

GAHC010238862023



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

Case No. : Bail Appln./3852/2023

SAIDUL ALI KHA
S/O- JOHOR ALI KHA ,R/O- GORAIMARI, P.S. AND DIST. BONGAIGAON,
ASSAM

VERSUS

UNION OF INDIA
NARCOTICS CONTROL BUREAU, REPRESENTED BY THE STANDING
COUNSEL, NARCOTICS CONTROL BUREAU.

Advocate for the Petitioner : MR. P K SAHARIA

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

19.12.2023

- 1.** Heard Mr. P.K. Saharia, learned counsel for the petitioner. Also heard Mr. S.C. Keyal, learned Standing Counsel, NCB.
- 2.** This application under section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Saidul Ali Kha, who has been

detained behind the bars since 23.03.2021 (for last 994 days, i.e. 2 years 8 months and 24 days) in connection with NDPS Case No. 17/2021 arising out of NCB Crime No. 14/2020 under Section 20(b)(ii)(C)/25/27A/28/29/35/54 of the NDPS Act, 1985 pending in the Court of learned Additional Sessions Judge No-2, Kamrup (M), Guwahati.

3. The gist of accusation in this case is that on 19.10.2020, at about 1600 hrs. one Shri Lalkhugin Bulte, Intelligence Officer, Narcotics Control Bureau, Zonal Unit Guwahati got an information through reliable sources that one person, namely, Bijoy Das Gupta of Tripura will be carrying huge quantity of ganja in a LPG tanker bearing Registration No. NL02L6746, and accordingly, a team of officers of NCB was constituted and a search operation was carried at Khanapara Police Traffic Point on 19.10.2020 at about 23:30 hrs. During the Naka Checking, the aforesaid LPG tanker was intercepted at Khanapara Police Traffic Point at about 3 AM on 20.10.2020 and the driver of the truck namely, Bijoy Das Gupta was apprehended, and during the search of the said truck total 144 packets containing light brown colour dried buds suspected to be ganja was found on weighing which the total weight of the same was found to be 1354.99 kg. Thereafter, during investigation, evidence was also collected against the present petitioner namely, Saidul Ali Kha, who was also arrested on 23.03.2021. During investigation, it was found that the present petitioner was the intended receiver of the seized contraband. However, the seized contraband could not be received by him as it was intercepted before that. It is also on record that during the investigation, the present petitioner made voluntary statement confessing his involvement in the alleged offence and there are other evidence also against the present petitioner including the CDR which is establishing his contact with the main accused Bijoy Das Gupta.

4. Learned counsel for the petitioner has submitted that on 20.04.2021, the NCB submitted final complaint before the Court of learned Additional Sessions Judge Kamrup (M), Guwahati and on the basis of which NDPS Case No. 17/2021 was registered and on 16.11.2022, the Trial Court framed charges against the present petitioner and other accused under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985 and fixed the matter for evidence of prosecution witnesses.

5. Learned counsel for the petitioner has submitted that nothing was seized from the possession of the present petitioner and he has been arrested merely on the basis of disclosure statement as well as the statement of the co-accused which is not admissible in evidence.

6. Learned counsel for the petitioner has also submitted that till now only 4(four) witnesses have been examined by the prosecution side and it is unlikely that the trial would be completed soon.

7. It is further submitted by the learned counsel for the petitioner that the petitioner is entitled to get bail mainly on the ground of prolonged incarceration as per the observations of Hon'ble Apex Court in "**Mohd Muslim @ Hussain Vs. State" (NCT of Delhi)** reported in **2023 SCC Online SC 352** as well as in "**Rabi Prakash Vs. The State of Odisha**" [order dated 13.07.2023 passed in Special Leave to Appeal (Crl.) No. 4169/2023]. The Apex Court has observed in the aforementioned cases that prolonged incarceration overrides the embargo of Section 37 of the NDPS Act, 1985.

8. Learned counsel for the petitioner has also submitted that the petitioner is a permanent resident of Bongaigaon district and he would face the trial if he is allowed to go on bail.

9. On the other hand, learned Standing Counsel, NCB has vehemently opposed the grant of bail to the present petitioner on the ground that the

quantity of contraband seized in this case is of commercial quantity and therefore, the embargo of Section 37 of the NDPS Act, 1985 is applicable here in this case.

10. It is further submitted that the petitioner was the intended receiver of the seized contraband and there are sufficient incriminating materials against the present petitioner and on that ground he vehemently opposed the grant of bail to the present petitioner only on the ground of prolonged incarceration.

11. I have considered the submissions made by learned counsel for both the sides and has perused the scanned copy of the case record of NDPS Case No. 17/2023.

12. Though this case involves commercial quantity of contraband, however, considering the fact that the petitioner has been detained behind the bars for more than last 2 years, the question before this Court is that whether prolonged incarceration of the petitioner overrides the embargo of Section 37 of the NDPS Act, 1985. If this Court comes to a finding that the delay is long enough, so as to come to the finding that the embargo of Section 37 of the NDPS Act, 1985 has been outweighed by the fundamental right guaranteed to the present petitioner under Article 21 of the Constitution of India, he may have to be released on bail in spite of the embargo of Section 37 of the NDPS Act, 1985.

13. It also appears that the delay in the trial in this case is not due to the fault of the present petitioner, as he has been detained behind the bars throughout his trial. 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)***" reported in "**2023 SCC Online SC 352**" 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***” (supra), 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 fundamental 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 the Hon'ble Supreme Court of India had granted bail to the accused facing charges for possession of commercial quantity of contraband only on the ground of prolonged 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 bars for one year and 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 the 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**), the petitioner was granted bail, by

the Apex Court, on the ground of prolonged incarceration of two years.

18. In the instant case also, the petitioner has been detained behind the bars since 23.03.2021 (for last 994 days, i.e., 2 years 8 months and 24 days) and only four prosecution witnesses have been examined. There is a likelihood that culmination of the trial would take some time and under the facts and circumstances of the present case, this Court is of the considered opinion that the long incarceration of the petitioner for more than 2 years in this case has outweighed the embargo of Section 37 of the NDPS Act, 1985, hence the petitioner is entitled to get bail in this case.

19. In view of above, the above named petitioner is hereby allowed to go on bail of Rs. 1,00,000/- (Rupees One Lakh) with two suitable sureties, one of whom should be a government employee and should be resident of the State of Assam, of like amount to the satisfaction of the learned Trial Court with conditions:-

- i.** That the petitioner shall cooperate in the trial of NDPS Case No. 17/2021, which is pending in the Court of learned Additional Sessions Judge Kamrup (M), Guwahati;
- ii.** That the petitioner shall regularly appear before the learned Trial Court as and when so required by the learned Trial Court;
- iii.** That the petitioner shall not directly or indirectly make any inducement, threat, or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such facts before the learned Trial Court in the trial pending against the present petitioner;

iv. That the petitioner shall provide his contact details including photocopies of his Aadhar Card, Driving License, PAN card, mobile number, and other contact details before the Officer-In-Charge of NCB Crime Police Station and before the Court of learned Additional Sessions Judge Kamrup (M), Guwahati;

v. That the petitioner shall not leave the jurisdiction of the learned Trial Court without prior permission of the learned Trial Court and when such leave is granted by the learned Trial Court, the petitioner shall submit his leave address and contact details during such leave before the learned Trial Court;

vi. That the petitioner shall not commit any offence similar to the one for which he has been accused of, while he is on bail.

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

JUDGE

Comparing Assistant