

GAHC010227442022



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

Case No. : Bail Appln./2996/2022

SHARUN KHAN
S/O PEER KHAN
R/O RAGHUNATHBAS,
P.O. GANDURA
P.S. BARODA MEO
DIST. ALWAR, RAJASTHAN

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR A ALI

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA

ORDER

Date : 20-02-2023

Heard Mr. A. Ali, learned counsel for the petitioner and also heard Mr. S.C. Keyal, learned S.C., Narcotic Control Bureau.

2. The petitioner, namely, Sharun Khan, who was arrested on 21.08.2021, and produced on 22.08.2021, and has spent 547 days in custody in connection with NCB (Guwahati) Crime No. 21/2021 and tried as Special (NDPS) Case No. 12/2022, under Section 8(c) of the NDPS Act, 1985, has prayed for regular bail under section 439 Cr.P.C.

3. The learned counsel for the petitioner has submitted that the petitioner is working in truck bearing registration no. RJ-02-GB-7575 as a handyman. The said truck owned by Sharif Khan, the co-accused (i.e. owner-driver) was hired by the proprietors of one Bitty of Nirala Transport Co., Morbi, Gujarat to deliver 1015 boxes of granite floor tiles to one Raj traders, Dharmanagar, Tripura. The said truck was intercepted by NCB officials near Amingaon Flyover and 4997 bottles of a codeine based cough syrup in 50 carton boxes were seized. It was submitted that the petitioner was not aware of the contents of the consignment and he cannot be said to be in conscious possession of the contraband. In the said context, it has been submitted that the petitioner neither had animus nor any control over the seized contraband. It is also submitted that if the petitioner is proceeded with on the strength of statement made by a co-accused, it would not be sustainable. Hence, it is submitted that the petitioner be granted bail on such terms and conditions as deemed appropriate.

4. In support of his submissions, the learned counsel for the petitioner has cited the case of *Rabindra Debnath for and on behalf of accused Uttam Debnath. v. The State of Tripura*, BA 13/2021, decided by Tripura High Court on 05.03.2021.

5. The learned S.C., NCB has produced the copy of final complaint and has opposed the prayer for bail. In support of his submissions, he has cited the following cases, viz., (i) *State (by NCB), Bangaluru v. Pallulabid Ahmad Arimutta & Anr., (2022) 0 Supreme(SC) 56*, (ii) *Union of India through NCB Lucknow v. Md. Nawaz Khan, (2021) 0 Supreme(SC) 508: AIR 2021 SC 4476*.

6. Perused the scanned copy of the case record received from the Court of the learned Special Judge, Kamrup, Amingaon.

7. As per the final complaint, on 20.08.2021, an Officer of the NCB received information from reliable source that two persons including the petitioner coming from Rangia towards Guwahati would be transporting narcotic drugs in truck bearing registration no. RJ-02-GB-7575. Accordingly, on being intercepted near Amingaon flyover, 4997 plastic bottles of codeine based cough syrup in 50 cartons were seized. Below these cartons were cartons of tiles. The investigation also reveals that although the tiles were loaded in Morbi, Gujarat, the entire lot of codeine based 4997 cough syrups were loaded in Barabanki in Uttar Pradesh. During investigation, it was also revealed that the owner-cum-driver of the said truck was in constant touch with the supplier and the recipient of the narcotic drugs.

8. It is the specific case of the prosecution that the codeine based 4997 cough syrup was loaded in the truck at Barabanki in Uttar Pradesh. Therefore, it is not acceptable that the petitioner, who was the handyman of the truck in question was not aware of what was being loaded in the truck, which was carrying tiles from Gujarat and that the petitioner was not in conscious possession of the contraband. It is not conceivable that there was no entrustment of 4997 bottles of codeine based cough syrup to the petitioner and

to the driver of the concerned truck. It is not the case of the petitioner that he and/or the truck driver could produce e-way bills and other supporting documents for transportation of the contraband drugs.

9. Coming to the case of *Rabindra Debnath (supra)*, cited by the learned counsel for the petitioner, with all respect to the said judgment, the said judgment and order would not have persuasive force in the present case because of the fact that the High Court of Tripura had accepted the two contention of the prosecution, (i) that although contraband drugs was seized from the co-passenger of the bus, but the two accused including Uttam Debnath were arrested and commercial quantity of contraband was recovered, (ii) the accused Uttam Debnath was in conscious possession of the commercial quantity of contraband. Nonetheless, without addressing the requirement of the provision of Section 37 of the NDPS Act, 1985 bail was granted to Uttam Debnath on the ground that investigation would not be completed soon, and wife and minor son were ill, enlarged the said Uttam Debnath on bail. Therefore, as the provision of Section 37 of the NDPS Act, 1985 was not considered by the said Hon'ble Court, if the said decision is followed, it would render the provision of Section 37 as otiose, which would be contrary to a catena of decision by the Supreme Court of India including the case of *Union of India v. Khalil Uddin*, (2022) 3 Supreme (SC) 1247, wherein the Supreme Court of India had held that "... *In the face of the mandate of Section 37 of the NDPS Act, the High Court would not and ought not to have released the accused on bail. We therefore, allow these appeals, set aside the view taken by the High Court and direct that both the appellants be taken in custody forthwith.*"

10. Rather, on the factum of possession, the case of *Rabindra*

Debnath (supra), cited by the learned counsel for the petitioner operates against the petitioner. In para-26 thereof, it has been held to the following effect:-

“26. Once possession is established the person who claims it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles.”

11. In view of the fact that the investigation is being carried out for committing offence under sections 21(c)/25/29 of NDPS Act, one of the relevant considerations under section 37 of the NDPS Act, 1985 for considering prayer for bail is that the Court is required to be 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.

12. In *Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav & Anr.*, (2004) 7 SCC 528, the Supreme Court of India had observed as under:

"The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly, where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

- (a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.*
- b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.*
- (c) Prima facie satisfaction of the court in support of the charge. (See*

Ram Govind Upadhyay v. Sudarshan Singh, (2002) 3 SCC 598 and Puran v. Rambilas, (2001) 6 SCC 338."

13. In the case of *Narcotics Control Bureau Vs. Mohit Aggarwal (AIR 2022 SC 3444)*, the case was lodged under section 8/22/29 of the NDPS Act, 1985. In the said case, the 3 Judge Bench of the Supreme Court of India had observed and held as follows:-

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.

* * *

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."

14. As commercial quantity of 4997 bottles of contraband narcotic drug based cough syrup has been seized from the conscious possession of the two accused found in the truck including the petitioner, the Court is unable to arrive at a *prima facie* conclusion that there are reasonable grounds for believing that the petitioner is not guilty of such offence and that he is not likely to commit any offence while on bail.

15. Thus, the Court is of the considered opinion that this is not a fit case for enlarging the petitioner on bail at this stage. Hence, this application for bail is rejected.

16. The Registry shall not issue any photocopy or certified or uncertified copy of any part of scanned copy of case record.

JUDGE

Comparing Assistant