

GAHC010259052023



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Bail Application No. 4210/2023

Jamal Khan,
Aged about 31 years,
S/o Amir Hasan,
R/o Vill-Maruabaran,P.O.-Bausi,
District:-Banka, Bihar-813104.

.....Petitioner

-Versus-

Union of India,
(Represented by S.C, NCB)

.....Opposite party.

Advocates for the Petitioner : Ms S K Nargis,
Advocate for the respondent: Mr S C Keyal, SC, NCB.

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of Order : 30.01.2024

ORDER

Heard Ms S K Nargis, learned counsel for the petitioner, Jamal Khan.

2. The petitioner has filed this application under Section 439 CrPC, with prayer for bail, as he is behind bars since 02.02.2021, in connection with NDPS Case No. 89/2021, arising out of NCB Crime No. 03/2021, under Sections 20(b)(ii)(C)/29 of the Narcotic Drugs And Psychotropic Substances Act, 1985 (NDPS, for short).

3. Also heard Mr S C Keyal, learned Standing Counsel, Narcotics Control Bureau (NCB, for short).

4. It is submitted on behalf of the petitioner that the petitioner is behind bars since 02.02.2021. Charge was framed on 03/12/2022. 11 (eleven) witnesses are enlisted in the charge sheet, but only three witnesses have been examined so far. The trial has been procrastinated by the prosecution as well as by the Court.

5. The learned counsel for the petitioner has relied on the decision of Hon'ble the Supreme Court in ***Hussain & Another -Vs- Union of India;***

reported in **(2017) 5 SCC 702**, wherein it has been observed that-

“In view of the above, we do consider it necessary to direct that steps be taken forthwith by all concerned to effectuate the mandate of the fundamental right under [Article 21](#) especially with regard to persons in custody in view of the directions already issued by this Court. It is desirable that each High Court frames its annual action plan fixing a tentative time limit for subordinate courts for deciding criminal trials of persons in custody and other long pending cases and monitors implementation of such timelines periodically. This may perhaps obviate the need for seeking directions in individual cases from this Court. We also feel that it is desirable for Chief Justices of all the High Courts to take other steps consistent with the directions already issued by this Court for expeditious disposal of criminal appeals pending in High Courts where persons are in custody by fixing priority having regard to the time period of detention. We also reiterate the directions for setting up of adequate number of forensic laboratories at all levels. Specification of some of these issues is in addition to implementation of other steps including timely investigation, timely serving of summons on witnesses and accused, timely filing of charge-sheets and furnishing of copies of charge-sheets to the accused. These aspects need constant monitoring by High Courts.”

6. Further the learned counsel for the petitioner has relied on the decision of Hon'ble the Supreme Court in ***Thana Singh -Vs- Central Bureau of Narcotics***, reported in **(2013) 2 SCC 590**, wherein it has been observed that-

“28. A monitoring agency is pivotal for the effective management of these

recommendations and for the general amelioration of the state of affairs. Therefore, it is directed that nodal officers be appointed in all the departments dealing with the NDPS cases, for monitoring the progress of investigation and trial. This nodal officer must be equivalent or superior to the rank of Superintendent of Police, who shall ensure that the trial is not delayed on account of non-supply of documents, non-availability of the witnesses, or for any other reason.

29. We have also learnt from the Narcotics Control Bureau that some form of informational asymmetry is prevalent with respect to the communication of the progress of cases between courts and the department. Therefore, there must be one Pairvi Officer or other such officer for each court who shall report the day's proceedings to the nodal officer assigned for that court."

7. The learned counsel for the petitioner has further relied on the decision of Hon'ble the Supreme Court in ***Rabi Prakash -Vs- The State of Odisha;*** in connection with Special Leave to Appeal (Criminal) No. 4169/2023, wherein vide order dated 13.07.2023, it has been observed that-

"4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. 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.”

8. The learned counsel for the petitioner has also relied on a decision of a coordinate Bench of this Court in Bail Application No. 3296/2023 **(Rafe @ Md Rafi &Anr. -Vs- Union of India)**, wherein vide order dated 01.12.2023, the accused Rafe @ Md Rafi was granted bail after observing that:-

“18. Now coming to the other aspect of the matter is that there is no likelihood of the petitioner committing any further similar offence, this Court is of the view that such anxiety of the prosecution can be redressed if stringent conditions are imposed while granting bail.

19. Therefore, the aforesaid leads to a belief of this Court that there are reasonable grounds that the petitioner is not guilty of such offence. In the aforesaid background, to balance the stringent condition of the NDPS Act, 1985 and the right of the petitioner under Article 21 of the Constitution of India, in the considered opinion of this Court, the petitioner can be released on bail with stringent conditions to ensure that the petitioner does not commit any such similar offence while on bail.”

9. It is submitted on behalf of the petitioner that the petitioner has been languishing in jail for more than 1084 days, i.e., for more than 2 years. 11 witnesses are enlisted and 4 witnesses have been examined. The right to

personal liberty has been curtailed due to procrastination of the trial. The Hon'ble Apex Court has observed through the decision of ***Thana Singh's case (supra) and Hussain and Another's case (supra) as well as the case of Rabi Prakash(supra)***, that procrastination of trial by the Court and the prosecution leads to infringement of fundamental right guaranteed by the Article 21 of the Constitution of India.

10. It is further submitted that it is unlikely that the trial will be concluded soon as 7 witnesses are yet to be examined. The petitioner has been languishing in jail for more than two years and only three witnesses have been examined so far. The petitioner has prayed for bail in the light of the decision of Hon'ble the Supreme Court.

11. Per contra, the learned Standing Counsel for NCB laid stress in his argument that the LCR clearly reveals that on 29.11.2023, witnesses were present, but cross-examination was deferred on the prayer by the defence, who sought adjournment. To this, the learned counsel for the petitioner has replied that the petitioner is eagerly willing to cooperate with the trial. It is not because of the petitioner's prayer that the cross-examination was deferred. It was on the prayer by the co-accused, represented by another

lawyer, on whose prayer, the cross-examination was deferred by the learned trial Court.

12. The learned Standing Counsel has relied on the decision of Hon'ble the Supreme Court in ***Tarun Kumar -Vs-Assistant Director, Directorate of Enforcement;*** reported in **(2023) 4 Crimes (SC) 442**, wherein it has been observed that-

“18. The submission of learned Counsel Mr. Luthra to grant bail to the appellant on the ground that the other co-accused who were similarly situated as the appellant, have been granted bail, also cannot be accepted. It may be noted that parity is not the law. While applying the principle of parity, the Court is required to focus upon the role attached to the accused whose application is under consideration. It is not disputed in that the main accused Sh. KewalKrishan Kumar, Managing Director of SBFL, and KMP of group companies and the other accused DevkiNandanGarg, owner/ operator/ controller of various shell companies were granted bail on the ground of infirmity and medical grounds. The co-accused Raman Bhuraria, who was the internal auditor of SBFL has been granted bail by the High Court, however the said order of High Court has been challenged by the respondent before this Court by filing being SLP (Crl.) No. 9047 of 2023 and the same is pending under consideration. In the instant case, the High Court in the impugned order while repelling the said submission made on behalf of the appellant, had distinguished the case of Raman Bhuraria and had observed that unlike Raman Bhuraria who was an internal auditor of SBFL (for a brief period statutory auditor of SBFL), the applicant was the Vice President of

Purchases and as a Vice President, he was responsible for the day-to-day operations of the company. It was also observed that the appellant's role was made out from the financials, where direct loan funds have been siphoned off to the sister concerns of SBFL, where the appellant was either a shareholder or director. In any case, the order granting bail to Raman Bhuraria being under consideration before the coordinate bench of this Court, it would not be appropriate for us to make any observation with regard to the said order passed by the High Court.

19. It is axiomatic that the principle of parity is based on the guarantee of positive equality before law enshrined in Article 14 of the Constitution. However, if any illegality or irregularity has been committed in favour of any individual or a group of individuals, or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing similar wrong order. Article 14 is not meant to perpetuate the illegality or irregularity. If there has been a benefit or advantage conferred on one or a set of people by any authority or by the court, without legal basis or justification, other persons could not claim as a matter of right the benefit on the basis of such wrong decision.

20. It is also difficult to countenance the submission of learned Counsel Mr. Luthra that the investigation qua the appellant is complete and the trial of the cases likely to take long time. According to him the appellant ought not to be incarcerated indefinitely merely because the investigation is kept open with regard to the other accused. In this regard, it may be noted that the appellant has not been able to overcome the threshold stipulations contemplated in Section 45 namely he has failed to prima facie prove that he is not guilty of the alleged offence and is not likely to commit any offence while on bail. It cannot be

gainsaid that the burden of proof lies on the accused for the purpose of the condition set out in the Section 45 that he is not guilty of such offence. Of course, such discharge of burden could be on the probabilities, nonetheless in the instant case there being sufficient material on record adduced by the respondent showing the thick involvement of the appellant in the alleged offence of money laundering under Section 3 of the said Act, the Court is not inclined to grant bail to the appellant.

21. The apprehension of the learned counsel for the appellant that the trial is likely to take long time and the appellant would be incarcerated for indefinite period, is also not well founded in view of the observations made by this Court in case of Vijay Madanlal (supra). On the application of Section 436A of the Code of Criminal Procedure, 1973, it has been categorically held therein that: -

“419. Section 436A of the 1973 Code, is a wholesome beneficial provision, which is for effectuating the right of speedy trial guaranteed by Article 21 of the Constitution and which merely specifies the outer limits within which the trial is expected to be concluded, failing which, the accused ought not to be detained further. Indeed, Section 436A of the 1973 Code also contemplates that the relief under this provision cannot be granted mechanically. It is still within the discretion of the Court, unlike the default bail under Section 167 of the 1973 Code. Under Section 436A of the 1973 Code, however, the Court is required to consider the relief on case-to-case basis. As the proviso therein itself recognises that, in a given case, the detention can be continued by the Court even longer than one-half of the period, for which, reasons are to be recorded by it in writing and also by imposing such terms and conditions so as to ensure that after release, the accused makes himself/herself available for

expeditious completion of the trial.”

13. The learned Standing Counsel has prayed to reject the bail petition, in the light of the decision of Hon’ble the Supreme Court in ***Tarun Kumar’s case (supra)***.

14. I have considered the submissions at the Bar with circumspection.

15. The offence alleged against the petitioner is that he is involved with the transportation of ganja through the vehicle bearing Registration No. WB-19 2829, a Tata truck, transporting 117.650 kgs of ganja. The present petitioner was allegedly the receiver of the transported ganja.

16. I have perused the scanned copies of the LCR.

17. It is true that during the pandemic there was procrastination of trial due to staggered roster. The petitioner was arrested on 02.02.2021. Since then, he is behind bars. There are 11 witnesses enlisted in the offence report and three witnesses have been examined so far. Seven witnesses are yet to be examined. The merits of the case are not brought to the fore. It appears to be unlikely that trial will be concluded soon. Out of the four witnesses examined, cross-examination of one witness has been deferred and kept

reserved. The statement of the learned counsel for the petitioner that the contraband was not recovered from the possession of the petitioner, cannot be considered at this juncture, as trial is under progress. The prayer on parity also cannot be considered at this juncture. However, I have considered the length of detention undergone by the petitioner. Only three witnesses have been examined so far.

18. I have also considered the submission of the petitioner that he is willing to abide by any stringent conditions, if imposed upon him, in the event he is granted bail.

19. I have relied on the decision of Hon'ble the Supreme Court in ***Rabi Prakash's case (supra)***. In the light of the decision of Hon'ble the Supreme Court in ***Rabi Prakash's case (supra)***, petition is allowed. Indeed, prolonged incarceration generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution of India.

20. In view of my foregoing discussions, I deem it proper to grant bail to the petitioner. The petitioner is, therefore, enlarged on bail of Rs. 1,00,000/-, with two local sureties of the like amount to the satisfaction of the learned

trial Court, under the conditions that-

- i) the petitioner shall appear on each and every date fixed by the learned trial Court and cooperate with the trial,
- ii) the petitioner shall not jump the bail, and
- iii) the petitioner shall refrain from such activities with which he is alleged.

On breach of any bail conditions, bail order shall stand cancelled.

21. Bail Application stands disposed of.

JUDGE

Comparing Assistant