

GAHC010185682024



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

Case No. : Bail Appln./2939/2024

SUNU ALI @ MD. NUR HUSSAIN
S/O NUR ISLAM ALI, R/O GARIGAON, P.S.-JALUKBARI, DIST- KAMRUP (M),
ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. A ALI, MR. A ALI, MR. Y ALI

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

Date : 11.11.2024

Heard Mr. K.N. Choudhury, learned Senior counsel assisted by Mr. A. Ali, learned counsel for the petitioner. Also heard Mr. B. Sharma, learned Additional PP for the State.

2. By filing this petition u/s 483 BNSS, 2023, the petitioner, Sunu Ali @ Md.

Nur Hussain has prayed for granting regular bail in connection with NDPS case No. 187/2024 u/s 21©/29 of NDPS Act (arising out of STF PS case no. 20/23) pending in the court of learned District and Sessions Judge No.5, Kamrup (M), Guwahati.

3. The instant case relates to recovery of commercial quantity of heroine from the hidden chamber of Tata Yodha vehicle bearing no. AS-25EC-4464 and the present petitioner was found inside the vehicle along with the alleged contraband. Accordingly, the recovered items were seized and the present accused/ petitioner was arrested.

4. The learned counsel for the petitioner has submitted that while the police personnel conducted search and seizure of the alleged narcotic drugs, no independent witnesses were present there to witness the search and seizure. Only the members of the search team were present. The signatures of the witnesses in the seizure list were taken in the police station. Thus, the entire procedure of search and seizure is patently vitiated for being in contravention of the mandate of section 103 of BNSS.

5. It is further submitted that from the inventory of seized narcotic drugs, it reveals that the sample was collected on 30/11/2023 from the godown but the seized articles were received in the said godown on 28/11/2023. It transpires that the IO did not take the sample on the spot which also violates the mandate laid down under the NDPS Act. Therefore, the petitioner is entitled to be released on bail.

6. According to learned counsel for the petitioner, the petitioner is a poor person, used to earn his livelihood by selling fruits on the road side adjacent to

Jalukbari flyover. The entire plan had been made by one Nawaz Sharif in collusion with other co-accused. The owner of the vehicle Nawaz Khan requested the petitioner to drive his vehicle to Bhetamukh Nayanpur but he did not know as to what contents were kept in the hidden chamber behind the driver's seat of the vehicle.

7. It is further contended that the petitioner has been languishing in judicial custody for last ten months and the trial has not yet commenced despite elapse of such period. Hence, the rigors of section 37 NDPS Act gets completely obliterated. Therefore, the petitioner may be enlarged on bail.

The learned counsel has referred the following case laws in support of his submissions –

a. (2022) SCC Online SC 2069 (***Shariful Islam @ Sharif vs. State of West Bengal***)

b. Bail application No. 190/2024 (***Yahiya Khan vs. Union of India***)

8. *Per contra*, learned Additional PP submits that the petitioner is the driver of the vehicle from which commercial quantity of heroine was recovered. Charge was framed only on 02/09/2024 and no witness is examined. As commercial quantity of heroine was recovered from the possession of the petitioner, without examining any witness, at this stage, it cannot be said that the provisions of BNSS or NDPS Act have been violated and the rigors of Section 37 of NDPS Act is satisfied with.

9. Admittedly, the quantity allegedly involved in this case is commercial.

Given this, the rigours of S. 37 of the NDPS Act apply in the present case. The burden is on the petitioner to satisfy the twin conditions put in place by the Legislature under Section 37 of the NDPS Act.

10. The petition states that the accused is entitled to bail because of the non-examination of independent witnesses. However, this plea would gather force only when the accused establishes after cross-examination that the police deliberately did not associate any independent witness even when they could have been made available, and in the facts and circumstances peculiar to this case, the argument does not satisfy the requirements of section 37 of NDPS Act.

11. In **State of Punjab v Baldev Singh**, (1999) 6 SCC 172, the Hon'ble Supreme Court has held that:

“The provisions of Sections 100 and 165 Cr.P.C. are not inconsistent with the provisions of the NDPS Act and are applicable for effecting search, seizure or arrest under the NDPS Act also. However, when an empowered officer carrying on the investigation including search, seizure or arrest under the provisions of the Code of Criminal Procedure comes across a person being in possession of the narcotic drugs or the psychotropic substance, then he must follow from that stage onwards the provisions of the NDPS Act and continue the investigation as provided thereunder. If the investigating officer is not an empowered officer then it is expected of him that he must inform the empowered officer under the NDPS Act, who should thereafter proceed from the stage in accordance with the provisions of the NDPS Act.”

12. In [Baldev Singh](#)'s case after referring to a number of judgments, the Bench opined that failure to comply with the provisions of [Cr.P.C.](#) in respect of search and seizure and particularly those of Sections 100, 102, 103 and 165 per se does not vitiate the prosecution case. If there is such a violation, what the courts have to see is whether any prejudice was caused to the accused. While appreciating the evidence and other relevant factors, the courts should bear in mind that there was such a violation and evaluate the evidence on record keeping that in view.

13. Whether the Investigator complied with the mandatory provisions of [sections 42](#) and [50](#) of the NDPS Act is a question of fact to be adjudicated in the trial. However, before this court treats the compliances as illegal, the prosecution needs an opportunity to prove that they had complied with the mandatory provisions as per law. Such stage would come only during the trial and certainly not at the bail stage. The exception to this would be applicable only when the non-compliance of the mandatory provisions of [sections 42](#) and [50](#) of the NDPS Act is apparent on the face of the special report under [section 57](#) of the NDPS Act and other documents of search and seizure, and in the opinion of the court, the lapse is non-rectifiable, after recording a finding that it is an incurable defect, the court might consider granting bail on such violations.

14. It is to be seen whether the accused has been afforded such a right and whether the authorised Officer has violated the mandatory requirement, as a question of fact, has to be proved at the trial. In ***Pooran Mal vs. Director of Inspection*** [(1974) 1 SCC 345] the Hon'ble Supreme Court has held that –

“.....Power of search and seizure is in any system of jurisprudence, an overriding power of the State for the protection of social security

and that power is necessarily regulated by law. A search by itself is not a restriction on the right to hold and enjoy property, though seizure is a temporary restriction to the right of possession and enjoyment of the property seized. However, the seizure will be only temporary and limited for the purpose of the investigation. The power of search and seizure is an accepted norm in our criminal law envisaged in [Sections 96 to 103](#) and [165](#) of the Criminal Procedure Code, 1973. [The Evidence Act](#) permits relevancy as the only test of admissibility of evidence. The evidence obtained under an illegal search and seizure does not exclude relevant evidence on that ground. It is wrong to invoke the spirit of Constitution to exclude such evidence. The decisions of the American Supreme Court spelling out certain Constitutional protections in regard to search and seizure are not applicable to exclude the evidence obtained on an illegal search. Courts in India refuse to exclude relevant evidence merely on the ground that it is obtained by illegal search and seizure. When the test of admissibility of evidence lies in relevancy, unless there is an express or necessarily implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search and seizure, is not liable to be shut out. Search and seizure are not a new weapon in the armoury of those whose duty it is to maintain social security in its broadest sense. If the safeguards are generally on the lines adopted by the Code, they would be regarded as adequate and render the restrictions imposed as reasonable measures.

It would thus be settled law that every deviation from the details of

the procedure prescribed for search, does not necessarily lead to the conclusion that search by the police renders the recovery of the articles pursuant to the illegal search, irrelevant evidence nor the discovery of the fact inadmissible at the trial. Weight to be attached to such evidence depends on facts and circumstances in each case. The Court is required to scan the evidence with care and to act upon it when it is proved and the Court would hold that the evidence would be relied upon.....”

15. The stand that the accused is in custody for sufficient time is also not legal grounds to overcome the rigors of S.37 of the NDPS Act at this stage.

16. The grounds taken in the bail petition that the petitioner has no knowledge what are the contents kept in the vehicle which was driving by him, do not shift the burden placed by the legislature on the accused under S. 37 of the NDPS Act. The petitioner has not given any reasonable statement to discharge the burden put by the stringent conditions placed in the statute by the legislature under section 37 of the NDPS Act. Thus, the petitioner has failed to make out a case for bail at this stage.

17. A perusal of the bail petition and the documents attached, prima facie points towards the petitioner's involvement and does not make out a case for bail.

18. Any observation made hereinabove is neither an expression of opinion on the merits of the case nor shall the trial Court advert to these comments.

19. The bail application is dismissed. However, the trial court is directed to make all endeavors to conclude the trial at the earliest.

With the above observations, the bail application is disposed of accordingly.

JUDGE

Comparing Assistant