

GAHC010159502024



2024:GAU-AS:12273

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

Case No. : Bail Appln./2375/2024

NIYARUN NESSA @ NEHARUN NESSA
W/O ASAR UDDIN, R/O DOLURBOND, P.S.-R K NAGAR, DIST- KARIMGANJ,
ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. M A CHOUDHURY, MR A AHMED, U U KHAN, MR. A AHMED

Advocate for the Respondent : PP, ASSAM,

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 04.12.2024

Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. R. J. Baruah, learned Additional Public Prosecutor for the State respondent.

2. This is an application under Section 483 of BNSS, 2023 praying for grant of bail to the accused/petitioner, who has been arrested in connection with Special (NDPS) Case No. 03/2024, pending before the Court of learned Sessions Judge, Karimganj, arising out of Ratabari P.S. Case No. 01/2024, under Section 22(c)/25/29 of the NDPS Act, 1985.

3. Scanned copy of the case record has already been received. Perused the same. Heard both sides.

4. It is submitted by Mr. Ahmed, learned counsel for the petitioner, that the present accused/petitioner was arrested in connection with this case on 31.03.2024 and since then, she is languishing in jail hajat. No recovery was made from her possession of the accused/petitioner and she was arrested only on the basis of the statement made by the other co-accused persons. From the Forwarding Report also, it is seen that the present accused/petitioner was arrested only on the basis of the statement made by the co-accused wherein it is alleged that the co-accused had confessed about involvement of the present accused/petitioner and on the basis of which, she got arrested. He further

submitted that it is a settled position of law that the statement recorded under Section 67 of NDPS Act cannot be used against other accused person and it has no value in the eye of law.

5. Mr. Ahmed also relied on a decision of this Court passed in **Bail Appln. No. 2090/2022**, wherein also the co-ordinate Bench of this Court had granted bail to the petitioner relying on the judgment of Hon'ble Supreme Court passed in the case of **Tofan Singh Vs. State of Tamil Nadu**, reported in **(2021) 4 SCC 1**, wherein it is held that the statement of the co-accused recorded under Section 67 NDPS Act cannot be used against the other accused persons nor the statement of the accused recorded under Section 67 of NDPS Act can be used against him. He basically emphasized on paragraph No. 2 of the said judgment, which reads as under:

"20. Now, the question which arises as to whether such statement can be used for conviction of the petitioner. The Supreme Court in the case of Tofan Singh vs. State of Tamil Nadu, reported in (2021) 4 SCC 1 observed that the confessional statement made before an Officer designated under Section 42 or Section 53 of the Act of 1985 cannot be the basis to convict a person under the Act of 1985. It was observed that without any non-obstinate clause doing away with Section 25 of the Evidence Act, 1872 and without any safeguard would be a direct infringement of the constitutional guarantees contained in Articles 14, 20 (3) and 21 of the Constitution of India. In paragraph Nos. 158 and its sub-paragraphs, the Supreme Court observed as follows:-

"158. We answer the reference by stating:

158.1. That the officers who are invested with powers under Section 53 of the NDPS Act are "police officers" within the meaning of Section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provisions of Section 25 of the Evidence Act, and cannot be taken into account in order to convict an accused under the NDPS Act.

158.2. That a statement recorded under Section 67 of the NDPS Act cannot be used as a confessional statement in the trial of an offence under the NDPS Act."

6. Mr. Ahmed also relied on a decision of Hon'ble Supreme Court passed in **Special Leave to Appeal (Crl.) No. 242/2022, decided on 10.01.2022**, and emphasized on paragraph Nos. 8, 9 & 10 of the judgment, wherein it has been held as under:

"8. Vide order dated 05th January, 2020, learned counsel for the petitioners- NCB were directed to prepare a comprehensive tabulated statement with respect to the role attributed to each of the respondents, the evidence gathered against them at the time of their arrest, their antecedents, the dates on which they were arrested and the period of custody undergone by them, for ready reference. The said tabulated statement has been filed and a perusal thereof reveals that in SLP (Crl.) @ Diary No.22702/2020, SLP (Crl.) No.1454/2021, SLP (Crl.) No. 1465/2021, SLP (Crl.) Nos. 1773-1774/2021, SLP (Crl.) No. 2080/2021, heavy reliance has been placed by the petitioner-NCB on the voluntary statements of the accused and the co-accused recorded under [Section 67](#) of the NDPS Act for arresting them. Another piece of evidence referred to is the CDR details in respect of A-3, A-4, A-5, A-6 and A-8 in the first case which as per the prosecution, goes to show that the said respondents were constantly in touch with each other and with A-1 and A-2 on the date of the seizure. The attention of this Court was also drawn to the fact that the antecedents of A-5, A-6 and A-8 in the first case and A-2 and A-5 in the second Petition for Special Leave to Appeal (Criminal) No. 1569 OF 2021 case are not clean.

9. Having gone through the records alongwith the tabulated statement of the respondents submitted on behalf of the petitioner-NCB and on carefully perusing the impugned orders passed in each case, it emerges that except for the voluntary statements of A-1 and A-2 in the first case and that of the respondents themselves recorded under [Section 67](#) of the NDPS Act, it appears, prima facie, that no substantial material was available with the prosecution at the time of arrest to connect the respondents with the allegations levelled against them of indulging in drug trafficking. It has not been denied by the prosecution that except for the respondent in SLP (Crl.) No. 1569/2021, none of the other respondents were found to be in possession of commercial quantities of psychotropic substances, as contemplated under the [NDPS Act](#).

10. It has been held in clear terms in [Tofan Singh Vs. State of Tamil Nadu](#) 6, that a confessional statement recorded under [Section 67](#) of the NDPS Act will remain inadmissible in the trial of an offence under the [NDPS Act](#). In the teeth of the aforesaid decision, the arrests made by the petitioner-NCB, on the basis of the confession/voluntary statements of the respondents or the co-accused 6 (2021) 4 SCC 1 Petition for Special Leave to Appeal (Criminal) No. 1569 OF 2021 under [Section 67](#) of the NDPS Act, cannot form the basis for overturning the impugned orders releasing them on bail. The CDR details of some of the accused or the allegations of tampering of evidence on the part of one of the respondents is an aspect that will be examined at the stage of trial. For the aforesaid reason, this Court is not inclined to interfere in

the orders dated 16 th September, 2019, 14th January, 2020, 16th January, 2020, 19th December, 2019 and 20th January, 2020 passed in SLP (CrI.) No@ Diary No. 22702/2020, SLP (CrI.) No. 1454/2021, SLP (CrI.) No. 1465/2021, SLP (CrI.) No. 1773-74/2021 and SLP (CrI.) No. 2080/2021 respectively. The impugned orders are, accordingly, upheld and the Special Leave Petitions filed by the petitioner-NCB seeking cancellation of bail granted to the respective respondents, are dismissed as meritless."

7. Accordingly, it is submitted by the learned counsel for the petitioner that except the statement made by the co-accused, there is no material to arrest the present accused/petitioner in the instant case nor any contraband has been recovered from her possession. More so, he submitted that one co-accused person, namely, Gobindra Cheta, has already been discharged from this case by the I.O. as no materials have been found against the said person and the case of the present petitioner is also similarly situated with the said person. Accordingly, Mr. Ahmed submitted that it is a fit case wherein the accused/petition can be granted with the privilege of bail and she being a lady and a permanent resident of her addressed locality, there is no chance of absconding, rather she will appear on each and every date before the learned Trial Court below.

8. Mr. Baruah, learned Additional Public Prosecutor, submitted in this regard that the present accused/petitioner got arrested in connection with this case only on 31.03.2024 and the Charge-Sheet was also filed on 31.03.2024 on the basis of the F.I.R. lodged on 01.01.2024. He further submitted that the statement made by the co-accused under Section 67 of NDPS Act may not be relevant at the time of trial, but at the time of investigation, the I.O. has to rely on the statement of the co-accused and on the basis of which, the Investigating Officer may investigate the matter to unearth some other facts of this case. He further submitted that the judgment of the Apex Court passed in case of **Tofan**

Singh (supra) does not bar to investigate the case on the basis of the statement made by the co-accused. However, the statement recorded under Section 67 of NDPS may not be relevant at the time of trial to convict the accused person. Mr. Baruah further submitted that it is an organized crime and the recovery of the contraband from the other accused person may not be there, but only due to non-recovery of the contraband, one cannot be released on bail if sufficient incriminating materials are available or collected by the I.O. during investigation of this case. He accordingly submitted that in the instant case also, it is a fact that the recovery was made from the co-accused persons, but during investigation, it has come into the light that the present accused/petitioner is the main accused person. More so, the husband of the present accused/petitioner is also one of the co-accused who is also involved in the alleged offence.

9. Mr. Baruah further submitted that the case being the commercial in nature, rigor of Section 37 of NDPS Act will also follow wherein the twin condition has to be satisfied that the accused is not guilty of the offence and there has to be a belief that the accused will not repeat or commit the same offence while on bail. But from the materials collected by the I.O. during investigation, there cannot be any reason to believe that the present accused/petitioner is not guilty of the alleged offence nor there can be any reasonable belief that she will not repeat similar kind of offence while on bail. He, accordingly, raised serious objection and submitted that it is not at all a fit case to grant bail to the present accused/petitioner at this stage.

10. He further submitted that one of the co-accused, who is the husband of

the present accused/petitioner, is still absconding and against him, the NBWA had been issued by the learned Sessions Judge, and as the co-accused is evading police arrest, the charge could not be framed by the learned Sessions Judge, though every endeavor has been made to procure the attendance of the co-accused.

11. Mr. Ahmed, learned counsel for the petitioner, submitted in this regard that the bail cannot be denied only on the sole ground that the co-accused has not surrendered or arrested. In that context, he also relied on a decision of Hon'ble Supreme Court passed in the case of **Sebil Elanjimpally Vs. The State of Odisha [2023 LiveLaw (SC) 474]**.

12. After hearing the submissions made by the learned counsels for both sides, I have also perused the scanned copy of the case record along with the Case Diary.

13. It is seen that the accused/petitioner was arrested in connection with this case on 31.03.2024. However, till date, the charge could not be framed by the learned Sessions Judge due to absence of one of the co-accused, who is also the husband of the present accused/petitioner and was also declared as an absconder in the charge-sheet. It is also a fact that there is no recovery from the present accused/petitioner, but from the materials available in the case record, it is seen that she is one of the culprit who used to deliver the contrabands to the other co-accused persons to deliver the same at Anipur area and during investigation also, it has revealed that the present accused/petitioner is alleged to have been involved in the said offence and she along with her husband used to deal with the business of drugs. It is also an admitted

fact that the case is of commercial in nature and hence, rigor of Section 37 NDPS Act will follow.

14. 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."

15. 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/petitioner is not guilty of such offence or he is not likely to commit any offence while on bail.

16. In this regard, a judgment of the Hon'ble Apex Court can be relied on which was reported in **2024 0 Supreme (SC) 130 (State by the Inspector of Police Vs. B. Ramu)**, wherein in paragraph Nos. 9, 10, 11 & 12 of the judgment, it has been held that in a case involving recovery of commercial quantity of narcotic drug or psychotropic substance, the Court would have to mandatorily record the satisfaction in terms of the rider contained in Section 37

of the NDPS Act. Court would have to record satisfaction that there are grounds for believing that accused is not guilty of offence alleged and that he is not likely to commit any offence while on bail. Further it has been held that the Courts should be slow in granting even regular bail to the accused persons who has the criminal antecedents.

17. From the record, it is seen that till date, the charge could not be framed due to absence of one of the co-accused. However, endeavour has been made by the learned Trial Court below to procure the attendance of the co-accused person who is shown as an absconder in the charge-sheet and NBWA has already been issued against him. So, considering the entire materials of the case, it also cannot be said that there was an inordinate delay and as stated above, the charge could not be framed only due to absence of one of the co-accused.

18. In **The State of Meghalaya Vs. Lalrintluanga Sailo [Special Leave to Appeal (Crl.) No(s). 16021/2023]**, wherein, in paragraph No. 8 of the judgment, it has been held that *"thus, the provisions under Section 37(1)(b)(ii) of the NDPS Act and the decisions referred supra revealing the consistent view of this Court that while considering the application for bail made by an accused involved in an offence under NDPS Act a liberal approach ignoring the mandate under Section 37 of the NDPS Act is impermissible. Recording a finding mandated under Section 37 of the NDPS Act, which is sine qua non for granting bail to an accused under the NDPS Act cannot be avoided while passing orders on such applications."*

19. In the light of discussion made above and also considering the seriousness

of the offence and also considering the fact that there is a *prima facie* case against the present accused/ petitioner and further considering the view expressed by the Apex Court in the case laws referred to hereinabove, this Court is of the view that it is not a fit case to enlarge the accused/ petitioner on bail at this stage. More so, the delay also cannot be considered as inordinate delay and in the same time, it is also seen that the learned Court below took all endeavor for procuring the attendance of the co-accused. Hence, the present bail application stands rejected.

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

JUDGE

Comparing Assistant