

GAHC010050142024



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

Case No. : Bail Appln./688/2024

DIGBIJOY NAVIS
S/O LATE RATHINDRA NATH NOBIS,
R/O H/NO. 4, 4TH FLOOR, FLAT NO. 4AB, GANPATI ENCLAVE, SEWALI
PATH, HENGRABARI, GANESHGURI, P.S. DISPUR, DIST. KAMRUP (M),
ASSAM, PIN-781036

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR N PATIRI

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 01.04.2024

Heard Mr. D.Das, Sr. Counsel for the accused petitioner and Mr. D.P.Goswami, learned Addl.P.P. for the State respondent.

By this application under section 439 CrPC, the accused petitioner namely **Digbijoy Navis** has prayed for bail in connection with Dispur P.S. Case No. 2277/23 under Sections 21 (b),

22 (c) and 29 of the NDPS Act

3. The factual matrix leading to this bail application is that on 08.12.2023, Officer-In-Charge of Dispur PS received an information from a reliable source that business of drug trafficking since long time is going on at Ganapati Enclave, Sewali Path, Hengrabari area under Dispur PS. Accordingly, a GD entry was recorded vide Dispur PS GD Entry No. 50 dated 07.12.2023. Accordingly, a team from crime branch raided Ganapati Enclave, Sewali Path, Hengrabari and arrested the present petitioner and another person Kundan Thakur. One transparent plastic packet containing to be suspected cocaine having total 33.71 grams and another plastic packet containing 11.64 grams of suspected MDMA, cash of Rs.3000/- and other articles were recovered from a vehicle bearing no. AS-01-AM-008 (Skoda Superb) which belongs to the present petitioner.

4. It was urged by the learned counsel for the accused petitioner that from the FIR, it is evidently clear that the alleged contraband was never found from the conscious possession of the accused petitioner. There is gross violation of Section 42 of the NDPS Act which is mandatory in nature. Therefore, the non-compliance of mandatory provision of Section 42 of the NDPS Act, the entire search and seizure is vitiated and creates a shadow of doubt.

5. It is also the submission of learned counsel for the petitioner that mere general diary entry does not amount to due compliance of Section 42 (1) and 42 (2) of the NDPS Act and the entry taken down in the station diary cannot be treated as information recorded under Section 42 (1) and (2) of NDPS Act. According to learned counsel for the petitioner, non-compliance of mandate of Section 42 (1) and (2) is not permissible.

6. It is also submitted that it is trite law that the report under Section 42 (1) of the NDPS Act must be in terms of a clear recorded statement in writing by the authorized officer and must not be contained in a document which is closed from the public view. It is only on this ground itself for failure to comply the mandate of Section 42 of the NDPS Act, the accused may be enlarged on bail.

7. Another point raised by learned counsel for the accused/petitioner is that the suspected cocaine which has been allegedly recovered from the car of the petitioner weighs 33.71 grams including both the contraband and the plastic packets respectively. Similarly,

11.6 grams of suspected MDMA which have been allegedly recovered from the car of the petitioner including both the contraband and the plastic packet respectively. According to the learned counsel for the accused/ petitioner, the quantity of the aforesaid contraband would fall within the meaning intermediate category and not commercial quantity. Therefore, the rigors of Section 37 of the NDPS Act does not apply in this case. It is further submitted that the accused has been detained in custody for last 115 days. Hence, considering the background of the case as well as length of detention, bail may be granted to the petitioner.

8. In support of his submission, learned counsel for the petitioner has relied on the following case laws:

1. 2023 SCC Online Cal 2462 (*Abdul Rakib –vs-State of W.B.*).
2. Bail Application No. 291/2023 Bombay High Court (*Imtiyaz Sattar Sheikh –vs- State of Maharashtra*)

9. In response, learned Addl.P.P. would submit that heinous offence is committed by the petitioner along with other accused persons and MDMA was seized to the extent of 11.64 grams which is commercial quantity. It is further submitted that non compliance of Section 42 of the NDPS Act cannot be a ground to enlarge the petitioner on bail and it is a matter of trial and the same has to be considered during the course of trial after adducing evidence of the witnesses by the parties.

10. Learned Addl.P.P.further contended that the very object of bringing the enactment under the NDPS Act is to combat the menace in the society and Hon'ble Supreme Court categorically held that while exercising the discretion that too during the bail stage, it would be too early to take into account and judge the matter regarding non-compliance with the formality and hence, at this juncture, this court cannot evaluate the evidence with regard to admissibility and non-compliance and the court has to take note that it is an offence against the society at large.

11. Having heard the receptive counsel for the parties and also the grounds urged in the petition, the points that arise for consideration is whether it is a fit case to exercise power under Section 439 CrPC in favour of the petitioner.

12. The Hon'ble Apex Court in the case of ***Superintendent , NCB, Chennai –vs- R.***

Paulsamy reported in 2000 (9) SCC 549, it was held that under the provision of Section 37 of the NDPS Act, it would be too early to take into account and judge the matter regarding non-compliance with the formalities during the bail stage. Since, recording of findings under Section 37 of the NDPS Act was *sine-qua-non* for granting bail under the Act. The Apex court also referring Section 37, 52 and 57 of the NDPS Act and set aside the bail granted in the said case and made an observation that non-compliance of Sections of NDPS Act is not a ground to enlarge him on bail and the same has to be tested during the course of trial.

13. In another case **Union of India –vs- Bal Mukund & Ors**, reported in 2009 (12) SCC 161, discussed with regard to Section 37 of the NDPS Act and also referred the earlier judgment of Paulsamy (supra) and come to the conclusion that the material would indicate that there is a material against the petitioner and hence, does not find any reason to enlarge him on bail.

14. The Apex Court in the case of **Nawaz Khan** with regard to the scope of conscious possession of contraband and also summarized the principles how to ascertain and also categorically held that mere absence of the possession of the contraband on the person of the accused does not ipso-facto mean that the accused was not in conscious possession of the contraband rather the knowledge of possession of contraband has to be gleaned from the facts and circumstance of a case. The term 'possession' could mean physical possession with animus, custody over the prohibited substances with animus, exercise of dominion and control as a result of concealment or personal knowledge as to the existence of the contraband and the intention based on such knowledge.

15. As a general rule, under Section 37 of the NDPS Act, the court cannot enlarge the petitioner on bail unless there is a reasonable ground that the petitioner is not guilty and he is not likely to be involved in similar offences in future. It is also a settled law that while granting bail, the court has to look into the interest of the society at large and if such acts are considered in a lenient way, it affects the society at large. The very information received from the arresting officer is clear that this petitioner along with others were indulging in trafficking of the manufactured drugs to Hengrabari area and outside State and the recovery was made from the vehicle which belongs to the petitioner. The vehicle was found inside the campus of

Ganapati Enclave wherein the petitioner used to reside in a flat.

16. Honble Apex Court in the case of **Abdul Rashid Ibrahim Mansoori –vs- State of Gujarat** reported in 2000 (2) SCC 512 observed that the procedure mandated in Section 42 (1) and 42 (2) does not require literal compliance. In view of the aforesaid mandate, the question with regard to violation of Section 42 of the NDPS Act is one that should be raised during trial.

17. In another case, Hon'ble Supreme Court has held in the case of **State of Madhya Pradesh –vs- Kazad** reported in 2001 (1) SCC 673 wherein the Hon'ble Apex Court has held:

“.....negation of bail is the rule and its grant an exception under Sub Clause –(ii) (b) of Section 37 (1). For granting the bail, the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offence with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the condition for granting the bail, specified in Clause-(b) of sub-Section (1) of Section 37 are in addition to the limitation provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail is uncalled for.”

18. Similarly, the Hon'ble Supreme Court in the case of **Union of India –vs- Nawaz Khan reported in 2021 (1) SCC 100** considered the position of law with regard to Section 37 of NDPS Act and held that the test which the High Court are required to apply while granting bail is that there are reasonable grounds to believe that the accused has not committed an offence and whether he is likely to commit any offence while on bail. Considering the seriousness of offences punishable under the NDPS and in order to curb the menace of drug trafficking in the country, stringent parameters for the grant of bail under the NDPS Act has been prescribed.

19. In view of the above discussion as well as the law propounded by the Hon'ble Supreme Court, this Court is of the opinion that it is not a fit case to exercise the discretion in favour of

the petitioner to enlarge the petitioner on bail and non-compliance of the mandatory provision also to be considered during trial and the same is a matter of fact whether the same is complied with or not. Hence, at this juncture this court cannot evaluate the evidence on record by exercising the discretion under section 439 of the CrPC.

20. Hence, I do not find any merit in the petition to enlarge the petitioner on bail that too on the ground of non-compliance of the mandatory provision and this court not to look into the technicalities at the time of considering the bail petition.

21. The bail application stands rejected and disposed of accordingly.

JUDGE

Comparing Assistant