

The State Of Tripura vs Ashak Miah on 22 December, 2021

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Bench: S.G. Chattopadhyay

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HIGH COURT OF TRIPURA
AGARTALA

B.A. No. 63 of 2021

The State of Tripura
Represented by Ld. Public Prosecutor, Hon'ble High Court of Tripura.
-----Applicant(s)

Versus

Ashak Miah
S/o. Manu Miah, R/o Anandpur, Ghatigharh, PS-Sonamura, P.O-
Kamalnagar, Dist. Sepahijala
-----Accused Respondent(s)

For Petitioner(s)	:	Mr. R. Datta, P.P. Mr. S. Debnath, Addl. P.P.
For Respondent(s)	:	Mr. S. Bhattacharya, Adv.
Date of Hearing	:	10th December, 2021.
Date of Pronouncement	:	22nd December, 2021.
Whether fit for reporting	:	NO.

B E F O R E
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY
JUDGMENT & ORDER

This is an application for cancellation of bail granted to Md. Ashak Miah, an accused in Sonamura PS case No. 2021 SNM 060 under sections 20(b)(ii)(C), 25 and 29 NDPS Act, 1985. Pre arrest bail under section 438 cr.P.C was granted to accused Ashak Miah by the Special Judge (Sessions Judge), Sepahijala District, Sonamura by the impugned order dated 09.08.2021 in Bail Application No.30 of 2021. [2] Aggrieved thereby, the State has filed this application seeking cancellation of such bail granted to the accused mainly on the following grounds:

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(i) Accused was booked under grave charges and prosecution produced adequate incriminating materials in support of those charges.

(ii) The learned Special Judge did not appreciate the fact that 1068 Kg ganja was recovered from the dwelling house of the accused in presence of witnesses whose statements were recorded by police under section 161 Cr.P.C during the investigation of the case and the same were also placed before the learned Sessions Judge at the time of hearing of the bail application.

(iii) Finding of the learned Special Judge that search was conducted in the dwelling house of the accused between sunset and sunrise without observing the procedural formalities is not correct because as per report obtained from Meteorological Department, Agartala Airport, the time at which the search conducted falls between sunrise and sunset.

(iv) Learned Special Judge did not also appreciate the fact that verification conducted by the jurisdictional Tehsildar reveals that the house from where the contraband was seized was the ancestral house of the accused.

(v) The learned Special Judge did not even refer to the bail restrictions provided under section 37 NDPS Act in the impugned order and granted anticipatory bail to the petitioner without recording his satisfaction under section 37 NDPS Act in total disregard of the settled principles.

Page - 3 of 14 [3] Heard Mr. R. Datta, learned P.P appearing along with Mr. S. Debnath, learned Addl. P.P for the petitioner. Also heard Mr. Kohinoor N Bhattacharya, learned advocate representing the accused respondent. [4] Before adverting to the contentions of the counsel representing the parties, it would be appropriate to state the background facts of the case in brief which is as under:

David Darlong, Sub Inspector of police of Sonamura police station lodged a suo motu FIR with the officer in charge of Sonamura police station in Sepahijala District alleging, inter alia, that on 11.07.2021, the source engaged by him informed that accused stored huge quantity of contraband in his dwelling house at Anandapur, Sonamura. He, immediately recorded the said information in the general diary (GD) of the police station vide PS GD entry No.09 dated 11.07.2021 at 08.13 hours and passed over the said information to the Jurisdictional SDPO over telephone. Pursuant to the instruction of the SDPO, he along with his accompanying police staff conducted raid in the house of the accused. No house inmate was present there at the time of such raid. However, some witnesses gathered from the neighbouring places and in their presence the search was conducted in the dwelling house of the accused from where 1068 Kg dried ganja in 27 plastic containers was recovered and seized. The entire search operation was carried out between 11.30 hours and 17.45 hours on 11.07.2021. No search warrant could be obtained since the accused were likely to Page - 4 of 14 remove the contraband to a different location. Having recovered and seized the contraband SI David Darlong lodged the FIR for police action against the accused.

[5] Based on his FIR, Sonamura PS case No.2021 SNM 060 was registered for commission of offence punishable under sections 20(b)(ii)(C),25 and 29 NDPS Act and the case was taken up for investigation.

[6] Apprehending arrest in the case, accused Ashak Miah filed an application seeking his release on pre arrest bail under section 438 Cr.P.C in the court of the Special Judge at Sonamura in Sepahijala Judicial District. It was contended on behalf of the accused before the learned Special Judge that accused was falsely implicated in the case and no contraband was recovered from his dwelling house. Counsel of the accused further contended before the learned Special Judge that there was no compliance of section 42 of the NDPS Act and moreover no proof was adduced on behalf of the prosecution to establish that the place from where the contraband was seized was the dwelling house of the accused.

[7] The Public Prosecutor appearing before the Special Judge on the other hand vehemently opposed the bail application on the ground that commercial quantity of contraband was recovered from the dwelling house of the accused even though the accused was not present at the spot at the time of search and recovery, there were sufficient Page - 5 of 14 incriminating materials against him on the basis of which police entangled the accused in the case. The prosecution lawyer also contended before the learned Special Judge that release of the accused on pre arrest bail would frustrate a fair investigation of the case. [8] Despite such opposition, the learned Special Judge granted pre arrest bail to the petitioner viewing as under:

"Therefore, it appears that the informant has violated the provision of Section 42 of NDPS Act before the alleged seizure. Moreover, in the complaint petition it has also been mentioned that they searched the surrounding around Ashak Miah's house and prolonged search they recovered total 1068 Kg of dry ganja which was kept in 27 nos of blue colour plastic drums deep in underground. Accordingly, seized the contraband items by preparing a seizure list in presence of police witnesses as no civil person is available at that place to give their signatures in the seizure list.

But on perusal of the seizure it appears that the alleged seizure has been made on 11.07.2021 at 1100 hours to 1745 hours at Anandapur, Ghatighar in the house premises of Ashak Miah, S/O Manu Miah and the informant also obtained signature of three witnesses in the seizure list including a signature of public witness namely Biswajit Datta of Madhuban, i.e. the place far away from the place of occurrence. There is also a details of seizure annexed, but there also no signature of witnesses are taken. Moreover, on perusal of the CD it appears that till date I/O has failed to collect any document relating to ownership of the land where from the alleged contraband articles were seized. Therefore, all these facts creates a reasonable doubt about the involvement of the accused petitioner in the alleged offence or the contraband articles were seized from the house of accused petitioner Ashak Miah or not. In a decision reported in (2016) 1 TLR 617 Khalek Miah Vs. State of Tripura wherein the Hon'ble Court observed thus:

"9. As far as the present case is concerned there is apparent violation Section 42(2) of NDPS Act and therefore following the law laid down by the Apex Court in Saria Banu alias Janarthani alias Janani and another Page - 6 of 14 Vs. State through Inspector of Police, (2004) 12 SCC 266, I am compelled to grant bail to the accused person on the following terms and conditions."

Considering the aforesaid observation of our Hon'ble High Court of Tripura this Court is of the view that the I/O of this case also did not comply the statutory provision of Section 42 of NDPS Act before conducting alleged raid and search. Hence, considering the entire facts and circumstances as stated that prima facie this Court is not at all satisfied about the involvement of the present accused petitioner Ashak Miah in the alleged offence. So, the prayer for anticipatory bail of accused petitioner is hereby allowed.

Accused petitioner namely Ashak Miah be enlarged on bail on his furnishing a bail bond of Rs.75,000/- (Rupees seventy five thousand) each with two sureties of like amount in the event of his arrest on condition that he shall not leave the State of Tripura without prior permission and also to appear before the I/O once in a week until further order for the interest of investigation and not to cause any hindrance in the investigation.

In view of the above, the instant bail application is disposed of on contest."

[9] Mr. R. Datta, learned P.P appearing for the petitioner has resorted to almost the same arguments which were advanced by him before the trial court. In addition, Mr. R. Datta, learned P.P has relied on the decision of the Apex Court in Satpal Singh Vs. State of Punjab reported in (2018) 13 SCC 813 and contended that where bail is opposed by the Public Prosecutor in a case under the NDPS Act, the court must be satisfied that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and he is not likely to commit any offence while on bail. Mr. Datta, learned P.P submits that bail cannot be granted in a case under the NDPS Act involving Page - 7 of 14 commercial quantity without recording such satisfaction terms of section 37 NDPS Act. Learned P.P has relied on paragraph 3 of the judgment of the Hon'ble Apex Court which reads as under:

"3. Under Section 37 of the NDPS Act, when a person is accused of an offence punishable under Section 19 or 24 or 27A and also for offences involving commercial quantity, he shall not be released on bail unless the Public Prosecutor has been given an opportunity to oppose the application for such release, and in case a Public Prosecutor opposes the application, the court must be satisfied that there are reasonable grounds for believing that the person is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. Materials on record are to be seen and the antecedents of the accused is to be examined to enter such a satisfaction. These limitations are in addition to those prescribed under Cr.P.C or any other law in force on the grant of bail. In view of the seriousness of the offence, the law makers have consciously put such stringent restrictions on the discretion available to the court while considering application for release of a person on bail.

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[10] It is contended by Mr. Datta, learned P.P that the trial court granted anticipatory bail to the petitioner even without making any reference to section 37 of the NDPS Act which is totally illegal and unsustainable. Mr. Datta, learned P.P representing the petitioner has also relied in the judgment of the Hon'ble Apex Court in State of Kerala & Ors. Vs. Rajesh & Ors. reported in (2020) 12 SCC 122 wherein the Apex Court having reiterated the ratio decided in the case of Satpal Singh (Supra) held that the jurisdiction of court to grant bail in a case under the NDPS Act involving commercial quantity is circumscribed by the provisions of section 37 NDPS Act. The Apex Court held that bail cannot be granted to an accused under NDPS Act where Page - 8 of 14 commercial quantity of contraband is involved without recording the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and recording of such finding mandated under section 37 NDPS Act is a sine qua non for granting bail to the accused under the NDPS Act. Learned P.P has relied on paragraphs 19,20 and 21 of the said judgment of the Hon'ble Apex Court which read as under:

"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with non obstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

21. We may further like to observe that the learned Single Judge has failed to record a finding mandated under Section 37 of the NDPS Act which is a sine qua non for granting bail to the accused under the NDPS Act."

[11] Having submitted thus, learned P.P urges the court for cancelling the bail granted to the accused.

Page - 9 of 14 [12] Mr. Kohinoor N Bhattacharya, learned counsel while opposing the stand taken by the prosecution contends that bail once granted cannot be cancelled except under very cogent and

overwhelming circumstances where such cancellation is warranted to meet the fair ends of justice. To support his contention, counsel has relied on the decision of the Apex Court in the case of the State through the Delhi Administration Vs. Sanjay Gandhi reported in AIR 1978 SC 961 wherein the Apex Court held that rejection of bail when bail is applied for, is one thing and cancellation of bail already granted is altogether different. Relying on paragraph 13 of the said judgment, Mr. Bhattacharya, learned counsel has argued that cancellation of bail involves a process of review of the earlier decision which is permitted only when the court finds that freedom of the accused granted under bail is being grossly misused by him and such freedom cannot be retained to ensure a free and fair trial. The observation of the Hon'ble Apex Court in paragraph 13 of the judgment is as under:

"13. Rejection of bail when bail is applied for is one thing; cancellation of bail already granted is quite another. It is easier to reject a bail application in a non-bailable case than to cancel a bail granted in such a case. Cancellation of bail necessarily involves the review of a decision already made and can by and large be permitted only if, by reason of supervening circumstances, it would be no longer conducive to a fair trial to allow the accused to retain his freedom during the trial. The fact that prosecution witnesses have turned hostile cannot by itself justify the inference that the accused has won them over. A brother, a sister or a parent who has seen the commission of crime, may resile in the Court from a statement recorded during the course of investigation. That happens instinctively, out of natural love and affection, not out of persuasion by the Page - 10 of 14 accused. The witness has a stake in the innocence of the accused and tries therefore to save him from the guilt. Likewise, an employee may, out of a sense of gratitude, oblige the employer by uttering an untruth without pressure or persuasion. In other words, the objective fact that witnesses have turned hostile must be shown to bear a causal connection with the subjective involvement therein of the respondent. Without such proof, a bail once granted cannot be cancelled on the off chance or on the supposition that witnesses have been won over by the accused."

[13] Counsel has also relied on the decision of the Apex Court in Bhagirathsingh Judeja Vs. State of Gujarat reported in AIR 1984 SC 372 wherein the Hon'ble Apex Court held that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of bail.

[14] Counsel of the accused respondent has further relied on the decision of the Apex Court in Dolat Ram & Ors. Vs. State of Haryana reported in (1995) 1 SCC 349 to establish his contention that the grounds for cancellation of bail are distinguishable from the grounds of rejection of bail. Counsel has relied on paragraph 4 of the said judgment which reads as under:

"4. Rejection of bail in a non-bailable case at the initial stage and the cancellation of bail so granted, have to be considered and dealt with on different basis. Very cogent and overwhelming circumstances are necessary for an order directing the cancellation of the bail, already granted. Generally speaking, the grounds for cancellation of bail, broadly (illustrative and not exhaustive) are: interference or attempt to interfere with the due course of administration of Justice or evasion or attempt to evade the due

course of justice or abuse of the concession granted to the accused in any manner. The satisfaction of the court, on the Page - 11 of 14 basis of material placed on the record of the possibility of the accused absconding is yet another reason justifying the cancellation of bail. However, bail once granted should not be cancelled in a mechanical manner without considering whether any supervening circumstances have rendered it no longer conducive to a fair trial to allow the accused to retain his freedom by enjoying the concession of bail during the trial. These principles, it appears, were lost sight of by the High Court when it decided to cancel the bail, already granted. The High Court it appears to us overlooked the distinction of the factors relevant for rejecting bail in a non bailable case in the first instance and the cancellation of bail already granted."

[15] According to Mr. Bhattacharjee, learned counsel, since there is no allegation against the accused that after his release on bail, he has misused his liberty or he has indulged in similar kinds of activities. Therefore, it would not be appropriate to cancel the bail granted to the accused respondent.

[16] Considered the submissions made at the bar. Perused the entire record including the updated case diary. [17] It would surface from the impugned order of the learned Special Judge that even though he did not refer to section 37 NDPS Act, the learned Special Judge recorded his satisfaction that the materials produced by the prosecution did not convince him about the involvement of the accused in the alleged offence. Learned Special Judge was also of the view that there was total non compliance of section 42 of the NDPS Act and having recorded the reasons he granted the relief of anticipatory bail to the petitioner by the impugned order Page - 12 of 14 dated 09.08.2021. After about a month, the prosecution moved this court for cancellation of bail granted to the petitioner by means of filing this petition under section 439(2) Cr.P.C on the grounds aforesaid. It is nowhere alleged in the petition that accused after his release on bail has ever misused his liberty or indulged in similar or any other criminal activity or he by any means has interfered with the course of investigation.

[18] In *Dataram Singh Vs. State of Uttar Pradesh & Anr.* reported in (2018) 3 SCC 22 the Apex Court held that the grant or refusal of bail is entirely within the discretion of the judge hearing the matter. In the present case, the learned Special Judge by a speaking order granted anticipatory bail to the accused in exercise of such discretion vested on him only after recording a specific finding that no convincing material was placed before him suggesting the involvement of the accused in the alleged offence.

[19] In *Raghubir Singh Vs. State of Bihar* reported in (1986) 4 SCC 481 the Hon'ble Apex Court laid down the circumstances under which bail granted to an accused can be cancelled. It has been held by the Apex Court in the said judgment that bail granted to an accused can be cancelled where (i) the accused misuses his liberty by indulging in similar criminal activity, (ii) interferes with the course of investigation,

(ii) attempts to tamper with evidence or witnesses, (iv) threatens witnesses or indulges in similar activities which would hamper smooth Page - 13 of 14 investigation, (v) there is likelihood of his fleeing to another country,

(vi) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (vii) attempts to place himself beyond the reach of his surety, etc. [20] It is true that this court is not powerless to cancel bail granted to an accused if it is found that such order(s) suffers from serious infirmities resulting in miscarriage of justice or it is shown to the court that while granting bail, the trial Judge ignored the relevant materials placed before him.

[21] But in the present case, the impugned order would demonstrate that the learned Special Judge heard the counsel representing the parties at length and after perusal of the updated case diary and the entire record granted bail the accused by a detailed order passed on 09.08.2021.

[22] More than 4(four) months have elapsed since the impugned order was passed. The bail conditions which have been imposed by the learned Special Judge include appearance of the accused before the investigating officer once in a week. There is no report of non compliance of such bail condition. By these conditions imposed on him, accused was also prevented from leaving the state without prior permission of the investigating officer and causing any obstruction to the investigation. There is no allegation against the accused that he has Page - 14 of 14 shown any kind of disregard to these bail conditions. It is no case of the prosecution that after his release on bail, the accused has in any other manner obstructed the course of investigation. [23] In these circumstances, this court is of the view that it would not be appropriate to cancel the bail granted to the accused. [24] For the reasons aforesaid, the petition stands rejected and the case is disposed of.

Return the case diary to Mr. R. Datta, learned P.P. JUDGE Rudradeep