

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT
SRINAGAR**

Bail App. No. 88/2023

Reserved on 02.12.2023

Pronounced on 12.12.2023

Bashir Ahmad Bhat (Aged 65 years)

Through his son Tashfeen Bhat S/O Bashir Ahmad Bhat

Resident of Marhama Bijbehara District Anantnag.

...Petitioner(s)

Through:- Mr. Manzoor Ahmad Ganai, Advocate.

V/s

Union Territory of Jammu and Kashmir through
S.H.O Police Station Bijbehara District Anantnag.

...Respondent(s)

Through:- Mr. Ilyas Nazir Laway, GA.

Coram: HON'BLE MR. JUSTICE SANJEEV KUMAR, JUDGE

JUDGMENT

1. This is an application by one Bashir Ahmad Bhat filed under Section 438 Cr.P.C for grant of bail in FIR No. 230/2021 registered at Police Station Sangam, Anantnag for offence under Sections 8/15 of the Narcotic Drugs and Psychotropic Substances Act, 1985, ['NDPS Act' for short].

2. Briefly stated the relevant facts for disposal of the bail application are that on 19-08-2021 at 1830 hours a Naka party headed by Sub Inspector Zahid Ahmad, while performing their duty at Doonipora crossing at National Highway Sangam, stopped an Alto Car bearing Registration No. JK18B-1097. The Car was being driven by the petitioner. During search Poppy Straw weighing 70 Kilograms was recovered from the vehicle. The seized

contraband was seized and sealed in front of the Executive Magistrate, Bijbehara. FIR was registered and on completion of legal formalities challan was presented in the Court of Principal Sessions Judge, Anantnag [‘the trial Court’].

3. The trial Court, after hearing the accused as well as the prosecution and after being satisfied that *prima facie* case for commission of offences under Sections 8/15 NDPS Act is made out, directed the prosecution to commence its evidence. On the date of filing of the instant bail application, the prosecution had examined six out of 12 cited witnesses.

4. The petitioner, who was arrested by police on 19-08-2021 on spot, moved an application before the trial Court for grant of bail on the ground that the trial of the case is being inordinately delayed by the prosecution and, therefore, the petitioner deserves to be enlarged on bail. It was contended by the petitioner before the trial Court that the star witnesses in the case have already been examined and said witnesses have not supported the prosecution story. It was thus argued that, since there is no *prima facie* case against the petitioner warranting his conviction under the NDPS Act, as such, it would be in the interest of justice to enlarge him on bail. The bail application was contested by submitting that the petitioner was involved in heinous and non-bailable offence under the NDPS Act which carries a very stringent punishment exceeding upto 20 years besides fine. The prosecution further submitted that the quantity of the contraband recovered from the petitioner is a commercial quantity, and, therefore, the bar under Section 37 of the NDPS Act is attracted. The trial Court considered the rival contentions

and the material on record and having regard to the fact that the petitioner was *prima facie* involved in the commission of offences for trafficking commercial quantity of the Poppy straw, as such, having regard to the rigors of Section 37 of the NDPS Act, the petitioner was not entitled to the bail. The trial Court, vide its order dated 17-07-2023 dismissed the bail application. It is in these circumstances the petitioner has moved this Court for indulgence.

5. Having heard the learned counsel for the parties and perused the material on record, I am of the considered opinion that petitioner does not deserve to be enlarged on bail at this stage. The order of the trial Court is well reasoned order and learned counsel for the petitioner could not point out any change of circumstances warranting consideration of the bail application afresh by this Court.

6. I am aware that after rejection of bail by the trial Court under Section 437 Cr.P.C, fresh bail application before the High Court under Section 439 Cr.P.C is maintainable. However, in the absence of change in circumstances or some new material brought on record, it would not be proper for the High Court to pass an order different from the one passed by the trial Court on same facts and material. I am saying so because the jurisdiction to grant bail under Section 439 Cr.P.C of the Sessions Judge and the High Court is concurrent.

7. Mr. Manzoor Ahmad Ganai, learned counsel appearing for the petitioner could not point out from the statements of the witnesses so far recorded in the trial, that the witnesses have not supported the prosecution

case. He, however, argues that right of speedy trial is a fundamental right implicit in right to life and liberty guaranteed by Article 21 of the Constitution of India. He submits that in the instant case the trial has taken more than two years and, therefore, the petitioner should be held entitled to bail on the ground that prosecution has not been able to wrap up its evidence even after two years. Interestingly, the learned counsel has not argued the bail on merits to demonstrate that having regard to the evidence on record, rigors of Section 37 of NDPS Act are not attracted in the case and, therefore, petitioner may be entitled to the concession of bail. Learned counsel has laid much stress upon the right of the accused to speedy trial and right of the accused to seek bail in case there is inordinate delay in completion of the trial.

8. Before I proceed to appreciate the contentions of the learned counsel for the petitioner, I deem it appropriate to set out Section 37 of the NDPS Act, herein below:-

“37. Offences to be cognizable and non-bailable. -- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),--

(a) every offence punishable under this Act shall be cognizable;

(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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

9. From reading of Section 37 above, it is abundantly clear that Section 37 overrides all contrary provisions contained in the Code of Criminal Procedure, 1973 relating to bail. In a case where a person is charged for commission of offence in relation to a commercial quantity of the contraband substance under the NDPS Act, he can not be released on bail unless; (i) the Public Prosecutor has been given an opportunity to oppose the application; (ii) the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences; and (iii) that Court is satisfied that the accused seeking bail is not likely to commit any offence while on bail. These three conditions contained in Section 37 of the Act are in addition to the limitations of the Code of Criminal Procedure, 1973 or any other law for the time being in force for grant of bail.

10. With a view to find out and determine whether there are reasonable grounds for believing that the person seeking bail is not guilty of offences in terms of Section 37 (1) (b) (ii) of the NDPS Act, Hon'ble the Supreme Court has adopted the concept of the *prima facie* case. Apart from other limitations, the Court will not grant bail to a person accused of committing offences under the NDPS Act in relation to commercial quantity of the contraband, unless the Court is satisfied that the accused is *prima facie* not guilty of such offences. The very fact that the Court, after hearing the accused as well as the prosecution, has framed charges under Section 8/15 of

the NDPS Act, goes a long way to show that a *prima facie* case of commission of offences does exist against the accused. The trial Court has already examined six out of 12 listed witnesses and it is not the case of the petitioner that the star witnesses, so far examined, have turned hostile. As a matter of fact, no effort was made by the learned counsel for the petitioner to take this Court to the statements recorded to demonstrate that a *prima facie* case, that may have existed at the time of framing of the charges, stands demolished by the testimony of the prosecution witnesses so far examined.

11. Viewed from any angle, I am of the considered opinion that rigors of Section 37 of the NDPS Act are fully attracted and the petitioner cannot be held entitled to bail at this stage when *prima facie* material indicating the commission of offence by the petitioner exists on record. The trial Court has already completed the trial half way and is likely to complete the rest in some reasonable time. It is true that after filing of this application the prosecution has not examined any more witness.

12. The right of speedy trial invoked by the learned counsel for the petitioner also cannot be invoked for the reason that the challan in the instant case appears to have been presented on 14-12-2021 and only two years have gone since the trial commenced. The prosecution has already examined half of its witnesses and, therefore, it cannot be said, by any stretch of reasoning, that the trial in the instant case is being inordinately delayed. I am, however, in agreement with the learned counsel for the petitioner that in case where the trial is inordinately delayed without any act or omission on the part of the accused, the accused may claim bail on the strength of his fundamental

right of speedy trial guaranteed under Article 21 of the Constitution, the rigors of Section 37 of the NDPS Act, notwithstanding. This issue has been considered by Hon'ble the Supreme Court on many occasions and it has been authoritatively held that with a view to save the constitutionality of Section 37 of the NDPS Act, it is necessary to read Section 37 of the NDPS Act subject to the fundamental right of life and liberty guaranteed under Article 21 of the Constitution of India. Para 19 and 20 of the judgment rendered by Hon'ble the Supreme Court in the case of **Mohammad Muslim @ Hussain v. State (NCT of Delhi)**, reported as **2023 SCC Online (SC) 352** beautifully sums up the position of law and reads thus:-

“19. A plain and literal interpretation of the conditions under Section 37 (i.e., that Court should be satisfied that the accused is not guilty and would not commit any offence) would effectively exclude grant of bail altogether, resulting in punitive detention and unsanctioned preventive detention as well. Therefore, the only manner in which such special conditions as enacted under Section 37 can be considered within constitutional parameters is where the court is reasonably satisfied on a prima facie look at the material on record (whenever the bail application is made) that the accused is not guilty. Any other interpretation, would result in complete denial of the bail to a person accused of offences such as those enacted under Section 37 of the NDPS Act.”

13. Before I close, I deem it appropriate to set out para 4 of **Rabi Prakash v. State of Orrisa, 2023 Livelaw (SC) 533**, as regards the twin conditions contained in Section 37 of the NDPS Act:-

“ 4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent – State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd condition re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. 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.”

14. In view of the clear enunciation of law on the point, there is not an iota of doubt that prolonged incarceration without bail violates the right of the accused to speedy trial which is implicit under Article 21 of the Constitution of India. In such situation where the Court is of the opinion that the trial in a case has been prolonged beyond reasonable limits, without any reason or justification, it may grant bail to the accused on the strength of Article 21 of the Constitution of India, the rigors of Section 37 notwithstanding.

15. As already noted, the trial in this case is merely two years old and half of the witnesses have already been examined. This Court, however, views seriously the lapse on the part of the prosecution to examine the rest of six witnesses with promptitude. I, therefore, take this opportunity to remind the trial Court of its onerous duty to conclude the trial without waste of time, more particularly when the accused is in custody.

16. For the foregoing reasons I find no merit in this application and the same is, accordingly, dismissed. The trial Court is, however, directed to

conclude the trial by taking all possible measures within a period of one years from today. It is, however, left open to the petitioner to file a fresh bail application in case the trial Court, for some reasons, fails to conclude the trial within the stipulated period granted.

(Sanjeev Kumar)
Judge

Srinagar.

12.12.2023

Anil Raina, Addl. Reg/Secy

Whether the order is speaking : Yes

Whether the order is reportable: Yes

