

GAHC010254832024



2024:GAU-AS:12839

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

Case No. : Bail Appln./3659/2024

JOYNAL HUSSEN @ JOYNAL HUSSAIN AND ANR.
S/O AFTAB ALI
VILL AND P.O. FULBARI AND P.S. CHURAIBARI
DIST. NORTH TRIPURA,
PIN-799262, TRIPURA.

2: JAKIR HUSSEN @ JAKIR HUSSAIN
S/O ABDUL SUKKUR
VILL
P.O. AND P.S. KADAMTALA
DIST. NORTH TRIPURA
TRIPURA

VERSUS

THE STATE OF ASSAM
REP BY THE PP, ASSAM

Advocate for the Petitioner : MR. A M BORA, MR. A K HANNAN, MR. D K BAIDYA

Advocate for the Respondent : PP, ASSAM,

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA**

ORDER

Date : 17.12.2024

Heard Mr. A. M. Bora, learned Senior Counsel assisted by Mr. D. K. Baidya, learned counsel for the petitioners. Also heard Ms. S. H. Bora, 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/petitioners, who have been arrested in connection with Special NDPS Case No. 53/2024, under Sections 22(c)/25/29 of the NDPS Act, arising out of Bazaricherra P.S. Case No. 90/2024, pending before the Court of learned Additional Sessions Judge, Karimganj.

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

4. It is submitted by Mr. Bora, learned Senior Counsel for the petitioners, that the present accused/petitioners are innocent and they are no way involved in the alleged offence and without any materials against them, the charge-sheet has been filed in this case. They were arrested in connection with this case on 15.09.2024, i.e. after 4 (four) months of recovery of the contraband, and since 16.09.2024, they are in judicial custody. No recovery was made from the possession of the accused/petitioners and they were arrested in connection with this case only on the basis of the statement made by the co-accused, i.e. the

driver of the vehicle, which is not admissible in the trial. 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. In this context, he also relied 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 them. He mainly relied on paragraph No. 158 of the said judgment, which reads as under:

"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."

5. Mr. Bora further submitted that to convict an accused under the NDPS, there has to establish one's culpable statement of mind, as mandated by Section 35 of NDPS Act. However, in the instant case, from the F.I.R., Forwarding Report as well as from Seizure Lists, it is seen that the alleged narcotic substances were recovered from the possession of the other accused person and the present petitioners were not having any knowledge about the concealment of

the contraband by the other accused person. In this context, he also relied on a decision of Hon'ble Supreme Court passed in **Bhola Singh Vs. State of Punjab [(2011) 11 SCC 653]**, wherein it is held that the initial burden that the accused had the knowledge lay on the prosecution, as would be clear from the word "knowingly", and it was only after the evidence proved beyond reasonable doubt that he had this knowledge, would the presumption under Section 35 arise.

6. In support of his case, Mr. Bora further relied on another decision of Hon'ble Supreme Court passed in **The State of Haryana Vs. Samarth Kumar [2022 LiveLaw (SC) 622]**, wherein it has been held that the accused can take the advantage of the decision in **Tofan Singh Vs. State of Tamil Nadu (supra)** at the time of arguing the regular bail application or at the time of final hearing after conclusion of the trial.

7. He also relied on another decision of Hon'ble Supreme Court passed in **State of West Bengal Vs. Rakesh Singh alias Rakesh Kumar Singh [2022 SCC OnLine SC 828]** and emphasized on paragraph No. 57 of the judgment, which reads as under:

"57. Although, the past history of the respondent and even his conduct in relation to the processes concerning the present case give rise to a few questions but, the strong countervailing factor in the present case is the prima facie indication that he is being sought to be framed by concoctions and baseless stories. Another factor noticeable is that the respondent has not been involved in any [NDPS Act](#) case or any akin offence in the past. Interestingly, it is noticed from the material placed on record that nothing of any contraband article has been recovered from the respondent or from any place under his exclusive control. This factor further adds on to the doubt as to whether the respondent had at all been indulgent in narcotics or any contraband? That being the

position, the view as taken by the High Court cannot be said to be an altogether unacceptable or impossible view of the matter. Moreover, it cannot be said that the respondent was consciously seeking to abscond on 23.02.2021 merely because he was found in the night at Purba Bardhaman and not at Kolkata. In any case, the aspect relating to tendency to flee has been duly taken care of with the conditions as imposed by the High Court. The other submissions with reference to the decision in the case of [Prasanta Kumar Sarkar](#) (supra) hardly make out a case for interference particularly looking to the nature of evidence sought to be adduced by the prosecution against the respondent. In this regard, we would hasten to observe that apart from the stringent conditions already imposed by the High Court, it is always open for the prosecution to seek imposition of any further condition or even to seek cancellation of the bail granted to the respondent, in case of any fault on his part in due adherence to the conditions already imposed."

8. Accordingly, it is submitted by Mr. Bora, learned Senior Counsel for the petitioners, that except the statement made by the co-accused, there is no material to arrest the present accused/petitioners in the instant case, nor any contraband has been recovered from their possession. Thus, he submitted that it is a fit case wherein the accused/petitioners can be granted with the privilege of bail and they being the permanent resident of their addressed locality, there is no chance of absconding, rather they will appear on each and every date before the learned Trial Court below.

9. Ms. Bora, learned Additional Public Prosecutor, submitted in this regard that there are sufficient incriminating materials against the present accused/petitioners in the Case Diary which was collected by the I.O. during investigation of this case. She 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. She 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.

10. Ms. Bora 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. She accordingly submitted that in the instant case also, it is a fact that the recovery was made from the other co-accused person, but during investigation, it has come into the light that the present accused/petitioners are also involved in the said offence.

11. Ms. Bora 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/petitioners are not guilty of the alleged offence nor there can be any reasonable belief that they will not repeat similar kind of offence while on bail. She, accordingly, raised serious objection and submitted that it is not at all a fit case to grant bail to the present accused/petitioners at this stage.

12. In support of her submissions, Ms. Bora further relied on following decisions:

(i) **Union of India Vs. Rattan Malik alias Habul [(2009) 2 SCC 624]**

(ii) **Satpal Singh Vs. State of Punjab [(2018) 13 SCC 813]**

(iii) **State of Kerala & Ors. Vs. Rajesh & Ors. [(2020) 12 SCC 122]**

13. In the case of **Rattan Malik** (supra), the Hon'ble Supreme Court in paragraph No. 14 of the judgment, as emphasized by the learned Additional Public Prosecutor, has held as under:

"14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail."

14. Further, in the case of **Rajesh** (supra), the Hon'ble Supreme Court in paragraph Nos. 19 & 20 of the judgment, as emphasized by the learned Additional Public Prosecutor, has held as under:

"19. The scheme of Section 37 reveals that the exercise of power to grant bail is not only subject to the limitations contained under Section 439 of the CrPC, but is also subject to the limitation placed by Section 37 which commences with nonobstante clause. The operative part of the said section is in the negative form prescribing the enlargement of bail to any person accused of commission of an offence under the Act, unless twin conditions are satisfied. The first condition is that the prosecution must be given an opportunity to oppose the application; and the second, is that the Court must be satisfied that there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the ban for granting bail operates.

20. The expression "reasonable grounds" means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case on hand, the High Court seems to have completely overlooked the underlying object of Section 37 that in addition to the limitations provided under the CrPC, or any other law for the time being in force, regulating the grant of bail, its liberal approach in the matter of bail under the NDPS Act is indeed uncalled for."

15. In this regard, Mr. Bora, learned Senior Counsel for the petitioner, submitted that the rigor of Section 37 NDPS Act will follow only when there is foundational facts established by the prosecution that the accused/petitioners are guilty of the offence or there is any reasonable ground to believe that the accused/ petitioners are also involved in the alleged offence. But, here in the instant case, except the statement of the co-accused, there is no material to connect the present accused/petitioners in the offence alleged against them.

16. 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.

17. As per allegation, it seen that on the day of incident, i.e. on 17.05.2024, at around 9.00 a.m., while the police personnel was doing Naka Checking, they

apprehended one 10 wheeler container body truck, which was coming from Delhi towards Tripura and was driven by the accused- Jayanta Deb. During checking, total 16 (sixteen) numbers of Cartons was found containing Triprolidine Hydrochloride & Codeine Phosphate Cough Syrup, Phensedyl, which was concealed in different kind of boxes and wrapped with small size colourful blankets. Accordingly, the articles were seized and the said accused- Jayanta Deb was arrested.

18. Further, from the record, it is seen that the present accused/petitioners were arrested in connection with this case on 15.09.2024 and the Charge-Sheet of the case was filed on 31.10.2024. However, it is an admitted fact that the charge has not yet been framed. It is also an admitted fact that the case is of commercial in nature and hence, rigor of Section 37 NDPS Act will follow.

19. 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."

20. Thus, as per Section 37 (1) (b) of NDPS Act, the bail can only be granted,

if there is reasonable ground for believing that accused are not guilty of such offence and that they are 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/petitioners are not guilty of such offence or they are not likely to commit any offence while on bail. Rather, from the materials so far collected by the I.O., it is seen that the present accused/petitioners, along with others, are involved in drug trafficking and they especially involved in escorting the vehicle from Assam to Tripura Border and directly involved in the transportation of the Narcotic Drugs.

21. Further, from the other materials collected by the I.O., it is seen that the I.O. has collected sufficient materials showing their involvement in the alleged offence. Thus, it is not a case that the charge-sheet has been filed only on the basis of the statement made by the co-accused, but there are sufficient materials available in the Case Diary which has been collected by the I.O. during investigation. The statement of the co-accused may not be used in trial for convicting the accused persons, but the investigation may carried out on the basis of the statement made by the co-accused or by the arrested person to unearth some other facts of the case and the involvement of the other persons in the alleged offence. More so, as held by the Hon'ble Apex Court in the case of **Rajesh** (supra) that the "reasonable ground" means something more than the prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence.

22. 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 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.

23. 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.*"

24. In the light of discussion made above and also considering the seriousness of the offence and the fact that there is a *prima facie* case against the present accused/petitioners 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/petitioners on bail at this stage. Hence, the

present bail application stands rejected.

25. The bail application stands disposed of in terms above.

JUDGE

Comparing Assistant