

GAHC010012322024



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

Case No. : Bail Appln./269/2024

MAYANK SHARMA
S/O RAKESH SHARMA
R/O HARTALA, KANTH ROAD,
MAU,P.S. CIVIL LINE, DIST. MURADABAD, UTTAR PRADESH.

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN
ORDER

23.02.2024.

Heard Ms. A. Mandla, learned counsel for the accused. Also heard Mr. R.J. Baruah, learned Addl. P.P. for the State respondent.

2. This application, under Section 439 of the Code of Criminal Procedure,

1973, is preferred by accused, namely, Mayank Sharma, who has been languishing in jail hazoot since 07.05.2023, in connection with Special NDPS Case No. 44/2023 under Sections 22(c)/25/29 of the NDPS Act, pending before the learned Special Judge, Karimganj, for grant of bail.

3. It is to be noted here that the aforementioned case has been registered on the basis of an FIR lodged by one SI Pranab Mili of Churaibari W.P. under Bazaricherra P.S. on 07.05.2023.

4. The essence of allegations, made in the said FIR is that acting on a tip off on 06.05.2023, at about 08.30 pm, the informant along with staffs were attending Naka Checking duty at Naka Check point of Churaibari W.P. on N.H. 08, and intercepted one Truck, bearing registration No. UP-21BN-1404, and same was coming from U.P. towards Tripura. The Truck was driven by one Mayank Sharma and there was one helper, namely, Vishal. And during checking of the vehicle they found 353 numbers of packets containing 35300 bottles of codeine phosphate Phensedyl Cough Syrup, weighing 4271.3 kgs without bottle, which were concealed with Haldiram's products and seized the same in presence of witnesses by preparing seizure list.

5. Ms. Mandla, learned counsel for the accused, submits that the accused was arrested on 07.05.2023 and since then he has been languishing in jail hazoot. Ms. Mandla, further submits that the case has already been charge sheeted, and the trial is yet to be started. It is the further submission of Ms. Mandla that the search and seizure was made in contravention of provision of section 42 and 50 of NDPS Act and the accused is entitled to benefit of the same even at the stage of bail. In support of her contention, Ms. Mandla has referred to a decision of Hon'ble Supreme Court in the case of **Sarija Banu alias Janarthani alias Janani & Anr. vs. State through Inspector of**

Police, reported in **(2004) 12 SCC 266**. Referring to another decision of Hon'ble Supreme Court in the case of **Boota Singh & Ors. vs. State of Haryana** reported in **(2021) SCC OnLine SC 324**, Ms. Mandla, submits that complete non-compliance of section 42 NDPS Act by officers under the NDPS Act is not permissible in the eye of law, and as in the case in hand there was total non compliance of section 42 NDPS Act the accused is entitled to bail on this count. Ms. Mandla, also submits that though at the time of intercepting the vehicle the informant could not comply with the section 42 yet thereafter, he could have complied the same but nothing has been done by him. Ms. Mandla, also submits that the accused is ready to face trial and will appear before the court on each and every date and therefore, it is contended to allow the petition.

6. On the other hand, Mr. R.J. Baruah, the learned Addl. P.P. submits that the vehicle in question was intercepted during Naka Checking and there was no prior information and as such non compliance was not fatal as the informant has given sufficient reason for such non-compliance. Mr. Baruah further submits that non compliance of section 42 NDPS Act is to be decided during trial after taking evidence only. Mr. Baruah further submits that the quantities of the contraband substances, so recovered from the possession of the accused persons are of commercial quantity, and as such the accused has to satisfy the twin conditions of Section 37 of the NDPS Act and that the accused has failed to satisfy the same and therefore, Mr. Baruah has contended to dismiss the petition.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the case record, and also the Status Report, received from the learned Court below.

8. It also appears that the learned court below had taken cognizance of the offence against the present accused and two others under section 22(C)/25/29 NDPS Act and as one of the accused has been charge sheeted showing him as absconder, the court below has issued NBWA against him and on such count charge against the accused has not yet been framed.

9. It is also not in dispute that the quantities of the contraband substances, so recovered from the possession of the accused persons are of commercial quantity, and as such the accused has to satisfy the twin conditions of Section 37 of the NDPS Act that there is no reasonable ground to believe that: the accused is not guilty of the offence and that he is not likely to commit any offence while on bail.

10. But, from the materials on record, specially from the scanned copy of the record received from the learned court below and also from the submission of learned counsel for the accused, this Court is unable to derive its satisfaction that there exists any reasonable ground for believing that the accused is not guilty of the offence and that he is not likely to commit any offence, while on bail.

11. It is also to be mentioned here that in the case of **Union of India vs. Ajay Kumar Singh @ Pappu**, Criminal Appeal No. 952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28 March, 2023, a bench of co-equal strength of Hon'ble Supreme Court, while setting aside the order of granting bail, by the Allahabad High Court, to the accused involving in commercial quantity of contraband substance, has held as under:-

“In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on

bail.”

12. Same principle is echoed by another bench of co-equal strength of Hon’ble Supreme Court in the case of **NCB vs. Mohit Agarwal** (Criminal Appeal Nos. 1001-1002 of 2022, arising out of petition for Special Leave to Appeal (Crl.) No. 6128-29 of 2021, decided on 19 July, 2022).

13. I have considered the submission of Ms. Mandla, learned counsel for the accused and also gone through the case laws referred by her. The contention of Ms. Mandla is that in the case in hand there is total non compliance of section 42 of the NDPS Act and that total non compliance is impermissible in view of the decision of Honble Supreme Court in the case of **Boota Singh** (supra) and that the vehicle involved here in this case is a Truck and it is a private vehicle and it is not a public place and that non compliance of section 42 of the NDPS Act can be considered at the stage of consideration of bail also.

14. In the case of **Boota Singh** (supra), having discussed its Constitutional Bench’s decision in **Karnail Singh vs. State of Haryana** reported in **(2009) 8 SCC 539**, Hon’ble Supreme Court has held that total non compliance of section 42 of NDPS Act is not permissible. It is also held that a private vehicle is not a “public place” as explained in [Section 43](#) of the NDPS Act.

15. In the case of **Sarija Banu** (supra) Hon’ble Supreme Court has held that -

“7. It is pertinent to note that in the bail application of the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance of Section 42 is mandatory and that is a relevant fact which should have engaged the attention of the Court while considering the bail application.”

16. The contention of Ms. Mandla is controverted by Mr. Baruah, the learned Addl. P.P. and he submits that herein this case the applicable provision is section

43 NDPS Act not section 42 as there was no prior information and that the vehicle was intercepted during Naka Checking.

17. There is no quarrel at the bar about the proposition of law as pointed out by Ms. Mandla. But, having adjudged the submission of learned counsel of both the parties, in the light of fact and circumstance on the record, I find sufficient force in the submission of Mr. Baruah, the learned Addl. P.P. Indisputably, herein this case there was no prior information about transportation of contraband substances in the Truck. During Naka Checking the Truck was checked and contraband substances were recovered. It is well settled in catena of decision of Hon'ble Supreme Court that private vehicle is not a "public place". And here in this case, the Truck, where the contrabands substances were recovered and seized is not a public conveyance. But, the fact remains that the contrabands were recovered and seized while in transit and as revealed from the FIR the informant was authorized by the Government of Assam vide Notification No. EX.145/85/301 dated 15.05.1995 under the provision of section 42(1) NDPS Act to enter, search and seizure. As the contraband substances were recovered and seized during transit in the Truck, as contemplated in section 43 (a) i.e. "***seize in any public place or in transit,***" this court is of the considered opinion that herein this case instead of section 42 of NDPS Act, section 43 of the said Act is attracted. And as such, recording of reasons for belief and for taking down of information received in writing with regards to the commission of an offence before conducting search and seizure, is not required to be complied with under section 43 of NDPS Act.

18. It is worth mentioning here in this context that in the case of **State of Punjab vs. Baldev Singh** reported in **(1999) 6 SCC 172**, Hon'ble Supreme Court has held that whether or not the safeguards provided in section 50 would

have to be determined by the court on the basis of the evidence led during trial. Further in the case of **Union of India v. Mohd. Nawaz Khan**, reported in **(2021) 10 SCC 100**, the Hon'ble Supreme Court has held that the issue of whether there was compliance of the procedure laid down under Section 42 of the NDPS Act is a question of fact.

19. In view of above, and also in view of the nature and gravity of the offence and the punishment prescribed for the same this Court is of the opinion that this is not a fit case to grant the privilege of bail, under Section 439 of the Cr.P.C., to the accused and therefore, the petition stands dismissed.

20. However, the learned Court below is directed to expedite the trial and conclude the same at the earliest possible time, without being influenced by any of the observations made by this court herein above. And if necessary, the learned court below shall take recourse to the provision of Section 309(1) of the Cr.P.C.

21. In terms of above, the bail application stands disposed of.

JUDGE

Comparing Assistant