

GAHC010159262023



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

Case No. : Bail Appln./2621/2023

MIZANUR RAHMAN
S/O AHMED ALI SK.
R/O VILL- SONAKHULI PT.I
P.S. GOLAKGONJ
DIST. DHUBRI, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : SK ABDULLAH

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 04-08-2023

Heard Mr. N. Uddin, learned counsel for the petitioner. Also heard Ms. A. Begum, learned Addl. PP for the State.

2) The petitioner, who was arrested on 03.09.2022, in connection

with Golokganj P.S. Case No. 324/2022 under Section 21(c) of the NDPS Act, 1984 is seeking bail by filing this application under Section 439 Cr.P.C. The said case is being tried before the Court of learned Special Judge (Addl.), Dhubri as Special Case No. 388/2022 under section 21(c) of the NDPS Act, 1984. This is the second application for bail before this Court. The earlier bail application was rejected by order dated 16.02.2023, passed by this Court in B.A. No. 2744/2022.

3) The learned counsel for the petitioner has submitted that till date only 4 (four) listed witnesses have been examined and therefore, there is no likelihood that the evidence of the case would be concluded in near future. It has been submitted that the witnesses examined so far have not been able to prove that any contraband was seized from the petitioner.

4) It would be relevant to refer to paragraphs 14, 15 and 16 of the case of *Union of India v. Rattan Malik*, (2009) 2 SCC 624: (2009) 0 Supreme(SC) 95, where the Supreme Court of India had observed as follows:-

14. *We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.*

15. *Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of*

the respondent; (ii) he is in jail for the last three years and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Indian Penal Code, 1860 etc. but are not sufficient to satisfy the mandatory requirements as stipulated in sub-clause (b) of sub-section (1) of Section 37 of the NDPS Act. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

16. *Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest.*

5) Therefore, the requirement of recording satisfaction as per the mandate of Section 37 of the NDPS Act, 1984 has not been diluted by any judgment cited by the learned senior counsel for the petitioner.

6) In this case the petitioner was arrested on 03.09.2022 and (i) a huge quantity of 2,600 (two thousand six hundred) methamphetamine tablets stored in 13 pouch, each containing 200 tablets, and (ii) 10 plastic containers containing suspected heroin (net weight 41.144 gram with container) were seized from the house of the petitioner. Hence, the petitioner was in conscious possession of the contraband narcotic/ psychotropic substance.

7) Moreover, as submitted by the learned counsel of the petitioner, within less than a year the prosecution has examined 4 prosecution witnesses.

8) Under such backdrop, it would be relevant to refer to the observations made by a 3- Judge Bench of the Supreme Court of India in the case of *Narcotics Control Bureau v. Mohit Aggarwal*, AIR 2022 SC 3444: (2022) 0 Supreme(SC) 619. Para 11 to 15 and 17, as extracted from the citation of (2022) 0 Supreme(SC) 61 is quoted below:-

11. *It is evident from a plain reading of the non-obstante clause inserted in sub-section (1) and the conditions imposed in sub-section (2) of Section 37 that there are certain restrictions placed on the power of the Court when granting bail to a person accused of having committed an offence under the NDPS Act. Not only are the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973 to be kept in mind, the restrictions placed under clause (b) of sub-section (1) of Section 37 are also to be factored in. The conditions imposed in sub-section (1) of Section 37 is that (i) the Public Prosecutor ought to be given an opportunity to oppose the application moved by an accused person for release and (ii) if such an application is opposed, then the Court must be satisfied that there are reasonable grounds for believing that the person accused is not guilty of such an offence. Additionally, the Court must be satisfied that the accused person is unlikely to commit any offence while on bail.*

12. *The expression "reasonable grounds" has come up for discussion in several rulings of this Court. In "Collector of Customs, New Delhi v. Ahmadaliev Nodira", (2004) 3 SCC 549 a decision rendered by a Three Judges Bench of this Court, it has been held thus :-*

"7. The limitations on granting of bail come in only when the question of granting bail arises on merits. Apart from the grant of opportunity to the Public Prosecutor, the other twin conditions which really have relevance so far as the present accused-respondent is concerned, are: the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and that he is not likely to commit any offence while on bail. The conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds. The expression "reasonable grounds" means something

more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.” [emphasis added]

13. The expression “reasonable ground” came up for discussion in “State of Kerala and others Vs. Rajesh and others”, (2020) 12 SCC 122 and this Court has observed as below:

“20. The expression “reasonable grounds” means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.” [emphasis added]

14. To sum up, the expression “reasonable grounds” used in clause (b) of Sub-Section (1) of Section 37 would mean credible, plausible and grounds for the Court to believe that the accused person is not guilty of the alleged offence. For arriving at any such conclusion, such facts and circumstances must exist in a case that can persuade the Court to believe that the accused person would not have committed such an offence. Dove-tailed with the aforesaid satisfaction is an additional consideration that the accused person is unlikely to commit any offence while on bail.

15. We may clarify that at the stage of examining an application for bail in the context of the Section 37 of the Act, the Court is not required to record a finding that the accused person is not guilty. The Court is also not expected to weigh the evidence for arriving at a finding as to whether the accused has committed an offence under the NDPS Act or not. The entire exercise that the Court is expected to undertake at this stage is for the limited purpose of releasing him on bail. Thus, the focus is on the availability of reasonable grounds for believing that the accused is not guilty of the offences that he has been charged with and he is unlikely to commit an offence under the Act while on bail.

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17. *Even dehors the confessional statement of the respondent and the other co-accused recorded under Section 67 of the NDPS Act, which were subsequently retracted by them, the other circumstantial evidence brought on record by the appellant-NCB ought to have dissuaded the High Court from exercising its discretion in favour of the respondent and concluding that there were reasonable grounds to justify that he was not guilty of such an offence under the NDPS Act. We are not persuaded by the submission made by learned counsel for the respondent and the observation made in the impugned order that since nothing was found from the possession of the respondent, he is not guilty of the offence for which he has been charged. Such an assumption would be premature at this stage.*

9) In the case of *Satender Kumar Antil v. Central Bureau of Investigation*, AIR 2022 SC 3386, the Supreme Court of India had referred to the provision of Section 436A Cr.P.C., it was held by the Supreme Court of India that where the undertrial accused is charged with an offence under the Act punishable with minimum punishment of 10 (ten) years and a maximum fine of Rs.1,00,000/- (Rupees one lakh only), such an undertrial shall be released on bail if he has been in jail for not less than 5 (five) years provided he furnishes bail in the sum of Rs.1,00,000/- (Rupees one lakh only) with two sureties for like sum.

10) The learned counsel for the petitioner has not been able to show that the ratio of the case of *Satender Kumar Antil (supra)* has been diluted in any manner by any subsequent decision of the Supreme Court of India.

11) Therefore, bound by the ratio of the case of *Satender Kumar Antil (supra)*, the Court is of the considered opinion that the petitioner has not become entitled to be released on bail at this stage.

12) When a huge commercial quantity of contraband has been seized from the conscious possession of the petitioner, the Court is unable to arrive at

a conclusion that the petitioner is not guilty of the commission of the offence and that he would not commit such an offence if released on bail, which is the mandate of Section 37(1)(b)(ii) of the NDPS Act, 1984.

13) Thus, the prayer for bail is rejected.

14) None of the observations made herein shall prejudice the petitioner during trial.

JUDGE

Comparing Assistant