

Mithun Rai @ Mithun Kumar @ Mithun vs Union Of India Through Ncb ... on 13 October, 2023

Author: Ratnaker Bhengra

Bench: Ratnaker Bhengra

IN THE HIGH COURT OF JHARKHAND AT RANCHI
B.A. No. 4380 of 2023

Mithun Rai @ Mithun Kumar @ Mithun, son of Dinesh Rai, resident of
Village: Barhona High School, PO: Barhona, PS: Vidhapati, Dist.:
Samistipur, Bihar, PIN 848 503 ... Petitioner

-Versus-

Union of India through NCB ... Opposite Party

CORAM :- HON'BLE MR. JUSTICE RATNAKER BHENGRA

For the Petitioner :- Mr. Md. Nasim Akhtar, Advocate
For the UoI :- Mr. Anil Kumar, ASGI;
Ms. Chandana Kumari, AC to ASGI
...

CAV on:05/09/2023
Ratnaker Bhengra, J.

Pronounced on: 13/ 10 /2023

Heard Mr. Md. Nasim Akhtar, the learned counsel for the petitioner as well as Mr. Anil Kumar, the learned ASGI appearing on behalf of the NCB.

2. In the instant application, the petitioner prays for grant of regular bail in connection with NCB Case No. 13 of 2021 (NDPS Case No. 81 of 2022), registered for the offence under section 8(c) read with sections 20b(ii) (C), 25, 29 and 35 of the NDPS Act, now pending before the learned Court of Special Judge (NDPS), Jamshedpur.

3. The prosecution case as mentioned in the offence report-cum- remand petition filed through SPP, NCB on 25.11.2021 for violation of section 8(c) read with sections 20b(ii) (C), 25, 29 and 35 of the NDPS Act is that upon secret information after following all statutory procedures a team of NCB with the help of Bahragora police, intercepted a golden brown Eicher truck bearing registration no. UKO6CB-3141 at about 20:45 hours near P.K. Bala Petrol Pump, Indian Oil NHo6, Odisha, Bahragora road, which was coming from Odisha side. Three persons were found boarded on it. They disclosed their name as Asim Khan, driver of the truck and other two persons sitting on the truck were Shailendra Ray and Mithun Ray. Upon search of the truck bearing registration no. UKO6CB-3141 greenish black dried flowering tops of cannabis believed to be Ganja wrapped in brown colour cello tape weighing approx. weight of 425.5 Kg. was recovered and seizure list was prepared. In addition thereto, ATM card, Aadhaar card, mobile phones and other documents confirming the identity of the apprehended accused were also recovered, detailed inventory whereof

has been prepared in presence of witnesses.

4. Mr. Md. Nasim Akhtar, the learned counsel for the petitioner, has argued and submitted that the petitioner is working as a khalasi of the truck and had no knowledge about the alleged seized material. He was totally unaware of the fact that along with salt packer there were Ganja packets. The learned counsel has further submitted that nothing has been recovered from the house or possession of the petitioner and that he has been falsely implicated in this case only for the reason he was khalasi of the said vehicle. The learned counsel has further submitted that in BA No. 11169 of 2022 another co-accused has been allowed bail vide order dated 05.12.2022 in a squat without any counter-affidavit filed by the NCB, though allegedly substance seized was of 425 kg. No application for cancellation of bail has been made by the NCB till today. The learned counsel has further submitted that the petitioner had earlier filed BA No. 9490 of 2022, which was rejected vide order dated 16.12.2022 and he is in custody since 27.11.2021. The learned counsel has further submitted that charge-sheet against the petitioner has been submitted and the charge has already been framed on 26.07.2022. The learned counsel has further submitted that this Court on rejecting the earlier bail application had directed for expediting the trial, but the petitioner is still languishing in custody. The learned counsel has further submitted that on perusal of the impugned order it is crystal clear that application under section 167(2) CrPC was ultimately for bail and the same has been rejected as premature in terms of stipulated time for default bail under section 167(2) CrPC and the provision under Specific/ Special Act, time frame for default bail under section 36A(4) of the NDPS Act is 180 days whereas under section 167(2) CrPC time frame is 60 to 90 days envisaged in the Act in general, hence, 167(2) CrPC shall have to be read along with Special Act. There is no specific provision for non-maintainability of default bail application it may be acceptable or non-acceptable, it may be rejected or allowed.

5. Mr. Anil Kumar, the learned ASGI appearing on behalf of the NCB, has first and foremost submitted that the only issue that the Court has to decide is the issue of maintainability. The learned ASGI has further submitted that the previous bail application of the petitioner was rejected by this Court vide order dated 16.12.2022 and at that time this impugned order dated 28.02.2022 had not been referred to or mentioned or challenged by the petitioner. Now at this stage, after previous rejection of the bail application of the petitioner on merit by this Court in BA No. 9490 of 2022, again the prayer has been made for grant of bail on the ground of default bail under section 167(2) CrPC. The learned ASGI has further submitted that although in the entire petition it has not been mentioned with respect to the grounds which have been taken by way of impugned order nor there is any specific assertion with regard to the merit of the case, which prima facie shows that the case of the petitioner falls within the section 37(1)(b)(ii) of the NDPS Act. The learned ASGI has further submitted that so far as the period of completion of investigation as provided under section 167(2) CrPC is concerned, there is maximum period of 90 days under the CrPC for completion of investigation and if the same is not being done then the accused is entitled for default bail but so far as the present case is concerned, the said period of 90 days has been extended to 180 days in terms of section 36(A)(4) of the NDPS Act.

6. The learned ASGI has then referred to sub-clause (4) to section 36(A) of the NDPS Act, which is reproduced here-in-below:

"In respect of persons accused of an offence punishable under section 19 or section 24 or section 27-A or for offences involving commercial quantity the references in sub-section(2) of Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) thereof to "ninety days" where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days."

7. The learned ASGI has then pointed out to the last paragraph of the impugned order dated 28.02.2022 and has submitted and quoted, "... that the accused is remanded in this case on 27/11/2021 since then only 90 days has passed though 90 days has remained.

Considering the above fact that petition being MCA no. 513 of 2022 filed on behalf of the accused petitioner is premature and not maintainable and hence it is hereby rejected."

8. The learned ASGI has further submitted and pointed out that as per the impugned order dated 28.02.2022, charge-sheet had not been filed as yet and that the jurisdictional Court then, as is apparent in the impugned order, had referred to section 36(A) of the NDPS Act. The learned ASGI has further submitted that if it is not possible to complete the investigation work in the said period of one hundred and eighty days, the Special Court may further extend the period up to one year under certain circumstances. The learned ASGI has further pointed out impugned order and that in MCA No. 513 of 2022, the accused was remanded on 27.11.2021 and then only 90 days had passed though 90 days remained. Considering all, the learned Special Judge (NDPS), Jamshedpur had held that the MCA No. 513 of 2022 is premature and not maintainable. The learned ASGI has further submitted that if a petition under section 167(2) CrPC is held not maintainable, it can only be challenged under section 482 CrPC and not under section 439 CrPC. The application made under section 167(2) CrPC is not for a regular bail. Under section 439 CrPC concurrent powers are given to both the High Court and the Sessions Court under special powers. Normally, any application, that is, filed under section 439 CrPC in the jurisdictional Court below is also challenged under section 439 CrPC in the High Court. In the present case, it was moved under section 167(2) CrPC.

9. The learned ASGI has then submitted that the order impugned had held that the bail application is premature and not maintainable, this Court has now to decide on this and that the maintainability under section 167(2) CrPC cannot be decided under section 439 CrPC. Therefore, the current bail application is not maintainable.

10. On another point, the learned ASGI has submitted that the last rejection in BA No. 9490 of 2022 vide order dated 16.12.2022 was against the impugned order or of the order passed in MCA No. 1204 of 2022 dated 02.08.2022. Nowhere in this order dated 02.08.2022 has it been referred to being moved under section 167(2) CrPC, or even under section 439 CrPC but it can be said to have

been moved under section 439 CrPC. The corresponding application then was moved under section 439 read with 440 CrPC in BA No. 9490 of 2022, which was dismissed by this Court on 16.12.2022. That now, rather belatedly the order dated 28.02.2022 in MCA No. 513 of 2022 which was moved in the Court of the Special Judge (NDPS), Jamshedpur under section 167(2) CrPC, is now being moved under section 439 & 440 CrPC and that too belatedly.

11. I have heard both counsels, gone through the record of the case and in the facts and circumstances. I have observed that in his bail application while the petitioner has taken grounds on merit as normally taken in bail applications, he has not referred to the reasons for rejection, that is, that it was rejected on the ground of prematurity due to not having expended the additional or entire period allowed for investigation under section 36A(4) of the NDPS Act. In fact, the bail application in MCA No. 513 of 2022 was not considered on merits at all by the learned Special Judge (NDPS), Jamshedpur rather the prayer was made for default bail under section 167(2) CrPC.

12. The learned Special Judge (NDPS), Jamshedpur held the bail application not maintainable because he had sought default bail when though 90 days as envisaged under section 167(2) CrPC may have been over, but the extended period under section 36A(4) of the NDPS Act still remained. This Court would agree with this decision as held by the learned Special Judge (NDPS), Jamshedpur, and also on this score hold the current bail application, B.A. No. 4380 of 2023 as not maintainable.

13. This Court thinks it is rightly argued by the learned ASGI that since question of maintainability was raised, it would have been proper to challenge the impugned order here under section 482 CrPC rather than under the provision of section 439 CrPC.

14. Further though this bail application has been moved under sections 439 & 440 CrPC, the bail application moved under MCA No. 513 of 2022 was moved under section 167(2) CrPC. Hence, on this ground also, the current bail application B.A. No. 4380 of 2023 is not maintainable.

15. Further another aspect has to be borne in mind. It is to be noted that there were two bail applications that were moved by Mithun Rai @ Mithun Kumar and both were rejected by the learned Special Judge (NDPS), Jamshedpur. The first bail application that was rejected was MCA No. 513 of 2022 which was moved under section 167(2) CrPC. This bail application was rejected as being premature and not maintainable by the Special Judge (NDPS), JSR vide order dated 28.02.2022.

16. Thereafter, Mithun Rai @ Mithun Kumar had again moved an application for bail being MCA No. 1204 of 2022 before the learned court- below. It seems that this bail application was considered on merits and it would be pertinent to point out that in this bail application at least facts as disclosed also revealed or indicated that 425.5 kg. of greenish black dried flowering top of cannabis believed to be Ganja wrapped in brown colour cello tape was recovered. This bail application was rejected on 02.08.2022 on merits. It would be important to point out that this bail application which was rejected on merits i.e. MCA No. 1204 of 2022 vide order dated 02.08.2022 was the impugned order in the bail application or BA No. 9490 of 2022 moved by Mithun Rai @ Mithun

Kumar @ Mithun. This bail application was rejected by this Court on 16.12.2022.

17. Thereafter it seems that the petitioner has now moved for bail in B.A. No. 4380 of 2023, however, this time he has used the impugned order with a prayer for default bail in MCA No. 513 of 2022 which was rejected on 28.02.2022. It is to be noted that this bail application in the Court of the learned Special Judge (NDPS), Jamshedpur was moved under the provision of section 167(2) CrPC.

18. Therefore, this Court sees that there are two relevant orders, both are rejections of bail application filed by the petitioner Mithun Rai @ Mithun Kumar @ Mithun in the jurisdictional Court concerned i.e. the learned Special Judge (NDPS), Jamshedpur.

19. The later order of 02.08.2022 which pertains to MCA No. 1204 of 2022 was the impugned order in the first bail application moved in this Court in BA No. 9490 of 2022, while the earlier order which is of 28.02.2022 pertains to MCA No. 513 of 2022 has been attached as impugned order subsequently in BA No. 4380 of 2023. So it seems that not only is the bail application for the later order moved first in the High Court and the earlier order moved the second time, but this Court also sees that while the first order in the jurisdictional Court-below concerned has been moved under section 167(2) CrPC, the second order dated 02.08.2022 was subject of an application apparently moved under the provisions of section 439 CrPC.

20. What is apparent to note is that this bail application under BA No. 4380 of 2023 has been moved under section 439 and 440 CrPC and the arguments set forth by the learned counsel for the petitioner is purely on merits without reference to why this impugned order was rejected which is on the issue of prematurity and maintainability.

21. Further, even on the basis of merits, for the reasons that have already been alluded to in the records available and also given that quantity of 425.5 kg. of narcotic substance was recovered, this bail application is also dismissed on merits in connection with NCB Case No. 13 of 2021 (NDPS Case No. 81 of 2022), pending before the learned Court of Special Judge (NDPS), Jamshedpur.

22. Accordingly, prayer for bail of the petitioner stands rejected.

(Ratnaker Bhengra, J.) Jharkhand High Court, Ranchi, Dated: 13 / 10 /2023 S.B.