

The State Of Tripura vs Kabir Hossen on 17 January, 2025

HIGH COURT OF TRIPURA
AGARTALA
B.A.No.86 of 2024

The State of Tripura
represented by the Secretary
to the Government of Tripura,
Home Department, Agartala

---- Applicant (s)

Versus

Kabir Hossen,
son of Bacchu Miah,
resident of Madhya Charipara,
Sachindralal, P.S. Amtali,
District-West Tripura

[---

--- Respondent (s)

For Applicant
(s) : Mr. Raju Datta, P.P. For Respondent(s) : Mr. P. Sen Choudhury, Adv.

HON BLE MR.
JUSTICE BISWAJIT PALIT Order 17/01/2025 Heard Mr. Raju Datta, Learned P.P. appearing on behalf of the petitioner-applicant. Also heard Mr. P. Sen Choudhury, Learned counsel appearing on behalf of the accused-respondent.

[2] This is an application under Section 483(3) read with Section 528 of Bharatiya Nagrik Suraksha Sanhita, 2023 for cancellation of the order dated 18.10.2024 passed by the Learned Special Judge, Court No.4, West Tripura District, Agartala which was later on extended by different orders till 25.01.2025 in connection with Amtali P.S. Case No.2024AMT104 under Section 21(b)/22(C)/23/25/27/27(A)/29 of NDPS Act.

[3] Learned P.P. appearing on behalf of the petitioner-applicant at the time of hearing first of all drawn the attention of this Court referring the FIR laid by Sri Om Prakash Swami, Ac, Coy Commander „D Coy 42 Bn. BSF to O/c Amtali P.S. and submitted that on the basis of that FIR the case was registered and this respondent-accused was produced before the Learned Special Judge, Court No.4, West Tripura, Agartala on 17.10.2024 and on that day, in-charge Learned Special Judge on perusal of the case diary rejected the bail application of the respondent-accused and remanded him to jail custody till 18.10.2024 with a direction to the IO to produce up to date case diary on 18.10.2024 but surprisingly on 18.10.2024, the Learned in-charge Special Judge released the

respondent-accused on interim bail without application of proper mind. [4] Learned P.P. further submitted that thereafter the case was posted on 05.11.2024 for hearing and on that day again his period of interim bail was further extended till 18.12.2024 and on 18.12.2024, Learned Special Judge, Court No.4 by a detailed order came to the observation that Section 37 of NDPS Act would not apply in this case and further extended the period of interim bail of the respondent-accused till 25.01.2025. So, Learned P.P. submits that the order passed by the Learned Special Judge suffers from infirmities which needs to be interfered with and further more referring the case diary, Learned P.P. submitted that in this case, there was allegation of possessing huge quantum of contraband items of narcotic drugs and in course of investigation, the name of the respondent-accused revealed to be involved with the alleged crime and there are sufficient materials showing implication of the said accused with the offence as alleged but Learned Special Judge without application of proper mind came to the observation that Section 37 of NDPS Act would not attract in respect of this present accused and released him with further interim bail till 25.01.2025 which needs to be interfered with and referred few citations in support of his contention.

[5] On the other hand, Learned counsel appearing on behalf of the respondent-accused first of all drawn the attention of this Court that there was no infirmity in the initial order passed by Learned in-charge Special Judge because the Learned in-charge Special Judge after perusal of the case diary came to the observation that nothing was recovered from the possession of the respondent-accused and for that, his period of interim bail was extended from time to time and by the last order Learned Special Judge, Court No.4 came to the observation that Section 37 of the NDPS Act would not attract in this case and extended his period of further interim bail till 25.01.2025 and there was no infirmity or illegality in the order of the Learned Special Judge and finally, Learned counsel for the respondent-accused submitted that there is no merit in the application for cancellation of bail filed by the state-applicant and urged for dismissal of this application allowing the respondent-accused to remain on bail as ordered.

Considered.

[6] In this case, the prosecution was set into motion on the basis of an FIR laid by the informant Sri Om Prakash Swami, Ac, Coy Commander „D Coy 42 Bn. BSF to O/c Amtali P.S. alleging inter alia that on 18.08.2024 at about 1445 hrs. on a specific information regarding narcotics items in possession of one Indian national, one QRT party of BSF jawans carried out search operation in general area of village Chari Para in alignment of BP No.2026/MP nearby Barber shop namely „Rahul Hair Cutting shop owned by one Manik Sarkar and during search operation one Indian National namely Ibrahim Miah was apprehended nearby Barber shop by the said BOP party headed by Inspector Santosh Kumar Gupta along with others and after apprehension, it was found that the said individual was having possession of huge quantum of narcotic items and thereafter in presence of witnesses, he was thoroughly searched and in course of search, 14 nos. of small plastic containers suspected to be brown sugar was recovered from his possession. After said preliminary enquiry the A/P Ibrahim Miah disclosed that he was in possession of approximately 1000 nos. of YABA Tablets which he had hidden in nearby area of Nischintpur Railway Station. Thereafter, search was carried out near Chari Para rail tracks when they could recover one small plastic container which was containing 05 nos. of plastic packets and one of the packet was opened for verification in presence of

witnesses when it was found that there were 200 nos. of Suspected YABA Tablets in one plastic packet and accordingly, they took all the seized contraband items into their custody and after that handed over the same to in-charge Amtali P.S. for taking necessary legal action along with accused and on the basis of that FIR Amtali P.S. Case No.104/2024 under Section 21(b)/22(C)/23/25/27/27(A)/29 of NDPS Act was registered and said Ibrahim Miah was taken into custody and he was produced under arrest before the Court on 19.08.2024 and since then, he is lodging in custody. Thereafter, in course of investigation, the respondent-accused Kabir Hossen was produced under arrest before the Learned Special Judge on 17.10.2024 and he was remanded back to judicial custody till 18.10.2024 and on that day, on perusal of case diary, Learned in-charge Special Judge, Court No.4, West Tripura, Agartala allowed the respondent-accused to go on interim bail to till 05.11.2024 and thereafter, the said order of interim bail was extended till 25.01.2025 as indicated earlier.

[7] I have gone through the relevant prosecution papers and also the case diary produced by the IO. For the sake of convenience, I would like to refer herein below the relevant provision of Section 37 of the NDPS Act which provides as under :

"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 of Section 27-A 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]."

[8] In course of hearing of argument, Learned P.P. representing the state-applicant referred few citations. For the sake of brevity, all the citations are mentioned herein below. Hon ble Supreme Court of India in Union of India versus Rattan Mallik alias Habul reported in (2009) 2 SCC 624 in para Nos. 16 & 17 observed as under :

"16. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent

was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

17. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest."

Referring the same, Learned P.P. drawn the attention of this Court that in this case, all though, no contraband items was recovered from the possession of the respondent-accused but, without considering the available materials on record Learned Special Judge allowed interim bail to the respondent-accused which was unwarranted and impermissible in the eye of law and also contrary to the provision of Section 37 of NDPS Act.

Learned P.P. thereafter referred another citation of the Hon ble Supreme Court of India in Union of India through Narcotics Control Bureau, Lucknow versus Md. Nawaz Khan reported in (2021) 10 SCC 100 wherein in para Nos.28 & 29 the Hon ble Apex Court observed as under :

"28. As regards the finding of the High Court regarding absence of recovery of the contraband from the possession of the respondent, we note that in Union of India v. Rattan Mallik :(2009) 2 SCC 624, a two-judge Bench of this Court cancelled the bail of an accused and reversed the finding of the High Court, which had held that as the contraband (heroin) was recovered from a specially made cavity above the cabin of a truck, no contraband was found in the „possession of the accused. The Court observed that merely making a finding on the possession of the contraband did not fulfil the parameters of Section 37(1)(b) and there was non-application of mind by the High Court.

29. In line with the decision of this Court in Rattan Mallik (supra), we are of the view that a finding of the absence of possession of the contraband on the person of the respondent by the High Court in the impugned order does not absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."

Referring the same, Learned P.P. drawn the attention of the Court that the observation of Learned Special Judge that no contraband item was found from the possession of the respondent-accused is also contrary to the principle of law laid down by the Hon ble Apex Court because the Learned Special Judge without considering the other materials on record and the statements of witnesses so far collected by the IO during investigation, released the accused on interim bail which was totally illegal and unwarranted.

Learned P.P. thereafter referred another citation of the Hon ble Supreme Court of India in State of Meghalaya versus Lalrintluanga Sailo and Another reported in 2024 SCC OnLine SC 1751 wherein para Nos.10 & 11 Hon ble Apex Court observed as under :

"10. The subject FIR viz., FIR No. 06(02)23 under Section(s) 21(c)/29 of the NDPS Act, would reveal that the quantity of the contraband involved is 1.040 kgs of heroin. The impugned order granting bail to accused-Smt. X, dated 29.09.2023 would reveal, this time also, the bail was granted on the ground that she is suffering from HIV and conspicuously, without adverting to the mandate under Section 37(1)(b)(ii), NDPS Act, even after taking note of the fact that the rigour of Section 37, NDPS Act, calls for consideration in view of the involvement of commercial quantity of the contraband substance. When the accused is involved in offences under Section 21(c)/29 of NDPS Act, more than one occasion and when the quantity of the contraband substance viz., heroin is 1.040 Kgs, much above the commercial quantity, then the non-consideration of the provisions under Section 37, NDPS Act, has to be taken as a very serious lapse. In cases of like nature, granting bail solely on the ground mentioned, relying on the decision in Bhawani Singh v. State of Rajasthan³ would not only go against the spirit of the said decision but also would give a wrong message to the society that being a patient of such a disease is a license to indulge in such serious offences with impunity. In the contextual situation it is to be noted that in Bhawani Singh's case the offence(s) involved was not one under the NDPS Act. We have no hesitation to say that in the above circumstances it can only be held that the twin conditions under Section 37 of the NDPS Act, are not satisfied and on the sole reason that the accused is a HIV patient, cannot be a reason to enlarge her on bail. Since the impugned order was passed without adhering to the said provision and in view of the rigour thereunder the accused- Smt.X is not entitled to be released on bail, the impugned order invites interference.

11. Consequently, the impugned order is set aside. The accused-Smt.X shall surrender before the trial Court within a week from today and in case of her failure to do so, she shall be taken into custody in accordance with law. Upon such surrender/production of the accused before the trial Court, it shall cancel the bail bond of the accused and discharge the sureties."

Referring the same, Learned P.P. drawn the attention of this Court that in the said case, all though, bail was granted on the ground that the accused was HIV patient but the Hon ble Apex Court set aside the bail granted to the accused on the ground that Section 37 of NDPS Act does not absolve the

accused from the liability of the offence as charged and here in the given case, Learned Special Judge without considering the available materials allowed the bail application of the accused for which Learned P.P. drawn the attention of the Court for interference of the order of the Learned Special Judge by setting aside the orders.

Learned P.P. thereafter referred another citation of the Hon ble Supreme Court of India in Ajwar versus Waseem and Another reported in (2024) 10 SCC 768 wherein in para No.27 Hon ble Apex Court observed as under :

"27. It is equally well settled that bail once granted, ought not to be cancelled in a mechanical manner. However, an unreasoned or perverse order of bail is always open to interference by the superior Court. If there are serious allegations against the accused, even if he has not misused the bail granted to him, such an order can be cancelled by the same Court that has granted the bail. Bail can also be revoked by a superior Court if it transpires that the courts below have ignored the relevant material available on record or not looked into the gravity of the offence or the impact on the society resulting in such an order. In P v. State of M.P. : (2022) 15 SCC 211 decided by a three judges bench of this Court [authored by one of us (Hima Kohli, J)] has spelt out the considerations that must weigh with the Court for interfering in an order granting bail to an accused under Section 439(1) of the Cr.P.C in the following words:

"24. As can be discerned from the above decisions, for cancelling bail once granted, the court must consider whether any supervening circumstances have arisen or the conduct of the accused post grant of bail demonstrates that it is no longer conducive to a fair trial to permit him to retain his freedom by enjoying the concession of bail during trial [Dolat Ram v. State of Haryana, (1995) 1 SCC 349 . To put it differently, in ordinary circumstances, this Court would be loathe to interfere with an order passed by the court below granting bail but if such an order is found to be illegal or perverse or premised on material that is irrelevant, then such an order is susceptible to scrutiny and interference by the appellate court."

Referring the same, Learned P.P. submitted that an unreasoned or perverse order is always open to interference by the superior Court if there are serious allegations against the accused and even if the accused does not misuse the conditions of bail granted to him still there is scope for setting aside the order of bail granted to an accused.

Learned P.P. referred another order of this High Court in State of Tripura Represented by the Ld. Public Prosecutor versus Mahabul Alam and Others reported in 2023 SCC OnLine Tri 777 wherein in para Nos. 17 to 21 this High Court observed as under :

"17. From the aforesaid enunciations of law on the subject, it is abundantly clear, that the Courts while considering the application for bail must strictly adhere to the two conditions embodied in Section 37 of the NDPS Act, and must record its reason of

satisfaction that there are substantial probable causes for believing that the accused is not guilty of committing such offence and that there is no likelihood of repetition of committing such offence by the accused while on bail. It is re-

iterated that while considering the bail application filed by the accused arrested under the penal provisions of the NDPS Act, learned Special Judges should be confined within the limits embodied in Section 37 of the NDPS Act. Procedural violations, if any, shall be taken into consideration during the course of trial, and not at the stage of consideration of bail application.

18. I have given due consideration to the submissions of Mr. Bhattacharjee, learned counsel appearing for the accused-respondents and the decisions he relies upon in order to support his plea that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of the bail as held by the Supreme Court in State(Delhi Administration) vs. Sanjay Gandhi, (1978) 2 SCC 411: AIR 1978 SC 961; Bhagirath Singh Judeja vs. State of Gujarat, (1984) 1 SCC 284: AIR 1984 SC 372; Bhuri Bai vs. State of Madhya Pradesh, 2022 LiveLaw (SC) 956.

19. A Full-Bench of the Hon'ble Supreme Court in Sanjay Gandhi (supra) held that in order to succeed in an application for cancellation of a bail the Court should make an endeavour to test the balance of probabilities that the accused has abused his liberty or that there is a reasonable apprehension that he will interfere with the course of justice. The bench further held that:

"24. Section 439(2) of the Code of Criminal Procedure confers jurisdiction on the High Court or Court of Session to direct that any person who has been released on bail under Chapter XXXIII be arrested and committed to custody. The power to take back in custody an accused who has been enlarged on bail has to be exercised with care and circumspection.

But the power, though of an extraordinary nature, is meant to be exercised in appropriate cases when, by a preponderance of probabilities, it is clear that the accused is interfering with the course of justice by tampering with witnesses. Refusal to exercise that wholesome power in such cases, few though they may be, will reduce it to a dead letter and will suffer the courts to be silent spectators to the subversion of the judicial process. We might as well wind up the courts and bolt their doors against all than permit a few to ensure that justice shall not be done."

20. Similar view has been expressed in Bhagirath Singh Judeja(supra) and Bhuri Bai(supra). At this juncture, I must say, as I said earlier, the Courts should not forget the limitations under Section 37 of the NDPS Act in addition to the limitations prescribed in Cr.P.C.

21. In the context of the case, it is found that after being enlarged on bail two of the accused, namely, Mahabul Alam and Piklu Bhowmik had abused the benefit of liberty granted by the Court by way of allowing their applications for bail. The accused-respondents were found to be involved in two other cases registered under different police stations during the period of bail."

Referring the same, Learned P.P. submitted that the Learned Special Judge at the time of releasing the accused on interim bail, totally misdirected and misread the provisions of Section 37 of the NDPS Act for which the interference of this Court is required and urged for cancellation of the order of bail granted to the accused.

Finally, Learned P.P. drawn the attention of this Court all though, by the last order dated 18.12.2024 Learned Special Judge further extended the period of interim bail of the accused till 25.01.2025 relying upon the judgment of the Hon ble Apex Court in State (By NCB) Bengalure versus Pallulabid Ahamad Arimutta and Another reported (2022) 12 SCC 633 and came to the observation that Section 37 of the NDPS would not attract in this case but the Hon ble Apex Court according to Learned P.P. in the said case granted bail to the concerned accused on the ground that no substantial materials was available with the prosecution at the time of arrest to connect the accused with the allegation leveled against them for indulging with drug trafficking and the respondent themselves recorded statement of the co-accused under Section 67 of the NDPS Act but rejected bail application of another accused. So, this principle of citation cannot be applied in this case. So, finally, Learned P.P. urged for cancellation of the bail granted to the respondent-accused by order dated 06.09.2024.

[9] In course of hearing of argument, Learned counsel for the respondent-accused totally objected the submission made by Learned P.P. and submitted that Learned Special Judge after perusal of the case diary came to an observation that Section 37 of the NDPS Act would not attract in this case as nothing was recovered from the possession of the accused. So, there was no infirmity in the order passed by the Learned Special Judge and urged for setting aside the application for cancellation of bail filed by the prosecution. [10] I have perused the FIR and also all the relevant prosecution papers and perused the principles of the aforesaid citations relied upon by the prosecution of the Hon ble Apex Court and also a coordinate bench of this High Court. The investigation of the case is in progress. Admittedly, in this case, the prosecution was set into motion on the basis of an FIR laid by one Om Prakash Swami, Ac, Coy Commander „D Coy 42 Bn. BSF on 19.08.2024 with the allegation that on 18.08.2024 accused Ibrahim Miah was arrested along with contraband items. The case was registered as already stated and in course of investigation, the present respondent-accused was taken into custody and was produced before the Learned Special Judge under arrest. I have also perused the statement of witnesses so far recorded by IO under Section 161 of Cr.P.C. during investigation up to this stage. From the impugned orders passed by the Learned Special Judge it appears to me that the Learned Special Judge at the time of allowing interim bail to the accused came to the observation that no contraband items was found under the possession of the respondent-accused and accordingly, granted interim bail to the accused which was extended time to time without considering the other materials on record. It is also on record that in this case apart from said Ibrahim Miah, another Abdul Hossen are presently lodging in jail and this present

respondent-accused and another have been released on interim bail. From the principles of law laid down by the Hon ble Apex Court in the afore noted cases, it is clear that from the mere observation that "nothing has been found from his possession" was not sufficient at this stage that the respondent was not guilty of the offences for which he had been charged. Furthermore, the finding of absence of possession from the respondent-accused does not absolve him from the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act. Here in the case at hand from the statement of witness collected by IO the involvement of the respondent-accused with the alleged crime cannot be ruled out as the investigation of the case is still in progress and furthermore, on perusal of the last order dated 18.12.2024, it appears that the Learned Special Judge gave a specific finding that the prosecution failed to fulfill the twin conditions as required under Section 37 of the NDPS Act. In my considered opinion it appears to be non-application of proper mind by the Learned Special Judge considering the gravity of the offence. Another question is that from the order dated 18.12.2024 passed by Learned Special Judge it appears that he gave a clear finding that Section 37 of NDPS Act would not apply against the present respondent-accused then how he had further extended the period of interim bail till 25.01.2025 appears to be a confusing and unreasoned order because once the Court comes to an observation that Section 37 of NDPS Act would not attract there remains nothing for the prosecution to proceed further against the present respondent-accused. Thus, it appears that the Learned Special Judge ignored the relevant materials available on record and also overlooked the gravity of the offence at the time of passing the impugned order because on 17.10.2024 Learned in-charge Special Judge on perusal of the case diary rejected the bail application of the respondent-accused but on the following day again he allowed the bail to the respondent-accused which appears to be non-application of proper mind and mis-interpreting or misreading the provision of Section 37 of the NDPS Act. The principle of citation as referred by Learned counsel for the respondent-accused in State (By NCB) Bengalure versus Pallulabid Ahamad Arimutta and Another reported in (2022) 12 SCC 633 cannot be applied in this case.

[11] So, considering the facts and circumstances of this case, it appears that the order dated 18.10.2024 suffers from infirmity which needs to be interfered with and accordingly the order dated 18.10.2024 passed by Learned Special Judge, Court No.4, West Tripura, Agartala stands cancelled and the subsequent orders for extending period of interim bail till 25.01.2025 of the respondent-accused is also accordingly stands cancelled. The respondent-accused is to surrender before the Learned Court below within a period of seven days from today failing which he shall be taken into custody as per law by the investigating authority. His bail bond along with surety bond also stand cancelled.

Thus, the application for cancellation of bail is accordingly stands allowed.

Pending application/s, if any, also stands disposed of. Send back the record of the Learned Special Judge, Court No.4, Agartala, West Tripura District along with a copy of this order. Also send back the CD through Learned P.P. along with a copy of this order.

SABYASACHI Digitally signed by SABYASACHI
BHATTACHARJEE

BHATTACHARJEE Date: 2025.01.27 13:14:25 +05'30' Sabyasachi B