

GAHC010259612024



2024:GAU-AS:12899

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

**Case No. : Bail Appln./3761/2024**

IKBAL HUSSAIN BARBHUIYA @ RIPON  
S/O JAKIR HUSSAIN BARBHUIYA @ MONA,  
VILLNISHINTAPUR PT.II,  
P.O. MONAHERRA,  
P.S. AND DIST. HAILAKANDI, ASSAM

VERSUS

THE STATE OF ASSAM  
REP BY THE PP, ASSAM

**Advocate for the Petitioner** : MR. A M BARBHUIYA, MS S R MAZARBHUIYA, MS A BEGUM

**Advocate for the Respondent** : PP, ASSAM,

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

**ORDER**

**Date : 18.12.2024**

Heard Mr. A. M. Barbhuiya, learned counsel for the petitioner. 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/petitioner, who has been arrested in connection with Special (NDPS) Case No. 02/2023, arising out of Hailakandi P.S. Case No. 42/2023, under Section 22(c)/29 of NDPS Act, corresponding to G.R. Case No. 258/2023, pending before the Court of learned Special Judge, Hailakandi,.

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

**4.** It is submitted by Barbhuiya, learned counsel for the petitioner, that the present accused/petitioner is innocent and he is no way involved in the alleged offence. He is only 19 year old boy. On the day of incident, while he was driving the Auto Rickshaw of his father as his father was busy in some other domestic works, 2 (two) other accused persons boarded in his Auto Rickshaw as passengers without his knowledge about the possession of any contraband with them, which was subsequently seized by the police from their possession and they were accordingly arrested in connection with this case. However, nothing has been seized from the possession of the present accused/petitioner and there is no involvement of the present petitioner in the alleged offence. He further submitted that at the time of interception of the Auto Rickshaw, the co-accused persons tried to flee away from the place of the interception, however they were arrested by police and on their body search, the alleged contraband was recovered from their possession. But during investigation, only on the basis of the statement of the co-accused, the present accused/petitioner was also charge-sheeted in this case showing him as an absconder. The present petitioner had no knowledge about the pendency of the case against him and

suddenly he got arrested in connection with this case on the strength of the NBWA issued against him. The co-accused persons who were arrested in connection with this case are already granted bail by the learned Special Judge vide order dated 19.05.2023, but the bail application for the present accused/petitioner was rejected by the learned Special Judge vide order dated 03.10.2024, though there is no proof of any link of the present accused/petitioner with the other co-accused persons. He further submitted that from the statement made by the complainant and the seizure witnesses also, it is seen that there is no incriminating materials against the present petitioner nor there is any recovery of the contraband from his conscious possession and the present accused/petitioner was charge-sheeted in the case showing him as an absconder only on the basis of the statement made by the co-accused persons.

**5.** Mr. Barbhuiya 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 him. 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."*

**6.** Mr. Barbhuiya further submitted that there is no compliance of Section 50 of NDPS Act at the time of search and seizure from the co-accused persons which is mandatorily required to be followed in the case of NDPS Act. In that context, he also relied on a decision of Hon'ble Delhi High Court passed in **Bail Appln. No. 1156/2023 (Aabid Khan Vs. State Government. of NCT of Delhi)** wherein, the Hon'ble Delhi High Court passed the judgment considering the view of the Hon'ble Apex Court and observed that compliance of Section 50 NDPS Act is mandatorily required.

**7.** Mr. Barbhuiya, learned counsel for the petitioner, also relied on another decision of Hon'ble Supreme Court passed in **Harbhajan Singh Vs. State of Haryana [2023 0 Supreme(SC) 410]** and emphasized on paragraph No. 6 of the said judgment, which reads as under:

*"6. The basic facts of the case as have been noticed above are not in dispute. The Appellant who is the registered owner of the truck was not arrested from the spot. A case was set up by the prosecution that Joginder Singh and Gurmail Singh were driver and cleaner of the truck. Even they were not arrested from the spot. Their identity was established on the basis of the information furnished to the police party by Ram Sarup (PW-6) and Naresh Kumar (PW-10). However, when appeared in Court, they were declared hostile. Joginder Singh and Gurmail Singh were acquitted. The Appellant is owner of the truck. He was not arrested from the spot. [Section 25](#) of the NDPS Act provides that if an owner of a vehicle knowingly permits it to be used for commission of any offence punishable under the [NDPS Act](#), he shall be punished accordingly."*

**8.** More so, he submitted that the accused/petitioner is behind the bar since 01.07.2024. The trial of the case has already commenced and 2 (two) vital witnesses are already been examined by the learned Trial Court below and hence, he submitted that considering his length of detention and other aspects of the case, the accused/petitioner may be released on bail. However, he is ready and willing to contest the case by appearing on each and every date before the learned Special Judge.

**9.** Mr. Baruah, learned Additional Public Prosecutor, submitted in this regard that there are sufficient incriminating materials against the present accused/petitioner which were collected by the I.O. during investigation. But, during the investigation, the present petitioner could not be arrested as he avoided police arrest during the entire investigation. However, after collecting sufficient materials against the present petitioner, he was charge-sheeted showing him as an absconder. He 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. He 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.** Mr. Baruah 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. He accordingly submitted that in the instant case also, it is a fact that the recovery was made from the other co-accused persons, but during investigation, it has come into the light that the present accused/petitioner is also involved in the said offence.

**11.** Mr. Baruah 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/petitioner is not guilty of the alleged offence nor there can be any reasonable belief that he will not repeat similar kind of offence while on bail. He, accordingly, raised serious objection and submitted that it is not at all a fit case to grant bail to the present accused/petitioner at this stage.

**12.** It is further submitted by Mr. Baruah that the F.I.R. of the instant case was lodged on 06.02.2023 and the charge-sheet was submitted on 21.05.2023 showing the accused/petitioner as an absconder. However, he got arrested in connection with this case on 01.07.2024. Thereafter, within a short period, the trial was commenced and on 04.12.2024, 2 (two) witnesses are already been examined out of 12 (twelve) numbers of witnesses. He, accordingly, submitted that it is not a fit case to release the accused/petitioner on bail only considering the length of detention. More so, the question of inordinate delay does not arise

in this case and there is speedy trial in the case and hence, it can be expected that the trial may be completed within a reasonable period of time. He further submitted that the bail of the other 2 (two) co-accused persons were granted by the learned Special Judge after completion of the statutory period and before filing of the charge-sheet, but that cannot be the ground to enlarge the present accused/petitioner on bail.

**13.** 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.

**14.** As per allegation, it seen that on the day of incident, an information was received from the reliable source regarding transporting of Narcotic Drugs in Auto from Lala Side towards Hailakandi Side. Accordingly, the complainant, along with police personnel accompanied by Officer-In-Charge of the Hailakandi Police Station, proceeded towards the Nischintapur area and intercepted the said Auto. During search, they found total 21 numbers of Black colour small plastic packets containing 4200 numbers of suspected YABA Tablets with gross weight of 450 grams. Accordingly, the articles were seized and the accused persons- Jahid Hussain Barbhuiya & Juboraj Pandey were arrested.

**15.** Further, from the record, it is seen that the charge-sheet was submitted on 21.05.2023 showing the present accused/ petitioner as an absconder and he was subsequently arrested in connection with this case on 02.07.2024. However, it is an admitted fact that the learned Trial Court below had already examined 2 (two) witnesses out of 12 (twelve) numbers of listed witnesses. It is also an

admitted fact that the case is of commercial in nature and hence, rigor of Section 37 NDPS Act will follow.

**16.** 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."*

**17.** 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 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, 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. Rather, from the materials so far collected by the I.O., it is seen that the present accused/petitioner, along with others, are involved in drug trafficking and the present accused/petitioner could not be apprehended by police as he fled away from the place of incident when the police intercepted his Auto Rickshaw. Further from the materials available in the Case Diary also, it is seen that the present accused/petitioner is also involved in the alleged offence as they used to supply the drugs in various parts

of the Hailakandi District.

**18.** 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.

**19.** Further, from the other materials collected by the I.O., it is seen that the I.O. has collected sufficient materials showing the involvement of the present accused/petitioner 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, in the case of **State of Kerala & Ors. Vs. Rajesh & Ors. [(2020) 12 SCC 122]** the Hon'ble Supreme Court has held 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. Accordingly, the Hon'ble Supreme Court 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."*

**20. 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.”*

**21.** More so, the judgment of Hon’ble Supreme Court passed in the case of **Harbhajan Singh** (supra), as relied by the learned counsel for the petitioner, is not applicable in this case as in the case in hand, the charge-sheet is not filed under Section 25 of NDPS Act, rather the case is charge-sheeted under Section 22(c)/29 of NDPS Act.

**22.** 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/ petitioner 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/ petitioner on bail at this stage. Hence, the present bail application stands rejected.

**23.** The bail application stands disposed of in terms above.

**JUDGE**

**Comparing Assistant**