

GAHC010153462023



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

Case No. : Bail Appln./2475/2023

HARISH MIA @ HARIJ MIAH
S/O- ABDUL MOZID, VILL.- BEJIMARA, P.S. SUNAMURA, DIST.
SEPAHIJALA, TRIPURA.

VERSUS

THE STATE OF ASSAM
TO BE REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

30.08.2023

1. ".....*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."

[Observation of the Apex Court in "Rabi Prakash vs The State of Odisha"

{Order dated 13.07.23 passed in Special Leave to Appeal (Crl.) No.4169/2023} reported in "2023 0 Supreme(SC) 707"

2. In the instant bail application this Court is called upon to examine as to whether the prolonged incarceration of the petitioner for 746 days, under the facts and circumstances of the case in hand, overrides the embargo of Section 37 of the NDPS Act, 1985 to grant bail to him, when he is facing a charge for possession of commercial quantity of contraband under Section 22(c) of the Narcotic Drug and Psychotropic Substances Act, 1985.

3. Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. K. K. Parasar, learned Special Public Prosecutor for the State.

4. This instant bail application, under Section 439 of the Code of Criminal Procedure, 1973, has been filed by the petitioner, namely, *Harish Mia @ Harij Miah*, who is detained behind the bar since 14.08.2021 in connection with Special (NDPS) Case No. 76/2021, corresponding to Patherkandi P.S. Case No. 468/2021 registered under Sections 21(b)/22(c) of the Narcotic Drug and Psychotropic Substances Act, 1985.

5. The accusation in this case is that, on 14.08.2021, one Bulbul Saikia lodged an FIR before the Officer-in-Charge of Patherkandi Police Station, *inter alia*, alleging that on that day (i.e. 14.08.2021) at about 11.15 a.m., an information was received

through reliable sources that one drug peddler was loitering near Patherkandi Railway Station and accordingly a team of Police personnel rushed to the spot and found a suspected person loitering in the Patherkandi Railway Station. Thereafter, the said person was apprehended by the Police along with one plastic bag. During search operation, 1080 numbers of tablets weighing about 135 grams suspected to be Yaba Tablets and 24 grams of suspected heroine was seized from the said person who was later on identified as the present petitioner namely *Harish Mia*. On receipt of the said FIR, Patherkandi P.S. Case No. 468/2021 was registered and investigation was initiated. During the course of investigation, the seized substance which was suspected to be heroine gave negative test for any narcotic drugs. Whereas the sample of the Tablets which were seized during search operation when sent for FSL examination gave positive test for *Methamphetamine*. After completion of the investigation the Investigating Officer laid charge-sheet, against the present petitioner, under Section 22(c) of the NDPS Act, 1985 (C.S. No. 380/2021 dated 25.11.2021) showing eight prosecution witnesses in the column No. 6 of the charge-sheet.

6. On 28.01.2022, learned Special Judge, Karimganj framed charge under Section 22(c) of the NDPS Act, 1985 against the present petitioner for possessing of 1080 nos. of Yaba Tablets, weighing 135 grams, containing Methamphetamine. It is pertinent to mention herein that quantity greater than 50 gm. of Methamphetamine is regarded as commercial quantity as per the

relevant notification of the Central government. When the said charge was read over and explained to the present petitioner, he pleaded not guilty to the same and claimed to be tried.

7. Mr. A. Ahmed, learned counsel for the petitioner has submitted that though the charges were framed, against the present petitioner on 28.01.2022, however, till date not even a single prosecution witnesses has been examined. It is also submitted by the learned counsel for the petitioner that till the date of filing of the instant bail application by the petitioner (i.e. 18th July, 2023) as many as 36 (thirty six) dates were fixed for production and evidence of prosecution witnesses, however, no prosecution witnesses has yet been examined.

8. Mr. A. Ahmed, 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."

9. The learned counsel for the petitioner has also cited the ruling of Supreme Court of India in "***Rabi Prakash vs. The State of Odisha***" [Order dated 13.07.2023 passed in Special Leave to Appeal (Crl) No(s). 4169/2023] wherein the Hon'ble Supreme Court had observed that the prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution 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.

10. Learned counsel for the petitioner has also cited ruling of Hon'ble Supreme Court of India in ***Nitish Adhikary @ Bapan Vs. The State of West Bengal*** (order dated 04.05.2022) in SLP (Criminal No. 5769/2022), where Hon'ble Apex Court granted bail to the accused who was facing an accusation under section 21 (c)

of the NDPS Act, 1985 on the ground of prolonged incarceration of 1 year 7 months.

He has also cited instances, wherein, this Court granted bail to the petitioner mainly on the ground of prolonged incarceration. In Bail Application No. 1995/2023 (***Asab Uddin Vs. The State of Assam***) where, the petitioner was granted bail on the ground of prolonged incarceration of 720 days, though he was facing a charge for possessing commercial quantity of contraband. He has also cited another case, i.e. Bail Application No. 1759/2023 (***Md. Rashid Ahmed Vs. State of Assam***), in which case, this Court granted bail to the petitioner on the ground of prolonged incarceration of 814 days though he was also facing a charge for possessing commercial quantity of contraband.

11. On the other hand, Mr. K.K. Parasar, learned Additional Public Prosecutor has submitted that as in the instant case the seized contraband is of commercial quantity, i.e. 135 grams of Methamphetamine. Hence, the embargo of section 37 of the NDPS Act, 1985 comes into play and hence, he has submitted that merely due to lapse of considerable period of time, the petitioner may not be granted bail. He has submitted that the length of period of detention of the present petitioner in itself may not be treated as a ground for granting bail to the present petitioner overriding the embargo of under section 37 of the NDPS Act, 1985.

In support of his submission, learned Additional Public Prosecutor has cited a ruling of Hon'ble Supreme Court of India in

Narcotics Control Bureau Vs. Mohit Aggarwal reported in “2022 Live Law (SC) 613,” where Hon’ble Apex Court has observed that “the length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act.”

12. I have considered the submissions made by learned counsel for both the sides and perused the materials available on record including the scanned copies of the case record of NDPS Case No. 76/21 which was requisitioned from the Court of learned Special Judge, Karimganj.

13. Though this case involves commercial quantity of Methamphetamine weighing 135 grams and charge has been framed against the present petitioner under section 22(c) of the NDPS Act, 1985 and apparently, it appears that the embargo of section 37 of the NDPS Act is applicable in the instant case. However, the present petitioner has been detained behind the bars since last 746 days and the charge was also framed against him on 28.01.2022 (i.e. 1 year 7 months 2 days ago) however, not even a single prosecution witness has yet been examined. The delay in trial is not due to the fault of the petitioner as he is already in custody. The petitioner has a right to get speedy trial under Article 21 of the Constitution of India.

14. 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.

15. 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.

16. 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.

17. 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.

18. In the instant case, the petitioner has been behind the bars since last 746 days and even after framing of charge under section 22(c) of the NDPS Act against him 1 year 7 months and 2 days has lapsed and the prosecution side is yet to examine any witness and there is unlikelihood that the trial would culminate immediately. Under such circumstances and in view of discussions made herein above, this Court is of the considered opinion that the present petitioner has been languishing behind the bars since 2 years 16 days (746 days) and the prosecution is yet to examine any witness, his prolonged incarnation under the facts and circumstances of this case overrides the embargo of section 37 of the NDPS Act and he is entitled to get bail under such circumstances.

19. In view of above, the petitioner, namely, Harish Mia @ Harij Miah is allowed to be released on bail of Rs. 50,000/- only with a suitable surety of like amount to the satisfaction of the learned Special Judge, Karimganj with following conditions:-

- (i) the petitioner shall co-operate in his trial in NDPS Case No. 76/2021 which is pending before the Court of learned Special Judge, Karimganj and he shall appear before the 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 or persons acquainted with the facts of the case so as to dissuade him or her from disclosing such facts before the learned trial Court;
- (iii) the petitioner shall not leave the jurisdiction of the learned trial Court without prior permission of the learned trial Court; and
- (iv) the petitioner shall refrain from committing any offence similar to the one of which he is accused of, while he is on bail.

20. With the above observations, this anticipatory bail application is hereby disposed of.

JUDGE

Comparing Assistant