

GAHC010024612024



2024:GAU-AS:12188

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

Case No. : Bail Appln./434/2024

ANIL YADAV
S/O SRI BHULAN YADAV
R/O VILL- NAYHKATOLA
BHUPATPUR, P.O. KOTWA, O.P. KOTWA,
DIST. MOTIHARI (EAST CHAMPARAN), BIHAR-845432

VERSUS

UNION OF INDIA AND ANR.
REP. BY SPECIAL PUBLIC PROSECUTOR, NARCOTICS CONTROL BUREAU,
GUWAHATI ZONAL UNIT,
GUWAHATI.

2:THE STATE OF ASSAM
REP. BY THE PP
ASSA

Advocate for the Petitioner : MR N BARMAN, MR B DEORI,MS J BARMAN

Advocate for the Respondent : SC, NCB, PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 03.12.2024

Heard Mr. N. Barman, learned counsel for the petitioner. Also heard Mr. S. C. Keyal, learned Standing Counsel, NCB for the respondent No. 1 and Ms. S. H. Bora, learned Additional Public Prosecutor for the State respondent No. 2.

2. This is an application under Section 439 of the Code of Criminal Procedure, 1973 praying for grant of bail to the accused/petitioner, who has been arrested in connection with NDPS Case No. 01/2023, pending before the Court of learned Additional Sessions Judge No. 5, Kamrup(M), Guwahati, arising out of NCB Crime Case No. 19/2022, registered under Sections 20(b)(ii)(C)/29 of NDPS Act, 1985.

3. Scanned copy of the case record has already been received. Perused the same. Heard both sides.

4. It is submitted by Mr. Barman, learned counsel for the petitioner, that the present accused/petitioner is innocent and he is not involved in the alleged offence. He is the driver of the vehicle (truck) and has no knowledge about the contraband alleged to have been recovered from the truck drove by him. He further submitted that the accused got arrested in connection with this case on 09.07.2022 and since then, he is in judicial custody. The Charge-Sheet of the case was filed on 03.01.2023 and the charge was accordingly framed on 08.05.2023 and since then, the case is fixed for evidence. More so, till date, the prosecution could examine only 3 (three) witnesses and out of which, the PW-3 is yet to be cross-examined by the defence. Further he submitted that the accused is behind the bar for more than 2 (two) years and 5 (five) months, i.e. 880 days, but till date, the prosecution could examine only 3 (three) witnesses out of 8 (eight) numbers of listed witnesses. He, accordingly, submitted that there is no probability of completion of trial within near future as lots of witnesses are yet to be examined by the prosecution and therefore he submitted that considering the period of long incarceration, the petitioner may be enlarged on bail.

5. Mr. Barman, learned counsel for the petitioner, further submitted that vide order dated 26.07.2024, the bail application for the co-accused was rejected by this Court with a direction to the learned Trial Court below to make an endeavor to dispose of the matter preferable within 6 (six) months. But, even after lapse of 4 (four) months from the date of order, the prosecution could examine only 3 (three) witnesses out of 8 (eight) numbers of listed witnesses.

6. In support of his submission, Mr. Barman, learned counsel for the

petitioner, further relied on the following decisions of the Hon'ble Supreme Court:

- (i) **Rabi Prakash Vs. State of Odisha [2023 0 Supreme(SC) 707]**
- (ii) **Hussainara Khatoon & Ors. Vs. Home Secretary, State of Bihar, Pata [(1980) 1 SCC 98]**
- (iii) **Mohd Muslim @ Hussain Vs. State (NCT of Delhi) [2023 0 Supreme(SC) 289]**
- (iv) **Nitish Adhikary @ Bapan Vs. The State of West Bengal [2022 SCC OnLine SC 2068]**

7. He further relied on another 2 (two) decisions of this Court passed in **Bail Appln. No. 4307/2023 (Abid Pervez @ Azad Pervez Vs. Union of India)** and **Bail Appln. No. 2691/2023 (Md. Sahabuddin Kazi @ Md Sihabuddin Kazi @ Md Shabuddin Vs. The State of Assam)**, wherein also the co-ordinate Bench of this Court had allowed the prayer for bail considering the period of incarceration.

8. Citing the above referred decisions, it is submitted by Mr. Barman, learned counsel for the petitioner, that the petitioner may be granted with the privilege of bail considering his long period of incarceration. Further he submitted that the present accused/petitioner is a permanent resident of his addressed locality

and there is no chance of absconding and he will produce the genuine bailor and will appear before the learned Trial Court below on each and every date to be fixed by the Court.

9. In this context, Mr. S. C. Keyal, learned Standing Counsel, NCB, raised objection in enlarging the accused/petitioner on bail at this stage and accordingly, he submitted that the Investigating Officer has collected sufficient incriminating materials against the present accused/petitioner showing his direct involvement in the alleged offence. He confessed before the I.O. regarding his involvement in trafficking of Ganja in greed of money. Further, the report of the I.O. reveals the detail about the involvement of the present petitioner in the alleged offence. He further submitted that the entire contraband was seized from the conscious possession of the present accused/ petitioner. Charge was framed in the case on 08.05.2023 and the next date for evidence is fixed on 20.05.2023. However, thereafter, only 3 (three) PWs are being examined by the prosecution and the PW-3 is yet to be cross-examined by the defence. He further submitted that in between the dates fixed by the learned Special Judge in 2 (two) occasions, the learned Special Judge was on leave and in one occasion, the defence also prayed for an adjournment and the next date is fixed for evidence on 06.12.2024 and there is every probability of examining more witnesses on the next date.

10. Mr. Keyal further submitted that it is a case of commercial quantity and there are sufficient incriminating materials so far collected by the I.O. which is available in the Case Diary and it cannot be denied the involvement of the present accused/ petitioner in the alleged offence. Accordingly, he submitted that considering the nature of allegation, which is of commercial quantity, the

accused/petitioner cannot be released on bail only considering the period of incarceration.

11. In support of his submissions, Mr. Keyal further relied on the following decisions of the Apex Court as well as the order passed by the co-ordinate Bench of this Court:

- (i) **The State of Meghalaya Vs. Lalrintluanga Sailo & Anr. [Special Leave to Appeal (Crl.) No(s). 16021/2023]**
- (ii) **Jitul Ali Vs. Union of India [Bail Appln. No. 2732/2024]**
- (iii) **Mahendra Singh Vs. The Union of India [Bail Appln. No. 3130/2024]**

12. Citing the above referred judgment, it is submitted by Mr. Keyal, learned Standing Counsel, NCB, that the long incarceration and the violation of fundamental rights under Article 21 of the Constitution of India or the delay in trial cannot be the ground for allowing the accused persons to go on bail in a heinous crime like NDPS case. He further submitted that Article 21 of the Constitution guarantees the personal liberty to everyone, however the same cannot be taken away except in accordance with the procedures established by law. In a criminal law, a person accused of an offence, which is non-bailable, is liable to be detained in custody during the pendency of the trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned

as being violative of Article 21 of since the same is authorized by law. When the seriousness of an offence is such, the mere fact that he was in jail for however long time should not be the concern of the court and in heinous crime, length of tenure in custody may not be the only factor of consideration for the grant of bail.

13. Mr. Keyal further cited a decision of Hon'ble Apex Court passed in **2022 0 Supreme(SC) 56 [State by (NCB) Bengaluru Vs. Pallulabid Ahmad Arimutta & Anr.]** wherein, in paragraph No. 11 of the said judgment, it has been held that the benefit of bail cannot be extended to the person who was found to be in conscious possession of the commercial quantity of contraband under the NDPS Act. Paragraph No. 11 of the said judgment reads as under:

"11. However, the evidence brought before us against Mohammed Afzal [A-2], respondent in SLP (Crl.) No. 1569/2021, subject matter of the second case i.e., NCB Case FN No. 48/01/07/2019/BZU, who was granted bail vide order dated 08th January, 2020, will have to be treated on an entirely different footing. There are specific allegations levelled against the said respondent regarding recovery of substantial commercial quantities of drugs from a rented accommodation occupied by him pursuant to which he was arrested on 16th June, 2019. This aspect has been completely overlooked while passing the order dated 08th January, 2020 wherein, the only reason that appears to have weighed with the High Court for releasing him on bail is that his case stands on the same footing as A-1, A-3 and A-4 who had been enlarged on bail vide orders dated 11th October, 2019, 16th September, 2019 and 09th September, 2019, in connection with the second case registered by the Department. We are of the firm view that A-2 cannot seek parity with the aforesaid co-accused and no such benefit could have been extended to him in view of Section 37 of the Act when he was found to be in conscious possession of commercial quantity of psychotropic substances, as contemplated under the NDPS Act. That being the position, the petitioner-NCB succeeds in SLP (Crl.) No. 1569/2021. The bail granted to the respondent-Mohammed Afzal [A-2] is cancelled forthwith at this stage and he is directed to surrender before the Sessions Court/Special Judge (NDPS) within a period of two weeks, for being taken into custody."

14. Mr. Keyal further submitted that the earlier bail application filed by the co-

accused was rejected by this Court with a direction to the learned Trial Court to make an endeavor to dispose of the case preferably within 6 (six) months. But the Hon'ble Apex Court in case of **High Court Bar Association, Allahabad Vs. State of U.P. & Ors. [2024 0 Supreme(SC) 169]** has expressed the view that the Constitutional Court cannot issue direction to complete the trial in a time bound manner.

15. After hearing the submissions made by the learned counsels for both sides, I have perused the case record and the judgments relied by the learned counsels for both sides.

16. It is the case of the petitioner that the accused is in custody for more than 2 (two) years 5 (five) months and till date, the prosecution could examine only 3 (three) witnesses out of 8 (eight) witnesses and hence, considering the period of incarceration, the prayer for bail may be considered. Further it is the case of the petitioner that there is no probability of disposal of this case within a short and reasonable period as some of the vital witnesses are yet to be examined by the prosecution.

17. On the other hand, it is the case of the defence that the accused/petitioner is alleged to have committed the offence under the commercial quantity of the NDPS Act and hence, only on the ground of long incarceration, he cannot be enlarged on bail and in that context, the learned Standing Counsel, NCB has already relied on the above referred judgments of the Apex Court as well as the order passed by the co-ordinate Bench of this Court.

18. However, from the judgments cited by the learned Standing Counsel, NCB, it is seen that the said judgments were passed in different context and it is not applicable in the present case. Further it is seen that the order of the co-ordinate Bench passed in Bail Appln. No. 2732/2024 also seems to be passed in different context, wherein the report of FSL was awaited till filing of the Charge-Sheet.

19. It is the admitted fact the there are some incriminating materials in the Case Diary which reveals from the statement made by the witnesses under Section 161 Cr.P.C. and apart from that, some other materials are also been collected by the I.O. during the investigation of this case and on the basis of which, the Charge-Sheet has been filed. It is also an admitted fact that the Charge-Sheet was filed within the statutory period and accordingly the charges were framed by the learned Trial Court below. However, it is a fact that till date, the prosecution could examine only 3 (three) witnesses out of 8 (eight) numbers of listed witnesses including some more vital witnesses of the prosecution. But it also cannot be denied that the efforts have been made by the learned Special Judge to procure the attendance of the witnesses. In the same time, it is also seen that on several occasion, the learned Special Judge was on leave and the case was also delayed. More so, the prosecution as well as the defence also prayed adjournment of this case.

20. Further, it is also an admitted position that the case is of commercial quantity and hence, the rigor of Section 37 NDPS Act will follow.

21. For ready reference, Section 37 NDPS Act is extracted hereinbelow:

"37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(b) No person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless—

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

22. Thus, as per Section 37 (1) (b) of NDPS Act, the bail can only be granted, if there is no reasonable ground for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. But, from the materials available in the case record, there cannot be any reasons to believe that the accused/petitioner is not guilty of such offence or he is not likely to commit any offence while on bail.

23. But, in the same time, it cannot be denied that the accused/petitioner is behind the bar for more than 2 (two) years 5 (five) months from the date of his arrest and till then, the prosecution has been able to examine only 3 (three) witnesses out of 8 (eight) numbers of witnesses and it also cannot be denied that to examine the remaining witnesses, the prosecution may take a considerable period for completion of the trial.

24. In the case of **Rabi Prakash (supra)**, as relied by the learned counsel for the petitioner, the Apex Court has granted bail to the accused with a view

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)9ii) of the NDPS Act.*”

25. In the case of **Chitta Biswas @ Subash Vs. the State of West Bengal [Criminal Appeal No (s) 245 of 2020 (Decided on 07.02.2022)]** also, the bail was granted by the Apex Court considering the long period of incarceration and also considering the fact that out of 10 (ten) numbers of witnesses, only 4 (four) witnesses were examined by the prosecution.

26. Again, in the case of **Nitish Adhikary @ Bapan (supra)**, considering the period of detention of 1 year 7 months, the bail was granted considering that the prosecution could examine only one witness and also considering that the case is at the preliminary stage of trial.

27. Further, in the case of **Shariful Islam @ Sharif Vs. The State of West Bengal [SLP(CrI) 4173/2022 (Decided on 04.08.2022)]** also, the Apex Court had considered the period of incarceration, i.e. 1 year 6 months, and the bail was granted.

28. The Apex Court in the case of **Mohammed Salman Hanif Shaikh Vs. The State of Gujrat [SLP(CrI) No. 5530/2022 (Decided on 22.08.2022)]** also granted bail to the accused without expressing any views on the merits of the case and only taking into consideration the period of custody.

29. In the case of **Karnail Singh Vs. The State of Odisha [Criminal Appeal No. 2027/2022, arising out of SLP(Crl) No. 9067/2022 (Decided on 22.11.2022)]** as well as in **Dheeraj Kumar Shukla (supra)** also, the Apex Court also expressed the same view and granted bail to the accused considering the period of incarceration.

30. Same view has been expressed by the Apex Court in the case of **Anjan Nath Vs. the State of Assam [SLP (CRL) No. 9860/2023 (Decided on 17.10.2023)]**

31. In the instant case, it is seen that there are some materials available in the Case Diary and on the basis of which, the Investigating Officer has also filed the Charge-Sheet against the present accused/petitioner showing his involvement in the alleged offence. More so, the learned Special Judge was directed to make an endeavour to dispose of the matter preferable within 6 (six) months, but it is seen that there is no such progress of the case and till date, the prosecution could examine only 3 (three) numbers of witnesses and the defence could cross-examine only 2 (two) witnesses of out 8 (eight) numbers of listed witnesses, though it a fact that the accused/petitioner is behind the bar for more than 2 (two) years 5 (five) months.

32. So, considering all above aspects of the case and also considering the observation made by the Apex Court in the various judgments, as discussed above, and further considering the other facts and circumstances of this case, this Court is of the opinion that the period of long incarceration undergone by

the accused/petitioner for more than 2 (two) years 5 (five) months may be considered as a ground for bail with the conditional liberty considering the fundamental right guaranteed under Article 21 of the Constitution and, therefore, without going into the merit of the case, I am inclined to grant bail to the present accused/petitioner.

33. Accordingly, it is provided that on furnishing a bond of Rs. 50,000/- (Rupees twenty thousand) only with 2 (two) sureties of like amount, provided that one surety has to be a government servant, to the satisfaction of the learned Additional Sessions Judge No. 5, Kamrup (M), Guwahati, the accused/petitioner, namely, Shri Anil Yadav, be enlarged on bail, subject to the following conditions:

- (i) that the petitioner shall appear before the Court of learned Additional Sessions Judge No. 5, Kamrup (M), Guwahati, on each and every date to be fixed by the Court;
- (ii) that the petitioner shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) That the petitioner shall submit his Aadhar Card and PAN Card before the learned Additional Sessions Judge No. 5, Kamrup (M), Guwahati; and

- (iv) that the petitioner shall not leave the jurisdiction of the learned Additional Sessions Judge No. 5, Kamrup (M), Guwahati, without prior permission.

34. In terms of above, this bail application stands disposed of.

JUDGE

Comparing Assistant