

GAHC010165102022



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

Case No. : Bail Appln./2044/2022

MD. IDOMEI AND ANR
S/O MD.KHAMBA,
VILL.- KEIBUNG MAYAI LEIKAI, KHEKMAN GRAM PANCHAYAT,
P.S.- THOUBAL,
DIST.- THOUBAL,
STATE- MANIPUR.

2: MD. NAWAZ KHAN
S/O LATE ZUMA KHAN
VILL.- KEIBUNG MATAI LEIKAI
KHEKMAN GRAM PANCHAYAT
P.S.- THOUBAL
DIST.- THOUBAL
STATE- MANIPUR

VERSUS

UNION OF INDIA
NARCOTICS CONTROL BUREAU.
REP. BY THE STANDING COUNCEL, NARCOTICS CONTROL BUREAU.

Advocate for the Petitioner : MR. N N B CHOUDHURY

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 09.01.2023

Heard Mr. N.N.B. Choudhury, learned counsel for the accused and also

heard Mr. S.C. Keyal, learned Standing Counsel, Narcotic Control Bureau (NCB).

2. This application under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused, namely, Md. Idomei and Md. Nawaz Khan, who have been languishing in jail hazot since 01.02.2022, in connection with the NCB Crime No. 15/2022 arising out of Basistha PS Case No. 151/2022, under sections 21[C]/24/29 of the NDPS Act, for granting bail.

3. The said case has been registered on the basis of an FIR lodged by SI Rahul Doley, on 01.02.2022, to the effect that acting on a tip off they have intercepted one 12 wheeler Truck, bearing registration No. JH-19-A-5623, which was coming from Manipur towards Delhi, at Basistha Chariali at around 10 pm, and conducting search in the said vehicle he has recovered 4.500 Kg of suspected Brown Sugar and seized the same preparing seizure list in presence of witnesses. Upon the said FIR the OC of Basistha PS, registered Basistha PS Case No. 151/2022, under sections 21[C]/24/29 of the NDPS Act and arrested accused Idomei and Md. Nawas Khan and forwarded them to the court. Subsequently, the case was handed over to the Narcotics Control Board [NCB] for further investigation. Then the NCB registered a case, being NCB Crime No. 15/2022, and carried out investigation and thereafter, on 26.07.2022, the Investigating Officer, NCB has filed a petition before the learned Special Judge, Kamrup [M] at Guwahati, under section 36A[4] of the NDPS Act, for extension of period of investigation for another 60 days, beyond 180 days. Accordingly, vide order dated 26.07.2022, the learned Special Judge, NDPS Act, Kamrup [M] at Guwahati has extended the period of investigation for another 60 days, allowing the prayer of the I.O.

4. Mr. Choudhury, learned counsel for the accused submits that the accused were arrested on 31.01.2022, and forwarded to the jail hazoot on 01.02.2022,

and since then they have been languishing in jail hazoot. Mr. Choudhury further submits that on 31.07.2022 the period of investigation of 180 days was completed and before completion of the said period on 26.07.2022, the IO has filed an application for extension of the period of investigation and the learned court below has extended the period for 60 days, beyond 180 days, allowing the prayer of the IO. Mr. Choudhury also submits that while allowing the prayer of the IO the learned court below has not issued notice to the accused and they have not been produced before the court so as to enable them to raise objection and they have never been heard on that point. Further, Mr. Chaudhury submits that the petition was not routed through the P.P. and no report was also called for from the P.P. and which is mandatory, in view of the law laid down by the Hon'ble Supreme Court in the case of **Sanjay Kumar Kedia vs. Intelligence Officer, NCB and Another**, reported in **2009 17 SCC 631**, and in the case of **Hitendra Vishnu Thakur vs. State of Maharashtra and Others**, reported in **1994 4 SCC 602**. Mr. Choudhury also submits that a coordinate Bench of this court in **Criminal Petition No. 804/2022**, vide order dated 07.11.2022, has set aside the order for extension of the period of investigation as it was passed without the report of the P.P. it is the further submission of Mr. Chaudhury that as the order dated 26.07.2022, is ex-facie illegal and consequently the period of extension is illegal and as no charge sheet was filed within 180 days, the accused is entitle to default bail, and therefore, it is contended to allow this petition.

5. On the other hand Mr. Keyal, learned Standing Counsel submits that originally the case was registered by Assam Police and subsequently it was transferred to the NCB by an order of the Government and the IO has submitted final complain on 26.09.2022 and that the order dated 26.07.2022, is not

challenged by the accused and as such, the legality or propriety of the said order cannot be examined in this bail application, and that the petition was routed through the P.P. and as commercial quantity of contraband substance is involved here in this case, and the requirement of section 37 of the NDPS Act have never been satisfied the petition is liable to be dismissed. Mr. Keyal also referred 2 case laws of **State of Maharashtra vs. Surendra Pundlik Gadling and Others**, reported in **2019 5 SCC 178** and **Sharjeel Imam vs. State of NCT of Delhi**, reported in **2020 0 Supreme[Del] 697**.

6. In his reply Mr. Choudhury, learned counsel for the accused submits that there is no signature of the P.P. in the petition filed by the I.O. let alone a report to show application of mind by the P.P. and as such and in view of the settled position of law, in the case **Sanjay Kumar Kedia [supra]** the accused can be enlarged on bail.

7. Having heard the submission of learned counsel for both the parties I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the record received from the learned court below and also gone through the case laws referred by learned counsel for both the parties.

8. It appears that the accused persons have been arrested on 31.10.2022, and forwarded to the jail hazoot on 01.02.2022, and the period of 180 days completed on 31.07.2022. It also appears that before completion of period of 180 days, the IO has filed a petition on 26.07.2022, for extension of the period of investigation for another 60, days beyond 180 days. It appears from the order dated 26.07.2022, passed by the learned court below that on the prayer being made by the IO under section 36A[4] of the NDPS Act the period of extension for investigation for another 60 days beyond 180 days was allowed.

The said order is reproduced as under:-

“CR put up today.

Seen the application filed by the Investigating Officer through Ld. Special P.P. under section 36A[4] of the NDPS Act praying for extension of prescribed period of 180 days for investigation to another period of 60 days.

It is stated that in the instant case, two persons namely, Md. Idomei, aged 38 years, resident of Thoubai, Manipur and Md. Nawaz Khan, aged 20 years, resident of Thoubai, Manipur were arrested in connection with this case and according to their statements, a person name Baro had given the contraband in Thoubai, Manipur. But, the full name and address of the said person is not available. CRD's of the accused have to be thoroughly analyzed to trace out this person name Baro. Further, it is stated that whole nexus from supplier to receiver and financier has to be traced out and the role of registered owner of the seized truck is to be established. As the investigation was taken Basistha PS, it took some time for investigation and also the investigating officer tested Covid positive for which he had to be in isolation and for which the investigation took some time for completion.

Accordingly, prayed for extension of period for investigation to another period of 60 days beyond 180 days under the proviso of Section 36A[4] of the NDPS Act.

After hearing the submission of the Ld. Special P.P. and the Investigating Officer and considering all pros and cons of the case, I find it justified to allow the prayer for extension of time under the proviso of Section 36A[4] of the NDPS Act and accordingly, prayer for extension of

60 days is hereby allowed.

Fix as before."

9. A careful perusal of the said order indicates that the IO has routed the prayer through the learned P.P. and the learned court below had heard the learned Special P.P. But, it appears that the said application of the I.O. bears no signature of the learned P.P. nor there is any report of the P.P. to show his application of mind. Also it appears that while extending the time, vide order dated 26.07.2022, the learned court below has not issued any notice to the accused persons nor they were produced before the court and no opportunity was afforded to them to raise any objection. Mr. Choudhury, learned counsel for the accused has pointed this out at the time of hearing and the said submission is not disputed by Mr. Keyal, learned Standing Counsel.

10. In the case of **Sanjay Kumar Kedia [Supra]** the Hon'ble Supreme Court has held that the condition on which the prayer for extension is to be considered are:-

- (i) a report of a public prosecutor;
- (ii) which indicates the progress of the investigation,
- (iii) specifies compelling reasons for seeking the detention of the accused beyond 180 days; and
- (iv) after notice to the accused.

In the said case, no notice was given to the accused and he was not present in the Court on the said date Hon'ble Supreme has held that the extension granted to the Investigating Officer under provision of section 36 A [4] of the NDPS Act did not satisfy the condition and accordingly, held that order extending the time was contrary to the law and accordingly, struck down the same.

11. In the case of **Hitendra Vishnu Thakur (supra)**, while considering *pari materia* provisions of Section 20(4)(b) and (bb) of TADA Act, had held that extension of time could be granted when a report is submitted by the Public Prosecutor, notice is issued to the accused before granting extension so that the accused may have an opportunity to oppose the extension on all legitimate and legal grounds available to him.

12. Similarly, in the case of **Surendra Pundlik Gadling [supra]** while considering *pari materia* provision of proviso to Section 43D(2)(b) of UA(P) Act, 1967, the Full bench of Supreme Court of India had held that request of an Investigating Officer for extension of time is not a substitute for the report of the Public Prosecutor.

13. As indicated herein above, a careful perusal of the petition of the IO for extension of the period of investigation at Annexure-3 and the order dated 26.07.2022 at Annexure-4, and this court left unimpressed by the submission of Mr. Keyal, learned Standing Counsel, NCB that the requirement of the provision of section 36 A[4] of the NDPS Act is complied with by the IO. It is apparent that the petition was not routed through the P.P. and no report has been submitted by the P.P. and there is no indication of the progress of investigation and the reason for seeking detention of the accused beyond 180 days, as no such report of the P.P. is available. Further, it appears that no notice has been issued to the accused regarding the extension of the period for investigation so as to enable him to file objection and they have also not been produced before the court and as such, this court finds sufficient force in the submission of Mr. Choudhury, learned counsel for the accused, and inclined to hold that the requirement of law, so laid down by Hon'ble Supreme Court in the case of **Sanjay Kumar Kedia [Supra]** and in the case of **Hitendra Vishnu Thakur**

(supra), have not been satisfied with herein this case.

14. It is a fact that this is an application for bail under section 439 of the Cr.P.C. and this is not a quashing petition under section 482 Cr.P.C. As such, the order for granting extension is not challenged before the court and consequently, this court is not entitled to examine the legality or propriety of the same. But, in view of the decision of the Hon'ble Supreme Court in the case of **Sanjay Kumar Kedia [Supra]** this court is of the view that since on completion of 188 days no charge sheet has been submitted and since the order for granting extension time to the IO is ex-facie appears to be not in conformity of the law laid down by Hon'ble Supreme Court in the case laws discussed herein above, and which is also contrary to the legislative intent, this court is of the view that the accused are entitled to bail.

15. In the case of **Pritam Manohar Pardeshi and Others vs. State of Odisha** decided by the High Court of Odisha on 05.10.2021, it has been held that if on completion of 180 days of detention of the accused, he applies for bail, he becomes entitled to default bail and the Court must release him without unnecessary delay.

16. I have carefully considered the submission of Mr. Kayel, the learned Standing Counsel for the NCB and also gone through the case laws **Surendra Pundlik Gadling** (supra), would not come into his aid and **Sharjeel Imam** (supra) and the same has to be treated to be restricted to its own facts because of the following reasons:-

- (i) the application, so filed in the said cases, by the I.O. bears the signature of the P.P.;
- (ii) there was a report of the P.P., which shows application of his mind;

17. Accordingly, it is provided that on furnishing a bond of Rs. 1,00,000/- each, with one surety of like amount to the satisfaction of the learned Special Judge, NDPS Act, Kamrup [M] at Guwahati, both the accused be enlarged on bail. This privilege is however subject to the following conditions:-

(i) They shall not leave the jurisdiction of learned Special Judge, Kamrup (M) at Guwahati, without prior permission;

(ii) They shall surrender his Passport, if any, before the I.O. within a week from today;

(iii) He shall appear before the I.O., as and when directed, and

(iv) He 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 from disclosing such facts to the Court or to any police officer.

18. In terms of above this B.A. stands disposed of.

JUDGE

Comparing Assistant