

GAHC010053132024



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

Case No. : Bail Appln./815/2024

MD. SAHADUL ISLAM
S/O SURMAN ALI, RESIDENT OF VILLAGE- KHUTAMARI, PS AND DIST.
GOALPARA, ASSAM

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR. N J DUTTA

Advocate for the Respondent : PP, ASSAM

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

ORDER

Date : 20-06-2024

- 1.** Heard Mr. N. J. Dutta, learned counsel for the petitioner. Also heard Mr. P. Sarma, 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 petitioner, namely, *Md. Sahadul Islam*, who has been detained behind the bars since 23.03.2022 (for last more than 2 years

and 3 months) in connection with NDPS Case No. 137/2022 under Section 22(c) of NDPS Act, 1985.

3. The gist of accusation is that on 23.03.2022 one Kartick Basak, SI of Police had lodged an FIR before the Officer-in-charge of Gorchuk Police Station, *inter alia*, alleging that on receipt of the information through reliable sources that one person was carrying suspected Psychotropic Substance Codeine Phosphate Cough Syrup (PHENSEDYL) from Barpeta to Tripura in a 1109 Truck bearing Registration No. AS-01-NC-1845, a naka checking was conducted at Beloali Path located at Pub Boragoan, Near Petrol Pump. During naka checking duty, the aforesaid vehicle was intercepted and the petitioner, namely, Md. Sahadul Islam was apprehended therefrom. During search of the said truck, the naka team recovered 6900 bottles of Linctus Phensedyl Cough Syrup containing Codein phosphate. The said bottles were kept in three different cartons and the said bottles were of 100 ml each. On receipt of the said FIR, Gorchuk P.S. Case No. 94/2022 was registered and investigation was initiated.

4. Ultimately, on completion of the investigation, the charge-sheet was laid against the above named petitioner on 11.06.2022. In the charge-sheet seven numbers of prosecution witnesses were listed. On 25.08.2022, charge under Section 22(c) of NDPS Act, 1985 was framed against the above named petitioner to which he pleaded not guilty.

5. The learned counsel for the petitioner has submitted that though the petitioner has been detained behind the bars for more than two years and three months, however, out of seven numbers of listed witnesses, the

prosecution could examine only two witnesses till date and, as such, there is no hope of immediate culmination of trial which is pending against the above named petitioner

6. The learned counsel for the petitioner has submitted that the petitioner, is therefore, entitled to get bail only on the ground of prolonged incarceration. The learned counsel for the petitioner has also submitted that in the case of prolonged incarceration embargo provided under Section 37 of the NDPS Act, 1985 gives way to the fundamental rights of the accused under Article 21 of the Constitution of India and in a case where there is a prolonged incarceration, the accused is entitled to get bail.

7. In support of his contention, the learned counsel for the petitioner has cited the following rulings of the Supreme Court of India:-

- 1.** "*Mohd Muslim @ Hussain Vs. State (NCT of Delhi)*" reported in "2023 SCC Online SC 352".
- 2.** "*Rabi Prakesh Vs. State of Orissa*" reported in 2023 live law (SC) 533".
- 3.** "*Shariful Islam @ Sarif Vs. State of West Bengal*" (Order dated 04.08.2022 passed in SLP Criminal No. 4173/2022).
- 4.** "*Nitesh Adhikari Vs. State of West Bengal*" (Order dated 04.05.2022 passed in SLP Criminal No. 5769/2022).
- 5.** "*Md. Salman Hanif Shaikh Vs. State of Gujarat*" (Order dated 22.08.2022 passed in SLA Criminal No. 5530/2022).

8. On the other hand, Mr. P. Sarma, learned Additional Public Prosecutor has submitted that the contraband seized in this case is of commercial

quantity and, therefore, embargo of Section 37 of the NDPS Act, 1985 comes into play and has, thus, vehemently opposed grant of bail to the present petitioner.

9. I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record including the case diary of Gorchuk P.S. Case No. 94/2022.

10. Hon'ble Supreme Court of India in "***Mohd Muslim @ Hussain Vs. State (NCT of Delhi)***" (supra) has observed that "grant of bail on the ground of undue delay in trial cannot be said to be fettered by Section 37 of the NDPS Act, 1985"

11. The Hon'ble Apex Court in "***Rabi Prakesh Vs. State of Orissa***" (supra) wherein it has been observed by the 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."

12. 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.

13. 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 Article 21 of the Constitution of India would outweigh the fetter imposed under Section 37 of the NDPS Act, 1985.

14. 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.

15. 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.

16. 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.

17. 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.

18. In the instant case, it appears that the present petitioner has been detained behind the bars for last more than 2 years and 3 months and only two prosecution witness have been examined till date and, therefore, in view of the light of the observation made by the Apex Court in the Judgments discussed herein above as well as in view of the facts and circumstances of this case, this Court is of considered opinion that the incarceration undergone by the present petitioner may be considered to be long enough to outweigh the embargo of Section 37 of the NDPS Act, 1985.

19. This Court, is, therefore, of the considered opinion that the petitioner is entitled to get bail on the ground of prolonged incarceration only.

20. In view of the above, the petitioner, namely, Md. Sahadul Islam is hereby allowed to go on bail of Rs.50,000/- (Rupees Fifty Thousand) with one surety of like amount, subject to the satisfaction of the learned Additional Sessions Judge (FTC) No. 3, Kamrup (M), Guwahati with following conditions:-

- i. That the petitioner shall cooperate in the trial of NDPS Case No. 137/2022, which is pending in the Court of learned Additional Sessions Judge (FTC) No. 3, Kamrup (M), Guwahati;
- ii. That the petitioner shall appear before the Trial Court as and when

so required by the Trial Court;

- iii. That the petitioner 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 petitioner;
 - iv. That the petitioner shall provide his contact details including photocopies of his Aadhar Card or Driving License or PAN card and mobile number and other contact details before the Trial Court;
 - v. That the petitioner 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 petitioner shall submit his leave address and contact details during such leave before the Trial Court; and
 - vi. That the petitioner shall not commit any similar offence while on bail.
- 21.** With the above observation, this bail application is accordingly disposed of

JUDGE

Comparing Assistant