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IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-52217-2023
Date of Decision: 19.10.2023

Ashok Kumar

..... Petitioner

Versus

State of Punjab

..... Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present: Mr. Ankit Bishnoi, Advocate,
for the petitioner.

Mr. G.S. Sidhu, AAG, 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 case bearing FIR No.160 dated 07.10.2021, under Section 15 of the NDPS Act, 1985, registered at Police Station Vairo Ke, District Fazilka.

2. Learned counsel for the petitioner submitted that the petitioner is in custody from 07.10.2021, which is 2 years and 11 days and in the present case, the allegations against the petitioner and the other four co-accused were that they were coming in a car from Rajasthan and they were apprehended on the basis of a secret information received by the police and the alleged recovery from the car of the petitioner in which he was sitting on the seat of the conductor was 62 kgs. of *Poppy Husk* and the commercial quantity as defined in the NDPS Act is 50 kgs. He further submitted that the

petitioner was only sitting in the car and was not involved in the present case and he was not aware of the existence of any contraband in the car. He also submitted that the petitioner has clean antecedents and is not involved in any other case and in the present case, he was only a passenger and the same can be proved only at the time of trial. He further submitted that however from the other car, there was a recovery of 90 kgs of *Poppy Husk*. He also submitted that although the aforesaid quantity of 62 kgs of *Poppy Husk* which was recovered from the car in which the petitioner was sitting, falls in the category of commercial quantity, but the bar contained under Section 37 of the NDPS Act will not apply in the present case considering the fact that the petitioner is not involved in any other case and also considering the fact that the charges in the present case were framed on 25.04.2022, which is almost 1½ years ago and till date, only three prosecution witnesses have been examined, out of which, two witnesses were non-material witnesses because those were the witnesses, who had deposited the sample at different places including the Forensic Science Laboratory and only one material witness has been examined till date. He also referred to the copy of the interlocutory orders passed by the learned trial Court after the framing of the charges stating that even on some dates, the accused were not even produced and rather on 15.07.2022, the prosecution witnesses were summoned through bailable warrants. The delay in the trial after framing of the charges, which is almost 1½ years ago is attributable to the prosecution witnesses and not to the petitioner. Learned counsel for the petitioner submitted that considering the aforesaid facts and circumstances, the petitioner may be considered for grant of regular bail.

3. Learned counsel for the petitioner has referred to the judgments of the Hon'ble Supreme Court passed 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, "Dheeraj Kumar Shukla Vs. The State of Uttar Pradesh", 2023 SCC Online SC 918 and "Rabi Prakash Vs. The State of Odisha" in *Special Leave to Appeal (Criminal) No.4169 of 2023* and contended that in view of the aforesaid factual position as well as the judgments passed by the Hon'ble Supreme Court when there is a long delay in the trial and especially when it is not the fault of the accused and in that situation even the effect of Section 37 of the NDPS Act will be diluted in the given facts and circumstances of each and every case.

4. On the other hand, Mr. G.S. Sidhu, learned AAG, Punjab submitted on instructions that it is correct that the petitioner is in custody from 07.10.2021, which is almost 2 years and 11 days and it is also correct that the charges in the present case were framed on 25.04.2022, but only 3 witnesses have been examined till date and the antecedents of the petitioner is also not disputed by the learned State counsel and he has stated that he is not involved in any other case. He, however, submitted that the bar contained under Section 37 of the NDPS Act will be operative qua the petitioner because from the car in which he was sitting, there was a recovery of 62 kgs of *Poppy Husk*, which falls in the category of commercial quantity under the NDPS Act.

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

6. It is a case where on the basis of secret information by the

police, two cars were intercepted and in the car in which the petitioner was sitting on the conductor seat, there was a recovery of 62 kgs of *Poppy Husk*, which was little higher than the commercial quantity as defined in the NDPS Act. The petitioner is stated to be not involved in any other case and has clean antecedents. According to the learned counsel for the petitioner, he was only a passenger and had taken lift in the car and has now faced incarceration for more than 2 years. About 1½ years elapsed, after framing of the charges, only three witnesses have been examined out of which, two witnesses are those witnesses, who had only deposited the sample but so far as the other material witnesses are concerned especially those, who are either the part of the police party or recovery witnesses, have not deposed before the Court and in the month of July, 2022, the Court had rather directed that the prosecution witnesses be summoned by way of bailable warrants. It is a case under the NDPS Act and normally the prosecution witnesses are the police officials, who set the criminal law into motion and after framing of the charges rather it becomes the duty of the police officials, who are the prosecution witnesses to depose before the Court and not to delay the trial. Furthermore, it is neither the case of the State nor it has been argued by the learned State counsel that in case the petitioner is released on bail then he may abscond or flee from justice or may influence the witness or may tamper with the evidence.

7. 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.49 of the aforesaid judgment is reproduced as under:-

“49. 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. 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.”

9. 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.”

10. 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.”

11. After hearing the learned counsel for the parties, this Court

while considering the aforesaid factors including the clean antecedents of the petitioner, the fact that he was only sitting on the conductor seat and after the framing of the charges on 25.04.2022 i.e. about 1½ years, only three witnesses have been examined including two witnesses, who were not the material witnesses, this Court is of the view that the bar contained under Section 37 of the NDPS Act will not apply to the petitioner in the light of the aforesaid judgments and in the light of Article 21 of the Constitution of India. Therefore, this Court deems it fit and proper to grant regular bail to the petitioner.

12. Consequently, 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.

13. 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.

19.10.2023

Bhumika

(JASGURPREET SINGH PURI)
JUDGE

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