GAHC010072222024

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

**Case No. : Bail Appln./1048/2024**

ALTAF HUSSAIN
SON OF MAGBUL HUSSAIN RESIDENT OF HOUSE NO.4, BALIJAN PATH, BYE LANE-5, DAKHINGAON, P.S.- HATIGAON, DISTRICT- KAMRUP (METRO), ASSAM.

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

**Advocate for the Petitioner** : MR. N J DUTTA, MR A BASUMATARY,MR. M M ZAMAN,MR N AHMED

**Advocate for the Respondent** : PP, ASSAM,

**BEFORE**
**HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA**

**ORDER**

**05.08.2024**

**1.** Heard Mr. N.J. Dutta, learned counsel for the petitioner. Also heard Mr. K.K. Parasar, learned Additional Public Prosecutor for the State.

**2.** This application under Section 439 of the Code of Criminal Procedure,

1973 has been filed by the petitioner, namely, Altaf Hussain, who is detained behind the bars since 01.03.2024 (for last 157 days) in connection with Hatigaon P.S. Case No. 39/2024, under Section 20(b)(ii)(C)/29 of the NDPS Act, 1985.

**3.** The gist of accusation in this case is that on 01.03.2024, one Sri Jeewel Das, SI of Police of Hatigaon Police Station, lodged an FIR before the Officer-in-Charge of Hatigaon Police Station, *inter-alia*, alleging that an information was received from one Atul Malakar to the effect that his tenant , namely, (1) Md. Haleef Afridi, and (2) Sadique Ul Hoque have been running illegal business of narcotics substance from his rented room situated at Puberun Path, House No. 38, Bye Lane No. 8, Hatigaon. After receiving the said information, the police team from Hatigaon Police Station proceeded to the said place and conducted the search inside the house.

**4.** During the search operation, 12 numbers of sealed packet wrapped with brown colour cello tape containing suspected *ganja*, weighing about 23 kg 436 grams, was recovered and three persons namely, Altaf Hussain, Sadique Ul Hoque and Haleef Afridi were apprehended therefrom.

**5.** The learned counsel for the petitioner has submitted that the petitioner is innocent and not involved in the offence alleged in the FIR against him.

**6.** The learned counsel for the petitioner has submitted that the petitioner has also filed an additional affidavit, bringing on record the order dated 02.03.2024 passed, in connection with the application under section 52 A of the NDPS Act, 1985, by the learned Judicial Magistrate 1$^{st}$ Class, in Hatigaon P.S. Case No. 39/2024.

**7.** The learned counsel for the petitioner has submitted that on perusal of

the aforesaid order dated 02.03.2024, it appears that the Investigating Officer has not followed the mandate of Section 52 A of the NDPS Act, 1985, as well as also flouted the mandate of Narcotics Drugs and Psychotropic Substance (Seizure, Storage, Sampling and Disposal) Rules, 2022(hereinafter referred to as "2022 Rules").

**8.** The learned counsel for the petitioner has submitted that on perusal of the order dated 02.03.2024, passed by the learned Judicial Magistrate 1st Class, in Hatigaon P.S. Case No. 39/2024, it is apparent that the Investigating Officer had produced the seized *ganja* in 12 numbers of sealed packets wrapped with brown colour cello tape weighing about 23.436 kg. The sealed packets were marked as A1 to A12. On weighing the sealed packets, it was found that (1) the weight of A1 was 1.950 kg, (2) the weight of A2 was 2.000 kg, (3) the weight of A3 was found to be 1.960 kg, (4) the weight of A4 was found to be 1.927 kg, (5)the weight of A5 was found to be 1.937 kg, (6) the weight of A6 was found to be 1.969 kg, (7) the weight of A7 was found to be 2.004 kg, (8) the weight of A8 was found to be 1.988 kg, (9) the weight of A9 was found to be 1.971 kg, (10)the weight of A10 was found to be 1.972 kg, (11) the weight of A11 was found to be 1.892 kg, and (12) the weight of A12 was found to be 1.948 kg.

**9.** The learned counsel for the petitioner has submitted that on perusal of the aforesaid order, it appears that the seal of the seized substance was broken in presence of the Magistrate and the seized substance was taken out from sealed packets in the presence of Magistrate from all 12 packets and mixed together on a plain white sheet to form a homogeneous mixture. Thereafter, three samples of seized contraband weighing about 25 grams each were taken out from the said homogenous mixture and packed in polythene packets, which were marked as S1, S2 and S3 respectively and thereafter it were sealed in the

presence of learned Magistrate.

**10.** It is also submitted by the learned counsel for the petitioner that after drawing of the representative samples the remaining suspected *ganja* was again sealed in the presence of the learned Magistrate.

**11.** The learned counsel for the petitioner has submitted that as the seizure of contraband, which is suspected to be *ganja*, in this case was in 12 separate packages, wrapped by brown colour cello tapes with different weights and the weight of each packet ranged from 1.892 kg to 2.004 kg and therefore, one sample, in duplicate, should have been drawn from each packet as per Rule 10(1) of the 2022 Rules.

**12.** The learned counsel for the petitioner has submitted that in the instant case, instead of drawing sample from each packet, the suspected contraband was taken out from all 12 packets on a plain white sheet to form a homogeneous mixture, which according to learned counsel for the petitioner is contrary to the mandate of the 2022 Rules, when the contraband were seized in different packages.

**13.** The learned counsel for the petitioner has also submitted that as per Section 2(iii)(b) of the NDPS Act, 1985, "*ganja"* has been defined as the flowering of the fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops).

**14.** It is also submitted by the learned counsel for the petitioner that no colour test by drug identification kit was done for coming to the conclusion that the contents of each packet were identical in all respect.

**15.** Hence, he has submitted that if some of the packets, which were seized in this case, did not contain the flowering of the fruiting tops of the cannabis, then by preparing a homogeneous mixture of entire seized contraband, in

violation of the mandate of Rule 10 of the 2022 Rules, the petitioner has been prejudiced as in the event any of the package did not contain *ganja*, there is every likelihood of the weight of seized contraband would have been less than 20 kg and in that event the mandate of Section 37 of the NDPS Act, 1985 could not have been applicable to the petitioner.

**16.** The learned counsel for the petitioner also submits that by not complying with the mandatory provisions of the "2022 Rules," in drawing samples from the seized contraband, the mandate of Section 52 A of the NDPS Act, 1985 has been violated and therefore, the petitioner is entitled to get bail on that ground.

**17.** On the other hand, learned Additional Public Prosecutor has vehemently opposed the grant of bail to the above-named petitioner on the ground that the quantity of contraband seized in this case is commercial quantity and therefore, the embargo of Section 37 of the NDPS Act, 1985 is applicable to the instant case.

**18.** He has also submitted that in this case, there has been no violation of the mandatory requirement of Section 52 A of the NDPS Act, 1985. He has produced the case diary of Hatigaon P.S. Case No. 39/2024 and has submitted that the mandatory requirement of Section 52 A of the NDPS Act, 1985 has been followed in this case and the inventory of the seized contraband was prepared and certified by the Judicial Magistrate 1$^{st}$ Class. It is also submitted that the sample of the seized contraband was also drawn before the Judicial Magistrate 1$^{st}$ Class as mandated under Section 52 A of the NDPS Act, 1985.

**19.** The learned Additional Public Prosecutor has also submitted that in the meanwhile, the Investigating Officer has already received the Forensic Laboratory report dated 22.04.2024, which gave positive test for cannabis in all

the three samples tested by it.

**20.** I have considered the submissions made by learned counsel for both the sides and have gone through the materials available on record, including the case diary of Hatigaon P.S. Case No. 39/2024 carefully.

**21.** On perusal of the seizure list (MR No. 36/24) which is available in the case diary, it appears that the contraband recovered in this case were found in 12 separate sealed packets of different weights. The packets containing suspected *ganja* were covered by cello tapes. It is also pertinent to note that the weight of the suspected seized *ganja* mentioned in the seizure list as well as in the inventory, includes the weight of the packets in which the *ganja* was kept and sealed at the time of weighing. The packets, in which the *ganja* was kept, were not weighed separately before putting *ganja* in those packets, so as to find out the weight of the packets without *ganja,* so that actual quantity of *ganja* seized could be found out.

**22.** Be that as it may, on perusal of order dated 02.03.2024, passed by learned Judicial Magistrate 1st Class, Kamrup(M) in Hatigaon P.S. Case No. 39/2024, it appears that the seized substances were in fact taken out from the sealed packets before the Magistrate, and the *ganja* from all the packets were mixed together on a plain white sheet to form a homogeneous mixture. Thereafter, three samples of the said *ganja,* weighing about 25 gram each, was taken from the said homogeneous mixture and were packed in separate polythene packets. The procedure adopted for drawing of samples in this case appears to be contrary to what has been provided by 2022 Rules.

**23.** Rule 3 (2) of the 2022 Rules provides that, "if the narcotics drugs, psychotropic substance and controlled substance are found in packages or containers, such packages and containers shall be weighed separately and

serially numbered for the purpose of identification."

**24.** Similarly, Rule 10 (1) which pertains to drawing of sample provides that "one sample in duplicate shall be drawn from each package and containers seized". However, in the instant case, instead of drawing one sample in duplicate from each of the 12 packages seized in this case, a homogeneous mixture was made, which is contrary to what has been provided in the 2022 Rules.

**25.** Rules 10(2) of the 1922 Rules provides that, where after colour test by the Drug Identification Kit, it is conclusively indicated that the packages are identical in all respect, then the packages may be bunched in lots of not more than 10 packets and from each such lot, one sample in duplicate shall be drawn, provided in the case of *ganja*, it may be bunched in lots of not more than 40 packages or containers.

**26.** Thus, it appears that in the instant case, the seizure was in 12 packets. Therefore, before drawing sample from the lot, there ought to have been a test conducted to come conclusively to the finding that all the 12 packages are identical in all respect. Otherwise, what was required is to draw one sample in duplicate from each of the 12 packets, which was not done in the instant case.

**27.** As per section 76 (2) (df), the Central Government may make rules for drawing of samples and testing and analysis of such samples. In pursuant to the said power, the Central Government has notified the Narcotics Drugs and Psychotropic Substance (Seizure, Storage, Sampling and Disposal) Rules, 2022 (referred to as "2022 Rules" in this order) on 22nd December, 2022. It is mandatory for the Investigating Officer/Seizing Officer to follow the procedure prescribed by the said rules, while drawing of samples before the Magistrate in pursuant to Section 52 A of the NDPS Act, 1985.

**28.** It is a settled position of law that the provisions of Section 52 A of the

NDPS Act, 1985 are mandatory in nature. While drawing the samples of the contraband before the Magistrate in pursuant to Section 52 A of the NDPS Act, 1985, the procedure prescribed in the 2022 Rules shall have to be scrupulously followed and there is no discretion on the part of the Investigating Officer/Seizing Officer to deviate from the procedure prescribed by the said Rules.

**29.** Since the offences under NDPS Act, 1985 prescribes very stringent punishment, hence the compliance with statutory prescriptions and procedures shall also have to be strictly and scrupulously followed. The statute mandates that the prosecution side must prove strict compliance of the prescribed procedures. If there is any kind of doubt regarding compliance of the mandatory provisions of the statute, the benefit shall have to be given to the accused. When a statutory provision mandates a particular procedure to be followed, it is the bounden duty of the Investigating Officer/Seizing Officer to follow the prescribed procedure and not following the mandate would vitiate the sample drawing procedure itself and ultimately, would have its impact on the outcome of test of such samples which in turn would affect the merit of the case.

**30.** This court is of considered opinion that not following the procedure prescribed by the 2022 Rules would amount to violation of the mandatory provision of Section 52 A itself, and in case of such a violation, the rigours of Section 37 of the NDPS Act, 1985 would not apply to such a case.

**31.** The applicant is detained behind the bars for last 157 days and for reasons mentioned herein above, he is entitled to get bail in this case.

**32.** In view of the reasons discussed hereinabove, the petitioner Altaf Hussain, is allowed to be released on bail of Rs. 50,000/- with two sureties of like amount, subject to the satisfaction of the learned Special Judge,

Kamrup(M), Guwahati with following conditions: -

**(i)** After getting released on bail, the petitioner shall appear before the Investigating Officer of Hatigaon P.S. Case No. 39/2024, once in every week for next four weeks or till the investigation is completed, whichever is earlier, and shall cooperate in the investigation.

**(ii)** 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 such person from disclosing such facts to the Court or to any Police Officer.

**(iii)** The petitioner shall provide his contact details, including the photocopies of his Aadhaar card or driving license or PAN card and mobile number and any other contact details to the Investigating Officer of the Case.

**33.** With the above observations, this bail application is accordingly disposed of.

**JUDGE**

**Comparing Assistant**