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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-53546-2023
Date of decision: 03.11.2023

SUMIT KUMAR

...Petitioner

VERSUS

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE JASGURPREET SINGH PURI

Present:- Mr. Parvesh Sachdeva, Advocate
for the petitioner.

Mr. Harsimar Singh Sitta, 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.23 dated 24.04.2022, under Sections 21, 29, 61 and 85 of the NDPS Act, registered at Police Station Amir Khas, District Fazilka, Punjab.

2. The first petition was dismissed as withdrawn on 06.12.2022 and the second petition was dismissed on 06.02.2023 since it was filed after a short span of time and there was no change of circumstance.

3. Learned counsel for the petitioner submitted that the petitioner is in custody from 24.04.2022, which is more than 1 year and 6 months and charges in the present case were framed on 01.08.2022 and till date not even a single prosecution witness has been examined despite the fact that almost 1 year and 3

months have elapsed after the framing of the charges. He further submitted that the petitioner has clean antecedents and he is not involved in any other case and as per the allegations, the police received an information pertaining to three persons including the petitioner that they are coming in a car along with *heroin* and as per the allegations the petitioner was sitting on the rear seat of the car and there was an alleged recovery of 260 grams of *heroin*, which is marginally higher than the commercial quantity as defined under the NDPS Act. He also submitted that it is a case where the petitioner has been falsely implicated and his submissions are substantiated from the fact that almost 1 year and 3 months have elapsed after framing of the charges that the prosecution has not been able to examine even a single prosecution witness although the criminal law was set into motion by those police officials who are the prosecution witnesses and there is no justification for the same and the reason as to why they are not deposing before the Court is that they have falsely implicated the petitioner in the present case, who is having clean antecedents and not involved in any other case. He has 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 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

further referred to a judgment of Hon'ble Supreme Court in *"Dheeraj Kumar Shukla versus The State of Uttar Pradesh", 2023 SCC Online SC 918* and also a judgment of Hon'ble Supreme Court in *"Rabi Prakash versus The State of Odisha", Special Leave to Appeal (Criminal) 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. He also referred to a recent judgment of Hon'ble Supreme Court in *Manish Sisodia versus Central Bureau of Investigation*, arising out of *Special Leave Petition (Criminal) Nos.8167 and 8188 of 2023* to contend that when the trial is not proceeding for reasons not attributable to the accused, the Court, unless there are good reasons, may well be guided to exercise the power to grant bail and this would be truer where the trial would take years. He further submitted that the delay in the trial has been caused by the prosecution and not by the petitioner in this regard.

4. On the other hand, Mr. Harsimar Singh Sitta, DAG, Punjab submitted that it is correct that the petitioner is in custody from 24.04.2022, which is more than 1 year and 6 months and about 1 year and 3 months have elapsed after the framing of the charges and not even a single prosecution witness has been examined till date. The fact that the petitioner has clean antecedents and he is not involved in any other case has not been disputed by the learned State counsel. He also submitted that since the recovery from the three persons including the petitioner was 260 grams of *heroin*, which is marginally higher than the commercial quantity as defined under the NDPS Act, the petitioner does not deserve the concession of regular bail in view of the bar contained under Section 37 of the NDPS Act.

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

6. As per the allegations, the police received an information that three persons including the petitioner are coming in a car from where there was an alleged recovery of 260 grams of *heroin*, which is marginally higher than the commercial quantity as defined under the NDPS Act. It is so submitted by the learned counsel for the parties that the petitioner is not involved in any other case and the alleged recovery in the present case is from the car in which the petitioner and other co-accused were sitting. Since an objection has been taken by the learned State counsel pertaining to the bar contained under Section 37 of the NDPS Act, this Court would therefore consider the aforesaid bar in the light of facts and circumstances of the present case.

7. The charges in the present case were framed on 01.08.2022 and it is almost 1 year and 3 months and not even a single prosecution witness has been examined. During the course of arguments, a specific query was raised to the learned State counsel as to what was the justification with regard to the same to which he could not offer any justification. It is not understandable as to why for such a long period of time, which is almost 1 year and 3 months the prosecution witnesses did not care to depose before the Court when the criminal law was set into motion by the police itself. In such cases under the NDPS Act, the police officials are the prosecution witnesses normally unless there is some private witness in this regard. It is a duty of those officials especially the police party who apprehend the accused persons to depose before the Court well in time on their own.

8. Hon'ble Supreme Court in Satender Kumar Antil's case (supra) has discussed this serious issue with regard to delay in trial and its effect on the Right to Life of an individual 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”.

9. Hon'ble Supreme Court in Mohd. Muslim Hussain's case (supra) has dealt with this issue with regard to delay in trial and long custody of the accused person vis-a-vis the bar contained under Section 37 of the NDPS Act. The relevant portion of the aforesaid judgment contained in para Nos.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.

10. 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.”

11. The Hon'ble Supreme Court in **Rabi Prakash's case** (**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.”

12. Recently, the Hon'ble Supreme Court in **Manish Sisodia's case** (**supra**) has observed as under:-

“28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious. While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded. The allegations have to be established and proven. The right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 of the Code and Section 45 of the PML Act. The reason is that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted, that he be ensured and given a speedy trial. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years.”

13. Therefore, considering the aforesaid totality and facts and circumstances of the present case, this Court is of the view that although the custody of the petitioner is more than 1 year and 6 months but there is a long period of almost 1 year and 3 months as well after the framing of the charges and during this period not even a single prosecution witness has been examined till date to which the learned State counsel has not been able to give any justification. It is clear that the trial has been delayed at the instance of the prosecution and not because of the present petitioner and therefore the bar contained under Section 37 of the NDPS Act will not apply to the petitioner in the light of Article 21 of the Constitution of India and also in view of the aforesaid judgments rendered by the Hon'ble Supreme Court.

14. Consequently, the present petition is allowed. The petitioner shall be released on regular bail, if not required in any other case, subject to furnishing bail bonds/surety bonds to the satisfaction of the learned trial Court/Duty Magistrate concerned.

15. However, anything observed hereinabove shall not be treated as an expression of opinion on the merits of the case and is meant for the purpose of deciding the present petition only.

(JASGURPREET SINGH PURI)
JUDGE

03.11.2023
Chetan Thakur

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