

GAHC010286812023



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

Case No. : Bail Appln./1520/2024

HABIBUR RAHMAN BARBHUIYA
S/O RAIS UDDIN BARBHUIYA

R/O VILL- NUN NAGAR
P.S. KATIGORAH
DIST. CACHAR
ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP
ASSAM

Advocate for : MR. L R MAZUMDER
Advocate for : PP
ASSAM appearing for THE STATE OF ASSAM

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

19.07.2024

1. Heard Mr. N. J. Dutta, learned counsel for the petitioner. Also heard Mr. M. P. Goswami, learned Additional Public Prosecutor.

2. This is a second bail application made under Section 439 Cr. P.C. seeking bail by the accused/petitioner, namely, **Habibur Rahman Barbhuiya**, who was arrested on 16.05.2022 in connection with Special NDPS Case No.77/2022 arising out of Badarpur PS case No. 116/2022 registered under Sections 22(C)/25/29 of the NDPS Act. This court under its order dated 01.12.2023 passed in Bail Appln No. 3682/2023 had rejected the prayer of the petitioner for bail.
3. Mr. Dutta, learned counsel relying on the decision of the Hon'ble Apex Court in the case of **Mohd Muslim –VS- State (NCT of Delhi)** reported in **AIR 2023 SC 164** contends that, there is no scope for early disposal of trial and the petitioner has been under incarceration for more than 2 years.
4. Per contra, Mr. Goswami, learned Additional Public Prosecutor relying on the judgment of the Hon'ble Apex Court in the case of **Narcotics Control Bureau – VS- Mohit Agarwal** reported in **2022 SCC OnLine 891**, argues that without having the satisfaction as regard the embargo placed in Section 37 of the NDPS Act, 1985, only on the ground of long incarceration an accused cannot enlarged on bail. The learned Additional Public Prosecutor has vehemently objected to the prayer of the petitioner for granting bail to the petitioner.
5. Heard the learned counsel for the parties, perused the material available on record.
6. Section 37 of the NDPS Act, 1985, mandates that a Court can grant bail to an accused only after hearing the Public Prosecutor and after having satisfactions of twin conditions that there are reasonable grounds for believing that the accused is not guilty of the offence charged/alleged and that, he is not likely to commit any offence while on bail. Such satisfaction, which the Court is required to record, should be based on reasonable reading and does not call for a meticulous examination of the materials collected during the investigation or during the trial,

otherwise the same will amount to mean a complete denial of bail under Section 37 of the NDPS Act, 1985 and the said provision would effectively exclude grant of bail altogether.

7. Grant of bail, on the ground of undue delay in the trial, cannot be said to be fettered by Section 37 of the NDPS Act, 1985, inasmuch as Section 436A of the Cr.P.C., is made applicable to the offences under the NDPS Act by the Hon'ble Apex Court in the case of **Satender Kumar Antil –VS- CBI** reported in **2022 10 SCC 51**.
8. Section 36A of the NDPS Act, 1985, mandates that the offences under the Act are triable by a Special Court. In the considered opinion of this Court, such mandate of the legislature is to achieve the object that the trials are completed at the earliest possible time inasmuch as the conditions of bail and other provisions under the Act, are very stringent in nature. It is also well settled that reasonable fair and just procedure in a criminal trial is a constitutional obligation on the part of the State. A speedy trial is also one of the dimensions of the fundamental right to life under Article 21 of the Constitution of India (**Reference Raghubir Singh –Vs- State of Bihar 1986-4 SCC-481**).
9. So far relating to the constitution of Special Court, it is stated at the bar that in the State of Assam, though different Sessions Judges and Additional Sessions Judges are designated as Special Courts under Section 36A of the NDPS Act, 1985, however, these Courts are also simultaneously entrusted with the different Sessions triable offences under IPC, Criminal Appeals under IPC and to act as Special Judges under Special Act like POCSO Act, 2012. In view of such undisputed factual position, the object of speedy trial under the NDPS Act, as discussed hereinabove shall be hardly achievable.
10. In the case of **Mohd. Muslim** (Supra), Hon'ble Apex Court held that a plain

and literal interpretation of the conditions under Section 37 of the NDPS Act, 1985 would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. It was further observed by the Hon'ble Apex Court that, therefore, the only manner in which the special conditions under Section 37 of the NDPS Act, 1985 can be considered within constitutional parameters is whether the Court is reasonably satisfied on a prima facie look at the materials on record that accused is not guilty. Any other interpretation would result in complete denial of the bail to a person accused of an offence, such as those enacted under Section 37 of the NDPS Act, 1985. It was also 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 inasmuch Section 436A of Cr.P.C. is applicable to the offences under the NDPS Act also.

11. On the aforesaid backdrop, now let this Court look into the facts of the present case.
12. The prosecution case is that on 15.05.2022 at about 4:30 p.m., approximately 200 tablets suspected to be Yaba tablets weighting about 212 grams were recovered from two Pulsar bike bearing registration No. AS 10 F1598 and AS 11 N7394 driven by the present petitioner and one Samim Ahmed Barbhuiya. Contrabands were recovered from the possession of the present petitioner and one Samim Ahmed Barbhuiya.
13. The charge-sheet was filed on 29.07.2022, charges under Section 20(C) of the NDPS Act read with Section 34 IPC and under Section 25/29 of the NDPS Act, were framed by the learned trial Court 14.11.2022. The prosecution has proposed to lay their case on the basis of fourteen witnesses.
14. PW1, the independent seizure witness has already been examined, who had deposed that the contraband has been recovered from the two accused

petitioners. However, he is not specific what is the quantity recovery from these two accused.

15. This court after considering the evidence of PW-1, the seizure witness, opined in the earlier proceeding that the petitioner has failed to satisfy rigor of Section 37 of the NDPS Act and accordingly rejected the prayer of bail. However, this Court after dealing with right of an accused regarding speedy trial, directed completion of the trial within a period of six months from the date of the order i.e. dated 01.12.2023 passed in Bail Appln No. 3682/2023.
16. Pursuant to this Court's aforesaid order, only six witnesses have been examined till date. Out of these six witnesses, PW-3, PW-4, PW-5, PW-7 and PW-8 are police officials. PW-6 was another seizure witness. Though PW-1 and PW-6, independent witnesses deposed that there were recovery, however, none of the said witnesses has specified from whose possession the contraband were recovered inasmuch as stand of the prosecution is that the two accused were travelling in two different bikes and recoveries were made from them. The PW-6 during cross-examination stated that he is not aware of the content of the Exhibit-1 i.e. seizure list though he admitted his signature. No seizure witness is specific out of these two witnesses from whom the contraband was recovered.
17. The Hon'ble Apex Court in some recent judgments and orders has been consistently taking a view that in case of prolonged incarceration, conditional liberty will override the statutory embargo under Section 37 of the Act inasmuch as such prolonged incarceration is against fundamental right guaranteed under Article 21 of the Constitution of India (reference **Ravi Prakash vs State of Odisha reported in 2023 0 Supreme(SC) 707**).
18. Now coming to the case in hand, the prosecution has not been able to bring any material to show that the present applicant has any previous criminal history.

Considering that he is languishing in jail since 16.05.2022 and in absence of any material to apprehend that in case the applicant is released on bail, he would again indulge in commission of similar offences, this Court is of the view that for the reasons recorded hereinabove, the petitioner has been able to make out a case for enlargement on bail in the crime in question. Accordingly, the bail stands allowed.

19. Considering the aforesaid aspects, propositions of law and in the given facts and circumstances of the present case, this Court is of the considered opinion that by imposing stringent conditions, the attendance of the petitioner before the learned trial Court could be secured and he can be barred from hampering and tampering or influencing the witnesses.
20. In view of the peculiar facts and circumstances of the case, the petitioner namely **Habibur Rahman Barbhuiya**, be released on bail on executing a bail bond of Rs. 1,00,000/- (One lakh) with two suitable solvent sureties of like amount one of which should be government employee to the satisfaction of the learned Court of Special Judge, Karimganj in connection with aforementioned case. The bail granted to the petitioner shall be subject to following conditions:-
 - (a) The petitioner shall not leave the territorial jurisdiction of learned Special Judge, Karimganj, without prior written permission from him/her;
 - (b) The petitioner shall not hamper and tamper with the evidence of the case;
 - (c) The petitioner 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.

- (d) The petitioner shall surrender his passport, if any (if not already surrendered) before the learned Special Judge, Karimganj.
- (e) The petitioner shall not try to contact any of the witnesses by any mode including telephone, social media etc.
- (f) The petitioner shall furnish the present residential address with proof to the learned trial Court below and shall not change the said residence without prior permission of the learned trial Court.
- (g) The petitioner shall appear before the learned trial Court below on each and every date of appearance during trial.

In the aforesaid terms, this bail petition is allowed.

JUDGE

Comparing Assistant