

GAHC010005852024



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Bail Appln./127/2024

ABDUL HOQUE
S/O- LATE IMAN ALI, VILL- RAJABALA, P.S. PHULBARI, DIST.- WEST GARO
HILLS, MEGHALAYA

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR

Advocate for the Petitioner : MOTIUR RAHMAN

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

07.03.2024

Heard Mr. M. Rahman, learned counsel for the petitioner. Also heard Mr. M. P. Goswami, learned Additional Public Prosecutor for the State respondent.

2. This is an application filed under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused/petitioner, namely, Abdul Hoque, who has been languishing in jail hazot since 06.05.2023 in connection with NDPS Case No. 161/2023, registered under Sections 21(c)/29 of NDPS Act which is pending before the Court of learned Additional Sessions Judge No.5, Kamrup (M), arising out of Jalukbari P. S. Case No. 269/2023.

3. The scanned copy of the LCR along with the Case Diary has been received and I have perused the same.

4. Mr. Rahman, learned counsel for the petitioner has submitted that the accused/petitioner is innocent and he is not all involved in the alleged offence. The present petitioner along with his nephew came to Guwahati who was suffering from illness and had stayed at Hotel New Castle at Bharalumukh and the main accused namely Motibar Rahman was known to the petitioner. The main accused made a contact with the petitioner over the phone and requested to accompany him to Goalpara. But, the petitioner refused to his proposal, but the number of the petitioner was found on the mobile call list of the main accused and accordingly, on the basis of the call list, the petitioner was arrested in connection with this case from the Hotel. But, nothing has been recovered from the possession of the accused/petitioner and he was arrested on mere suspicion. The accused/petitioner was arrested on 06.05.2023 in connection with this case and since then he is languishing in jail hazot.

5. He further submits that except the voluntary statement made by the co-accused which was recorded under Section 67 of NDPS Act, there is no materials available against the accused/petitioner at the time of his arrest to connect him with the allegation leveled against him indulging in drug trafficking. But, on the statement of the co-accused recorded under Section 67 of NDPS Act he was arrested which is not admissible even at the stage of considering bail, after judgment passed by the Hon'ble Apex Court in the Case of Tofan Singh (Supra).

6. Further, he also submits that the petitioner is under custody since more than 244 days in connection with this case and at present the case is that the stage of trial of prisoner and for the speedy justice is the fundamental rights and under Article 21 of the Constitution of India. The petitioner also filed an application before the learned Sessions Judge No.5, Kamrup (M) and the same was rejected vide order dated 26.12.2023. The petitioner being the sole earner of the family his entire family is facing acute financial crises. The accused being the local resident, there is no probability of absconding, if the accused/petitioner is granted with the privilege of bail. Further, the accused/petitioner has no criminal antecedent and he was arrested in connection with this case only on suspicion and on the basis of the statement of the co-accused recorded under Section 67 of NPDS Act.

7. To substantiate his submission, the learned counsel for the petitioner relies on the decision passed by the Hon'ble Apex Court reported in **2022 Live Law 95C) 878 [Union of India (NCB) ETC. vs. Khalil Uddin]**, wherein, it has been observed by the Hon'ble Apex Court, which read as under;

“The answer to said question could be the statement recorded of Md. Nizam Uddin. The statement of Md. Jakir Hussain recorded under Section 67 of the Act has also named his owner accused Abdul Hai. We are conscious of the fact that the validity and scope of such statements under Section 67 has been

pronounced upon by this Court in Tofan Singh vs. State of Tamil Nadu. In State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta & Anr., the rigor of law lay down by this Court in Tofan Singh was held to be applicable even at the stage of grant of bail.”

8. He further relies on another decision passed by the Hon’ble Apex Court in the Special Leave to Appeal (Crl) No.242 of 2022 and stressed mainly on paragraph No.10 of the said judgment, which read as under;

“10. It has been held in clear terms in Tofan Singh Vs. State of Tamil Nadu⁶, that a confessional statement recorded under Section 67 of the NDPS Act will remain inadmissible in the trial of an offence under the NDPS Act. In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused under Section 67 of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in the orders dated 16th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (Crl.) No@ Diary No. 22702/2020, SLP (Crl.) No. 1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) No. 1773-74/2021 and SLP (Crl.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless.”

9. In addition to his submission, he also relies on the decision passed by the Co-ordinate Bench of this Court in Bail Application No.3887/2023 wherein the said Bench of this Court relying on the decision of ***Satender Kumar Antil vs. CBI reported in 2022 10 SCC 51*** and also considering the judgment of Hon’ble Apex Court passed in ***Raghubir Singh vs. State of Bihar reported in 1986 4 SCC 481***, had allowed the accused/petitioner to go on bail, considering the observation of the Hon’ble Apex Court that speedy trial is one of the dimension of fundamental rights to live under Article 21 of the Constitution of India.

10. Relying on those above judgments referred above, the learned counsel for the petitioner has submitted that as the petitioner was arrested on suspicion only on the basis of the statement of the co-accused recorded under Section 67 of NDPS Act which is not at all admissible and also considering the length of detention, the accused/petitioner may be enlarged on bail.

11. In this context, Mr. Goswami, the learned Additional Public Prosecutor has submitted that the case has already been charge-sheeted and at present the case is fixed for physical production of the accused/petitioner and for furnishing copy within short period and also there is a probability of commencing trial of the case. He further submits that, it is not a case that only on the basis of the statement of the co-accused made under Section 67 of NDPS Act, the accused/petitioner was arrested in connection with this case, but, there are sufficient incriminating materials available in the case diary on the basis of which the accused/petitioner was arrested.

12. He further submits that this is a case of commercial quantity and the Hon'ble Apex Court also expressed a view that the Court should be slow in granting bail to the accused petitioner if the matter is involved with the commercial quantity. The learned Additional Public Prosecutor relies on the judgment of the Hon'ble Apex Court passed in the case of ***State by the Inspector of Police vs. B. Ramu*** and stressed mainly on paragraph Nos. 9, 11, 12, 14 and 15 of the said judgment, which read as under;

“9. A plain reading of statutory provision makes it abundantly clear that in the event, the Public Prosecutor opposes the prayer for bail either regular or anticipatory, as the case may be, the Court would have to record a satisfaction that there are grounds for believing that the accused is not guilty of the offence alleged and that he is not likely to commit any offence while on bail.

11. In case of recovery of such a huge quantity of narcotic substance, the Courts should be slow in granting even regular bail to the accused what to talk of anticipatory bail more so when the accused is alleged to be having criminal antecedents.

12. For entertaining a prayer for bail in a case involving recovery of commercial quantity of

narcotic drug or psychotropic substance, the Court would have to mandatorily record the satisfaction in terms of the rider contained in Section 37 of the NDPS Act.

13. Manifestly, a very strange approach has been adopted by the learned Single Judge in the impugned order whereby the anticipatory bail was granted to the respondent on the condition that the appellant would deposit a sum of Rs.30,000/- to the credit of the registered Tamil Nadu Advocate Clerk Association, Chennai along with various other conditions. The condition no.(a) (supra) so imposed by the High Court is totally alien to the principles governing bail jurisprudence and is nothing short of perversity.

14. The fact that after investigation, the charge-sheet has been filed against the respondent-accused along with other accused persons, fortifies the plea of the State counsel that the Court could not have recorded a satisfaction that the accused was prima facie not guilty of the offence alleged.

15. As a consequence, the impugned order is cryptic and perverse on the face of the record and cannot be sustained. Thus, the same is quashed and set aside."

13. Accordingly, it is submitted by the learned Additional Public Prosecutor that as the case is of commercial quantity, rigor of section 37 will follow and without recording any satisfaction of the Court that the accused/petitioner is not guilty of the offence alleged against him or he will not commit similar kind of offence, the bail should not be granted.

14. Mr. Rahman, learned counsel for the petitioner also submitted that non compliance of mandatory provision of Section 42 of NDPS Act or Section 50 of NDPS Act may be the ground for acquittal as well as those ground can be also taken up at the time of hearing of the bail application.

15. In this contest, Mr. Goswami, learned Additional Public Prosecutor has submitted that there is no allegation of any recovery from the possession of the accused and hence, applicability of Section 50 of NDPS Act does not arise.

16. Considering the submissions made by the learned counsels for both sides and after perusing the LCR as well as the Case Diary. It has been alleged that a

commercial quantity of the contraband was recovered from the possession of the accused/petitioner and thus the rigor of Section 37 of NDPS Act will follow. Section 37(1)(b) of NDPS Act, which reads as follows:

“37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(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.”

17. Thus, as per Section 37 (1) (b) of NDPS Act, the bail can only be granted, if there is no reasonable ground for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. But, from the materials available in the case record as well as the evidences of the witnesses, there cannot be any reasons to believe that the accused/petitioner is not guilty of such offence or he is not likely to commit any offence while on bail as per Section 37 (1) (b) of NDPS Act.

18. Considering the submissions of the learned Counsels for both sides and also considering the materials available in the Case Diary as well as the nature of offence and the punishment prescribed for the same, I find that the accused/petitioner is not entitle to release on bail only on the ground that the accused was arrested on suspicion on the basis of the statement recorded by the co-accused under Section 67 of NDPS Act.

19. In terms of above, this Bail Application stands disposed of.

20. The LCR be returned.

JUDGE

Comparing Assistant