

GAHC010285722023



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

Case No. : Bail Appln./4625/2023

ENNUS ALI @ INNUS
S/O MD. HASEM ALI
R/O RANGESWARI
P.S. NAGARBERA
DIST. KAMRUP, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR. A PARAMANIK

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN

ORDER

11.03.2024.

Heard Mr. A. Paramanik, 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, namely, Ennus Ali @ Innus, who has been languishing in jail hazoot since 28.11.2023, in connection with Nagarbera P.S. Case No. 127/2023, under Sections 22(C)/29 of the NDPS Act, 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 one SI Alex Sonowal of Nagarbera P.S. on 06.11.2023.

4. The essence of allegations, made in the said FIR is that acting on a tip off on 05.11.2023, at about 9:30 pm, the informant, along with other staff have conducted search in the house of one Noor Alam of Rangeswari Village and recovered 85 Nos. of bottles of Novogen cough syrup, having codine phosphate, and seized the same by preparing seizure list in presence of witnesses. And during interrogation he disclosed that he had purchased the same from one Ennus Ali. Thereafter he had conducted search in the house of Ennus Ali at about 10.40 pm on the same day and found him absent.

5. Mr. Paramanik, learned counsel for the accused, submits that the accused is behind the bar for last 99 days, as he was arrested on 29.11.2023. Mr. Paramanik further submits that the accused is innocent and no way involved with the offences alleged in the FIR and that no contraband substances were recovered from the possession of the accused and that he was arrested only on the basis of statement of co-accused, which is not admissible and that the accused is ready to co-operate with the investigating agency and will face trial 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 85 Nos. of bottles of Novogen cough syrup, having codine phosphate, were found

in the possession of co-accused and that the same were of commercial quantity and the accused have failed to fulfill the twin requirement of section 37 of the NDPS Act. Mr. Baruah further submits that though nothing has been found from the possession of the present accused yet, there are materials in the case diary to show that the accused has been doing the business of codine cough syrup and therefore, Mr. Baruah has 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 case diary with the assistance of Mr. Baruah, the learned Addl. P.P.

8. It appears from the case diary that nothing has been recovered from the possession of the present accused. He was arrested on the basis of statement of co-accused and also on the basis of his own statement. But, it is now well settled in the case of **Tofan Singh Vs. State of Tamil Nadu**, reported in **(2021) 4 SCC 1**, that the statement of co-accused and the statement of the accused, recorded under Section 67 of the NDPS Act is not admissible in evidence.

9. But, it also appears that apart from the statement of co-accused and his own statement there are some independent witnesses who have implicated the accused with the offence alleged. Besides, investigation is going on and co-accused are yet to be arrested.

10. It is also not in dispute 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 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. Though it is contended that nothing has been found in possession of the accused and for the sake of argument it is accepted that the contraband substances were not recovered from the conscious possession of the present accused, yet, the same does not absolve it of the level of scrutiny required under section 37(1) (b) (ii) of NDPS Act, as held by Hon'ble Supreme Court in **Union of India through NCB, Lucknow vs. Nawaz Khan** reported in **(2021) 10 SCC 100**, as the quantity of contraband substance recovered from the co-accused were of commercial quantity, and as such, the embargo under Section 37 of the NDPS Act will definitely come into play.

12. But, from the materials collected so far in the case diary 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.

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, a bench of co-equal strength of 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. Case diary be returned.

JUDGE

Comparing Assistant