

GAHC010244932023



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

Case No. : Bail Appln./3945/2023

AFTAR HUSSAIN
S/O ABDUL SUKKUR
VILL- DHALOPAR (TOKAR BAZAR)
P.S. PATHARKANDI,
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR H R CHOUDHURY

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 18.12.2023

Heard Mr. H. R. Choudhury, learned counsel for the petitioner. Also heard Mr. M. P. Goswami, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 439 of the Code of Criminal Procedure praying for grant of bail to the accused/ petitioner, namely, Aftar Hussain, who has been arrested on 14.07.2022 in connection with Special NDPS Case No. 106/2022 (Patharkandi P.S. Case No. 176/2022), under Sections 21(C)/25/29 of the NDPS Act, 1985.

3. The scanned copy of the case record as well as the status report of the case has already been received. Perused the same. Heard both sides.

4. It is submitted by the learned counsel for the petitioner, Mr. Choudhury, that the accused is innocent and he is no way connected with the alleged offence. However, the case is Charge-Sheeted against him, along with one co-accused, and he is languishing in jail for more than 1 (one) year and till date, no witness could be examined by the learned Sessions Judge and the case is still pending at the stage of production of the accused. It is further submitted that no contraband was seized from the petitioner and he never involved in the alleged offence, however the police wrongly implicated him alleging that some

bags of contrabands were recovered which is owned by the petitioner. It is a fact that the vehicle from where the contrabands were recovered is owned by the present accused/petitioner, but he is not aware about the contraband which was allegedly recovered from his vehicle. He further submitted that the Charge-Sheet was laid about 10 (ten) months before, but till date, the trial is not yet commenced and hence, further detention of the present accused/petitioner will not serve any purpose and he being a permanent resident of his addressed locality, there is no chance of absconding if he is enlarged on bail. Rather, he will regularly appear before the Court as and when the date is fixed by the Court of learned Sessions Judge.

5. In support of his case, the learned counsel for the petitioner further relied on a decision of a Co-ordinate Bench of this Court passed in **B.A. No. 2106/2023, dated 11.12.2023**, wherein, the accused of the said case was allowed to go on bail, who was also involved in an NDPS matter, considering the judgment of the Hon'ble Apex Court reported in **2023 SCC OnLine SC 1109 (Rabi Prakash Vs. State of Odisha)**.

6. In this context, the learned Additional Public Prosecutor, Mr. Goswami, has submitted that there are sufficient incriminating materials collected by the I.O. against the present accused/petitioner and considering the *prima face* material, the Charge-Sheet was filed against him along with another co-accused. He further submitted that if the accused is allowed to go on bail only considering the length of detention or period of incarceration, the probability of absconding of the accused cannot be denied and in which event, there will be delay in disposal of the case. Further it is submitted that to consider a bail application

under the NDPS Act in case of commercial quantity, rigor of Section 37 will apply and hence, considering the nature of allegation, he raised objection against the bail prayer of the present accused/petitioner.

7. The learned Additional Public Prosecutor further relied on a decision of Hon'ble Apex Court passed in **Criminal Appeal Nos. 1001-1002 of 2022, arising out of Special Leave to Appeal(Crl.) No. 6128-29 of 2021 (Narcotics Control Bureau Vs. Mohit Aggarwal)**, wherein it has been held that if the Court is not satisfied that the accused is not guilty of the offence alleged against him, the Court should not allow the accused to go on bail. He further gives emphasized on paragraph No. 18 of the said judgment, which reads as under:

"18. In our opinion the narrow parameters of bail available under Section 37 of the Act, have not been satisfied in the facts of the instant case. At this stage, it is not safe to conclude that the respondent has successfully demonstrated that there are reasonable grounds to believe Criminal Appeal Nos. of 2022 @ Petitions for Special Leave to Appeal (Criminal) No. 6128-6129 OF 2021 that he is not guilty of the offence alleged against him, for him to have been admitted to bail. The length of the period of his custody or the fact that the charge-sheet has been filed and the trial has commenced are by themselves not considerations that can be treated as persuasive grounds for granting relief to the respondent under Section 37 of the NDPS Act."

8. I have given my anxious consideration to the submissions advanced by the learned counsels for both sides. From the record, it reveals that as per the last order, the date is fixed on 06.01.2024 for production of the accused and it reveals that one of the co-accused, who was shown as an absconder in the Charge-Sheet, is yet to be booked though NBWA's were regularly issued by the Court. As the other co-accused is not yet produced before the Court, the

learned Sessions Judge could not frame the charge and the trial is yet to be commenced. However, it cannot be denied that the accused is behind the bar since more than 1(one) year and due to non-production of the other co-accused, the case could not be proceeded or the trial could not be commenced, though the Charge-Sheet was laid before the Court about 10(ten) months before.

9. Section 37 of the NDPS Act read as follows:

"37. Offences to be cognizable and non-bailable. (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) every offence punishable under this Act shall be cognizable;

(b) No person accused of an offence punishable for [offences under Section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is 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. (2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

10. Thus, the bail in cases under the NDPS Act, specially the commercial quantity, has to be seen as to whether there is any material to believe that the accused is not guilty of such offence and he is not likely to commit the offence while on bail.

11. In case of **Rabi Prakash (Supra)**, the Hon'ble Supreme Court has held as under:

"4. As regard to the twin conditions contained in Section 37 of the NDPS Act, learned counsel for the respondent- State has been duly heard. Thus, the 1st condition stands complied with. So far as the 2nd conditions re: formation of opinion as to whether there are reasonable grounds to believe that the petitioner is not guilty, the same may not be formed at this stage when he has already spent more than three and a half years in custody. The prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution and in such a situation, the conditional liberty must override the statutory embargo created under Section 37(1)(b)(ii) of the NDPS Act."

12. Accordingly, the Hon'ble Apex Court held that the prolonged incarceration, generally militates against the most precious fundamental right guaranteed under Article 21 of the Constitution. Similar view has been expressed by the Hon'ble Apex Court in case of **Sariful Islam @ Sarif Vs. The State of West Bengal, dated 04.08.2022**, wherein also, considering the length of detention and also considering the aspect that there is no likelihood of completion of trial in near future, the bail was granted to the petitioner.

13. The same view is also expressed in another recent judgment of Division Bench of Hon'ble Apex Court in **Mohd Muslim @ Hussain Vs. State (NCT of Delhi)**, reported in **2023 LiveLaw (SC) 260**, wherein, in paragraph No. 23 of the said judgment, it has been held as under:

"23. There is a further danger of the prisoner turning to crime, "as crime not only turns admirable, but the more professional the crime, more honour is paid to the criminal" (also see Donald Clemmer's 'The Prison Community' published in 1940). Incarceration has further deleterious effects – where the accused belongs to the weakest economic strata: immediate loss of livelihood, and in several cases, scattering

of families as well as loss of family bonds and alienation from society. The courts therefore, have to be sensitive to these aspects (because in the event of an acquittal, the loss to the accused is irreparable), and ensure that trials – especially in cases, where special laws enact stringent provisions, are taken up and concluded speedily.”

14. In the instant case also, it is seen that till date, the case is at the stage of production and due to absence of the other co-accused, who is absconding, the Court could not even frame the charge and thus, the trial is yet to be commenced. Accordingly, it can be held that there is no probability of disposal of the case in near future and at the same time, it is seen that the accused is behind the bar for more than 1 (one) years.

15. So, considering all these aspects of the case and the view of the Hon'ble Apex Court passed in recent cases, without going by the merit of the case, I find it a fit case to allow the accused to go on bail.

16. Accordingly, it is provided that on furnishing a bond of Rs. 50,000/- (Rupees fifty thousand) only with two sureties of like amount, provided that one surety has to be a government servant, to the satisfaction of the learned Sessions Judge, Karimganj, the accused/petitioner, namely, Aftar Hussain, be enlarged on bail, subject to the following conditions:

- (i) that the petitioner shall appear before the Court of learned Sessions Judge, Karimganj on each and every date to be fixed by the 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 to the Court or to any police officer; and

- (iii) that the petitioner shall not leave the jurisdiction of the learned Sessions Judge, Karimganj without prior permission.

17. In terms of above, this bail application stands disposed of.

JUDGE

Comparing Assistant