

GAHC010117682024



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

Case No. : Bail Appln./1721/2024

AFAZ ALI @ AFAS ALI
S/O- BANIS ALI,
VILL- AMBARI
P.S. HOWLY
DIST. BARPETA, ASSAM

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR. R ALI, MR H A AHMED

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 07.08.2024

1. Heard Mr. R. Ali, learned counsel for the petitioner. Also heard Mr. K. Baishya, 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, *Afaz Ali @ Afas Ali* who has been detained behind the bars since 10.07.2023 for 395 days in connection with

Special NDPS Case No. 61/2023 arising out of Howly P.S. Case No. 125/2023 under Section 21(c)/29 of the NDPS Act, 1985.

3. The gist of the accusation in this case is that on 10.07.2023, one Niranjana Das had lodged an FIR before the Officer-in-charge of Howly Police Station, *inter alia*, alleging that one Ramesh Ch. Biswas, along with the present petitioner have been running illegal business of drugs. The said Ramesh Ch. Biswas was apprehended while he was loitering at Sonkuchi Bazar in a suspicious manner. During interrogation, the said Ramesh Chandra Biswas led the police team to the house of the present petitioner and during search of the house of the present petitioner, 30 numbers of soap cases containing 939.88 grams of heroin were recovered therefrom. On receipt of the said FIR, Howly Police Case No. 125/2023 was registered under Section 21(c)/29 of the NDPS Act, 1985 and investigation was initiated. Ultimately, on completion of the investigation, the charge-sheet was laid against 8 number of accused persons on 29.09.2023 under Section 21(c)/29 of the NDPS Act, 1985.

4. The learned counsel for the petitioner has submitted that the petitioner has been languishing behind the bars since last 395 days and only 8 out of 12 prosecution witnesses have been examined and seizure witnesses have not supported the case of the prosecution. The learned counsel for the petitioner has also submitted that in the instant case, there has been a violation of the mandatory provisions of Section 42 of the NDPS Act, 1985 as the Officer-in-charge of Barpeta Police Station, who received the information at the first instance did not follow the mandate of Section 42 by recording the said information in writing as well as by forwarding the same to the superior officer.

5. The learned counsel for the petitioner has also submitted that the search in the house of the present petitioner was conducted after sunset,

however, the officer who conducted the search has not followed the mandate of second proviso to the Section 42 of the NDPS Act, 1985, where it is mandatory to record the grounds for belief as mentioned in the second proviso for conducting the search in between the sunset and sunrise.

6. The learned counsel for the petitioner submits that in the instant case, no such grounds for conducting the search and seizure was mentioned by the Seizing Officer. In support of his submissions, the learned counsel for the petitioner has cited a Constitution Bench judgment of the Supreme Court of India in the case of "**Karnail Singh vs State Of Haryana**" reported in "**(2009) 8 SCC 539**".

7. The learned counsel for the petitioner has also submitted that the compliance of Section 42 of the NDPS Act is mandatory in nature and non-compliance of same is relevant even while considering a bail application. In support of the said submission, learned counsel for the petitioner cited a ruling of the Apex Court in the case of "**Sarija Banu alias Janarthani alias Janani & Anr. vs. State through Inspector of Police**", reported in "**(2004) 12 SCC 266**".

8. The Apex Court of India, in the case of "Sarija Banu" (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.”

9. The learned counsel for the petitioner has also submitted that the prosecution witness No. 3, who is the informant as well as the Seizing Officer in this case, has stated nothing in his deposition regarding compliance of the provision of Section 42 of the NDPS Act, 1985.

10. The learned counsel for the petitioner has also submitted that as the petitioner has been languishing behind the bars for last 395 days and the trial is yet to culminate, hence, on the ground of prolonged incarceration he prays for allowing the petitioner to go on bail.

11. On the other hand, the learned Additional Public Prosecutor has submitted that the instant case was registered on the basis of an FIR which was lodged by the Officer-in-charge of Howly Police Station and the Seizing Officer as well as the Officer who conducted the search had complied with the mandatory provisions of NDPS Act, 1985.

12. He has submitted that in the instant case, the search and seizure procedure was conducted by one Niranjana Das, SI of Police of Howly Police Station, who was duly authorized by the Additional Superintendent of Police (Headquarters), Barpeta under Section 41(2) of the NDPS Act, 1985.

13. The learned Additional Public Prosecutor has submitted that as in the instant case, the search operation was conducted after obtaining due authorization under Section 41(2) of the NDPS, 1985. The learned Additional Public Prosecutor has also submitted that in the facts and circumstances of this case the provisions of Section 42 of second proviso is not applicable as the said provision is applicable only under circumstances when warrant or authorization cannot be obtained, which is not the case in the instant case.

14. The learned Additional Public Prosecutor has also produced a copy of authorization letter dated 09.07.2023 issued by the Dr. Pradeep Saikia, APS, Additional Superintendent of Police (Headquarters), Barpeta and on perusal of the said authorization letter, it appears that by virtue of the said authority letter, SI, Niranjan Das of Howly Police Station was authorized to search any premises by day nor night and seize any psychotropic substance, article, things, documents etc. therefrom. The said authority letter was issued on 09.07.2023 at 9.00 PM and it was valid for one day.

15. The learned Additional Public prosecutor has submitted that on the same day i.e., 09.07.2023, a report regarding search and seizure of the contraband was submitted to the Superintendent of Police, Barpeta.

16. The learned Additional Public Prosecutor submits that on perusal of the testimony of PW-2, it is clear that the petitioner was the tenant of the premises from where the contraband was seized in this case.

17. The learned Additional Public Prosecutor has also submitted that as the contraband seized in this case is of commercial quantity, therefore, the rigors of Section 37 of the NDPS Act, 1985 is applicable to this case and, hence he vehemently opposed the grant of bail to the above named petitioner.

18. I have considered the submissions made by the learned counsel for both the sides and have perused the materials available on record including the scanned copy of Special NDPS Case No. 61/2023.

19. In the instant case, there is no dispute that the quantity of contraband, which was seized from the rented house of the above named petitioner, is of commercial quantity. Hence, apparently the embargo of Section 37 of the NDPS Act, 1985 is applicable to this case.

20. Moreover, on perusal of the case diary, it appears that on 09.07.2023 at 9.00 PM, the Additional Superintendent of Police (Headquarter), Barpeta had authorized the Seizing and Search Officer Shri Niranjana Das to conduct search and seizure by day or by night in reference to Howly P.S. GDE No. 225/2023 dated 09.07.2023. It also appears that the said authority letter was issued by the Additional Superintendent of Police in response to an application made by the Officer-in-charge of Howly Police Station in reference to Howly P.S. GDE No. 225/2023, dated 09.07.2023, whereby it was reported to him regarding storage of illegal narcotic drugs in the house of the above named petitioner at Ambari, Ward No. 10 under Howly Police Station.

21. Thus, it appears that the Search and Seizing Officer was authorized under Section 41(2) of the NDPS Act, 1985 to conduct search in the rented premises of the above named petitioner even at night. Therefore, in the instant case, in the considered opinion of this Court, the provisions of Second Proviso to the Section 42 of the NDPS Act, 1985 would not be applicable. It also appears that on the date of search and seizure itself, i.e., on 9th July after completing the search and seizure procedure a report regarding search and seizure was also submitted to the Superintendent of Howly Police Station. Therefore, from the materials available on record, *prima facie* it appears that there has been no violation of the Section 42 of the NDPS Act, 1985 in the instant case as the search and seizure was conducted after due authorization under Section 41(2) of the NDPS Act, 1985.

22. Moreover, it also appears that as the FIR in this case was lodged before the Officer-in-charge of Howly Police Station by the informant who received the information from the Officer-in-charge of Barpeta Station and after receipt

of the information the said information was taken down in writing and *prima facie* the requirement of NDPS Act, 1985 appears to have been followed by the person who received the information before registering the case against the above named petitioner.

23. As regards the prolonged incarceration of the present petitioner for last 395 days is concerned, it appears that there are several rulings of the Apex Court in this regard, wherein the Apex Court has observed that prolonged incarceration militates against the most precious fundamental right of the accused guaranteed under Article 21 of the Constitution of India. However, in none of such cases, the Apex Court has released an accused on the ground of prolonged incarceration before completing at least one year six months period of detention, if the contraband involved in the case is of commercial quantity.

24. In the instant case the contraband recovered is weighing about 939.88 grams of heroin which is indisputably of commercial quantity. Hence, this Court is of considered opinion that the detention of 395 days may not be considered as long enough to outweigh the embargo of Section 37 of the NDPS Act, 1985 in the instant case.

25. For the aforesaid reasons, this Court is of considered opinion that the above named petitioner is not entitled to get bail in the instant case.

26. The prayer for bail of the petitioner is accordingly, dismissed.

JUDGE

Comparing Assistant