

GAHC010199242023



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

Case No. : Bail Appln./3390/2023

JOWEL HOSSAIN AND ANR
S/O HABIL MIAH
VILL- KARALIMURA
P.O. AND P.S. SONAMURA
DIST. SEPAHIJHALA, TRIPURA

2: PARBINDER SINGH
S/O JASPAL SINGH
R/O GURU TRG
BAHADUR NAGAR
KOTAKPURA (19)
P.S. CITY POLICE STATION
DIST. FARIDKOT
PUNJAB

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

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

ORDER

Date : 25-06-2024

- 1.** Heard Mr. A. Ahmed, learned counsel for the petitioners. Also heard Mr. B. Sarma, 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. Jowel Hossain, and 2. Parbinder Singh*, who are detained behind the bars since 16.10.2022 (for more than last one year and eight months) in connection with Special (NDPS) Case No. 151/2022, corresponding to Bazaricherra P.S. Case No. 185/2022 under Section 20(b)(ii)(C)/25/29 of the NDPS Act, 1985, which is pending in the Court of learned Special Judge, Karimganj.

- 3.** The gist of accusation is that on 16.10.2022, one Nirranjan Das had lodged an FIR before the Officer-in-charge of Bazaricherra Police Station, *inter alia*, alleging that while conducting naka checking duty at Naka checkpoint of Churaibari Watch Post at National Highway No. 8 at around 6.35 PM, a brick red colour 18 wheelers truck bearing Registration No. PN-04-N-8281, which was coming from Tripura side was intercepted. The said truck (trailer) was loaded with drums. During checking, it was found that the drums were filled with liquid rubber and on thorough checking, it was found that from 48 numbers of the drums suspected Ganja was recovered and remaining 72 drums were filled with liquid rubber. After recovery of the Ganja, when the same was weighed, it was found that the total weight of the recovered Ganja was 2400 Kgs, which was kept in 96 numbers of packets. The driver of the truck i.e., Parbinder Singh (petitioner No. 2) and the other companion i.e., Jowel Hossain (petitioner No.

1) could not give any satisfactory reply as regards the recovery of ganja from the aforesaid truck. On receipt of the said FIR, Bazaricherra P.S. Case No. 185/2022 was registered and investigation was initiated.

4. Ultimately, on completion of the investigation, charge-sheet was laid against the above named petitioners and one Kazi Golam Mostafa on 31.01.2023. Apart from the aforesaid charge-sheet, the name of one Kazi Golam Mostafa was also shown as an accused who is shown as an absconder in the charge-sheet.

5. The learned counsel for the petitioners has submitted that though the petitioners are detained behind the bars for more than last 1 year and 8 months, however the trial has not yet commenced as even the charges are not yet framed and there is an unlikelihood that the trial would culminate soon.

6. 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 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.

7. The learned counsel for the petitioners has submitted that as the seized contraband was found in drums inside the seized vehicle, which was driven by the petitioner No. 2 and petitioner No. 1 was only the occupant of the said vehicle. They were not aware about what was there inside the said drums as the as the consignment was only with regard to the liquid rubber.

8. The learned counsel for the petitioners has submitted that the mere physical possession without animus on the part of the above named petitioners would not constitute possession within the meaning of the provisions of NDPS

Act, 1985. In support of his submission, he has cited a ruling of the Apex Court of India in the case of “**Mohan Lal vs State Of Rajasthan**” reported in “**AIR 2015 SC 2098**”.

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 of the petitioners is long enough i.e., for more than 1 year and 8 months, the prolonged incarceration of present petitioners in this case would override the embargo of Section 37 of the NDPS Act, 1985.

10. The learned counsel for the petitioner 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 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), **Karnail Singh –Vs- State of Odisha** (Order dated 22.11.2022 in Criminal Appeal No. 2027/2022 arising out of SLP(Crl.) No. 9067/2022), **Kabirul Islam & Anr. –Vs- State of West**

Bengal (order dated 28.02.2024 in SLP (Crl.) No. 12773/2023 and **Rased Mia – Vs- State of West Bengal** (order dated 24.01.2024 in SLP (Crl.) No. 14347/2023) 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 petitioner, who has been languishing behind the bars for more than 1 year and 8 months, may be allowed to go on bail.

12. On the other hand, learned Additional Public Prosecutor has submitted that the trial could not proceed as one of the co-accused is yet to be apprehended and every effort has been made by the trial court to procure the attendance of the absconding accused, namely Kazi Golam Mostafa and as the co-accused is yet to appear before the Trial Court, the charges could not be framed against the above named petitioners.

13. It is also submitted by the learned Additional Public Prosecutor that as the quantity of contraband seized in this case is huge quantity and is of commercial quantity, the embargo of Section 37 of the NDPS Act, 1985 would be applicable in this case and, hence, he has vehemently opposed the grant of bail to the above named petitioners.

14. I have considered the submissions made by the learned counsel for both the sides and have perused the materials available on record including the scanned copy of the case record of Special (NDPS) Case No. 151/2022 which was requisitioned in connection with this case.

15. In the case of "**Hussain Ara Khatoon**" (Supra) 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.

16. 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 will certainly have a negative impact on the rigours of Section 37 of the NDPS Act, 1985.

17. 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”.

18. The Apex Court in “***Rabi Prakash 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.*”

19. It appears from the record that since the date of their arrest i.e., on 16.10.2022, both the petitioners have been detained behind the bars and till today the charges are yet to be framed.

20. 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.

21. In this regard the observations made by the Apex Court in the case of "*Satender Kumar Antil –Vs- CBI* reported in "*2022 (10) SCC 51*" 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, they shall make sure that the accused does not suffer for the delay occasioned due to no fault of his own.”

22. 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 petitioners are long enough, they 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 petitioners under Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

23. 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.

24. 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.

25. 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.

26. 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.

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

28. In the instant case also, the above named petitioners are detained behind the bars for more than one year and eight months and the charges are yet to be framed and in view of the facts and circumstances of this case as well as in the light of the observations made by the Apex Court in the rulings cited herein above, this Court is of considered opinion that in the instant case also, the facts and circumstances are such that the long incarceration of the above named petitioners outweighs the embargo of Section 37 of the NDPS Act, 1985, and they are, therefore, entitled to get bail on the ground of prolonged incarceration only.

29. In view of the above, the above named petitioners 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 Special Judge, Karimganj with the following conditions:

- i. That the petitioners shall cooperate in the trial of Special (NDPS) Case No. 151/2022, which is pending in the Court of learned Special Judge, Karimganj;
- ii. That the petitioners shall appear before the Trial Court as and when so 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 before the Trial Court in the trial pending against the present petitioners;

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 petitioners shall submit his 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.

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

JUDGE

Comparing Assistant