

(2021) 06 GAU CK 0149

Gauhati High Court

Case No: Bail Application No. 962 Of 2021

Hemanta Deka

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision: June 24, 2021

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 173(2), 439
- Narcotic Drugs & Psychotropic Substances Act, 1985 - Section 8(c), 21(c), 22, 37, 37(1)(b)
- Indian Penal Code, 1860 - Section 379, 411
- Drugs and Cosmetics Act, 1940 - Section 18(c), 27(a), 27(b)(ii), 27(c), 36AC, 36AC(1)(b), 36AC(2), 36AC(3)

Hon'ble Judges: Manish Choudhury, J

Bench: Single Bench

Advocate: M U Mahmud

Final Decision: Dismissed

Judgement

1. The Court proceedings have been conducted through remote video conferencing mode due to the prevailing Covid-19 pandemic situation in the State.

2. By this application under Section 439, Code of Criminal Procedure, 1973 (â€œthe Codeâ€ and/or â€œCrPCâ€, for short), the accused-petitioner viz.

Sri Hemanta Deka has prayed for his release on bail, as he is in custody since 23.01.2021, in connection with Special (NDPS) Case no. 05/2021,

arising out of Baihata Chariali Police Station Case no. 91/2020 which was originally registered under Sections 379/411, Indian Penal Code (IPC) read

with Section 27(a) (b)(ii) of the Drugs and Cosmetics Act, 1940 read with Sections 8(c)/21(c)/22 of the Narcotics Drugs and Psychotropic Substances (NDPS) Act, 1985.

3. The accused-petitioner was made an accused and arrested in connection with Baihata Chariali Police Station Case no. 91/2020, registered under

Sections 379/411, IPC read with Section 27(a)(b)(ii) of the Drugs and Cosmetics Act, 1940 read with Sections 8(c)/21(c)/22, NDPS Act, 1985. After

completion of investigation, a charge sheet being Charge Sheet no. 1/2021 dated 28.01.2021 had been submitted against the accused-petitioner. On

submission of the said charge sheet, the case has been registered as Special (NDPS) Case no. 05/2021 and the same is pending before the Court of

learned Additional District and Sessions Judge, Rangia as the Special Court at present.

4. When an application for bail was preferred by the accused-petitioner before the said Special Court, it was rejected by an order dated 08.04.2021.

5. The scanned copies of the case records of Special (NDPS) Case no. 05/2021 and the concerned case diary were called for from the Special Court.

The same have been received.

6. Heard Mr. M.U. Mahmud, learned counsel for the accused-petitioner and Mr. M.P. Goswami, learned Additional Public Prosecutor for the

respondent State of Assam.

7. Mr. Mahmud has submitted that the accused-petitioner has been victimized by his business rivals/neighbours. By naming two persons in the

application, it has been averred that it is those two persons who use to run the illegal business of drugs. In order to get rid of police action, they gave

the false information to the police that the house from which the suspected contraband substances were seized, was the house of the accused-

petitioner. He has submitted that the contraband substances were seized actually from the house of those persons. It is his further submission that the

case was registered initially under the wrong provisions of the NDPS Act. Later on, when the charge sheet was filed it was submitted correctly under

the provisions of the Drugs and Cosmetics Act, 1940. He has further submitted that the materials on record do not attract the ingredients of the

offences under Section 27(a) and/or Section 27(b)(ii) of the Drugs and Cosmetics Act.

8. Learned Additional Public Prosecutor has vehemently objected to the prayer of bail made on behalf of the accused-petitioner. He has submitted that as the charges against the accused-petitioner have not been framed till date the bail application is premature. He has further submitted that it is the materials on record, collected during the course of investigation leading to the submission of the charge sheet, which are required to be considered.

An omission on the part of the Investigating Officer (I.O.) to mention the appropriate offences in respect of which prima facie materials have been found against the accused person charge sheeted, in the charge sheet does not ipso facto entitle such an accused person to be released on bail. The entire materials on record along with the relevant provisions of the statutes operating in the field are required to be considered. It is his submission that in that view of the matter, if one looks at the contraband substances seized from the possession of the accused-petitioner along with the report of chemical analysis given by the Forensic Science Laboratory (FSL), Assam in respect of those contraband substances, it is very much evident that the case in hand is required to be considered in terms of the restrictions for bail qua the provisions contained in the NDPS Act, 1985 apart from the pari materia provision contained in the Drugs and Cosmetics Act, 1940.

9. I have considered the submissions advanced by the learned counsel for the parties and have also perused the materials on record available in the scanned copies of the case records of Special (NDPS) Case no. 05/2021 and the concerned case diary.

10. The First Information Report (FIR) in Baihata Chariali Police Station Case no. 91/2020 came to be lodged on 01.04.2020 by a Sub-Inspector of Police, attached to the said police station. As per the FIR, an information was received from a reliable source on 01.04.2020 that a huge quantity of contraband substances i.e. Corolex and Eskuf DX cough syrups were kept concealed in the house of the accused-petitioner. Accordingly, a general diary entry being General Diary Entry no. 08 dated 01.04.2020 was registered. Information was received to the effect that the accused-petitioner was involved in the business of selling those contraband substances. After observing formalities in that regard, a team of police personnel was constituted

and the team proceeded to the house of the accused-petitioner. When the house of the accused-petitioner was searched, 397 nos. of bottles of suspected contraband substances labelled as Corolex and Eskuf DX cough syrups, kept concealed in plastic bags and carton boxes, were found. The same were seized vide two seizure lists (M.R. no. 20/2020 and M.R. no. 21/2020) in presence of independent witnesses. Samples from the contraband substances were duly taken in presence of independent witnesses. The seized items and the samples were duly sealed in presence of the witnesses. At the time of the search operation, the accused-petitioner could not be found in his house. On receipt of the FIR, the case was registered initially for the offences under Sections 379/411, IPC read with Section 27(a)(b)(ii) of the Drugs and Cosmetics Act, 1940 read with Sections 8(c)/21(c)/22 of the NDPS Act, 1985 on 01.04.2020.

11. Though the case was registered on 01.04.2020, the accused-petitioner could be arrested only on 23.03.2021. After arrest, he was produced before the learned Sub-Divisional Judicial Magistrate, Rangia, Kamrup on 23.01.2021. Upon such production, the accused-petitioner was remanded to custody on 23.01.2021 and since then, he is in custody.

12. After completion of investigation the Investigating Officer (I.O.) of the case had filed a charge sheet being Charge Sheet no. 1/2021 dated 28.01.2021 under Section 173(2), CrPC finding a prima facie case against the accused-petitioner only under the offences defined under Sections 379/411, IPC and Sections 27(a)(b)(ii) of the Drugs and Cosmetics Act, 1940.

13. The case records go to show that during the search, the following suspected contraband substances were seized vide the two seizure lists (supra)

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• MR NO 20/2020

Description of the Seizure:

1/ COROLEX MAX (Chlorpheniramine Maleate & Codeine Phosphate Syrup) • 01 Carton • Total 96 Bottles, 100 ml in each bottle. (Sample drawn & Marked as A-1 & A-2 • Total 10 Bottles)

2/ COROLEX MAX (Chlorpheniramine Maleate & Codeine Phosphate Syrup) • 01 Carton • Total 145 Bottles, 100 ml in each bottle. (Sample

drawn & Marked as D-1 & D-2 " Total 10 Bottles)

MR NO 21/2020

Description of the Seizure:

1/ Eskuf DX (Dextromethorphan Hydrobomide Chlorpheniramine Maleate Syrup) " 01 Carton " Total 76 Bottles, 100 ml in each bottle. (Sample

drawn & Marked as B-1 & B-2 " Total 10 Bottles)

2/ Eskuf DX (Dextromethorphan Hydrobomide Chlorpheniramine Maleate Syrup) " in plastic bag " Total 80 Bottles, 100 ml in each bottle.

(Sample drawn & Marked as C-1 & C-2 " Total 10 Bottles)."

14. The FSL, Assam gave its report of chemical analysis of the samples vide Report no. DFS.933/2020/1154/DN-507/2020 dated 05.10.2020. As per

the report the exhibits of samples branded as "Corolex"™ were marked as DN-507/2020(a1) to DN-507/2020(a5) respectively. Those exhibits on

examination gave positive tests for Codeine (present as Codeine Phosphate) and the amount of Codeine Phosphate in each exhibit was found to be

189.2 mg. The samples branded as "Eskuf DX"™ upon examination, gave negative tests for Narcotic Drugs and Psychotropic Substances.

15. Entry no. 28 in the Table appended to the NDPS Act, 1985 has mentioned Codeine. As per the said Entry no. 28, a quantity upto 10 grams is small

quantity and a quantity above 1 kg of Codeine is considered to be commercial quantity. It has been settled by the Supreme Court of India in Criminal

Appeal no. 722/2017 [Hira Singh and another vs. Union of India and another], decided on 22.04.2020, that in case of seizure of mixture of Narcotic

Drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken

into consideration along with the actual content by weight of the offending drug, while determining the "small or commercial quantity"™ of the

Narcotic Drugs or Psychotropic Substances. Going by the aforesaid proposition, though a bottle of cough syrup of 100 ml, branded as "Corolex"™,

contained a quantity of 189.2 mg of Codeine the entire weight of 100 ml is to be considered as the quantity of Narcotic Drugs and Psychotropic

Substances. It is found that 239 nos. of bottles of cough syrup of 100 ml, branded as "Corolex"™, were seized during the search operation carried

out in the house of the accused-petitioner. Thus, the total quantity of 23,900 ml of Narcotic Drugs and Psychotropic Substances (Codeine) contained in

239 nos. of bottles have to be counted, by way of conversion, as 23,900 grams i.e. 23.90 kg. Viewed from that perspective, the total quantity of

contraband substance (Codeine) appears to fall in the commercial quantity category. It is not known from the materials available in the records as to

for what reason, the I.O. of the case had filed the charge sheet only under for the offences under the Drugs and Cosmetics Act, 1940 and without

incorporating the provisions of the NDPS Act, 1985. A report was sought for from the I.O. of the case in that regard through the learned Additional

Public Prosecutor but despite grant of sufficient opportunities no report in that regard has been placed before this Court and the learned Additional

Public Prosecutor has failed to give any proper reason for non-submission of such report by the investigating authority.

16. A person if he does not hold a licence issued by the competent authority, cannot, as per the provisions of clause (c) of Section 18 of the Drugs and

Cosmetics Act, 1940, manufacture for sale or for distribution or sell, or stock or exhibit or offer for sale, or distributes any drug. As per clause (a) of

Section 27 of the said Act, whoever, himself manufactures for sale or for distribution or sells, or stocks or exhibits or offers for sale or distributes any

drug falling under the categories mentioned therein, shall be punishable imprisonment for a term which shall not be less than 10 years but which may

extend to imprisonment for life and shall also be liable to fine which shall not be less than ten lakh rupees or three times the value of the drugs

confiscated, whichever is more. If any drug other than the drug under clause (a) which is not adulterated, is stocked by a person without a valid

licence then such a person is punishable with imprisonment under Section 27(b)(ii) for a term which shall not be less than three years but which may

extend to five years and also with fine in the manner stated therein.

17. Learned counsel for the accused-petitioner has not made any submission showing ground that the contraband substances, found in concealed

condition and seized from his house, do not come under the purview of the provisions of the Drugs and Cosmetics Act, 1940, which prima facie also

comes under the purview of the NDPS Act, 1985. Though a submission is made that the house wherefrom the contraband substances were recovered

and seized, does not belong to him but no materials, not to speak of sufficient materials, have been placed before this Court to arrive at any reasonable

opinion that the contraband substances were not seized from the house of the accused-petitioner. In his application, the accused-petitioner by naming

two persons, has targeted towards them as the persons who were behind implicating the accused-petitioner in the crime of stocking of contraband

substances in huge quantity. But on perusal of the records, it is found that those two persons were witnesses who witnessed the process of search,

recovery and seizure of the contraband substances and they are listed to be prosecution witnesses in the trial which is yet to take place. The learned

counsel for the accused-petitioner has submitted that the charges are yet to be framed, meaning thereby, the trial of the case has not yet started. The

accused-petitioner has asserted that the two persons who are going to be the prosecution witnesses, are his business rivals and neighbours.

18. Section 36AC of the Drugs and Cosmetics Act, 1940 has mentioned that the offences under the Act to be cognizable and non-bailable in certain

cases. Clause (b) of sub-section (1) of Section 36AC has inter alia provided that notwithstanding anything contained in the CrPC, no person accused

of an offence punishable under clauses (a) and (c) of Section 27 of the Act, shall be released on bail or on his own bond unless (i) the Public

Prosecutor has been given an opportunity to oppose the bail application for such release; and (ii) where the Public Prosecutor opposes the bail

application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty for such offences and he is not likely to commit

any offence while on bail. The said provision is pari materia to the provision contained in sub-clause (b) of sub-section (1) of Section 37 of the NDPS

Act, 1985. Sub-section (2) of Section 36AC of the Drugs and Cosmetics Act, 1940 has further provided that the limitation on granting of bail specified

in clause (b) of sub-section (1) is in addition to the limitations under the CrPC or any other law for the time being in force on granting of bail. As per

sub-section (3) of Section 36AC, nothing contained in that Section shall be deemed to affect the special powers of the High Court regarding bail under

Section 439 of the Code and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of Section 36AC of the Act.

19. The expression "reasonable grounds" appearing in Section 36AC has to be considered in the context of the similar provision contained in

Section 37 of the NDPS Act, 1985 which expression has been interpreted in a number of decisions of the Supreme Court of India. In *State of Kerala*

vs. *Rajesh*, reported in AIR 2020 SC 721, it has been observed that the expression "reasonable ground" means something more than *prima facie*

grounds. It contemplates substantial probable clauses for believing that the accused is not guilty of the alleged offence. The reasonable belief

contemplated requires existence of such facts and circumstances as sufficient in themselves to justify satisfaction that the accused is not guilty of the

alleged offence.

20. It is well settled that the matters to be considered in an application for bail are (i) whether there is any *prima facie* or reasonable ground to believe

that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv)

danger of the accused absconding or fleeing, if released on bail; (v) character, behavior, means, position and standing of the accused; (vi) likelihood of

the offence being repeated; (vii) reasonable apprehension of the witnesses being tampered with; and (viii) danger, of course, of justice being thwarted

by grant of bail. It is no doubt true that while considering an application for bail the aspect of personal liberty of the accused is also to be considered.

But at the same time, the interest of free and fair trial of the case, more particularly, when it pertains to an offence of heinous nature is also to be

looked into. The discretion vested in the Court for grant of bail or otherwise has to be exercised in a judicious manner and not as a matter of course.

21. Reverting back to the fact of the case in hand, huge quantities of contraband substances containing Codeine as a constituent were found

concealed in the house of the accused-petitioner. The accused-petitioner has not been able to show by any cogent material that the said contraband

substances (Codeine) in the shape of 239 nos. of bottles were kept by virtue of any licence issued in his name or it belonged to some other person with

a licence. He has not also been able to show also that the house wherefrom the huge quantity of contraband substances were recovered, does not belong to him. Though he has made an attempt to project the two persons who would be prosecution witnesses having witnessed the process of search, recovery and seizure of the contraband substances, as his business rivals and also his neighbours but nothing has been brought on record to substantiate such contention. Conspicuously, the accused-petitioner has stated in his application that he runs a pan shop at Baihati Chariali and situated as such, he has failed to substantiate in what manner those two prosecution witnesses are his business rivals. Having due regard to the facts and circumstances of the case where the accused-petitioner is facing the charge of stocking huge quantity of contraband substance in his house and where the charges have not yet been framed and the independent witnesses have not yet been examined as prosecution witnesses, the possibility of influencing or intimidating or preventing the independent witnesses from deposing in the trial to be taken place in a manner free from any fear or influence in the event of his release on bail, at this stage, cannot be ruled out. In the aforesaid fact situation obtaining in the case in hand, this Court is not persuaded to arrive at a view that there are reasonable grounds to believe that the accused-petitioner is not guilty of the offences for which he is accused of. Further, this Court is of the view that the release of the accused-petitioner on bail at this stage is likely to impede the process of free and fair trial when the charges are yet to be framed and the independent witnesses are yet to be examined. Upon due consideration of all these aspects, this Court does not find any merit in this bail application. Accordingly, the prayer for bail made on behalf of the accused-petitioner is rejected.

22. While rejecting this application with the aforesaid observations, it is made clear that the above observations are only limited to the question of granting bail or otherwise and the observations, made above, shall not have any bearing in the merits of the case during the course of the trial. Liberty is, however, granted to the accused-petitioner to renew his prayer for bail after the charges are framed and the independent witnesses are examined.

The learned trial court shall take note of the same when it proceeds with the trial.