

20.12.2021
Sl. No.89
akd/PA
[Rejected]

C. R. M. 5066 of 2021 [via video conferencing]

In Re: An application for bail under Section 439 of the Code of Criminal Procedure filed on 30.07.2021 in connection with NCB Crime No. 27/NCB/KOL/2016 under Sections 20(b)(iii)(c)/21(c) of the NDPS Act. (NDPS Case No.50 of 2016)

And

Shital Biswas

... .. Petitioner

vs.

Narcotics Control Bureau

.....Opposite party

Mr. Koustav Bagchi
Mr. Amanul Islam
Mr. Sourav Mukherjee
Mr. Debayan Ghosh

... .. for the petitioner

Mr. Y. J. Dastoor .. Ld. Addl. Solicitor General
Mr. Phiroze Edulji
Ms. Rajashree Kundalia

... .. for the NCB

Petitioner renews his prayer for bail. It is submitted on behalf of the petitioner that he is in custody for five years and six months. It is further submitted that inspite of direction given by this court for expeditious conclusion of trial, there is very little progress in the trial of the case. Petitioner relies on ***Sanawar Ali vs. State of West Bengal***¹ in support of his contention.

Learned Additional Solicitor General with Mr. Phiroze Edulji, learned advocate, appearing for the NCB argues that delay in the trial cannot be attributed to the prosecution alone. There were systematic reasons for the delay. Accused also contributed to the delay.

¹ AIR Online 2020 Cal 561

In reply, it is submitted that one of the witnesses for prosecution did not appear and witness warrant had to be issued.

We have considered the materials on record. Allegations involve possession of narcotic substance above commercial quantity. Hence, statutory restrictions under Section 37 of the NDPS Act stand in the way of considering the prayer for bail of the petitioner on merits. However, bail in the present case is being sought on the ground of inordinate delay in conducting trial infracting his fundamental right for speedy trial under Article 21 of the Constitution of India. In ***Union of India vs. K.A. Najeeb***², while considering bail under UAPA Act, the Apex Court held that power of constitutional courts to grant bail on the ground of delay in trial resulting in infraction of fundamental right under Article 21 stands on a different footing and is not encumbered by the statutory restrictions under the special law. In view of the aforesaid ratio, restrictions under Section 37 of the NDPS Act may not stand in the way of consideration of prayer for bail of an accused under the NDPS Act when such bail is sought on the ground of inordinate delay in trial. [***Sanjit Das @ Gosai vs. State of West Bengal***³]

In ***Supreme Court Legal Aid Committee vs. Union of India***⁴, the Apex Court directed that undertrials facing prosecution under the NDPS Act who had undergone imprisonment for five years may be released on bail. It would be argued that such direction is not a binding precedent under Article 141 of Constitution of India passed by the Apex Court.

Without going into the issue whether such direction of the Apex Court is in the nature of a binding precedent under Article 141, it is

² (2021) 3 SCC 713

³ MANU/WB/0892/2021

⁴ (1994) 6 SCC 731

undeniable that the aforesaid direction to grant bail for inordinate delay in trial would provide a wholesome guideline in judging whether protraction of trial under similar factual matrix would justify consideration of bail to undertrials on the score of infraction of Article 21 of the Constitution of India.

In ***Hussain and Another vs. Union of India***⁵ the Apex Court directed the High Courts to issue directions so that in Magistrate trials, where accused are in custody, trials are normally completed within six months and in sessions trials, where accused are in custody, trials are ordinarily completed within two years. It was also directed efforts be made to dispose of cases which are above five years old by the end of the year.

The present case is pending before the special court and is required to be tried as a sessions case. The aforesaid directions in ***Hussain*** (supra) with regard to prompt conclusion of trial would leave no doubt in ones mind that failure to conclude a trial within 5 years would be deemed as inordinate delay which is so onerous that it would ordinarily infract the right of the undertrial under Article 21 of the Constitution of India.

It is argued that Section 436A of the Code of Criminal Procedure, inter alia, provides for release on bail only upon completion of half of the maximum period of sentence which may be imposed in a particular case. In the present case, such term would conclude after the accused suffers incarceration for ten years.

We are of the view in the light of the observations made in ***Supreme Court Legal Aid Committee*** (supra) and ***Hussain*** (supra) when a trial is unduly protracted and continues beyond five years, it

⁵ (2017) 5 SCC 702 [paragraph 29.1.2 and 29.1.3].

would certainly give justification to an undertrial to seek bail for infraction of his fundamental right under Article 21 of the Constitution of India. Grant of relief in such cases though not within the pale of section 436A Cr.P.C. is clearly in consonance with the spirit of the said statutory provision. It may be apposite to note that the aforesaid provision is not couched in negative terms ruling out the possibility of consideration of bail under circumstances other than those envisaged therein when inordinate delay in the facts of a particular case renders further detention of the undertrial unjust and oppressive.

Whether the prosecution of a case has been delayed due to indolence on the part of the prosecuting/investigating agency or not has to be judged on the facts of each case keeping in mind the other contributing factors namely, systematic reasons as well as contribution from the end of accused persons.

In this backdrop we have chosen to examine the facts of the present case to evaluate whether the petitioner may be considered to be released on bail on the ground of inordinate delay in trial infracting his fundamental right under Article 21 of the Constitution of India.

Trial in the instant case has protracted beyond five years which may be viewed as inordinate, in the light of the directions given by the Apex Court in **Supreme Court Legal Aid Committee** (supra) as well as **Hussain** (Supra). Ordinarily under such circumstances unless the prosecution is able to show that a substantial portion of the delay was due to circumstances beyond its control, in our estimation the accused would be entitled to bail for infraction of his fundamental right under Article 21.

Thus, we need to consider whether in the facts of the present case there were factors beyond the control of the prosecution which contributed to the delay.

In the instant case, we note delay in trial was due to other factors beyond the control of the prosecution, including non-production of the accused persons on the ground of his ill health. It is also important to note for more than 1¹/₂ years trial was stalled due to pandemic conditions.

Balancing the aforesaid factors contributing to the delay on the one hand and the protracted period of undertrial detention already suffered by the petitioner on the other hand, we are of the opinion a last opportunity should be given to the prosecution to conclude the trial within six months from date.

Accordingly, we are not inclined to grant bail to the petitioner at this stage.

The application for bail is thus **rejected**.

However, we direct the trial court to ensure that the trial in the present case is concluded within six months from the next date fixed before the said court without granting unnecessary adjournment to either of the parties. The aforesaid direction shall be peremptory and in the event prosecution fails to adhere to the time schedule and no other unforeseen factor contributes to the delay, the petitioner would be permitted to renew his prayer for bail in accordance with law.

(Bivas Pattanayak, J.)

(Joymalya Bagchi, J.)