

GAHC010024482024



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

Case No. : Bail Appln./391/2024

MD. HUSSAIN AHMED
VILLAGE- ALAKULIPUR, P.O. BADARPUR GHATR- 788803
P.S. BADARPUR
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR B MALAKAR

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

06.03.2024

Heard Mr. B. Malakar, 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, *read with* Section 36-A of NDPS Act is preferred by the accused/petitioner, namely, Md. Hussain Ahmed, who has been languishing in jail hazot since 12.10.2022 in connection with Badarpur P. S. Case No. 239/2022 registered under Sections 22c/25/29 of NDPS Act.

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

4. Mr. Malakar, learned counsel for the petitioner has submitted that the present petitioner is innocent and no way involved in the alleged offence, though he has been detained in connection with this case and since 12.10.2022 he is in custody in connection with Badarpur P. S. Case No. 239/2022 registered under Sections 22c/25/29 of NDPS Act. He also submits that the petitioner also filed a bail application before this Court being numbered as Bail Application No.117/2023. But, during the course of hearing, the learned Additional Public Prosecutor has submitted that the case has already been charge-sheeted against the accused/petitioner. Accordingly, this Court pleased to close the bail application with a direction to approach before the learned Trial Court for regular bail. Thereafter, the learned Sessions Judge, Karimganj, vide order dated 03.06.2023 framed charge against the accused/petitioner under Sections 22c/25/29 of NDPS Act, and wherein, he was pleaded not guilty and claim to be tried.

5. He further submitted that the accused/petitioner has a Maruti IGNIS car and not Alto Car from where alleged contraband was recovered. Till date 2(two) witnesses namely Kamrul Islam/PW-1 and Nayan Das/PW-2 had been examined. Accordingly, the witnesses have revealed that they saw one Alto Car and 2(two) persons seating outside the car and from the car, the contraband were alleged to have recovered. Both the witnesses also recognized one

Islam Uddin, however, as per them; the present petitioner was not present in the place of occurrence.

6. Mr. Malakar, learned counsel for the petitioner also submits that on the day of the incident he was standing near the Maruti IGNIS car which has been seized in connection with this case. But, there is no evidence against the accused/petitioner that he is involved in the alleged offence, however, he has been arrested only on suspicion. He also submits that the case has already been charge-sheeted and 2(two) witnesses has already been examined and at present the accused/petitioner is behind the bar since last more than 1(one) year i.e. 12.10.2022. Hence, considering his length of detention, he may be release on bail.

7. In addition to his submission, Mr. Malakar, learned counsel for the petitioner has relies on the decision passed by the Co-ordinate Bench in *Bail Application No.2901/2023 dated 16.10.2023 [Hussain Ahmed vs. the State of Assam]* wherein, the said Bench had allowed the accused to go on bail considering the period of custody of 710 days and also considering the mandate of Article 21 of the Constitution of India.

8. He further relies on another decision rendered by the Co-ordinate Bench in Bail Application No. 2979/2023 dated 11.12.2023, wherein, also the accused was granted bail by considering the decision of the Hon'ble Apex Court passed in ***Rabi Prakash vs. State of Orissa, reported in 2023 SCC online SC 1109***, arising out of Special Leave to Appeal (Crl) No.4169/2023.

9. In support of his submission, Mr. Malakar, learned counsel for the petitioner also relies on another decision passed by the Honble Apex Court reported in ***2023 (0) Supreme (SC) 289 [Mohd Muslim @ Hussain vs. State (NCT of Delhi)]***, wherein, he relies on paragraph Nos. 22 and 23 of the said judgment, which read as under;

"22. The danger of unjust imprisonment, is that inmates are at risk of "prisonisation" a term described by the Kerala High Court in [A Convict Prisoner v. State21](#) as "a radical transformation" whereby the prisoner:

"loses his identity. He is known by a number. He loses personal possessions. He has no personal relationships. Psychological problems result from loss of freedom, status,

possessions, dignity any autonomy of personal life. The inmate culture of prison turns out to be dreadful. The prisoner becomes hostile by ordinary standards. Self-perception changes."

23. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal"22 (also see Donald Clemmer's 'The Prison Community' 20 National Crime Records Bureau, Prison Statistics in India https://ncrb.gov.in/sites/default/files/PSI-2021/Executive_ncrb_Summary-2021.pdf 21 1993 Cri LJ 3242 22 Working Papers - Group on Prisons & Borstals - 1966 U.K. published in 194023). Incarceration has further deleterious effects - where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily."

10. Accordingly, the learned counsel for the petitioner has prayed to enlarge the accused/petitioner on bail considering his period of incarceration. He also submits that the petitioner is a permanent resident of the address provided in the petition and he will appear on each and every date fix by the learned Trial Court.

11. In this context, Mr. Goswami, learned Additional Public Prosecutor has submitted that several incriminating materials has been collected by the IO against the accused/petitioner. Further, considering the *prima facie* material, the charge has been framed against the accused/petitioner. He also submits that if the accused/petitioner is allowed to go on bail only considering his length of detention or period of incarceration, the probability of absconding cannot be denied if the same is allowed. Further, he submits that considering the nature of offence which is of commercial quantity the rigor of Section 37 of NDPS Act will follow. Accordingly, he raised objection against the bail prayer filed by the accused/petitioner.

12. In support of his contention, the learned Additional Public Prosecutor relies on decision passed by the Hon'ble Apex Court reported in **(2022) 0 AIR (SC) 3444 [Narcotics Control Bureau vs. Mohit Agarwal]**, wherein, had made an observation in the context of Section 37 of the Act.

"10. The provisions of [Section 37](#) of the NDPS Act read as follows:

"[37. Offences to be cognizable and non-bailable.—(1) Notwithstanding anything contained in the [Code of Criminal Procedure](#), 1973 (2 of 1974) –

- (a) every offence punishable under this Act shall be cognizable;
- (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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the [Code of Criminal Procedure](#), 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.]

11. It is evident from a plain reading of the non-obstante clause inserted in sub-section (1) and the conditions imposed in sub-section (2) of [Section 37](#) that there are certain restrictions placed on the power of the Court when granting bail to a person accused of having committed an offence under the [NDPS Act](#). Not only are the limitations imposed under [Section 439](#) of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of [Section 37](#) are also to be factored in. The conditions imposed in sub- section (1) of [Section 37](#) is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused Criminal Appeal Nos. of 2022 @ Petitions for Special Leave to Appeal (Criminal) No. 6128-6129 OF 2021 person for release and (ii) if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail."

13. The learned Additional Public Prosecutor accordingly submitted that while granting bail in the case of commercial quantity, rigor of Section 37 of NDPS Act will apply. Thus, considering the nature of allegation he raised objection and submitted that it is not a fit case to grant bail to the accused/petitioner. More so, the probability of absconding of the accused/petitioner also cannot be denied at this stage. The trial is proceeded expeditiously

and two numbers of witnesses are already been examined and accordingly, he submits that it is not at all a fit case to allow the accused/petitioner to go on bail at this stage.

14. Considering the submissions made by the learned counsels for both sides and after perusing the LCR and evidence of the witnesses already recorded by the learned Special Judge, it is seen that there is an allegation of recovery of commercial quantity of the contraband 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."

15. 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.

16. Further, it is also seen that the accused/petitioner is behind the bar since 12.10.2022 and within this period the case has already been charge-sheeted, and two witnesses has already been examined. However, it cannot be denied that the accused/petitioner is behind the bar for a reasonable period, but, in the same time, it also cannot be denied that the case has been proceeded, trial has been commenced and two witnesses were already examined.

17. The judgment relied by the learned counsel for the petitioner passed in the case of ***Mohn Muslim @ Hussain (Supra)***, where, it has been seen that accused/petitioner was in custody for 7 years and 4 months and the trial has been at a snail's pace. However, considering the period the incarceration the bail was granted by the Hon'ble Apex Court. In the case of ***Rabi Prakash (Supra)***, the Hon'ble Apex Court had considered the period of detention which is more than 3 years and ½ years and considering the Article 21 of the Constitution of India, the bail was granted to the accused petitioner.

18. But, here in the instant case, it is seen that within a period of one year the case has been charge-sheeted and two witnesses has already been examined by the prosecution. Hence, only considering the length of incarceration, I do not find it a fit case to allow the accused/petitioner to go on bail. Further, 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..

19. Considering the submissions of the learned Counsels for both sides and also considering the materials available in the LCR 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 and the provision under Section 37 (1) (b) (ii) of the NDPS Act are not satisfied and accordingly, I am of the view that this is not a fit case where the privilege of bail can be extended to the accused/applicant at this stage and accordingly, the same stands rejected.

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

21. LCR be returned.

JUDGE

Comparing Assistant