

CRM-M-26769-2023

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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-26769-2023
Date of Decision: 05.09.2023

Gurpal Singh

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. R.S. Sekhon, Advocate,
for the petitioner.

Mr. Sarabjit Singh Cheema, DAG, Punjab.

JASGURPREET SINGH PURI, J. (ORAL)

1. The present petition has been filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in case bearing FIR No.167 dated 03.10.2019 under Sections 21/25 of the NDPS Act, 1985 (Section 29 of the NDPS Act added later on), registered at Police Station Gharinda, District Amritsar.

2. Learned counsel for the petitioner has submitted that the petitioner is in custody for 3 years and 10 months and the petitioner is having clean antecedents and is not involved in any other case. He further submitted that as per the prosecution story, the police was on patrolling and they had intercepted the petitioner along with other co-accused on a motorcycle and there has been an alleged recovery of 6 kgs. of *Heroin* from the petitioner and another 6 kgs. of *Heroin* from another co-accused. He also submitted that the present is a case which was planted upon the petitioner

who is having no criminal background and it was done only because of political rivalry in the village.

3. Learned counsel for the petitioner further submitted that in the present case, first time the charges were framed on 01.04.2020, thereafter, supplementary challan was presented by the police on 24.12.2020 and thereafter, the charges were framed on 05.03.2022. He submitted that only four witnesses have been examined till date. He while referring to the FIR, especially as per the vernacular of the FIR, the police officials, who had intercepted the petitioner along with the other co-accused, asked them as to what they were carrying in their bags to which they had replied that they are carrying *Heroin* and thereafter, once they came to know that there was *Heroin* in their bags then they had decided to give a notice under Section 50 of the NDPS Act. However, when the notice under Section 50 of the NDPS Act was given to them, then the same was totally defective which is clear from the FIR itself whereby it was so offered that the petitioner has got a right to be searched either from the the Inspector himself or from a 'Gazetted Officer Police' or from a 'Magistrate' and to which the petitioner had stated that he wants to get searched from a 'Gazetted Officer Police'. He further submitted that thereafter as per the FIR, one DSP was called, who also made same kind of offer for the second time that whether the petitioner wants to get himself searched from the DSP himself or from some other 'Gazetted Officer Police' or a 'Magistrate'. He submitted that firstly, there cannot be a third offer and in the present case, an offer was given that the search can be conducted by the Inspector himself or by a 'Gazetted Officer Police' or by a Magistrate which defeats the purpose of Section 50 of the NDPS Act itself

and secondly, the provision of Section 50 of the NDPS Act provides that an offer is to be given for getting searched in the presence of 'Gazetted Officer' or 'Magistrate' but in the present case, so far as the 'Gazetted Officer' is concerned, it was so stated that the petitioner has a right to get himself searched from a 'Gazetted Officer Police' and therefore, this is a second violation and consequently, the offer itself was totally contrary to Section 50 of the NDPS Act and the aforesaid authorities can not be qualified by any other executive especially when here in the present case the expression 'Police' has been given. He further submitted that the basic purpose of Section 50 of the NDPS Act has been violated in the present case which is apparent from the bare perusal of the FIR and the proceedings thereon. He also submitted that it is a settled law that when there is a blatant violation of Section 50 of the NDPS Act then the entire recovery gets vitiated. He also referred to the judgment passed by the Hon'ble Supreme Court in "*State of Rajasthan Vs. Parmanand & another*", 2014(5) SCC 345 in this regard.

4. Learned counsel for the petitioner further submitted that be that as it may, the petitioner, who is having clean antecedents and is not involved in any other case, has already faced incarceration for 3 years and 10 months and the trial may take long time and it was also delayed because the charges were earlier framed qua the petitioner and thereafter, re-framed after the other co-accused was arrested. He also referred to the judgments passed by the Hon'ble Supreme Court in "*Satender Kumar Antil Vs. Central Bureau of Investigation and another*", 2022(10) SCC 51, "*Mohd. Muslim @ Hussain Vs. State (NCT of Delhi)*", 2023 AIR(SC) 1648, *Special Leave to Appeal (Criminal) No.6690 of 2022* titled as "*Dheeraj Kumar Shukla Vs.*

The State of Uttar Pradesh” and *Special Leave to Appeal (Criminal No.4169 of 2023* titled as “*Rabi Prakash Vs. The State of Odisha*” to contend that long custody itself becomes a ground for bail and the bar contained under Section 37 of the NDPS Act would not apply on the ground of speedy trial and in the light of Article 21 of the Constitution of India.

5. On the other hand, Mr. Sarabjit Singh Cheema, learned DAG, Punjab submitted that so far as the custody part of the petitioner is concerned, the same is correct and the petitioner is in custody for 3 years and 10 months. He further submitted on instructions from the police official, who is present in Court today that four witnesses have already been examined in the present case. He submitted that it is also correct that the petitioner is not involved in any other case and has clean antecedents. He has however opposed the ground of regular bail to the petitioner on the ground that the recovery from the petitioner and the co-accused was 6 kgs. of *Heroin* each which falls in the category of commercial quantity, and therefore, the prayer of the petitioner is hit by the bar contained under Section 37 of the NDPS Act.

6. Learned State counsel further submitted that so far as the arguments raised by the learned counsel for the petitioner with regard to defective offer is concerned, the same was not available to the petitioner in view of the fact that in the memo of offer, no such defect has been found and while referring to the record, he submitted that the memo which was prepared, the expression ‘Police’ has not been used whereas in the FIR and its proceedings, the expression ‘Gazetted Officer Police’ has been used and therefore, it cannot be said that the offer was defective in nature. He also

submitted that it was an inadvertent mistake on the part of the scribe of the FIR.

7. I have heard the learned counsels for the parties.

8. The allegations against the petitioner and the other co-accused were with regard to recovery of 6 kgs. of *Heroin* each when they were travelling on the motorcycle and they were intercepted by the police. The petitioner is stated to be not involved in any other case and has clean antecedents even as per the learned State counsel to which there is no dispute. The custody of the petitioner is 3 years and 10 months. Four witnesses have already been examined as per the learned State counsel. Since the quantity involved in the present case, falls in the category of commercial quantity, this Court would, therefore, consider the prayer of the petitioner for grant of regular bail in the light of Section 37 of the NDPS Act.

9. A perusal of the FIR and its subsequent proceedings would show that when an offer was given by the police officer, who had apprehended the petitioner, as per the FIR, he was told by the petitioner and the other co-accused that they were carrying *Heroin* in their bags and therefore, an offer under Section 50 of the NDPS Act was made but the offer was pertaining to being searched by the Inspector himself or by a 'Gazetted Officer Police' or 'Magistrate'. Not only this, when the DSP was called, he had also made the same offer that whether the petitioner wants to get himself searched by the DSP himself or by some other 'Gazetted Police Officer' or 'Magistrate' and such offer was a defective offer and totally contrary to the provisions under Section 50 of the NDPS Act. The Hon'ble Supreme Court

in *Parmanand's case (supra)* has observed as under:-

“19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of section 50(1) of the NDPS Act. On this ground also, In our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High

Court's view is perverse. The appeal is, therefore, dismissed.”

10. Although an argument has been raised by the learned State counsel that it was only an inadvertent mistake on the part of the scribe of the FIR but there was no such mistake in the memo of offer which is the part of the record, but on the other hand learned counsel for the petitioner, during the course of arguments, has submitted that the memo of offer which the learned State counsel is relying upon was an ante-dated document and in order to rectify the mistake which had occurred on the part of the police and such a mistake was the mistake which renders the entire recovery as nullified and vitiated being violative of Section 50 of the NDPS Act and therefore, at the most there can be a major discrepancy in the FIR and its proceedings and the memo of offer.

11. The Hon'ble Supreme Court in ***Satender Kumar Antil's case (supra)*** discussed this issue with regard to delay in trial and its effect on the right to life under Article 21 of the Constitution of India. Para No.40 of the aforesaid judgment is reproduced as under:-

“40. 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.”

12. Now recently, Hon’ble Supreme Court in ***Mohd. Muslim @ Hussain's case (supra)*** also discussed the issue with regard to delay in trial and the long custody of the accused person vis-a-vis the bar contained Section 37 of the NDPS Act. The relevant Paras of the aforesaid judgment are reproduced as under:-

“19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete

denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.

20. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused's guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only prima facie, based on a reasonable reading, which does not call for meticulous examination of the materials collected during investigation (as held in Union of India v. Rattan Malik). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. Satender Kumar Antil supra). Having regard to these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail."

13. Similarly, the Hon'ble Supreme Court in ***Dheeraj Kumar Shukla's case (supra)*** has opined as under:

"3. It appears that some of the occupants of the 'Honda City' Car including Praveen Maurya @ Puneet Maurya have since been released on regular bail. It is true that the quantity recovered from the petitioner is commercial in nature and the provisions of Section 37 of the Act may ordinarily be attracted. However, in the absence of criminal antecedents and the fact that the petitioner is in custody for the last two and a half years, we are satisfied that the conditions of Section 37 of the Act can be dispensed with at this stage, more so when the trial is yet to commence though the charges have been framed."

14. Further recently, the Hon'ble Supreme Court in ***Rabi Prakash's***

case (Supra) has dealt with the issue of prolonged incarceration. The relevant portion of the judgment is reproduced as below:

“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.”

15. After hearing the learned counsels for the parties and considering the totality of the facts and circumstances of the present case, this Court is of the view that considering the long custody of the petitioner which is stated to be 3 years and 10 months and also considering the offer which was given as per the FIR and its proceedings as discussed above, the bar contained under Section 37 of the NDPS Act will not apply to the present petitioner especially in the light of Article 21 of the Constitution of India. Consequently, this Court deems it fit and proper to grant regular bail to the petitioner.

16. In view of the above, the present petition is allowed and the petitioner is ordered to be released on regular bail on furnishing bail bond/surety bond to the satisfaction of the trial Court/Duty Magistrate concerned, if not required in any other case.

17. However, anything observed hereinabove shall not be treated as

an expression of opinion on merits of the case and is only meant for the purpose of decision of present petition.

05.09.2023 (JASGURPREET SINGH PURI)
Bhumika JUDGE

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| 1. Whether speaking/reasoned: | Yes/No |
| 2. Whether reportable: | Yes/No |