

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

CRM-M-31591-2023(O&M)

Date of decision: 01.09.2023

Surender @ Sunder**...Petitioner****VERSUS****State of Haryana****...Respondent****CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI**

Present:- Mr. R.K. Lathwal, Advocate, for the petitioner.

Mr. Naveen Kumar Sheoran, DAG, Haryana.

JASGURPREET SINGH PURI, J. (Oral)

1. The present is fourth petition filed under Section 439 of the Code of Criminal Procedure for the grant of regular bail to the petitioner in FIR No.445 dated 30.11.2020, under Section 20-C of the NDPS Act, registered at Police Station Kalanaur, District Rohtak (Haryana).

2. Learned counsel for the petitioner has submitted that the present is a fourth successive bail petition and earlier two bail petitions were withdrawn and one bail petition was dismissed on merits vide Annexure P-7. He submitted that the present bail petition is maintainable in view of the change in circumstances because even till date no prosecution witness has been examined despite the fact that the charges were framed on 19.05.2022 which is almost 1 year and 3 months and apart from the above, the petitioner has now faced incarceration for 2 years and 9 months and it was only on account of the fault of the prosecution witnesses for not deposing before the learned trial Court. He

submitted that it is a case where the allegations against the petitioner and the other co-accused were that they were travelling in two different cars and the car from where the petitioner was travelling, there had been a recovery of 140 kgs. & 300 grams of *Ganja* which falls under the category of commercial quantity but due to the reasons mentioned above, the bar contained under Section 37 of the NDPS Act will not apply to the present petitioner in view of the peculiar facts and circumstances of the present case.

3. Learned counsel submitted that after the framing of charges on 19.05.2022 more than 1 year and 3 months have elapsed but not even a single witness has been examined and it is rather the duty of the police officials who have set the criminal law into motion to have deposed before the Court and the custody of the petitioner has been perpetuated not because of the fault of the petitioner but because of the fault of the prosecution. He also referred to various zimni orders passed by the learned trial Court after the framing of the charges to show that for a number of occasions evenailable warrants were issued against the prosecution witnesses for deposing before the Court. He submitted that in fact the petitioner has been falsely implicated in the present case and that was the reason as to why the police officials who are the prosecution witnesses are not deliberately coming forward for deposing before the Court and there is no justification with regard to the same with a result that now the petitioner had to face incarceration for 2 years and 9 months. He 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.

4. On the other hand, Mr. Naveen Kumar Sheoran, DAG, Haryana has submitted that so far as the custody of the petitioner is concerned, the same is correct and it is also correct that after the framing of the charges on 19.05.2022, no prosecution witness has been examined despite the fact that bailable warrants were issued against the prosecution witnesses. He has however opposed the grant of regular bail to the petitioner on the ground that the recovered quantity from the petitioner 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. He also submitted that the petitioner is involved in two more cases under the NDPS Act, although he is on bail in those cases.

5. At this stage, the learned counsel for the petitioner has submitted that the provisions of Section 50 NDPS Act were not complied with. He referred to the translated form of the FIR as well as to the vernacular form of the FIR to contend

that when the offer under Section 50 of the NDPS Act was given, then it was so stated that as to whether the petitioner was ready and willing to get himself searched either from the Gazetted Officer or an Illaqua Magistrate or a Duty Magistrate. He submitted that as per the provisions of Section 50 of the NDPS Act, the offer can be only pertaining to two authorities i.e. a Magistrate or a Gazetted Officer but the police officer who is giving an offer under Section 50 of the NDPS Act has no authority to enlarge the scope of Section 50 of the NDPS Act to make three options in this regard and therefore, entire recovery itself gets vitiated. He has referred to a judgment of Hon'ble Supreme Court in **State of Rajasthan versus Parmanand and another, 2014(5) SCC 345** in this regard.

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

7. It is a case where the petitioner has already faced incarceration of about 2 year and 9 months and after the framing of the charges on 19.05.2022 no prosecution witness has been examined despite the fact that for a number of times bailable warrants were issued against the prosecution witnesses. A perusal of the FIR as pointed out by the learned counsel for the petitioner would show that when an offer was given under Section 50 of the NDPS Act, it was offered that the petitioner has a right to get searched in the presence of a Gazetted Officer or an Illaqua Magistrate or a Duty Magistrate. The provisions of Section 50 of the NDPS Act are unambiguous and very clear in its language. The officer who had given an offer appears to have enlarged the scope of 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."

8. Although in the present case, there was no such offer from concerned police officer to get the petitioner searched from himself but the rationale and principle of the aforesaid judgment will be applicable in the present case as well. Therefore, it appears that prima facie the offer was not in

accordance with law. It is made clear that it is only for the purpose of considering the prayer of the petitioner for the grant of regular bail and the aforesaid validity of the offer will not be construed to be anything on the merits of the case and the issue of validity is to be seen at the time of trial.

9. So far as the judgments referred by the learned counsel for the petitioner as aforesaid with regard to delayed trial are concerned, the 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”.

10. 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.

11. 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.”

12. 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.

13. Therefore, considering the totality of aforesaid facts and circumstances of the present case and especially considering the custody of the petitioner which comes out to be 2 years and 9 months, this Court is of the view that 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.

14. Consequently, the present petition is allowed. The petitioner shall be released on regular bail subject to furnishing bail bonds/surety bonds to the satisfaction of the learned trial Court/Duty Magistrate concerned, if any required in any other case.

15. 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.

01.09.2023
rakesh

(JASGURPREET SINGH PURI)
JUDGE

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