

GAHC010028122024



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

Case No. : Bail Appln./460/2024

ISLAM UDDIN
S/O MUSABBIR ALI
VILL- DEORAIL
P.S. BADARPUR
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR H R CHOUDHURY, S. TALUKDAR, A S PRODHANI

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 16.09.2024

Heard Mr. H. R. Choudhury, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State respondent.

2. This an application under Section 439 of the Code of Criminal Procedure praying for grant of bail to the accused/petitioner, who has been arrested in connection with Special NDPS Case No. 148/2022 (arising out of Badarpur P.S. Case No. 239/2022), under Section 22(C)/25/29 of the NDPS Act, 1985.

3. Scanned copy of the case record has been received. Perused the same. Heard both sides.

4. It is submitted by Mr. Choudhury, learned counsel for the petitioner, that the present accused/petitioner is innocent and he is no way involved in the alleged offence and without any materials against him, the charge-sheet has been filed in this case and since more than 1 year 11 months, he is in custody. More so, the charge-sheet was filed on 27.12.2022, but till date, only 3 (three) prosecution witnesses could be examined out of 11 numbers of witnesses by the learned Trial Court below and the last witness was examined only on 11.08.2023 and thus, even after lapse of 1 year, no other prosecution witnesses could be examined by the learned Court below.

5. Mr. Choudhury further submitted that there is total non-compliance of Section 42(1) of the NDPS Act and the search and seizure was made after the sunset. Apart from that, the witnesses, i.e. PWs-1 & 2, who have already been examined by the prosecution, are the seizure witnesses and these 2 (two) witnesses also did not support the prosecution case and as per them, the accused persons were standing outside the vehicle and nobody was seen inside the vehicle and thus, there is no evidence that the recovery was made from the

conscious possession of the accused/petitioner.

6. To substantiate his plea, Mr. Choudhury, learned counsel for the petitioner, relied on the following decisions:

- (i) Boota Singh Vs. The State of Haryana [Criminal Appeal No. 421 of 2021, decided on 16.04.2021]**
- (ii) Sarija Banu (A) Janarthani @ Jahai Vs. State through Inspector of Police [(2004) 12 SCC 266]**
- (iii) Nitish Adhikary @ Bapon Vs. The State of West Bengal [2022 SCC OnLine SC 2068]**
- (iv) Mohammad Salman Hanif Shaikh Vs. The State of Gujarat**
- (v) Rabi Prakash Vs. The State of Odisha [2023 Live Law (SC) 533]**
- (vi) Mohd Muslim @ Hussain Vs. The State (NCT of Delhi) [2023 Live Law (SC) 260]**
- (vii) Shariful Islam @ Sarif Vs. the State of West Bengal [Special leave to Appeal (Crl.) No. 4173/2022]**

7. In the case of **Nitish Adhikary** (supra), the Hon'ble Apex Court granted bail to the accused, who was facing trial for accusation under Section 21(C) of NDPS Act, on the ground of incarceration of 1 (one) year 7 months.

8. Further, in the case of **Rabi Prakash** (supra), the Apex Court has

observed that “*the prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act.*”

9. In the case of **Shariful Islam** (supra) also, the Hon’ble Apex Court granted bail to the accused on the ground of prolong incarceration who was arrested for the possession of commercial quantity of the contraband.

10. Again in the case of **Mohd Muslim** (supra), the bail was granted to the accused considering the long period of incarceration.

11. Same view has been expressed by the Hon’ble Supreme Court in the case of **Mohammad Salman Hanif Shaikh** (supra).

12. Further, in the case of **Sarija Banu (A) Janarthani** (supra), the Hon’ble Apex Court has observed that the compliance of Section 42 NDPS Act is mandatory and that is a relevant which should have engaged attention of the Court while considering the bail application.

13. In the case of **Boota Singh** (supra), it has been held by the Hon’ble Apex Court that total non-compliance of Section 42 NDPS Act is impermissible. However, the said judgment was passed while disposing an appeal and not at the stage of considering the bail application.

14. Accordingly, Mr. Choudhury has submitted that considering the delay in

disposal of this case, viz-a-viz non-compliance of Section 42 of NDPS Act, and also considering the evidence of PWs- 1 & 2, who did not support the prosecution case, the accused/petitioner is entitled to bail. He being a permanent resident of his addressed locality, there is no chance of absconding and will regularly appear before the learned Trial Court as and when the date is fixed.

15. On the other hand, it is submitted by Mr. Baishya, learned Additional Public Prosecutor, that the compliance of Section 42 NDPS Act in the present case does not arise as the search and seizure was made in a public place while at the time of Naka checking. He further submitted that out of 11 (eleven) numbers of witnesses, 3 (three) witnesses have already been examined and the next date is fixed on 19.09.2024 for recording of evidences of PWs. Further he submitted that the PWs, who were already examined by the prosecution, brought several incriminating materials against the present accused/petitioner and he is also properly identified by the PWs. Mr. Baishya further submitted that the charge-sheet was filed on 27.12.2022 and the charge was accordingly framed on 03.06.2023 and thereafter the case was fixed for evidence. However, on 2 (two) occasions, due to some inconvenience on the part of the Court, the evidence of PWs could not be recorded and on one occasion, the defence took adjournment while 2 (two) PWs were present for adducing evidence. He further submitted that the necessary direction may be given to the learned Special Judge to expedite the trial of the case, but only on the period of incarceration, the accused/ petitioner may not be released on bail as the probability of absconding by the present accused/petitioner cannot be denied at this stage. Accordingly, Mr. Baishya raised objection in allowing the accused/petitioner to go on bail.

16. Mr. Baishya, learned Additional Public Prosecutor, further relied on the decision of Hon'ble Apex Court passed in **State of Haryana Vs. Jarnail Singh & Ors. [(2004) 5 SCC 188]**, wherein the provision of Section 42 & 43 NDPS Act has been discussed. He basically emphasized on paragraph Nos. 7, 8, 9, 10 & 11 of the said judgment.

17. After hearing the submissions made by the learned counsels for both sides, I have also perused the case records and the judgments cited by the learned counsels.

18. It is seen that the present petition has been filed basically praying for bail of the petitioner on the ground of long period of incarceration, delay in trial and non-compliance of Section 42 NDPS Act. It is also submitted by the learned counsel for the petitioner that there is no evidence against the present accused/petitioner in the testimonies of PWs-1 & 2, which are also doubtful and not convincing.

19. On the other hand, it is the case of the State respondent that 3 (three) witnesses have already been examined by the prosecution who have directly implicated the involvement of the present accused/petitioner in the present case. It is also stated that the other PWs had also appeared before the learned Trial Court, but due to some inconvenience on 2 (two) occasions, the PWs could not be examined and on one occasion, the defence also took adjournment in spite of presence of witnesses.

20. 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.

21. 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."

22. 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.

23. Coming to the compliance of Section 42 NDPS Act, it is seen that the seizure was made from a car in a public place and thus, it cannot be held that there was total non-compliance of Section 42 NDPS Act to consider the bail

application of the present accused/petitioner at this stage. From the evidence of the PWs., it is also seen that the contraband was seized in their presence and they also identified the accused/petitioner and as per them, the entire contraband was recovered from the car of the accused/petitioner.

24. Thus, it cannot be held that the accused/petitioner is not guilty of such offence and/or not likely to commit the offence to consider his bail application wherein the case has already been charge-sheeted and trial has already been commenced.

25. Further, as per the view of the Hon'ble 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 Hon'ble 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."*

26. The Hon'ble 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.

27. In the case of **Rajesh Ranjan [(2004) 7 SCC 528]**, the Hon'ble 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.

28. Further, in the case of **Pramod Kumar Saxena vs. Union of India & Anr.**, the Hon'ble 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 Hon'ble 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."

29. In view of the discussion made above and also considering the entire facts and circumstances of this case, nature and gravity of the offence and further considering the view expressed by the Hon'ble 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 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. However, the learned Special Judge (NDPS), Karbi Anglong, is hereby directed to expedite the trial and to examine the remaining PWs and dispose of the matter as early as possible preferably within

6 (six) months from today.

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

JUDGE

Comparing Assistant