

GAHC010260122022



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

Case No. : Bail Appln./3513/2022

LAL BADSHA BANIA @ LALU @ LADU
S/O- LATE SABED ALI BANIA, R/O- GORAIMARI, P.S. AND DIST.
BONGAIGAON, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE P.P., ASSAM

Advocate for the Petitioner : MS. S K NARGIS

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

ORDER

Date : 19-01-2023

Heard Ms. S.K. Nargis, learned counsel for the accused and also heard Mr. B.B. Gogoi, learned Additional Public Prosecutor for the State respondent.

02. This application under Section 439 Cr.P.C. is preferred by the accused Lal Badshah Bania @ Lalu @ Ladu, who has been languishing in jail hajot in connection with NDPS Case No. 6 of 2021, arising out of Dhaligaon P.S. Case No. 150 of 2021, under Section 17(c)/29 NDPS Act, pending before the court of learned Special Judge, NDPS Act Chirang, since 05.09.2021, for grant of bail.

03. The said case has been registered on the basis of an FIR lodged by S.I. Jhagdish Doley of Dhaligaon Police Station, on 12.06.2021, to the effect that on the same day, at about 12-30 pm, at Chapaguri point, acting on a tip off, he has intercepted one Toyota Innova vehicle, bearing registration No. PB-10CW-5400, and apprehended two persons, namely, Mandeep Singh and Narinder Pal Sing and recovered 5.171 kg and 0.058 kg of suspected opium paste from his possession and seized the same preparing seizure list in presence of witnesses. The allegation against the petitioner is that he along with accused Bijoy Agarwal used to sell contraband substances to the Truck Drivers at his Dhaba, located at Goimari and he has been operating inter-state drug trafficking with Bijoy Agarwala, Narinder Pal Singh and Mandeep Singh.

04. Ms. S.K. Nargis, the learned counsel for the accused submits that the case has already been charge sheeted under Section 17(C)/29 of the NDPS Act, along with other co-accused, and the accused pleaded not guilty to the charge. Ms. Nargis further submits that the accused has been languishing in jail hazoot since 05.09.2021, and that nothing has been recovered from his possession and that out of 23 cited witnesses in the Charge Sheet 13 witnesses have already been

examined by the prosecution side and out of 13 witnesses, so examined by the prosecution side, none has whispered any word against the accused Lal Badshah Bania to show complicity of the accused with the offence charged and that he is ready to face trial and therefore, it is contended to allow the petition.

05. Per contra, B.B. Gogoi, learned Additional Public Prosecutor has vehemently opposed the petition and submits that though thirteen witnesses have already been examined by the prosecution side, yet, there remains to examine another 10 witnesses, and the examination-in-chief of the informant is yet to be completed and it is premature to assume at this stage that the accused is not guilty. Mr. Gogoi further submits that the statements of the co-accused and other facts and circumstances available in the case diary, do not justify the release of the accused on bail at this stage. Mr. Gogoi further submits that the quantity of drugs recovered and seized from co-accused is of commercial quantity and the embargo under section 37 of the NDPS Act will be applicable here and the accused has failed to satisfy the two requirements of the said section, and therefore, it is contended to dismiss this petition.

06. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the record received from the learned court below.

07. And it appears that there is substance in the submission of Ms. Nargis, the learned counsel for the accused. It is not in dispute that the accused was arrested on 05.09.2021, and since then he has been

languishing in jail hayat. Further, it appears that nothing was recovered from the possession of the accused and the learned court below has 13 witnesses so far. Though Ms. Nargis, learned counsel for the accused, referring to the evidence of 13 witnesses, submitted that the same are not at all sufficient to reveal any complicity of the accused with the offence charged, yet, the same left this court unimpressed. This court cannot evaluate the evidence/materials on record to find out the guilt of the accused. In the case of **NCB vs. Mohit Agarwal [2022] 0 Supreme (SC) 619**, while dealing with the issue, Hon'ble Supreme Court has held in paragraph No. 15 as under:-

“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.”

08. Keeping the aforesaid principle in mind, while an endeavour is made, to find out availability of reasonable grounds for believing that the accused is not guilty of the offences he has been charged with, and that he is unlikely to commit an offence under the Act while on bail, this court is unable to arrive at a positive finding in this regard. As

stated above, examination-in-chief of the informant is yet to be completed. And 10 prosecution witnesses, including the investigating officer, are yet to be examined. It is to be noted here that the accused is also charged under section 29 NDPS Act with that of section 17(C) NDPS Act. The record also reveals that there are statements of the co-accused and some other facts and circumstances are on the record, for establishing the same fair opportunity has to be given to the prosecution side. Thus, it would not only be pre-mature, but, also unwise at this stage, to arrive at a finding that a case for granting bail to the accused is made out. Mr. Gogoi, the learned Addl. P.P. has rightly pointed this out.

09. It is also not in dispute that the contraband substance recovered and seized from the possession of co-accused Mandeep Sing and Narinder Pal Singh, vide seizure list dated 05.09.2021, are of commercial quantity. And as per the FSL report, the sample of the contraband substance gave positive test for Opium. And as such the embargo under section 37 of the NDPS Act will be applicable herein this case and the accused has to satisfy the same as the learned Addl. P.P. has opposed the bail petition. But, as stated herein above, the accused has failed to satisfy the same from the materials on record.

10. In view of the above, and also in view of the embargo under Section 37 of the NDPS Act, this Court is of the view that it is not a fit case where the privilege of bail that can be extended to the accused. It is well settled by Hon'ble Supreme Court in the case of **Mohit Agarwal** (supra), that liberal approach in the matter of bail under the NDPS Act is indeed uncalled for.

11. Accordingly, the instant petition stands dismissed. However, the learned court below is directed to expedite the trial and if possible, complete the same within a period of three months from today, without being influenced by any of the observation made herein above, as the same is made only for the purpose of disposing of this bail application, not on merit of the case. If necessary, recourse has to be taken to the provision of section 309(1) Cr.P.C.

JUDGE

Comparing Assistant