

GAHC010048862024



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

Case No. : Bail Appln./778/2024

AYESHA BEGUM
W/O ASAR UDDIN
R/O VILL- LAMA RATABARI, P.O. AND P.S. RATABARI,
DIST. KARIMGANJ, ASSAM,
PIN-788735

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 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 Ratabari P.S. Case No. 240/2023, under Section 21 (C) & 25 of the NDPS Act, 1985 and corresponding Special (NDPS) Case No. 135 of 2023, pending before the Court of learned Sessions Judge, Karimganj.

3. It is submitted by Mr. Sishir Dutta, learned Senior Counsel for the petitioner, that the accused/petitioner is innocent and she is no way involved in the alleged offence and the alleged contraband was not recovered from the conscious possession of the accused/petitioner. She belongs to a very poor family and is a house wife and totally dependent on her husband. From the F.I.R. itself, it is seen that on the spot verification, it revealed that on 10.10.2023 in the evening hours, one Kamrul Islam brought the suspected contraband, which was carried in a olive green colour bag and handed over the same to the petitioner's husband and the petitioner accordingly handed over the bag to the police personnel, though she was not aware about the contents of the same. She has been falsely implicated in the instant case and she is totally

unaware about the contents of the said bag. He further submitted that as per the forwarding report of the Investigating Agency, the accused confessed her guilty before the police, but as held by the Apex Court in the case of **Toofan Singh Vs. State of Tamil Nadu** that any confessional statement made before the officers empowered under the NDPS Act would be barred under the provisions of Section 25 of the Evidence Act and is inadmissible in evidence. Further it is submitted that although the Officer-In-Charge, Ratabari Police Station, recorded the said information vide Ratabari PS GDE No. 280, dated 11.10.2023, but the same cannot be treated as due compliance of Section 42(1) of the NDPS Act as before the search and seizure, the information has to be recorded in writing in a statement along with grounds for his believe 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 believe 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 11.10.2023, 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.

4. 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.

5. He also 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."

6. Mr. Dutta, learned Senior Counsel, further submitted that there is no compliance of Section 52 NDPS Act as per the Guideline of the Standing Order No. 1/89 of the Government of India and there is no specific mentioned as to how sampling was prepared while sending the same for FSL examination. As per the seizure list, 29 (twenty nine) numbers of soap boxes of various colours containing suspected heroin total weighing 992 gram were recovered and that apart, 3 (three) numbers of plastic packets with an adhesive tap and were kept concealed in one olive green colour school bag 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 Hon'ble Allahabad High Court passed in Criminal Misc. Bail Application No. 18303 of 2020.

7. 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.

8. He further submitted that she is a mother of infant child, aged about 1 years 6 months, and at present she is inside the jail premises along with her infant child and hence, considering the humanitarian ground also, she may be released on bail. Moreso, she was arrested in connection with this case on 12.10.2023 and since then, she is behind the bar and hence, considering her long incarceration period also, she may be released on bail 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.

9. In this context, Mr. Baruah, learned Additional Public Prosecutor, has submitted that there are sufficient incriminating materials collected by the I.O. at the time of filing the Charge-Sheet against the present accused/petitioner along with others and the recovery was made from the conscious possession of the accused/petitioner and the entire contraband was recovered from the house of her husband and from the statement of the witnesses recorded under Section 161 Cr.P.C., it also reveals that the accused/petitioner is involved in the alleged offence. The charge could not be framed by the learned Trial Court below as the other accused persons are yet to be arrested in connection with this case. More so, here in the instant case, it is seen that the written authorization was issued to the seizing officer and thus, there is a total compliance of Section 42 NDPS Act. More so, the Investigating Officer also complied with Section 52 of the NDPS Act while sampling and sending the samples for FSL examination. Accordingly, he 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.

10. 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 record.

11. It is a fact that the present accused/petitioner, along with others, were

arrested in connection with this case on the allegation of recovery of commercial quantity of the contrabands from their conscious possession and accordingly, in the present case, rigor of Section 37 NDPS Act will follow.

12. 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."

13. 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 she is not likely to commit any offence while on bail as per Section 37 (1) (b) of NDPS Act.

14. Coming to the compliance of Section 42 & 52 of the NDPS Act, it is seen that the search and seizure had to be made by authorised officer and in the instant case, it is seen that the written authorization was issued to the seizing officer.

15. From the statement narrated in the F.I.R., it is seen that after getting the information, the team of Ratabari Police searched the house of the accused- Asar Uddin (husband of the present petitioner) by making G.D. Entry No. 280, dated 11.10.2023 and accordingly, it can be considered that there was a compliance of Section 42 NDPS Act.

16. 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."

17. Further, from the submissions made by the learned counsels for both sides, it is seen that the trial could not be commenced as some of the co-accused are yet to be arrested in connection with this case.

18. 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.

19. 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.

20. 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."

21. 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.

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

JUDGE

Comparing Assistant