

GAHC010072292024



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

Case No. : Bail Appln./1047/2024

KUNAL BHATTACHARJEE AND ANR.
S/O KAJAL KANTI BHATTACHARJEE,
R/O BRAHMAN SHASON, P.S. NILAMBAZAR, DIST. KARIMGANJ, ASSAM,
PIN-788722

2: SAURAV SHARMA
S/O SANJOY SHARMA
R/O BRAHMAN SHASON
P.S. NILAMBAZAR
DIST. KARIMGANJ
ASSAM
PIN-78872

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR SISHIR DUTTA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 28.06.2024

Heard Mr. S. Dutta, learned counsel for the petitioners. Also heard Mr. R.R. Kaushik, learned Additional Public Prosecutor for the State.

2. This application under section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, 1) Kunal Bhattacharyya and (2) Sourabh Sharma , who have been detained behind the bars since 21.06.2022 (for last 2 years 1 month) in connection with Special (NDPS) Case P.S. Case No. 97/ 2022 (arising out of Bazaricherra P.S. Case No. 117/2022) under Sections 22(c)/ 25/ 29 of the NDPS Act, 1985, pending before the Court of the learned Special Judge, Karimganj.
3. The gist of accusation against the present petitioners on 20.06.2022, on the basis of a secret information by SI (UB) Sri Jyoti Prasad Das, before the Officer-in-Charge of Bazaricherra Police Station *inter-alia*, alleging that a huge quantity of narcotic drugs (cough syrup) suspected to be illegally transported to Jherjheri . A police team was constituted to proceed to Jherjheri and after reaching Jherjheri, police intercepted a motorcycle bearing registration No. AS 10A- 2024 moving from Bazaricherra towards Jherjheri and two persons were on the motorcycle and the said two persons were namely Kunal Bhattacharyya and Sourabh Sharma (the above named present petitioners) and on search total 130 Nos. of KOFDEL C Syrup bottles 100 ml each were recovered from the possession of the present petitioners.
4. The learned counsel for the petitioners has submitted that the petitioners were arrested in connection with Special (NDPS) Case P.S. Case No. 97/ 2022 (arising out of Bazaricherra P.S. Case No. 117/2022) on 21.06.2022 and have been languishing behind the bars for last 2 years 1 month. However, though the charges were framed against them on 28.07.2023 and the trial has not been fairly progressed and only 4 out of 8 prosecution witnesses are examined. The learned counsel for the petitioners has submitted that there is possibility of delay in convening trial.
5. The learned counsel for the petitioners has submitted that though commercial quantity of contraband is involved in this case but as the petitioners have been detained in custody for a long period of 2 years 1 month, their fundamental rights guaranteed under Article 21 of the Constitution of India has been violated and under such circumstances, it would override the embargo under Sections 37 of the NDPS

Act, 1985.

6. The learned counsel for the petitioners has cited a ruling of the Apex Court in the case of "**Rabi Prakash Vs. State of Orissa**" reported in **2023 SCC Online SC 1109**, wherein it has been observed by the Ape 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.

7. Similarly in "**Md Salman Hanif Shaikh Vs. State of Gujarat**" (Order dated 22.08.2022, passed in SLA Criminal No. 5530/2022), the petitioner was granted bail by the Apex Court on the ground of prolonged incarceration of two years..

8. On the other hand, Mr. B.B. Gogoi, learned Addl. Public Prosecutor has produced the case record including the case diary of Special (NDPS) Case P.S. Case No. 97/ 2022 (arising out of Bazaricherra P.S. Case No. 117/2022) and has submitted that the quantity seized by the Investigating Agency are commercial quantity and the emgargo under Section 37 of the NDPS Act is applicable in this case. He vehemently opposed the release of the petitioners on bail.

9. I have considered the submissions made by learned counsel for both the sides and perused the materials available on record including the case diary Special (NDPS) Case P.S. Case No. 97/ 2022 (arising out of Bazaricherra P.S. Case No. 117/2022). I have also perused the materials available on record including the scanned copy of the case diary of Special (NDPS) Case P.S. Case No. 97/ 2022 (arising out of Bazaricherra P.S. Case No. 117/2022) .

10. It appears that both the above named petitioners were arrested on 21.06.2022 and have been in judicial custody for last 2 years and 1 month. Though the charage sheet has been framed on 28.07.2023 but till date only 4 out of 8 prosecution witnesses have been examined.

11. The 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".

12. This Court is of the considered opinion that for whatsoever reasons, if inordinate delay has been caused and if it is not due to any fault of the petitioner, then to keep him under incarceration for a long period on one hand, and to continue to cause delay in culmination of the trial on the other hand would certainly be infringing his fundamental rights guaranteed under Article 21 of the Constitution of India and under such circumstances, the petitioner be entitled to get bail.

13. 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 petitioner 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 petitioner under Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

14. It is also pertinent to mention therein that the Supreme Court of India had granted bail to the accused facing charges for possession of the 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 the bars for one year six months.

15. In "**Nitesh Adhikari Vs. State of West Bengal (Order dated 01.08.2022 in SLP Criminal No. 5769/2022)**" 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.

16. In view of the above, the petitioners are allowed to go on bail of Rs. 50,000/-

(Rupees fifty thousand only) each with two sureties of like amount (one of whom should be Govt. servant & running within the State) subject to the satisfaction of the learned Trial Court with the following conditions:

- (i) That the petitioners shall cooperate in the trial of Special (NDPS) Case P.S. Case No. 97/ 2022 (arising out of Bazaricherra P.S. Case No. 117/2022) under Sections 22(c)/ 25/ 29 of the NDPS Act, 1985, which is pending before the learned Special Judge, Karimganj;
- (ii) That the petitioners shall regularly appear before the Trial Court as and when 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 of the case before the Trial Court in the trial pending against the present petitioners;
- (iv) That the petitioners shall provide his contract details including photocopies of their Adhar Card, or Driving licence, or PAN Card and, Mobile Number as well as other contract details before the Trial Court;
- (v) That the petitioners shall not leave the territorial jurisdiction of the learned Trial Court without prior permission of the trial Court and when such leave is granted by the Trial Court, the petitioners shall submit his leave address and contact details during such leave before the Trial Court.

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

18. Send back the case diary.

JUDGE

Comparing Assistant