

**IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side**

C.R.M No. 7715 of 2021

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Bibhas Ranjan De

Sapan Mondal

Vs.

Narcotics Control Bureau

For the petitioner : Mr. Ayan Basu
Mr. Sk. Salim
Mr. Sumit Routh

For the NCB : Mr. Y.J. Dastoor, Ld. A.S.G
Mr. Phiroze Edulji
Mr. Debajyoti Deb

Heard on : February 2, 2022

Judgement on : February 9, 2022

DEBANGSU BASAK, J.:-

1. The petitioner has renewed the prayer for bail.
2. Learned advocate appearing for the petitioner has submitted that, the petitioner is languishing in the correctional home for the past five years and two months. Learned advocate appearing for the petitioner has submitted that, the charges were framed on April 17, 2019 and despite the same, only two prosecution witnesses were examined till date. The prosecution has identified seven witnesses. The prosecution has been tardy in the conduct of the case. He has contended that there is hardly any possibility of the trial being disposed of expeditiously in the near future. The rights guaranteed to the petitioner under Article 21 of the Constitution of India have been infracted.
3. Learned advocate appearing for the petitioner has submitted that, since charges have been framed inter alia under Section 8(c)/15/29 of the Narcotics Drugs and Psychotropic Substances Act, 1985 the minimum period of punishment is ten years. The

petitioner has already spent in excess of five years two months in the correctional home which is more than half of the minimum punishment prescribed. He has relied upon **1994 Volume 6 Supreme Court Cases 731 (Supreme Court Legal Aid Committee vs Union of India and Ors.)** and submitted that, where an under trial has spent half of the minimum punishment prescribed, bail should be granted. He has relied upon **AIR Online 2020 Calcutta 561 (Sanawar Ali Vs. State of West Bengal)** and submitted that a co-ordinate Bench has taken note of **Supreme Court Legal Aid Committee (supra)** and granted bail to the accused. He has also relied upon **CRM 3484 of 2021 (Sanjit Das @ Gosai vs. State of West Bengal)** and submitted that, the provisions of Section 436 (A) of the Criminal Procedure Code were considered and bail was granted to the accused. He has contended that in the facts of the present case, the petitioner should be granted bail on such condition as the Court may deem fit.

4. Learned Additional Solicitor General appearing for the **Narcotics Control Bureau, Calcutta Zonal Unit**, has submitted that, the prosecution has examined two witnesses on November 29, 2021 and November 30, 2021. In fact, both the two witnesses have been cross-examined and discharged. On November 30, 2021, the prosecution had examined one more witness in part. Since the Judge presiding over the NDPS Court is under order of transfer, he has fixed the next date on February 14, 2022. He has submitted that, had the Learned Judge not been on order of transfer the prosecution could have advanced with further examination of their witnesses.

5. Learned Additional Solicitor General has highlighted the fact that this is the seventh application for bail made on behalf of the petitioner. He has submitted that a commercial quantity of narcotics had been seized from the possession of the petitioner. According to him, the petitioner has not been able to overcome the restriction imposed under Section 37 of the NDPS Act, 1985.

6. Learned Additional Solicitor General has referred to **Supreme Court Legal Aid Committee (supra)** and submitted that, the ratio laid down therein should be understood in the factual matrix of that case. In that case, the Supreme Court had found that, the various States lacked necessary infrastructure including judicial personnel to man the special Courts. The Supreme Court had, therefore, in such context issued the directions. According to him, the directions should be construed to be one under Article 142 of the Constitution of India. In any event, he has submitted that, **Supreme Court Legal Aid Committee (supra)** should not be read to lay down a proposition of law, that bail should be granted to an accused who is in custody for the half the minimum of punishment prescribed.

7. Learned Additional Solicitor General has drawn the attention of the court to the date of the judgement of **Supreme Court Legal Aid Committee (supra)** and submitted that, subsequent thereto, Section 436(A) was introduced to the

Criminal Procedure Code. Section 436(A) has prescribed a period of half of the maximum for which an under trial prisoner can be detained. According to him, only when an under trial has undergone a detention for a period exceeding up to half of the maximum period of imprisonment specified in the offence under the law, he should be considered for release on bail.

8. Relying upon **CRM 5066 of 2021 (Shital Biswas vs. The Narcotics Control Bureau)** learned Additional Solicitor General has submitted that, **Sanawar Ali (supra)** as well as **Supreme Court Legal Aid Committee (supra)** have been considered therein. The Court had denied bail to the petitioner therein. He has contended that, the petitioner is not entitled to bail in the facts and circumstances of the instant case. The prosecution has not delayed the disposal of the trial. No right of the petitioner far less rights guaranteed under Article 21 of the Constitution of India have been infringed by the prosecution.

9. The petitioner had been arrested with regard to the complaint relating to possession of narcotics of commercial quantity. The petitioner had moved six bail applications before this Hon'ble Court resulting in rejection. The last rejection had been on December 24, 2020. The petitioner had moved an application for bail before the Jurisdictional Court which was rejected on January 20, 2021. The petitioner has been arrested as an accused in Special Case No. 58 of 2016 along with two others. According to the petitioner, such two other co-accused have been enlarged on bail.

10. Charges against the petitioner had been framed on April 17, 2019 under Section 15(c) read with Section 29 of the Act of 1985. The petitioner had pleaded innocence and not guilty and claimed to be tried before the jurisdictional Court on such date.

11. Since, provisions of the Act of 1985 are involved and since charges under Section 15(c) read with Section 29 of the Act of 1985 have been framed against the petitioner, the petitioner is

required to overcome the restrictions under Section 37 of the Act of 1985 to obtain bail. The petitioner, however, has not sought bail on the ground of Section 37 of the Act of 1985. The prayer for bail of the petitioner has been founded upon the fact that the petitioner had spent more than one half of the minimum period of punishment in custody. According to the petitioner, the prosecution had been tardy with the trial. The petitioner has spent more than five years two months in custody with the prospect of an expeditious conclusion of the trial being remote. Therefore, his rights for an expeditious trial recognized as a fundamental right under Article 21 of the Constitution of India stand infringed warranting grant of bail.

12. In ***Supreme Court Legal Aid Committee (supra)*** the Supreme Court has dealt with a petition filed under Article 32 of the Constitution with regard to delay in the disposal of cases under the Act of 1985 involving foreigners. The petitioner there had prayed for release of all under trials in jail for the commission of any offence under the Act of 1985 for a period

exceeding two years on account of the delay in the disposal of cases lodged against them. It has been observed in paragraph 15 placetum b at page 748 of the report 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 visualised by Article 21. It has thereafter gone on to issue directions which includes a direction that an accused charged with an offence under the Act of 1985 punishable with minimum imprisonment of 10 years shall be released on bail if he has been in jail for not less than five years on the conditions specified therein. In paragraph 15 of the report, it has clarified that, the directions were intended to operate as a one-time directions for cases in which the accused persons are in jail and the trials are delayed. It has further clarified that, the directions were not intended to interfere with the court's power to grant bail under Section 37 of the Act of 1985.

13. ***Supreme Court Legal Aid Committee (supra)*** has to be read in the factual matrix that gave rise to the Article 32 petition which had been considered by the Supreme Court. The directions passed therein have been clarified to be one-time directions

without intending any interference with the powers of the courts to grant bail under Section 37 of the Act of 1985. The directions had been passed after a finding being returned that, fundamental rights visualized by Article 21 of the Constitution had been infringed. It cannot and should not be construed to mean that, any accused who has undergone incarceration for a period one half of the minimum period of the offence he is accused of, is entitled to bail ipso facto on the basis of his period in custody.

14. When an accused has sought bail on the sole strength of his period of detention then such prayer has to be considered in light of Section 436(A) of the Criminal Procedure Code. Section 436(A) of the criminal procedure code has been introduced to the statute with effect from which is subsequent to the rendition of **Supreme Court Legal Aid Committee (supra)**. Section 436(A) of the criminal procedure code has prescribed that an accused will be entitled to bail on completion of one half of the maximum period of imprisonment specified for the offence under the law of which the accused has been investigated or enquired into or tried upon. Where an accused has sought bail involving the Act of 1985 merely on the ground of his period of detention, then he is guided

by the provision of Section 436(A) of the Criminal Procedure Code.

15. The coordinate bench in **Sanawar Ali (supra)** has considered the issue as to whether restrictions imposed by Section 37 of the Act of 1985 are overridden by the operation of the directions given by **Supreme Court Legal Aid Committee (supra)** in the matter of grant of bail to under trials in cases involving the Act of 1985. It has observed as follows: –

“Aforesaid ratio clearly carves out a separate niche for grant of bail to under trials on the score of inordinate delay in contradistinction to bail on merits. Exercise of judicial discretion in this domain stands on a completely different footing from grant of bail on merits which is circumscribed by the restrictions envisaged under section 37 of the Act.”

16. **Sanjit Das @ Gosai (supra)** has considered **Sanawar Ali (supra)** and granted bail to the accused therein. Prayer for bail had been renewed by an accused in custody for five years and six months in **Shital Biswas (supra)**. In **Shital Biswas (supra)** the coordinate bench has considered **Sanawar Ali (supra)**, **Sanjit Das @ Gosai (supra)** and various other authorities. **Shital**

Biswas (supra) has observed that, failure to conclude a trial within five years would be deemed as inordinate delay which is so onerous that it would ordinarily infract the right of the under trial under Article 21 of the Constitution. Despite the petitioner there being in custody for five years and six months, **Shital Biswas (supra)** on appreciation of the facts of the case has noted that the delay in trial was due to other factors beyond the control of the prosecution and therefore denied bail to the accused.

17. A petition for grant of bail on merits, for an accused involved in offences under the Act of 1985 is required to be considered on the parameters of Section 438 of the criminal procedure code and Section 37 of the Act of 1985. Again, on merits, an accused in a case involving the Act of 1985 can seek bail under the provisions of Section 436(A) of the criminal procedure code on fulfilling the conditions prescribed therein. An accused in a case involving the Act of 1985 can also invoke the provisions of the Constitution particularly the rights guaranteed under Articles 14 and 21 thereof to seek bail. Once the accused has prayed for bail on the basis of his Constitutional rights being infringed the fetters under Section 37 of the Act of 1985 or the period of detention prescribed under Section 436(A) are no longer

attracted. The court's power to grant bail is no longer circumscribed by the provisions of Section 37 of the Act of 1985. In such a case, the prayer for bail has to be considered on the ground of infringement of the rights guaranteed under Article 21 of the Constitution if the factual matrix obtaining therein permits such a conclusion to be drawn.

18. In the facts of the present case, the petitioner has been in custody in excess of five years and two months. The trial has commenced. At the trial, the Court has fixed more than twenty two days for recording of evidence commencing from November 11, 2019. Two witnesses have been examined at the trial and they have been discharged. The fact that, the ongoing pandemic has impacted the functioning of the Courts cannot be discounted. The pandemic has spanned over a period in excess of one year and six months. Therefore, it cannot be said that, the prosecution has delayed the trial or has been lackadaisical in proceeding with the trial. In the facts of the present case, we are unable to return a finding that, rights guaranteed to the petitioner under Article 21 of the Constitution have been infringed so as to warrant granting of bail to the petitioner. We are, however, of the view that, interest of justice will be sub-served by requiring the Court

in the seisin of the trial to dispose of the same as expeditiously as possible and without granting any unnecessary adjournment to any of the parties.

19. Prayer for bail as has been made by the petitioner is consequently rejected. CRM 7715 of 2021 is dismissed.

[DEBANGSU BASAK, J.]

I Agree.

[BIBHAS RANJAN DE, J.]