

GAHC010235102023



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

Case No. : Bail Appln./3768/2023

MAJIBUR RAHMAN
SON OF - MD BASIRUDDIN RESIDENT OF VILLAGE- UDALI KACHARI
GAON, LANKA POLICE STATION- LANKA DISTRICT - HOJAI (ASSAM)

VERSUS

THE STATE OF ASSAM
REPRESENTED BY PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. R SARMA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 05.01.2024

Heard Mr. R. Sarma, learned counsel for the petitioner. Also heard Mr. D. Das, learned Additional Public Prosecutor, Assam.

2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner Majibur Rahman, who has been detained behind the bars since 28.10.2021 (for the last two years two months and eight days) in connection with NDPS Case No.168/2022 pending before the

Court of Additional Sessions Judge, FTC No.3, Kamrup(M) Guwahati.

3. The gist of accusation in this case is that on 27.10.2021 one Sri Rohit Das had lodged an FIR before the Officer-In-Charge of Special Task Force Police Station, Assam, inter alia, alleging that on receipt of an information through reliable source that some illicit drugs were being carried by some person at Lanka in Hojai district. The informant who is a member of Special Task Force proceeded to Lanka to lodge a search operation and they conducted a search operation in front of Ashique Nursery, near National Highway-54 under Lanka Police Station and apprehended the present petitioner from there and recovered 16 packets containing 280 gm suspected heroin from his possession.
4. On receipt of the same, STF P.S. Case No.5/2021 under Section 21(c) NDPS Act was registered and investigation was initiated. Ultimately after completion of the investigation charge-sheet was laid against the present petitioner and one Sahabuddin under Section 21(c) of the NDPS Act, 1985.
5. Learned counsel for the petitioner has submitted that the petitioner has been detained behind the bars since 28.10.2021 i.e. for the last two years two months and eight days. Though the charge-sheet was laid before the trial Court on 01.08.2022, however, till today not even the charges have been framed in the said case.
6. It is also submitted by the learned counsel for the petitioner that the co-accused namely Sahabuddin is absconding and therefore, trial could not be proceeded. Learned counsel for the petitioner has also submitted that the petitioner is entitled to get the bail mainly on the ground of prolonged incarceration as per the observation of the Apex Court in ***Mohd Muslim @ Hussain –vs- State (NCT of Delhi)*** reported in ***2023 SCC Online SC 352***.
7. On the other hand, learned Additional Public Prosecutor opposed the grant of bail to the present petitioner on the ground that contraband seized from the possession of the present petitioner is of commercial quantity and therefore embargo of Section 37 comes into place.
8. It is also submitted by the learned Additional Public Prosecutor that the trial of the present petitioner could not proceed because of the fact that the co-accused Sahabuddin who is absconding is yet to be apprehended.
9. I have considered the submission made by the learned counsel for both the parties and have perused the scan copy of the case record of NDPS Case No.168/2022. Though this case involves commercial quantity of contraband however, considering the fact that the petitioner has been detained behind the bar for last two years two months and eight days, the question before this Court is as to

whether prolonged incarceration of the petitioner would override the embargo of Section 37 of the NDPS Act, 1985 and if this Court comes to a finding that delay is long enough to outweigh the embargo of Section 37 of the NDPS Act, 1985, he may have to be released on bail in spite of the embargo of Section 37.

10. It appears that the delay in trial is mainly because of the fact that the co-accused is yet to be apprehended and the present petitioner is not at fault for the delay caused in the trial. As he has been detained behind the bar all along since the day of his arrest, the petitioner has a right to get a speedy trial under Article 21 of the Constitution of India.

11. Considering that the Hon'ble 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 Hon'ble Supreme Court of India in "**Rabi Prakash Vs. State of Orissa**" [order dated 13.07.2023 passed in Special Leave to Appeal (Crl.) No.4169/2023], wherein Hon'ble 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 the 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 the petitioner, he would be entitled to get bail on the ground of prolonged incarceration only as in such case of prolonged incarceration, the fundamental 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.

12. It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to the 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**" (order dated 04.08.2022 in SLP Criminal No. 4173/2022), wherein the accused was detained behind bars for one year and six months.

13. In "**Nitesh Adhikari Vs. State of West Bengal**" (Order dated 04.05.2022 in SLP Criminal No. 5769/2022), the 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.

14. Similarly in "**Md. Salman Hanif Shaikh Vs. State of Gujarat**" (Order dated 22.08.2022 in SLA Criminal No. 5530/2022), the petitioner was granted bail by the Apex Court on the ground of prolonged

incarceration of two years.

15. In the instant case also, the petitioner has been detained behind the bar since 28.10.2021 (for the last two years two months and eight days) and the charges are yet to be framed. There are seven numbers of listed witnesses in the charge-sheet and there is a likelihood that culmination of trial would take some time.

16. Under the facts and circumstance in the case, this Court is of the considered opinion that long incarceration of the present petitioner for the last two years two months and eight days outweighs the embargo of Section 37 of the NDPS Act, 1985, and the petitioner is entitled to get bail in this case.

17. In view of the above, the petitioner namely Majibur Rahman is hereby allowed to go on bail of Rs.50,000/- with two sureties of the like amount subject to the satisfaction of the Trial Court with the following conditions that:

i) The petitioner shall cooperate in the trial of NDPS Case No. 168/2022 which is pending before the Court of Additional Sessions Judge, FTC No.3, Kamrup(M), Guwahati;

ii) The petitioner shall regularly appear before the Trial Court as and when so required by the Trial Court;

iii) 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;

iv) The petitioner shall also provide his contact details including photocopy of Adhar Card, Driving Licence, Pan Card, Mobile Number and other contact details to the Trial Court.

v) The petitioner shall not directly or indirectly make any inducement thereof or promise to any other person/witness who may be acquainted with the fact of the case so as to dissuade such person/witness from disclosing such facts before the Trial Court.

With the above observation, the bail application stands disposed of.

JUDGE

Comparing Assistant