

GAHC010241092023



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

Case No. : Bail Appln./3934/2023

SURAT JAMAL @ SUROT JAMAL
S/O EYAD ALI
R/O VILL- SHREEGRAM
PT.VI (MARUATILA)
P.S. CHAPAR, DIST. DHUBRI
STATE- ASSAM
PH-9577726468

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR K THAKUR

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN
ORDER

25.01.2024

Heard Mr. K. Thakur, learned counsel for the accused. Also heard Mr. R.J. Baruah, learned Addl. P.P. for the State respondent.

2. This application, under Section 439 Cr.P.C. is preferred by accused, **Surat Zamal @ Surot Jamal**, who has been languishing in jail hajot since

05.03.2023, in connection with **Special (NDPS) Case No. 03/2023**, arising out of Chapar P. S. Case No. 38/2019, under Sections 20(c) of the Narcotic Drugs and Psychotropic Substance Act, pending before the Learned Special Judge, Bilashipara, for grant of bail.

3. The above noted case has been registered on the basis of an FIR lodged by one Soleman Ali, S. I. of Police, Chapar, on 06.02.2019.

4. The essence of allegation, made in the FIR, dated 06.02.2019, is that acting on a tip off the informant and other police staff have conducted search in the house premises of the accused, situated at Shreegram [Pt-VI] and recovered 22.500 Kg of Ganja.

5. Mr. Thakur, learned counsel for the accused submits that the accused has been languishing in jail hazoot for more than 276 days and that out of 10 witnesses cited in the charge sheet, 5 have already been examined. Mr. Thakur further submits that the informant, who had seized the contraband substance, prepared the inventory at the police station, which is in contravention to the provision of Section 52A of the NDPS Act and also in violation of the direction of the Hon'ble Supreme Court in the case of **Union of India vs. Mohanlal and Anr.**, reported in **[2016] 3 SCC 379**. Mr. Thakur also submits that the accused is ready to face trail and to appear before the learned court below on each and every date and therefore, it is contended to allow the application.

6. On the other hand, Mr. Barua, learned Addl. P.P. submits that out of 10 witnesses cited in the charge sheet, 5 have already been examined and that the contraband substance recovered from the possession of the accused is of

commercial quantity and as such, the provision of Section 37 of the NDPS Act has not been complied with and therefore, it is contended to dismiss the application.

7. Having heard the submission of learned Advocates for both the parties, I have carefully gone through the petition and the documents placed on record and also perused the evidence of the 5 witnesses recorded by the learned Court below.

8. It is to be noted here that Section 52A of the NDPS Act read as under:-

“52A. Disposal of seized narcotic drugs and psychotropic substances.-

(1)

(2) Where any [narcotic drugs, psychotropic substances, controlled substances or conveyances] has been seized and forwarded to the officer incharge of the nearest police station or to the officer empowered under section 53, the officer referred to in subsection (1) shall prepare an inventory of such [narcotic drugs, psychotropic substances, controlled substances or conveyances] containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] or the packing in which they are packed, country of origin and other particulars as the officer referred to in subsection (1) may consider relevant to the identity of the [narcotic drugs, psychotropic substances, controlled substances or conveyances] in any proceedings under this Act and make an application, to any Magistrate for the purpose of

- (a) certifying the correctness of the inventory so prepared; or
 - (b) taking, in the presence of such Magistrate, photographs of [such drugs or substances or conveyances] and certifying such photographs as true; or
 - (c) allowing to draw representative samples of such drugs or substances, in the presence of such Magistrate and certifying the correctness of any list of samples so drawn.
- (3) Where an application is made under subsection (2), the Magistrate shall, as soon as may be, allow the application.
- (4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872) or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of [narcotic drugs, psychotropic substances, controlled substances or conveyances] and any list of samples drawn under subsection (2) and certified by the Magistrate, as primary evidence in respect of such offence."

9. In the case of **Mohanlal [Supra]**, the Hon'ble Supreme Court while dealing with Section 52A of the NDPS Act clearly laid down that :-

“it is manifest from the said provision that upon seizure of the contraband, it has to be forwarded either to the officer incharge of the nearest police station or to the officer empowered under Section 53 who is obliged to prepare an inventory of the seized contraband and then to make an application to the Magistrate for the purposes of getting its correctness certified. It has been further laid down that the samples drawn in the presence of the Magistrate and the list thereof on being certified alone would constitute primary evidence for the purposes of the trial.”

10. Again in the case of **Yusuf @ Asif vs. The State**, in Criminal Appeal No. 3191 of 2023, Hon'ble Supreme Court held that :-

“In the absence of any material on record to establish that the samples of the seized contraband were drawn in the presence of the Magistrate and that the inventory of the seized contraband was duly certified by the Magistrate, it is apparent that the said seized contraband and the samples drawn there from would not be a valid piece of primary evidence in the trial. Once there is no primary evidence available, the trial as a whole stands vitiated.”

11. Here in this case, though PW1 in his evidence stated that he has prepared the inventory at P.S., yet, from the scanned copy of the record received from the learned court below, it appears that the contraband substance were seized and samples drawn in presence of the Magistrate.

12. In view of above, it cannot be said that the sample was not drawn in presence of the Magistrate, as mandated by the Section and by the ratio laid down in the case laws discussed herein above. Moreover, the quantity of contraband substance allegedly recovered from the accused is of commercial quantity and as such, he has to satisfy the requirement of two conditions of Section 37 of the NDPS Act.

13. It is not in dispute that the quantity of the contraband substances, so recovered from the possession of the accused person is of commercial quantity, and as such the accused person has to satisfy the twin conditions of Section 37 of the NDPS Act that - there is no reasonable ground to believe that the accused is not guilty of the offence and that he is not likely to commit any offence while on bail.

14. But, from the materials on record, specially from the scanned copy of the record received from the learned court below and also from the submission of learned counsel for the accused, this Court is unable to derive its satisfaction that there exists any reasonable ground for believing that the accused is not guilty of the offence and that he is not likely to commit any offence, while on bail.

15. In view of above, and also in view of the nature and gravity of the offence and the punishment prescribed for the same this Court is of the opinion that this is not a fit case to grant the privilege of bail under Section 439 of the Cr.P.C. to the accused and therefore, the same stands **dismissed**.

16. However, the learned Court below is directed to expedite the trial and conclude the same at the earliest possible time, preferably within a period of three months from today, without being influenced by any of the observations made by this court herein above. And if necessary, the learned court below shall take recourse to the provision of Section 309(1) of the Cr.P.C.

17. In terms of above, the bail application stands disposed of.