

GAHC010040792024



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

Case No. : Bail Appln./599/2024

NANDA RAY
S/O LT. JAGJIBAN RAY, R/O BAHRAMPUR, PS AND PO RAGHAPUR,
DISTRICT BAISALI, BIHAR

VERSUS

THE STATE OF ASSAM
REP. BY PP ASSAM

Advocate for the Petitioner : MR. A DUTTA

Advocate for the Respondent : PP, ASSAM

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

28.06.2024

Heard Mr. A. 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 on 10.08.2023 in connection with NDPS Case No.44/2024, registered under Sections 20(b) (ii) (C) of NDPS Act, pending before the Court of learned Additional District & Sessions Judge No.-2, Kamrup (M), Guwahati.

3. The scanned copy of the LCR along with the Case Diary has already been received and I have perused the same.

4. It is submitted by Mr. Dutta, learned counsel for the petitioner that the accused/petitioner was arrested in connection with this case on 10.08.2023 and since then, he is behind the bar. It is further submitted that the charge was framed on 10.04.2024 and accordingly, the matter was fixed on 29.05.2024 for evidence, however, on the said date the PWs remained absent and the next date for evidence was fixed on 06.07.2024. He further submits that the petitioner was 78 years old when he got arrested in the year 2023 and presently he is 79 years old and hence, considering his old age as well as the length of detention he may be enlarged on bail. Upon perusal of the seizure list, it is seen that there were no independent witnesses at the time of seizure of the contraband. Thus, he submits that there is non-compliance of Section 42 (2) and 50 of NDPS Act and on non-compliance of those mandatory provisions the

accused/petitioner is entitled for bail.

5. In addition to his submission, Mr. Dutta, learned counsel for the petitioner relies on the decision passed by the Punjab & Haryana High Court in CRM-M-25498-2021 dated 14.06.2022 [***Pankaj vs. State of Punjab***] wherein, the said High Court had expressed the view that where there was a total non compliance of Section 42 of NDPS Act, the accused ought to have granted the concession of regular bail and it is also observed that a *prima facie* satisfaction can be recorded under Section 37 of the NDPS Act, if there is total non compliance of Section 42 of NDPS Act.

6. He also relies on the decision passed by the Orissa High Court passed in BLAPL No.2430 of 2021 decision on 14.10.2022 [***Raghu @ Rahul Rajput Thakur vs. State of Orissa***] wherein, it has been held that the total non compliance of mandatory provision of Sections 42 and 50 of NDPS Act can be considered while entertaining an application for bail. More so, the learned counsel for the petitioner relies on another decision passed by this Court reported in ***2018 (2) GLT 402 [Joginder Singh & Anr. vs. Union of India]***, passed in Criminal Appeal Case No.256 of 2014 & 16 of 2015 decided on 08.03.2018, and also relied on the decision of the Apex Court reported in ***AIR 2021 SUPREME COURT 1913 [Boota Singh & Ors. vs. State of Haryana]*** wherein, the Apex Court has observed that the accused is entitled for acquittal, if there is non compliance of Section 42 of NDPS Act.

7. Accordingly, he submitted that considering the entire aspect of the case as well as age of the accused/petitioner and the length of detention already undergone by the accused/petitioner, he may be enlarged on bail. Further it is submitted that the accused/petitioner is a permanent resident of his addressed

locality and there is no chance of absconding if the accused/petitioner is enlarged on bail, rather, he will appear before the learned Trial Court on each and every date fixed for the trial.

8. In this context, Mr. Baruah, learned Additional Public Prosecutor, has submitted that it was a chance recovery and the contraband was recovered from the possession of the accused/petitioner when the Railway Team had conducted the joint checking drive, wherein, the accused/petitioner was found with the possession of the suspected ganja and accordingly complying the required formalities those were seized from the possession of the accused/petitioner. He further submitted that it is not a case that the Railway authority had conducted the drive with prior information, but, it was a chance recovery and on observing all the formalities the contraband was seized. He further submitted that there is no total non compliance of Section 50 of NDPS Act as the IO has observed all the necessary formalities required at the time of seizure while producing the accused/petitioner before the concerned Magistrate. He further submitted that presently the case is at the stage of evidence and next date of evidence is fixed on 06.07.2024 and hence, there is probability of disposal of the case within a reasonable period. Further, he submitted that as the case was under the commercial quantity, the rigor of Section 37 has to be followed and he accordingly submitted that there is no reason to believe that the accused/petitioner is innocent and he is not involved in the alleged offence nor there can be any belief that he will not commit such kind of offence if he is enlarged on bail, which are mandatory requirement while dealing with a case of commercial in nature. Accordingly, he raised objection and submitted that it is not a fit case to allow the accused/petitioner to go on bail at this stage and apart from that the accused/petitioner belong to another State and hence the

possibility of absconding also cannot be denied at this stage.

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.

10. It is a fact that the present accused/petitioner, arrested in connection with this case on the allegation of recovery of commercial quantity of contraband from his conscious possession. From the record, it is seen that seizure was done in presence of the witnesses and that apart prayer was accordingly made for certification under Section 52 A of the NDPS Act and accordingly, the inventory was also prepared which were produced before the learned Magistrate for certification of the inventory which was accordingly done by the learned Magistrate and order for drawing the sample was also passed by the Magistrate concerned which were accordingly sent to FSL examination. Thus, it cannot be held that there was total non compliance of Sections 42 and 50 of NDPS Act for consideration of bail. However, detail discussion may be required at the time of final hearing of the case. But at present it is seen that there is a *prima facie* case against the accused/petitioner and this Court do not find any reason to belief that the accused/petitioner is innocent and he will not commit the same kind of offence. Further, it is a case of commercial quantity and hence, 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. 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 case has already been fixed for evidence after framing of the charge. 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. 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.

19. The bail application stands disposed of in terms above.

20. Returned the Case Diary.

JUDGE

Comparing Assistant