

GAHC010292792023



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

Case No. : Bail Appln./4697/2023

SUHEL AHMED @ SIBLU
S/O LATE ABDUL MANNAN,
VILL.- HAJIPUR, P.S.- BADARPUR, DIST.- KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM
REP. BY THE PUBLIC PROSECUTOR.

Advocate for the Petitioner : MR. T T TARA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

ORDER

27.02.2024

Heard Mr. TT Tara, learned counsel, assisted by Mr. AR Tahbildar, learned counsel for the petitioner. Also heard Mr. MP Goswami, learned Additional Public Prosecutor, Assam for the State respondents.

2. This is an application under Section 439 Cr.P.C. praying for bail to the petitioner, namely, Suhel Ahmed @ Siblu, who was arrested on 10.09.2023 in connection with Badarpur Police Station Case No.243/2023 under Sections 22(c)/25/29 of the NDPS Act, 1985.

3. The factual matrix leading to this bail application is that on 10.09.2023, one police personnel of Badarpur Police station lodged an FIR alleging *inter alia* that acting on a tip off the informant along with some other police personnel of Badarpur Police Station started raiding the house of the petitioner from 12.20 A.M., and at 3.AM recovered 2100 numbers of bottles of *Phensedyl Cough Syrup* of 100ml each from the house of the petitioner and seized the substances accordingly in presence of the witnesses and subsequently arrested the accused petitioner.

4. The learned counsel for the petitioner has submitted that as per seizure list, an operation had started in the house of the accused petitioner from 12.20 A.M. and completed at 4.45 A.M of 10.09.2023, but the information of the incident was made at the police station at 9.AM on the same day. According to the learned counsel for the petitioner, there is a complete non-compliance of Section 42(2) of the NDPS Act, *inasmuch as*, even though there was adequate time with the complainant to take permission from the competent officer, but the informant preferred not to take such permission or inform the competent authority before making the raid. It is further submitted by the learned counsel for the petitioner that even during the bail stage, if it is shown that the mandatory provisions have not been complied with by the searching and seizing officers that itself constitute the ground for granting bail to the accused person and considering that for non-observance of the mandatory requirements of law, the trial is bound to fall through, *inasmuch as*, the trial is held on

ascertaining the nature and species of the seized substances. The apparent non-compliance of the provisions of Section 42 vitiates the trial.

5. In support of his submission, the learned counsel for the petitioner has relied upon a decision of the coordinate bench of this Court in Bail Appln. 2316/2023. The learned counsel for the petitioner has pointed out that in the aforesaid bail application, a reference is made to the case of *Sarija Banu and Another Vs. State through Inspector of Police* reported in (2004) 12 SCC 266, wherein the Hon'ble Supreme Court has held *that the compliance with Section 42 is mandatory and that is a relevant fact, which should have engaged the attention of the Court while considering the bail application. On that ground, the Hon'ble Apex Court ultimately granted bail to the petitioner who was facing an accusation under Section 20(b)(ii)(c) of the NDPS Act, 1985.*

6. In view of the legal proposition held in the case of *Sarija Banu* (supra), this Court also granted bail to the accused petitioner in Bail Application No.2316/2023.

7. In response to the above, Mr. MP Goswami, the learned Additional Public Prosecutor, Assam has controverted the above contentions stating that immediately on receipt of the information, a GD entry was recorded vide Badarpur Police Station G.D.E. No.265 dated 10.09.2023 and the informant along with other members of the police party visited the house of the accused petitioner and a large quantity of *Phensedyl Cough Syrup* was recovered from the house of the accused petitioner. According to the learned Additional Public Prosecutor, on receipt of such information, the police rushed to the spot, as the same required immediate action to be taken and delay would have resulted in the accused fleeing away from the place and the police might not have been able to apprehend the accused with contrabands. As such, the

police party proceeded to the spot and recovered commercial quantity of narcotic substances inside the house of the petitioner. In view of such emergent situation, such compliance under Section 42 of the NDPS Act could not be made as alleged by the learned counsel for the petitioner.

8. Learned Additional Public Prosecutor has placed reliance in the case of *Karnail Singh Vs. State of Haryana* reported in (2009) 8 SCC 539, wherein in paragraph 17 it has been held as under:

“It is clear from [Sajan Abraham](#) 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.”

9. Learned Additional Public Prosecutor also submitted that since commercial quantity of narcotic substances have been seized from the possession of the petitioner, therefore, unless the statutory requirements incorporated in Section 37(1)(b)(ii) of the NDPS Act as satisfied by this Court, bail may not be granted without compliance of the provisions contained in Section 37(1)(b) of the NDPS Act as the requirements are of mandatory in nature.

10. I have considered the submissions of the learned counsel for the parties and also perused the case diary.

10.1. Section 37(1)(b) of the NDPS Act 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.”

11. A careful perusal of the aforesaid provision would show that power and jurisdiction of this Court considering the application for grant of bail under the provisions of the NDPS Act is circumscribed by the provisions of Section 37 of the NDPS Act, in the case of a person accused of an offence punishable under Section 19(2), under Section 24(3), under Section 27-A(4) and also offences involving commercial quantity. These limitations are in addition to those prescribed under the Cr.P.C. or any other law in force on the grant of bail.

12. It can be considered and granted only in a case where there are reasonable grounds for believing by the Court concerned that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail. The above stated statutory requirements are mandatory to be relied with while releasing the accused on bail.

13. The Hon'ble Supreme Court in the case of the *Union of India Vs. Ram Samuzh and another* reported in (1999) 9 SCC 429 considering the issue held that conditions imposed under Section 37(1)(b) of the NDPS Act are mandatory and observed as under-

“To check the menace of dangerous drugs, flooding the market, Parliament has provided that the person accused of offences under the NDPS Act would not be released on bail during trial unless the mandatory conditions provided in Section 37, namely, (i). there are reasonable grounds for believing that the accused is not guilty of such offence and (ii) that he is not likely to commit any offence while on bail are satisfied. The High Court has not given any justifiable reason for not abiding by the aforesaid mandate, while ordering the release of the respondent accused on bail. Instead of attempting to take the holistic view of the harmful socio-economic consequences and health hazards which would accompany trafficking illegally in dangerous drugs the court should implement the law in the spirit with which parliament after due deliberation has amended.”

14. The Supreme Court in the case of *MP Vs. Kajad* reported in (2001) 7 SCC 673 held that *negation of bail is the rule and its grant an exception under Sub-Clause (ii) of (b) of Section 37(1) of the NDPS Act and for granting the bail the Court must on the basis of the record produce before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offences while on bail.*

15. The aforesaid legal position stands reiterated in the case of *Sami Ullah Vs. Superintendent Narcotics Central Bureau* reported in (2008) 16 SCC 471 and in the case of *Union of India Vs. Rattan Mallik @ Habul* reported in (2009) 2 SCC 624, in which it has been clearly held by the Hon'ble Supreme Court that when a

prosecution/conviction is for offence(s) under the Special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, such provisions cannot be ignored while dealing with such an application. It has been observed in Ratta Mallik's case (supra) as under:

“The broad principles which should weigh with the court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application.”

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.

18. In the case of *State of Kerala Vs. Rajesh* reported in (2020) 12 SCC 122, the Hon'ble Supreme Court followed the principles of law laid down in Ram Samuj's case (supra) and clearly held that Section 37 of the NDPS Act commences with non-obstante clause and the conditions enumerated in Section 37(1)(b) have to be complied before admitting the accused on bail of the aforesaid offence under the Act in case of commercial quantity. In the said case, the meaning of 'reasonable grounds' was explained and the same are extracted as below:

“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 Cr.P.C, but is also subject to the limitation placed by Section 37 which commences with non-obstante 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 an 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 offences. If either of these two conditions is not satisfied, the ban for granting bail operates.

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 Cr.P.C., 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."

19. Reverting back to the present case, 2100 numbers of *Phensedyl Cough Syrup* were recovered from the house of the present petitioner, which is undisputedly of more than commercial quantity. After going through the case diary, having heard the learned counsel for the parties, considering the materials available on record and considering the recovery of huge commercial quantity of psychotropic substances from the house of the present petitioner, it cannot be held that there are reasonable ground for believing that the accused petitioner has not committed the said offence and he is not likely to commit any offence, if released on bail.

20. Now coming to the judgment referred to by the learned counsel for the petitioner i.e Sarija Banu (supra) the case had different facts. It was established on record that a police party had illegally entered into the house occupied by the appellants and taken them into custody. A telegram in that regard has been sent to the Commissioner of Police and other police officers. The sending of the telegram and receipt thereof was not disputed. Therefore, the prosecution story was found to be suspicious coupled with the fact that there was violation of Section 42 of the NDPS Act. The petitioner was ordered to be released on bail. It was not only on account of non-compliance of Section 42 of the Act that the bail application had been accepted.

21. In view of the above discussion, this Court is of the considered view that the petitioner above-named is not entitled to be released on bail as accusation is of commercial quantity and the provisions of Section 37(1)(b)(ii) of the NDPS Act are not satisfied. Under the facts and circumstances of the present case, it cannot be held that there are reasonable grounds for believing that the petitioner had not committed the said offence and he is not likely to commit any offence, if released on bail.

22. Accordingly, bail application is rejected and disposed of.

JUDGE

Comparing Assistant