

GAHC010268962023



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

Case No. : Bail Appln./4359/2023

SOFIQL ISLAM AND ANR
S/O ABDUL KARIM
R/O VILL- NAITOR, PS. NAGARBERA
DIST. KAMRUP (R), ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REP.BY THE PP, ASSAM

2:MOMIN ALI
S/O SAHID ALI
R/O VILL- CHINAMARI
P.S. BILASHIPARA
DIST. DHUBR

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 18-04-2024

1. Heard Mr. M. A. Choudhury, learned counsel for the petitioners.
Also heard Mr. B. Sarma, learned Additional Public Prosecutor, Assam
for the respondent.

2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, Sofiquil Islam and Momin Ali who are detained and behind bars since 08.05.2021 (for last 2 years 11 months 10 days) in connection with Special (NDPS) Case No.43/2021 corresponding to Bazaricherra P.S. Case No.85/2021 pending before the Court of Special Judge, Karimganj under Sections 21 (c)/29 of the NDPS Act, 1985.

3. The gist of the accusation in this case is that on 07.05.2021, one Mintu Seal, the In-Charge of Churaibari W.P. under Bazaricherra Police Station had lodged an FIR before the O/C, Bazaricherra Police Station inter-alia alleging that during Naka checking duty at Naka checking point at N.H.08 in front of Churaibari W.P., at about 9:35 PM, one Tata truck bearing registration No.AS-01-KC-6150 was intercepted and on search, it was found that cartons of phensedyl bottles containing codeine cough syrup were recovered therefrom. It was found that there were 144 numbers of cartons containing 100 bottles in each carton and each bottle contains 100 ml phensedyl cough syrup. The total numbers of cough syrup bottles which were recovered were 14,400.

4. On receipt of the said FIR, Bazaricherra P.S. Case No.85/2021 was registered under Sections 21 (c)/29 of the NDPS Act and investigation was initiated. Immediately after completion of investigation, charge sheet was laid against the present petitioners under Sections 21 (c)/29 of the NDPS Act. The present petitioners were arrested on 08.05.2021 and since then they are detained behind the bars.

5. It is submitted by the learned counsel for the petitioners that the charges under Sections 21 (c)/29 of the NDPS Act, 1985 were framed

against the present petitioners on 10.12.2021. However, it is further submitted by the learned counsel for the petitioners that out of the total eight listed prosecution witnesses in the charge sheet, only four have been examined till date and inspite of prolonged incarceration of the present petitioners, the trial has not fairly progressed, and therefore, on the ground of prolonged incarceration itself, the learned counsel for the petitioners has prayed for allowing the petitioners to go on bail.

6. The learned counsel for the petitioners has submitted that while keeping the present petitioners detained behind the bars for long period and thereafter delay is caused either by the prosecution side or by the Court and where there is no fault of the present petitioners, it could certainly violate the fundamental rights guaranteed to the petitioners under Article 21 of the Constitution of India, and hence, the learned counsel for the petitioners has submitted that the petitioners are entitled to get bail solely on the ground of prolonged incarceration as in such a case of prolonged incarceration without fair progress of trial, the fundamental rights to life and personal liberty of the petitioners granted under Article 21 of the Constitution of India are violated and it overrides the embargo of Section 37 of the NDPS Act. In support of his submission, the learned counsel for the petitioners has cited the following Rulings:-

- i. ***Rabi Prakash Vs. State of Orissa***, reported in **2023 SCC Online SC 1109**;
- ii. ***Chitta Biswas @ Subhas Vs. The State of West Bengal*** (Order dated 07.02.2020) in Criminal Appeal No.245/2020;
- iii. ***Nitesh Adhikari @ Bapan Vs. State of West Bengal*** (Order dated 01.08.2022 in SLP Criminal No. 5769/2022);

iv. *Shariful Islam @ Sarif Vs. State of West Bengal* (order dated 04.08.2022 in SLP Criminal No. 4173/2022);

v. *Karnail Singh Vs. State of Odisha*, (order dated 22.12.2022 in Criminal Appeal No.2027/22 arising out of SLP Criminal No. 9067/22); and

vi. Order dated 14.09.2023 in Bail Appln. No.3215/2023 passed by this Court.

7. On the other hand, Mr. B. Sarma, the learned Additional Public Prosecutor, Assam has submitted that huge quantity of phensedyl cough syrups has been recovered in this case and considering the fact that the contraband seized in this case is of commercial quantity, the embargo of Section 37 of the NDPS Act, 1985 is applicable to this case, and therefore, he has opposed granting of bail to the present petitioners. On the plea of the learned counsel for the petitioners regarding prolonged incarceration, the learned Additional Public Prosecutor, Assam has submitted that the delay in trial has been caused due to various reasons which are beyond the control of the prosecution side. He has specifically mentioned that on three dates when the case was fixed for examination of prosecution witnesses, the Trial Court could not take up the matter. On two occasions, the Presiding Officer was absent. On third occasion, i.e. on 28.11.2023, the counsel for the accused persons took adjournments.

8. I have considered the submission made by the learned counsel for both the said and have perused the materials available on records very carefully and also considered the Rulings cited by the learned counsel for the parties.

9. In the case of ***Hussain Ara Khatoon*** (supra), the Apex Court has

observed that the procedure prescribed by law for depriving a person of his personal liberty cannot be regarded as reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21 of the Constitution of India.

10. Though, Section 37 of the NDPS Act, 1985 provides for stringent provision for grant of bail, however, Section 36 (1) of the NDPS Act, 1985 also mandates the Government to constitute as many special courts as necessary for the purpose of providing speedy trial of offences under the NDPS Act, 1985. If speedy trial is not provided to an incarcerated accused, it will certainly have a negative impact on the rigours of Section 37 of the NDPS Act, 1985.

11. It is also pertinent to note that due to many factors such designated special courts are not in a position to expeditiously dispose of NDPS cases, and therefore, it takes much more time than what is necessary to dispose of an NDPS case pending before such courts.

12. However, for whatsoever reasons, if delay has been caused and if it is not due to any fault of the petitioner, then to keep him under incarceration for long period on one hand, and to cause delay in culmination of the trial on the other hand would certainly be violative of his fundamental rights guaranteed under Article 21 of the Constitution of India.

13. In this regard the observations made by the Apex Court in the case of **Satender Kumar Antil** (supra) are relevant and which is quoted here in

below:

49. Sub-section (1) mandates courts to continue the proceedings on a day-to-day basis till the completion of the evidence. Therefore, once a trial starts, it should reach the logical end. Various directions have been issued by this Court not to give unnecessary adjournments resulting in the witnesses being won over. However, the non-compliance of Section 309 continues with gay abandon. Perhaps courts alone cannot be faulted as there are multiple reasons that lead to such adjournments. Though the section makes adjournments and that too not for a longer time period as an exception, they become the norm. We are touching upon this provision only to show that any delay on the part of the court or the prosecution would certainly violate Article 21. This is more so when the accused person is under incarceration. This provision must be applied inuring to the benefit of the accused while considering the application for bail. Whatever may be the nature of the offence, a prolonged trial, appeal or a revision against an accused or a convict under custody or incarceration, would be violative of Article 21. While the courts will have to endeavour to complete at least the recording of the evidence of the private witnesses, as indicated by this Court on quite a few occasions, they shall make sure that the accused does not suffer for the delay occasioned due to no fault of his own.

14. The Supreme Court of India in “**Mohd Muslim @ Hussain Vs. State (NCT of Delhi)**”(supra) has observed that “Grant of bail on ground of undue delay in trial, cannot be said to be fettered by section 37 of the NDPS Act, 1985”.

15. Similarly, the Apex Court of India has also observed in “**Rabi Prakash Vs. The State of Odisha**” (supra) wherein, it 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.”

16. Moreover, as discussed herein above, though the provisions of section 37 of the NDPS Act, 1985 are very stringent in nature and same has to be interpreted keeping in the mind the object and purpose of the Act, however, it is also to be kept in mind that the NDPS Act, 1985 also mandates speedy and expeditious trial of offences under the said Act. If there is undue delay in the trial and the accused has been detained for long period, his fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution of India would outweigh the embargo of Section 37 of the NDPS Act, 1985.

17. This Court is also of the considered opinion that while considering an application for bail involving commercial quantity of contraband, if the court comes to a finding that there has been undue delay in completion of the trial and that there has been prolonged incarceration of the petitioner during this time, he would be entitled to get bail in such case of prolonged incarceration as the fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

18. It is also pertinent to mention herein that the 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***” (*supra*), wherein the accused was detained behind the bars for one year and six months.

19. In “***Nitesh Adhikari Vs. State of West Bengal***” (*supra*), the 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.

20. In the instant case, the petitioners have been detained behind the bars for more than 2 years 11 months and only four prosecution witnesses out of total eight listed prosecution witnesses in the charge sheet have been examined. It also appears from the records that there seems to be no fault on the part of the present petitioners which has caused delay in the trial.

21. Under the facts and circumstances of this case, considering the prolonged incarceration of the petitioner as well as slow progress of the trial, this court is of the considered opinion that the fundamental right to life and personal liberty of the petitioners guaranteed under Article 21 of the Constitution of India has outweighed the fetters imposed under Section 37 of the NDPS Act, 1985 and accordingly the petitioners are entitled to get bail in this case.

22. In view of the above, the above-named petitioners are hereby directed to be released on bail on furnishing a bond of Rs.50,000/- (Rupees Fifty Thousand only) each with two suitable sureties, one of whom should be a Government employee and should be resident of the State of Assam, of like amount to the satisfaction of the Trial Court with the following conditions: -

- i.** That the petitioners shall cooperate in the trial of Special (NDPS) Case No.43/2021, which is pending in the Court of Special Judge, Karimganj;
- ii.** That the petitioners shall regularly 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 person from disclosing such facts before the trial court in the trial pending against the present petitioners;

iv. That the petitioners shall provide their contact details including photocopies of thier Aadhar Cards, Driving Licenses, PAN cards, mobile numbers, and other contact details before 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 addresses and contact details during such leave before the trial court.

23. With the above observations, this bail application is hereby disposed of.

JUDGE

Comparing Assistant