

GAHC010107732024



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

Case No. : Bail Appln./1572/2024

MOFIDUL ISLAM AND ANR
S/O MOJIBOR RAHMAN, R/O VILL- PALASH KANDI, P.S.-LAKHIPUR, PIN-
783129, DIST- GOALPARA, ASSAM

2: ANOWAR HUSSAIN
S/O NURUL HOQUE
R/O VILL- NAGARJAR
P.S.-HOWLY
PIN-781316
DIST- BARPETA
ASSA

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR M RANA

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 16.07.2024

Heard Mr. M. Rana, learned counsel for the petitioners. Also heard Mr. B. Sharma, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 439 of the Code of Criminal Procedure, 1973 for grant of bail to the accused/ petitioners, who have been arrested in connection with Barama P.S. Case No. 109/2021, under Section 22(C) NDPS Act, 1985, added Section 489(C) of the Indian Penal Code, corresponding to Special NDPS Case No. 02/2022.

3. Scanned copy of the case record along with the Case Diary has been received. Perused the same. Heard both sides.

4. It is submitted by Mr. Rana, learned counsel for the petitioners, that the present accused/petitioners are innocent and they have not committed any offence as alleged in the F.I.R. The actual fact of the case is that both the accused/petitioners were travelling in a vehicle as passenger wherefrom the contraband by allegedly recovered by the Investigating Officer. But nothing was recovered from the conscious possession of the present accused/petitioners and they were arrested in connection with this case purely on suspicion. He further submitted that the accused/petitioners are behind the bar for last 2 (two) years and 9 (nine) months and till then, only 2 (two) witnesses are being examined by

the prosecution. More so, the P.W.-1 gave some contradictory statement which contradicts the statement made in the F.I.R. As per him, the suspected drugs were recovered from the side dickey of the bus, while as per the informant or as per the statement made in the F.I.R., the suspected drugs were recovered from inside the bus. More so, the petitioner No. 2 was not present at the place of occurrence though both the accused/petitioners were arrested purely on suspicion and thus, there is every chance of acquittal in this case. He further submitted that both the accused/petitioners were arrested in connection with this case only on 12.10.2021 and the Charge-Sheet was also filed, vide Charge-Sheet No. 01/2022, on 10.01.2022, i.e. the Charge-Sheet was filed within the stipulated period of time. But, till then, even after the lapse of 2 (two) years and 9 (nine) months, only 2 (two) witnesses are being examined by the prosecution, who also gave some contradictory statements which creates reasonable doubt in the veracity of the prosecution case.

5. In support of his submission, Mr. Rana further relied on the decisions of Apex Court passed in **Rabi Prakash Vs. State of Orissa**, reported in **2023 Live Law SC 533**, as well as **Mohd Muslim @ Hussain Vs. State (NCT of Delhi)**, reported in **2023 0 Supreme (SC) 289**. He also relied on an order of co-ordinate Bench of this Court passed in **Bail Appln. No. 815/2024, dated 20.06.2024**, wherein the co-ordinate Bench granted bail considering the view of the Apex Court in case of **Rabi Prakash Vs. State of Orissa (supra)** as well as the case of **Mohd Muslim @ Hussain Vs. State (NCT of Delhi) (supra)** and also other judgments of Apex Court.

6. Mr. Rana further submitted that the embargo of Section 37 of NDPS Act

can be outweigh considering the long period of incarceration of the present accused/petitioner. He further submitted that there is no scope or probability of disposal of the case within short period as there are several witnesses to be examined by the prosecution.

7. In this context, Mr. Sharma, learned Additional Public Prosecutor, has submitted that it is not only the case wherein the commercial quantity of the contraband was recovered from the possession of the accused/petitioners, but subsequently after recovery of fake currency, Section 489(C) is also added against the present accused/petitioners. Moreover, huge quantity of contraband was recovered from the conscious possession of the accused/petitioners and thus, the rigor of Section 37 NDPS Act will follow in the present case. He further submitted that considering the nature of offence, the accused/petitioners are not entitled to release on bail only considering the period of long incarceration. More so, the trial is progressing fairly and 2 (two) witnesses are already been examined by the prosecution. Accordingly, he raised objection and submitted that it is not a fit case wherein the accused/petitioners can be released on bail and in the same time, he submitted that hampering or tampering of the witnesses as well as probability of absconding of the accused/petitioners also cannot be denied at this stage. Thus, he raised objection in granting bail to the accused/petitioners.

8. After hearing the submissions made by the learned counsels for both sides, I have perused the scanned copy of the case record and the annexures filed along with the petition.

9. As per the allegation, information was received by the Investigating Officer from a reliable source regarding carrying of narcotic substance by a vehicle heading from Guwahati towards Barpeta road and on the basis of the said information, the S.I. of Barama Police Station, along with Additional Superintendent of Police and other Police Officials, arrived at the Barama Bus Stand and conducted Naka checking in presence of the witnesses and detained the said bus. During checking, one cartoon was recovered containing 42 packets of SIMPLFX-C capsules total 6048 capsules suspected to be Narcotic drugs were recovered from the possession of accused/petitioner No. 1- Mofidul Islam and accordingly, observing all formalities, those were seized in presence of the witnesses. However, it is the case of the petitioners that both the accused/petitioners were arrested by the police only on suspicion and the contrabands were not recovered from the conscious possession of the accused/petitioners.

10. It is a fact that the present accused/petitioners, along with some others, were arrested in connection with this case with the allegation of recovery of commercial quantity of contraband from their possession on 12.10.2021 and since then, both the accused/petitioners are in custody. After their arrest and on completion of investigation, police find *prima facie* materials against both the petitioners and accordingly filed the Charge-Sheet against them.

11. From the record, it also reveals that 2 (two) PWs are already been examined by the prosecution. However, from the statement made by the witnesses, it is seen that the PW-1 could not identify any of the accused persons while adducing his evidence and he has no idea as to who was apprehended by

the police at the time of investigation. However, he supported the prosecution case regarding the recovery of one cartoon from the vehicle which was intercepted by police during investigation. In the same time, PW-2, who was working as an Attached Officer at Barama P.S., also claimed his presence at the time of recovery of cartoon containing 42 packets of total 6048 capsules.

12. From the scanned copy of the Case Diary as well as the case record, it is also seen that there are sufficient incriminating materials against the present 2 (two) accused/ petitioners and being a case of commercial quantity, the rigor of Section 37 NDPS Act will also follow.

13. For ready reference, Section 37 NDPS Act is extracted hereinbelow:

"37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973

(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."

14. Thus, as per Section 37 (1) (b) of NDPS Act, the bail can only be granted, if there is no reasonable ground for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. But, from the materials available in the case record, there cannot be any reasons to

believe that the accused/petitioners are not guilty of such offence or they are not likely to commit any offence while on bail.

15. But, in the same time, it cannot be denied that both the accused/petitioners are behind the bar for more than 2 (two) years 9 (nine) months from their date of arrest and till then, the prosecution has been able to examine only 2 (two) witnesses out of 13 (thirteen) numbers of witnesses and it also cannot be denied that to examine the remaining 11 (eleven) numbers of witnesses, the prosecution may take a considerable period for completion of the trial.

16. In the case of **Rabi Prakash Vs. State of Orissa (supra)**, the Apex Court has observed that "*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.*" Further, in the case of **Mohd Muslim @ Hussain Vs. State of (NCT of Delhi)**, it has been observed by the Apex court that grant of bail on the ground of undue delay in trial cannot be said to be fettered by Section 37 of the NDPS Act, 1985.

17. Again in the case of **Nitish Adhikari Vs. State of West Bengal (passed in SLP Criminal No. 5769/2022/2022)**, as relied by the learned counsel for the petitioner, as well as in **Md. Salman Hanif Shaikh Vs. State of Gujarat (passed in SLA Criminal No. 5530/2022)**, the Apex Court also expressed the same view and the petitioners of the said cases were released on bail on the ground of prolonged incarceration.

18. In the instant case, it is seen that there are some materials available in the Case Diary and on the basis of which, the Investigating Officer has also filed the Charge-Sheet against the present accused/petitioners showing their involvement in the alleged offence. The Charge-Sheet was also filed within the statutory period, but it is seen that in spite of filing of the Charge-Sheet in the year 2022, the prosecution could examine only 2 (two) witnesses out of 13 (thirteen) numbers of witnesses, though it a fact that both the accused/petitioners are behind the bar for more than 2 (two) years 9 (nine) months.

19. In view of above and also considering the observation made by the Apex Court in the various judgments, as discussed above, and further considering the other facts and circumstances of this case, this Court is of the opinion that the period of long incarceration undergone by the accused/petitioners for more than 2 (two) years 9 (nine) months may be considered as a ground for bail with the conditional liberty considering the fundamental right guaranteed under Article 21 of the Constitution and, therefore, I am inclined to grant bail to the present accused/petitioners.

20. Accordingly, it is provided that on furnishing a bond of Rs. 50,000/- (Rupees twenty thousand) only each with 2 (two) sureties of like amount, one surety has to be a government servant, to the satisfaction of the learned Special Judge, Baksa, Mushalpur, the accused/petitioners, namely, (i) Mofidul Islam & (ii) Anowar Hussain, be enlarged on bail, subject to the following conditions:

- (i) that the petitioners shall make himself available for interrogation by

the Investigating Officer as and when required;

- (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 Special Judge, Baksa, Mushalpur, without prior permission.

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

JUDGE

Comparing Assistant