

GAHC010155732024



2024:GAU-AS:12860

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

Case No. : Bail Appln./2305/2024

ABDUL KADIR
S/O LATE MANJIR ALI, R/O VILL- DASGRAM (KANDIGRAM), P.S.-
NILAMBAZAR, DIST- KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. MAHMED, MD I H LASKAR

Advocate for the Respondent : PP, ASSAM,

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND
ORDER

16.12.2024

Heard Mr H R A Choudhury, learned Senior Counsel for the petitioner, Abdul Kadir, who has filed this application under Section 483 of the BNSS, 2023, with prayer for bail, as he is behind bars since 31.03.2023, in connection with Special NDPS Case No. 24/2023, arising out of Ratabari PS Case No. 92/2024, registered under Sections 21(c)/25/29 of the NDPS Act.

3. Heard Mr K K Das, learned Additional Public Prosecutor for the State of Assam.
4. It is submitted on behalf of the petitioner that he is behind bars for more than 1 year 8 months. The petitioner is not at all complicit. He is the owner of the vehicle carrying the contraband. The petitioner cannot be incarcerated in a case, where he was tracked down with CDR. The petitioner's brother was inside the vehicle and this does not mean that the petitioner can also be roped in connection with this case. The petitioner is a religious person and he was in the mosque when he was arrested, after his prayers were over. Trial has not yet commenced and thus, petitioner's right to freedom has been curtailed and this is a fit case for bail as the rigours of Section 37 of the NDPS Act, gets thwarted.
5. The learned Additional Public Prosecutor has raised serious objection stating that the merits of this case cannot be considered at this stage. Charge has been framed and at that time, this plea was not taken. The petitioner is complicit of having transporting 1.56 kgs of heroin, which is an enormous quantity. The lives of petitioner are menace to the society.
6. I have considered the submissions at the bar with circumspection.
7. The learned Senior Counsel for the petitioner has relied on the decision of the Hon'ble Supreme Court in *State by (NCB) Bengaluru -Vs- Pallulabid Ahmad Arimutta and Another*, and other such petitioners in connection with Special Leave to Appeal (Crl.) No. 242 of 2022, wherein vide order dated 10.01.2022, it has been held

that-

“8. Vide order dated 05th January, 2020, learned counsel for the petitioners- NCB were directed to prepare a comprehensive tabulated statement with respect to the role attributed to each of the respondents, the evidence gathered against them at the time of their arrest, their antecedents, the dates on which they were arrested and the period of custody undergone by them, for ready reference. The said tabulated statement has been filed and a perusal thereof reveals that in SLP (Crl.) @ Diary No.22702/2020, SLP (Crl.) No.1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) Nos. 1773-1774/2021, SLP (Crl.) No. 2080/2021, heavy reliance has been placed by the petitioner-NCB on the voluntary statements of the accused and the co-accused recorded under Section 67 of the NDPS Act for arresting them. Another piece of evidence referred to is the CDR details in respect of A-3, A-4, A-5, A-6 and A-8 in the first case which as per the prosecution, goes to show that the said respondents were constantly in touch with each other and with A-1 and A-2 on the date of the seizure. The attention of this Court was also drawn to the fact that the antecedents of A-5, A-6 and A-8 in the first case and A-2 and A-5 in the second Petition for Special Leave to Appeal (Criminal) No. 1569 OF 2021 case are not clean.

10. It has been held in clear terms in Tofan Singh Vs. State of Tamil Nadu 6, that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused 6 (2021) 4 SCC 1 Petition for Special Leave to Appeal (Criminal) No. 1569 OF 2021 under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16 th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No.

1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.

11. However, the evidence brought before us against Mohammed Afzal [A-2], respondent in SLP (Crl.) No. 1569/2021, subject matter of the second case i.e., NCB Case FN No. 48/01/07/2019/BZU, who was granted bail vide order dated 08th January, 2020, will have to be treated on an entirely different footing. There are specific allegations levelled against the said respondent regarding recovery of substantial commercial quantities of drugs from a rented accommodation Petition for Special Leave to Appeal (Criminal) No. 1569 OF 2021 occupied by him pursuant to which he was arrested on 16 th June, 2019. This aspect has been completely overlooked while passing the order dated 08th January, 2020 wherein, the only reason that appears to have weighed with the High Court for releasing him on bail is that his case stands on the same footing as A-1, A-3 and A-4 who had been enlarged on bail vide orders dated 11th October, 2019, 16th September, 2019 and 09th September, 2019, in connection with the second case registered by the Department. We are of the firm view that A-2 cannot seek parity with the aforesaid co-accused and no such benefit could have been extended to him in view of Section 37 of the Act when he was found to be in consciouspossession of commercial quantity of psychotropic substances, as contemplated under the NDPS Act. That being the position, the petitioner-NCB succeeds in SLP (Crl.) No. 1569/2021. The bail granted to the respondent-Mohammed Afzal [A-2] is cancelled forthwith at this stage and he is directed to surrender before the Sessions Court/Special Judge (NDPS) within a period of two weeks, for being taken into custody.”

8. It has to be borne in mind that the case of *Pallulabid Ahmad Arimutta (supra)* is relating to cancellation of bail, which is not on the same footing with this case.
9. Learned Senior Counsel for the petitioner has relied on the decision of the High

Court of Judicature at Delhi, in connection with *Amit Ranjan –Vs- NCB*, reported in 2022 0 Supreme (Del) 376, wherein it has been held that-

“40. As regards the contention raised by the NCB that the verdict in Tofan Singh (supra) relates only to the aspect of the lack of admissibility of statements made under Section 67 of the NDPS Act, 1985 at the stage of conclusion of the trial and cannot be considered at the stage of grant of bail or otherwise, the said submission is clearly repelled by the verdict of the Hon^{ble} Supreme Court in "State by NCB Bengaluru V. Pallulabaid Ahmad Arimutta; SLP Crl. 242/2022 alongwith Petition for Special Leave to Appeal (CRL.) No.1569 of 2021 in case titled as "UNION OF INDIA VERSUS MOHAMMED AFZAL" with Petition for Special Leave to Appeal (CRL.) No.1454 of 2021 in case titled as "UNION OF INDIA NARCOTICS CONTROL BUREAU, BENGALURU VERSUS MOHAMMED AFZAL" with Petition for Special Leave to Appeal (CRL.) No.1465 of 2021 in case titled as "STATE BY INTELLIGENCE OFFICER, NARCOTICS CONTROL BUREAU" VERSUS MUNEES KAVIL PARAMABATH @ MUNEES KP" with Petition for Special Leave to Appeal (CRL.) No.2080 of 2021 in case titled as "STATE OF KARNATAKA VERSUS MUNEES KAVIL PARAMABATH" and Petition for Special Leave to Appeal (CRL.) No.1773-74 of 2021 in case titled as "STATE BY INTELLIGENCE OFFICER (NCB) BENGALURU ZONAL UNIT, BENGALURU VERSUS ABU THAHIR @ ABDU & ETC.", a verdict dated 10.01.2022 which relates to the challenge laid by the NCB to release of the accused persons on bail by orders of the Hon^{ble} High Court of Karnataka qua offences punishable under Section 8(c), 8A r/w Sections 20(b), 21, 22, 27A, 27B, 28 & 29 of the NDPS Act, 1985, wherein, the accused persons were inter alia arrested on the basis of call detail records and statements recorded under Section 67 of the NDPS Act, 1985 and with contentions raised by the NCB therein that the call detail records between the accused persons showed that they were constantly in touch

with each other even on the date of the seizure with the Hon^{ble} Supreme Court having observed vide paragraph 10 of the said verdict to the effect:-

"10. It has been held in clear terms in Tofan Singh Vs. State of Tamil Nadu, that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.", which makes it apparent thus, that it cannot be contended by the Narcotics Control Bureau that the verdict in Tofan Singh (supra) in relation to the aspect of the statements recorded under Section 67 of the NDPS Act, 1985 i.e. the confessional statement allegedly recorded being inadmissible in the trial of an offence under the NDPS Act, 1985, cannot be considered at the time of consideration of a bail application.

44. In the instant case, the Narcotics Control Bureau has

not placed on record further incriminating evidence through the initial complaint dated 12.02.2019 nor through the supplementary complaint dated 08.01.2020 filed against the applicant in relation to any recovery having been effected pursuant to the stated voluntary statement made by the applicant under Section 67 of the NDPS Act, 1985. CDRs between the applicant and the co-accused persons per se at this stage do not suffice to establish the existence of a conspiracy between the applicant and the co-accused in illicit trafficking of psychotropic substances nor is there any document placed on the record by the Narcotics Control Bureau during the course of consideration of the present bail application to bring forth the transportation of any narcotic or psychotropic substance from the applicant to the co-accused persons through K.K. Pharma to Vinay Pharmaceuticals nor has the Narcotics Control Bureau placed on record any document to show the connection of the applicant with K.K. Pharma Solutions through whom allegedly the psychotropic substances were sent to Vinay Pharmaceuticals i.e. to the co-accused Manish Mohan. That there were monetary transactions between the co-accused Pulkit Kumar and the applicant, per se, also do not indicate that the said monetary transaction was in relation to any illicit trafficking of narcotic or psychotropic substances.

46. It is essential to observe that the aspects of the CDR details and alleged connection between K.K. Pharma Solutions and Vinay Pharmaceuticals and the applicant and the co-accused persons and monetary transactions between them being in relation to illicit trafficking of narcotic or psychotropic substances can only be gauged at trial. In view thereof, there having been no recovery of any alleged narcotic or psychotropic substances of a commercial quantity having been effected from

the applicant and apart from the confessional statements made by the applicant and the co-accused which confessional statement made by the applicant has already been retracted, presently, this Court is satisfied that there are reasonable grounds for believing that the applicant is not guilty of the commission of the said offences and in view of his clean antecedents that he is not likely to commit any offence whilst on bail,- the applicant in the instant case is allowed to be released on bail on filing a bail bond in the sum of Rs.2,00,000/- (Rupees Two Lakhs) with two sureties of the like amount to the satisfaction of the learned Trial Court with directions to the applicant to the effect that:- ,

“He shall not leave the country under any circumstances and intimation to this effect be sent to FRRO; , he shall keep his mobile phone on at all times; , he shall drop a PIN on the google map to ensure that his location is available to the Investigation Officer; , he shall commit no offence during the pendency of the appeal and in the event of there being any FIR/ DD Entry/complaint lodged against the applicant, the State shall bring it to the notice of the Court forthwith.” ”.

10. The High Court of Judicature at Delhi has also relied on the decision of Hon’ble the Supreme Court in ***Pallulabid Ahmad Arimutta & Another(supra)*** and the facts and circumstances of this case is not at all similar to the case of ***Pallulabid Ahmad Arimutta & Another (supra)***, as well as the case of ***Amit Ranjan (supra)***.

11. Learned Senior Counsel has also relied on the decision of ***Rabi Prakash -Vs- The State of Odisha***, in connection with Special Leave to Appeal (Criminal) No. 4169/2023, wherein vide order dated 13.07.2023, it has been observed that-

“4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. 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.”

12. It has to be borne in mind that the appellant, Rabi Prakash was behind bars for more than 3 ½ years and only 1 out of 19 witnesses were examined during his incarceration.

13. Learned Senior Counsel for the petitioner has also relied on the decision of the Hon’ble Supreme Court in *Shariful Islam @ Sarif –Vs- The State of West Bengal*, in connection with Special Leave to Appeal (Crl.) No. 4173/2022, wherein it has been observed that-

“2. Taking into consideration the fact that the petitioner is reported to be in custody since 27-1-2021 and has suffered incarceration for over 1 year 6 months and there being no likelihood of completion of trial in the near future, which fact cannot be controverted by the learned counsel appearing for the State, we are inclined to grant him bail.”

14. Reverting back to this case, it is held that the facts and circumstances of this case reveals that the petitioner is behind bars for more than 1 year 8 months. Trial has not yet

commenced as the co-accused, Atikur Rahman, is evading to appear before the Court. It cannot be ignored that trial is yet to commence, but at the same time, it is apparent that charge sheet has been laid under Sections 21(c)/25/29 of the NDPS Act.

15. Considering the peculiar facts and circumstances of this case, I am not inclined to grant bail to the petitioner. The rigours under Section 37 of the NDPS Act, comes into play. The merits of this case are not brought to the fore. It cannot be conclusively held that there is no possibility of conclusion of trial any time in the near future.

16. I have considered the enormity of the offence. It is true that 15 witnesses are cited as witnesses in the charge sheet.

17. I have also relied on the decision of Hon'ble the Supreme Court in *Gurwinder Singh –Vs- State of Punjab and Another*; reported in (2024) 5 SCC 403, wherein it has been observed that-

“32. The Appellant’s counsel has relied upon the case of KA Najeeb (supra) to back its contention that the appellant has been in jail for last five years which is contrary to law laid down in the said case. While this argument may appear compelling at first glance, it lacks depth and substance. In KA Najeeb’s case this court was confronted with a circumstance wherein except the respondent-accused, other co-accused had already undergone trial and were sentenced to imprisonment of not exceeding eight years therefore this court’s decision to consider bail was grounded in the anticipation of the impending sentence that the respondent- accused might face upon conviction and since the respondent-accused had already served portion of the maximum imprisonment i.e., more than five years, this court took

it as a factor influencing its assessment to grant bail. Further, in KA Najeeb's case the trial of the respondent-accused was severed from the other co-accused owing to his absconding and he was traced back in 2015 and was being separately tried thereafter and the NIA had filed a long list of witnesses that were left to be examined with reference to the said accused therefore this court was of the view of unlikelihood of completion of

trial in near future. However, in the present case the trial is already under way and 22 witnesses including the protected witnesses have been examined. As already discussed, the material available on record indicates the involvement of the appellant in furtherance of terrorist activities backed by members of banned terrorist organization involving exchange of large quantum of money through different channels which needs to be deciphered and therefore in such a scenario if the appellant is released on bail there is every likelihood that he will influence the key witnesses of the case which might hamper the process of justice. Therefore, mere delay in trial pertaining to grave offences as one involved in the instant case cannot be used as a ground to grant bail. Hence, the aforesaid argument on the behalf the appellant cannot be accepted."

18. In the light of the decision of Hon'ble the Supreme Court in *Gurwinder Singh's case (supra)* and considering the peculiar facts and circumstances of this case, which is not at all similar to the cases, referred to by the petitioner, I am constrained to reject the bail petition of the petitioner.

20. Petition with prayer for bail is rejected at this stage.

JUDGE

Comparing Assistant