

GAHC010143882023



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

Case No. : Bail Appln./2316/2023

LUTFUR RAHMAN @ TIPU
S/O AZIR UDDIN
R/O SOUTH KACHUBARI
P.S. PATHARKANDI
DIST. KARIMGANJ, 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 : MR. D. DAS(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

17.08.2023

1. Heard Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. D. Das, learned Additional Public Prosecutor appearing for the State of Assam.

2. This application under Section 439 of the Code of Criminal Procedure, 1973 has been filed for bail of the petitioner, namely, Lutfur Rahman @ Tipu, who has been detained behind the bars, since 10.04.2023 (129 days) in connection with Patharkandi P.S. Case No. 124/2023 under Sections 22(c)/25/29 of the NDPS Act, 1985.

3. The accusation in this case was that on 09.04.2023, one Smti. Gayatri Phukan, S.I. of Police lodged an FIR before Officer-in-Charge of Patharkandi Police Station, *inter-alia*, alleging that at about 12:30 A.M., a secret information was received from reliable sources by the Officer-in-Charge of Patharkandi Police Station to the effect that the present petitioner, namely, Lutfur Rahman @ Tipu was dealing with narcotic drugs and psychotropic substances from his house and after receiving the said information a search operation was arranged and the first informant accompanied with the police party of Patharkandi Police Station along with personnel of Central Reserve Police Force went to the house of present petitioner and cordoned off the house and conducted the search operation. During search operation 7(seven) cartons containing 840 numbers of bottles of maleate and codeine phosphate cough linctus, cossex cough syrup were found. Further, 852 numbers of bottles of cossex cough syrup were also found in the house of the present petitioner. The entire operation was video-graphed and was completed at 5:00 A.M., and at about 5:30 A.M. the seized articles were brought to the Patharkandi Police Station and deposited in the Malkhana of the said Police Station. On receipt of the said FIR, Patharkandi P.S. Case No. 124/2023 has been registered.

4. Learned senior counsel for the petitioner submits that there is a gross violation of provision of Section 42 of the NDPS Act, 1985 in conducting the search and seizure operation, after sunset, in the instant case.

5. It is submitted by learned senior counsel that actual facts of this case is that the petitioner was sleeping in his house on the alleged day of occurrence at night and at about 1:00 A.M., the informant along with the police and CRPF personnel entered into the house without complying with Section 42 of the NDPS Act, 1985 and they also brought some cartons along with them and put the same in the house of the petitioner.

6. It is stated by the learned senior counsel for the petitioner that the police had framed the present petitioner in the instant case falsely at the instigation of some rivals of the present petitioner who belong to the same village.

7. Learned senior counsel submitted that mere perusal of the FIR as well as forwarding report shows that the search operation was started after 12:30 A.M at night and it was finished by 5:00 A.M. in the morning, hence, the search operation was conducted in between sunset and sunrise. However, there no reasons have been stated anywhere as required under 2nd Proviso to Section 42 (1) of the NDPS Act, 1985.

8. Learned senior counsel for the petitioner also submitted that compliance of Section 42 of the NDPS Act, 1985 is mandatory and its non-compliance is a relevant fact while considering a bail application.

9. Learned senior counsel for the petitioner has relied upon a ruling of Hon'ble Supreme Court of India in "***Sarija Banu and Another Vs. State Through Inspector of Police***", reported in ***(2004) 12 SCC 266***, wherein, Hon'ble Supreme Court has observed that "***the compliance with Section 42 is mandatory and that is a relevant fact which should have engaged the attention of the Court while considering the bail application***". On

that ground, Hon'ble Apex Court ultimately granted bail to the petitioner who was facing an accusation under Section 20(b)(ii)(C) of the NDPS Act, 1985.

10. On the other hand, learned Additional Public Prosecutor has submitted that the quantity of contraband seized in this case is of commercial quantity and the Investigating Officer has complied with all the procedural requirement as mandated by the NDPS Act, 1985. He has also placed the scanned copy of the case diary of Patharkandi P.S. Case No. 124/2023 before this Court.

11. I have considered the submissions made by learned counsel for both the sides and have perused the materials placed on record. The provision of 2nd Proviso to Section 42 (1) of the NDPS Act, 1985 is quoted herein below:

"Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief."

12. Though, from the materials available before this Court, it appears that search and seizure operation in this case was conducted in between 12.30 AM to 5.00 AM, i.e. after sunset and before sunrise, however, learned Additional Public Prosecutor has failed to show that the mandatory provision of recording reasons when the search and seizure is conducted after sunset and before sunrise has been followed in this case. Moreover, on perusal of the scanned copy of the case diary, in the instant case, no such grounds, as required under 2nd Proviso to Section 42 (1) is found to be recorded anywhere, in writing, which had necessitated such a search operation in between sunset and sunrise,

which in the considered opinion of this Court is a clear violation of the mandatory provision of 2nd Proviso to Section 42 (1) of the NDPS Act, 1985 and due to such non-compliance of mandatory provision and in view of the ruling of the Hon'ble Supreme Court of India in ***Sarija Banu (supra)***, the petitioner is entitled to get the benefit of bail and the embargo of Section 37 of the NDPS Act, 1985 would not be applicable in the instant case.

13. In view of above, the petitioner, namely, Lutfur Rahman @ Tipu, is hereby allowed to be released on bail of Rs. 50,000/- with two sureties of like amount to the satisfaction of learned Special Judge, Karimganj with following conditions:-

(i) That the petitioner shall co-operate with the Investigating Officer of Patharkandi P.S. Case No. 124/2023 and shall appear before the Investigating Officer once in every week till the completion of the investigation of the said case;

(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 or her from disclosing such facts to the Investigating Officer or to any Court;

(iii) That the petitioner shall not leave the jurisdiction of Karimganj District without prior permission of the learned Special Judge, Karimganj and intimation to the Investigating Officer of Patarkandi P.S. Case No. 124/2023; and

(iv) That the petitioner shall not indulge in any similar offence with which he has been accused in the instant case.

14. It is, however, made clear that the observation made here are

made only for the purpose of consideration of instant bail application and it shall have no bearing upon any decision which may be required to be taken by learned Trial Court, at any stage, during trial, in the event any charge-sheet is laid against the present petitioner.

15. With the above observation, this instant bail application is hereby disposed of.

JUDGE

Comparing Assistant