

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRM-M-29549-2022 (O&M)

Date of Decision: 10.08.2023

Gursewak Singh

....Petitioner(s)

Versus

State of Punjab

.....Respondent(s)

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

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

Mr. Sarabjit Singh Cheema, DAG, Punjab.

JASGURPREET SINGH PURI, J. (Oral)

1. The present is a third petition filed under Section 439 of the Code of Criminal Procedure for the grant of regular bail to the petitioner in FIR No. 0051 dated 03.03.2021, under Sections 22 (c), 61, 85 of NDPS Act, registered at Police Station Lambi, District Sri Muktsar Sahib.

2. Learned counsel appearing on behalf of the petitioner has submitted that the petitioner is in custody for 2 years and 5 months and the charges in the present case were framed on 16.08.2021. He submitted that almost 2 years have elapsed but only two prosecution witnesses have been examined and these two prosecution witnesses are only formal witnesses, one witness lady Constable who had deposited the sample in the Forensic Laboratory and another witness had recorded the zimni. He

submitted that none of the persons of the police party which are so stated in the FIR or any recovery witness etc. or any other material witness have been examined till date despite the fact that 2 years have elapsed after the framing of the charges. He submitted that the allegations against the petitioner and the other co-accused were that they were coming on a motorcycle and there had been a recovery of 1000 tablets of Tramadol from them. He further submitted that though the quantity falls under the category of commercial quantity under the NDPS Act but the bar contained under Section 37 of the NDPS Act will not apply to the present petitioner in view of the aforesaid factual position. He further submitted that in fact the petitioner has been falsely implicated in the present case which gets substantiated from the aforesaid fact that the material prosecution witnesses have not cared to depose before the learned trial Court for long 2 years after the framing of the charges. He submitted that the petitioner was earlier involved in one case under the NDPS Act and that was the reason as to why the aforesaid contraband was planted upon the petitioner. He has also referred to a judgment of the Hon'ble Supreme Court in ***Satender Kumar Antil Versus Central Bureau of Investigation and another [2022 (10) SCC 51]*** and contended that when there is a long custody, which is not attributable to the accused and the delay has been caused by the prosecution, then Rights under Article 21 of the Constitution of India are affected. He also referred to another judgment of the Hon'ble Supreme Court in ***Mohd. Muslim @ Hussain Versus State (NCT of Delhi) [2023 AIR (SC) 1648]*** wherein the scope of Section 37 of the NDPS Act vis-a-vis Article 21 of the Constitution of India has been discussed by taking a serious view with

regard to long trial. He also referred to a judgment of Supreme Court in *Dheeraj Kumar Shukla v. The State of Uttar Pradesh (Special Leave to Appeal (Crl.) No.(s) 6690 of 2022)* and also a recent judgment of Supreme Court in *Rabi Prakash Versus State of Odisha, Special Leave to Appeal (Crl.) No.4169 of 2023* to contend that long custody itself is a ground for grant of bail notwithstanding the bar contained under Section 37 of the NDPS Act.

3. On the other hand, Mr. Sarabjit Singh Cheema, DAG, Punjab has submitted that it is correct that the petitioner is in custody for 2 years and 5 months and the charges were framed on 16.08.2021 which is almost 2 years but no material witness has been examined till date and only two formal witnesses have been examined. He has however opposed the grant of regular bail to the petitioner on the ground that the recovered quantity from the petitioner and the other co-accused 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.

4. I have heard the learned counsel for the parties.

5. It is a case where the petitioner has already faced incarceration for 2 years and 5 months. The charges were framed on 16.08.2021 and surprisingly only two witnesses have been examined till date who are not even the material witnesses, as per the learned counsel for the parties. During the course of arguments, a specific query was raised to the learned State counsel as to what was the justification as to why the police party who had allegedly arrested the petitioner or even any other such material witness has not been examined till date despite the fact that two years have elapsed

after the framing of the charges, they are evading process to which after seeking instructions from ASI Swaran Singh, he was not able to justify the same.

6. Hon'ble Supreme Court in ***Satender Kumar Antil Versus Central Bureau of Investigation and another (Supra)*** has discussed this serious issue. Para 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”.

7. Hon'ble Supreme Court in ***Mohd. Muslim @ Hussain (Supra)*** has dealt with this issue. The relevant portion of the aforesaid judgment contained in para No.19 and 20 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.*

8. The Hon'ble Supreme Court in ***Dheeraj Kumar Shukla***'s case (supra) has observed 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.”

9. Recently the Hon'ble Supreme Court in ***Rabi Prakash Versus State of Odisha (Supra)*** has also discussed the effect of Section 37 of the NDPS Act in such like cases of long custody. The relevant portion of the aforesaid judgment contained in para No.4 is reproduced as under:-

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.

10. In the present case, the petitioner has already faced incarceration for 2 years and 5 months and after the framing of the charges on 16.08.2021, no material witness has been examined. Therefore, this Court is of the view that in view of the long custody of the petitioner and the factual position with regard to the stage of trial, the bar contained under Section 37 of the NDPS Act will not apply to the present petitioner in the light of Article 21 of the Constitution of India.

11. Consequently, the present petition is allowed. The petitioner shall be released on regular bail subject to furnishing bail bonds/surety to the satisfaction of the learned trial Court/Duty Magistrate concerned.
12. However, anything observed hereinabove shall not be treated as an expression of opinion on merits of the case and is meant for the purpose of deciding the present petition only.

10.08.2023

rakesh

Whether speaking
Whether reportable

(JASGURPREET SINGH PURI)
JUDGE

: Yes/No
: Yes/No