

GAHC010249602023



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

Case No. : Bail Appln./4021/2023

REJABUL HOQUE
S/O HASMAT ALI
VILL- HASILABIL
P.S. GOALPARA
DIST. GOALPARA,
PIN-783101

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. A ROSHID

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN
ORDER

23.01.2024.

Heard Ms. T. Begum, 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 of the Code of Criminal Procedure, 1973, is preferred by accused **Rejabul Hoque**, who has been languishing in jail hazoot since 02.08.2022, in connection with the **Special Case No. 6/2023**, arising out of Goalpara P.S. Case No. 176/2022, under Sections 21(C)/29 of the NDPS Act, pending before the learned Special Judge, Goalpara, for grant of bail.
3. It is to be noted here that the aforementioned case has been registered on the basis of an FIR lodged by SI Darshan Jyoti Bora of Goalpara P.S. on 02.08.2022.
4. The essence of allegations, made in the said FIR is that on acting on a tip off on 02.08.2022, at about 2.30 am the informant along with staff intercepted one 407 Truck bearing registration No. ML 08 H 3418 at Bhalukdubi and on checking the vehicle he found 5000 bottles of Phensedyl concealed under cement bags and apprehended the driver, namely, Hasibul Islam and during interrogation he reveals that Rejabul Haque had delivered the said consignment to him.
5. Ms. Begum, learned counsel for the accused, submits that the accused was arrested on 02.08.2022, and since then he has been languishing in jail hazoot. Ms Begum further submits that though charge sheet has been submitted long back and charges has also been framed against the accused by the learned trial court yet, only 3 witnesses have been examined so far, out of 11 witnesses cited in the charge sheet. It is the further submission of Ms. Begum that nothing has been recovered from the possession of the present accused and he was arrested only on the basis of statement of co-accused and his own statement under section 67 NDPS Act and the statement under section 67 NDPS Act is not admissible. Further Ms. Begum submits that the accused is ready to face trial and will appear before the court on each and every date and therefore, it is contended to allow the petition.
6. On the other hand, Mr. R.J. Baruah, the learned Addl. P.P. submits that all total 5000 bottles of Phensedyle cough syrup were recovered from the possession of the accused driver namely, Hasibul Islam while the same were being carried in a 407 Truck, bearing registration No. ML 08 H 3418, and that the same were of commercial quantity and that the accused has failed to fulfill the twin requirement of section 37 of the NDPS Act, and that trial is going on and five witnesses have already been examined. Mr. Baruah also submits that there is no delay in trial and therefore, it is contended to dismiss the petition.
7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the scanned copy of the case record, and also the Status Report, received from the learned Court below.

8. The status report reveals that the accused was arrested on 02.08.2022, and since then he has been languishing in jail hazoot. It also appears that the learned court below had framed charge against the present accused under Section 21(C)/29 of the NDPS Act on 07.02.2023 and as many as five witnesses have been examined so far by the prosecution side out of 11 witnesses. Given the pace of the trial, being conducted in the learned court below, it cannot be said that there is any considerable delay in the same.

9. It is, however, a fact that nothing has been recovered from the possession of the present accused. He was arrested on the basis of the statement of co-accused and his own statement under section 67 NDPS Act and Ms. Begum, the learned counsel for the accused has rightly pointed this out during argument. There is no quarrel at the bar that the statement under section 67 of the NDPS Act is not admissible in view of the decision of Hon'ble Supreme Court in **Toofan Sing vs. State of Tamil Nadu**, reported in **(2021) 4 SCC 1**. It is to be noted here that in the said case, it has been held 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.

10. But, the fact remains that the quantities of the contraband substances, so recovered from the possession of the accused persons are 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.

11. This court is conscious of the fact that the contraband substances were not recovered from the possession of present accused person. But, this lack of possession does not absolve this court from the level of scrutiny requires under section 37 NDPS Act. Reference in this context can be made to a decision of Hon'ble Supreme Court in **Union of India through NCB, Lucknow vs. Nawaz Khan** reported in **(2021) 10 SCC 100**, where it has been held that absence of possession of contraband on the person of respondent by High Court in impugned order does not absolve it of level of scrutiny required under section 37(1) (b) (ii) of NDPS Act.

12. But, from the materials on record, specially from the scanned copy of the record received from the

learned court below 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.

13. It is also to be mentioned here that in the case of **Union Of India vs. Ajay Kumar Singh @ Pappu**, Criminal Appeal No. 952 OF 2023 [Arising out of SLP (CRL.) No.2351 OF 2023], decided on 28 March, 2023, Hon'ble Supreme Court, while setting aside the order of granting bail by the Allahabad High Court, to the accused involving in commercial quantity of contraband substance, has held as under:-

“In view of the above provisions, it is implicit that no person accused of an offence involving trade in commercial quantity of narcotics is liable to be released on bail unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such an offence and that he is not likely to commit any offence while on bail.”

14. Same principle is echoed by another bench of co-equal strength of Hon'ble Supreme Court in the case of **NCB vs. Mohit Agarwal** (Criminal Appeal Nos. 1001-1002 of 2022, arising out of petitions for Special Leave to Appeal (Crl.) No. 6128-29 of 2021, decided on 19 July, 2022.

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 complete the trial as expeditiously as possible, 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.

JUDGE

Comparing Assistant