

GAHC010205342024



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

Case No. : Bail Appln./2987/2024

BIVESH KUMAR
S/O- RAM BINAY RAI,
R/O- VILLAGE HARRAKHPURA,
P.O- KORAI, P.S- GARHPURA, DIST- BEGUSARAI, BIHAR, PIN-848204

VERSUS

THE STATE OF ASSAM
REP BY THE PP ASSAM

Advocate for the Petitioner : MR. D J KAPIL, MR. A BHATTACHARJEE

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 20.12.2024

- 1.** Heard Mr. D. J. Kapil, learned counsel for the petitioner. Also heard Mr. B. Sarma, learned Additional Public Prosecutor appearing for the State of Assam.
- 2.** This bail application under Section 483 of the BNSS, 2023 has been filed by the petitioner, namely, *Bivesh Kumar*, who has been detained behind the

bars since 14.06.2023 (for more than 1 year 6 months and 4 days) in connection with Special (NDPS) Case No. 70/2023 corresponding to Bazaricherra P.S. Case No. 126/2023 under Section 22(c)/25/29 of the NDPS Act, 1985 pending in the Court of learned Special Judge, Karimganj.

3. The gist of the accusation in this case is that on 13.06.2023, one S.I. Pranab Mili, SI of Police and In-charge of Churaibari Police Watch Post, had lodged an FIR before the Officer-In-Charge of Bazaricherra Police Station, *inter alia*, alleging that during daily *naka* checking duty at *naka* check point of Churaibari Watch Post at National Highway No. 8, three trucks bearing Registration Nos. WB 11D 4702, WB 29B 5386 and NL 01A F0300, coming together from Guwahati side towards Tripura were signaled to be stopped and were searched and during search operation 93,920 numbers of bottles of cough syrups containing codeine phosphate in 587 numbers of cartons were recovered from there. The said cough syrups were seized and the drivers of the vehicle bearing Registration No. WB 11D 4702, namely, Bivesh Kumar (present petitioner) and the driver of vehicle bearing registration No. WB 29B 5386, namely, Saminur Islam were arrested. The driver of the truck bearing Registration No. NL 01A F0300 could not be apprehended as he fled away from the scene.

4. On receipt of the said FIR, Bazaricherra P.S. Case No. 126/2023 was registered and investigation was initiated. Ultimately, on completion of the investigation, charge sheet bearing No.167/2023 dated 30.11.2023 was laid against the arrested accused persons, namely, Bivesh Kumar (present petitioner) and Saminur Islam.

5. The learned counsel for the petitioner has submitted that the petitioner is the driver of the truck bearing Registration No. WB-29B-5386 from which 71

nos. of cartons containing 11,360 nos. of bottles of Codeine Phosphate Cough Syrups recovered. He has submitted that the petitioner was engaged as a driver by his employer and he was only carrying the goods from the place of loading of the consignment to its destination without knowing as to what was there in the consignment and hence, it is submitted that the petitioner was not having conscious possession of the seized contraband.

6. It is also submitted by the learned counsel for the petitioner that the FIR itself shows that the sample were packed at the place of occurrence and the sample were also taken at the place of occurrence which is against the mandate of Section 52A of the NDPS Act, 1985, which requires sampling and taking of photographs of the contraband before the Magistrate. He submits that the petitioner is entitled to bail due to violation of the mandatory provisions of section 52A of the NDPS Act, 1985 by the prosecution side.

7. The learned counsel for the petitioner has submitted that the petitioner has been detained behind the bars for more than one year and six months, however, till date even the charges are yet to be framed and, hence, he submits that due to the prolonged incarceration his fundamental rights under Article 21 of the Constitution of India would override the embargo of Section 37 of the NDPS Act, 1985 and on that ground, he is entitled to get bail.

8. 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.*"

9. The learned counsel for the petitioner has also relied on ruling of the Apex Court in the case of "**Zakirul Islam @Md. Zakirul Islam @ Zakir Vs. State of Assam**" Special Leave to Appeal (Crl.) No. 3632/2024 dated 15.07.2024 and in the case of "**Ankur Chaudhary Vs. State of Madhya Pradesh**" Special Leave to Appeal (Crl.) No. 4648/2024 dated 28.05.2024, wherein the Apex Court granted bail to the petitioner in offence concerning commercial quantity of Narcotic Drugs and Psychotropic Substances on the ground of prolonged incarceration for more than 1 year 6 months.

10. The learned counsel for the petitioner has also submitted that one of the co-accused, namely, Saminur Islam who was also arrested under similar circumstances in this case and who is the driver of the another vehicle which has been seized in connection with this case has already been granted bail by this Court by order dated 19.12.2024 passed in Bail Application No. 3427/2024 on the ground of prolonged incarceration.

11. On the other hand, learned Additional Public Prosecutor has opposed the prayer for grant of bail to the petitioner on the ground that there are sufficient incriminating materials on record regarding the involvement of present petitioner in the alleged offence and, hence, the embargo of Section 37 of the NDPS Act, 1985 would be applicable to the instant case.

12. He submits that the petitioner was driving the truck in which huge consignment of codeine phosphate was carried, hence, he would be treated of having conscious possession of the goods which he was carrying in the vehicle driven by him.

13. The learned Additional Public Prosecutor has also submitted that as regards the plea taken by the petitioner regarding prolonged incarceration is

concerned, same is not applicable to this case as though the charge-sheet against the petitioner was laid on 30.11.2023, however, the supplementary charge-sheet against the co-accused was laid on 05.02.2024. Moreover, he also submits that the trial could not proceed as the petitioner had filed an application for his discharge and the case was fixed for orders on the discharge petition filed by the petitioner.

14. I have considered the submissions made by the learned counsel for both the sides and have gone through the materials available on record including the scanned copy of the case record of Special (NDPS) Case No. 70/2023.

15. 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*”.

16. The Apex Court in “***Rabi Prakash Vs. State of Orissa***” reported in “**2023 SCC Online SC 1109**,” has observed 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.*”

17. In the case of “***Ankur Chaudhary Vs. State of Madhya Pradesh***” (supra), the Supreme Court of India has observed as follows: -

“.....it is to observe that failure to conclude the trial within a reasonable time resulting in prolonged incarceration militates against the precious fundamental right guaranteed under Article 21 of the Constitution of India, and as such, conditional liberty overriding the statutory embargo created under Section 37(1)(b) of the NDPS Act may, in such circumstances, be considered.”

18. In this regard *the* observations made by the Apex Court in the case of **Satender Kumar Antil** reported in **AIR 2022 SC 3386** 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.”

19. In the instant case, the petitioner was arrested on 14.06.2023 and since then he has been languishing behind the bars.

20. It also appears from records that till date even the charges are not yet framed against the present petitioner and for the same no fault can be

attributed to the present petitioner.

21. This Court is of considered opinion that in view of the ruling cited hereinabove as well as in view of the facts and circumstances of this case, there does not appear to be any fault on the part of the present petitioner for his prolonged incarceration and delayed culmination of trial and, therefore, under the circumstances of this case, his fundamental rights guaranteed under Article 21 of the Constitution of India has outweighed the embargo of Section 37 of the NDPS Act, 1985 and thus he is entitled to get bail on the ground of infringement of his Fundamental Rights guaranteed under Article 21 of the Constitution of India.

22. As the petitioner is found to be entitled to bail on the ground of prolonged incarceration, the plea taken by him regarding violation of section 52A of the NDPS Act, 1985 as well as not having conscious possession of the seized contraband is not required to be considered in this bail application and same is left to be considered by the Trial Court in the trial.

23. In view of the above, the petitioner, namely, *Bivesh Kumar*, is allowed to go on bail of Rs.1,00,000/- (Rupees One Lakh only) 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, Assam with the following conditions:

- i. That the petitioner shall cooperate in the trial of Special (NDPS) Case No. 70/2023, which is pending in the Court of learned Special Judge, Karimganj, Assam;
- 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 his contact details including photocopies of his Aadhar Card or Driving License or PAN card, mobile number, and 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 petitioner shall submit his leave address and contact details during such leave before the Trial Court; and

vi. That the petitioner shall not commit any offence while on bail.

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

JUDGE

Comparing Assistant