

GAHC010033932024



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

**Case No. : Bail Appln./506/2024**

NAZRUL ISLAM  
S/O SHEIKH GONI  
R/O HUMAIPUR ABDALPUR, P.S. MADHYAMGRAM  
NORTH-24, PARGANAS, WEST BENGAL, INDIA.

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 : 13.05.2024**

- 1)** Heard Mr. S. Dutta, learned senior counsel, assisted by Mr. P. Kotaki, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State of Assam.
- 2)** This application under Section 439 of the Code of Criminal Procedure,

1973 has been filed by the petitioner, namely, Nazrul Islam, who has been detained behind the bars since 04.02.2024 (*for last 3 months 9 days*) in connection with Special NDPS Case No. 70/2023 corresponding to the Bajaricherra P.S. Case No. 126/2023 under Section 22(c)/25/29 of the NDPS Act, 1985 pending in the Court of learned Special Judge, Karimganj.

**3)** The gist of the accusation in this case is that on 13.06.2023, one S.I. Pranab Mili, SI of Police and In-charge of Churaibari Police Watch Post, had lodged an FIR before the Officer-In-Charge of Bajaricherra Police Station, *inter-alia*, alleging that during daily naka checking duty at Naka check point of Churaibari Watch Post at National Highway No. 8, three trucks bearing Registration Nos.WB 11D 4702, WB 29B 5386 and NL 01A F0300, coming together from Guwahati side towards Tripura were signalled to be stopped and were searched and during search operation 93,920 numbers of bottles of cough syrups containing codine phosphate in 587 numbers of cartons were recovered from there. The said cough syrups were seized and the drivers of the vehicle bearing Registration No. WB 11D 4702, namely, Bibesh Kumar and the driver of vehicle bearing registration No. WB 29B 5386, namely, Saminur Islam were arrested. The driver of the truck bearing Registration No. NL 01A F0300 could not be apprehended as he fled away from the scene.

**4)** The present petitioner, who is the owner of one of the seized vehicles, namely vehicle truck bearing Registration No. WB 29B 5386 was also named in the FIR as one of the accused persons.

**5)** On receipt of the said FIR, Bajaricherra P.S. Case No. 126/2023 was registered and investigation was initiated. Ultimately, on completion of the investigation, charge sheet bearing No.167/2023 dated 30.11.2023 was laid against the arrested accused persons, namely, Bibesh Kumar and Saminur

Islam.

**6)** The name of the present petitioner has been shown in column No.11 of the charge sheet as a not charge sheeted accused person.

**7)** The learned senior counsel for the petitioner has submitted that the petitioner had approached the trial court for seeking the *zimma* of his truck which was seized in connection with this case which was initially rejected by the Trial Court by its order dated 20.07.2023 passed in Special NDPS Case No. 70/2023. However, later on, the petitioner again filed an application for seeking zimma of the seized truck on 25.01.2024 and the Trial Court by its order dated 25.01.2024 granted interim zimma of the seized vehicle bearing Registration No. WB-29B-5386 to the present petitioner with certain conditions.

**8)** It is further submitted by learned senior counsel for the petitioner that when on 03.02.2024 the petitioner approached the Investigating Officer of the case to take the zimma of the seized vehicle as per the directions of the Trial Court, he was arrested in connection with the above case. It is also alleged that he was demanded a huge amount of money by the Investigating Officer and on his failure to pay the same he was arrested by the Investigating Officer.

**9)** The learned senior counsel for the petitioner has submitted that it is only after the arrest of the present petitioner, the Investigating Officer on 05.02.2024 made a prayer to learned Special Judge, Karimganj to record the statement of two witnesses, namely, Rajesh Urang and Sanjit Rabidas under Section 164 of the Code of Criminal Procedure, 1973, on the ground that the petitioner has made extra judicial confession before the said witnesses.

**10)** Learned senior counsel for the petitioner has submitted that in the instant case after the completion of the investigation, the charge sheet was submitted, bearing No. 167/2023 dated 30.11.2023, wherein the present

petitioner was shown as an accused not charge sheeted, as no evidence could be gathered against the present petitioner during the investigation.

**11)** Learned senior counsel for the petitioner has also submitted that when no material was available against the present petitioner at the time of filing of the charge sheet, then under such circumstances, unless further investigation is conducted and unless Investigating Officer could obtain any further evidence, the present petitioner could not have been arrested. However, in this case, the Investigating Officer without any leave for further investigation from the Court of learned Special Judge, Karimganj, had arrested the petitioner on 03.04.2024 when he approached the Investigating Officer to take the zimma of his vehicle. It is submitted by the learned senior counsel for the petitioner that as the present petitioner was an accused named in the chargesheet who was not sent up for trial after investigation, he could not have been arrested without there being any evidence on record against him.

**12)** It is also submitted by the learned senior counsel that the police, only with an intention to create false evidence against the present petitioner, got the statement of two purported witnesses, before whom the petitioner had allegedly made confessional statement.

**13)** Learned counsel for the petitioner has also submitted that after the judgment of the Apex court in the Case of "***Vinay Tyagi Vs. Irshad Ali @ Deepak & Others***" reported in **2013 5 SCC 762**, the requirement of seeking prior leave of Court to conduct "further investigation" and/or to file supplementary report will have to be read into and is a necessary implication of the provisions of the Section 173 (8) of the Code of Criminal Procedure, 1973.

**14)** He has also submitted that as in the instant case no such leave was obtained for conducting any further investigation against the petitioner and no

evidence against the present petitioner was available on record, when he was arrested on 03.02.2024, the arrest of the present petitioner by the police in the instant case is an illegal arrest and the petitioner is entitled to get the bail on that count only.

**15)** In support of his submission learned senior counsel for the petitioner as cited a ruling of the Apex Court in the case of ***Vinay Tyagi Vs. Irshad Ali (Supra)***.

**16)** Learned senior counsel for the petitioner has also submitted that though, under Section 173 (8) of the Code of Criminal Procedure, 1973, the police has the power to do further investigation even if the charge sheet has been laid in a case, however, in view of the ruling of the Apex Court in ***Vinay Tyagi Vs. Irshad Ali (Supra)***, no such further investigation may be conducted by the Investigating Officer without taking prior leave of the Court. He has also submitted that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. All other methods of performance are necessarily forbidden. To substantiate his argument, learned senior counsel for the petitioner has cited a ruling of the Privy Council in the case of “***Nazir Ahmad Vs. King Emperor***” reported in ***1936 0 Supreme SC 38***.

**17)** On the other hand, Mr. K. Baishya, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioner on the ground that the quantity of contraband seized in this case is of commercial quantity and hence, the embargo of Section 37 of the NDPS Act, 1985 is applicable to this case.

**18)** It is also submitted by the learned Additional Public Prosecutor that though, the present petitioner was shown as not charge sheeted in the charge sheet, however, the Investigating Officer took leave for getting the statement of witnesses, namely, Rajesh Urang and Sanjit Rabidas recorded under Section 164

of the Code of Criminal Procedure, 1973 and in that statement made under the Code of Criminal Procedure, 1973, the aforesaid witnesses had stated that the present petitioner had confessed before them that his vehicle which was loaded with codine phosphate is seized by police, and as such, he suffered huge loss. He also shared his mobile No. with the said witnesses for getting favour from the said witness.

**19)** Learned Additional Public Prosecutor has also submitted that the petitioner had also defied the Investigating Officer by not appearing before him after getting notices under Section 67 of the NDPS Act, 1985, and therefore, his involvement in the offence alleged in this case is apparent and he has therefore, opposed the grant to the bail of the present petitioner.

**20)** I have considered the submissions made by learned counsel for both the sides and have perused the scanned copy of the case record of the Special NDPS Case No. 70/2023 and connected papers which were called for in connection with this bail application.

**21)** It appears from the record that though, the present petitioner was named in the FIR, however, after completion of the investigation he was shown as a not a charge sheeted accused person in the charge sheet bearing No. 167/2023 dated 30.11.2023. Thus, at the time of filing of the charge sheet there was no incriminating materials against the present petitioner and due to lack of evidence, after completion of the investigation he was not sent up for trial.

**22)** It also appears from record that there was no prayer for further investigation by the Investigating Officer at the time of submitting the charge sheet. It also appears from the arrest memo, which is available on record, that the present petitioner was arrested on 03.02.2024 at about 6.30 PM, without

leave from the Court of the learned Special Judge, Karimganj by the Investigating Officer to conduct any further investigation.

**23)** The observation made by the Supreme Court of India in the case of ***Vinay Tyagi Vs. Irshad Ali (Supra)*** regarding requirement of seeking prior leave of the Court to conduct further investigation is quoted herein below:

***“49. Now, we may examine another significant aspect which is how the provisions of Section 173(8) have been understood and applied by the courts and investigating agencies. It is true that though there is no specific requirement in the provisions of Section 173(8) of the Code to conduct ‘further investigation’ or file supplementary report with the leave of the Court, the investigating agencies have not only understood but also adopted it as a legal practice to seek permission of the courts to conduct ‘further investigation’ and file ‘supplementary report’ with the leave of the court. The courts, in some of the decisions, have also taken a similar view. The requirement of seeking prior leave of the Court to conduct ‘further investigation’ and/or to file a ‘supplementary report’ will have to be read into, and is a necessary implication of the provisions of Section 173(8) of the Code. The doctrine of contemporanea expositio will fully come to the aid of such interpretation as the matters which are understood and implemented for a long time, and such practice that is supported by law should be accepted as part of the interpretative process.***

***50. Such a view can be supported from two different points of view. Firstly, through the doctrine of precedence, as afore-noticed, since quite often the courts have taken such a view, and, secondly, the investigating agencies which have also so understood and applied the principle. The matters which are understood and implemented as a legal practice and are not opposed to the basic rule of law would be good practice and such interpretation would be permissible with the aid of doctrine of contemporanea expositio. Even otherwise, to seek such leave of the court would meet the ends of justice and also provide adequate safeguard against a suspect/accused.”***

**24)** Though, the police has the power to conduct further investigation under Section 173 (8) of the Code of Criminal Procedure, 1973, however, in view of the observation of the Apex Court in the case of ***Vinay Tyagi Vs. Irshad Ali (Supra)***, the police has to seek prior leave of the Court before it conduct further investigation. Any violation of the same would be regarded as illegal.

**25)** The observation of the Privy Council in the case of ***Nazir Ahmad Vs. King Emperor (Supra)*** to the effect that "*where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. All other methods of performance are necessarily forbidden*" is aptly applicable to the facts and circumstances of this case. As the NDPS Act, 1985 contains stringent provisions as regards bail, it is necessary that the statutory provisions and procedural requirements before arresting an accused are strictly followed, so that adequate safeguards are there for an innocent person

**26)** In the instant case, the purported statement of the witnesses namely, Rajesh Urang and Sanjit Rabidas were recorded only on 05.02.2024, whereas the petitioner was arrested on 03.02.2024, when there was no material against him on record and there was no permission from the Court to conduct further investigation. Hence, in the considered opinion of this Court, the arrest of the petitioner on 03.02.2024 at 6.30 PM was an illegal arrest and, only on that count, he is entitled to get bail.

**27)** This Court is of the considered opinion that in the instant case when the above-named petitioner was shown as not charge sheeted accused in the charge sheet after completion of the investigation, he could not have been arrested without there being a leave for conducting further investigation and without there being any material on record against the present petitioner at the



time when he was arrested.

**28)** This Court is of the considered opinion that in case of such an illegal arrest the embargo of Section 37 of the NDPS Act, 1985 would not be applicable.

**29)** In view of above, the above-named petitioner is hereby directed to be released on bail on furnishing a bond of Rs. 50,000/- (Rupees Fifty Thousand only) with two suitable sureties, one of whom should be a government employee and should be resident of the State of Assam, of like amount to the satisfaction of the Trial Court with following conditions: -

- i.** That the petitioner shall cooperate with the Investigating Officer of the Bajaricherra P.S. Case No. 126/2023;
- ii.** That the petitioner shall not directly or indirectly make any inducement, threat, or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such facts before the Investigating Officer or before the Court;
- iii.** That the petitioner shall provide his contact details including photocopies of his Aadhar Card, Driving License, PAN card, mobile number, and other contact details before the Trial Court;
- iv.** That the petitioner shall not leave the jurisdiction of the Trial Court without prior permission of the Trial Court and when such leave is granted by the Trial Court, the petitioner shall submit his leave address and contact details during such leave period before the trial court.

**30)** With the above observations, this bail application is hereby disposed of.

**JUDGE**

**Comparing Assistant**