

GAHC010157082023



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

Case No. : Bail Appln./2504/2023

ALOM ALI
S/O MIYACHAN ALI
R/O GOROIMARI
P.S. CHHAYGAON
DIST. KAMRUP, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. Y S MANNAN

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

ORDER

Date : 12.02.2024

- 1.** Heard Mr. Y. S. Mannan, learned counsel for the petitioner. Also heard Mr. K. Baishya, learned Additional Public Prosecutor for the State respondent.
- 2.** This application under Section 439 of the Code of Criminal Procedure,

1973 has been filed by the petitioner, namely, *Alom Ali*, who has been detained behind the bars since 27.12.2022 (for last 1 year, 1 month and 16 days, i.e., 412 days) in connection with Paltan Bazar P.S. Case No. 613/2022 corresponding to NDPS Case No. 75/2023 pending in the Court of the learned Special Judge (NDPS), Kamrup (M), Guwahati.

3. The gist of accusation against the present petitioner, in brief, is that on 26.12.2022, one Jitumani Rabha, S.I. of Police, lodged an FIR (*First Information Report*) before the Officer-in-Charge of Paltan Bazar Police Station, *inter alia*, alleging that on 26.12.2022 at about 5 p.m., an information was received through reliable sources that one Alto vehicle bearing Registration No. AS-01-EH-9902 was used by one drug peddler for transporting and supplying narcotic drug in Paltan Bazar area and other areas of Guwahati. Accordingly, on the basis of the input, on 26.12.2022 at about 9 p.m., the said person was apprehended near Excel Care Hospital on the highway bypass. The accused was thereafter taken to his rented flat near Tetelia Chariali and a search was conducted in the flat. During the search operation, 22 soap boxes containing suspected heroine weighing about 300 grams were recovered therefrom.

4. On the receipt of the said FIR, Paltan Bazar P.S. Case No. 613/2022 under Sections 21(c)/29 of the NDPS Act, 1985 was registered and investigation was initiated.

5. During the course of the investigation, when the seized drugs were produced before the Judicial Magistrate, First Class, Kamrup (M) and were weighed, it was found to be 282 grams. Ultimately, on completion of the investigation, a charge-sheet was laid against the present petitioner under Sections 21(c)/29 of the NDPS Act, 1985. On 10th July 2023, the learned Special

Judge, Kamrup (M), after considering the materials on record, framed a charge under Section 21(c) of the NDPS Act, 1985 against the present petitioner and when the said charge was read over and explained to him, he pleaded not guilty and claimed to be tried.

6. Mr. Y. S. Mannan, learned counsel for the petitioner has submitted that though 11(eleven) prosecution witnesses are listed in the charge-sheet, however, only 3(three) prosecution witnesses have been examined till date and the said witnesses have not adduced any implicating evidence against the present petitioner.

7. Learned counsel for the petitioner has submitted that the prosecution side has not complied with mandatory provisions contained in Section 42 of the NDPS Act, 1985 and on that ground alone, the petitioner is entitled to get bail in this case. By referring to the seizure memo dated 26.12.2022 by which the contraband in this case was seized, the learned counsel for the petitioner has submitted that it is apparent that seizure has been made at 9.00 PM, i.e., after sunset. However, no authorization is there to conduct search and seizure, in the rented flat of the petitioner, after sunset.

8. Learned counsel for the petitioner has further submitted that, the officer conducting the search and seizure in the rented flat of the petitioner after sunset has not recorded any grounds of his belief as to what necessitated the search of the house of the petitioner after sunset. Hence there is total violation of the mandatory provision contained in the second proviso to the Section 42(1) of the NDPS Act, 1985.

9. Learned counsel for the petitioner, in support of his submissions, has cited a ruling of the Supreme Court of India in the case of "***State of Rajasthan v.***

Jagraj Singh,” reported in **(2016) 11 SCC 687** wherein it was observed as follows:

“15. Section 42(1) indicates that any authorised officer can carry out search between sunrise and sunset without warrant or authorisation. The scheme indicates that in the event the search has to be made between sunset and sunrise, the warrant would be necessary unless the officer has reasons to believe that a search warrant or authorisation cannot be obtained without affording the opportunity for escape of the offender which grounds of his belief have to be recorded.”

10. Learned counsel for the petitioner, relying on the decision of the Supreme Court of India in the case of “**Boota Singh vs State of Haryana**” reported in “**2021 SCC Online 321**” has submitted that the non-compliance with the requirement of section 42 of the NDPS Act, 1985 is impermissible whereas delayed compliance with satisfactory explanation will be acceptable compliance of section 42, however, in the instant case there is not even the delayed compliance with the requirement of recording the grounds of belief which necessitated the search of the house of the petitioner after sunset hence there is total violation of the mandatory provision contained in the second proviso to the Section 42(1) of the NDPS Act, 1985.

11. Learned Counsel for the petitioner has also submitted that while considering an application for bail in a case where commercial quantity of contraband is involved, the question as to whether mandatory provisions of the NDPS Act, 1985 were followed by the prosecution side or not becomes relevant and any non-compliance of the mandatory provision would entitle the accused to be released on bail in spite of the embargo of section 37 of the NDPS Act, 1985. Learned counsel for the petitioner has cited a ruling of the Apex Court in the case of “**Sarija Banu Vs. State**”, reported in “**(2004) 12 SCC 266**” where in it

was 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. Mr. K. Baishya, learned Additional Public Prosecutor, on the other hand, has submitted that the quantity of contraband seized in this case is a commercial quantity and hence the embargo of Section 37 of the NDPS Act, 1985 comes into play and on that ground he had opposed the grant of bail to the present petitioner. He has also referred to GD Entry No. 769/ 2022 dated 26.12.2022 of Paltan Bazaar Police Station and has stated that the said GD Entry shows that the search and seizure by the seizing officer was authorized by an Additional DCP of Police, who is a senior officer to the officer who conducted the search and seizure.

13. Mr. K. Baishya, learned Additional Public Prosecutor also submitted that the question as to whether there was any compliance with Section 42 of the NDPS Act, 1985 or not, should be raised only in the course of the trial, and this is not the appropriate stage to raise the said question and in support of his contention, he has cited a ruling of the Apex Court in "***Union of India, NCB, Lucknow Vs Muhammad Nawaz Khan***" (Criminal Appeal No. 1043/2021 dated 22.09.2021).

14. However, learned Additional Public Prosecutor has not been able to show anything regarding recording of grounds which necessitated the search and seizure of the house of the petitioner after sunset by the officer who conducted

search and seizure in the rented house of the petitioner after sunset.

15. I have considered the submissions made by learned counsel for both the sides and have perused the materials available on record, including the scanned copy of the case record of NDPS Case No. 75/2023, as well as the scanned copy of the case diary of Paltan Bazar P.S. Case No. 613/2022.

16. On perusal of the Seizure Memo dated 26.12.2022, it appears that the contraband i.e., the suspected heroin, in this case, was found in the rented flat of the present petitioner, which is situated near the Tetelia Chariali at Guwahati. It also appears from the said Seizure Memo that the seizure of the contraband in this case was made at 9.00 p.m. Thus, there is no doubt that the search of the flat and the seizure of the contraband in this case was made after sunset. However, there is nothing on record to show that the search was preceded by recording of grounds for belief of the officer who conducted the search to show the reasons that necessitated the search of the house of the petitioner after sunset.

17. On perusal of the GD Entry No. 769/2022 dated 26.12.2022 from Paltan Bazar police station, it appears that the said GD Entry pertains only to the authorization for apprehension of the present petitioner and seizure of the vehicle bearing registration number AS01EH9902 and the said GD Entry does not mention anything about conducting a search in the rented house of the present petitioner after sunset.

18. It also appears from the order dated 11.01.2024, passed by the learned Special Judge (NDPS), Kamrup (M), Guwahati in NDPS Case No. 75/2023, that the authorization letter as stated in GD Entry No. 769/2022 dated 26.12.2022 has never been submitted by the Investigating Officer in the court. Thus, in the

instant case, it appears that the prosecution is not been able to show that there was any authorization to a conduct search in the rented premises of the present petitioner on 26.12.2022 after sunset. There is no record to show that the officer who conducted the search after sunset in the rented premises of the petitioner had recorded the grounds of his belief that necessitated the search of the rented premises of the petitioner after the sunset. Therefore, it appears that the mandatory provisions contained in the second proviso to the Section 42 (1) of the NDPS Act, 1985 were not followed in the instant case.

19. In the case of "***Union of India through NCB Lucknow Vs Mohammad Nawaz Khan Kumar***"(*Supra*), the Apex Court after considering the materials on record, it has been observed that the contention that Section 42 of the NDPS Act, 1985 was not complied with was prima facie misplaced in that case, and therefore the facts of the said case are distinguishable from the facts of the instant case where prima facie it appears that the mandatory provisions contained in the second proviso to Section 42 (1) of the NDPS Act, 1985 have not been followed.

20. As observed by the Supreme Court of India in the case of ***Sarija Banu Vs. State (Supra)***, the compliance of Section 42 is mandatory and is also relevant fact, which should engage the attention of court while considering a bail application. In the instant case, it appears that there has been non-compliance with the mandatory provisions of Section 42 of the NDPS Act, 1985, and hence prima facie the search and seizure in this case, which is in contravention of the mandatory provision of Section 42 of the NDPS Act, 1985, makes the said search and seizure and recovery made during said search and seizure of the contraband doubtful. Under such circumstances, for the limited purpose of consideration of the instant bail petition, it can be held that there are

reasonable grounds for believing that the present petitioner is not guilty of the offence for which he has been charged in this case. Moreover, there is no material on record to show that if the petitioner is released on bail, he is likely to commit any offence.

21. In view of the above discussion, this Court is of the considered opinion that the embargo of the Section 37(b)(ii) of the NDPS Act, 1985 would not be applicable to the petitioner under the facts and circumstances of this case. Hence, the petitioner is entitled to get bail in the NDPS Case No. 75/2023, which is pending before the Court of the learned Special Judge (NDPS), Kamrup (M), Guwahati.

22. For the above reasons, the petitioner, namely, Alom Ali is hereby allowed to be released on bail of Rs.50,000/- (Rupees Fifty Thousand Only) with two sureties of like amount to the satisfaction of learned Special Judge (NDPS), Kamrup (M), Guwahati in NDPS Case No. 75/2023 with the following conditions:

- i. That the petitioner shall cooperate in the conduct of the trial of NDPS Case No. 75/2023, and shall appear before the trial court on each and every date fixed for the trial unless exempted by the trial court.
- ii. That the petitioner shall not leave the State of Assam without prior permission from the trial court.
- iii. That the petitioner shall not directly or indirectly make any inducement, threat or promise to any of the listed witnesses or any other person who may be acquainted with the facts of the case, so as to dissuade such person/witnesses from deposing against the present petitioner in the pending trial in NDPS Case No. 75/2023.

iv. That the petitioner shall keep informed the trial court about his current address, mobile number/contact number, and any change of his residential address or contact details, if any, from time to time.

23. Learned trial court may add any other conditions to the conditions imposed by this court, if it deems it proper to do so.

24. It is hereby clarified that the observations made hereinbefore are limited to the purpose of considering the instant bail application only and shall have not affect the merits of the case during trial before the trial court.

25. With the above observations, this bail application is hereby disposed of.

JUDGE

Comparing Assistant