

GAHC010037202024



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

Case No. : Bail Appln./556/2024

TAHIR ALI AND ANR
S/O LT. YUSUF ALI
R/O VILL- JUKICHERRA
ISABEEL, P.S. BAZARICHERRA,
DIST. KARIMGANJ, ASSAM

2: GIYAS UDDIN
S/O TAHIR ALI
R/O VILL- JUKICHERRA
ISABEEL
P.S. BAZARICHERRA

DIST. KARIMGANJ
ASSA

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR H R CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE

HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

26.06.2024

- 1.** Heard Mr. H.R. Choudhury, learned counsel for the petitioners. Also heard Mr. R.R. Kaushik, learned Additional Public Prosecutor appearing for the State of Assam.
- 2.** This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, 1. Tahir Ali and 2. Giyas Uddin, who are detained behind the bars since 17.10.2022 in connection with Special (NDPS) Case No. 149/2022(arising out of Bazaricherra P.S. Case No. 186/2022 under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985.
- 3.** The gist of accusation in this case is that on 17.10.2022, one Mintu Gogoi, SI of Police had lodged an FIR before the Officer-In-Charge of Bazaricherra Police Station, *inter alia*, alleging that on receipt of an information through reliable sources, regarding transportation of huge quantity of ganja in a Maruti vehicle bearing Registration No. AS10F0307 coming from Jogicherra towards Patharkandi side, a naka checking was organized at Hatikhira near Hatikhira Hospital at National Highway No. 08.
- 4.** During the naka operation, the aforesaid vehicle was intercepted and the petitioners were apprehended therefrom. During search of the said vehicle, the search team recovered total 27 numbers of packets from the said vehicle weighing about 215 kg.

5. On receipt of the said FIR, Bazaricherra P.S. Case No. 186/2022 was registered and investigation was initiated. Ultimately on completion of the investigation, charge-sheet was laid against both the above-named petitioners.
6. Learned counsel for the petitioners has submitted that since the date of their arrest both the petitioners are languishing behind the bars and they have already completed custodial detention of more than 1 year 8 months.
7. The learned counsel for the petitioners has also submitted that though the charges were framed in this case on 29.05.2023, however, till date not even a single witness out of 9 listed witnesses has been examined by the prosecution side.
8. It is also submitted by the learned counsel for the petitioners that the petitioners have been detained for a long period without the trial against him progressing any further. He has also submitted that under the facts and circumstances of this case, due to his prolonged incarceration the fundamental rights of the petitioners guaranteed under Article 21 of the Constitution of India would override the embargo of section 37 of the NDPS Act, 1985.
9. Learned counsel for the petitioners has cited a ruling of the Apex Court in "***Rabi Prakesh Vs. State of Orissa***" reported in ***2023 live law (SC) 533***, wherein it has been observed by the Apex Court 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."

10. The learned counsel for the petitioners has also cited the rulings of the Apex Court in (i) "**Shariful Islam @ Sarif Vs. State of West Bengal**" (order dated 04.08.2022 in SLP Criminal No. 4173/2022), (ii) "**Dheeraj Kumar Shukla Vs. State of Uttar Pradesh**" [order dated 25.10.2023 passed in Special Leave to Appeal (Criminal) No. 6690/2022], (iii) "**Anjan Nath V. The State Of Assam**" [Order dated 17.10.2023 passed in Special Leave to Appeal (Criminal) No. 9860/2023], (iv) "**Nitesh Adhikari Vs. State of West Bengal**" (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022) and (v) "**Md. Salman Hanif Shaikh Vs. State of Gujarat**" (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022), wherein the petitioners (who were facing trial for possessing a commercial quantity of contraband) were granted bail by the Apex Court. However, due to the prolonged incarceration in all the above mentioned cases, the petitioners were allowed to go on bail. Therefore, on the same principle, the learned counsel for the petitioners has also submitted that in the instant case also the petitioners, who have been languishing behind the bars for more than 1 year 8 months, may be allowed to go on bail.

11. On the other hand, Mr. R.R. Kaushik, learned Additional Public Prosecutor has submitted that the quantity of contraband seized in this case, i.e. 215 kg of ganja is commercial quantity and therefore, the embargo of section 37 of the NDPS Act is applicable in this case and accordingly, he has vehemently opposed the grant of bail to the present

petitioners.

12. I have considered the submissions made by the learned counsel for both the sides as well as perused the materials available on record, including the scanned copy of the case record of Special (NDPS) Case No. 149/2022.

13. 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".

14. The Apex Court in "***Rabi Prakesh Vs. State of Orissa***" (supra), wherein it has been observed by the Apex Court 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."

15. It appears on perusal of the rulings cited by learned counsel for the petitioners that in all the cases cited by the petitioners, though commercial quantity of contraband was involved and apparently the embargo of Section 37 would have been applicable in those cases, however, only because of the fact of the prolonged incarceration of the petitioners, the Apex Court allowed the petitioners to go on bail.

16. In view of the observation made by the Apex Court, this Court is of the considered opinion that if, under the facts and circumstances of a case, this Court comes to the finding that there is an undue delay in the

completion of the trial, and that the incarceration of the petitioners is long enough, he would be entitled to get bail on the ground of such prolonged incarceration, as in such a case of prolonged incarceration, the right to life and personal liberty guaranteed to the petitioners under Section Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

17. It is also pertinent to mention herein that the Supreme Court of India had granted bail to an accused facing charges for possession of a commercial quantity of contraband only on the ground of prolonged incarceration in "***Shariful Islam @ Sarif Vs. State of West Bengal***" (supra), wherein the accused was detained behind bars for one year and six months.

18. In "***Nitesh Adhikari Vs. State of West Bengal***" (supra), the 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.

19. Similarly in "***Md. Salman Hanif Shaikh Vs. State of Gujarat***" (supra), the petitioner was granted bail by the Apex Court on the ground of prolonged incarceration of two years.

20. In "***Chitta Biswas Alias Subha Vs. The State Of West Bengal***" (Order dated 07.02.2020 passed in SLP Criminal No. 8823/2019), the Apex Court granted bail to the petitioner, who was facing a trial for possessing a commercial quantity of contraband on the ground of prolonged incarceration of 1 year 6 month.

21. In the instant case also, the present petitioners have been detained behind the bars for last more than 1 year 8 months and the trial is yet to culminate and in view of the facts and circumstances of this case as well as considering the observations made by the Apex Court in the rulings cited hereinabove, wherein, it has dealt with the question of long incarceration of similarly situated petitioners who were before the Apex Court, this Court is of the considered opinion that in the instant case also, the facts and circumstances are such that the long incarceration of the present petitioners outweighs the embargo of Section 37 of the NDPS, Act 1985 and the petitioners are therefore entitled to get bail on the ground of prolonged incarceration only.

22. In view of the above, the above-named petitioners, are allowed to go on bail of Rs. 1,00,000/- (Rupees One Lakh only) each with two sureties of like amount (one of whom should be a government servant and residing within the State of Assam) subject to the satisfaction of the learned Special Judge, Karimganj with the following conditions:

- i. That the petitioners shall cooperate in the trial of NDPS Case No. 149/2022, which is pending in the Court of learned Special Judge, Karimganj;
- ii. That the petitioners shall appear before the Trial Court as and when so required by the Trial Court;
- iii. That the petitioners 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 Trial Court in the trial pending against the present petitioners;

- iv. That the petitioners shall provide his contact details including photocopies of their Aadhar Card or Driving License or PAN card and mobile number, and other contact details before the Trial Court;
- v. That the petitioners shall not leave the jurisdiction of the Trial Court without prior permission of the Trial Court and when such leave is granted by the Trial Court, the petitioners shall submit their leave address and contact details during such leave before the Trial Court; and
- vi. That the petitioners shall not commit any similar offence while on bail.

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

JUDGE

Comparing Assistant