

IN THE HIGH COURT AT CALCUTTA

(Criminal Miscellaneous Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Debansu Basak

And

The Hon'ble Justice Bibhas Ranjan De

C.R.M (NDPS) 248 of 2022

Ashok Shil @ Arun

Vs

State of West Bengal

For the State/ Petitioner : Mr. Sudip Ghosh Chowdhury

For the Opposite Party : Mr. Sanjay Bardhan
Mr. Palash Ch. Majhi

Heard on : March 2, 2022

Judgment on : March 10, 2022

Bibhas Ranjan De, J.:-

1. This is an application for bail under Section 439 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C'), involving an offence under Section 21(c)/25/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') i.e involving possession of contraband articles

(Phensedyle cough syrup containing codeine phosphate) of commercial quantity. This case was put into motion by a written complain submitted by one Ashim Mandal S.I of Police for initiating Dankuni Police Station case no. 86/2017 dated 22.02.2017 under Section 21(c)/25/29 of the NDPS Act. The instant application was filed only on the ground that petitioner is in custody for more than five years without trial in a NDPS case and thereby already served more than half minimum punishment of the relevant sections.

2. Mr. Sudip Ghosh Chowdhury, Ld. Advocate appearing on behalf of the petitioner harped on the string of period of custody of the petitioner for more than five years and thereby right to bail has accrued in favour of the petitioner according to specific direction of the Hon'ble Court. Mr. Ghoshrefrained himself from going into the merit of the case and in support of his contention he relies on ***Supreme Court Legal Aid Committee Representing Undertrial Prisoners Appellants Vs. Union of India (UOI) and Ors¹, Sanawar Ali Vs. Union of India², Ramesh Mahato &Ors Vs. State³ and Shital Biswas Vs. Narcotics Control Bureau⁴.***

3. While opposing instant application under Section 439 Cr.P.C, Mr. Sanjay Bardhan, Ld. Advocate appearing on behalf of the State as vehemently submitted that the offence alleged in the case involves a commercial quantity of contraband articles. That apart, it is also submitted that the

¹1994 6 SCC 731.

²C.R.M 9314 of 2020.

³CRM 4139 of 2021

⁴C.R.M 5066 of 2021

petitioner is to satisfy that the reason of delay solely attributed to prosecution.

4. In ***Supreme Court Legal Aid Case (supra)*** Hon'ble Apex Court was concerned with delayed trial for the offence under the NDPS Act in the background of huge pendency of the cases under the NDPS Act in the State of Maharashtra for non establishment of sufficient Special court under the Act to deal with the cases. The Hon'ble Supreme Court 'inter alia' took the following views:

"15 On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36 (1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution. We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. Indeed we have adverted to this section in the earlier part of the Judgment. We have also kept in mind the interpretation placed on a similar provision in Section 20 of the TADA Act by the Constitution Bench in Kartar Singh V. State of Punjab,. Despite this provision, we have directed as above mainly at the call of Article 21 as the right to speedy trial may even require in some cases quashing of a criminal proceeding altogether, as held by a Constitution Bench of this Court in A.R. Antulay v. R.S. Nayak, release on bail, which can be taken to be embedded in the right of speedy trial, may, in some cases be the demand of Article 21. As we have not felt inclined to accept the extreme submission of quashing the proceedings and setting free the accused whose trials have been delayed beyond reasonable time for reasons already alluded to, we have felt that deprivation of the personal liberty without ensuring speedy trial would also not be in consonance with the right guaranteed by Article 21. Of Course, Some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty

would be violative of the fundamental right visualized by Article 21, which has to be telescoped with the right guaranteed by Article [14](#) which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned Counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned Counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act prescribing a punishment of imprisonment of five years or less and fine, such an undertrial shall be released on bail if he has been in jail for a period which is not less than half the punishment provided for the offence with which he is charged and where he is charged with more than one offence, the offence providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50 of the said amount with two sureties for like amount. If the maximum fine is not prescribed bail shall be to the satisfaction of the concerned Special Judge with two sureties for like amount.

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs. 50,000 with two sureties for like amount.

(iii) Where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh, such an undertrial shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.

(iv) Where an undertrial accused is charged for the commission of an offence punishable under [Sections 31](#) and [31A](#) of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.

The directives in Clauses (i), (ii) and (iii) above shall be subject to the following general conditions:

(i) the undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the concerned Special Court and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the concerned Passport Officer to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;

(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under Clause (i), once in a fortnight in the case of those covered under Clause (ii) and once in a week in the case of those covered by Clause (iii), unless leave of absence is obtained in advance from the concerned Special Judge;

(iii) the benefit of the direction in Clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;

(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and shall appear before the Special Court as and when required;

(v) the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge ;

(vi) the undertrial accused may furnish bail by depositing cash equal to the bail amount;

(vii) the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a cases for cancellation of bail is otherwise made out; and

(viii) after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be

accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.”

5. Next, we come to **Sanawar Ali’s case (supra)** wherein Hon’ble Bench inter alia held :

*“We are conscious that delay may also be caused by an accused and it is nobody’s case that such a litigant can derive benefit out of his own wrong. However, the principle of apportionment of responsibility in the matter of delay in trial must be counteracted in the backdrop of the constitutional duty of the State to ensure effective and speedy prosecution. The Constitution assures every individual the precious right of personal liberty and when it is forfeited by the State to ensure administration of criminal justice a heavy corresponding duty is cast on it to ensure speedy conclusion of trial minimizing under trial detention. Directives in **Supreme Court Legal Aid Committee (Supra)** are to be viewed from such perspective. These directions cannot be whittled down or restricted by the operation of Section 436 A Cr.P.C. The said provision is an expression of similar anxiety of the legislature to minimize under trial detention. The directives of the Apex Court relating to bail and section 436A operate in the same field and are supplementary to one another. To read one in derogative of the other would amount to restricting the right of under-trials to bail in the face of inordinate delay in trials and would frustrate the very spirit of the aforesaid law.*

*In this backdrop, we have gone through the records of the case and we do not find any special feature relating to contributory role of the petitioner in the inordinate delay in trial. Absence of forensic laboratories, under staffing in those laboratories, inadequate number of prosecutors and frequent transfer of official witnesses cause chronic delay in trial of narcotic cases. Adverting to such issues, the Apex Court in **Thana Singh v. Central Bureau of Narcotics, (2013) 2 SCC 590** issued various directions to ensure speedy trial. **Thana Singh (Supra)** quoted with approval the directives **Supreme Court Legal Aid Committee (Supra)**. In spite of such directions, there is little progress in the ground and the bleak picture of delay persist to haunt under trials.*

*In light of the aforesaid discussion, we are of the view that the directives in **Supreme Court Legal Aid Committee** (Supra) applies with full force to the facts of this case and the petitioner ought to be released on bail on the score of inordinate delay in trial infracting his fundamental rights under Articles 14 and 21 of the Constitution.”*

6. In Ramesh **Mahato’s case (supra)** Hon’ble Bench relied on **Supreme Court Legal Aid Committee (supra)** and also **Sanawar Ali (supra)** and arrived at the following findings:

*“We are privileged to have an unreported decision of the coordinate Bench rendered in the case of **In re : Sanawar Ali (CRM 9314 of 2020 dated 27.11.2020)**, wherein similar argument was advanced by Mr. Dastoor, appearing for the Union of India and the same had been answered in the following words:-*

*“ We are conscious that delay may also be caused by an accused and it is nobody’s case that such a litigant can derive benefit out of his own wrong. However, the principle of apportionment of responsibility in the matter of delay in trial must be counteracted in the backdrop of the constitutional duty of the State to ensure effective and speedy prosecution. The Constitution assures every individual the precious right of personal liberty and when it is forfeited by the State to ensure administration of criminal justice a heavy corresponding duty is cast on it to ensure speedy conclusion of trial minimizing under trial detention. Directives in **Supreme Court Legal Aid Committed** (Supra) are to be viewed from such perspective. These directions cannot be whittled down or restricted by the operation of Section 436 A Cr.P.C. The said provision in an expression of similar anxiety of the legislature to minimize under trial detention. The directives of the Apex Court relating to bail and section 436A operate in the same field and are supplementary to one another. To read one in derogative of the other would amount to restricting the right of under-trials to bail in the face of inordinate delay in trials and would frustrate the very spirit of the aforesaid law.*

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We do not find any ground to take a contrary view to what had already been taken by the Co-ordinate Bench. Even apart, the Mandate of the Hon'ble Supreme Court is explicit, elucide and clear in expounding the law on the subject and there is no other alternative but to follow the same.

We, thus hold that the moment under-trial prisoners have undergone half or more than the minimum period of punishment provided in the statute, they are entitled to bail despite the existence of Section 37 of the NDPS Act.

*Accordingly, the application for bail of the petitioners is **allowed**."*

7. Further it is worthy to mention the observation of the Hon'ble Court in **Shital Biswas (supra)** wherein it was held as follows:

*"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 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 1 ½ 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.”

8. In *Legal Aid Committee (supra)* Hon’ble Apex Court has formulated guidelines for releasing accused involving possession of contraband

articles of commercial quantity under the NDPS Act, after five years in custody. In **Sanawar Ali (supra)** and also in **Ramesh Mahato (supra)** the Hon'ble Court granted bail to the accuseds/petitioner as in the facts of those two cases, the Court found the rights of the accuseds/petitioner under Article 21 of the Constitution of India to be violated. But in the case of Shital Biswas Hon'ble Court took other factors into consideration and did not find violation of Article 21 of the Constitution.

9. In **Legal Aid Committee (supra)** Hon'ble Apex Court before formulating directions, observed as follows:

“ 21.Of Course, Some amount of deprivation of personal liberty cannot be avoided in such cases; but if the period of deprivation pending trial becomes unduly long, the fairness assured by Article 21 would receive a jolt. It is because of this that we have felt that after the accused persons have suffered imprisonment which is half of the maximum punishment provided for the offence, any further deprivation of personal liberty would be violative of the fundamental right visualized by Article 21, which has to be telescoped with the right guaranteed by Article [14](#) which also promises justness, fairness and reasonableness in procedural matters. What then is the remedy? The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned Counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers appropriate to impose. This suggestion commends to us. We were told by the learned Counsel for the State of Maharashtra that additional Special Courts have since been constituted but having regard to the large pendency of such cases in the State we are afraid this is not likely to make a significant dent in the huge pile of such cases. We, therefore, direct as under:.....”

10. Therefore, Hon'ble Apex Court never intended to release any under trial prisoner on bail if he has been in jail for not less than five years irrespective of any reason of delay in investigation or trial. But, in view of the observation of the Hon'ble Apex Court, it is axiomatic that the right of an under trial guaranteed under Article 21 of the Constitution of India cannot be ignored where prosecution is the sole author of delay.

11. In a case involving the NDPS Act, 1985 bail can be granted on the satisfaction of the parameters enshrined in Section 37 thereof. In a given case, bail can also be granted when approached under Section 436A of the Criminal Procedure Code. ***Supreme Court Legal Aid committee (supra), Sanawar Ali (supra), Ramesh Mahato (supra)*** and ***Shital Biswas (supra)*** are authorities for the proposition that, if the factual matrix so warrants bail can be granted on the ground of infraction of the rights guaranteed under Article 21 of the Constitution of India. When rights guaranteed under Article 21 of the Constitution of India stand infringed, then Section 37 of the NDPS Act, 1985 or Section 436A of the Criminal Procedure Code does not impede the grant of bail. However, a compelling case for involving Article 21 needs to be made out by the accused. Period of detention ipso facto does not lead to grant of bail under Article 21 of the Constitution.

12. In the facts of the present case it would be appropriate to expedite the trial. The trial Court is requested to dispose of the trial as expeditiously as possible and preferably within six months from the date of communication of this order to him. The trial Court is also requested

not to grant unnecessary adjournments to any of the parties. The trial Court may fix consecutive dates for trial and make every endeavour to adhere to the same.

13. Thus, the bail application stands rejected.

14. Case dairy be returned.

15. Let a copy of this order be communicated to the Jurisdictional Court for compliance, at once.

[BIBHAS RANJAN DE, J.]

16. I Agree.

[DEBANGSU BASAK, J.]