

GAHC010152572023



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

Case No. : Bail Appln./2442/2023

FARID UDDIN @ FORID UDDIN
S/O MD. NISAR ALI
VILL- KEUTI, P.O. ASHALKANDI
P.S. PATHARKANDI, DIST. KARIMGANJ, ASSAM, INDIA, PIN NO. 788723

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

Date : 21.12.2023

- 1.** Heard Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. J.M. Suleiman, learned counsel for the petitioner. Also heard Mr. D. Das, learned Additional Public Prosecutor, Assam.
- 2.** This application under Section 439 of the Code of Criminal Procedure,

1973 has been filed by the petitioner, namely, Farid Uddin @ Forid Uddin, who has been detained behind the bars since 20.09.2022 (for last 1 year and 3 months) in connection with Special (NDPS) Case No.141/2022 corresponding to Karimganj P.S. Case No.235/2022.

3. The gist of accusation in this case is that on 19.09.2022, one SI Rajpratap Singh of Patharkandi Police Station had lodged an FIR before the Officer-In-Charge of Patharkandi Police Station, *inter-alia*, alleging that on receipt of an information through reliable sources that one Forid Uddin, i.e., the present petitioner, has concealed narcotic drugs in his house located at Keuti, a search operation was conducted in the house of the present petitioner and 332 gram of suspected Heroin as well as 2.177 kg of yellow coloured suspected yaba tablets containing methamphetamine were seized therefrom.

4. It appears from the FIR that the said search operation was conducted during night time and it was completed at 3:15 A.M. on the said date.

5. Learned counsel for the petitioner has submitted that in this case there has been total non-compliance of the mandatory procedures prescribed under Section 42 of the NDPS Act, 1985. Learned counsel for the petitioner has submitted that there is non-compliance of Section 42(1) of the NDPS Act, 1985, wherein it has been mandated that after receipt of an information and after taking down the same in writing as provided under Section 42(1) of the NDPS Act, 1985 or after recording grounds of belief under proviso to the said Section, the person recording such information in writing shall have to send a copy thereof to his immediate superior official within 72 hours. However, in the instant case, it is submitted by learned senior counsel for the petitioner that there is no material on record to show that the said mandatory requirement was complied with by the Investigating Officer.

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

7. Learned senior counsel for the petitioner has cited a ruling of the Supreme Court of India in "***Sarija Banu and Another Vs. State Through Inspector of Police***", reported in **(2004) 12 SCC 266**, wherein, the 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.

8. On the other hand, learned Additional Public Prosecutor has submitted that the quantity of contrabands seized in this case is of commercial quantity and it is further submitted that the Investigating Officer has complied with all the mandatory procedural requirements as mandated under the NDPS Act, 1985. He has also placed the scanned copy of case record of Special (NDPS) Case No.141/2022 along with the scanned copy of the case diary of Karimganj P.S. Case No.235/2022 before this Court which was called for in connection with this case.

9. I have considered these submissions made by learned counsel for both sides and have perused the materials available on record, including the scanned copy of the case record of Special (NDPS) Case No.141/2022 as well as scanned copy of the case diary of Karimganj P.S. Case No.235/2022.

10. In case of a search conducted after sunset and before sunrise, the second proviso to section 42(1) of the NDPS Act, 1985 provides as herein as herein below:

“provided further that if such officer has reasons to believe that such warrant or authorization cannot be obtained without affording opportunity for the offender without affording opportunity for the concealment of evidence or facility for escape of an offender, he may enter and search such building, conveyance or enclosed place at all time between sunsets and sunrise, after recording the grounds for his belief.

11. In the instant case, the available material on record shows that the search and seizure operation was conducted after sunset and before sunrise. However, the learned Additional Public Prosecutor has failed to show that the mandatory provision of recording reasons when such search and seizure is conducted after sunset and before sunrise has been followed in this case. Moreover, on perusal of this scanned copy of the case diary, it also appears that no grounds as required under the second proviso to Section 42(1) of the NDPS Act, 1985 has been recorded anywhere in writing which had necessitated such a search operation between sunset and sunrise.

12. There is also nothing on record to show that copy of the writing, wherein the grounds of belief under the proviso to Section 42(1) of the NDPS Act, 1985 was forwarded within 72 hours to the immediate officer who conducted the search and seizure operation, is available on record. It appears that though the officer who conducted search and seizure in this case was a Sub-inspector (UB of Police) and was empowered by the Government notification under the provisions of the Section 42(1) of the NDPS Act, 1985 to search and seize without authorization, however, as it appears that there is a clear violation of the mandatory provision of the second proviso to Section 42(1) of the NDPS Act, 1985 as well as violation of the provision of Section 42(1) of the NDPS Act, 1985, in view of the ruling of the Apex Court in ***Sarija Banu (supra)***, the petitioner is entitled to get the benefit of bail in this case 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 above-named petitioner, Farid Uddin @ Forid Uddin is hereby allowed to go on bail of Rs. 50,000/- (Rupees Fifty Thousand) with two suitable sureties of like amount, subject to the satisfaction of the learned Special Judge, Karimganj with following conditions:-

i. That the petitioner shall cooperate in the trial of NDPS Case No. 141/2022 and shall regularly appear before the Trial Court as and when so required by the Trial Court;

ii. That the petitioner shall not directly or indirectly make any inducement, threat, or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such facts before the Trial Court in the trial pending against the present petitioner;

iii. That the petitioner shall not leave the jurisdiction of the Trial Court without prior permission of the Special Judge, Karimganj;

iv. That the petitioner shall not indulge in any offence similar to the one for which he has been accused of in the instant case.

14. It is, however, made clear that the observations made in this case shall not have any bearing on the trial, and the same are made only for the purpose of consideration of the instant bail application.

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

JUDGE

Comparing Assistant