

GAHC010109162024



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

Case No. : Bail Appln./1587/2024

ABDULLAH AL MAHMUD CHOUDHURY @ ABDULLAH CHOUDHURY @
BABLU
S/O LATE MOINUL ISLAM CHOUDHURY
R/O EAST KANISHAIL
P.S. KARIMGANJ
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

ORDER

24.06.2024

Heard Mr. H.R.A. Choudhury, learned Senior counsel assisted by Ms. R. Deka, learned counsel for the accused and also heard Mr. P.S. Lahkar, learned Additional Public Prosecutor, Assam, appearing for the State respondent.

2. This application under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused, namely, Abdullah Al Mahmud Choudhury @ Abdullah Choudhury @

Bablu, who has been languishing in jail hazot since 06.05.2023, in connection with Special (NDPS) Case No.43/2023, arising out of Karimganj P.S. Case No.334/2023 under Section 21(c)/25/29 of the NDPS Act, pending before the Court of learned Special Judge, Karimganj, for grant of bail.

3. Notably, the aforementioned case has been registered on the basis of an FIR lodged by S.I. Badru Zaman Ahmed of Karimganj P.S., on 05.05.2023. The essence of allegations, as reflected in the said FIR is that acting on a tip off on 05.05.2023, at 5:20 am, the informant and staff intercepted one Maruti Alto vehicle, bearing registration No.AS-10F-4531, driven by one Abul Khayer Md. Siddique and during search they have recovered 48 soap cases containing 567 grams of suspected Heroin. And during interrogation, the driver disclosed that one Abdullah Choudhury @ Bablu is the receiver of the same and he is also involved in the consignment and there was a plan to deposit the same to him.

4. Mr. Choudhury, learned Senior counsel for the accused, submits that this is the second bail application filed by the accused on the ground of delay in trial. Mr. Choudhury further submits that the accused was arrested on 05.05.2023, and since then he has been languishing in jail hazoot. Mr. Choudhury also submits that though charge has been framed against the accused on 16.12.2023, yet, till date, no witnesses have been examined by the prosecution side. It is also the submission of Mr. Choudhury that nothing was recovered from the possession of the present accused and he was arrested only on the basis of statement under Section 67 of the NDPS Act and also on the basis of Call Details Report and in view of the case of **Toofan Sing vs. State of Tamil Nadu**, reported in **(2021) 4SCC 1**, the statement under Section 67 of the NDPS Act is not admissible. Further, Mr. Choudhury submits that the accused is ready to face trial and will appear before the court below on each and every date and therefore, it is contended to allow the petition.

5. On the other hand, Mr. P.S. Lahkar, the learned Additional Public Prosecutor, Assam submits that a second bail application is maintainable only on the change of

circumstances in favour of the accused and since no change of circumstances could have been shown in favour of the accused, this application is not maintainable. Further, Mr. Lahkar submits that the contentions, so raised by Mr. Choudhury had already been considered by this court in the first application and the same cannot be reviewed again. Further, Mr. Lahkar submits that the quantity of Heroin, allegedly recovered from the possession of the co-accused are of commercial quantity and as such, the accused has to satisfy the twin requirement of Section 37 of the NDPS Act. And as the accused has failed to satisfy twin requirement, Mr. Lahkar has contended to dismiss the petition.

6. Having heard the submissions 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 case record, received from the learned Court below.

7. The scanned copy of the record of the learned trial court reveals that charge had already been framed against the present accused under Sections 21(C)/25/29 of the NDPS Act, on 16.12.2023 and now the case is pending for evidence. Till date, no witnesses have been examined by the prosecution side.

8. Indisputably, this is second bail application preferred by the accused. The first bail application was dismissed by this court on 12.02.2024. It is well settled that second bail application is maintainable only on change of circumstances. Reference in this context can be made to the decisions of Hon'ble Supreme Court in **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav & Anr.**, reported in **(2005) 2 SCC 42** and also in **State of Tamil Nadu vs. S.A. Raja**, reported in **(2005) 8 SCC 380**.

9. In the case in hand, as submitted and pointed out by Mr. Lahkar, the learned Addl. P.P. no change of circumstance could have been shown in favour of the accused after rejection of the first application on 12.02.2024. Rather, Mr. Choudhury has reiterated the points which he had already argued in the first bail application and considered by this Court. This Court finds no ground to review the same again.

10. That, the issue of non-recovery of contraband substances from the possession of

the accused had already been considered and dealt with in the first application. The issue of CDR analysis, also had been taken note of earlier. No new ground has been shown here in this petition.

11. No endeavour is also made to satisfy the twin requirement of Section 37(1)(b)(ii) of the NDPS Act, which is a requirement of law as held by Hon'ble Supreme Court in **Union of India Through NCB vs. Md. Nawaz Khan** {Criminal Appeal No. 1043/2021, arising out of SLP (Crl.) No. 1771/2021} and as such, the embargo under Section 37 of the NDPS Act will definitely come into play.

12. In the case of **Union Of India vs. Ajay Kumar Singh @ Pappu**, Criminal Appeal No.952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28th March, 2023, Hon'ble Supreme Court, has held that no person, accused of an offence involving trade in commercial quantity of narcotics, is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.

13. No doubt to some extent there is delay in the trial. Though the charges were framed against the accused on 16.12.2023, till date no witnesses turned up, no apparent prejudice is shown to have caused to the accused. At best the delay, that had occurred here in this case, can be termed as systemic delay.

14. Under the above mentioned facts and circumstances and also in view of the nature and gravity of the offence and the punishment prescribed for the same this Court is of the opinion that this is not a fit case to grant the privilege of bail under Section 439 of the Cr.P.C. to the accused and therefore, the same stands dismissed.

Sd/- Robin Phukan
JUDGE

Comparing Assistant