

GAHC010024182024



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

Case No. : Bail Appln./473/2024

AHMEDUR RAHMAN BARBHUIYA @ AHMEDUR BARBHUIYA
R/O VILL- LALA BAZAR,
BSHNUPUR P.S.LALA
DIST. HAILAKANDI, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

**Advocate for the Petitioner : MR SISHIR DUTTA, Sr. Cl.
MR S. DUTTA**

Advocate for the Respondent : MR R J BARUAH, ADDL.PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 21.06.2024

Heard Mr. Sishir 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 respondent.

2. This is an application under Section 439 of the Code of Criminal Procedure, 1973 for grant of bail to the accused/petitioner, who has been arrested in connection with Badarpur P.S. Case No. 195/2022, under Section 21(b)/22(c)/25 /29 of the NDPS Act, 1985 & corresponding Special (NDPS) Case No. 130/2022, pending before the Court of learned Special Judge, Karimganj.

3. It is submitted by Mr. Sishir Dutta, learned Senior Counsel for the petitioner, that the accused/petitioner is innocent and he is no way involved in the alleged offence. He belongs to a poor family and runs a small grocery shop and sometimes also used to give his father's vehicle on rent in order to earn his livelihood. The other co-accused has already been granted with bail by the learned Special Judge, Karimganj vide Order dated 28.11.2022 and zimma of the said Bolero vehicle is also given to the co-accused Moinuddin Barbhuiya. On the day of incident, the accused/petitioner was simply driving the vehicle carrying some consumer goods to deliver to a consignor and he had no knowledge about the contraband which was found inside the driver's seat and he has been made a scapegoat in the instant case as he was totally unaware regarding the carry bags and soap boxes which was concealed in the Bolero Vehicle. Mr. Dutta further submitted that from the F.I.R., it reveals that the search and seizure of the contraband was conducted by the Naka Checking Team under Section 42(1) of the NDPS Act, but the mandatory provision of Section 42 NDPS Act is not complied with as before the search and seizure, the information has to be recorded in writing in a statement along with grounds for his belief that the contraband would be concealed or facilitate escape of the offender. But, here in the instant case, it is seen that the Officer, who conducted

the search and seizure operation, has not written separately the ground of his belief and thus, violated the provision under Section 42 NDPS Act, which is a mandatory requirement. Further it is submitted that from the F.I.R., it is seen that one G.D. Entry was made on 01.09.2022, but the said G.D. entry could not be treated as due compliance of Section 42(1) of NDPS Act as under the proviso of Section 42(1), it should be separately recorded in writing by the authorized officer or by the concerned Police Station and as such, due to procedural irregularity, the petitioner should be enlarged on bail. In this context, he also relied on the decision of Bombay High Court passed in BA No. 568/2021, dated 26.10.2021, (Raju Bhavlal Pawar & Ors. Vs. The State of Maharashtra), wherein it has been held by the Court that the entry in the station diary is not a compliance under Section 42 of the NDPS Act. He also relied on judgment of Kolkata High Court passed in CRM (NDPS) 546/2023, wherein the Kolkata High Court also relied on the decision of the Bombay High Court, as referred to above.

4. Mr. Dutta furthermore relied on a decision of Apex Court reported in **(2004) 12 SCC 266 (Sarija Banu alias janarthani alias janani & Anr. Vs. State through inspector of police)**, and emphasized on paragraph No. 7 of the judgment, which reads as under:

"7. It is pertinent to note that in the bail application 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 attention of the Court while considering the bail application."

5. Mr. Dutta, learned Senior Counsel, further submitted that the Investigating Agency also did not comply with Section 52 of the NDPS Act which may also be one of the grounds to consider his bail application. He further submitted that there is no specific mention as to whether the sampling was done as per the Standing Order 1/89 of the Government of India. Further, as per the seizure list, 10 (ten) numbers of soap boxes were recovered containing suspected heroin total weighing 131 gram and that apart, one blue carry bag was also recovered where 10 numbers of box containing suspected heroine and 3 (three) numbers of black packets containing suspected YABA tablets (orange/red colour) each packet containing approx. 200 Nos. of tablets were recovered from the possession of the accused persons. But there is no specific mention as to whether the sampling was done as per the said Standing Order of 1/89 which is mandatorily required to be followed. He further submitted that the Standing Instruction and the Guideline issued by the authority have a legal sanction and hence, it has to be followed strictly by the Investigating Agency. In this context, he also relied on the decision of Allahabad High Court passed in Criminal Misc. Bail Application No. 18303 of 2020.

6. Mr. Dutta further submitted that the second proviso of Section 42 of the NDPS Act is also not complied with in the instant case, wherein it is provided that if the officer has the reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for concealment of evidence or facility for escape of the offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the ground of his belief. But, here in the instant case, from the

contents of the F.I.R. itself, it is seen that the seizing officer has not recorded his ground of belief in a separate Register while conducting the search and seizure. Thus, there is no compliance of Section 42 of NDPS Act which may be one of the grounds for acquittal and it may also consider while dealing with an application for bail. He further submitted that the contraband was not recovered from the conscious possession of the accused/petitioner and more so, the Court can consider the period of incarceration and as on today, the accused/petitioner is in custody for more than 567 days and hence, considering his long period of incarceration, his bail may be considered as the prolonged incarceration militates the most precious fundamental right guaranteed under Article 21 of the Constitution of India. Further he submitted that there is no scope for disposal of the case within a short period as the trial is yet to be commenced and hence, considering this aspect of the case also, the accused/petitioner may be released on bail.

7. In this context, Mr. Baruah, learned Additional Public Prosecutor, has submitted that that the commercial quantity of the contraband was recovered from the possession of the present accused/petitioner along with others and at present, 3 (three) witness are already been examined and all the witnesses have implicated the present accused/petitioner showing his involvement in the alleged offence. He further submitted that on perusal of the Charge-Sheet also, it reveals that the ground of believe was recorded vide Malua PICP GDE No. 09, dated 01.09.2022, before conducting the search and seizure and thus, there was a total compliance of Section 42 NDPS Act. More so, while sending the samples to the FSL examination, in presence of the Magistrate, the Investigating Officer also collected the certificate of correctness regarding the inventory and

the seized exhibits, which otherwise establishes that there was a compliance of Section 52(A)(2)(a)(b)(c) of the NDPS Act.

8. He further submitted that 3 (three) witnesses, who are already been examined by the prosecution, has implicated the present accused/petitioner, wherefrom it is also seen that the contraband was recovered from the conscious possession of the accused/petitioner which is admittedly a commercial quantity and hence, rigor of Section 37 will be applied while dealing with an application for bail. He accordingly submitted that considering the nature and gravity of the offence, it is not at all a fit case to allow the accused/petitioner to go on bail at this stage and there is every probability of disposal of the matter within a short period.

9. After hearing the submissions made by the learned counsels for both sides, I have also perused the case record and the relevant annexures and the other documents annexed along with the petition as well as in the case record of Special (NDPS) Case No. 130/2022.

10. It is a fact that the present accused/petitioner, along with one another, arrested in connection with this case on the allegation of recovery of commercial quantity of contraband from their conscious possession. From the record, it is also seen that the 3 (three) numbers of P.Ws., who were already examined by the prosecution, implicates the present accused/petitioner showing his direct involvement in the alleged offence and thus, the rigor of Section 37 NDPS Act will follow.

11. For ready reference, Section 37 NDPS Act is extracted hereinbelow:

"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."

12. 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.

13. Coming to the compliance of Sections 42 & 52 of the NDPS Act, it is seen that the search and seizure had to be made by authorised officer. However, authorisation from a gazetted officer could not be obtained as per Section 42 of the NDPS Act for conducting detention and search after sunset as it was believed that authorisation could not have been obtain without affording opportunity for concealment of the evidence, facility of escape of the offenders and removal of the transportation of NDPS substance. From the statement narrated in the F.I.R., it is seen that after getting the information, the team of

Karimganj Police was checking the vehicle and immediately one check post was fixed for detention of the vehicle by making the G.D. Entry No. 08, dated 01.09.2022, However, it is seen that the grounds of believe was recorded vide Malua PICP GDE No. 09, dated 01.09.2022, complying Section 42 of the NDPS Act. Thus, it is seen that the said G.D. Entry was made to record the ground of believe by the seizing officer, though it was not recorded in a separate Register but it cannot be considered that there was total non-compliance of Section 42 NDPS Act.

14. Further it is seen that the inventory was prepared by the Investigating Officer and the Certificate was also obtained from the Magistrate while sending the contraband for examination to FSL. It is a fact that there was no elaborate discussion about the drawing of the samples in the Charge-Sheet itself, but it cannot be said to be total non-compliance of Section 52 NDPS Act as from the record, it reveals that the certificate of correctness was also obtained by the Investigating Officer after preparing the inventory at the time of sending the sample to FSL. Further, as per the view of the Apex Court, the Court should be slow in granting bail to the accused if the matter is involved with the commercial quantity. In this context, a judgment of the Apex Court, passed in the case of **State by the Inspector of Police vs. B. Ramu (Criminal Appeal No. 801 of 2024)**, can be relied on, wherein in paragraph Nos. 9, 11, 12, 14 and 15 thereof, it has been held 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."*

15. Further, it is not the case that the trial has not yet commenced and it is seen that the prosecution has already examined 3 (three) numbers of witnesses in support of the case and the case is at the stage of evidence. So, it is not a case to grant bail to the present accused/petitioner only considering the period of incarceration.

16. The Supreme Court in the case of **Kalayan Chandra Satkar Vs. Rajesh Ranjan Alias Pappu Yadav & Anr. [(2005) 2 SCC 42]** has expressed the view that the accused cannot be granted with bail solely on the ground of period of incarceration undergone by the accused. It was further held that the sole ground of delay in conclusion of the trial without taking into consideration the allegation made by the prosecution in regard to the existence of *prima facie*

case, gravity of the offence and the allegation of tampering with the witnesses by threat and inducement when on bail.

17. In the case of **Rajesh Ranjan [(2004) 7 SCC 528]**, the Supreme Court has held that mere fact that the accused has undergone certain period of incarceration by itself would not entitle the accused to be enlarged on bail nor the fact that the trial is not likely to be concluded in the near future, either by itself or coupled with the period of incarceration would be sufficient for enlarging the accused on bail. It is also held that while considering the bail application, the Court must consider the nature of acquisition, the severity of the punishment in case of conviction, the nature of supporting evidence, reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant and prima facie satisfaction of the court in support of the charge.

18. Further, in the case of **Pramod Kumar Saxena vs. Union of India & Anr.**, the Supreme Court has held that mere long period of incarceration in jail would not be *per se* illegal. If the accused has committed offence, he has to remain behind bars. Such detention in jail even as an under trial prisoner would not be violative of Article 21 of the Constitution. In the case of **Prahlad Singh Bhati Vs. NCT, Delhi reported in (2001) 4 SCC 280**, the Supreme Court has culled out the principles, which the courts has to consider at the time of granting or refusing bail as under:-

"The jurisdiction to grant bail has to be exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of

the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge. It is not excepted , at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

- 19.** In view of the discussions made above and also considering the entire facts and circumstances of the case, nature and gravity of the offence and further considering the view expressed by the Apex Court in the case laws referred to hereinabove, this Court is of the opinion that there is a *prima facie* case against the accused/petitioner and thus, at this stage, I am of the view that it is not a fit case to enlarge the accused/petitioner on bail only considering the period of incarceration and hence, the same stands dismissed.
- 20.** The bail application stands disposed of in terms above.

JUDGE

Comparing Assistant