

GAHC010221622022



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

Case No. : Bail Appln./2917/2022

SUSHIL PRASAD SAHU @ SUSHIL SAHU AND ANR
S/O LATE KAMAL PRASAD
R/O HOUSE NO. 09, EKTA PATH, BHASKAR NAGAR, AMBARI, P.S. FATASIL
AMBARI, DIST. KAMRUP (M), ASSAM, PIN-782025

2: DHANIKLAL PRASAD @ PAPPU
S/O LATE BHOLA PRASAD

R/O TELIPATTI
P.O. AND P.S. POROMPAT
DIST. IMPHAL EAST
MANIPUR

VERSUS

THE UNION OF INDIA
REP. BY NARCOTIC CONTROL BUREAU (NCB), GUWAHATI.

Advocate for the Petitioner : MR. P K ROYCHOUDHURY

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 10.01.2024

1) Heard Mr. P. K. Roy Chowdhury, learned counsel for the petitioners. Also heard Mr. S. C. Keyal, learned Standing Counsel, NCB.

2) This application under section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, Sushil Prasad Sahu @ Sushil Sahu and Dhaniklal Prasad @ Pappu who are detained behind the bars since 06.11.2020 in connection with NDPS Case No.18/2021 pending before the Court of learned Additional Sessions Judge No.5, Kamrup (M), Guwahati.

3) On 03.05.2021, the Union of India represented by the Narcotics Control Bureau (NCB) through the Intelligence Officer, Guwahati Zonal Unit, Guwahati filed a complaint before the learned Sessions Judge, Kamrup (M), *inter-alia*, stating that on 06.11.2020 the Intelligence Officer, NCB, Guwahati got an information through reliable source that one person, namely, Sushil Sahu will be carrying 1.5 kg to 2 kg of methamphetamine tablets for delivering the said consignment to some unknown person. Accordingly, a search team was constituted and on 06.11.2020 at about 5:20 pm when a scooty bearing registration No. AS 01 BG 7311 arrived at Bye lane No.1, Rajgarh Road, Chandmari, Guwahati, same was intercepted. The person driving the scooty parked the scooty near the road and open the boot of the scooty and took out one white coloured polythene packet from the said scooty. The Intelligence Officer, NCB introduced himself to the said person whose name was Sushil Prasad Sahu, who was at that time holding one white coloured plastic packet. After opening the said white colour packet it contains two plastic packets inside the said packet and in one of the packet 986 gram of methamphetamine tablets were found. In the second packet 858 gram of methamphetamine tablets were found. The total weight of methamphetamine tablets recovered was 1.844 kg.

4) Thereafter, on the same day after getting information from the petitioner Sushil Prasad Sahu, a search operation was conducted in his house at

Bhaskar Nagar, Ambari, Kamrup (M) and 234 gram of methamphetamine tablets was recovered from there. The co-accused Dhanik Lal Prasad, who was there in the said house, was also arrested from there.

5) Learned counsel for the petitioners has submitted that both the petitioners were arrested on 06.11.2020 and since then they are languishing behind the bars.

6) Learned counsel for the petitioners has submitted that though the NCB team at the time of doing the search also recovered Rs.5760/- from the person of petitioner No.1, however, no information was provided to him by the team conducting the search that he has a legal right to be searched in presence of a Gazetted Officer or a Magistrate, hence it is submitted that there was a total non-compliance of the mandatory requirement of Section 50 of the NDPS Act, 1985 and on that ground learned counsel for the petitioners has prayed for allowing the petitioners to go on bail.

7) Learned counsel for the petitioners has cited the ruling of the Apex Court in the case of “***State of Punjab Vs Baldev Singh***” reported in **(1999) 6 SCC 172**, wherein it was observed by the Apex Court that non-compliance of mandatory provisions of Section 50 of the NDPS Act ,1985 would vitiate the trial.

8) In support of his submissions, learned counsel for the petitioners has also cited the ruling of the Apex Court in “***Raju Vs. State of W.B.***” reported in **(2018) 9 SCC 708**, wherein it was observed as follows:

18. In Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345: (2014) 2 SCC (Cri) 563], on a search of the pers+on of the respondent, no substance was found. However, subsequently, opium was recovered from the bag of the respondent. A two-Judge Bench of this Court considered

whether compliance with Section 50(1) was required. This Court held that the empowered officer was required to comply with the requirements of Section 50(1) as the person of the respondent was also searched. [Reference may also be made to the decision of a two-Judge Bench of this Court in Dilip v. State of M.P. [Dilip v. State of M.P., (2007) 1 SCC 450: (2007) 1 SCC (Cri) 377]] It was held thus: (Parmanand [State of Rajasthan v. Parmanand, (2014) 5 SCC 345: (2014) 2 SCC (Cri) 563], SCC p. 351, para 15)

“15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application.”

9) Learned counsel for the petitioners has also submitted that the petitioners are languishing behind the bars for last three years two months and four days (total 1160 days), however, even charges are yet to be framed against the present petitioners, and on the ground of prolonged incarceration, they are entitled to go on bail.

10) Learned counsel for the petitioners has cited the ruling of the Apex Court in “***Rabi Prakash 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.***”

11) On the other hand, learned standing counsel, NCB has vehemently opposed the grant of bail to the present petitioners on the ground that quantity of contraband in this case is of commercial quantity and due to the embargo of Section 37 of the NDPS Act, 1985, the petitioners may not be released on bail.

12) Learned standing counsel, NCB has also submitted that in the instant case, nowhere there is any mention about personal body check of the petitioner No.1, i.e., Sushil Prasad Sahu and mere mentioning in the seizure lists that Rs. 5,760/- being recovered from the petitioner would not imply that he was subjected to body search, when no mention about such personal check is there on record.

13) It is also submitted by learned standing counsel, NCB that the contraband at the first instance was recovered from the plastic bag which was carried by the petitioner, Sushil Prasad Sahu and therefore, as the contraband was recovered from a bag carried by the petitioner, Section 50 of the NDPS Act, 1985 shall have no application.

14) In support of his submission, learned standing counsel, NCB has cited a ruling of the Apex Court in the case of “***State of Punjab Vs. Baljinder Singh***”, reported in **(2019) 10 SCC 473**, wherein it was observed by the Apex Court that as regards applicability of the requirement of Section 50 of the NDPS Act, 1985 is concerned, it is well settled that the mandate of Section 50 of the Act is confined only to personal search, and not to search of a vehicle or a container or a premises. It was also observed by the Apex Court that when the personal search of the accused did not result in recovery of any contraband, even if there was any such recovery, the same could not be relied upon for the want of compliance of requirement of Section 50 of the Act but the search of the vehicle and recovery of contraband in pursuant thereto having stood, proved merely

because there was non-compliance of Section 50 of the Act as far as personal search was concerned, no benefit can be extended so as to invalidate the effect of recovery from search of the vehicle. Any such idea would be directly in the teeth of the conclusion that the search has to be in relation to a person, as contrasted to search of premises, vehicle, or articles for applicability of Section 50 of the NDPS Act, 1985.

15) Learned standing counsel, NCB has also furnished a compilation of the dates in NDPS Case No. 18/2021 pending before the Trial Court to show that the prosecution was not at fault for any delay in conduct of the trial of the said case, and the delay was mainly due to the fact that the Presiding Officer of the Court, in which the NDPS Case No. 18/2021 is pending, was on leave or was transferred and therefore, the charges could not be framed till now. It is further submitted by learned standing counsel, NCB that next date in NDPS Case No. 18/2021 is fixed on 20.01.2024 for consideration of charges.

16) I have considered the submissions made by learned counsel for both the sides and have gone through the materials available on record, including the scanned copy of the case record of NDPS Case No. 18/2021. As regards non-compliance of the provisions of Section 50 of the NDPS Act, 1985, in the instant case is concerned, it appears that the first recovery made from the petitioner No.1 Sushil Prasad Sahu, was from a polythene bag which was carried by him and which was taken out by the petitioner No.1 from the boot of his scooty. There is nothing on record to suggest that any personal search of the petitioner No.1 Sushil Prasad Sahu was conducted by the Seizing and Search officer and mere mentioning in the second seizure list that Rs. 5760/- was recovered from Sushil Prasad Sahu would not in itself imply that any personal search of the petitioner No.1 Sushil Prasad Sahu was conducted in absence of any evidence

to that effect on record and therefore, at this stage, when there is no evidence on record clearly suggesting that any personal search of the petitioner, Sushil Kumar Sahu, was conducted by the Seizing Officer, this Court is of the considered opinion that at this stage, there is no sufficient materials on record to suggest that the provisions of Section 50 of the NDPS Act, 1985, should have been complied with in the instant case. As apparently the polythene bag was carried by the petitioner No.1, after taking out the same from the boot of his scooty and there is nothing on record to suggest that any personal search of the petitioner No.1 was conducted, this Court is of considered opinion that Section 50 of the NDPS Act, 1985 will have no application in the instant case.

17) As regards submissions of learned counsel for the petitioners, that the petitioners are detained behind the bars since a very long period of time and on the ground of prolonged incarceration they may be allowed to go on bail, it appears that in the instant case commercial quantity of contraband has been recovered from the possession of the petitioners, however, the fact that the present petitioners are detained behind the bars for the last 3 years, 2 months and 4 days, and not even the charges are framed till now in itself shows that the trial of the case would not culminate soon and the petitioners may be entitled to get bail on the ground of prolonged incarceration only.

18) 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***" and also considering the observation of the Supreme Court of India in "***Rabi Prakash Vs. State of Orissa***" (order dated 13.07.2023 passed in SLA (CrI.) No. 4169/2023), wherein the Apex Court has observed that "***prolonged incarceration, generally militates against the***

most precious fundamental right guaranteed under Article 21 of the Constitution of India and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b) (ii) of the NDPS Act, 1985, this Court is of considered opinion that if this Court comes to a finding that there is undue delay in completion of trial and that there is prolonged incarceration of petitioners, they would be entitled to get bail on the ground of prolonged incarceration only as in such case of prolonged incarceration, the right to life and personal liberty under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

19) It is also pertinent to mention herein that the Supreme Court of India had granted bail to accused facing charges for possession of commercial quantity of contraband only on the ground of prolong incarceration in “***Shariful Islam @ Sarif Vs. State of West Bengal***” (order dated 04.08.2022 in SLP Criminal No. 4173/2022), wherein the accused was detained behind the bar for one year six months.

20) In “***Nitesh Adhikari Vs. State of West Bengal***” (Order dated 04.05.2022 in SLP Criminal No. 5769/2022, the Apex Court granted bail to accused facing accusation under Section 21(c) of the NDPS Act, 1985 on the ground of incarceration of one year seven months.

21) Similarly in “***Md. Salman Hanif Shaikh Vs. State of Gujarat***” (Order dated 22.08.2022 in SLA Criminal No. 5530/2022, wherein the petitioner was granted bail on the ground of prolong incarceration of two years.

22) In the instant case, also, as already discussed herein above, that the petitioners are detained behind the bars since 06.11.2020 (for last 3 years, 2 months and 4 days) and the trial is yet to commence as even charges are not

yet framed.

23) Under the above circumstances, this Court is of considered opinion that in the instant case, also the prolonged incarceration of the present petitioners under the facts and circumstances of this case, overrides the embargo of Section 37 of the NDPS Act, 1985, and the fundamental rights guaranteed to the petitioners under Article 21 of the Constitution of India, which includes a right to speedy trial, outweighs the embargo of Section 37 of the NDPS Act, 1985 and the above named petitioners are therefore, entitled to get bail in NDPS Case No. 18/2021, which is pending in the Court of learned Additional Sessions Judge No.5, Kamrup (M), Guwahati.

24) In view of the above, the petitioners, namely, 1. Sushil Prasad Sahu @ Sushil Sahu and 2. Dhaniklal Prasad @ Pappu are allowed to go on bail of Rs. 50,000/- (Rupees Fifty Thousand only) each with two sureties of like amount (One of whom should be a government employee) subject to the satisfaction of the learned Additional Sessions Judge No.5, Kamrup (M), Guwahati with the following conditions:

- i.** That the petitioners shall cooperate in the trial of NDPS Case No.18/2021, which is pending in the Court of learned Additional Sessions Judge No.5, 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 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 persons from disclosing such facts before the Trial Court in the trial of NDPS Case No.18/2021 pending against the present petitioners.

iv. That the petitioners shall provide their contact details including photocopies of their Aadhar Card, Driving License, PAN card, mobile number, and other contact details to 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 their leave address and contact details during such leave before the Trial Court.

vi. That the petitioners shall not commit any offence similar to the one for which they have been accused of, while they are on bail.

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

JUDGE

Comparing Assistant