

(1991) 08 DEL CK 0086

In the Delhi High Court

Case No : Criminal Miscellaneous (Main) Appeal No's. 2924 of 1990 and 496 of 1991

Gurbux Bhiryani

APPELLANT

Vs

J.K. Handa

RESPONDENT

Date of Decision : 05-08-1991

Acts Referred:

Constitution of India, 1950 — Article 21

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 37

Citation : (1991) 45 DLT 100

Hon'ble Judges : R.L. Gupta, J

Bench : Single Bench

Advocate : Ram Jethmalani, R.L. Mehta, Sunil Mehta and J.S.Arora, for the Appellant;

Judgement

R.L. Gupta, J.

(1) This order will dispose off Cr. M (M) 2924 of 1990 filed by Gurbux Bhiryani and Cr. M. (M) 496 of 1991 filed by Rajni Kant Patel, both u/s 439 read with Section 482 of the Code of Criminal Procedure for their release on bail.

(2) The petitioners are facing trial under Sections 21 and 29 of Ndps Act (hereinafter called the Act) (r)n the allegations that they and some other coaccused persons entered into and were parties to a criminal conspiracy to export heroin out of India in contravention of the provisions of the Act and sell the same in the United States of America. Petitioner Gurbux Bhiryani has been further accused of having exported 3 kgs of heroin on or about November 19, 1987 through one U.S. Gala and Mrs. Manjulaben respectively whose services are alleged to have been procured by him with the help of co-accused Rajni Kant Patel and Pandya.

(3) I have heard arguments advanced by learned Counsel for the parties. The main contention on behalf of the petitioners is that they are languishing in jail

without a speedy trial. In spite of the fact that earlier this Court ordered on 15.2.90 in Cr. M. (M) 2089/89 that the trial Court shall try to complete the prosecution evidence within six months and if due to lapse of the prosecution, the prosecution evidence is not completed within six months, petitioners will be granted bail, there is practically no progress in the case and it is still at the stage of framing of charge against the petitioners and others. According to the learned Counsel this has completely violated the fundamental right of the petitioners under Article 21 of the Constitution of India and, Therefore, inspire of the rigour of Section 37 of the Act dictating refusal of bail, the petitioners were entitled to be released on bail because of the fundamental right vested in them under Article 21 of the Constitution. It is further argued that Section 37 being a part of sub-servant legislation must give way to the protection available to the petitioners under Article 21 of the Constitution.

(4) In order to fully appreciate the contention on behalf of the petitioners, first of all this Court will have to go into the question whether actually there has been such a delay on the part of the prosecution in not adducing its evidence before the trial Court. With this aim in view I asked learned Counsel for the petitioners to file copies of various orders passed by the trial Court specially after the order dated 15.2.90 of this Court. I have been taken through all these orders starting from 2.2.90 to 1.5.91. A perusal of these orders indicates that the case is still at the stage of hearing arguments on charge. Actually part of the arguments have been completed. On behalf of Ncb written arguments were filed on 9.4.91. On 2.2.90, Sh. S.K. Aggarwal, Advocate filed an application for exemption from personal appearance on behalf of accused Pandya which was allowed. It is further found that on that date, learned Counsel for the complainant was present while Counsel for none other accused were present. The Presiding Officer was also on leave on that day. The case was adjourned to 23.3.90, which actually was the first date after the order of this Court on 15.2.90. On that date, application on behalf of Pandya for exemption was repeated while Counsel for no other accused was present. Counsel for Ncb was present. Obviously on account of the exemption application and the absence of Counsel for the other accused no further progress in the case was possible. On 6.4.1990 Counsel for Ncb, accused Pandya and Jasbir Singh only were present while counsel for other accused were again absent. In fact, on that date the petitioner Gurbux Bhiryani informed the trial Court that he had moved a petition for transfer of his case before the Supreme Court which was listed for 23.4.90 and that the case may be taken up thereafter. Thus on that date, the case could not be proceeded with. On 26.4.90, Counsel for Ncb, Gurbux Bhiryani and Pandya only were present. Application for exemption of Pandya was again moved because he was admitted in hospital. Accused Vipin Jaggi also moved an application u/s 307 Cr.P.C. for grant of pardon. On 4.5.90 besides the exemption application of Pandya, reply was filed on behalf of Ncb to the aforesaid application. The other accused persons were also given opportunity to file objections, if any, to the prayer of Vipin Jaggi accused. Thereafter that application remained pending until it was disallowed

after a number of hearings on 4.10.90. It may be noted that during the dates in between applications were moved sometime by one and sometime by the other accused for exemption. Moreover, because of the pendency of the application of Vipin Jaggi for being made an approver, arguments on charge could not be heard till the disposal of that application. Ncb did not oppose the application. It was only some of the accused who vehemently opposed the grant of pardon. The case was then listed for arguments on charge on 9.10.90, when except Counsel for Ncb, no other counsel was present. The matter was adjourned to 25.10.90 when some of the accused in custody were not produced. Presence of Counsel for the accused is also not recorded on that date.

(5) After carefully perusing the entire proceedings of various dates, I am of the view that there has been actually no attempt on the part of the prosecution to delay the trial of the case. As already stated earlier written arguments. on behalf of Ncb have been filed on 9.4.91 and till date arguments on charge on behalf of the accused persons have not been completed. In the light of the aforesaid history of the case, can it be said by any stretch of imagination that prosecution is guilty of protracting the trial in this case. . No doubt, this Court directed in its order dated 15.2.90 that the prosecution will try to complete its evidence within six months. But as noted above, there is no fault on the part of the prosecution in the progress of the case.

(6) It may also be noted that there is only one Court dealing with the cases under this Act in New Delhi. A number of cases under this Act are pending before that Court but in spite of that the case has been rotated by the trial Court on a number of dates. The principle contained in Article 21 of the Constitution, Therefore, in the present case is not at all attracted. In the case of Hussainara Khatoon and Others Vs. Home Secretary, State of Bihar, Patna, , the state of affairs was extremely shocking arid alarming. The Supreme Court found that alarmingly a large number of men and women, children including, were behind prison bar for years awaiting trial in Courts of law. Some of them were charged with trivial offences, which, even if proved, would not warrant punishment for more than a few months, perhaps for a year or two and yet those unfortunate forgotten specimen of humanity were found in jail for periods ranging from 3 to 10 years without even as much as their trial having commenced. The present case has no similarity with that case. Petitioners have even enjoyed the benefit of interim bail on some occasions. In fact, it can be said that the trial Court in the present case is doing its best.

(7) Another argument on behalf of the petitioners is that one of the coaccused Jasbir Singh was allowed bail by this Court in Cr. M.(M) 2753/90 on 11.1.91 because of the delay in the progress of the case. Therefore, the petitioners were also entitled to be considered at par. with Jasbir Singh. I do not agree with this contention also for the reason that the bail to Jasbir Singh was granted when the ruling of the Supreme Court in the case of Narcotics Control Bureau v. Kishan Lal 1991 CLJ 654 had not come. By that time the concept was that the High Court u/

s 439 of the Code of Criminal Procedure had the power to grant bail in spite of the rigour of Section 37 of the Act. This was the view of a Division Bench of this Court which was reversed by the Supreme Court in the case of Kishan Lal (Supra). Moreover another fact which weighed with this Court at the time of grant of bail to Jasbir Singh was that the other co-accused except Sukhdev Singh were on bail. They were actually on interim bail and not on regular bail. Therefore, the scenario having changed after the case of Kishan Lal, and further in view of the fact that there is no violation of the protection available to the petitioners under Article 21 of the Constitution in the present case, the petitioners are not entitled to the grant of bail. In fact, it is doubtful whether such co-accused who are enjoying bail now, are entitled to so remain after the decision in Kishan Lal's case.

(8) These petitions have, Therefore, no merit and the same are hereby dismissed.