

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRM-M-29847-2022(O&M))

Date of Decision: 25.09.2023

Kuldeep Kumar @ Gaurav

....Petitioner

Versus

State of Punjab

.....Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. Jashandeep Singh Sandhu, Advocate, for the petitioner.

Mr. Sarabjit Singh Cheema, DAG, Punjab.

JASGURPREET SINGH PURI, J. (Oral)

1. The present is a second petition filed under Section 439 of the Code of Criminal Procedure for grant of regular bail to the petitioner in FIR No.94 dated 24.06.2021, under Sections 22 (c), 29 of the NDPS Act, 1985, registered at Police Station Bahavwala, District Fazilka, Punjab.

2. Learned counsel for the petitioner has submitted that the petitioner is in custody for 2 years and 3 months. He submitted that in the present case after the completion of the investigation, challan was presented and charges were framed on 18.01.2022 and thereafter immediately one of the witnesses namely ASI Shagan Lal was examined but thereafter the prosecution witnesses did not appear despite being summoned repeatedly and even the learned trial Court was constrained to issue bailable warrants against the prosecution witnesses on one date still they did not appear when they were bound down to appear. He submitted that against one of the co-accused supplementary challan was presented and qua him also charges

were framed after the framing of the charges against the present petitioner but after the framing of the charges against the petitioner i.e. on 18.01.2022, 1 year and 8 months have elapsed and only one witness has been examined and that also at the initial stages and there is no justification for non-deposition of the prosecution witnesses who are the police officials who themselves had set the criminal law into motion. He further submitted that the petitioner is having clean antecedents and is not involved in any other case and the allegation against the petitioner was with regard to recovery of 4500 tablets of Tramadol from him and the present case has been planted upon the petitioner. He further submitted that the petitioner is also having a critical medical ailment. He has been diagnosed with hernia and he was advised for hernioplasty by the concerned Surgeon but it is more than 1 year which has elapsed and surgery could not be conducted and the petitioner is suffering from pain. He submitted that the reason as to why the surgery could not be conducted was due to uncontrolled high sugar level as he is suffering from acute diabetes mellitus type-2. He further submitted that it is not only that he is suffering pain from hernia but it is also that due to acute high diabetes mellitus type-2, the other organs of the petitioners are also being effected. In this regard, he referred to the short affidavit filed by the Superintendent, Central Jail, Ferozepur in which the medical report of the petitioner has been attached in this regard to substantiate his submissions. He submitted that be that as it may, now the petitioner has faced incarceration for 2 years and 3 months and the delay has been caused at the hands of the prosecution and not at the hands of the petitioner and therefore, the petitioner may be considered for the grant of regular bail.

3. Learned counsel further 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 effected. 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 referred to another 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.

4. On the other hand, Mr. Sarabjit Singh Cheema, DAG, Punjab submitted that so far as the custody of the petitioner is concerned, the same is correct and it is also correct that the petitioner is suffering from hernia and diabetes as per the affidavit filed by the Superintendent of Jail, Ferozepur. However, he submitted that adequate medical arrangements can be made in the jail. He has however opposed the grant of bail to the petitioner on the ground that there has been a recovery of 4500 tablets of Tramadol from the petitioner which falls in the category of commercial quantity under the NDPS Act and therefore, the prayer of the petitioner is hit by the bar contained under Section 37 of the NDPS Act. So far as the criminal

antecedent of the petitioner is concerned, he also submitted that the petitioner is not involved in any other case.

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

6. It is a case where the petitioner was apprehended on the basis of secret information and the police recovered 4500 tablets of Tramadol from him. After the completion of investigation, the challan was presented and thereafter, the charges were framed on 18.01.2022 but it is almost 1 year and 8 months which have elapsed that only one prosecution witness has been examined and he was examined at the initial stages only i.e. on 02.05.2022 as per the interlocutory order which have been supplied to the Court by the learned counsel for the petitioner during the course of proceedings. A perusal of the aforesaid orders would show that after the examination of ASI Shagan Lal at the initial stages the prosecution witnesses were bound down and even once bailable warrants were also issued to the prosecution witnesses but they did not appear and although qua one of the other co-accused charges were framed on a later date but the petitioner has faced incarceration for 2 years and 3 months and it appears that it was due to non-deposition of the prosecution witnesses as per the interlocutory orders which have been supplied to the Court today. The net result of the same was that the petitioner had to face incarceration for 2 years and 3 months and the petitioner is having no criminal backgrounds.

7. 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”.

8. 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.

9. 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.”

10. 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.

11. Apart from the above, the petitioner is stated to be having medical ailment of hernia for which he could not even be operated and as per the learned counsel for the petitioner, he is also in pain. He could not be operated because he is having high sugar levels which are uncontrolled even as per the affidavit filed by the State in this regard.

12. In view of the aforesaid totality and circumstances of the present case, considering the medical ailment of the petitioner, long custody of the petitioner and the fact that for 1 year and 8 months after the framing of the charges, only one prosecution witness has been examined and also considering the judgments of the Supreme Court as aforesaid, this Court is of the view that considering the aforesaid facts and circumstances and the total custody of the petitioner, the bar contained under Section 37 of the NDPS Act will not apply to the petitioner especially in the light of Article 21 of the Constitution of India.

13. 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, if not

required in any other case.

14. 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.

25.09.2023

rakesh

(JASGURPREET SINGH PURI)
JUDGE

Whether speaking	:	Yes/No
Whether reportable	:	Yes/No