

GAUHATI HIGH COURT

Bench: Honourable Mr. Justice Robin Phukan

Date of Decision: 18.11.2023

Case No. : Bail Appln./2729/2023

VINOD BIJARNIA

VERSUS

UNION OF INDIA

Advocate for the Petitioner : MR. V N UPADHYAY

Advocate for the Respondent : SC, NCB

Legislation:

Section 439 of the Code of Criminal Procedure, 1973

Sections 21(C), 29, 37, 67 of the NDPS (Narcotic Drugs and Psychotropic Substances) Act

Article 21 of the Constitution of India

Section 309(1) of the Cr.P.C. (Criminal Procedure Code)

Subject: Bail application under NDPS Act for alleged transportation and possession of a commercial quantity of Phensedyle, a Codeine-based cough syrup.

Headnotes:

Bail Application - NDPS Act Violation - Accused's Bail Plea Dismissed: In the case of Vinod Bijarnia vs. Union of India, the Gauhati High Court denied bail to the accused involved in a narcotics case. The accused had been in jail since 17.11.2021 for allegedly transporting a commercial quantity of Phensedyle, a Codeine-based cough syrup. The application for bail, under Section 439 of the Cr.P.C., was considered in light of the charges under Sections 21(C)/29 of the NDPS Act. [Para 2, 4, 15]

Arguments for Bail - Delay in Trial and Lack of Direct Evidence: The defense argued for bail citing the long incarceration without trial completion, reliance on inadmissible confessions under Section 67 of the NDPS Act, and no direct recovery of contraband from the accused. Reference was made to the

Supreme Court's decision in *Toofan Singh vs. State of Tamil Nadu* and *Ravi Prakash vs. The State of Odisha* regarding the admissibility of statements and right to speedy trial under Article 21 of the Constitution. [Para 5, 9, 12]

Prosecution's Counter and Court's Observation: The prosecution countered that the trial delay wasn't significant, with the first witness already examined. The court noted that despite the lack of direct recovery from the accused, he owned the vehicle used for transporting the contraband. The court also referenced decisions from the Supreme Court, highlighting the gravity of offences involving commercial quantities of narcotics and the necessity to satisfy stringent conditions for bail under the NDPS Act. [Para 6, 8, 10, 11, 13, 14]

Decision and Directions for Expedited Trial: The court concluded that due to the nature and gravity of the offence, bail was not granted. However, the court directed the lower court to expedite the trial, preferably completing it within three months, without being influenced by the High Court's observations. [Para 15, 16]

Referred Cases:

- *Toofan Singh vs. State of Tamil Nadu*, (2021) 4 SCC 1
- *Rabi Prakash vs. The State of Odisha*, Special Leave of Appeal (Crl.) No. 4169/2023, dated 13.07.2023
- *Union Of India vs. Ajay Kumar Singh @ Pappu*, Criminal Appeal No. 952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28 March, 2023
- *NCB vs. Mohit Agarwal*, Criminal Appeal Nos. 1001-1002 of 2022, arising out of petitions for Special Leave to Appeal (Crl.) No. 6128-29 of 2021, decided on 19 July, 2022
- *National Insurance Company Ltd. Vs. Pranay Sethi & Another*, (2017) 16 SCC 680

Representing Advocates:

Advocate for the Petitioner: Mr. V N Upadhyay

Advocate for the Respondent: SC, NCB (Mr. S. C. Kayel)

ORDER

18.11.2023.

Heard Mr. P. Das, learned counsel for the accused. Also heard Mr. S. C. Kayel, learned Standing Counsel for the NCB respondent.

2. This application, under Section 439 of the Code of Criminal Procedure, 1973, is preferred by two accused **Vinod Bijarnia**, who have been languishing in jail hazoot since 17.11.2021, in connection with the **Special NDPS Case No.**

46/2021, under Sections 21(C)/29 of the NDPS Act, pending before the learned Special Judge, Kamrup Amingaon, for grant of bail.

3. It is to be noted here that the aforementioned case has been registered on the basis of a complaint lodged by one Anil Kushwaha, Intelligence Officer, NCB, Guwahati on 22.09.2021.
4. The essence of allegations, made in the said complaint is that on 29.03.2021, at about 16.20 hrs. Shri Anil Kushwaha, Intelligence Officer, NCB, Guwahati Zone has received an information that two persons namely, Ayodhya Prasad and Mahendra Singh of Uttar Pradesh are coming in a Truck, bearing registration No. UP-22-T-8859, from Rangia side towards Agartala, Tripura and they have been carrying 10000 bottles of Phensedyle, Codine based cough syrup in the said Truck and will cross Narayana Hospital in between 2100 hrs- 2300 hrs. Then a team of NCB official intercepted the said Truck, near Narayana Hospital and apprehended the said two persons, namely, Ayodhya Prasad and Mahendra Singh) and on checking the Truck they recovered 9975 bottles of Phensedyle, Codine based cough syrup, and seized the same in presence of witnesses, preparing seizure list. Thereafter NCB has issued notice to the present accused namely, Vinod Bijarnia, under section 67(C) of the NDPS Act to appear before it and accordingly the accused appeared before the NCB, Guwahati on 17.11.2021 and on his appearance he was arrested by NCB and since then he has been languishing in jail hazoot. The investigation has culminated in submission of Supplementary Offence Report against the petitioner on 27.01.2022. Thereafter, the learned court below has framed charge against the present accused under section 21(C)/29 of the NDPS Act on 27.03.2023 and thereafter, the learned court below has examined one witness out of 8 witnesses cited by the prosecution side.
5. Mr. Das, learned counsel for the accused, submits that the accused is behind the bar for last two years, as he was arrested on 27.11.2021. Mr. Das further submits that though the Offence Report has been submitted long back, yet, only one witness has been examined so far, out of 8 witnesses cited in the charge sheet. It is the further submission of Mr. Das that nothing has been recovered from the possession of the present accused and he was arrested only on the basis of statement under section 67 NDPS Act and also on the basis of Call Details Report and as per the law laid down in the case of **Toofan Sing vs. State of Tamil Nadu**, reported in **(2021) 4 SCC 1**, the statement under section 67 NDPS Act is not admissible. Further Mr. Das submits that there is considerable delay in conducting trial and the same impaired the right

to speedy trial of the petitioner as guaranteed by Article 21 of the Constitution of India. Mr. Das, referring to a decision of Hon'ble Supreme Court in **Rabi Prakash vs. The State of Odisha (Special Leave of Appeal (Crl.) No. 4169/2023, dated 13.07.2023)** further submits that though the quantity of contraband substances, so recovered from the possession of accused persons were of commercial quantity, yet, the conditional liberty available under Article 21 of the Constitution of India, must override the statutory embargo created under section 37 of the NDPS Act. Mr. Das also submits that the accused is ready to face trial and will appear before the court on each and every date and therefore, it is contended to allow the petition.

6. On the other hand, Mr. S.C. Kayel, the learned Standing Counsel for NCB submits that all total 9975 bottles of Phensedyle, Codine based cough syrup were recovered from the possession of the accused persons while the same were being carried in a Truck, bearing registration No. UP-22-T8859, and that the same were of commercial quantity and that the accused has failed to fulfill the twin requirement of section 37 of the NDPS Act, and that trial is going on and one witness has already been examined. Mr. Kayel also submits that there is no delay in trial and charge was framed only on 27.03.2023. Referring to the para No. 11 of the Affidavit submitted by NCB, Mr. Kayel submits that after framing of charge on 27.03.2023, on three subsequent dates the Presiding Judge was on leave on 24.04.2023 and 08.05.2023 and thereafter on 03.06.2023 the Presiding Judge was transferred and 30.06.2013, no witness was present in the court and on 10.08.2023 though one witness was present the leaned defence counsel was absent and on 09.10.2023 one witness was present and he was examined and next date was fixed on 09.10.2023, and as such it cannot be said that there is considerable delay in trial so as to term it as protracted trial and therefore, Mr. Kayel has contended to dismiss the petition.
7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the case record, and also the Status Report, received from the learned Court below.
8. It also appears that the Investigating Officer had lodged the Final Complaint on 27.01.2022, against the present accused. Further, it appears that the accused was arrested on 27.11.2021. It also appears from the thereafter the learned court below had framed charge against the present accused and two others under Section 21(C)/29 of the NDPS Act on 27.03.2023. Thereafter, on 24.04.2023 and 08.05.2023 the learned Presiding Judge was on leave and thereafter on 03.06.2023 the learned Presiding Judge was transferred. Then 30.06.2013, no witness was present in the court and on 10.08.2023, though

one witness was present the learned defence counsel was absent and on 09.10.2023, one witness was present and he was examined. This being the factual position it cannot be said that there is considerable delay in trial and neither the prosecution nor the court is to be blamed.

9. It is, however, a fact that nothing has been recovered from the possession of the present accused. He was arrested on the basis of the statement under section 67 NDPS Act and also on the basis of the CDR analysis, and Mr. Das, the learned counsel for the accused has rightly pointed this out during argument. There is no quarrel at the bar that the statement under section 67 of the NDPS Act is not admissible in view of the decision of Hon'ble Supreme Court in **Toofan Singh** (supra). It is to be noted here that in the said case, it has been held that a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act. But, the fact remains that he is the registered owner of the Truck No. UP-22-T-8859, from where the contraband substances were recovered, the contrabands were carried in the vehicle with his knowledge, from Gorokhpur to Agartala. Thus, because of the factum of being the registered owners of the vehicle, couple with other circumstances, so referred in the final complaint, the matter of the accused stands on a different footing.
10. It is not in dispute that the quantities of the contraband substances, so recovered from the possession of the accused persons are of commercial quantity, and as such the accused persons have to satisfy the twin conditions of Section 37 of the NDPS Act that there is no reasonable ground to believe that: the accused is not guilty of the offence and that he is not likely to commit any offence while on bail.
11. But, from the materials on record, specially from the scanned copy of the record received from the learned court below also from the submission of learned counsel for the accused, this Court is unable to derive its satisfaction that there exists any reasonable ground for believing that the accused is not guilty of the offence and that he is not likely to commit any offence, while on bail.
12. I have also gone through the decision of Hon'ble Supreme Court in **Ravi Prakash** (supra) wherein Hon'ble Supreme Court has held that prolong incarceration, generally militate against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such situation, the conditional liberty must override the statutory embargo created under section 37(1) (b) (ii) of the NDPS Act. As discussed herein above, there is no considerable

delay in trial and neither the prosecution nor the court is to be blamed for any delay. Therefore, to the considered opinion of this court the decision so referred by Mr. Das, learned counsel for the accused will advance his case.

13. It is also to be mentioned here that in the case of **Union Of India vs. Ajay Kumar Singh @ Pappu**, Criminal Appeal No. 952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28 March, 2023, a bench of co-equal strength of Hon'ble Supreme Court, while setting aside the order of granting bail, by the Allahabad High Court, to the accused involving in commercial quantity of contraband substance, has held as under:-

“In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.”

14. Same principle is echoed by another bench of co-equal strength of Hon'ble Supreme Court in the case of **NCB vs. Mohit Agarwal** (Criminal Appeal Nos. 1001-1002 of 2022, arising out of petitions for Special Leave to Appeal (Crl.) No. 6128-29 of 2021, decided on 19 July, 2022. It may be noted here that these decisions are earlier in point of time, and therefore, the same also cannot be ignored altogether in view of the Doctrine of binding precedent, as held by a five Judges bench of Hon'ble Supreme Court in - **National Insurance Company Ltd. vs. Pranay Sethi & Another reported in (2017) 16 SCC 680.)**

15. In view of above, and also in view of the nature and gravity of the offence and the punishment prescribed for the same this Court is of the opinion that this is not a fit case to grant the privilege of bail under Section 439 of the Cr.P.C. to the accused and therefore, the same stands dismissed.

16. However, the learned Court below is directed to expedite the trial and conclude the same at the earliest possible time, preferably within a period of three months from today, without being influenced by any of the observations made by this court herein above. And if necessary, the learned court below shall take recourse to the provision of Section 309(1) of the Cr.P.C.

17. In terms of above, the bail application stands disposed of.

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