



GAHC010010832023

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

Case No. : Bail Appln./193/2023

AMINUL ISLAM
S/O- EFAZUDDIN AHMED @ EFAZZUDDIN AHMED, R/O- VILL- 530
MAUKHOWA, P.O. BAHALPUR, P.S. CHAPAR, DIST.- DHUBRI, ASSAM, PIN-
783371

VERSUS

THE NARCOTIC CONTROL OF BUREAU
GUWAHATI ZONAL UNIT, GUWAHATI REP. BY STNDING COUNSEL,
GAUHATI HIGH COURT

Advocate for the Petitioner : MR. S H ZAMAN

Advocate for the Respondent : SC, NCB

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri A. Ahmed,
Advocates for the respondent: Shri SC Keyal, SC, NCB

Date of hearing : **03.04.2023**

Date of Judgment : **03.04.2023**

JUDGMENT & ORDER

Heard Shri A. Ahmed, learned counsel for the petitioner, namely, Aminul Islam, who has filed this application under Section 439 CrPC seeking regular bail in connection with NDPS Case No. 60/2019 arising out of NCB Crime No. 03/2019 registered under Section 8(c) and punishable under Sections 21(c) / 22(c) / 29 of NDPS Act, 1985. Also heard Shri SC Keyal, learned Standing Counsel, NCB.

2. At the outset, this Court has been informed that on earlier two occasions, the prayer for bail of the petitioner has been rejected by this Court. At the time of filing of the present petition, it was revealed that the Final Report was already filed. Subsequently, it has also been informed that a supplementary complaint under Section 173(8) of the CrPC read with Section 63A of the NDPS Act, 1985 was also filed on 09.03.2021.

3. The petitioner was arrested on 06.10.2020. In paragraph 12 of the petition, it has been admitted that the petitioner was already in custody in connection with Chapar PS Case No. 367/2020 under Section 22(b) of the NDPS Act.

4. In terms of the order passed earlier, the scanned copy of the case records has been transmitted to this Court. The learned Standing Counsel, NCB has also produced a copy of the Supplementary Complaint.

5. In the earlier bail applications, the following submissions were made on behalf of the petitioner.

- i. The petitioner is not an FIR named accused and the FIR is primarily against Mograb Ali, Jiaur Rahman and Abdul Motleb Mir.
- ii. The name of the petitioner was inserted as accused no. 6 only in the time of final complaint by the NCB.
- iii. No contraband was seized from the petitioner or from his conscious possession.
- iv. The petitioner has been arrested only on the basis of the statements made under Section 67 of the NDPS Act by co-accused Mograb Ali, Nurezzaman Islam and Gopal Sarkar.

v. Co-accused Nurezzaman was enlarged on bail and therefore, on the ground of parity, the petitioner should also be released on bail.

vi. The petitioner had been in custody for about one year and six months and therefore, there is no requirement of any further custodial detention.

6. Without going into the issue as to whether the same grounds could be urged in a subsequent petition for bail even after rejection of the prayer on earlier occasions on the same grounds, Shri Ahmed, learned counsel for the petitioner apart from reiterating the said grounds had also urged the following additional grounds. Further, the ground of length of custodial detention has also been modified.

i. The petitioner had valid drug license and at the time of commission of the offence / lodging of the Information i.e. 28.02.2019. The license was valid till 15.02.2019 when the same was suspended.

ii. The length of custodial detention has increased to about 2 years and 6 months.

iii. The trial is not progressing.

iv. Though the petitioner was arrested on the basis of statements made by a co-accused Mograb Ali and Gopal Sarkar, no such allegation has been found in the statement by Mograb Ali.

7. In support his submissions, the learned counsel has placed reliance upon the following case laws / orders –

i. Order dated 07.02.2020 in Crl.App. No. 245/2020 by the Hon'ble Supreme Court (Chitta Biswas @ Subhas Vs. State of West Bengal).

ii. Order dated 01.08.2022 in SLP(Crl.) No. 5769/2022 by the Hon'ble Supreme Court (Nitish Adhikary @ Bapan Vs. State of West Bengal).

iii. Order dated 05.08.2022 in Crl.App. No. 1169/2022 by the Hon'ble Supreme Court (Gopal Krishna Patra @ Gopalrusma Vs. Union of India)



iv. Order dated 22.08.2022 in SLP(Crl.) No. 5530/2022 by the Hon'ble Supreme Court (Mohammad Salman Hanif Shaikh Vs. State of Gujarat).

v. Order dated 28.03.2023 in SLP(Crl.) No. 915/2023 by the Hon'ble Supreme Court (Mohd. Muslim @ Hussain Vs. State, NCT of Delhi).

8. In the case of **Chitta Biswas (Supra)**, bail has been granted on the ground that the appellant was in custody since 21.07.2018.

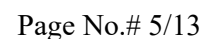
9. In the case of **Nitish Adhikary (Supra)**, bail has been granted only on the ground of delay. The same consideration was also in the cases of **Gopal Krishna Patra (Supra)** and **Mohammad Salman Hanif Shaikh (Supra)**.

10. In the case of ***Mohd. Muslim (Supra)***, bail was granted on the primary ground of undue delay in trial.

11. On the other hand, Shri SC Keyal, the learned Standing Counsel, NCB submits that the points taken by the petitioner in the instant case were also the same points which were taken in the earlier bail applications and the same were considered and answered by this Court. He submits that except for increase in the length of detention and the development in the stage of the trial, there is no new grounds at all. He submits that there being no concept of review, the present petition can subsist only on the limited point of increase in the detention period.

12. Shri Keyal, learned Standing Counsel further submits that the petitioner is under a duty to make out a case for grant of bail based on the facts and circumstances and the concept of precedents in criminal cases is not strictly applicable except for a point of law.

13. The learned Standing Counsel submits that the conduct of the petitioner itself raises serious doubts on his plea of innocence inasmuch as, the petitioner had failed to appear to give his statement to the notices served under Section 67 of the NDPS Act and such statements were required in view of the statements of co-accused that they used to supply Codeine based cough syrup to the petitioner of Boxo Drug Agency, Dhubri and the petitioner is the main supplier of the said contraband in Chapar area. In this regard, attention of this Court has been drawn to paragraph 83 of the complaint filed. As per the prosecution, specific role was attributed to the petitioner.



15. As regards the trial, it is submitted that the same is at an early stage wherein only three out of 11 nos. of witnesses have been examined and releasing the petitioner on bail at this stage may jeopardize the proceeding. The further relevant consideration is that the quantity involved is a huge one falling within commercial quantity for which a strict approach needs to be adopted while considering the bail of an accused. He further submits that offence under this Act is organized one wherein a number of persons are involved and seizure / recovery from each of them may not be there.

i. (2019) 2 SCC 466 [State of Punjab Vs. Rakesh Kumar]

iii. Order dated 21.10.2022 in Crl.App. No. 1841-1842 of 2022 (Union of India-NCB Vs. Khalil Uddin).

17. In the case of ***Rakesh Kumar (Supra)***, the distinction between Drugs and Cosmetics Act, 1940 and the NDPS Act, 1985 has been explained. It has been laid down that simply because the license has been issued under Act of 1940, it will not preclude from application of the Act of 1985. It has been clarified that the NDPS Act should not be read in exclusion to the Drugs and Cosmetics Act, 1940 and therefore only because the contraband in question is manufactured drug, no benefit would accrued upon an accused person.

18. In the case of ***Mohit Aggarwal (Supra)***, the Hon'ble Supreme Court has interpreted Section 37 of the Act which has been inserted especially for the purpose of consideration of bail. It has been held that the expression "reasonable ground" appearing in Section 37(1)(b) would mean credible and plausible grounds for the Court to believe that the accused person is not guilty for which supporting facts and circumstances must exist. The satisfaction regarding the accused person unlikely to commit any offence while on bail has also been highlighted.

19. In the case of ***Khalil Uddin (Supra)***, this Court has held that no contraband article was recovered from the possession of the petitioner and he was implicated by a co-accused. The bail was granted on the basis of the judgments in ***Bharat Choudhury Vs. Union of India in Petition for Special Leave (Crl.) Appeal No. 5703/2021*** and ***Tofan Singh Vs. State of Tamil Nadu in Criminal Appeal No. 152 of 2013***.

20. In the case of ***Ajay Kumar Singh (Supra)***, the Hon'ble Supreme Court interfered with an order passed by the Allahabad High Court whereby bail was granted. It was held that Section 37 of the Act was lost sight of. In paragraph 12 of the said judgment, it has been observed that it was on record that the accused was involved in similar offence and cases are pending against him.

21. The submissions made by the rival parties have been carefully considered and the scanned copy of the case records perused. It appears that the thrust of the argument made on behalf of the petitioner in support of the prayer for bail is that the arrest and detention has been made solely on the basis of a statement of the co-accused and nothing else and therefore, by relying on the cases of the Hon'ble Supreme Court, the petitioner has prayed for bail. Further, no recovery, whatsoever, has been made from the petitioner. Emphasis has also been laid on the delay factor and the length of detention.

22. *Prima facie*, it appears that in the FIR, the petitioner has not been named and from the forwarding report one would come to learn that it is only on the basis of the statements made by co-accused that the petitioner has been arrested.

23. The offence involved in this case is one under the NDPS Act and the quantity involved is a commercial quantity. The contraband involved is also chemical manufacture drugs. To be

more specific, the FIR itself reveals that the following recovery has been made-

Sl. No.	Article seized	Package Description	Quantity / Value	Where from recovered
1.	Relaxcof	Packed in 05 carton boxes	600	From Car No. AS 26/B 5506
2.	Recofex	Packet in 10 cartoons boxes	1200
3.	Metamphetamine tablet	Packet in two blue colour plastic tablets	68 gm	

24. So far as the submissions regarding not being named in the FIR, arrest being done on the basis of statements made by co-accused and delay, the same were duly considered by this Court in the earlier judgment dated 06.05.2022 passed in BA/2816/2020. This Court finds force in the contention made on behalf of the Prosecution that the same grounds are not liable to be taken as the same would amount to reviewing the earlier order which is not permissible under the criminal jurisprudence. In any case, this Court in the aforesaid order dated 06.05.2022 had made the following observations:

“17. This Court finds force in the submission of the learned Standing Counsel, NCB that offences under the NDPS Act are part of an organized crime wherein difference roles are played by different accused persons. Therefore, recovery or seizure cannot be held to be a sine qua non for the arrest / detention or even for conviction if there are other convincing and corroborating materials. Therefore, this Court is unable to accept the plea that since no recovery was made from the petitioner, his involvement can be ruled out.

18. What is left now is the issue of the arrest being based on the statement of the co-accused. At this stage, it is to be kept in mind that it is only the question of grant of bail which is the subject matter of the petition and this Court is not required to go to the aspect as to whether conviction on the sole testimony of a co-accused is

sustainable.

19. *To resolve the aforesaid issue, one may gainfully refer to the relevant provision of law, namely, Section 133 of the Indian Evidence Act, which reads as follows-*

"133. Accomplice.

An accomplice shall be a competent witness against an accused person; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

20. *Since, the aforesaid aspect finds mention by way of an illustration, to come to a correct finding the same is also required to be consideration which is extracted hereinbelow-*

"14. Court may presume existence of certain facts.

The court may presume the existence of any fact which it things likely to have happened regard being had to the common course of natural events human conduct and public and private business, in their relation to the facts of the particular case.

Illustrations

The Court may presume-

(a) ...

(b) That an accomplice is unworthy of credit, unless he is corroborated in material particulars."

21. *A conjoint reading of the aforesaid provisions would lead to a conclusion that though a statement of an accomplice can be relied upon for the purpose of conviction of a co-accused, such statement is necessarily required to be corroborated with other relevant materials.*

22. *The above provision of law and the discussion made are in the context of coming to a finding of conviction which is at a much later stage. However, in the instant case, that stage has not even come and the trial is at a very initial stage.*

Further, this Court is of the view that if an arrest and detention is not permissible on the basis of a statement of a co-accused, no investigation would be possible leading to a situation of anarchy and lawlessness.

23. *Further, this Court is of the view that it is a settled position of law that in a case involving the NDPS Act, though the length of detention may be a relevant factor, the same shall not be the sole factor for determining a bail application and various other factors are taken into consideration like the quantity of the contraband, nature of the substance, nature of involvement etc. In the present case, the contraband is a commercial quantity and the substance is chemically manufactured drug. Moreover, Section 37 of the NDPS Act lays down that before granting a bail, the relevant factors are that the Court should come to a satisfaction that prima facie the petitioner is not guilty of the offence and also the petitioner has to satisfy the Court that in case bail is granted, he is not likely to commit further offence. The aforesaid two factors do not seem to be fulfilled in the present case.*

24. *At this stage, it would be gainful to refer the following decisions of the Hon'ble Supreme Court.*

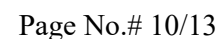
i. ***Satpal Singh Vs. State of Punjab*** reported in **(2018) 13 SCC 813** and

ii. ***Union of India (NCB) Vs. Md. Nawaz Khan*** reported in **(2021) 10 SCC 100.**

25. *In the case of **Satpal Singh (Supra)**, the Hon'ble Supreme Court reiterated that the rigors of granting bail under the NDPS Act should be strictly followed and the conditions laid down under Section 37 of the Act are to be mandatorily followed.*

26. *In the case of **Md. Nawaz Khan (Supra)**, the Hon'ble Supreme Court by referring to various earlier judgments had laid down that a finding of absence of possession of contraband on the person does not necessarily absolve it of the level of scrutiny required under Section 37(1)(b)(ii) of the NDPS Act."*

25. The only issue is with regard to the delay and length of detention. As observed above,



26. So far as the cases referred by the petitioner are concerned, in the case of ***Chitta Biswas (Supra)***, the Hon'ble Supreme Court however made it clear that no opinion was expressed on the merits. Further, there is no discussion on the provision of Section 37 of the NDPS Act relating to bail. The case of ***Nitish Adhikary (Supra)***, may not come to the aid to the petitioner inasmuch as, the Hon'ble Supreme Court had also looked into the attending facts and circumstances including the fact that the petitioner did not have any criminal antecedents. In the case of ***Mohammad Salman Hanif Shaikh (Supra)***, the Hon'ble Supreme Court has clarified that whether the allegation of "commercial quantity" stood substantiated was yet to be decided.

27. In the case of ***Mohd. Muslim (Supra)***, the Hon'ble Supreme Court laid down the primary importance on the right to speedy trial and in this case, the appellant was found to be in custody for seven long years as an under trial. The Hon'ble Supreme Court had also taken into consideration the provisions of Section 436A of the CrPC. Though a discussion has been made on Section 37 of the Act, the observation made appears to be only on one part of the said Section. Juxtaposed, in the case of ***Mohit Aggarwal (Supra)***, the other requirement that the accused person is unlikely to commit any offence while on bail has also been taken into consideration. Further, in this case the provisions of Section 436A of the CrPC is *prima facie* is not applicable *qua* the period in custody.

28. The NDPS Act is a special Act with an inbuilt mechanism in the form of Section 37 relating to bail. For ready reference, Section 37 is extracted 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 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. "

29. The said Act has introduced an additional restriction in the form of giving an opportunity to the Public Prosecutor and more importantly, the Court has to be satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence **and** that he is not likely to commit any offence while on bail. Section 37 (2) makes it clear that the aforesaid limitations are in addition to the other limitations under the Cr.P.C or any other law for the time being in force, on grant of bail.

30. The attention of this Court has been drawn to the fact that the petitioner is an accused

and was arrested in connection with Chapar PS Case No. 367/2020 under Section 22(b) of the NDPS Act. Section 37, more particularly Sub-Section (1)(b)(ii) of the NDPS Act being special enactment which has an inbuilt mechanism with regard to bail has introduced two statutory restrictions before grant of bail, apart from giving an opportunity to the Public Prosecutor. Those are:

- (i) There has to be *prima facie* satisfaction regarding existence of reasonable grounds that the accused is not guilty **and**
- (ii) The accused is not likely to commit any offence while on bail.

As indicated above, there are materials on record regarding the involvement of the petitioner in another case concerning NDPS Act itself and therefore, the restrictions will come into operation.

31. So far as the provision under Section 37 of the Act regarding requirement of a satisfaction to be arrived at by the Court that the accused is not likely to commit any offence while on bail, this Court is of the view that the aforesaid satisfaction can be based more on presumption and speculation as it is impossible to foresee one's action in the future. Therefore, the only yardstick which may be applied is to examine the antecedents of the accused. This will necessarily require the Court to see as to whether the accused is involved in any other offence. In the instant case, the petitioner is admittedly an accused in another criminal case namely, Chapar PS Case No. 367/2020 which is also under the NDPS Act involving commercial quantity.

32. Though length of detention may be one of the factor in consideration the prayer for bail, the same cannot be the sole factor more so when all the requirement of Section 37 of the Act are not fulfilled.

33. In the case of ***Chandrakeshwar Prasad Vs. State of Bihar***, reported in **(2016) 9 SCC 443** (Popularly known as Md. Sahabuddin Case), the Hon'ble Supreme Court has laid down in clear terms that interest of the society is a relevant factor to be taken into account while considering the prayer for bail. For ready reference, the relevant paragraphs of the said case are extracted hereinbelow:

"10. This Court in Rajesh Ranjan Yadav @ Pappu Yadav v. CBI through its Director (2007) 1 SCC 70 balanced the fundamental right to individual liberty with the interest of the society in the following terms in paragraph 16 thereof:

"We are of the opinion that while it is true that Article 21 is of great importance because it enshrines the fundamental right to individual liberty, but at the same time a balance has to be struck between the right to individual liberty and the interest of society. No right can be absolute, and reasonable restrictions can be placed on them. While it is true that one of the considerations in deciding whether to grant bail to an accused or not is whether he has been in jail for a long time, the court has also to take into consideration other facts and circumstances, such as the interest of the society."

34. In that view of the matter and also taking into consideration the very object of the enactment, namely to curb the menace of drugs and its ill effects on the society which has the propensity to destroy the generation as a whole, this Court is of the opinion that no case for grant of bail is made out at this stage. Accordingly, the same stands rejected.

35. It is however clarified that the observation made are tentative in nature and shall not cause prejudice to either of the parties in the trial.

JUDGE

Comparing Assistant