

GAHC010236862023



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

Case No. : Bail Appln./3881/2023

SANJAY KUMAR SHAH
S/O LATE VINDESH SHAH
R/O WARD NO. 16, VILL- MAHNAR TARA CHAURI, P.O. AND P.S. MAHNAR,
DIST. VAISHALI, BIHAR,
PIN- 844506

VERSUS

THE UNION OF INDIA
REP. BY THE SC, NCB

Advocate for the Petitioner : MR. M BISWAS

Advocate for the Respondent : SC, NCB

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 22.01.2024

1) Heard Mr. M. Biswas, learned counsel for the petitioner. Also heard Mr. S. C. Keyal, learned standing counsel for the NCB.

2) This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioner, namely, Sanjay Kumar Shah who has been detained behind the bars since 25.07.2021 (for last 2 years 5 months and 28 days, i.e., 910 days) in connection with NDPS Case No. 04/2022 corresponding to NCB Crime No. 18/2021 under Sections 20(b)(ii)(C)/28/29/35 and 54 of the NDPS Act, 1985 pending before the Court of the learned Session Judge, Kamrup, Amingaon.

3) The gist of the accusation in this case is that on 23.07.2021 at about 10.00 hours, one Shri Kaushik Sarkar Kumar, Intelligence Officer, NCB Guwahati received an information from reliable sources that on 25.07.2021, two persons, namely, Javaid Iqbal and Sanjay Kumar Shah (the present petitioner) were coming from Tripura in a truck bearing registration No. JK 02 BG 6260 carrying a huge quantity of ganja. Accordingly, one NCB team conducted naka checking near Narayana Super Speciality Hospital at Amingaon on 24.07.2021 at about 10:45 p.m. and thereafter, on 25.07.2021, at about 3:30 a.m., the aforementioned truck was intercepted and two persons, including the present petitioner, were apprehended from the said truck. During the search of the said truck, total of 35 numbers of brown colored packets were recovered, which are suspected to be Ganja. The total weight of the ganja packets recovered was 360.350 kg. Thereafter, the NCB had filed a complaint against the present petitioner and the co-accused, namely Javaid Iqbal.

4) Learned counsel for the petitioner has submitted that though in this case the charges under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985 were framed against the present petitioner and the co-accused on 10.06.2022, however, even after lapse of more than 2 years 5 months, only 3 witnesses have been examined till now and there is no hope of culmination of the trial at the

earliest. Therefore, the learned counsel for the petitioner has submitted that on the ground of prolonged incarceration, the petitioner is entitled to go on bail.

5) Learned counsel for the petitioner has also submitted that the petitioner was not in the conscious possession of the seized contraband as he took lift in the said vehicle and therefore, he was found in the vehicle when it was intercepted by NCB team.

6) 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 inordinate delay in trial, the embargo is lifted and it gives way to the right of the accused under Article 21 of the Constitution of India.

7) Learned counsel for the petitioner has also submitted that though the present case is a case where commercial quantity of contraband is involved, however, as the detention of the petitioner is long enough, i.e., he has been detained behind the bars for last 2 years 5 months and 28 days, the prolonged incarceration of the present petitioner in this case would override the embargo of Section 37 of the NDPS Act, 1985.

8) Learned counsel for the petitioner has cited a ruling of the Apex Court in “***Rabi Prakesh Vs. State of Orissa***” reported in ***2023 live law (SC) 533***, wherein it has been observed by the Hon'ble 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 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), wherein the petitioners (who were facing trial for possessing a commercial quantity of contraband) were granted bail by the Apex Court. 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 petitioner has also submitted that in the instant case also the petitioner, who has been languishing behind the bars for more than 2 years 5 months and 28 days may be allowed to go on bail.

10) On the other hand, learned Standing Counsel, NCB has vehemently opposed the grant of bail to the present petitioner on the grounds that there are sufficient incriminating material against the present petitioner for possessing a commercial quantity of ganja (360.350 kg) in this case, and hence the embargo of Section 37 of the NDPS Act, 1985 is applicable in the instant case, and therefore, he may not be allowed to go on bail.

11) Learned Standing Counsel, NCB has submitted that the cases that the rulings of the Apex Court cited by the learned counsel for the present petitioner does not indicate any ratio on the basis of which the petitioners in the said cases were allowed to go on bail.

12) It is submitted by learned Standing Counsel, NCB that what is binding is

not the conclusion arrived at by the higher Court, but the underlying principles, on the basis of which that conclusion has been arrived at and it is further submitted that the ruling cited by the learned counsel for the petitioner does not indicate any underlying principle, on the basis of which, the bail was granted by the Apex Court.

13) In support of his submission, learned standing counsel for NCB has cited a ruling of the Apex Court in "***Secundrabad Club ETC. versus C.I.T.***" reported in **2023 LiveLaw (SC) 660**.

14) Learned Standing Counsel, NCB has cited a ruling of Apex Court in "***Tarun Kumar Vs. Assistant Director Directorate of Enforcement***" reported in **2023 0 Supreme SC 1162** wherein the Apex Court has observed that while applying the principle of parity, the Court is required to focus upon the ruling attached to the accused whose application is under consideration.

15) I have considered the submissions made by learned counsel for both sides and have perused the materials on record, including the scanned copy of the case record of NDPS Case No. 04/2022.

16) It appears from the record that since the date of arrest, i.e. 25.07.2021, the petitioner has been detained behind the bars and though the charges were framed on 10.06.2022, however, till now, only 3 prosecution witnesses have been examined and the trial has not yet been completed in spite of the fact that the petitioner has been detained behind the bars for the last 2 years 5 months and 28 days.

17) 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".

18) The Hon'ble Apex Court in "***Rabi Prakesh Vs. State of Orissa***" reported in ***2023 live law (SC) 533***, wherein it has been observed by the Hon'ble 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 on perusal of the rulings cited by learned counsel for the petitioner that in all the cases cited by the petitioner, though commercial quantity of contraband was involved and apparently the embargo of Section 37 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.

20) 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 petitioner is long enough, he 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 petitioner under Section Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

21) 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 a 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 passed in SLP Criminal No. 4173/2022), wherein the accused was detained behind bars for one year and six months.

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

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

24) 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.

25) In the instant case also, the present petitioner has been detained behind the bars for last 2 years 5 months and 28 days and the trial is yet to culminate and in view of the facts and circumstances of this case as well as considering the observations made by the Apex Court in the rulings cited hereinabove, wherein, it has dealt with the question of long incarceration of similarly situated petitioners who were before the Apex Court, this Court is of the considered opinion that in the instant case also, the facts and circumstances are such that the long incarceration of the present petitioner outweighs the embargo of Section 37 of the NDPS, Act 1985 and the petitioner is therefore entitled to get bail on the ground of prolonged incarceration only.

26) In view of the above, the petitioner, namely, Sanjay Kumar Shah 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 Session Judge, Kamrup, Amingaon with the following conditions:

- i. That the petitioner shall cooperate in the trial of NDPS Case No. 04/2022, which is pending in the Court of learned Session Judge, Kamrup, Amingaon;
- 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, Driving License, 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 similar offence while on bail.

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

28) Let a copy of this order be furnished by the Registry of this Court.

JUDGE

Comparing Assistant