

GAHC010231662023



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

Case No. : Bail Appln./3765/2023

BAIJU THAKUR
S/O TARAKANT THAKUR
R/O H. NO 339, GALI NO. 16, BLOCK-F, MOLARBAND, NEW DELHI-110044

VERSUS

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

Advocate for the Petitioner : MR. M BISWAS

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 13.02.2024

Heard Mr. M. Biswas, learned counsel, for the accused and also heard Mr. S.C. Keyal, learned Standing Counsel for the Union of India (NCB).

2. This application, under Section 439 Cr.P.C., is preferred by the accused, namely, **Shri Baiju Thakur**, who has been languishing in jail hajoot, in

connection with **NDPS Case No. 08 of 2021**, under Section **20(b)(ii)(c)/29 NDPS Act**, pending before the court of learned Special Judge, NDPS, Kamrup, Amingaon since 01.10.2020, for grant of bail.

3. It is to be noted here that aforementioned case has been registered on the basis of a complaint lodged by one Kaushik Sarkar, Intelligence office, Guwahati Zonal Unit of Narcotic Control Bureau (NCB), on 03.02.2021, to the effect that acting on a tip off, he has intercepted one Truck, bearing registration No. NL 01 AE 1397, near Tolaram Bafna Civil Hospital, Kamrup, Amingaon and recovered 707.050 kg of Ganja from three persons namely, Tarun Kumar, Pramod Ray and Sujit Kumar and seized the same by preparing seizure list.

4. Mr. M. Biswas, the learned counsel for the accused submits that-this is the second bail application and the first one, being BA No. 2537/2022, was dismissed by this court on 16.12.2022. Mr. Biswas, further submits that the ground for filing this second application is that while dismissing the first application, this court was pleased to direct the learned court below to complete trial at the earliest possible time and if necessary to take recourse to provision of Section 309(1) Cr.P.C., but, inspite of such direction the learned court below has failed to complete trial and examined only three witnesses, out of 8 cited witnesses, after dismissal of the first application, about one year back. Mr. Biswas, also submits that the accused is behind the bar for 3 years 3 months and 17 days, and that his right to speedy trial stands violated. It is the further submission of Mr. Biswas that except being the owner of the Truck, from where the contraband substances were recovered, there is no incriminating materials against the accused and nothing was found in his possession and that he was arrested only on the basis of statement under section 67 of NDPS Act and in view of the decision of Hon'ble Supreme Court in the case of **Tofan Singh vs.**

State of Tamil Nadu reported in **(2021) 4 SCC 1**, such statements are inadmissible. Mr. Biswas, also submits that the accused had voluntarily appeared before the I.O., immediately after receiving the notice and that he will appear before the learned court below on each and every date, and therefore, it is contended to allow this petition. Mr. Biswas, has referred following 16 case laws, to contend that in those cases considering the period of detention bail was granted to the accused persons.

- (i) Sharif Islam @ Sarif vs. The State of West Bengal; Petition for Special Leave to Appeal (Crl.) 4173/2022;
- (ii) Dheeraj Kumar Shukla vs. The State of Uttar Pradesh; Petition(s) for Special Leave to Appeal (Crl.) 6690/2022;
- (iii) Anjan Nath vs. The State of Assam; B.A. No. 2022/2023
- (iv) Anjan Nath vs. The State of Assam; Petition(s) for Special Leave to Appeal (Crl.) 9860/2023;
- (iv) Chitta Biswas @ Subhas vs. The State of West Bengal; Criminal Appeal No(s). 245/2020
- (v) Nitish Adikari @ Bapan vs. The State of West Bengal; Petition(s) for Special Leave to Appeal (Crl.) 5769/2022;
- (vi) Mohammad Salman Hanif Shaikh vs. The State of Gujarat; Petition(s) for Special Leave to Appeal (Crl.) 5530/2022;
- (vii) Harish Mia @ Harij Mia vs. The State of Assam; in B.A. No. 2475/2023;
- (viii) Abu Sufian vs. The State of Assam; in B.A. No. 1128/2023
- (ix) Bayar Debbarma @ Jakki and Anr. vs. Union of India in B.A. No. 3548/2023
- (x) Rabi Prakash vs. The State of Odisha; Petition(s) for Special Leave to Appeal (Crl.) 4169/2023;
- (xi) Lamabamayum Brojen Singh vs. Union of India; in B.A. No. 3779/2023
- (xii) Md. Senaul Sk. @ Sanaul Sekh @ Senaul Sekh & 2 Others vs. Union of

India; in B.A. No. 3406/2023

(xiii) Birendra Kumar vs. Union of India, in B.A No. 3830/2023;

(xiv) Sanjay Kr. Shah vs. Union of India B.A. No. 3881/2023;

(xv) Indra Kumar Bhattarai @ Indram Kr. Bhattaroy vs. The Union of India
B.A. No. 3964/2023

(xvi) Saddik Hussain Rajbarbhuyan vs. The Union of India B.A. No.
3158/2023

5. On the other hand, having opposed the petition, Mr. S.C. Keyal, learned Standing Counsel, NCB, submits that the accused is the registered owner of the Truck from where contraband substances were recovered and that too from a specially made cavity of the vehicle and without his permission and knowledge the same cannot be made. Further, Mr. Keyal submits that the accused was implicated by the co-accused and there was monetary transaction between him and one of the co-accused and CDR analysis of present accused and of the driver of the vehicle, namely, Tarun Kumar also establish frequent communication between them. Mr. Keyal, also submits that trial is going on, and that out of 8 cited witnesses, three have already been examined and the learned court below has been issuing summon to the witnesses and there is no fault on the part of the prosecution and therefore, it is contended to dismiss the petition.

6. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the record received from the learned court below.

7. It is not in dispute that this is second bail application and the first one, being BA No. 2537/2022, was dismissed by this court on 16.12.2022. The ground for filing this second bail application is that while dismissing the first application,

this court was pleased to direct the learned court below to complete trial with in earliest possible time by taking recourse to section 309(1) Cr.P.C., but despite such direction, the learned court below within a period of one year, able to examine only two witnesses and thereby right to speedy trial stands violated. However, to a pointed query of this court, as to who is responsible for the delay, Mr. Biswas submits that the prosecution side is responsible for the delay as it has failed to produce the witnesses.

8. To appreciate the submission of Mr. Biswas, I have gone through the scanned copy of the case record received from the learned court below and I find that in between dismissal of the first bail application on 16.12.2022, till filing of the present application on 11.10.2023, the learned court below has examined only two witnesses.

9. Further, having gone through the order sheet of the record of learned court below, I find that despite specific direction of this court to expedite the trial, and if necessary, to take recourse of Section 309(1) Cr.P.C., no endeavour appears to be made by the learned court below. From the order dated 06.01.2023, it appears that the learned counsel for the accused has produced the copy of order of this court dated 16.12.2022, before the learned court below. Despite, the learned court below has failed to expedite the trial and take recourse to section 309(1) Cr.P.C.

10. Thus, it becomes apparent from the record of the learned court below that no endeavour was made to expedite the trial and that the mandate of section 309(1) has not been followed. Consequently, only two witnesses could be examined within a period of almost one year.

11. Further, it appears that there is lapse on the part of the accused persons

also, as on some dates when the witnesses turned up the same could not be examined on account of absence of the counsel for the accused. It also appears that the prosecution side also could not produce the witnesses despite direction of the learned court below. The record of the learned court below also indicates that the NCB has failed to take step to issue summon to the prosecution witnesses.

12. Thus, it appears that there is lapse on the part of the learned court below, the accused and the prosecution side; which caused delay in trial that allegedly leads to impairment of right to speedy trial of the accused. Now, what left to be seen is can the accused be allowed to reap the benefit of delayed trial, while he is also equally responsible for the same. The answer is emphatic no.

13. It is a fact that the accused has been languishing in jail hazoot since 01.10.2020. In the case of **NCB vs. Mohit Agarwal**, reported in **[2022] 0 Supreme (SC) 619**, a three Judges Bench of Hon'ble Supreme Court has held that the length of period of his custody or the fact that the charge sheet has been filed and the trial has commenced are by themselves not consideration that can be treated as persuasive ground for granting relief to the accused under section 37 of the NDPS Act. That being so, the length of detention, to the considered opinion of this court, cannot be a ground of releasing the accused on bail.

14. I have considered the submission of Mr. Biswas, in respect of absence of materials against the accused and also gone through the ratio, laid down in the case of **Tofan Singh's**, but I find that the same would hardly advanced his case. It is, however, a fact that no contraband substance was recovered from the possession of the accused. Mr. Biswas, has rightly pointed this out at the time of hearing. But, even accepting his submission that the contraband

substances were not recovered from the conscious possession of the present accused, yet, the same does not absolve it of level of scrutiny required under section 37(1) (b) (ii) of NDPS Act, as held by Hon'ble Supreme Court in **Union of India through NCB, Lucknow vs. Nawaz Khan** reported in **(2021) 10 SCC 100**, since the contraband substances recovered from the possession of the co-accused is of commercial quantity. So, the accused has to satisfy the twin requirement of section 37 of the NDPS Act.

15. It is to be noted here that the accused is admittedly the registered owner of the vehicle, from which the contraband substances were recovered. The substances were recovered from a specially made cavity of the vehicle. I find substance in the submission of Mr. Keyal, the learned Standing Counsel for the NCB submits that without the connivance and knowledge of the owner the same cannot be made. Therefore, it cannot be said that there was no culpable mental state of the accused in commission of the crime.

16. Also I find substance in the submission of Mr. S.C. Keyal, the learned Standing Counsel for the NCB that the CDR analysis of mobile phones of the accused with the co-accused shows frequent communication between the accused with the co-accused i.e. the driver of the vehicle from where the contraband substances were recovered at the material time of occurrence.

17. Moreover, the record of learned court below indicates that accused has criminal antecedent and he is accused in charge sheet No. 140/2012, dated 09.10.2012, in connection with Jhanjharpur P.S. FIR No.34/2012, under section 364/120(B) IPC.

18. But, from the aforementioned facts and circumstances it cannot be said that the accused has succeeded in satisfying the twin requirements of section

37 of the NDPS Act that he is not guilty of the offence and that he will not commit any such offence while on bail. It is to be mentioned here that in the case of **Union Of India vs. Ajay Kumar Singh @ Pappu**, Criminal Appeal No. 952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28 March, 2023, a bench of co-equal strength of Hon'ble Supreme Court, while setting aside the order of granting bail, by the Allahabad High Court, to the accused involving in commercial quantity of contraband substance, has held as under:-

“In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.”

19. In view of the above and also in view of the embargo under Section 37 of the NDPS Act, this Court is of the view that it is not a fit case where the privilege of bail can be extended to the accused. It is well settled by Hon'ble Supreme Court in the case of **Mohit Agarwal** (supra), that liberal approach in the matter of bail, under the NDPS Act is indeed uncalled for.

20. Though, Mr. Biswas has relied upon the decision of Hon'ble Supreme Court in **Rabi Prakash** (supra) to contend that though the quantity of contraband substances, so recovered from the possession of accused persons were of commercial quantity, yet, the conditional liberty available under Article 21 of the Constitution of India, must override the statutory embargo created under section 37 of the NDPS Act, yet the fact and circumstance of the case in hand is quite different from the case, as in the case in hand the accused is also responsible for the delay and as such the ratio laid down in the said case would not advance his case. The other decisions referred by Mr. Biswas also would not

advance his case as only the length of detention was considered in those cases, but in view of the decision in **Mohit Agarwal** (supra) that cannot be a ground for releasing on bail. Moreover, decision in **Ajay Kumar Singh @ Pappu**, (supra) and in **Mohit Agarwal** (supra), are earlier in point of time, and therefore, the same also cannot be ignored altogether in view of the doctrine of binding precedent, as held by a five Judges bench of Hon'ble Supreme Court in - **National Insurance Company Ltd. vs. Pranay Sethi & Another reported in (2017) 16 SCC 680.**

21. Accordingly, the instant petition stands dismissed. However, the learned court below is directed to conduct day to day trial by resorting to section 309(1) Cr.P.C. and complete the same at the earliest possible time, without being influenced by any of the observation made herein above as the same is made only for the purpose of disposing this bail application, not merit of the case.

22. The Registry shall communicate this order to the learned court below by a special messenger/e-mail and on receipt of which the learned court below shall proceed to hear the case on day to day basis keeping in mind that right to speedy trial is a fundamental right of the accused encompassed under Article 21 of the Constitution of India.

23. In terms of above this bail application stands disposed of.

JUDGE

Comparing Assistant