

GAHC010003922024



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

Case No. : Bail Appln./91/2024

SUJIT NATH
S/O SATYENDRA CHANDRA NATH
R/O VILL- MADHYA KALI BARI CHURAIBARI, P.S. KADAMTALA
DIST. NORTH TRIPURA, TRIPURA, PIN-799262

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR SISHIR DUTTA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 23.04.2024

- 1)** Heard Mr. S. Dutta, learned Senior Counsel assisted by Mr. S. Dutta, learned counsel for the petitioner. Also heard Mr. R. J. Baruah, learned Additional Public Prosecutor for the State.
- 2)** This application under Section 439 of the Code of Criminal Procedure,

1973 has been filed by the petitioner, namely, Sujit Nath, who has been detained behind the bars since 09.09.2023 (*for last 7 months 14 days*) in connection with Special NDPS Case No. 119/2023 under Sections 20(b)(ii)(C)/25/29 of the NDPS Act, 1985 (corresponding to Bazaricherra P. S. Case No. 182/2023) pending before the Court of learned Special Judge, Karimganj.

3) The gist of accusation in this case is that on 09.09.2023, one Shri Pranab Milli, SI of Police had lodged an FIR before the Officer-In-Charge of Bazaricherra Police Station, *inter-alia*, alleging that on that day during conducting *naka* checking duty at *naka* checking point of Churaibari Watch Post at National Highway No. 8, at about 6.30 AM, one 12 wheeler goods carrier truck bearing Registration No. TR 01 AS 1811, coming from the Tripura Side was signalled to stop and thereafter, it was checked. During checking of the said vehicle, 66 numbers of packets containing suspected *ganja* were found concealed in secret chambers of the said vehicle. On weighing the recovered *ganja*, the weight was found to be 400 kg and 200 grams. From the said truck, the driver, Pradip Biswas, the co-driver, Mintu Choudhury and the helper Sujit Nath (present petitioner) were apprehended. It is also alleged that the present petitioner tried to escape from the place of occurrence, however, he was apprehended with the help of local people. During interrogation of apprehended persons, it came to light that the recovered contraband was sent by one Giribhai @ Bibhash and the present petitioner was in contact with the said person over his mobile phone.

4) On receipt of the FIR, Bazaricherra P.S. Case No.182/2023 under Sections 20(b)(ii)(C)/25/29 of the NDPS Act, 1985, was registered.

5) Ultimately, on completion of the investigation, charge-sheet was laid against the accused persons including the present petitioner.

6) Mr. S. Dutta, learned Senior Counsel for the petitioner has submitted that the present petitioner is an innocent person and is in no way connected with the offence alleged in the FIR. It is also submitted by learned Senior Counsel for the petitioner that the present petitioner is known to the owner of the seized vehicle and on 09.09.2023, at about 10.30 AM, he was called by the owner of the seized truck and was informed that the driver of the seized truck has not been taking up his phone call and therefore, requested him to look into the matter. Thereafter, the petitioner went to the place, where the truck was seized, by riding his bike bearing Registration No. TR 05 B4 589. However, when he reached the spot, he was cordoned off by the *naka* checking party and was apprehended.

7) It is also submitted by learned Senior Counsel for the petitioner that no contraband was seized from the possession of the present petitioner and he does not have any criminal antecedent. It is also submitted by the learned Senior Counsel for the petitioner that the present petitioner is a patient of chronic abdomen ailment (IBS) and bleeding haemorrhoids since last 10 years.

8) Learned Senior Counsel for the petitioner has also submitted that in this case, there has been clear violation of the mandatory provision of Section 42 of the NDPS Act, 1985, as no authorization from the Gazetted Officer was obtained by the Seizing Officer prior to seizure of the contraband.

9) Learned Senior Counsel for the petitioner has also submitted that under

Section 42(2) of the NDPS Act, 1985, the Officer receiving information regarding commission of any offence under NDPS Act, 1985 has to forward the same to his immediate Official superior within 72 hours, however, same has not been done in this case, which itself entitles the petitioner to get bail. To fortify his submissions, learned Senior Counsel for the petitioner has referred to following rulings:

i. ***“Rajinder Singh Vs. State of Haryana”*** reported in ***(2011) 8 SCC 130***

ii. ***“Raju Bhavlal Pawar and others Vs. State of Maharashtra” (Order dated 26.10.2021 in Bail Application No. 568/2021)*** of the Bombay High Court.

iii. ***“Abdul Rakib Vs. State of West Bengal” (Order dated 25.08.2023 in CRM (NDPS) No.546/2023)*** of High Court of Calcutta.

iv. ***“Alom Ali Vs. State of Assam” (Order dated 12.02.2024 in Bail Application No. 2504 of 2023)*** of this Court.

10) Learned Senior Counsel for the petitioner has also submitted that the vehicle from where the recovery of contraband was made in this case was a goods carrying vehicle and was not a public transport vehicle, hence, the said vehicle would not come within the expression *“Public Place”* as explained in Section 43 of the NDPS Act, 1985 and therefore, total non-compliance of mandatory requirements of Section 42 of the NDPS Act, 1985 is impermissible and such non-compliance would entitle the petitioner to go on bail. In support of his submission, learned Senior Counsel for the petitioner has referred to the judgment of the Apex Court in the case of ***“Boota Singh and Others Vs. State of Haryana”*** reported in ***2021 SCC OnLine SC 324***.

11) Learned Senior Counsel for the petitioner has also submitted that

even where the Seizing Officer had no prior information about the contraband which was seized, however, when he came across the accused persons being in possession of Narcotic Drugs, then he must follow from that stage onwards the provision of NDPS Act, 1985 and continue the investigation as provided there under. It is submitted by the learned Senior Counsel for the petitioner that there has been total non-compliance of provisions of Section 42 of the NDPS Act, 1985 in this case, which is impermissible and which would entail the petitioner to get bail. To fortify his submission, learned Senior Counsel for the petitioner has referred to the ruling of the Apex Court in the case of “***State of Punjab Vs. Baldev Singh***” reported in **(1999) 6 SCC 172**.

12) On the other hand, Mr. R. J. Baruah, learned Additional Public Prosecutor has submitted that the seizure list in this case would show that 400 kg and 200 grams of *ganja* was seized from the possession of three numbers of accused persons including the present petitioner, who was the helper in the seized vehicle. It is also submitted by learned Additional Public Prosecutor that as commercial quantity of *ganja* has been seized in this case, the embargo of Section 37 of the NDPS Act, 1985 is applicable to this case. Hence, he has vehemently opposed the grant of bail to the present petitioner.

13) Learned Additional Public Prosecutor has also submitted that in the instant case the Seizing Officer had no prior information or knowledge about the seized contraband. It was only in the search operation conducted during regular *naka* checking duty, the contraband seized in this case were recovered. He has submitted that as the recovery in this case was a chance recovery from a vehicle which was in transit, the

provisions of Section 43 of the NDPS Act, 1985 are applicable to the instant case and the provisions of Section 42 of the NDPS Act, 1985 are not applicable in this case. To fortify his submissions, learned Additional Public Prosecutor has referred to following rulings:

i. “***SK. Raju @ Abdul Hoque @ Jagga Vs. State of West Bengal***” reported in ***(2018) 9 SCC 708***.

ii. “***Mayank Sharma Vs. State of Assam***” (***Order dated 23.0.2024 passed in Bail Application No. 269/2024***) of this Court

14) I have considered the submissions made by the learned counsel for both the sides and perused the scanned copy of case record of Special NDPS Case No. 119/2023. I have also gone through the rulings cited by learned counsel for both the sides.

15) Though, the learned Senior Counsel for the petitioner had taken the plea that the petitioner was not present at the place where the truck was seized and he reached that place only after sometime in his motorcycle, however, from the documents available on record, namely, the seizure list, the FIR, the charge-sheet, etc., it appears that the present petitioner was apprehended along with other two accused persons from the truck and the seized contraband was found from the said truck. It also appears from record that the present petitioner also tried to escape, however, he was apprehended by *naka* checking team with the help of local people.

16) It also appears that in the instant case the recovery made by the Seizing Officer was not on the basis of any prior information and it was made from the truck on a National Highway while same was in transit from Tripura. A Co-ordinate Bench of this Court has held in the case of ***Mayank Sharma Vs. State of Assam (Supra)*** that wherever seizure of

contraband is made from any public place or “*in transit*”, the provisions of Section 43 of the NDPS Act, 1985 is applicable. I am also in agreement with the observations made in the aforesaid case.

17) It also appears that in the instant case, the seizure of contraband from the said vehicle was made by one Pranab Milli, SI of Police. As per Notification No. Ex.145/85/290 dated 25.04.1995 issued by the Government of Assam, the Sub-Inspector of Police have been authorised to exercise powers under Section 42 and Section 67 of the NDPS Act, 1985. This Court in the case of “***Dikbahadur Chetri Vs. State of Assam***” reported in **2002 (3) GLT 137** has held that the aforesaid notification has not been superseded by Notification No. Ex.145/85/301 dated 15.05.1995 and that a Sub-Inspector of Police is authorised to exercise powers under Section 42 of the NDPS Act, 1985. As such, a Sub-Inspector of Police, in the State of Assam, is also empowered to make seizure under Section 43 of the NDPS Act, 1985.

18) The Apex Court has observed in the case of “***State of Haryana Vs. Jarnail Singh and Others***” reported in **(2004) 5 SCC 188** as hereunder:

“7. The next question is whether Section 42 of the NDPS Act applies to the facts of this case. In our view Section 42 of the NDPS Act has no application to the facts of this case. Section 42 authorises an officer of the Departments enumerated therein, who are duly empowered in this behalf, to enter into and search any such building, conveyance or place, if he has reason to believe from personal knowledge or information given by any person and taken down in writing that any narcotic drug or psychotropic substance, etc. is kept or concealed in any building, conveyance or enclosed place. This power can be exercised freely between sunrise and sunset but between sunset and sunrise if such an officer proposes to enter and search such building, conveyance or enclosed place, he must record the grounds for his belief

that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender.

8. Section 43 of the NDPS Act provides that any officer of any of the Departments mentioned in Section 42 may seize in any public place or in transit any narcotic drug or psychotropic substance, etc. in respect of which he has reason to believe that an offence punishable under the Act has been committed. He is also authorised to detain and search any person whom he has reason to believe to have committed an offence punishable under the Act. Explanation to Section 43 lays down that for the purposes of this section, the expression "public place" includes any public conveyance, hotel, shop, or other place intended for use by, or accessible to, the public.

9. Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the NDPS Act for searching the vehicle between sunset and sunrise."

19) In the instant case also, the Seizing Officer being a Sub-Inspector of Police was authorised to seize the contraband under Section 42 of the NDPS Act, 1985. He had no prior information or any knowledge regarding the contraband, which has been seized in this case. From the materials available on record, *prima facie*, this case appears to be a case of chance recovery. Further, as the seizure has been made from a goods carrier, "*in*

transit” at a National Highway, which is a public place, this Court is of considered opinion that in the instant case, provisions of Section 43 of the NDPS Act, 1985 is attracted and not Section 42 of the said Act.

20) The facts involved in the judgments cited by learned Senior Counsel for the petitioner are distinguishable from the facts of the present case as in those judgements the Seizing Officer had prior information/knowledge about the contraband and hence, compliance of Section 42 of the NDPS Act, 1985 was held to be mandatory, however, the instant case, appears to be a case covered by Section 43 of the NDPS Act, 1985.

21) As the contraband seized in this case is of huge quantity (commercial quantity), the embargo of Section 37 of the NDPS Act, 1985 is applicable in this case and the petitioner has failed to overcome the said embargo.

22) For the reasons mentioned above, this Court is of considered opinion that the petitioner is not entitled to get bail in this case.

23) It is, however, hereby made clear that the observations made hereinabove are for limited purpose of consideration of the instant bail application and same shall have no bearing in the trial of Special NDPS Case No. 119/2023, pending before the Court of learned Special Judge, Karimganj. The Trial Court shall consider the matter before it during trial, independent of observations made by this Court in this order.

24) This bail application is accordingly, dismissed.

JUDGE

Comparing Assistant