

GAHC010119422024



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

Case No. : Bail Appln./1737/2024

KUMARJIT DEB
S/O KARUNAMOY DEB
R/O VILL- VIDYASAAGAR SARANI
P.S. SILCHAR
DIST. CACHAR, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

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

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 06.12.2024

- 1.** Heard Mr. H. R. A. Choudhury, learned senior counsel assisted by Mr. M. A. Choudhury, learned counsel for the petitioner. Also heard Mr. R. R. Kaushik, learned Additional Public Prosecutor appearing for the State of Assam.
- 2.** This bail application under Section 439 of the Code of Criminal

Procedure, 1973 has been filed by the petitioner, namely, *Kumarjit Deb*, in connection with Karimganj P.S. Case No. 19/2024, under Section 22(c)/25/29 of the NDPS Act, 1985 praying for his bail.

3. The gist of accusation in this case is that, on 06.01.2024, one Krishnamoni Kolita, WSI of Karimganj Police Station had lodged an FIR before the Officer-in-charge of Karimganj Police Station, *inter alia*, alleging that on 06.01.2024, at about 5:30 PM, an information was received through reliable sources to the Superintendent of Police of Karimganj that one four wheeler red colour Wagan-R car bearing Registration No. AS-11-D-8655 coming from Badarpur to Patharkhandi through National Highway No. 37 was carrying huge quantity of suspected drugs hidden inside the said vehicle. Accordingly, a GD entry bearing GD Entry No. 152 dated 06.01.2024 was made at Karimganj Police Station. Thereafter, a police team was constituted and a naka checking was arranged near Karimganj bypass road near Sherwali Dhaba on the National Highway No. 37. During naka checking, the vehicle (Wagan-R), bearing Registration No. AS-11-D-8655, which was coming from Badarpur towards Patharkhandi via Karimganj bypass road, was intercepted. The driver of the vehicle along with another occupant was found inside the said vehicle. On enquiry, the driver was identified as Kumarjit Deb (present petitioner) and the other occupant of the vehicle was identified as Dhiman Bhattacharjee. During search of the said vehicle, one big brown packet inside which small packets were found concealed on the back side of the driver's seat and the rear seat, a bag was found to containing total 9,000 numbers of Yabba tablets weighing about 992 grams were recovered from the said vehicle. During investigation, the sample of the seized contraband, which was examined at the Regional Forensic Science Laboratory, Silchar, gave positive test for Methamphetamine. Ultimately,

on conclusion of the investigation, finding sufficient materials against the present petitioner and the co-accused Dhiman Bhattacharjee, the charge-sheet was laid against both of them under section 22(c)/25/29 of the NDPS Act, 1985.

4. The learned senior counsel for the petitioner has submitted that the petitioner has been falsely implicated in the instant case and he is innocent and not involved in the offence alleged in the charge-sheet. It is submitted by the learned senior counsel that the petitioner is the employed driver of one Hari Pada Saha, who is the owner of the Wagon-R car which was seized in connection with this case. It is submitted by the learned counsel for the petitioner that on the date of alleged incident, the present petitioner, who is the driver, was asked by the owner of the vehicle to drop his friend, namely, Dhiman Bhattacharjee, from Silchar to Patharkandi. Accordingly, the petitioner drove the car and in the midway, the Police stopped the car and made the search and at that time he came out of the car.

5. It is also submitted that during search by the Police, the contraband was found in the duffel bag belonging to the occupant Dhiman Bhattacharjee. The petitioner, who was merely a driver, was having no idea as to what was carried by the occupant of the vehicle, namely, Dhiman Bhattacharjee. It is submitted that the petitioner was unaware of what was being carried by the said Dhiman Bhattacharjee in his duffel bag and, therefore, he was not in conscious possession of the contraband which was recovered from the car which the petitioner was driving.

6. Learned senior counsel for the petitioner has also submitted that the seizure list which has been annexed along with the bail application as Annexure-2, by which the contraband was seized, shows that the seizure was made at

7:30 PM on 06.01.2024. He, therefore, submits that apparently the seizure was made after sunset, however, there has been violation of the mandatory provisions of Section 42 of the NDPS Act, 1985 in this case. He submits that though the seizure was made after sunset, however, the Seizing Officer has not recorded in writing the grounds for his belief that the authorization for such seizure in between sunset and sunrise could not be obtained without affording opportunity for concealment of evidence or facility for the escape of the offender.

7. Learned senior counsel for the petitioner has also submitted that the requirement of following the mandatory provisions of Section 42(2) of the NDPS Act, 1985 by sending a copy of any information written down in writing within 72 hours by the Seizing Officer has not been followed in this case.

8. Learned senior counsel for the petitioner has also submitted that the vehicle from which the contraband was seized is a private Wagon-R car, therefore, same cannot be regarded as a “public place” within the meaning of Section 43 of the NDPS Act. He also submits that procedural safeguards as provided under Section 42 of the NDPS Act, 1985 are available to the petitioner in this case and any violation of such mandatory procedural safeguards would entitle the petitioner to get bail in spite of the embargo of Section 37 of the NDPS Act, 1985. In support of his submission, learned senior counsel for the petitioner has cited a ruling of the Apex Court in the case of “**Boota Singh & Ors. –Vs- State of Haryana**” reported in “**(2021) 19 SCC 606**” wherein the Supreme Court of India has observed as follows: -

“12. The evidence in the present case clearly shows that the vehicle was not a public conveyance but was a vehicle

belonging to accused Gurdeep Singh. The Registration Certificate of the vehicle, which has been placed on record also does not indicate it to be a Public Transport Vehicle. The explanation to Section 43 shows that a private vehicle would not come within the expression "public place" as explained in Section 43 of the NDPS Act. On the strength of the decision of this Court in Jagraj Singh alias Hansa, the relevant provision would not be Section 43 of the NDPS Act but the case would come under Section 42 of the NDPS Act.

13. It is an admitted position that there was total non-compliance of the requirements of Section 42 of the NDPS Act.

14. The decision of this Court in Karnail Singh as followed in Jagraj Singh alias Hansa, is absolutely clear. Total non-compliance of Section 42 is impermissible. The rigor of Section 42 may get lessened in situations dealt with in the conclusion drawn by this Court in Karnail Singh but in no case, total non-compliance of Section 42 can be accepted".

9. Learned senior counsel for the petitioner has also submitted that the word "transit" appearing in Section 43 of the NDPS Act, 1985 cannot be read on a standalone basis and it has to be read along with the word "any public place". He submits that the seizure under Section 43 of the NDPS Act, 1985 may be made only if contraband is found in any "public place" and it was in "transit". He submits that in the absence of any of two components, seizure cannot be made

under Section 43 of the NDPS Act, 1985.

10. On the other hand, learned Additional Public Prosecutor has submitted that the contraband recovered in this case is 992 grams of Yabba tablets containing Methamphetamine which is commercial quantity of Methamphetamine.

11. Any psychotropic substance containing more than 50 grams of Methamphetamine falls within the commercial quantity of psychotropic substance as per the notification issued by the Central Government under Section 2(vii-a) and 2(xxiiiia) of the NDPS Act, 1985.

12. As the contraband recovered in this case is of commercial quantity, the learned Additional Public Prosecutor submits that the embargo of Section 37 of the NDPS Act, 1985 would be applicable in this case. He also submits that though the seizure was made in Wagon-R car, the said Wagon-R car was intercepted on the National Highway No. 37 near Sherwali Dhaba which is a public place. He also submits that as the contraband was seized while it was in "transit", the provisions of Section 43 of the NDPS Act, 1985 is applicable in this case.

13. The learned Additional Public Prosecutor submits that Section 43 of the NDPS Act, 1985 empowers Officer authorized under Section 42 of the NDPS Act to seize in "any public place" or in transit any narcotic drugs and psychotropic substance. He also submits that if the seizure is made under Section 43 of the NDPS Act, 1985, the Seizing Officer need not to comply that mandatory requirement of Section 42 of the NDPS Act, 1985 and in support of his submission, he has cited following rulings: -

(i) *State of Haryana Vs. Jarnail Singh and Ors.* reported in “(2004) 5 SCC 188”

(ii) *Sujit Nath Vs. State of Assam* reported in **2024 Supreme(Online)(GAU) 3584**

(iii) *Mandeep Kaur Vs. State of Punjab* reported in **2022 0 Supreme (P&H) 819”**

14. I have considered the submissions made by the learned counsel for both the sides and have gone through the materials available on record including the scanned copy of the Special (NDPS) Case No. 5/2024 as well as scanned copy of the case diary of Karimganj P.S. Case No. 19/2024.

15. The petitioner who was the driver of the seized vehicle was arrested on 06.01.2024 and since then he is in custody.

16. It also appears that total 9000 Yabba tablets weighing about 992 grams were recovered and seized from the vehicle bearing Registration No. AS-11-D-8655 (Wagon-R) which was driven by the present petitioner.

17. It also appears that during the forensic test of the samples collected from the seized contraband, it gave positive result for Methamphetamine which is prohibited psychotropic substance and commercial quantity of the same is mentioned to be more than 50 grams in the relevant notification.

18. Though, the petitioner pleaded his innocence and has stated that he was not aware about the fact that the occupant of the car, namely, Dhiman Bhattacharjee was carrying the seized contraband in his duffle bag. However, on perusal of the statement recorded under section 161 of the code of Criminal

Procedure of the seizure witness, it appears that they have stated that the contraband was recovered from a bag which was hidden on the floor of the rear seat of the vehicle. Now, the question as to whether the contraband was kept hidden in the car or not can be answered only in the trial, however, at this stage the materials on record prima-facie shows that it was kept hidden on the floor. Thus, the materials available on record at this stage, therefore, is not sufficient to come to the conclusion that reasonable grounds are there for believing that the petitioner was not in the conscious possession of the seized contraband and that he is not guilty of the offence involved in this case. Hence, apparently, the embargo of Section 37 of the NDPS Act, 1985 appears to be applicable to this case.

19. As regards the requirement of following mandatory provisions of Section 42 of the NDPS Act, 1985 is concerned, the observation made by the Apex Court in the case of “***State of Haryana Vs. Jarnail Singh***”(supra) is relevant in this case. Same is quoted herein below:-

“Sections 42 and 43, therefore, contemplate two different situations. Section 42 contemplates entry into and search of any building, conveyance or enclosed place, while Section 43 contemplates a seizure made in any public place or in transit. If seizure is made under Section 42 between sunset and sunrise, the requirement of the proviso thereto has to be complied with. There is no such proviso in Section 43 of the Act and, therefore, it is obvious that if a public conveyance is searched in a public place, the officer making the search is not required to record his satisfaction as contemplated by the proviso to Section 42 of the

NDPS Act for searching the vehicle between sunset and the sunrise'.

20. Though, in view of the observations made by the Apex Court in the case of "***Boota Singh and Ors –Vs- State of Haryana***" (supra), this Court is of the opinion that a private (Wagon-R) car may not be regarded as a "public place" within the meaning of section 43 of the NDPS Act, 1985. However, the submissions made by the learned Additional Public Prosecutor to the effect that the seizure was made while the contraband was in transit is relevant and if the seizure is made in transit, the seizure would be regarded as a seizure made under Section 43 of the NDPS Act, 1985 and in that event, in light of the observations of the Apex Court in the case of "***State of Haryana –Vs- Jarnail Singh and Ors.***", the procedural requirement contemplated by the proviso to Section 42 of the NDPS Act, need not to be followed.

21. Regarding the submission of the learned senior counsel for the petitioner that the word "transit" appearing in Section 43 of the NDPS Act, 1985 cannot be read on a standalone basis and it has to be read along with the word "any public place", I am unable to persuade myself. In the Section 43 of the NDPS Act, 1985, the legislature has used the word "or" in between the word "any public place" and "in transit". It has not used the word "and" between said phrases. The word "or" is a disjunctive word and where a statutory provision is clear and unambiguous the word "or" cannot be read as "and" by applying the principle of reading down.

22. The word "transit" has been defined in the Black Laws Dictionary (11th edition) as "the transportation of goods or person from one place to another". If we take that meaning of the word transit in this case, it would appear that in

the instant case, the contraband was carried from Badarpur to Patharkhandi and it was seized at Karimganj Bypass Road at National Highway near Karimganj Bypass Road while the contraband was "in transit".

23. Thus, even if the seizure from a Maruti Wagon-R car in the instant case may not be regarded as a seizure at "a public place", however, as the contraband was seized while it was in transit, this Court is of the considered opinion that the seizure in this case appears to have been made under Section 43 of the NDPS Act, 1985. Hence, as per the observations made by the Apex Court in the case of "***State of Haryana –Vs- Jarnail Singh and Ors.***"(*supra*), there may not be any requirement of complying with the procedural safeguards as provided in Section 42 of the NDPS Act, 1985.

24. For the above stated reasons, this Court is of the considered opinion that the petitioner is not entitled to get the bail on the ground of violation of any mandatory provisions of Section 42 of the NDPS Act as submitted by the learned senior counsel for the petitioner.

25. The prayer for grant of bail to the petitioner is, therefore, rejected and this bail application is accordingly disposed of.

JUDGE

Comparing Assistant