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

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CRM-M-41173-2023

Date of decision : 21.12.2023

Jatt Umar Khamisha and another

..... Petitioners

versus

State of Punjab

..... Respondent

CORAM : HON'BLE MR. JUSTICE PANKAJ JAIN

Present: Mr. Ashok Saini, Advocate
for the petitioners.

Mr. Jaswinder Singh Arora, DAG, Punjab
with SI Surinder Singh.

PANKAJ JAIN, J. (Oral)

1. Present petition has been filed under Section 439 Cr.P.C. for grant of regular bail in case F.I.R. No.138 dated 27.08.2022, registered for offences punishable under Sections 21, 25, 29 and 61 of NDPS Act, 1985 at Police Station, City Nawanshahar, District Shahid Bhagat Singh Nagar.

2. As per the case of prosecution, a secret information was received regarding Rajesh Kumar @ Sonu Khatri, Kulwinder Ram @ Kinda, Bittu and Somnath @ Beko being in possession of huge quantity of contraband. Barricading was laid. A truck was intercepted. An effort was made by the occupants of the truck to run away. However, both were apprehended. One disclosed his name as Kulwinder Ram @ Kinda and second is Bittu. On search, huge quantity of heroin weighing 38 kg was recovered. Truck bearing No. PB-4V-6316 is owned by

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Kulwinder Ram @ Kinda, who on interrogation disclosed that he was working for Rajesh Kumar @ Sonu Khatri and that the contraband was procured from Gujarat from the present petitioners.

3. On 19th of October, 2023 following order was passed :

“Learned State counsel is directed to ascertain from the Ministry of Home, Gujrat Government with respect to the antecedents of the petitioners especially whether they are involved in any other NDPS matters in the State of Gujrat or not. Learned counsel for the petitioners shall also be at liberty to file affidavit of family members of the petitioners to the same effect.

Adjourned to 22.11.2023.

4. State Counsel has produced certificate issued by Police Station Officer Narayan Sarovar Post Gujrat to the following effect :

“Which certificate is hereby issued that UMAR s/o KHAMISHA s/o JAMADAR JAT At-lakki ta.-lakhapat dist-kutchh. Whose record is verified on the basis of e-Gujcop database and General conviction register of police station is Not found to be arrested or prosecuted in any crime and involved in any crime. No offense has been registered against him, For which this certificate is issued.”

5. Likewise counsel for the petitioners has also placed on record the affidavits of fathers of both the petitioners. Affidavit of Khamisha father of petitioner No.1 reads as under:-

“xx

1. That my son Jatt Umar Khamisha has been falsely involved by Punjab police in FIR No.138 dated 27.08.2022 U/S 21, 25, 29-61-1985 NDPS Act, Police Station Nawanshahar, District Shahid Bhagat Singh Nagar and is presently lodged in Central Jail Ludhiana.”

2. That on the last date of hearing i.e. 19.10.2023 this Hon'ble High Court was pleased to pass the following order :-

Learned State counsel is directed to

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ascertain from the Ministry of Home, Gujrat Government with respect to the antecedents of the petitioners especially whether they are involved in any other NDPS matters in the State of Gujrat or not.

Learned counsel for the petitioners shall also be at liberty to file affidavit of family members of the petitioners to the same effect.

3. That I, the father of accused petitioner Jatt Umar Khamisha, hereby through this sworn affidavit solemnly affirm and declare that my son namely Jatt Umar Khamiza has never been involved in any case related with NDPS Act throughout his life in Gujrat State or anywhere in India.

4. That the contents of this affidavit has been read over and explained to me in my native language and I have signed/thumb marked the same in token of its correction. And I am bound by whatever has been stated in my affidavit. Xxx”

6. The second affidavit i.e. of father of petitioner No.2 is also to the same effect.

7. Counsel for the petitioners submits that apart from the disclosure statement made by co-accused, there is no incriminating evidence against the petitioners, who have clean antecedents. As per the custody certificate, the petitioners are behind bar since 07.09.2022 i.e. for more than 01 year, 03 months and 15 days. It has been further contended that out of 32 cited witnesses, by now, only 01 has been examined. The trial is going at snail’s pace. Reliance is being placed upon law laid down by Supreme Court in *Tofan Singh vs. State of Tamil Nadu* reported as (2021) 4 SCC 1, to submit that mere disclosure will not be sufficient to convict the petitioners as the disclosure in police custody is inadmissible in evidence.

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8. *Per contra*, State counsel has not disputed the aforesaid factual assertions made by counsel for the petitioners. However, it has been submitted by him that once the petitioners are released on bail, it will be very hard to procure their presence keeping in view that they are residents of State of Gujarat. He further submits that the petitioners be put to strict terms so that risk of them evading the trial is minimized.

9. On a specific query by the Court to the State counsel about the incriminating evidence against the petitioners, he fairly submits that apart from the disclosure of the co-accused, there is no incriminating evidence against the petitioners collected during the investigation and there is no recovery effected from them.

10. Faced with the situation, counsel for the petitioners submits that the petitioners are ready to deposit Rs.10 lakh each with the trial Court as surety and undertake to attend the trial Court regularly without fault.

11. I have heard counsel for the parties and have gone through the records of the case.

12. Apex Court in *Tofan Singh vs. State of Tamil Nadu* reported as **(2021) 4 SCC 1**, observed as under:-

“xx xx xx

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act.”

13. Counsel for the petitioners further submits that the trial is pending and has proceeded at snail's pace as only 01 out of 32 cited witnesses could be examined in a year. He relies upon order passed by

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Apex Court in the case of ***Rabi Prakash Vs. The State of Odisha*** passed in ***Special Leave to Appeal (Crl.) No(s). 4169 of 2023*** decided on 13.07.2023 wherein it has been held 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.”

14. Earlier to ***Rabi Prakash's case supra*** also Apex Court has consistently held that the prolonged incarceration has to be considered de hors bar contained under Section 37 of the NDPS Act. The Supreme Court in order dated 22.08.2022 passed by the Supreme Court in ***Special Leave to Appeal (Crl.) No.5530-2022*** titled as "***Mohammad Salman Hanif Shaikh Vs. The State of Gujarat***, had held as under:-

"We are inclined to release the petitioner on bail only on the ground that he has spent about two years in custody and conclusion of trial will take some time.

Consequently, without expressing any views on the merits of the case and taking into consideration the custody period of the petitioner, this special leave petition is accepted and the petitioner is ordered to be released on bail subject to his furnishing the bail bonds to the satisfaction of the Special Judge/ concerned Trial Court.

The special leave petition is, accordingly, disposed of in the above terms.

Pending application(s), if any, shall also stand disposed of."

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15. Supreme Court in order dated 07.02.2020 passed by the Hon'ble Supreme Court in ***Criminal Appeal No.245/2020 titled as "Chitta Biswas Alias Subhas Vs. The State of West Bengal"*** was pleased to grant concession of bail to the petitioner (therein) in a case where the custody was of 1 year and 7 months approximately. The relevant portion of the said order dated 07.02.2020 is as under: -

"Leave granted.

This appeal arises out of the final Order dated 30.7.2010 passed by the High Court of Calcutta in CRM No.6787 of 2019.

The instant matter arises out of application preferred by the appellant under Section 439 Cr.P.C. seeking bail in connection with Criminal Case No.146 of 2018 registered with Taherpur Police Station for offence punishable under Section 21-C of the Narcotic Drugs and Psychotropic Substances Act, 1985.

According to the prosecution, the appellant was found to be in possession of narcotic substance i.e. 46 bottles of phensydryl cough syrup containing codeine mixture above commercial quantity.

The appellant was arrested on 21.07.2018 and continues to be in custody. It appears that out of 10 witnesses cited to be examined in support of the case of prosecution four witnesses have already been examined in the trial.

Without expressing any opinion on the merits or demerits of the rival submissions and considering the facts and circumstances on record, in our view, case for bail is made out. We therefore, allow this appeal and direct as under:

(a) Subject to furnishing bail bond in the sum of Rs.2 lakhs with two like sureties to the satisfaction of the Judge, Special Court, NDPS Act, Nadia at Krishnagar, the appellant shall be released on bail.

(b) The Special Court may impose such other conditions as it deems appropriate to ensure the presence and participation of the appellant in the pending trial. With the aforesaid directions, the appeal stands allowed."

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16. In order dated 05.08.2022 passed by the Supreme Court in ***Criminal Appeal No.1169 of 2022 titled as "Gopal Krishna Patra @ Gopalrusma Vs. Union of India,"*** the Supreme Court was pleased to observe as under: -

"Leave granted.

This appeal challenges the judgment and order dated 25.01.2022 passed by the High Court Of Madhya Pradesh, Principal Seat at Jabalpur, in MCRC No.117/2022. The appellant is in custody since 18.06.2020 in connection with crime registered as N.C.B. Crime No.02/2020 in respect of offences punishable under Sections 8, 20, 27-AA, 28 read with 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985.

The application seeking relief of bail having been rejected, the instant appeal has been filed.

We have heard Mr. Ashok Kumar Panda, learned Senior Advocate in support of the appeal and Mr. Sanjay Jain, learned Additional Solicitor General for the respondent.

Considering the facts and circumstances on record and the length of custody undergone by the appellant, in our view the case for bail is made out.

We therefore, direct that:

(a) The appellant shall be produced before the Trial Court within five days from today.

(b) The Trial Court shall release the appellant on bail subject to such conditions as the Trial Court may deem appropriate to impose.

(c) The appellant shall not in any manner misuse his liberty.

(d) Any infraction shall entail in withdrawal of the benefit granted by this Order.

The appeal is allowed in aforesaid terms."

17. In order dated 01.08.2022 passed by the Supreme Court in Special Leave to Appeal (Crl.) No.5769/2022 titled as ***"Nitish Adhikary @ Bapan Vs. The State of West Bengal"*** Supreme Court has observed as under: -

"As per the office report dated 29.07.2022, copy of the show cause notice along with Special Leave Petition was supplied to the Standing Counsel for the State of West Bengal and separate notice

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has been served on the State also. However, no one has entered appearance on their behalf.

The petitioner seeks enlargement on bail in F.I.R. No. 612 of 2020 dated 17.10.2020 filed under Section 21(c) and 37 of the NDPS Act, registered at Police Station Bongaon, West Bengal.

During the course of the hearing, we are informed that the petitioner has undergone custody for a period of 01 year and 07 months as on 09.06.2022. The trial is at a preliminary stage, as only one witness has been examined. The petitioner does not have any criminal antecedents.

Taking into consideration the period of sentence undergone by the petitioner and all the attending circumstances but without expressing any views in the merits of the case, we are inclined to grant bail to the petitioner.

The petitioner is accordingly, directed to be released on bail subject to him furnishing bail bonds to the satisfaction of the Trial Court.

The Special Leave Petition is disposed of on the aforestated terms.

Pending application(s), if any, shall stand disposed of."

18. Without commenting on the merits of the case, considering the period already spent by the petitioners, the present petition is allowed. The petitioners are ordered to be released on bail on their furnishing bail/surety bonds to the satisfaction of the Ld. Trial Court/Duty Magistrate, concerned. However, in addition to conditions that may be imposed by the Trial Court/Duty Magistrate concerned, the petitioners shall remain bound by the following conditions :-

- (i) The petitioners shall not mis-use the liberty granted.*
- (ii) The petitioners shall not tamper with any evidence oral or documentary during the trial.*
- (iii) The petitioners shall not absent himself on any date before the trial.*
- (iv) The petitioners shall not commit any offence similar to the one alleged in the present case.*
- (v) The petitioners shall deposit his passport, if any with the trial Court.*

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- (vi) The petitioners shall give his cellphone number to the police authorities and shall not change his cell-phone number without permission of the trial Court.
- (vii) The petitioners shall not in any manner try to delay the trial.
- (viii) The petitioners shall deposit Rs.10,00,000/- (ten lakh) each with the trial Court as stated by counsel for the petitioners.

19. In case of breach of any of the aforesaid conditions and those which may be imposed by the Trial Court, the prosecution shall be at liberty to move cancellation of bail of the petitioners.

20. Ordered accordingly.

(PANKAJ JAIN)
JUDGE

21.12.2023
Dinesh

Whether speaking/reasoned :	Yes
Whether Reportable :	No