

GAHC010045262023



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

Case No. : Bail Appln./756/2023

MUSADDIK HUSSAIN
S/O LATE AYUB ALI
R/O SAHARIAPAM
P.S. MOIRABARI
DIST. MORIGAON, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

03.08.2023

1. Heard Mr. A. Ahmed, learned counsel for the petitioner as well as Mr. D. Das, learned Additional Public Prosecutor representing the State of Assam.

2. This bail application has been preferred under Section 439 of Code of Criminal Procedure, 1973, praying for bail of petitioner, namely, Musaddik Hussain, who has been detained behind the bar since 12.09.2022 (325 days) in connection with Sessions (Special) Case No. 04/2023 arising out of Moirabari P. S. Case No. 156/2022 under section 120(B)/201/121/121(A) of the Indian Penal Code read with Section 17/19/20/21/39/40 of the Unlawful Activities (Prevention) Act, 1967, which is pending before the Court of learned Sessions Judge, Morigaon.

3. The accusation in this case is that on 27.07.2022, one Sri Jitendra Basumatary, SI of Police of Moirabari Police Station lodged an FIR before the Officer-in-Charge of Moirabari Police Station, inter alia, alleging that on the basis of specific information it was reliably learnt that a person, namely, Mustafa @ Mufti Mustafa, S/o Rustom Ali of Village- Saharia Gaon, Ward No. 6 under Moirabari Police Station was acting an important financial conduit of the recently busted Ansarullah Bangla Team (ABT) module in India. It is also alleged that the ABT is linked to Al Qaida in Indian Subcontinent (AQIS) which is a Terrorist Organization as per the Unlawful Activities (Prevention) Act, 1967. It is also alleged in the FIR that the accused runs a Madrassa at Saharia Gaon and he had several financial transactions linked with arrested ABT members and leaders for past several years. It is also alleged in the FIR that the accused Mustafa @ Mufti Mustafa is associated with the "*Saruchala-Al-Jamiatush Shalihat Madrassatul Bannat Saruchala*" and it is believed that both the places were used for carrying out activities of

the ABT module. It was also alleged that the said accused had provided shelter and harboured absconding members of the ABT module in India. The said accused is stated, in the FIR, to be an active member of the ABT in India and has been actively raising funds for carrying out the unlawful activities of ABT. It is also alleged that the activity of the Madrasa are being funded through the proceeds of unlawful activities and it is further stated in the FIR that there are reasonable cause to suspect that the money raised by the accused is being used for the purpose of terrorism.

4. On receipt of the said FIR, Moirabari P.S. Case No. 156/2022 was registered and investigation was initiated. During the course of investigation, the present petitioner was arrested and the allegation against the present petitioner is that he had participated in the training program organized by the main accused, Mustafa Mufti for carrying out Jihadi activities for the purpose of ABT Module at Milanpur in the house of one Moromi Begum near Noor Masjid for 3-4 days in the year 2020-21. It is also stated that they had frequently visited Jamiul Huda Madrasa at Sahariagaon run by the accused Mustafa and met with another members many a times. It is also alleged that the present petitioner is a supporter of the Madrasa run by main accused person Mustafa and also of ABT module in Assam.

5. On 21.03.2023, the Investigating Officer had laid the charge-sheet against the 9(nine) Nos. of accused persons including the present petitioner before the Court of Sessions Judge, Morigaon. The charge-

sheet was filed against the present petitioner under Section 18/20/38/39 of the Unlawful Activities (Prevention) Act, 1967 under Section 120 (B) of the Indian Penal Code and the Sessions (Special) Case No. 04/2023 is pending before the Court of learned Sessions Judge, Morigaon where charges are yet to be framed.

6. It appears that by order dated 21.07.2023 passed in the instant case, learned Sessions Judge, Morigaon was requested to send the up-to-date status report of Sessions (Special) Case No. 04/2023, however, it appears that instead of sending the status report, learned Sessions Judge, Morigaon has sent the original case of this Court, which was not called for by this Court and sending the original record has unnecessarily caused further delay in proceeding pending before learned Sessions Judge, Morigaon. Hence, send back the original case record of Sessions (Special) Case No. 04/2023 to the Court of learned Sessions Judge, Morigaon, immediately.

7. Learned counsel for petitioner submits that the present petitioner has been falsely implicated in the instant case. He submits that even if the allegation that the present petitioner is a supporter of ABT module in Assam is assumed to be true, there is still nothing to show that they have committed any offence under Unlawful Activities (Prevention) Act, 1967 in this regard as the ABT Module in India is not a terrorist organization mentioned in the First Schedule to the Unlawful Activities (Prevention) Act, 1967.

8. It is also submitted by learned counsel for the petitioner that the main accused named in the FIR namely, Mustafa @ Mufti Mustafa was an Imam of Sahariapam, Abu Bakkar Masjid at Saharia Gaon, Morigoan from January' 2021 to May' 2021 and as the said Masjid was situated near the residence of the present petitioner, the main accused was known to the persons of the said locality including the present petitioner and he does not have any other kind of relation with the main accused, namely, Mustafa Mufti.

9. It is also submitted by the learned counsel for the petitioner that no incriminating material has been seized from the possession of the present petitioner except his Vivo Mobile handset bearing no. 70023476618. It is also submitted that as the main accused namely, Mustafa Mufti was an Imam of a Masjid situated near the house of the present petitioner, he was known to him and merely because the call data records collected by the Investigating Officer shows that there was telephonic conversation from the mobile phone of present petitioner and the main accused without there being anything to show the content of such conversation, no offence as alleged against the present petitioner has been committed by the present petitioner.

10. Learned counsel for the petitioner submits that there is no credible material on record from which it may be shown that the allegation made against the present petitioner under section 18 of the Unlawful Activities (Prevention) Act, 1967 is prima facie true. Similarly, it is also submitted that as there is no credible material on record to show

that the present petitioner is a member of Ansarullah Bangla Team (ABT) module in India or that ABT is a terrorist organization or a terrorist gang in India, and that the petitioner has intentionally supported any terrorist organization to further the activities of such terrorist organization, the allegation against him under Section 20, 38 and 39 of Unlawful Activities (Prevention) Act, 1967 are prima facie not true.

11. Learned counsel for the petitioner has cited a ruling of Hon'ble Supreme Court of India in ***Thwaha Fasal and others Vs. Union of India*** and others reported in ***2021 SCC OnLine SC 1000***, wherein the Hon'ble Supreme Court of India has observed as follows:

"19. Now, we come to the provision in the 1967 Act regarding the grant of bail. Sub-section (5) of Section 43D is relevant which reads thus:

"(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true."

(emphasis added)

20. The stringent conditions for grant of bail in sub-

section (5) of Section 43D will apply only to the offences punishable only under Chapters IV and VI of the 1967 Act. The offence punishable under Section 13 being a part of Chapter III will not be covered by sub-section (5) of Section 43D and therefore, it will be governed by the normal provisions for grant of bail under the Criminal Procedure Code, 1973. The proviso imposes embargo on grant of bail to the accused against whom any of the offences under Chapter IV and VI have been alleged. The embargo will apply when after perusing charge sheet, the Court is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Thus, if after perusing the charge sheet, if the Court is unable to draw such a prima facie conclusion, the embargo created by the proviso will not apply.

21. *In the case of Watali (supra), this Court has extensively dealt with sub-section (5) of Section 43D of the 1967 Act and has also laid down the guidelines for dealing with bail petitions to which sub-section (5) of Section 43D is applicable. In paragraph 23, this Court considered the difference in the language used by Section 37 of the NDPS Act governing grant of bail and sub-section (5) of Section 43D of the 1967 Act. Paragraph 23 of the said decision reads thus:—*

23. *By virtue of the proviso to sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against the accused is prima facie true or otherwise. Our attention was invited to the decisions of this Court, which has had an occasion to deal with similar special provisions in TADA and MCOCA. The principle underlying those decisions may have some bearing while considering the prayer for bail in relation to the offences under the 1967 Act as*

well. Notably, under the special enactments such as TADA, MCOCA and the Narcotic Drugs and Psychotropic Substances Act, 1985, the Court is required to record its opinion that there are reasonable grounds for believing that the accused is "not guilty" of the alleged offence. There is a degree of difference between the satisfaction to be recorded by the Court that there are reasonable grounds for believing that the accused is "not guilty" of such offence and the satisfaction to be recorded for the purposes of the 1967 Act that there are reasonable grounds for believing that the accusation against such person is "prima facie" true. By its very nature, the expression "prima facie true" would mean that the materials/evidence collated by the investigating agency in reference to the accusation against the accused concerned in the first information report, must prevail until contradicted and overcome or disproved by other evidence, and on the face of it, shows the complicity of such accused in the commission of the stated offence. It must be good and sufficient on its face to establish a given fact or the chain of facts constituting the stated offence, unless rebutted or contradicted. In one sense, the degree of satisfaction is lighter when the Court has to opine that the accusation is "prima facie true", as compared to the opinion of the accused "not guilty" of such offence as required under the other special enactments. In any case, the degree of satisfaction to be recorded by the Court for opining that there are reasonable grounds for believing that the accusation against the accused is prima facie true, is lighter than the degree of satisfaction to be recorded for considering a discharge application or framing

of charges in relation to offences under the 1967 Act."

(emphasis added)

22. After considering the law laid down by this Court in various decisions including the decision in the case of *Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra*⁷, in paragraphs 24 and 25 it was held thus:—

"24. A priori, the exercise to be undertaken by the Court at this stage-of giving reasons for grant or non-grant of bail-is markedly different from discussing merits or demerits of the evidence. The elaborate examination or dissection of the evidence is not required to be done at this stage. **The Court is merely expected to record a finding on the basis of broad probabilities regarding the involvement of the accused in the commission of the stated offence or otherwise.**

25. From the analysis of the impugned judgment, it appears to us that the High Court has ventured into an area of examining the merits and demerits of the evidence. For, it noted that the evidence in the form of statements of witnesses under Section 161 are not admissible. Further, the documents pressed into service by the investigating agency were not admissible in evidence. It also noted that it was unlikely that the document had been recovered from the residence of Ghulam Mohammad Bhatt till 16-8-2017 (para 61 of the impugned judgment). Similarly, the approach of the High Court in completely discarding the statements of the protected witnesses recorded Under Section 164 CrPC, on the specious ground that the same was kept in a sealed cover and was not even perused by the Designated Court and also because reference to such statements having been recorded was not found in the charge-sheet already filed against the respondent is, in our

*opinion, in complete disregard of **the duty of the Court to record its opinion that the accusation made against the accused concerned is prima facie true or otherwise. That opinion must be reached by the Court not only in reference to the accusation in the FIR but also in reference to the contents of the case diary and including the charge-sheet (report under Section 173 CrPC) and other material gathered by the investigating agency during investigation.***"

(emphasis added)

23. *Therefore, while deciding a bail petition filed by an accused against whom offences under Chapters IV and VI of the 1967 Act have been alleged, the Court has to consider whether there are reasonable grounds for believing that the accusation against the accused is prima facie true. If the Court is satisfied after examining the material on record that there are no reasonable grounds for believing that the accusation against the accused is prima facie true, then the accused is entitled to bail. Thus, the scope of inquiry is to decide whether prima facie material is available against the accused of commission of the offences alleged under Chapters IV and VI. The grounds for believing that the accusation against the accused is prima facie true must be reasonable grounds. However, the Court while examining the issue of prima facie case as required by sub-section (5) of Section 43D is not expected to hold a mini trial. The Court is not supposed to examine the merits and demerits of the evidence. If a charge sheet is already filed, the Court has to examine the material forming a part of charge sheet for deciding the issue whether there are reasonable grounds for believing that the accusation against such a person is prima facie true. While doing so, the Court has to take the material in the charge sheet as it is."*

12. Learned counsel for the petitioner thus submits that the material on record against the present petitioner are not sufficient to come to a finding that the accusation against him of committing offence under Section 18, 20, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 are prima facie true and hence, he is entitled to bail.

13. On the other hand, learned Additional Public Prosecutor has placed the case record of Sessions (Special) Case No. 04/2023 and the scanned copy of case diary of Moirabari P. S. Case No. 156/2022 and has submitted that there are incriminating material against the present petitioner, which attracts the embargo of Section 43 D (5) of the Unlawful Activities (Prevention) Act, 1967 and hence, has opposed the grant of bail to the present petitioner.

14. I have considered the submissions made by learned counsel for both the parties and have perused the materials on record including the case diary as well as charge-sheet laid under Section 173 of the Code of Criminal Procedure, 1973.

15. It appears that only one vivo mobile handset with mobile no. 7002347618 was seized from the present petitioner and the CDR analysis of said mobile no. had revealed that he was in touch with the main accused Mustafa Mufti since long. However, there is nothing to show the nature of conversation between Mustafa Mufti and the present petitioner to show that he conspired or attempted to commit or advocated, abetted, advised, incited directly or knowingly facilitated

commission of any terrorist act as defined under Section 15 of the Unlawful Activities (Prevention) Act, 1967, so as to believe that the accusation against him under Section 18 of the Unlawful Activities (Prevention) Act, 1967 are prima facie true. Moreover, the other incriminating materials available on record against the present petitioner including the testimony of witnesses where it has been stated by the said witnesses that the present petitioner attended training program on radicalization organized by the main accused Mustafa Mufti where the leaders of ABT were also invited. It is also alleged that the present petitioner frequented the Madrasa of the main accused on many occasions and the main accused had indoctrinated him on Jihadi thoughts.

16. On consideration of materials available in record, this Court is of considered view that mere attending the meetings organized by the main accused namely, Mustafa Mufti would in itself not constitute the offence alleged against the present petitioner. The Ansarullah Bangla Team is not a terrorist organization specified in the First Schedule to the Unlawful Activities (Prevention) Act, 1967 and there is no material to show that the present petitioner had any links with Al Qaeda in Indian Sub-continent (AIQS). There is no materials on record to show that the present petitioner is a member of a terrorist organization as defined under Section 2(m) of Unlawful Activities (Prevention) Act, 1967. Similarly *there is no materials on record to show that present petitioner has been involved in the offence under Section 39 of the Unlawful Activities (Prevention) Act, 1967 relating to support given to a terrorist*

*organization so as to believe that the accusation against him under Section 39 of the Unlawful Activities (Prevention) Act, 1967 may be prima facie believed to be true. Hon'ble Apex Court has observed in **Thwaha Fasal and others Vs. Union of India (Supra)**, that the materials/evidence collected by Investigating Officer against the accused in reference to the accusation made against him must be good and sufficient on its face to establish a given fact or chain of facts constituting the state of offence, unless rebutted or contradicted. However, on consideration of the materials available in the case diary as well as in the charge-sheet against the present petitioner, this Court is unable to form an opinion that there are reasonable grounds for believing that the accusation against the present petitioner for commission of offence under Section 18, 20, 38 and 39 of the Unlawful Activities (Prevention) Act, 1967 are prima facie true. Hence, the embargo on the grant of bail to the present petitioner under proviso to Section 43 D (5) of the Unlawful Activities (Prevention) Act, 1967 will not apply in this case.*

17. In view of above discussion and considering the fact that the present petitioner has already been detained behind the bar since 325 days and that he is also a permanent resident of Saharia Gaon under Moirabari Police Station, this Court is of considered opinion that his further custodial detention does not appear to be necessary for fair completion of trial in Sessions (Special) Case No. 04/2023, if he co-operates in his trial. Hence, the petitioner, namely, Musaddik Hussain is allowed to be released on bail of Rs. 50,000/- (Rupees Fifty Thousand

Only) with two sureties of like amount to the satisfaction of learned Sessions Judge, Morigaon subject to following conditions that:

- i. That the petitioner shall co-operate in his trial in Sessions (Special) Case No. 04/2023 in the Court of learned Sessions Judge, Morigaon and shall appear before the said Court as and when so required by the learned Trial Court.
- ii. That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts before the Trial Court.
- iii. During pendency of the Trial of Sessions (Special) Case No. 04/2023, the petitioner shall not leave the State of Assam, without prior permission of learned Sessions Judge, Morigaon.

18. It is hereby made clear that the observations made herein above by this Court has been made only for the purpose of consideration of the instant bail application and same shall have no bearing on the trial court to independently assess the material available on record during consideration of charges against the present petitioners or during any other stage of trial of Sessions (Special) Case No. 04/2023.

19. With above observations, the instant bail application is disposed of.

20. Registry to send back the original case record of Sessions

(Special) Case No. 04/2023 to the Court of learned Sessions Judge,
Morigaon, immediately.

JUDGE

Comparing Assistant