

GAHC010043832024



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

Case No. : Bail Appln./667/2024

MD. NOUSHAD AND ANR
S/O LATE JARIF AHMED, VILLAGE DINGHARPUR, P.S. MENATHAR,
DISTRICT MURADABAD, UTTAR PRADESH.

2: MD. MOGISH
S/O LATE JAHID HUSSAIN
VILLAGE DINGHARPUR
P.S. MENATHAR
DISTRICT MURADABAD
UTTAR PRADESH

VERSUS

THE STATE OF ASSAM
REP BY THE PP ASSAM

Advocate for the Petitioner : MS. S K NARGIS

Advocate for the Respondent : PP, ASSAM

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

ORDER

Date : 19.06.2024

1. Heard Ms. S. K. Nargis, learned counsel for the petitioner. Also heard Mr. R. R. Kaushik, learned Additional Public Prosecutor for the State.

2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed by the petitioners, namely, *1. Md. Noushad and 2. Md. Mogish* who have been detained behind the bars since 19.07.2022 (for last 1 year and 11 months) in connection with NDPS Case No. 221/2022 arising out of Garchuk P.S. Case No. 219/2022 under Sections 22(c)/29 of the NDPS Act, 1985 which is pending in the Court of learned Additional Sessions Judge (FTC) No. 3, Kamrup(M), Guwahati.

3. The gist of accusation in this case is that on 18.07.2022, one Shri Kartick Basak, SI of Police of Garchuk Police Station, *inter alia*, alleging that on receipt of an information received from reliable sources that vehicle bearing Registration No. UP-21-BN-8713, carrying huge quantity of contraband (Cough Syrup) was coming from Jalukbari towards the Imphal and, a naka checking was conducted at Lohkra near Lalung Gaon. On the same day at about 11.10 AM, the aforesaid vehicle was intercepted and during search of the said vehicle, 139 numbers of cartons containing 12 syrup boxes, each box containing 12 numbers of bottles of "Anrex-CP Chlorpheniramine Maleate & Codeine Phosphate Cough Syrup" (in total 20,016 bottles of Cough Syrup) were recovered therefrom.

4. On receipt of the said FIR, Garchuk P.S. Case No. 219/2022 was registered under section 22(c)/29 of the NDPS Act, 1985 and the investigation was initiated and, ultimately, on completion of the investigation charge-sheet was laid against the petitioners under Section 22(c)/29 of the NDPS Act, 1985. The charge-sheet was laid on 30.09.2022 and six numbers of prosecution witnesses were listed in the charge-sheet. It is pertinent to mention herein that since the date of arrest, i.e., on 19.07.22, the petitioners are detained behind the bars.

5. The learned counsel for the petitioners has submitted that the charges were framed against the present petitioners on 25.01.2023, and thereafter, even after lapse of 1 year and 11 months of the detention period of the present petitioners, the trial in this case has not progressed. Learned counsel for the petitioners has also submitted that prior to approaching this Court by filing the instant bail application, on earlier two occasions also the petitioners had approached this court, and the prayer for bail was rejected on those occasions.

6. It is submitted by the learned counsel for the petitioners that while disposing of the second bail application of the present petitioners, a Co-ordinate Bench of this court by order dated 26.06.2023, passed in Bail Application No. 1695/2023, had observed that the trial court shall make all endeavour to expedite the trial of the petitioners to ensure speedy justice to them and if necessary by fixing a calendar of the hearing. It was also observed that the petitioners shall be at liberty to move a fresh bail application before the trial court at an appropriate stage of trial, and if such an bail application is filed, the same should be disposed of and considered in accordance with law.

7. Learned counsel for the petitioners has submitted that in spite of categorical observations made by co-ordinate Bench of this court, as aforesaid, the trial court had failed to fix any calendar of trial and until today, not even a single witness has been examined. It is also submitted by the learned counsel for the petitioners that citing all these facts the petitioners had moved an application for bail before the trial court. However, by order dated 30.11.2023, the trial court rejected the said application without discussing therein the observations made by the co-ordinate Bench of this court.

8. Learned counsel for the petitioner has submitted that though in this case commercial quantity of contraband was seized and the charge was framed under section 20(b)(ii)(c)/29 of the NDPS Act, 1985, however, the petitioners have been detained behind the bars for last 1 year and 11 months and not even a single prosecution witness has been examined till now and there is no hope of culmination of the trial at the earliest. Therefore, she has submitted that the petitioners are entitled to get bail solely on the ground of prolonged incarceration. It is also submitted by the learned counsel for the petitioners that the petitioners are the drivers and handymen of the seized truck respectively and in the meanwhile, the seized truck has already been given in the custody of its owner.

9. Learned counsel for the petitioners has cited a ruling of the Apex Court in "**Rabi Prakesh Vs. State of Orissa**" reported in "**2023 live law (SC) 533**", wherein it has been observed by the Hon'ble Apex Court that "*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.*"

10. The learned counsel for the petitioners has also cited the rulings of the Apex Court in (i) "**Shariful Islam @ Sarif Vs. State of West Bengal**" (order dated 04.08.2022 in SLP Criminal No. 4173/2022), (ii) "**Dheeraj Kumar Shukla Vs. State of Uttar Pradesh**" [order dated 25.10.2023 passed in Special Leave to Appeal (Criminal) No. 6690/2022], (iii) "**Anjan Nath V. The State Of Assam**" [Order dated 17.10.2023 passed in Special Leave to Appeal (Criminal) No. 9860/2023], (iv) "**Nitesh Adhikari Vs. State of West Bengal**" (Order dated 04.05.2022 passed in

SLP Criminal No. 5769/2022) and (v) "***Md. Salman Hanif Shaikh Vs. State of Gujarat***" (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022), wherein the petitioners (who were facing trial for possessing a commercial quantity of contraband) were granted bail by the Apex Court. However, due to the prolonged incarceration in all the above mentioned cases, the petitioners were allowed to go on bail. Therefore, on the same principle, the learned counsel for the petitioners has also submitted that in the instant case also the petitioners, who has been languishing behind the bars for more than 1 year and 11 months may be allowed to go on bail.

11. On the other hand, Mr. R. R. Kaushik, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioners on the ground that this case involves commercial quantity of contraband and huge quantity of codeine phosphate was recovered from the truck which was driven by the present petitioners and the said contraband was found in the conscious possession of the above named petitioners. He has submitted that as commercial quantity of contraband is involved in this case, hence the embargo of Section 37 of the NDPS Act, 1985 is applicable in the instant case and, therefore, he has opposed the grant of bail to the above named petitioners.

12. Learned Additional Public Prosecutor also submits that since both the above named petitioners hails from Uttar Pradesh there is also a flight risk if they are granted bail and it would be difficult to ensure their presence in the trial. Learned Additional Public Prosecutor citing the ruling of "***Narcotics Control Bureau –Vs- Mohit Aggarwal***" reported in "***AIR 2022 SC 3444***" in a case involving heinous offence, court should be reluctant to grant bail. Learned Additional Public Prosecutor has also submitted that the court in which the NDPS Case No.

221/22 is pending was vacant from 22.08.2023 till 12.10.2023 which is also one of the causes of the delay cause in progress of the trial which was beyond the control of the prosecution side.

13. I have considered the submissions made by learned counsel for both the sides as well as perused the scanned copy of the case record of NDPS Case No. 221/2022 along with the case diary of Garchuk P.S. Case No. 219/2022.

14. It appears from the record that since the date of the arrest of the above named petitioners i.e., since 19.07.2022, both the petitioners have been detained behind the bars. However, till date not even a single prosecution witness has been examined.

15. The Hon'ble Apex Court in "***Rabi Prakesh Vs. State of Orissa***" reported in "***2023 live law (SC) 533***", wherein it has been observed by the Hon'ble Apex Court that "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."

16. It appears on perusal of the rulings cited by learned counsel for the petitioner that in all the cases cited by the petitioner, though commercial quantity of contraband was involved and apparently the embargo of Section 37 would have been applicable in those cases, however, only because of the fact of the prolonged incarceration of the petitioners, the Apex Court allowed the petitioners to go on bail.

17. In view of the observation made by the Apex Court, this Court is of the

considered opinion that if, under the facts and circumstances of a case, this Court comes to the finding that there is an undue delay in the completion of the trial, and that the incarceration of the petitioner is long enough, he would be entitled to get bail on the ground of such prolonged incarceration, as in such a case of prolonged incarceration, the right to life and personal liberty guaranteed to the petitioner under Section Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

18. It is also pertinent to mention herein that the Hon'ble Supreme Court of India had granted bail to an accused facing charges for possession of a commercial quantity of contraband only on the ground of prolonged incarceration in "***Shariful Islam @ Sarif Vs. State of West Bengal***" (Order dated 04.08.2022 passed in SLP Criminal No. 4173/2022), wherein the accused was detained behind bars for one year and six months.

19. In "***Nitesh Adhikari Vs. State of West Bengal***" (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022), Hon'ble 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.

20. Similarly in "***Md. Salman Hanif Shaikh Vs. State of Gujarat***" (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022), the petitioner was granted bail by the Apex Court on the ground of prolonged incarceration of two years.

21. In "***Chitta Biswas Alias Subha Vs. The State Of West Bengal***" (Order dated 07.02.2020 passed in SLP Criminal No. 8823/2019), the Apex Court granted bail to the petitioner, who was facing a trial for possessing a

commercial quantity of contraband on the ground of prolonged incarceration of 1 year 6 month.

22. In the instant case also, the present petitioners are detained behind the bars for more than 1 year and 11 months and the prosecution side is yet to start examining its witness and under such circumstances and view of the observations made by the Apex Court discussed hereinabove where it has dealt with the question of long incarceration of similarly situated persons who were before the Apex Court, this court is of considered opinion that in the instant case also under the facts and circumstances discussed herein above, the detention of the present petitioners for 1 year and 11 months is long enough and in view of the considered opinion of this Court, it outweighs the embargo of Section 37 of the NDPS Act, 1985 and, therefore, the petitioners are entitled to get bail on the ground of prolonged incarceration only.

23. In view of above, the petitioners, namely, *1. Md. Noushad and 2. Md. Mogish* are allowed to go on bail of Rs.1 lakh (Rupees One Lakh) *each* with 2 sureties of like amount, one of whom should be a resident of within the State of Assam, subject to satisfaction of the learned Additional Sessions Judge (FTC) No. 3, Kamrup(M), Guwahati with following conditions:-

- i. That the petitioners shall cooperate in the trial of NDPS Case No. 221/2022, which is pending in the Court of learned Additional Sessions Judge (FTC) No. 3, Kamrup(M), Guwahati;
- ii. That the petitioners shall 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 their Aadhar Card or Driving License or PAN card and mobile number, and other contact details before the Trial Court;
- v. That the petitioners shall not leave the jurisdiction of the Trial Court without prior permission of the Trial Court and when such leave is granted by the Trial Court, the petitioners shall submit their leave address and contact details during such leave before the Trial Court; and
- vi. That the petitioners shall not commit any similar offence while on bail.

24. With above observation, this bail application is disposed of.

JUDGE

Comparing Assistant