

GAHC010095562024



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

Case No. : Bail Appln./1389/2024

ENAM UDDIN
SON OF LATE SAKAWAT ALI
R/O VILL- PIRERCHOWK, CHAND SRIKONA, P.S. KARIMGANJ
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
THROUGH THE PP, ASSAM

Advocate for the Petitioner : MR. J M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 27.05.2024

- 1)** Heard Mr. J.M.A. Choudhury, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor appearing for the State of Assam.
- 2)** This application under Section 439 of the Code of Criminal Procedure,

1973 has been filed by the petitioner, namely, Enam Uddin, who has been detained behind the bars since 04.04.2023, in connection with Special NDPS Case No. 28/2023 corresponding to Karimganj P.S. Case No. 252/2023, registered under Section 21(c)/29 of the NDPS Act, 1985, pending in the Court of learned Special Judge, Karimganj.

3) The gist of accusation, in this case, is that on 03.04.2023, one Nishi Ranjan Dey, S.I. of Police, of Karimganj Police Station had lodged an FIR before the Officer-In-Charge of Karimganj Police Station, *inter-alia*, alleging that the Superintendent of Police, Karimganj had received an information at about 6.00 p.m. that large quantity of drugs were concealed by two peddlers in the house of Abdul Khalique, and on receiving the said information, the informant at about 6.20 pm along with the other police personnel proceeded to the house of said Abdul Khalique and after reaching the house, he conducted search of the said house and during the search, Yaba Tablets, weighing about 2.095 kg, were recovered therefrom. The present petitioner was also found in the same house. After conducting the formalities of search and seizure, the police apprehended the present petitioner and returned to the Police Station at about 8.20 pm. On receipt of the said FIR, Karimganj P.S. Case No. 252/2023 was registered under Section 21(c)/29 of the NDPS Act, 1985 and investigation was initiated. Ultimately, on completion of investigation, charge-sheet bearing Charge-sheet No. 398/2023 dated 26.09.2023 was filed against the present petitioner under Section 21(c)/29 of the NDPS Act, 1985. Another accused, namely, Abdul Khalique was also charge-sheeted along with the present petitioner.

4) The learned counsel for the petitioner has submitted that the petitioner is innocent and has been falsely implicated in this case. He has also submitted that the contraband in this case was not seized from the possession of the

present petitioner, but it was seized from the house of Abdul Khalique. It is submitted by the learned counsel for the petitioner that when police came to the house of Abdul Khalique on the day when the search was conducted, the petitioner along with other villagers went there to see as to what has happened, however, police apprehended him and implicated him in this case.

5) It is also submitted by the learned counsel for the petitioner that though, the search and seizure procedure was conducted after the sunset at about 7.50 pm, no reason has been shown by the Police for conducting search during the night after the sunset and there has been a clear violation of the second proviso of Section 42 (1) of the NDPS Act, 1985, which is mandatory. The learned counsel for the petitioner has also submitted that due to non-compliance of mandatory provisions of Section 42 of the NDPS Act, 1985, the petitioner is entitled to get benefit of the same and is entitled to get bail.

6) The learned counsel for the petitioner has also cited a ruling of the Apex Court of India in the case of “**Sarija Banu Alias Janarthani Alias Janani and Another Vs. State through Inspector of Police**” reported in “**(2004) 12 SCC 266**” to show that the compliance of Section 42 of the NDPS Act, 1985 is mandatory and the petitioner would get benefit of the same, if the mandatory provisions of Section 42 of the NDPS Act, 1985 is not complied with.

7) On the other hand, the learned Additional Public Prosecutor has vehemently opposed the grant of bail to the present petitioner and has submitted that the search and seizure has been conducted by the authorized officer in pursuant to the procedure laid down under NDPS Act, 1985 and as the seized contraband is of commercial quantity, the embargo of Section 37 of the NDPS Act, 1985 would be applicable in this case and, therefore, bail should not be granted to the petitioner.

8) The learned Additional Public Prosecutor has also submitted that by GD Entry No. 73 dated 03.04.2023 of Karimganj Police Station, the authority to conduct search and seizure in the house of the Abdul Khalique was also given by the Officer-In-Charge of Karimganj Police Station.

9) I have considered the submissions made by learned counsel for both the sides and have perused the scanned copy of Special NDPS Case No. 28/2023 including the scanned copy of the case diary of the Karimganj P.S. Case No. 252/2023.

10) Though, in this case, commercial quantity of Yaba Tablet was seized by the Seizing Officer, however, it appears from the seizure list dated 03.04.2023 (MR No. 132/23) a copy of which is available in the case record. The search and seizure was conducted at 7.50 pm on 03.04.2023 and, therefore, apparently, it is after the sunset. It also appears from the authority slip given by the Officer-In-Charge of Karimganj Police Station to the S.I. Nishi Ranjan Dey, who conducted the search and seizure operation (GD Entry No. 73 dated 03.04.2023) that the said authorization is to conduct the search at the house of Abdul Khalique, however, there is no mention therein as to why the search has to be conducted after sunset. It appears that the mandatory requirement of recording the grounds for his belief as provided in Proviso 2 to Section 42 (1) of the NDPS Act, 1985 has not been complied in this case which is mandatory in nature.

11) The Apex Court of India in the case of ***Sarija Banu Alias Janarthani Alias Janani and Another. Vs. State through Inspector of Police***” (*supra*) has observed as follows:-

“7. It is pertinent to note that in the bail application of the appellants, it was alleged, that there was serious violation of Section 42 of the NDPS Act. In the impugned order

nothing is stated about the alleged violation of Section 42, and it is observed that it was not necessary to consider such violation at this stage. The compliance with Section 42 is mandatory and that is a relevant fact which should have engaged the attention of the Court while considering the bail application."

12) Thus, it appears that compliance of Section 42 of the NDPS Act, 1985 is mandatory and for non-compliance of the same by the search and seizing officer would entitle the petitioner to get bail.

13) Thus, having regard to the facts and circumstances of this case as discussed above and also this Court, *prima facie*, coming to a finding, only for the limited purpose of consideration of the instant bail application, that there appears to be non-compliance of mandatory provision of second proviso to Section 42 of the NDPS Act, 1985 for conducting search and seizer in the house of Abdul Khalique after sunset, the petitioner would be entitled to get bail in this case.

14) In view of the above, the above-named petitioner is directed to be released on bail of Rs. 50,000/- (Rupees Fifty Thousand only) with two sureties of like amount subject to the satisfaction of learned Special Judge, Karimganj with the following conditions :-

- (i) That out of the said sureties one should be a government servant;
- (ii) That the petitioner shall cooperate in the trial of Special NDPS Case No. 28/2023 and shall regularly appear before the Trial Court as and when so required by the Trial Court;
- (iii) That the petitioner shall not directly or indirectly make any inducement, threat or promise to any person who may be acquainted with the facts of the case, so as to dissuade such person from disclosing such

facts to the Trial Court during the trial;

(iv) That the petitioner shall not leave the jurisdiction of the Trial Court without prior permission of the Trial Court.

(v) That the petitioner shall not commit any offence similar to the one for which he has been accused of in this case while on bail.

15) With the above observation, this bail application is accordingly, disposed of.

JUDGE

Comparing Assistant