

GAHC010138932024



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

Case No. : Bail Appln./2040/2024

MAIDI DAIMARI
S/O LT. BHOPEN DAIMARI, R/O VILL- CHUMUGAON, P.O. AND P.S.-ORANG,
DIST-UDALGURI

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. P K SAHARIA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

24.07.2024

- 1.** Heard Mr. P. K. Saharia, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State.
- 2.** This application under Section 483 of BNSS, 2023 has been preferred by the petitioner, namely, Maidi Daimari, who has been detained behind the bars

since 18.12.2022 (for more than last one year and seven months) in connection with NDPS Case No. 74/2023, corresponding to Hatigaon P.S. Case No. 573/2022 under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985, which is pending in the Court of learned Additional District & Sessions Judge No. 3, Kamrup(M), Guwahati.

3. The gist of accusation in this case is that on 18.12.2022, one Subrata Bhattacharjee, SI of Hatigaon Police Station had lodged an FIR before the Officer-in-Charge of Hatigaon Police Station, inter alia , alleging that on receipt of an information through reliable sources that two persons carrying illegal drugs were coming in a vehicle bearing Registration No. AS-01-R-0044 to Biharibosti, Tiniali, a naka checking was conducted at Biharibosti, Tiniali. On the same date at about 3.20 PM the aforesaid vehicle was intercepted and the occupants of the vehicle, namely, Maidi Daimari (present petitioner) and Gopal Basumatary were apprehended and eight numbers of white polythin packets containing 40.680 Kgs. of suspected cannabis were recovered from the said vehicle. On receipt of the said FIR, Hatigaon P.S. Case No. 573/2022 was registered and the investigation was initiated.

4. Ultimately, on completion of the investigation, charge-sheet was laid and the present petitioner faced the trial remaining in custody.

5. The learned counsel for the petitioner has submitted that in the instant case, the co-accused, namely, Gopal Basumatary has already been granted bail by this Court on 26.06.2024 in Bail Application No. 1439/2024 on the ground of prolonged incarceration.

6. The learned counsel for the petitioner has also submitted that though the petitioner has been languishing behind the bars for last more than one year and seven months and though the charges were framed on 05.01.2024,

however, till date not even a single witness has been examined.

7. The learned counsel for the petitioner has 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 inordinate delay in trial, the embargo is lifted and it gives way to the right of the accused under Article 21 of the Constitution of India.

8. The learned counsel for the petitioner has also submitted that though in the present case commercial quantity of contraband is involved, however, as the detention of the present petitioner for more than one year and seven months, under the facts and circumstances of the case may be regarded as a prolonged incarceration, his such detention would override the embargo of Section 37 of the NDPS Act.

9. Learned counsel for the petitioner 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 petitioner 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 petitioner has also submitted that in the instant case also the petitioner, who has been languishing behind the bars for more than one year and seven months may be allowed to go on bail.

11. On the other hand, learned Additional Public Prosecutor has submitted that since the quantity of contraband involved in the instant case is of commercial quantity, the embargo of Section 37 is applicable to this case and, hence, he has opposed the grant of bail to the above named petitioner.

12. I have considered the submissions made by the learned counsel for both the sides and have perused the materials on record including the scanned copy of the case record of NDPS Case No. 74/2023 which was called for in connection with this case.

13. It appears from record that in the instant case though the charges were framed against the present petitioner on 05.01.2024 and though 9 prosecution witnesses are listed in the charge-sheet, however, till date not even a single prosecution witness has been examined.

14. 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".

15. 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."

16. It appears on perusal of the rulings cited by learned counsel for the petitioner that in all the cases cited by the petitioner, 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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 one year six months.

22. In the instant case also from the facts and circumstances discussed hereinabove as well as in the light of the observations made by the Apex Court in the rulings cited hereinabove, this Court is of considered opinion that the long incarceration of one year seven months already undergone by the above-named petitioner and in view of the fact that not even a single witness has been examined, the fundamental right guaranteed to the petitioner under Article 21 of the constitution of India outweighs the embargo of Section 37 of the NDPS Act, 1985 in this case and as such, the above-named petitioner is entitled to get bail on the ground of prolonged incarceration only.

23. In view of the above, the above named petitioner is allowed to go on bail of Rs. 50,000/- (Rupees Fifty Thousand only) with two sureties of like amount (one of whom should be resident of the State of Assam) subject to the satisfaction of the learned Additional District & Sessions Judge (FTC) No. 3, Kamrup(M), Guwahati with the following conditions:

- i. That the petitioner shall cooperate in the trial of NDPS Case No. 74/2023, which is pending in the Court of Additional Sessions Judge (FTC) No. 3, Kamrup(M);

- ii.** That the petitioner 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 petitioner 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 petitioner 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 his leave address and contact details during such leave before the Trial Court; and
- vi.** That the petitioner shall not commit any similar offence while on bail.

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

JUDGE

Comparing Assistant