

GAHC010228932022



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

Case No. : Bail Appln./3012/2022

PRABHA SANKAR TIWARI
S/O SWAMI DAYAL TIWARI
R/O 551 K/252, BHILAWAN
P.O. AND P.S. ALAMBAGH
DIST. LUCKNOW, UP

VERSUS

THE UNION OF INDIA
REP. BY THE NARCOTICS CONTROL BUREAU GUWAHATI ZONAL UNIT
VIP ROAD,
RUPKONWAR PATH,
CHACHAL KHANAPARA
GUWAHATI - 781022

Advocate for the Petitioner : MR. S MITRA

Advocate for the Respondent : MR. SC KEYAL(SC, NCB)

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

ORDER

25.04.2023.

Heard Mr. S. Mitra, learned counsel for the accused and also heard Mr. S.C. Keyal, learned Standing Counsel, NCB, for the respondent.

2. This application, under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused, namely, Prabhu Shankar Tiwari, who has been languishing in jail hazoot, in connection with the NDPS Case No.47/2022, under sections 8(C)/21(C)/29/35/35A/53A/54/60/66/67/68/ and 69 of the NDPS Act, since 25.09.2021, for granting bail.

3. The said case has been registered on the basis of one complaint, lodged by one C.S.K. Singh, Intelligence Officer, NCB Guwahati to the effect that acting on a tip off, they have intercepted one vehicle bearing Registration No. UP 32 KN 6464, on 04.09.2021, at about 10.45 PM, near Madanpur Toll Plaza, Guwahati and recovered 40102 bottles of Codine based cough syrup, packed in cartoon boxes and also loose bottles packed in sacks, manufactured by Laborate Pharmaceuticals India Ltd. (LESL-292), and apprehended accused Santosh Kumar, the driver of the Truck and one Amarendra Kumar Singh, stated to be the owner of the Truck. In his voluntary statement accused Amarendra Kumar Singh discloses that on the direction of his friend/petitioner Prabhu Shankar Tiwari, he went to Coochbiher and with the help of one Sanjoy he loaded the contraband substances in his Truck. Thereafter, Prabhu Shankar Tiwari came to the office of the NCB, Guwahati in connection with NCB Crime No. 25/2021, to give his voluntary statement under section 67 of the NDPS Act. Then he was directed to give his voluntary statement in the present case i.e. NCB Crime No. 24/2021 and ultimately the NCB team apprehended him and arrested on 25.09.2021 and forwarded him to jail hazoot. Then after completion of investigation Final Complaint has been laid before the court of learned Sessions Judge, Kamrup (M) at Guwahati against the accused Prabhu Shankar Tiwari to stand trial in the court under Sections 21(C)/29 of the NDPS Act.

4. It appears from the record that 40102 bottles of Codine based cough syrup were recovered from the Truck and two persons namely Santosh Kumar, the driver of the Truck and one Amarendra Kumar Singh, owner were apprehended by the NCB. Indisputably, the quantity of contraband substance recovered from the Truck is of commercial quantity. As the learned Standing Counsel for NCB has opposed the bail petition, this court has to derive its satisfaction that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail in view of the provision of section 37(1)(b)(ii) of the NDPS Act.

5. Mr. S. Mitra, the learned counsel for the accused, submits that the embargo under section 37 of the NDPS Act is not attracted herein this case as the materials collected and brought on record so far against the accused, is insufficient to show his complicity with the offence alleged except, however, the statement of co-accused, and his own statement. And nothing has also been recovered from his possession. Referring to the decisions of Hon'ble Supreme Court in **Toofan Sing vs. State of Tamil Nadu reported in (2021) 4 SCC 1**, and also in **State By (NCB) Bengaluru vs. Pallulabid Ahmed Arimutta & Anr.** reported in **AIR Online 2022 SC 130**, Mr. Mitra submits that the voluntary statement of the accused under section 67 NDPS Act and the statement of co-accused also not admissible in trial. Referring to another decision of High Court of Punjab and Haryana in **Vikrant Singh vs. State of Punjab, reported in CRM-M-39657 of 2020(O&M)** Mr. Mitra submits that though the prosecution side has relied upon CDR of the mobile of the accused, yet, it has failed to produce the transcript of the conversations exchanged between the present accused with that of the co-accused, and as such mere production of CDR would not be considered to be the corroborative material in

absence of substantive materials against the accused. Referring to another decision of Hon'ble Supreme Court in **Mohd Muslim @ Hussain vs. State (NCT of Delhi) Criminal Appeal No. ---of 2023 [@ Special Leave Petition (CRL) No(s). 915 of 2023]**, Mr. Mitra further submits that the conditions under section 37 of the NDPS Act has to be interpreted reasonably as the accused has to be presumed to be innocent in law. The satisfaction which the courts are expected to record, that the accused may not be guilty, is only prima-facie satisfaction, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation. Mr. Mitra also submits that the accused was arrested on 25.09.2021, and since then, he has been languishing in jail hajoot and there is also no certainty when the trial would come to an end, as charge has not yet been framed, and therefore, it is contended to allow the accused to go on bail.

6. On the other hand, Mr. S.C. Keyal, the learned Standing Counsel for the NCB, has vehemently opposed the petition on the ground that there are sufficient materials to show complicity of the accused with the offence alleged. Mr. Kayel further submits that though nothing has been recovered from the possession of the present accused, yet, the materials collected against him and relied upon by the prosecution, as is reflected in paragraph No. 38 and 49 of the Final Complaint reveals his complicity with the offence. Mr. Kayel further submits that the fact of the case of **Mohd Muslim** (supra) is completely different from the present one as in the said case the accused had completed half of the period of sentence in the jail. Mr. Kayel also referred to two other decision of Hon'ble Supreme Court in **NCB vs. Mohit Agarwal** reported in **2022 0 Supreme (SC) 619**, and **Union of India (NCB) Etc. vs. Khaliluddin reported in 2022 LiveLaw(SC) 878**, to contend that though no contraband substance was

recovered from the possession of the present accused, yet, because of the statement of accused Amarendra Kumar Singh, who went to Coochbehar, as per instruction of present accused Prabhu Shankar Tiwari, and met one Sanjoy there and loaded the contraband substances, with which he proceed to Agartala and then intercepted by NCB at Madanpur Toll Plaza, the matter stands on a different footing. It is the further submission of Mr. Kayel that two cases, being NCB Case No. 49/2021, and the present case, are pending against him and as such he is habituated to such offence, and it cannot be said that he will not commit such offence again if enlarged on bail. Drawing attention of this court to the status report of the other case, being NCB Case No. 25/2021, pending before learned court below, Mr. Kayel submits that because of the non co-operation of the counsel for the accused the said case is pending at the stage of framing of charge. Mr. Kayel further submits that the bar of Section 37 of the NDPS Act is applicable in the present case and as the accused has failed to satisfy the requirement of said section and therefore, it is contended to dismiss the petition.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the case record, received from the learned Court below.

8. It appears that Final Complaint has been filed under sections 21(C)/29 NDPS Act, against the present accused along with two other accused namely Amarendra Kumar Singh and Santosh Kumar on 03.03.2022. Further, it appears that till date charges have not yet been framed against the accused persons. The Investigating Agency has, in paragraph No. 49 of the Final Complaint has mentioned the material collected against the present accused under:-

(i) Prabhu Shankar Tiwari is the accomplice of main supplier Gopal Kumar

Sah.

- (ii)** Accused Amarendra Kumar Sing has stated in his voluntary statement recorded u/s 67 of NDPS Act that Prabhu Shankar Tiwari has told him to go to Coochbihar to load codine based cough syrup with brand name Eskuf. Prabhu Shankar Tiwari has told him to meet Sanjoy to get help to load codine based cough syrup in his Truck. These facts were also accepted and endorsed by the accused Prabhu Shankar Tiwary in his voluntary statement recorded under section 67 NDPS Act.
 - (iii)** CAF of the mobile No. 9695483332 of accused Prabhu Shankar Tiwari was analysed and it was found to be registered in his own name.
 - (iv)** From the analysis of CDR of mobile No. 9695483332 of accused Prabhu Shankar Tiwari, it is found that the accused Prabhu Shankar Tiwari was in contract with accused Amarendra Kumar Singh(mobile No. 7638907739) 51 times.
 - (v)** From the analysis of CDR of mobile No. 9695483332 of accused Prabhu Shankar Tiwari, it is found that accused Prabhu Shankar Tiwari was in contract with Gopal Kumar Saha @ Nanhki @ Bunty (mobile No. 8388096946) 470 times.
 - (vi)** From the analysis of CDR of mobile No. 9695483332 of accused Prabhu Shankar Tiwari, it is found that accused Prabhu Shankar Tiwari was in contract with suspect Raju (mobile No. 9127296595) 121 times.
- 9.** Thus, it appears that except the statement of co-accused and his own statement, there is no direct evidence against the accused Prabhu Shankar Tiwari and nothing has also been recovered from his possession. Mr. S. Mitra, the learned counsel for the accused has rightly pointed this out during his

argument and there is substance in the same, and the case laws- **Toofan Sing** (supra) and also in the case of **Pallulabid Ahmed Arimutta** (supra), and in **Vikrant Singh** (supra) also strengthen his submission. But, in view of the statement of one of the co-accused, namely Amarendra Kumar Singh, the matter stands on a different footing. Be it noted here that as per statement of accused Amarendar Kumar Singh, after unloading of cold-drinks at Guwahati from his Truck, as per direction of accused Prabhu Shankar Tiwari, he went to Coochbihar and met one Sanjoy there and loaded the contraband substances there, with which he proceed to Agartala and then intercepted by NCB at Madanpur Toll Plaza and seized the contraband substance. This recovery and seizure of the contraband substance by the NCB from the Truck of the accused Amarendra Kumar Singh lends sufficient credence to his version. Thus, from the facts and circumstances discussed herein above it cannot be said that no prima-facie case is made out against the present accused.

10. Thus, having made an endeavour to find out the availability of reasonable ground for believing that the accused is not guilty of the offences that he has been charged with, by examining the materials and the evidence on the record of the learned court below, and discussed herein above, for the limited purpose of releasing the accused on bail, and to ascertain that he is unlikely to commit an offence under the Act, while on bail, this Court is unable to derive its satisfaction that there exist any reasonable ground to show that the accused is not guilty of the offence and that he is unlikely to commit such offence while on bail. Pendency of another case, NCB Case No. 49/2021, against him also stands in the way.

11. There is no dispute that the accused was arrested on 25.09.2021, and since then he has been languishing in jail hazoot. But, in view of a decision of Hon'ble

Supreme Court, in **Mohit Agarwal (supra)** the length of period of his custody or the fact that the charge sheet has been filed and the trial has commenced are by themselves are not consideration that can be treated as persuasive ground for granting relief to the accused under section 37 of the NDPS Act. This being the position, the submission of Mr. Mitra, the learned counsel for the accused, in respect of the period of detention as the ground for releasing the accused on bail, is devoid of any substance. It is well settled by Hon'ble Supreme Court in the case of **Mohit Agarwal (supra)** that liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

12. In view of the above and also in view of the embargo under Section 37 of the NDPS Act, this Court is of the view that it is not a fit case where the privilege of bail that can be extended to the accused. I have gone through the case law, **Mohd Muslim (supra)** referred by Mr. Mitra and find that the same has to be treated to be restricted to its own facts and not applicable in all force to the facts and circumstances herein this case. In that case trial was undue delay in the trial and the accused was in jail for 7 years and 4 months. It is also to be mentioned here that the accused hails from Uttar Pradesh.

13. Having considered above and also considering the nature and gravity of the offence and the punishment prescribed for the same, and also considering the possibility of misusing the liberty, in the event of granting bail to the accused, the instant petition stands dismissed. However, the learned court below is directed to expedite the trial and complete the same within the earliest possible time, without being influenced by any of the observation made herein above, as the same is made only for the purpose of disposing of this bail application, not on the merit of the case. If necessary, the learned court below shall take recourse to the provision of section 309(1) Cr.P.C.

JUDGE

Comparing Assistant