this regard learned counsel for the petitioner has cited a ruling of Hon'ble Supreme Court of India in "**Mohd Muslim @ Hussain Versus State (NCT of Delhi)**" reported in "**2023 SCC Online SC 352**" wherein the Hon'ble Supreme Court of India has observed as follows :-

"19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation would

result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India V. Rattan Malik 19). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (Ref. Satender Kumar Antil Supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail."

6. Learned counsel for the petitioner has also submitted that there no scope of completion of trial soon and therefore, only on the ground of long incarceration, the petitioner is entitled to be released on bail.

7. On the other hand, learned Additional Public Prosecutor opposed the grant of bail to the present petitioner on the ground that quantity of contraband seized from the present petitioner is of commercial quantity. Hence, the embargo of Section 37 of the NDPS Act is application in the instant case and bail may not be granted.

8. I have considered the submissions made by learned counsel for

both sides and perused the materials available on record including the scanned copy of Special (NDPS) Case No. 45/2021, which was requisitioned from the Court of Special Judge, Karimganj.

9. Though, apparently it appears that as commercial quantity of contraband is involved in the instant case as charge under Section 21 (c) of the NDPS Act, 1985 has been framed against the present petitioner, the embargo of Section 37 of the NDPS Act, 1985 is applicable to the instant case. However, the fact that the present petitioner has been detained behind the bar since 21.05.2021 (814 days) and no prosecution witness has yet been examined, the petitioner appears to be entitled to get bail on the ground of long incarceration and delay in culmination of trial.

10. Hon'ble Supreme Court of India in ***Mohd Muslim @ Hussain Vs. State (NCT of Delhi) (Supra)*** has observed that "*grant of bail on the ground of undue delay in trial cannot be said to be fettered by Section 37 of the NDPS Act, 1985*" and also considering the observation of Hon'ble Supreme Court of India in ***Rabi Prakash Vs. State of Orissa*** (order dated 13.07.2023 passed in ***SLA (Crl.) No. 4169/2023***), wherein Hon'ble Apex Court has observed that "prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution of India and in such a situation, the conditional liberty must override the statutory embargo created under Section 37 (1) (b) (ii) of the NDPS Act, 1985, this Court is of considered opinion that if this Court comes to a

finding that there is undue delay in completion of trial and that there is prolong incarceration of petitioner, he would be entitled to get bail on the ground of prolong incarceration only as in such case of prolong incarceration, the right to life and personal liberty under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

11. Moreover, considering the fact that the co-accused in this case namely, Abu Sufian has already been granted bail by a Co-ordinate Bench of this Court by order dated 11.05.2022 in Bail Application No. 1128/2023, this Court is of considered opinion that the present petitioner is also entitled bail on the ground of parity.

12. It is also pertinent to mention herein that Hon'ble Supreme Court of India had granted bail to accused facing charges for possession of commercial quantity of contraband only on the ground of prolong incarceration in ***Shariful Islam @ Sarif Vs. State of West Bengal*** (order dated 04.08.2022 in *SLP Criminal No. 4173/2022*), wherein the accused was detained behind the bar for one year six months.

13. In ***Nitesh Adhikari Vs. State of West Bengal*** (Order dated 04.05.2022 in *SLP Criminal No. 5769/2022*, Hon'ble Apex Court granted bail to accused facing accusation under Section 21 (c) of the NDPS Act, 1985 on the ground of incarceration of one year seven months.

14. Similarly in ***Md. Salman Hanif Shaikh Vs. State of Gujarat***

(Order dated 22.08.2022 in *SLA Criminal No. 5530/2022*, wherein the petitioner was granted bail on the ground of prolong incarceration of two years.

15. In view of the above, the petitioner, namely, Md. Rashid Ahmed is allowed to go on bail on furnishing of bail bond of Rs. 50,000/- (Rupees Fifty Thousand only) with two sureties of like amount to the satisfaction of the learned Special Judge, Karimganj with following condition:

- i. That the petitioner shall co-operate in his trial in Special (NDPS) Case No. 45/2021 and shall appear before learned Trial Court as and when so required by the learned Trial Court.
- ii. The petitioner shall not directly or indirectly make any inducement, threat, or promise to any person acquainted with the facts of the case, so as to dissuade him or her from disclosing such facts before the Trial Court.
- iii. The petitioner shall refrain from committing any offence similar to which is he is accused while on bail.

16. With the above observation, this bail application is accordingly disposed of.

JUDGE

Comparing Assistant