GAHC010036282024

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

Case No. : Bail Appln./520/2024

PRABHA SHANKAR TIWARI
S/O SWAMI DAYAL TIWARI
R/O 551K/252, BHILAWAN
P.O. AND P.S. ALAMBAGH
DIST. LUCKNOW,
UTTAR PRADESH, PIN-226005

VERSUS

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

2:NARCOTICS CONTROL BUREAU
GUWAHATI ZONAL UNIT
VIP ROAD
RUPKONWAR PATH
CHACHAL KHANAPARA
GUWAHATI-78102

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. This application, under Section 439 of Cr.P.C., is preferred by accused, namely, Shri Prabha Shankar Tiwari, who has been languishing in jail hazoot in connection with NDPS Case No.49/2022, corresponding to NCB Crime No. 25/2021, registered under Sections 8(c)/21(c)/29/35/53A/54/60/66/67/68/69 of the NDPS Act, since 25.09.2021.

3. It is to be noted here that the said case has been registered on the basis of a complaint lodged by one Anil Kushwaha, Intelligence Officer, NCB, Guwahati.

4. The essence of allegation made in the said complaint is that on 05.09.2021, at about 03.00 am, near Madanpur Toll Plaza, Guwahati the complainant and other staffs of NCB, acting on a tip off, have intercepted one vehicle bearing registration No. UP 32 HN 9008, and recovered 18989 bottles of Codeine based Phensydyl cough syrup, manufactured by Abbott Healthcare Pvt.Ltd, Village-Bhatauli, Solan, Himachal Pradesh, and apprehended accused Imran and Kamal Kumar. Thereafter, on 24.09.2021, while the present accused Shri Prabha Shankar Tiwari came to Guwahati and was waiting at Railway Station, Guwahati in the evening, NCB team apprehended him and arrested on 25.09.2021 and forwarded him to jail hazoot. Then after investigation, final complaint has been laid before the court of learned Sessions Judge, Kamrup(M), Guwahati against the present accused along with three others to stand trial in the Court under sections 21(c) & 29 of NDPS Act.

5. Mr. Mitra, learned senior counsel, appearing for the accused submits that the accused was arrested on 25.09.2021, and since then he has been languishing in jail hazoot for more than 877 days. Mr. Mitra further submits that the learned court below had framed charge against the accused under section

21(C) & 29 of NDPS Act, on 12.04.2023, and thereafter, had examined as many as 3 witnesses, out of 11 witnesses cited in the charge sheet. Mr. Mitra also submits that this is the second bail application preferred on the ground of delay in trial, and first bail application being BA No. 2096/2022, was dismissed by this Court vide order dated 18.11.2022, and while dismissing the said application, this court was pleased to direct the learned court below to complete the trial within earliest possible time by taking recourse to section 309(1) Cr.P.C. but, the learned court below had neither taken recourse to said section nor able to complete the trial and for which the right to speedy trial of the accused stands violated.

6. Mr. Mitra also submits that there was lapse on the part of the prosecution side, as it has failed to produce the witnesses before the learned court below. It is the further submission of Mr. Mitra that within such a long period, after framing of the charge, the learned court below has been able to examine only three witnesses and if on this pace, the trial would go on, then there is no immediate prospect of conclusion of trial. Mr. Mitra further 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. Keyal, learned Standing Counsel for the respondent NCB submits that though after framing of charge, the case was listed on 11 occasions, for hearing, yet, there was no lapse on the part of the prosecution side and on each dates steps were taken to summon the witnesses, on some dates no witnesses turned up and it is not responsible for non appearance of the witnesses. Mr. Keyal further submits that examinations of three witnesses have already been completed and examination-in-chief of another witness was completed here in this case and cross-examination has been kept reserved due to want of time and that there is no lapse on the part of the prosecution so as to term the trial protracted. Thus, Mr. Keyal submits, it cannot be said that the right to speedy trial of the accused is violated and therefore, it is contended to dismiss the petition. Mr. Keyal 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 scanned copy of the case record of learned court below and the case laws referred by learned Advocates of both sides.

9. The scanned copy of the record of the learned court below indicates that :-

(i) The complaint was registered on 05.09.2021, and the accused was arrested on 25.09.2021 and since then he has been languishing in jail hazoot for more than 834 days;

(ii) The learned court below had framed charge against the accused under section 21(c)/29 of the NDPS Act.

(iii) After framing of charge, the learned court below had examined three witnesses and examination-in-chief of the fourth witness has already been completed and his cross-examination is pending.

(iv) It also appears that after framing of charge the case was listed on 11 occasions for evidence and almost on all dates, the prosecution side has taken steps for issuing summon to the witnesses.

(v) However, despite taking of steps almost on all the occasions', the prosecution witnesses did not turn up on some dates.

10. Thus, there appears to be no lapse either on the part of the prosecution in taking steps to summon the witnesses, or on the part of the learned court below in passing order to that effect. It is however, a fact that on some dates the witnesses did not turn up.

11. Now, what left to be seen is whether this non appearance of witnesses, in spite of issuance of summon to them, can be termed as lapse on the part of the prosecution and also whether it caused any prejudice to the accused so as to term it to be inordinate delay and whether it is sufficient to impair the right to speedy trial of the accused.

12. While dealing with this issue of delay in trial a Constitutional Bench of the 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:

(i) '… 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.'

(ii) 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.

13. 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.**

14. In the case in hand, having examined all the attendant circumstances, including nature of offence, number of accused and witnesses, and also considering the rival submissions of learned advocates of both sides, this court is unable to agree with the submission of Mr. Mitra, learned counsel for the accused that there is any lapse on the part of the prosecution as well as the learned court below has caused any prejudice to the accused and thereby impaired his right to speedy trial.

15. The scanned copy of the record of the learned court below also indicates the followings:-

(i) The complainant had recovered 18,989 bottles of codeine based Phensydyl Cough Syrup from the Truck, bearing registration No. UP 32 HN 9008, on 05.09.2021, at about 03.00 am, near Madanpur Toll Plaza, Guwahati being driven by two accused namely Imran and Kamal Kumar;

(ii) The I.O. had apprehended accused Prabha Shankar Tiwari from Railway Station, Guwahati on 24.09.2021 and arrested him on 25.09.2021;

(iii) There was frequent connection between accused Imran, Kamal Kumar and accused Prabha Shankar Tiwari and Gopal Kumar Saha and the said

fact is apparent from the CDR of his two mobile phones, No. 9695483332 and 8902793391;

(iv) That CDR analysis of the mobile phone of accused Imran, bearing mobile No. 9794743289 and mobile phone of accused Kamal Kumar, bearing mobile No. 9170851656 (during the period 15.08.2021 and 06.09.2021) also reveals their connection with Prabha Shankar Tiwari and Gopal Kumar Saha and also between themselves;

(v) That, accused Imran and Kamal Kumar, in their statements, have implicated accused Prabha Shankar Tiwari and as per their statement they were to be paid a sum of Rs.10,000/ each, for trafficking cough syrup and he also identified the photo of accused Imran, Kamal Kumar and of Gopal Kumar Saha;

(vi) The accused also in his voluntary statement admitted having involved in this trafficking with accused Gopal Kumar Saha for monetary benefits and he was the mediator;

(vii) As the quantity of contraband substance, so recovered from the possession of the accused, is of commercial quantity, the rigors of section 37 NDPS Act will come into play as the bail application is being opposed by the learned standing counsel for NCB;

16. 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.

17. 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, and 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. Be it mentioned here that he is an accused in NDPS Case No. 47/2022, wherein also commercial quantity of contraband substances are involved.

18. I have carefully gone through the case laws, referred by Mr. Mitra, learned counsel for the accused with the aid of all circumspection at our command. 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 hazoot outweighs the embargo of Section 37 of the NDPS Act, 1985 and the accused is 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, 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 not advance the case of the petitioner. 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.

19. I have also gone through the case laws referred by Mr. Keyal, 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 left 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.

20. In the result, the bail petition stands dismissed. However, this court deemed it appropriate to issue following direction to safeguard the interest of the accused:-

(i) The learned court below shall take recourse to the provision of section 309(1) Cr.P.C. and conduct day to day trial from the very date of receipt of a certified copy of this order.

JUDGE

Comparing Assistant