

GAHC010072912024



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

Case No. : Bail Appln./1102/2024

RANDHIR KUMAR AND 2 ORS.
SON OF SOGARATH RAY,
R/O VILL- DUMARI DAKSHINI
P.O. BAGHRA, P.S. PATORI
DIST. SAMASTIPUR, BIHAR
PIN CODE-848506

2: PAPPU KUMAR
S/O LATE AM EKWAL RAY
R/O VILL- DUMARI DAKSHINI
P.O. BAGHRA
P.S. PATORI
DIST. SAMASTIPUR
BIHAR
PIN CODE-848506

3: RAHUL KUMAR @ RAHUL RAY
S/O PRAMOD RAY
R/O VILL- CHAMTHA
WARD NO. 05
CHAMTHA BARPUR
P.S. BACHWARA
DIST. BEGUSARAI
BIHAR

PIN CODE- 85111

VERSUS

THE UNION OF INDIA
REP. BY PP, GOVT. OF INDIA

Advocate for the Petitioner : MR. Y S MANNAN

Advocate for the Respondent : SC, NCB

**BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

ORDER

Date : 27.06.2024

1. Heard Mr. Y. S. Mannan, learned counsel for the petitioners. Also heard Also heard Mr. S. C. Keyal, learned Standing Counsel for the Narcotics Control Bureau (NCB).

2. This application under Section 439 of the Code of Criminal Procedure has been filed by the petitioners, namely, (1) Randhir Kumar, (2) Pappu Kumar, and (3) Rahul Kumar @ Rahul Ray who were arrested on 30.06.2021 (petitioner Nos. 1 and 2) and 28.07.2021 (petitioner No. 3), respectively, in connection with NDPS Case No. 223/2021 corresponding to NCB Crime Case No. 14/2021 under Section 20(b)(ii)(C) and 29 of the NDPS Act, 1985 pending in the Court of the learned Additional Sessions Judge, No. 3, Kamrup (M), Guwahati.

3. The gist of accusation in this case is that one Pankaj Kumar Chauhan, Intelligence Officer, Guwahati Zonal Unit, NCB, Guwahati had filed a written complaint against the above named petitioners and two other accused persons, *inter-alia*, alleging that on receipt of an information through reliable sources that one tanker bearing Registration No.NL01Q37959 was coming from Tripura with a huge consignment of ganja and which is proceeding towards Bihar. A search team was conducted and on 30.06.2021, at about 0240 hours the said tanker was intercepted while it was coming from Jorahat side.

4. The petitioner No.1 and petitioner No. 2 were found inside the said tanker. They were interrogated and a search was conducted. During search operation, 68 packets of suspected ganja, weighing about 735.16 kg was recovered from the said vehicle. Thereafter, on the basis of statement of the apprehended accused persons, the petitioner No.3, namely, Rahul Kumar, was arrested on 28.07.2021.

5. The learned counsel for the petitioners has submitted that though, all the above-named petitioners are languishing behind the bars for 2 years 11 months. However, not even a single witness out of the 11 listed witnesses have been examined.

6. The learned counsel for the petitioners has submitted that the petitioner, Nos. 1 and 2, were not in conscious possession of the seized contraband, as they were only the driver and co-driver of the vehicle from where this contraband was recovered, and they were only transporting the goods from its place of origin to its place of destination, without knowing about the fact that the goods also contain seized contraband.

7. It is also submitted that as regards the petitioner No.3, Rahul Kumar @ Rahul Ray is concerned, nothing was seized from his possession and he has been implicated in this case merely on the basis of a statement recorded under Section 67 of the NDPS Act, 1985, which is inadmissible in evidence in a trial concerning an offence under NDPS Act, 1985.

8. The learned counsel for the petitioners has also submitted that though the embargo of Section 37 of the NDPS Act, 1985 is mandatory in nature, however, in view of the observations made by the Supreme Court in a number

of cases, in case of prolonged incarceration and inordinate delay in trial, the embargo of Section 37 of the NDPS Act, 1985, is lifted and it gives way to the right of the accused guaranteed under Article 21 of the Constitution of India.

9. The learned counsel for the petitioners has also submitted that though in the present case commercial quantity of contraband is involved. However, as the detention period of the above-named petitioner is long enough and not even a single witness has been examined till date, hence, their prolonged incarceration would override the embargo of Section 37 of the NDPS Act, 1985.

10. 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 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.*”

11. 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 commercial

quantity of contraband). 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 2 years 11 months may be allowed to go on bail.

12. On the other hand, learned Standing Counsel for the NCB has vehemently opposed the prayer for grant of bail to the above named petitioners on the ground that there are sufficient incriminating materials against the above named petitioners for possessing a commercial quantity of ganja in this case, and hence, the embargo of Section 37 of the NDPS Act, 1985 is applicable to the instant case.

13. The learned Standing Counsel for the NCB has also submitted that what is binding is not the conclusion arrived at by the higher Court, but the underlying principles, on the basis of which that conclusion has been reached. He has submitted that the rulings of the Apex Court cited by the learned counsel for the petitioner does not indicate any *ratio-decidendi* on the basis of which the petitioners in the said cases were allowed to go on bail.

14. The learned Standing Counsel for the NCB has also submitted that in case of an heinous offence like that of offences under the NDPS Act, 1985, the object of enacting NDPS Act, 1985 as well as legislative mandate of the said Act should be strictly followed and no accused should be released on bail unless mandatory conditions provided under Section 37 of the NDPS Act, 1985 are fulfilled. To substantiate his submission, the learned Standing Counsel, NCB has cited a ruling of the Supreme Court of India in the case of “***Union of India Vs. Ram Samujh***”, reported in **(1999) 9 SCC 429**. The learned Standing Counsel, NCB

has also cited a ruling of the Apex Court in the case of "**State By (NCB) Bangaluru Vs. Pallulabid Ahmed Arimutta**" reported in **(2022) 12 SCC 633**.

15. The learned Standing Counsel, NCB has also submitted that in a criminal trial it is not possible to lay down a fixed period for conclusion of trial as the conclusion of criminal trial depends on many factors like nature of offence, the number of accused, the number of witnesses, the workload in the particular court, the means of communication and several other circumstances which are to be kept in mind and if the delay is not for any wrong on the prosecution side the accused should not get benefit of any such systemic delay. The learned Standing Counsel, NCB has cited a ruling of the Apex Court in the case of "**High Court Bar Association, Allahabad Vs. The State Of Uttar Pradesh**" reported in **2024 Legal Eagle (SC) 198**, to buttress his submission.

16. The learned Standing Counsel, NCB has also submitted that in the case of "**Satender Kumar Antil Vs. CBI**" reported in **2022 (10) SCC 51**, the Apex Court has observed that Section 436 A of the Code of Criminal Procedure, 1973, which relates to the maximum period for which an under trial prisoner can be detained behind the bars, is also applicable to offences under NDPS Act, 1985. It is submitted by the learned Standing Counsel, NCB that as Section 436A of the Code of Criminal Procedure, 1973, provides that if an under trial prisoner had undergone detention for a period extending up to one half of the maximum period of imprisonment specified for that offence under that law he shall be released by the Court on his personal bond with or without surety, hence, for an offence under NDPS Act, 1985 an under trial prisoner may be detained behind the bars till he completes one half of the maximum period of imprisonment specified for that offence. It is submitted by the learned Standing Counsel, NCB

that unless the under trial prisoner completes the said period, he may not be released on bail merely on the ground of prolonged incarceration as embargo of Section 37 of the NDPS Act, 1985 would be applicable in such case.

17. I have considered the submissions made by learned counsel for both sides, and have perused the materials available on record, including the scanned copy of the case record of NDPS Case No. 223/2021, which was called for in connection with this case.

18. In the case of "***Hussain Ara Khatoon Vs. State of Bihar***" reported in **(1980) 1 SCC 98**, the Apex Court has observed that the procedure prescribed by law for depriving a person of his personal liberty cannot be regarded as reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21 of the Constitution of India.

19. Though, Section 37 of the NDPS Act, 1985 provides for stringent provision for grant of bail, however, Section 36 (1) of the NDPS Act, 1985 also mandates the Government to constitute as many special courts as necessary for the purpose of providing speedy trial of offences under the NDPS Act, 1985. If speedy trial is not provided to an incarcerated accused. It is pertinent to mention here that instead of constituting required numbers of Special Courts as mandated by the Statute, the existing Session Courts have been designated as Special Judges, which is not as per the legislative mandate. It will certainly have a negative impact on the rigours of Section 37 of the NDPS Act, 1985.

20. 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”.

21. In the case of “**Rabi Prakash Vs. State of Orissa**” (*Supra*) 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.*”

22. In the light of the observations of the Apex Court, the submissions made by the learned Standing Counsel, NCB to the effect that as because Section 436A of the Code of Criminal Procedure, 1973 is applicable to offence under the NDPS Act, 1985, therefore, the accused may not be released on bail unless he has completed one half of the maximum period of imprisonment specified for that offence, does not appears to be a reasonable argument.

23. It appears from record that the since the date of their arrest, all the above named petitioners are detained behind the bars and though, charges were framed on 21.02.2024, however, till date not even a single witness has been examined, in spite of the fact that the above named petitioners have been detained behind the bars for 2 years 11 months.

24. 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 would be entitled to get bail.

25. In this regard the observations made by the Apex Court in the case of ***Satender Kumar Antil (Supra)*** are relevant, same is quoted here in below:

“49. Sub-section (1) mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the noncompliance of Section 309 continues with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the section makes adjournments and that too not for a longer time period as an exception, they become the norm. We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21. This is more so when the accused person is under incarceration. This provision must be applied inuring to the benefit of the accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an accused or a convict under custody or incarceration, would be violative of Article 21. While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions

26. 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.

27. It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to an 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***” (*Supra*), wherein the accused was detained behind bars for one year and six months.

28. In “***Nitesh Adhikari Vs. State of West Bengal***” (*Supra*), 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.

29. 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.

30. 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.

31. It appears on perusal of the rulings cited by learned counsel for the petitioner that in all the cases, though commercial quantity of contraband was involved and apparently the embargo of Section 37 of the NDPS Act, 1985 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.

32. In the instant case, also, the above named petitioners are detained behind the bars for 2 years and 11 months, and the and not even a single witness has been examined. So under such circumstances and considering the and also in the light of the observations made by the Apex Court in the ruling cited herein above, this court is of considered opinion that under the facts and circumstances of this case, the long incarceration of the above named petitioners would outweigh the embargo of Section 37 of the NDPS Act, 1985 in this case, and for that reason, the above named petitioners are entitled to get bail.

33. In view of the above, the petitioners, namely (1) Randhir Kumar, (2) Pappu Kumar, and (3) Rahul Kumar @ Rahul Ray 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 Additional Sessions Judge, No. 3, Kamrup (M), Guwahati with the following conditions:

- i.** That the petitioners shall cooperate in the trial of NDPS Case No. 223/2021, which is pending in the Court of learned Additional Sessions Judge, No. 3, Kamrup (M), Guwahati;
- ii.** That the petitioners shall appear before the Trial Court as and when so required by the 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 Trial Court in the trial pending against the present petitioner;

iv. That the petitioners shall provide their contact details including photocopies of their Aadhar Card or Driving License or PAN card, and mobile number as well as 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 petitioner 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.

34. With above observation, this bail application is hereby disposed of.

JUDGE

Comparing Assistant