

GAHC010029982024



**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : Bail Appln./427/2024

PRABHA SHANKAR TIWARI
R/O 551 K/252, BHILAWAN
P.O. AND P.S. ALAMBAGH
DIST. LUCKNOW, UP

VERSUS

THE UNION OF INDIA AND ANR.
REP. BY THE DEPUTY SOLICITOR GENERAL OF INDIA.

2:NARCOTICS CONTROL BUREAU
GUWAHATI ZONAL UNIT
VIP ROAD
RUPKONWAR PATH
CHACHAL KHANAPARA
GUWAHATI-781022

Advocate for the Petitioner : MR. S MITRA

Advocate for the Respondent : SC, NCB

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

O R D E R

22.04.2024.

Heard Mr. S. Mitra, learned counsel for the accused and also heard Mr.

S.C. Keyal, learned Standing Counsel, NCB, for the respondent.

2. With a prayer to grant bail, this application, under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused, namely, Prabha Shankar Tiwari, who has been languishing in jail hazot, in connection with the NDPS Case No.47/2022, corresponding to NCB Crime No.24/2021, registered under sections 8(c)/21(c)/29/35/53A/54 /60/66/67/68 and 69 of the NDPS Act, since 25.09.2021.

3. It is to be noted here that above noted case has been registered on the basis of a complaint, lodged by one C.S.K. Singh, Intelligence Officer, NCB Guwahati.

4. The essence of allegation made in the said complaint is that acting on a tip off; the complainant and other staffs of NCB have intercepted one vehicle, bearing Registration No. UP 32 KN 6464, on 04.09.2021, at about 10.45 PM, near Madanpur Toll Plaza, Guwahati and recovered 40,102 bottles of Codeine based cough syrup, packed in cartoon boxes and also loose bottles packed in sacks, manufactured by Laborate Pharmaceuticals India Ltd. (LESL-292). They have also apprehended one Santosh Kumar, the driver of the Truck and one Amrendra Kumar Singh, who stated to be the owner of the Truck. Accused Amrendra Kumar Singh in his voluntary statement, discloses that on the direction of his friend, Prabha Shankar Tiwari, he went to Coochbehar and with the help of one Sanjay he had loaded the contraband substances in his Truck. Thereafter, while Prabha Shankar Tiwari came to the office of the NCB, Guwahati in connection with NCB Crime No. 25/2021, to give his voluntary statement under section 67 of the NDPS Act, then he was directed to give his voluntary statement in the present case i.e. NCB Crime No. 24/2021 and ultimately the NCB team apprehended him and arrested on 25.09.2021 and

forwarded him to jail hazoot. Thereafter, investigation was carried out which culminated in lodging of Final Complaint before the court of learned Sessions Judge, Kamrup (M) at Guwahati against the accused Prabha Shankar Tiwari and others, to stand trial under Sections 21(c)/29 of the NDPS Act.

5. The respondent NCB has filed its affidavit, opposing the petition. But, having gone through the same I find that the said affidavit is related to NDPS Case No. 49/2022, arising out of NCB Crime No. 25/2021, which is completely a different offence. Therefore, the same could not be taken into consideration.

6. Mr. S. Mitra, the learned counsel for the accused, submits that the accused herein this case was arrested on 25.09.2021 and since then he has been languishing in jail hazoot. Mr. Mitra further submits that the learned trial court had framed charge against the accused on 20.05.2023, and thereafter, examined two witnesses out of eight witnesses cited in the final complaint. Mr. Mitra, producing a chart of dates before the court submits that since the date of framing of charge, on 20.05.2023, till 01.04.2024, the case was listed on 18 occasions, but, within such a long period, the learned court below has been able to examine only 2 witnesses. Mr. Mitra, referring to the chart of dates and actions taken, so prepared by him, further submits that there is glaring lapse on the part of the prosecution side and on several dates it had not taken any step to issue summon to the witnesses despite direction of the trial court. Besides, Mr. Mitra pointed out that there is also lapse on the part of the learned trial court as no order for issuance of summon was passed on some occasions. And this glaring lapse on the part of the prosecution, as well as on the part of the learned court below, caused considerable delay in disposal of the case, which, on the other hand, violated the most precious right of the accused, i.e. right to speedy trial, as guaranteed under Article 21 of the Constitution of India, as he

has been languishing in jail hazoot since 25.09.2021. Mr. Mitra also submits that while rejecting the earlier bail petition being BA No. 3012/2022, vide order dated 25.04.2023, this court was pleased to direct the learned court below to take recourse to section 309(1) Cr.P.C. and inspite of such direction the learned court below has failed to take recourse of the same and this lapse also caused delay in trial. Mr. Mitra also submits that since within a long period, after framing of the charge, the learned court below has been able to examine only two witnesses and if at this pace, the trial would go on, then there is no immediate prospect of conclusion of trial. Further, Mr. Mitra, submits that the accused will appear before the learned court below on each and every date, and therefore, it is contended to allow the petition. To bolster his submission Mr. Mitra has referred following case laws :-

- (i) **Rabi Prakash vs. The State of Orissa**, reported in **LiveLaw (SC) 533**;
- (ii) **Mohd Muslim @ Hussain vs. State (NCT of Delhi)** reported in **2023 SCC OnLine SC 352**,
- (iii) **Union of India vs. K.A. Najeeb** reported in **(2021) 3 SCC 713**;
- (iv) **Vishwajeet Singh vs. State (NCT of Delhi) Bail Application No. 3148/2021**;
- (v) **Dheerak Kumar Shukla vs. The State of Uttar Pradesh SLP(Crl.) No. 6690/2022**;
- (vi) **Nitesh Adhikari @ Bapan vs. The State of West Bengal SLP (Crl) No. 5769/2022**;
- (vii) **Satinder Kumar Antil vs. Central Bureau of Investigation** reported in **(2022) 10 SCC 51**;

(viii) NCB vs. Mohit Agarwal reported in **2022 LiveLaw (SC) 613;**

(ix) Sanjoy Kumar Shah vs. The Union of India, Bail Application No. 3881/2023;

7. On the other hand, Mr. S.C. Kayel, learned Standing Counsel for the respondent NCB submits that though after framing of charge as many as on 18 dates the case was listed for hearing, yet, on account of transfer of Presiding Judge the learned court below was vacant for quite some time, and on as many as 9 dates there was no order to take step upon the witnesses. Mr. Kayel further submits that on some dates step could not be taken to issue summon to the witnesses, as no order to that effect was passed though there was Presiding Judge in the learned court below. And on some dates, though order was passed, yet due to inadvertence on one or two occasion, step could not be taken to summon the witnesses. But, Mr. Kayel submits that it was because of bona-fide mistake and on rest of the dates steps were taken and two witnesses appeared and both of them are examined. Mr. Kayel, therefore, submits that whatever delay in disposal of the case had taken place, the same is neither due to fault on the part of the prosecution, nor on the part of the court and the same also cannot be termed as considerable delay so as to impair the right to speedy trial of the accused and moreover, Article 21 of the Constitution of India is not attracted here as the accused was arrested for contravention of law, following due process of law and that there cannot be an outer limit for disposal of a case. And therefore, it is contended to dismiss the petition. Mr. Kayel has referred following case laws in support of his submission:-

(i) High Court Bar Association, Allahabad vs. State of U.P. reported in **2024 0 Supreme (SC) 169;**

- (ii) Kalyan Ch Sarkar Etc. vs. Rajesh Ranjan @ Pappu Yadav, reported in 2005 (2) SCC 42,**
- (iii) Baiju Thakur vs. Union of India (NCB) Bail Application No. 3765/2023,**

8. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the case record, received from the learned Court below.

9. It appears that Final Complaint has been filed under sections 21(c)/29 NDPS Act, against the present accused along with two other accused, namely, Amrendra Kumar Singh and Santosh Kumar on 03.03.2022. Thereafter, the learned court below had framed the charge against all the accused persons, on 20.05.2023. And after framing charge on 20.05.2023, till 01.04.2024, the case was listed on 18 dates, but, within such a long period the learned court below has been able to examine only 2 witnesses.

10. Further, it appears that the learned court below was vacant on account of transfer of the learned Presiding Judge since 17.06.2023 to 17.10.2023. Thus, on 01.07.2023, 15.07.2023, 27.07.2023, 10.08.2023, 24.08.2023, 07.09.2023, 21.09.2023 and 06.10.2023, no judicial order for issuing summon to the witnesses came to be passed. It also appears that on 20.05.2023, i.e. on the date of framing of charge, no order for issuing summon to the witnesses was passed though the next date was fixed for evidence. And though, order for issuing summon was passed on 03.06.2023, 17.06.2023, 17.10.2023, 31.10.2023 and on 06.02.2024, yet, the NCB had not taken any step to summon the witnesses. Then on 05.03.2024 and 01.04.2024 two witnesses

turned up and they were examined.

11. And most interestingly, the order dated 24.01.2024, so passed by the learned court below, appears to be manipulated. On that day no order for issuing summons to the witnesses was passed, as revealed from the certified copy of the said order was taken on 29.01.2024. But, from the scanned copy of the record of the learned court below indicates that one additional line has been added and perhaps after furnishing certified copy of the said order on 29.01.2024, whereby Special P.P. of NCB was directed to take step upon witnesses, which was not therein in the certified copy of the order dated 29.01.2024, produced by Mr. Mitra. Mr. Mitra has also pointed this out during argument and I find substance in the same.

12. Thus, apparently, there are some lapses on the part of the respondent NCB in taking step to summon the witnesses and also on the part of the learned court below, as no order to take step to summon the witnesses was passed for which there occasioned some delay. Now, what left to be seen is whether this delay in trial can be said to be inordinate delay and whether it is sufficient to impair the right to speedy trial of the accused.

13. While dealing with this issue of delay in trial, a Constitutional Bench of Hon'ble Supreme Court in the case of **Abdul Rehman Antulay vs. R.S. Nayak, (1992) 1 SCC 225**, in para No.86, has held as under:-

86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social

interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is — who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a

superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

(5) While determining whether undue delay has occurred (resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on — what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in *Barker* [33 L Ed 2d 101] "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in *U.S. v. Ewell* [15 L Ed 2d 627] in the following words:

... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in *Barker* [33 L Ed 2d 101] and other succeeding cases.

(8) Ultimately, the court has to balance and weigh the several relevant factors — 'balancing test' or 'balancing process' — and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order — including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded — as may be deemed just and equitable in the circumstances of the case.

(10) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis.

14. It is to be noted here that mere delay in trial pertaining to grave offences cannot be a ground to grant bail. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Gurwinder Singh vs. State of Punjab, Criminal Appeal No. 704 of 2024 @ Special Leave petition (Criminal) No. 10047 of 2023.**

15. In the case in hand, having examined all the attendant circumstances, including nature of offence, number of accused and witnesses, and also considering the factum of absence of Presiding Judge of the learned court below, and applying the proposition of law laid down in the afore mentioned cases, this court is unable to agree with the submission of Mr. Mitra, learned counsel for the accused that the lapse on the part of the prosecution as well as the learned court below has caused much prejudice to the accused and thereby impaired his right to speedy trial. There is no material on the record to show that there was mala-fide intention on the part of the prosecution side and also on the part of the learned court below.

16. It appears from the record that 40,102 bottles of Codeine based cough syrup were recovered from the Truck and two persons namely Santosh Kumar, the driver of the Truck and one Amrendra Kumar Singh, owner of the truck were apprehended by the NCB.

17. Further, the scanned copy of the record, received from the learned court below, indicates that the Investigating Agency, during investigation, has collected following materials against the present accused:-

- (i)** Accused Prabha Shankar Tiwari is the accomplice of main supplier Gopal Kumar Saha.
- (ii)** Accused Amrendra Kumar Singh has stated in his voluntary statement recorded u/s 67 of NDPS Act that Prabha Shankar Tiwari has told him to go to Coochbehar to load codeine based cough syrup with brand name Eskuf. Prabha Shankar Tiwari has told him to meet Sanjay to get help to load codeine based cough syrup in his Truck. These facts were also accepted and endorsed by the accused Prabha Shankar Tiwari in his

voluntary statement recorded under section 67 NDPS Act.

- (iii)** CAF of the mobile No. 9695483332 of accused Prabha Shankar Tiwari was analysed and it was found to be registered in his own name.
- (iv)** From the analysis of CDR of mobile No. 9695483332 of accused Prabha Shankar Tiwari, it is found that the accused Prabha Shankar Tiwari was in contract with accused Amrendra Kumar Singh (mobile No. 7638907739) 51 times.
- (v)** From the analysis of CDR of mobile No. 9695483332 of accused Prabha Shankar Tiwari, it is found that accused Prabha Shankar Tiwari was in contact with Gopal Kumar Saha @ Nanhki @ Bunty (mobile No. 8388096946) 470 times.
- (vi)** From the analysis of CDR of mobile No. 9695483332 of accused Prabha Shankar Tiwari, it is found that accused Prabha Shankar Tiwari was in contact with suspect Raju (mobile No. 9127296595) 121 times.

18. And indisputably, the quantity of contraband substance recovered from the Truck is of commercial quantity. And as such this court has to derive its satisfaction that there are reasonable grounds for believing that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail in view of the provision of section 37(1)(b)(ii) of the NDPS Act.

19. But, having made an endeavour to find out the availability of reasonable ground for believing that the accused is not guilty of the offences that he has been charged with, by examining the materials and the evidence on the record of the learned court below, as discussed herein above, for the limited purpose of releasing the accused on bail, and to ascertain that he is unlikely to commit an offence under the Act, while on bail, this Court is unable to derive its satisfaction

that there exist any reasonable ground to show that the accused is not guilty of the offence and that he is unlikely to commit such offence while on bail. It is to be noted here that he is also an accused in NDPS case No. 49/2022, wherein also commercial quantity of contraband substances were involved.

20. I have carefully gone through the case laws, referred by Mr. Mitra, learned counsel for the accused. The proposition of law, so laid down in **Rabi Prakash** (supra), **Mohd Muslim @ Hussain** (supra), **K.A. Najeeb** (supra), **Vishwajeet Singh** (supra); **Dheerak Kumar Shukla** (supra); **Nitesh Adhikari @ Bapan** (supra); **Satinder Kumar Antil** (supra) is that long incarceration of the accused in jail outweighs the embargo of Section 37 of the NDPS, Act 1985 and the accused is therefore entitled to get bail on the ground of prolonged incarceration only. There is no quarrel at the Bar regarding the proposition of law laid down in the aforementioned cases. But, in the given facts and circumstances, on the record of the case in hand, and also in view of above discussion and finding, this court is of the view that the ratios, so laid down in the said cases would advance the case of the petitioner. I have also gone through the decision in **Mohit Agarwal** (supra) and I find that the ratio laid down in the said case also would not come into the aid of the accused, as in the said case it has been held that the length of the period of detention or the fact that charge sheet has been filed and trial has commenced, are by themselves cannot be considered, as that can be treated as persuasive grounds for granting relief to the accused under Section 37 of the NDPS Act. And accordingly, this court is unable to agree with the submission of learned counsel for the accused that the delay herein this case caused prejudice to the accused and thereby impaired his right to speedy trial.

21. I have also gone through the case laws referred by Mr. Kayel, learned

standing counsel for the NCB, and I find that the same lends credence to his submission. In the case of **High Court Bar Association, Allahabad** (supra) it has been held that it is not advisable to fix outer limit for disposal of certain cases and it is better to leave it to concerned court. And in the case of **Rajesh Ranjan @ Pappu Yadav** (supra), it has been held that when the accused is arrested for commission of an offence, after following due process of law, it cannot be said that his right stands violated.

22. In the result, I find this petition bereft of merit and accordingly, the same stands dismissed. However, this court deemed it appropriate to issue following direction, which to our considered opinion will safeguard the interest of the accused:-

- (i) The learned court below shall, on receipt of a certified copy of this order, shall take recourse to the provision of section 309(1) Cr.P.C. and shall pass necessary order to that effect and thereafter shall conduct day to day trial, from the very next date of hearing;
- (ii) The respondent NCB shall take steps well in advance to produce the witnesses before the learned court below;
- (iii) The learned Sessions Judge, Kamrup (M) Guwahati, shall conduct an enquiry as to how the order dated 24.01.2024, came to be manipulated after furnishing of certified copy of the said order to the accused on 29.01.2024;
- (iii) The Registry shall furnish a copy of this order along with the certified copy of the said order produced by the accused and order available in the scanned copy of the record received from the learned court below, to the learned Sessions Judge, Kamrup(M) at Guwahati so as to enable him to

- carry out the enquiry;
- (iv) The finding of such enquiry shall be communicated to the Registrar (Vigilance) of this court;
- (v) However, liberty will, remain with the accused to approach this court again in the event of trial, not being concluded within a period of six months from today.

JUDGE

Comparing Assistant