

GAHC010291472023



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

Case No. : Bail Appln./4676/2023

ABDULLAH AL MAHMUD CHOUDHURY @ ABDULLAH CHOUDHURY @
BABLU
S/O LATE MOINUL ISLAM CHOUDHURY
R/O EAST KANISHAIL,
P.S. KARIMGANJ
DIST. KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
TO BE REP. BY THE PP, ASSAM

Advocate for the Petitioner : MR H R A CHOUDHURY

Advocate for the Respondent : PP, ASSAM

BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN
ORDER

12.02.2024.

Heard Mr. H.R.A. Choudhury, learned senior counsel, assisted by Mr. A. Ahmed 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 **Abdullah Al Mahmud @ Abdullah Choudhury @ Bablu** who has been languishing in jail

hazoot since 17.11.2021, in connection with **Special NDPS Case No. 46/2021**, under Sections 21(C)/25/29 of the NDPS Act, pending before the learned Special Judge, Karimganj, 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 S.I. Badru Zaman Ahmed of Karimganj P.S. on 05.05.2023.

4. The essence of allegations, made in the said FIR is that acting on a tip off on 05.05.2023, at 5-20 am, the informant and staff intercepted one Maruti Alto vehicle, bearing registration No. AS-10-F-4531 driven by one Abul Khayer Md. Siddique and during search they have recovered 48 soap cases containing 567 grams of suspected Heroin. And during interrogation, the driver disclosed that one Abdullah Choudhury @ Bablu is the receiver and he is also involved in the consignment and there was a plan to deposit the same to him.

5. Mr. Choudhury, learned senior counsel for the accused, submits that the accused was arrested on 05.05.2023 and since then he has been languishing in jail hazoot. Mr. Choudhury also submits that investigation of the case has already been completed and charge sheet has been filed against the accused along with another accused and the learned court below has framed charges against them under Sections 21(C)/25/29 of the NDPS Act, and now the case is pending for evidence. Mr. Choudhury also submits that nothing was recovered from the possession of the present accused and he was arrested only on the basis of statement under section 67 NDPS Act and also on the basis of Call Details Report and as per the law laid down in the case of **Toofan Sing vs. State of Tamil Nadu**, reported in (2021) 4 SCC 1, the statement under section 67 NDPS Act is not admissible. Further, Mr. Choudhury submits that the accused is ready to face trial and will appear before the court below on each and every date and therefore, it is contended to allow the petition. Mr. Choudhury also referred following decisions of Hon'ble Supreme Court in support of his submission:-

- (i) **NCB vs. Mohit Aggarwal** (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;
- (ii) **State by (NCB) Bengaluru vs. Pallulabid Ahmad Arimutta & Anr**, reported in **2022 LiveLaw (SC) 69**;
- (iii) **Manoj Kumar vs. Narcotic Control Bureau** reported in **MANU/HP/0856/2022**;
- (iv) **Abdul Hussain & Anr vs. State of Assam, Bail Appln./126/2021**;

(v) **Union of India through NCB, Lucknow vs. Md. Nawaz Khan** reported in (2021) 10 SCC 100,

6. On the other hand, Mr. R.J. Baruah, the learned Addl. P.P. submits that the quantity of contraband substance i.e. Heroin, so recovered from the possession of the co-accused 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 has already begin 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 scanned copy of the case record, received from the learned Court below.

8. It appears that the Investigating Officer had completed investigation and filed charge sheet against the accused and the learned court below has framed charge against both of them under Sections 21(C)/25/29 of the NDPS Act, and now the case is pending for evidence.

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 under section 67 NDPS Act and also on the basis of the CDR analysis, and Mr. Choudhury, 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 Singh** (supra). 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 he belongs to the same locality and is the receiver of the seized contraband substances and that there was frequent call between the accused and the co-accused. The CDR analysis of the co-accused i.e. the driver's mobile No. 6361185590 and 9954212525 reveals that there were frequent calls to mobile No. 9387382539, belonging to present accused. And CDR/SDR/PTL analysis of mobile No. 9387382539 indicates that there were 38 calls, between 25.03.2023 to 05.05.2023, to mobile No. 6361185590 and there were two calls on 05.05.2023 to mobile No. 9954212525. And the present accused calls four times to the co-accused, i.e. the driver of the vehicle on 05.05.2023. These frequent communications on 05.05.2023, prior to recover and seizure of the commercial quantity of contraband substances from the co-accused, lends supports to the fact that the present accused is the receiver of the seized consignment of the contraband substances.

11. It is 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 persons have 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.

12. Even 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 level of scrutiny required under section 37(1) (b) (ii) of NDPS Act, as held by Hon'ble Supreme Court in **Md. Nawaz Khan** (supra) and as such, the embargo under Section 37 of the NDPS Act will definitely come into play.

13. But, from the materials on record, specially from the scanned copy of the record received from the learned court below 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.

14. 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.”

15. Same principle is echoed by another bench of co-equal strength of Hon'ble Supreme Court in the case of **NCB vs. Mohit Aggarwal** (supra).

16. I have gone through the case laws referred by Mr. Choudhury, the learned counsel for the accused and I find that the ratio laid down in the said cases would not advance the case of the accused. In Bail Appln./126/2021, a co-ordinate bench of this court granted bail to the accused as nothing was recovered from his possession and the CDR analysis of his mobile number established no link with the

co-accused and the seized contraband substance. But in the case in hand, the CDR analysis has clearly established the link of the accused with the co-accused from whose possession commercial quantity of contraband substances were recovered.

17. In the case of **Manoj Kumar (supra)** though there was CDR analysis, besides the statement under section 67 NDPS Act, the High Court, in para No.7 of the judgment, has held that the record does not demonstrate money trail between the petitioner of that case and other co-accused. But, this court is unable to record concurrence to such a finding as there is no such requirement prescribed in law.

18. In the case of **Pallulabid Ahmad Arimutta (supra)** Hon'ble Supreme Court has observed in paragraph No.10 that the CDR details of some of the accused or the allegation of tampering of evidence on the part of another accused is an aspect that will be examined at the stage of trial. However, no observation has been made in respect of admissibility of the CDR in the said case.

19. But, in the case of **Mohit Aggarwal (supra)** Hon'ble Supreme Court has taken note of the submission of Counsel for the appellant NCB in respect of CDR details of the mobile phones of the co-accused and the respondent, Mohit Aggarwal, which shows that they were in touch with each other. Again, in the case of **Md. Nawaz Khan (supra)** also Hon'ble Supreme Court has taken note of the CDR analysis of the respondent of that case with other accused.

20. 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.

21. However, the learned Court below is directed to expedite the trial and conclude the same at the earliest possible time, preferably within a period of three months from today, 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.

22. In terms of above, the bail application stands disposed of.

JUDGE

Comparing Assistant