

GAHC010023922024



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

Case No. : Bail Appln./364/2024

HAFIJUL MANDAL AND ANR.
S/O FAJAL HAQUE MANDAL
VILL- A KAWATIKA
P.S. BIJNI
DIST. CHIRANG, ASSAM
PIN-783390

2: ABDUL KHALEK KHAN
S/O SOMESH KHAN
VILL- BARPAKHRA
P.O. PHAGUNAGAN
P.S. MANIKPUR
DIST. BONGAIGAON
ASSAM
PIN-783390

2: Abdul Khalek Khan
ASSA

VERSUS

NARCOTICS CONTROL BUREAU
GUWAHATI ZONAL UNIT, GUWAHATI

Advocate for the Petitioner : MR D K MEDHI

Advocate for the Respondent : SC, NCB

**BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

ORDER

Date : 20.04.2024

- 1)** Heard Mr. D. K. Mehdi, learned counsel for the petitioners. Also heard Mr. S. C. Keyal, learned Standing Counsel, Narcotic Control Bureau (NCB).
- 2)** Since a similar matter was heard in Bail Application No. 4136/2023, where Ms. S. K. Nargis has made her submission for the petitioner, Mr. D. K. Mehdi, learned counsel for the present petitioners, has requested that he shall adopt the submissions made by Ms. S. K. Nargis in Bail Application No. 4136/2023, in this case. Apart from that, he also made certain points by himself.
- 3)** This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, Hafijul Mandal and Abdul Khalek Khan, who are detained behind the bars since 09.01.2022 (*for more than 2 years 3 month*) in connection with NDPS Case No. 160/2022 pending before the Court of learned Additional Sessions Judge No. 3, Kamrup (M), Guwahati under section 20(b)(C)/29 of the NDPS Act, 1985.
- 4)** The gist of accusation in this case is that the Narcotic Control Bureau represented by one Shri Manoj Sauguna, Intelligence Officer, Guwahati Zonal Office, lodged a complaint before the learned Sessions Judge, Kamrup (M), Guwahati against the present petitioners, *inter-alia*, alleging that on receipt of an information received through secret sources that two persons would be carrying huge quantity of *ganja* near Health City Hospital, Khanapara, and are going towards Jalukbari side, a search operation was conducted on 09.01.2022, at about 1315 hours, and one truck bearing Registration No. NL-01-AB-3995 was

intercepted and 765.380 kgs of suspected *ganja* was recovered from there.

5) On receipt of the said complaint, special NDPS Case No. 160/2022 was registered.

6) The present petitioners were arrested on 09.01.2022, and on 13.09.2022, charges were framed against both of them.

7) The learned counsel for the petitioners has submitted that though the charges against both the petitioners were framed on 13.09.2022, and though the present petitioners have been detained behind the bars for more than two years and three months, however, the trial of NDPS Case No. 160/2022 has not fairly progressed, and only 5 out of total 13 prosecution witnesses have been examined till date.

8) Learned Counsel for the Petitioner has also submitted that the petitioner No. 1 has also been suffering from tuberculosis and lung infection.

9) Learned counsel for the petitioners has submitted that to continue to keep the present petitioners under detention for a long period on one hand and to delay the trial of the case on the other hand is clearly unfair and unreasonable and contrary to the spirit of Section 36 (1) of the NDPS Act, 1985, Section 309 of the Code of Criminal Procedure, 1973 and Article 14, 19 and 21 of the Constitution of India.

10) Learned counsel for the petitioners has also submitted that by keeping the present petitioners detained behind the bars for a long period and if any delay in the trial is caused either due to the prosecution side or the court and where there is no fault of the present petitioners, it would certainly violate the fundamental rights guaranteed to the present petitioners under Article 21 of the Constitution of India and hence, he has submitted that the petitioners are entitled to get bail solely on the ground of prolonged incarceration as such a

prolonged incarceration has violated the fundamental right to life and personal liberty guaranteed to them by Article 21 of the Constitution of India.

11) In support his submissions, learned counsel for the petitioners has cited following rulings:

- i. ***Hussain Ara Khatoon & Ors Vs. Home Secretary, State of Bihar***, reported in ***(1980) 1 SCC 98***
- ii. ***Supreme Court Legal Aid Committee Representing Under Trial Prisoners Vs. Union of India & Others*** reported in ***1994 (6) SCC 731***
- iii. ***Satender Kumar Antil Vs. Central Bureau of Investigation***, reported in ***(2022) 10 SCC 51***
- iv. ***Mohd Muslim @ Hussain Vs. State (NCT of Delhi)*** reported in ***2023 SCC Online SC 352***
- v. ***Rabi Prakash Vs. State of Orissa*** reported in ***2023 SCC Online SC 1109***.
- vi. ***Chitta Biswas @ Subhas Vs. The State of West Bengal*** (Order dated 07.02.2020) in Criminal Appeal No. 245/2020,
- vii. ***Nitesh Adhikari @ Bapan Vs. State of West Bengal*** (Order dated 01.08.2022 in SLP Criminal No. 5769/2022),
- viii. ***Shariful Islam @ Sarif Vs. State of West Bengal*** (order dated 04.08.2022 in SLP Criminal No. 4173/2022).

12) On the other hand, Mr. S. C. Keyal, learned Standing Counsel, NCB, while vehemently opposing the grant of bail to the petitioners, has submitted that the

problem of drug addicts and drug trafficking is international and the mafia is involved in commission of such crime. It is the crime against society and it has to be dealt with iron hands. He referred to the statement of objects and reasons for enacting the NDPS Act, 1985 and has submitted that to combat the menace of drug trafficking, the NDPS Act, 1985 has introduced stringent provisions regarding bail and therefore, to safeguard the life and liberty of innocent persons who become victim to this dragnet of organized crime of illicit drug trafficking, the provisions of NDPS Act, 1985 are required to be interpreted keeping in the mind the object and purpose of the Act.

13) Citing the ruling of the Apex Court in ***Pramod Kumar Saxena Vs. Union of India***, reported in ***(2008) 9 SCC 685***. Mr. S. C.

Keyal, learned Standing Counsel, NCB has submitted that mere long period of incarceration in jail would not be *per se* illegal. If the petitioner has committed offence he has to remain behind the bars and such detention in jail even as under trial prisoner would not be violative of the Article 21 of the Constitution of India.

14) Learned Standing Counsel, NCB has also submitted that where a bail application has been rejected earlier there is an onus on the court to consider the subsequent application for grant of bail by noticing the grounds on which earlier application have been rejected and after such consideration, if court is of opinion that bail has to be granted then court will have to give specific reason why in spite of earlier rejection the subsequent application should be granted.

15) Learned Standing Counsel, NCB has also submitted that the principle of parity is not applicable while considering an application for bail as each case has to be considered on its own merit. In support of his submission, learned Standing Counsel, NCB has cited a ruling of the Apex Court in the case of

Tarun Kumar versus Assistant Director, Directorate of Enforcement reported in ***2023 SCC online SC 1480***.

16) Learned Standing Counsel, NCB has also submitted that in a criminal trial it is not possible to lay down a fixed period for conclusion of trial as the conclusion of criminal trial depends on many factors like nature of offence, the number of accused, the number of witnesses, the workload in the particular court, the means of communication and several other circumstances which are to be kept in mind and if the delay is not for any wrong on the prosecution side the accused should not get benefit of any such systemic delay. Learned Standing Counsel, NCB has submitted that the delay has been caused due to successive filing of bail application.

17) Learned Standing Counsel, NCB has cited a ruling of the Apex Court in the case of **High Court Bar Association, Allahabad Vs. The State Of Uttar Pradesh** reported in ***2024 Legal Eagle (SC) 198***. to buttress his submission. Apart from above cited rulings learned Standing Counsel, NCB has also cited following ruling in support of his submission:

i. ***Hira Singh and Another Vs. Union of India and Another*** reported in ***2020 (20) SCC 272***.

ii. ***Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another*** reported in ***(2005) 2 SCC 42***.

iii. ***Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav and Another*** reported in ***(2004) 7 SCC 528***.

iv. ***Narcotics Control Bureau v. Kishan Lal*** reported in ***(1991)1 SCC 705***.

v. ***Union of India v. Ram Samujh and Anr.,*** reported in ***1999 9 SCC 429***.

- vi. ***State of Punjab v. Rakesh Kumar, decided on 03.12.2018 reported in 2019 (2) SCC 466.***
- vii. ***State of Maharashtra v. Buddhikota Subba Rao reported in 1989 0 Supreme (SC) 493.***
- viii. ***Satender Kumar Antil v. CBI reported in 2022 (10) SCC 51.***
- ix. ***Animul Islam v. Union of India, decided on 06.05.2022, reported in 2022 0 Supreme (Gau) 321.***
- x. ***Gurwinder Singh v. State of Punjab, reported in 2024 0 Supreme (SC) 104.***
- xi. ***Narcotics Control Bureau v. Mohit Aggarwal, reported in 2022 0 Supreme (SC) 619.***
- xii. ***Union of India v. Ajay Kumar Singh @ Pappu, reported in 2023 0 Supreme (SC) 285.***
- xiii. ***State of Bihar & Anr. v. Amit Kumar @ Bacha Rai, reported in 2017 (13) SCC 751.***
- xiv. ***MattuLal v. Radhe Lal, reported in AIR 1974 SC 1596.***
- xv. ***National Insurance Company Limited v. Pranay Sethi reported in 2017 16 SCC 680.***
- xvi. ***Secundrabad Club v. CIT reported in 2023 0 Supreme (SC) 765.***

18) Learned Standing Counsel, NCB has also submitted that since the contraband seized in this case is of commercial quantity, the embargo of Section 37 of the NDPS Act, 1985 comes into play and as there are incriminating materials against the petitioners, he is not entitled to get bail in this case. He

has also submitted that in view of the embargo of section 37 of the NDPS Act, 1985, the long incarceration in itself cannot be a ground for allowing the petitioner to go on bail.

19) I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record very carefully. I have also considered the rulings cited by learned counsel for both the sides. Since, learned counsel for the petitioners has made his submissions for bail mainly on the ground of prolonged incarceration, I have confined my discussion to that point only.

20) In the case of ***Hussain Ara Khatoon*** (*Supra*) the Apex Court has observed that the procedure prescribed by law for depriving a person of his personal liberty cannot be regarded as reasonable, fair or just unless that procedure ensures a speedy trial for determination of guilt of such person. No procedure which does not ensure a reasonably quick trial can be regarded as reasonable, fair or just and it would fall foul of Article 21 of the Constitution of India.

21) Though, Section 37 of the NDPS Act, 1985 provides for stringent provision for grant of bail, however, Section 36 (1) of the NDPS Act, 1985 also mandates the Government to constitute as many special courts as necessary for the purpose of providing speedy trial of offences under the NDPS Act, 1985. If speedy trial is not provided to an incarcerated accused, it will certainly have a negative impact on the rigours of Section 37 of the NDPS Act, 1985.

22) It is pertinent to mention herein that presently there is only one special NDPS court in the state of Assam which has been constituted under Section 36(1) of the NDPS Act 1985. In all other cases, the existing Sessions Court or Additional Sessions Court have been “designated” as special court. It is also

important to note here that the practice of designating the existing Sessions Court as Special Court under NDPS Act, 1985 does not have any statutory backing as there is no statutory provision for “designating” a Sessions Court as Special Court under the said Act. The statutory mandate under section 36(1) of the NDPS Act, 1985 is for “constituting” special courts and not for “designating” already existing sessions courts as special courts. More so, as Section 36 D of the NDPS Act, 1985 provides for transitional provision in the statute itself. It provides that until a Special Court is constituted, any offence under NDPS Act, 1985, which is triable by Special Court, may be tried by a Court of Sessions. The existing Sessions Courts are already overburdened with various kind of other cases pending before such courts, hence, the practice of merely designating an existing Sessions Court as Special Court has only defeated the statutory purpose and mandate enshrined in Section 36(1) of the said Act for constituting Special Courts for speedy and expeditious trial of offences under NDPS Act, 1985.

23) It is also pertinent to note that due to many factors such designated special court are not in a position to expeditiously dispose of NDPS cases and therefore, it takes much more time than what is necessary to dispose of an NDPS case pending before such courts.

24) However, for whatsoever reasons, if delay has been caused and if it is not due to any fault of the petitioners, then to keep them under incarceration for long period on one hand, and to cause delay in culmination of the trial on the other hand would certainly be violative of their fundamental rights guaranteed under Article 21 of the Constitution of India.

25) In this regard the observations made by the Apex Court in the case of ***Satender Kumar Antil (Supra)*** are relevant and which is quoted here in below:

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.

26) The Supreme Court of India in “**Mohd Muslim @ Hussain Vs. State (NCT of Delhi)**” (*supra*) has observed that “Grant of bail on ground of undue delay in trial, cannot be said to be fettered by section 37 of the NDPS Act, 1985”.

27) Similarly, the Apex Court of India has also observed in “**Rabi Prakash Vs. The State of Odisha**” (*Supra*) wherein, it observed that “prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution of India and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act, 1985.”

28) As regards the submissions made by learned Standing Counsel, NCB that

in the case of ***Pramod Kumar Vs. Union of India and others*** (*Supra*), the Apex Court has observed that mere long incarceration in jail would not be *per se* illegal, it appears that no such observation has been made by the Apex Court in the said case, rather, it was the narration of the averments made by the state of UP in its affidavit submitted before Apex Court and in the said case the petitioner was ultimately granted bail.

29) Moreover, as discussed here in above, though the provisions of section 37 of the NDPS Act, 1985 are very stringent in nature and same has to be interpreted keeping in the mind the object and purpose of the Act, however, it is also to be kept in mind that the NDPS Act, 1985 also mandates speedy and expeditious trial of offences under the said Act. If there is undue delay in the trial and the accused has been detained for long period, his fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution of India would outweigh the embargo of Section 37 of the NDPS Act, 1985.

30) This Court is also of the considered opinion that while considering an application for bail involving commercial quantity of contraband, if the court comes to a finding that there has been undue delay in completion of the trial and that there has been prolonged incarceration of the petitioners during this time, they would be entitled to get bail in such case of prolonged incarceration as the fundamental right to life and personal liberty guaranteed under Article 21 of the Constitution of India would outweigh the fetters imposed under Section 37 of the NDPS Act, 1985.

31) It is also pertinent to mention herein that the Supreme Court of India had granted bail to the accused facing charges for possession of commercial quantity of contraband only on the ground of prolonged incarceration in “***Shariful Islam @ Sarif Vs. State of West Bengal***” (*Supra*), wherein the

accused was detained behind the bars for one year and six months.

32) In “*Nitesh Adhikari Vs. State of West Bengal*” (*Supra*), the Apex Court granted bail to the accused facing accusation under Section 21(c) of the NDPS Act, 1985 on the ground of incarceration of one year seven months.

33) In the instant case also, the petitioners have been detained behind the bars for more than *2 years and 3 month* and only 5 witnesses have been examined by the prosecution side till date. There seems to be no fault on the part of the present petitioners which has caused delay in the trial. They are detained behind the bars since the date of their arrest.

34) Under the facts and circumstances of this case, considering the prolonged incarceration of the petitioners as well as slow progress of the trial, this court is of the considered opinion that the fundamental right to life and personal liberty of the petitioners guaranteed under Article 21 of the Constitution of India has outweighed the fetters imposed under Section 37 of the NDPS Act, 1985 and accordingly the petitioners are entitled to get bail in this case.

35) In view of above, the above-named petitioners are hereby directed to be released on bail on furnishing a bond of Rs. 50,000/- (Rupees Fifty Thousand only) each with two suitable sureties, one of whom should be a government employee and should be resident of the State of Assam, of like amount to the satisfaction of the trial court with following conditions: -

- i. That the petitioners shall cooperate in the trial of NDPS Case No. 160/2022, which is pending in the Court of learned Additional Sessions Judge No. 3, Kamrup (M), Guwahati;
- ii. That the petitioners shall regularly appear before the trial court as and when so required by the trial court;

- iii. That the petitioners shall not directly or indirectly make any inducement, threat, or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such facts before the trial court in the trial pending against the present petitioners;
- iv. That the petitioners shall provide their contact details including photocopies of his Aadhar Card, Driving License, PAN card, mobile number, and other contact details before the trial court;
- v. That the petitioners shall not leave the jurisdiction of the learned Trial Court without prior permission of the trial court and when such leave is granted by the trial court, the petitioner shall submit their leave address and contact details during such leave before the trial court.

36) With the above observations, this bail application is hereby disposed of.

JUDGE

Comparing Assistant