

IN THE HIGH COURT AT CALCUTTA
CRIMINAL MISCELLANEOUS JURISDICTION
[CIRCUIT BENCH AT JALPAIGURI]

Present:

Hon'ble Justice Arijit Banerjee

And

Hon'ble Justice Partha Sarathi Sen

CRM(NDPS) No. 428 OF 2023

Shainur Bibi @Sainur Bibi &Anr

Versus.

The State of West Bengal.

For the Petitioner : Mrs. Madhushri Dutta, Adv.

For the State : Mr. Sourav Ganguly, Adv..

Last heard on : 07.07.2023

Judgment on. : 27.07.2023

Partha Sarathi Sen, J:-

1. The instant case as arises out of an application under Section 439 of the Code of Criminal Procedure, 1973, is taken up for passing judgement.
2. In course of hearing Ms. Dutta, learned advocate for the accused-petitioners has handed up to us photocopies of the memos of arrest in the names of the present two accused persons. Drawing attention to column 10 of the said two memos of arrest, it is argued by Ms. Dutta,

learned advocate for the petitioner that in the said column no.10 at the place of signature of the witnesses (either a member of the family or a respectable person of the locality) one lady constable (L/C 76), Rama Nag has put her signature. It is contended on behalf of the petitioner that considering the fact that the alleged arrest of the aforesaid two accused persons has been done at day time and that too in a public place, there cannot be any justification on the part of the prosecution in not obtaining either the signature of a family member or of a respectable person of the locality on such memos of arrest instead of a lady constable while from the seizure list it would transpire that the said seizures had taken place on the self same day and hour and at the self same P.O in the presence of three independent witnesses.

3. In course of her submission Ms. Dutta, learned advocate for the accused-petitioners placed her reliance on the following decisions:-

- i. D.K Basu vs. State of West Bengal in Writ Petition (CRL) no. 592 of 1987; reported in (1997) 1SCC 416: 1997 SCC(Cri) 92: AIR 1997 SC 610;*
- ii. Order passed in Crl.M.P no.16086 of 1997; in Crl.M.P no. 4201 of 1997;*
- iii. The order dated 10.08.2018 as passed in CRM 5708 of 2018 by a co-ordinate bench of this Hon'ble High Court;*
- iv. The order dated 30/09/2021 as passed in CRM 1002 of 2021 as passed by another Co-ordinate Bench of this Hon'ble Court;*

- v. An order dated 16.12.2021 as passed in CRM 5799 of 2021 as passed by a Co-ordinate Bench of this Hon'ble Court;*
- vi. An order dated 31.01.2023 as passed in CRM (NDPS) 3 of 2023 as passed by The Hon'ble High Court Calcutta, Circuit Bench at Jalpaiguri;*
- vii. An order dated 31.01.2023 as passed in CRM (NDPS) 12 of 2023 as passed by The Hon'ble High Court Calcutta, Circuit Bench at Jalpaiguri.*

4. Placing reliance upon the aforesaid decisions, Ms. Dutta, learned advocate for the accused-petitioner contended that after the judgement of the Hon'ble Supreme Court in the case of **D.K Basu (supra)** it is the consistent view of the Supreme Court as well as of our High Court that obtaining the signature of at least one witnesses who is either a member of the family of the arrestee or a respectable person of the locality from where the arrest of the accused is made, is a *sine-qua-non* especially in the case of NDPS Act 1985(hereinafter referred to as the said Act of 1985) and in the event of noncompliance of such mandatory provision, a presumption may be drawn that the arrest of the accused may not have occurred in the manner as alleged by the prosecution leading credence to the petitioner's plea of prior arrest and wrongful detention. It is further argued on behalf of the petitioner that considering the facts and circumstances involved in the instant case it is amply clear that the prosecution has miserably failed to explain the discrepancies as pointed out by her in the aforementioned two arrest memos and therefore the

instant bail application may be allowed notwithstanding the rigour of Section 37 of the said Act of 1985.

5. Per contra, Mr. Sourav Ganguly, learned advocate for the State at the very outset draws attention of this Court to Section 37 of the said Act of 1985. It is contended by Mr. Ganguly that on perusal of section 37 of the said Act of 1985 it would appear that the Legislature in its wisdom has incorporated certain restrictions which the accused is required to overcome prior to obtaining a favourable order of bail especially in a case of NDPS Act of 1985.

6. Mr. Ganguly, in course of his submission places reliance on the following three decisions namely;

i. Union of India vs. Ajay Kumar Singh @ Pappu reported in (2023) SCC Online SC 346;

ii. Union of India vs. Ram Samujh reported in (1999) 9 SCC 429: (1999)SCC (Cri) 1522 and;

iii. An order dated 12.04.2023 as passed in CRM (NDPS) 260 of 2023.

7. Placing reliance up the aforesaid three decisions it is argued by Mr. Ganguly that the aforesaid three decisions would reveal that time and again the Hon'ble Supreme Court as well as this High Court considered the true implications of Section 37 of the said Act of 1985 and have come to a finding that a Court while disposing of an application for bail under the said Act of 1985 ought to consider the restrictions on granting of bail

as incorporated in Section 37(i) (b) of the said Act of 1985 in addition to the other limitations as enunciated in the Code of Criminal Procedure or in any other law for the time being in force on granting bail. It is thus argued by Mr. Ganguly, learned advocate for the State that considering the true spirit and object of the restrictions on granting bail under Section 37 of the said Act of 1985, the instant application for bail may be rejected.

8. In our considered view for effective adjudication of the instant bail application, a look to the provisions of Section 37 of the said Act is necessary and the same is reproduced hereinbelow:-

“37. Offences to be cognizable and non-bailable.

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for 2[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.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

9. We have minutely perused the entire material placed before us. We have gone through the decisions cited from the Bar. We have given our

anxious consideration to the submissions of Learned Advocates for the contending parties.

10. On perusal of the decision in **D.K Basu (supra)**, it appears to us that in the said decision the Hon'ble Supreme Court issued various directions which are mandatorily to be followed in all cases of arrest or detention till legal provisions are made in that behalf, as preventive measures and out of the said directions the following direction of the Hon'ble Supreme Court is very much pertinent for us while disposing of the instant bail application and the same is reproduced hereinbelow:-

“.....
(2) That the police officer carrying out the arrest of the arrestee shall prepare a memo of arrest at the time of arrest a such arrest memo shall be attested by atleast one witness who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made. It shall also be counter signed by the arrestee and shall contain the time and date of arrest.”

11. At this juncture if we look to the order dated 10.08.2018 passed in CRM 5708 of 2018 by a Co-ordinate Bench of this Court, it would appear that the said court dealing with the self same matter expressed the following view:-

“.....
Absence of signature in the arrest memo of a respectable member of the locality particularly when it is alleged that apprehension and recovery from the petitioner was at a public place in presence of independent witnesses gives rise to

reasonable grounds that the arrest of the petitioner may not have occurred in the manner as alleged by the prosecution leading credence to the petitioner's plea of prior arrest and wrongful detention."

A similar view was taken by other Co-ordinate Benches in the decisions cited by Ms. Dutta.

12. Coming to the factual aspects of the case in hand it appears to us from the case dairy that commercial quantity of contraband was alleged to have been seized from the possession of the present two accused-persons on 10.12.2020 in between 13:15 hours and 15:30 hours at the P.O i.e. beside NH 31 near Paschim Madati Toll Plaza under P.S Phansidewa, District Darjeeling and from the said seizure list it appears that the said seizure was witnessed by three independent witnesses and that the said three independent witnesses put their respective signatures on such seizure list on 10.12.2020. However on perusal of the two memos of arrest in the names of the present two accused petitioners it appears that they have been arrested on the self same day at self same P.O at 15:35 hours and that in column no. 10 of the said two memos of arrest it appears that one lady constable (no.76), Rama Nag has put her signature. In course of hearing no possible explanation could be advanced on behalf of the State as to what prevented the prosecution to get the signatures of any one of the aforesaid three seizure list witnesses

in the said memos of arrest when the time gap between the completion of seizure and the process of arrest was only five minutes.

13. Such being the position we are constrained to hold that in the case in hand a serious of doubt arises in our mind that the arrest of the petitioners may not have occurred in the manner as alleged by the prosecution and a reasonable doubt arises in our mind with regard to the genuineness of the complicity of the accused in the alleged crime.
14. In our further considered view the decisions as cited from the side of the prosecution have been passed in a completely different perspective and those are distinguishable from the facts and circumstances as involved in the instant bail application.
15. In view of the discussion made hereinabove and in view of the infraction of the mandate of the Hon'ble Apex Court in the case of **D.K Basu (supra)** we are constrained to hold that the petitioners of the instant case are successful in diluting the statutory restrictions for grant of bail under Section 37 of the said Act of 1985 and on an overall consideration of the facts and circumstances of this case, we are inclined to grant bail to the petitioners.
16. It is thus ordered that the present two accused petitioners may find bail of Rs. 20,000/-with two registered sureties of like amount subject to satisfaction of learned Judge, Special Court (NDPS), 3rd Court Siliguri in connection with CR(NDPS) case no.78 of 2020 arising out of Phansidewa P.S Case no. 570 of 2020 dated 10.12.2020 on condition

that the present accused-petitioners shall appear before the learned trial court on each date of substantive hearing and shall not threaten or intimidate the witnesses and/or tamper with evidence in any manner whatsoever, or commit similar offences in future with a further direction to appear before O/C Phansidewa P.S once a week and shall not leave the territorial jurisdiction of learned trial court till conclusion of the CR(NDPS) 78 of 2020 unless such condition has been relaxed by the learned trial court.

17. With the aforementioned directions the instant bail application being **CRM (NDPS) No. 428 OF 2023** is thus disposed of.
18. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

I Agree.

(Arijit Banerjee, J)

(Partha Sarathi Sen, J)