

GAHC010252182023



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

Case No. : Bail Appln./4092/2023

BILAL UDDIN
S/O- MAKADDACH ALI @ MAKADDAS ALI, VILL- SUNATILA UTTAR
KEOTI, ASALKANDI, POLICE STATION- PATHERKANDI, DIST.-
KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REPRESENTED BY THE PUBLIC PROSECUTOR

Advocate for the Petitioner : MR. M A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

04.03.2024

Heard Mr. A. Ahmed, learned counsel for the petitioner. Also heard Mr. D. P. Goswami, learned Additional Public Prosecutor for the State respondent.

2. This is an application filed under Section 439 of the Code of Criminal Procedure, 1973, is preferred by accused/petitioner, namely, Bilal Uddin, who has been languishing in jail hazot since 26.08.2022 in connection with Karimganj P. S. Case No. 510/2022 registered under Section 22(c) of Narcotics Drugs and Psychotropic Substance Act, 1985 (in short NDPS, Act) of the Indian Penal Code.

3. The scanned copy of the LCR along with the Case Diary has been received and I have perused the same.

4. Mr. Ahmed, learned counsel for the petitioner has submitted that there is no proper compliance of Section 50 of NDPS Act, and from the statement made in the FIR itself, it is seen that the present petitioner was searched in presence of the gazette officer i.e. Additional S. P. (Hq) who came to the place of occurrence on being informed by the informant and thus, his presence on the spot was only to supervise the team and he was present from the side of the investigation team and hence, it cannot be said to be strict compliance of Section 50 of NDPS Act. On the said ground also the present petitioner is entitle for bail, as there is every chance of acquittal of the petitioner on the sole ground of non-compliance of mandatory provision of Section 50 of NDPS Act.

5. In addition to his submission, Mr. Ahmed, learned counsel for the petitioner relies on the decision passed by the Hon'ble Orissa High Court reported in ***BLAPL No.2430/2021 [Raghu @ Rahul Rajput Thakur vs. State of Odisha]***, wherein, he relies on paragraph No.20 of the said judgment, which read as under;

"Para-20; Upon a careful scrutiny of the provisions contained in Section 50 of the

N.D.P.S. Act and further keeping in view the aforesaid analysis of law by the Hon'ble Supreme Court and applying the same to the facts of the present case and also considering the mandatory nature of the provisions, this Court upon careful scrutiny of the F.I.R. as well as record produced before this Court, is of the considered opinion that no opportunity as has been provided under Section 50 of the N.D.P.S. Act was ever given to the petitioner in the present case. Therefore, on the basis of the materials available on record, this Court is constrained to hold that prima facie provisions contained in Section 50 of the N.D.P.S. Act has not been complied with in the case in hand, of course such finding is subject to detail evidence to be laid during trial."

6. Relying on the above referred judgment, it is submitted by the learned counsel for the petitioner, Mr. Ahmed that as per twin conditions as prescribed under Section 37 of the NDPS Act, the non-compliance of Section 50 of NDPS Act, the prima facie establishes that there is reasonable ground to hold that the petitioner is not guilty and this may be a good ground for acquittal of the accused/petitioner in the trial.

7. He further submits that on the ground of non compliance of mandatory provision of Section 50 of NDPS Act also can be a good ground for acquittal and in that regard, he also relies on the decision passed by the Hon'ble Calcutta High Court reported in ***C.R.A 90/2020 [Ishdan Seikh vs. Union of India]*** as well as ***C.R.A 744/2019 [Ali Hossain Sk. @ Ali Hussain Seikh vs. Narcotics Control Bureau]***.

8. Mr. Ahmed, learned counsel for the petitioner also submitted that non compliance of mandatory provision of Section 42 of NDPS Act or Section 50 of NDPS Act may be the ground for acquittal as well as those ground can be also taken up at the time of hearing of the bail application. In this regard, he further relies on the decision rendered by the Hon'ble Apex Court passed in ***Criminal Appeal No. 302/2004 [Sarija Banu (A) Janarthani & Ors. Vs. State through Inspector of Police]***, wherein, he relied on paragraph Nos. 6 and 7 of the said judgment, which read as under;

"6. The fact that such a telegram was sent and received is not disputed. However, it is stated by the respondent that they could not find whereabouts of Kandasamy. It is also

pertinent to note that even though such a serious information was received by the police as per the complainant, no case was registered and no investigation started. From this facts, it appears that something happened on 9.7.2003 and these are relevant factors of granting bail. We are conscious of the stringent provisions contained in [Section 37](#) of the NDPS Act and we are also conscious of the fact that a charge has now been framed against the appellants and they have to face the trial.

7. It is pertinent to note that in the bail application 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 of [Section 42](#) is mandatory and that is a relevant fact which should have engaged attention of the Court while considering the bail application. In the aforesaid circumstances having regard to the special facts of the case, we direct that the appellants 1 and 2 be released on bail on executing a bail bond for Rs. 50,000 each with two solvent sureties for the like amount to the satisfaction of the Special Judge, EC/NDPS, Madurai on the following conditions:

(1) The counsel for the appellants requested that the appellants may be allowed to stay outside the State of Tamil Nadu. We are not inclined to grant such a prayer as the respondents police authorities would not be able to ensure the timely presence of the appellants in Court;

(2) The appellants shall not leave jurisdiction of the District Court, Madurai and shall report before the Circle Inspector, Karuppayurani Police Station once in two weeks for 3 months, thereafter, once in a month.

(3) The appellants shall surrender their pass-port before the Court, if not already seized by the police."

9. Accordingly, he has submitted that in the instant case also there is no proper compliance of Section 50 of NDPS Act and the gazette officer being the team of raid party, it cannot be considered as a strict compliance of Section 50 of NDPS Act.

10. In this context, Mr. Goswami, learned Additional Public Prosecutor has submitted that from the statement made in the FIR itself, it is seen that the Additional SP (Hq) was not in the team and he was only informed by the informant and on being informed he came to the spot and in his presence only the search was made where from large quantity of contraband was collected from the possession of the accused/petitioner. Thus, there is total compliance of Section 50 of NDPS Act. At present the case is at the stage of evidence and 3(three) witnesses are already been examined by the learned Trial Court in connection with this case,

and they have brought sufficient incriminating materials against the accused/petitioner and thus, recovery of those contraband from the possession of the accused/petitioner is well established. From the statement of the witnesses and from the other materials available on record, there cannot be any reasonable believe that the accused is not guilty for the offence nor there is any material to believe that he will not commit similar kind of offence in future which are the conditions of granting bail under Section 37 of NDPS Act.

11. In support of his submission, the learned Additional Public Prosecutor relies on decision passed by the Hon'ble Apex Court reported in **(2009) SCC 539 [Karnail Singh vs. State of Haryana]**, wherein, he stressed on paragraph No.17 of the said judgment, which read as under;

"Para-17 It is clear from [Sajan Abraham](#) (supra) that to enforce the law under the [NDPS Act](#) stringently against the persons involved in illicit drug trafficking and drug abuse, the legislature has made some of its provisions obligatory for the prosecution to comply with, which the courts have interpreted to be mandatory. It is further clear that this is in order to balance the stringency for an accused by casting an obligation on the prosecution for its strict compliance. The court however while construing such provisions strictly should not interpret them literally so as to render their compliance impossible. It concluded that if in a case, the strict following of a mandate results in delay in trapping an accused, which may lead the accused to escape, then the prosecution case should not be thrown out. It is also clear that when substantial compliance has been made it would not vitiate the prosecution case."

12. Mr. Goswami, learned Additional Public Prosecutor further submits that the contraband alleged to have been recovered from the possession of the accused/petitioner which is commercial quantity and thus, rigorous Section 37 of NDPS will follow and further, he submitted that from the statement made in the FIR, as well as from the statement made by the witnesses, it is very much evident that there is total compliance of Section 50 of NDPS Act and unless the statutory requirements incorporated under Section 37(1)(b)(I) of the NDPS Act is satisfied by this Court, bail cannot be granted without compliance of provision content in Section 37 (1) (b) of NDPS Act as the requirements are of mandatory in nature.

13. Accordingly, the learned Additional Public Prosecutor has raised objection and submitted that it is not a fit case to grant bail to the accused/petitioner. More so, the probability of

absconding of the accused/petitioner also cannot be denied at this stage. The trial is proceeded expeditiously and three numbers of witnesses are already been examined and accordingly, he submits that it is not at all a fit case to allow the accused/petitioner to go on bail at this stage.

14. Considering the submissions made by the learned counsels for both sides and after perusing the LCR as well as the Case Diary and evidence of the witnesses already recorded by the learned Special Judge. It has been alleged that a commercial quantity of the contraband was recovered from the possession of the accused/petitioner and thus the rigor of Section 37 of NDPS Act will follow. Section 37(1)(b) of NDPS Act, which reads as follows:

“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 as well as the evidences of the witnesses, 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 as per Section 37 (1) (b) of NDPS Act. Rather, from the statement made in the FIR itself, it is seen that the recovery was made from the possession of the accused/petitioner. It is a fact that the gazette officer i.e. that Additional SP (Hq) was informed by the informant and he arrived at the spot accordingly. However, it is seen that the accused/petitioner was given an opportunity and he was informed about the right to be search in presence of the

gazetted officer in compliance of Section 50 of NDPS Act and he accordingly, agreed to be searched in presence of Additional SP (Hq) who being the gazetted officer in the team. So, it cannot be held that there is non compliance of Section 50 of NDPS Act and from the FIR also, it is seen that the Additional SP (Hq) was not in the team, when the accused person was apprehended, but, on being informed by the informant and he arrived at the spot and the accused/petitioner was agreed to be searched in presence of the Additional SP (Hq).

16. In this connection, the judgment relied by the learned counsel for the petitioner passed in ***Sarija Banu*** (*supra*) case, the fact of the case is different from the present case, in the said case, the Hon'ble Apex Court considered that there was a total non compliance of Section 42 of NDPS Act and also considering the entire circumstances of this case, the accused/petitioner was released on bail. But, here in the instant case, it cannot be held that there was total non compliance of Section 50 of NDPS Act or there is any reasonable ground to belief that the accused/petitioner is not guilty of the offence and the accused/petitioner is not likely to commit any such offence in future, if he is released on bail. The paragraph Nos. 16 and 17, of a bail order passed by the Co-ordinate Bench in Bail Application No.4697/2023 read as under;

"16. The Hon'ble Supreme Court in the case of Rattan Mallik (*supra*) and further in the case of Union of India and another Vs. Sanjeev V. Pandey reported in (2014) 13 SCC 1 explained the true import of Section 37 of the NDPS Act. Paragraph 12 of the report of the Rattan Mallik's case(*supra*) is as follows: "it is plain from a bare reading of the non-obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitation imposed under Section 439 of the Code of Criminal Procedure 1973, it is also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the public prosecutor to oppose the application for such release the other twin conditions viz. (i). the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the

conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty has to be based on reasonable grounds.

17. The accusation in the present case is with regard to the fourth factor namely, commercial quantity. Be that as it may, once the Public Prosecutor opposes the application for bail to the person accused of the enumerated offences under Section 37 of the NDPS Act, in case, the Court proposes to grant bail to such a person, two conditions are mandatorily to be satisfied in addition to the normal requirements under the provisions of the Cr.P.C, or any other enactments. (1) the Court must be satisfied that there are reasonable grounds for believing that the person is not guilty of such offence and (2) the person is not likely to commit any offence while on bail.”

17. Considering the submissions of the learned Counsels for both sides and also considering the materials available in the Case Diary as well as the nature of offence and the punishment prescribed for the same, I find that the accused/petitioner is not entitle to release on bail and the provision under Section 37 (1) (b) (ii) of the NDPS Act are not satisfied and accordingly, I am of the view that this is not a fit case where the privilege of bail can be extended to the accused/applicant at this stage and accordingly, the same stands rejected.

18. In terms of above, this Bail Application stands disposed of.

19. Case Diary be returned.

JUDGE

Comparing Assistant