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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL WRIT PETITION NO.2914 OF 2016**

Najam Mohammad Syed

...Petitioner

Versus

1. The State of Maharashtra

2. Farhanaz Najam Syed

...Respondent

Mr.Subhash Jha a/w Ms.Rushita Jain, i/b Law Global Advocates, for the Petitioner.

Mr.Hassnain Kazi a/w Mr.Afroz Shaikh, i/b Ms.Saima Ansari, for Respondent No.2.

Mr.S.R.Agarkar, A.P.P for the Respondent-State

Petitioner is present.

Respondent No.2 is present.

***CORAM : REVATI MOHITE DERE, J.  
DATE : 8<sup>th</sup> SEPTEMBER, 2016***

**P.C. :**

1. Heard learned Counsel for the petitioner, the learned A.P.P and learned counsel for the respondent no.2.

2. By this petition, the petitioner seeks quashing and setting aside of the impugned Order dated 11<sup>th</sup> August, 2016, passed by the Judicial

Magistrate, First Class, Court No.6, Pune, below Exhibit – 85 in R.C.C.No.203 of 2014.

3. Learned Counsel for the petitioner submits that the petitioner is an NRI and is a resident of Canada and that he intends to go to Canada for his work as well as for his Hepatitis – B treatment. He further submits that infact, the learned JMFC had directed return of the passport of the petitioner and had permitted the petitioner to travel vide order dated 18<sup>th</sup> October, 2014. He submitted that the petitioner has given an undertaking in the trial Court that his Advocate will appear and that he will not dispute his identity and that he will remain present as and when so directed by the trial Court. Learned Counsel for the petitioner urged, that if the petitioner is not permitted to travel to Canada he will loose his job resulting in tremendous hardship. He further submitted that the petitioner's mother and brother are residing in Mumbai and that the petitioner is ready to deposit his mother's passport in the trial Court, in case the respondent no.2 has any reservations about his return. Learned Counsel for the petitioner has also tendered an affidavit-cum-undertaking of the petitioner. The same is taken on record and marked 'X' for identification. In the said affidavit-cum-undertaking, the

petitioner has undertaken that (i) he will deposit the original property papers concerning the two properties, one in Mumbai and other in Kolkatta, in this Hon'ble Court till the conclusion of the trial concerning R.C.C.No.203 of 2014, which is pending in the Court of learned JMFC, Court No.6, Pune and the Domestic Violence Act proceedings, which is pending in the Court of learned JMFC, Pune; (ii) that in the event of his failure to deposit the maintenance amount and upon any execution proceedings being initiated in respect of the aforesaid two properties, he will not object to the levy of execution proceeding, so initiated by the Respondent No.2; (iii) he will deposit the passport of his mother bearing No.J9086370 in this Hon'ble Court till conclusion of R.C.C.No.203 of 2014, pending in the Court of learned JMFC, Court No.6, Pune;(iv) that he shall be represented in the trial court in R.C.C.No.203 of 2014, through his Advocate and that his advocate will not seek any adjournment on account of he being out of India and that he has duly instructed his Advocate to have his statement recorded under Section 313 and that he will remain present in the court at the time of pronouncement of the Judgment in R.C.C.No.203 of 2014.

4. Learned Counsel for the Respondent No.2 has expressed respondent no.2's apprehension, that the petitioner being a Canadian citizen, will not return to India and that the proceedings which are pending against the petitioner will be jeopardized. He urged that the petitioner was absconding for one year, pursuant to which look out notice was issued, after which the petitioner was arrested and subsequently enlarged on bail. He submitted that the petitioner has not spelt out the period for which he is leaving for Canada and when he is likely to return. He submitted that a perusal of the Roznama shows that the petitioner has been delaying the trial and that he has not complied with the orders of the trial Court. He submitted that the reason given in the application, that the petitioner is suffering from Hepatitis – B is not borne out by any medical report.

5. Perused the papers. The petitioner is facing prosecution along with his mother, for the alleged offences punishable under Sections 498A, 420, 406 r/w 34 of the Indian Penal Code. The said case is pending before the learned JMFC, Court No.6, Pune and charges have been framed against the petitioner and the co-accused. It appears that the petitioner had preferred an application, being Exhibit – 16, for return of his passport and

for permission to travel to Canada, in September, 2014. The learned JMFC, Court No.6, Pune vide order dated 18<sup>th</sup> October, 2014 was pleased to allow the said application. Para 4 of the said order reads thus:-

“4. In the circumstances, PSO Khadak is directed to release the passport of the accused Najam Mohammad Sayyed on his executing a P.R.Bond of Rs.2,00,000/- (Two Lakh Rupees Only) with surety of like amount. Accused to give undertaking that he shall remain present before court as and when directed. Accused to file exemption application through advocate on each and every date. Accused to furnish his contact number and full address of abroad to investigating officer and to this court. Accused to file affidavit that his lawyer will conduct the trial in his absence, without disputing this identity.”

6. It thus appears from the aforesaid order that PSO Khadak was directed to release the passport of the petitioner on his executing a P.R.Bond of Rs.2,00,000/- (Two Lakh Rupees Only) with surety of like amount. The petitioner was also directed to give an undertaking that he shall remain present before court as and when directed and the petitioner

was directed to file an exemption application through his advocate on each and every date. The petitioner was also directed to furnish his contact number and full address of the place where he would be residing abroad, to the investigating officer and to the trial Court. The petitioner was further directed to file an affidavit that his lawyer will conduct the trial in his absence, without disputing this identity. Pursuant to the said order, it appears that the petitioner travelled twice to Canada. It appears that after charges were framed, an application was filed by the petitioner being Exhibit – 85, seeking permission to travel to Canada from 15<sup>th</sup> August, 2016 to 15<sup>th</sup> December, 2016. It was also urged in the said application that the petitioner was suffering from Hepatitis – B and that he was required to go to Canada for his treatment. It appears that as the petitioner had not submitted any medical certificate to show that he was suffering from the said disease, the learned Magistrate concluded that there was nothing to show that the petitioner was suffering from Hepatitis – B. It was also observed that the petitioner was out of India for more than 6 months, without obtaining permission from the trial Court. Accordingly, the petitioner's application was rejected. The said order has been impugned in this petition.

7. Learned Counsel for the petitioner has tendered documents to show that the petitioner is suffering from acute Hepatitis – B. The said documents which are tendered in Court are taken on record. The petitioner has also tendered an e-mail sent by the petitioner's employer and owner of Evoluz Inc, one Mr.Stephen Greene. In the said mail, the petitioner's employer has given him a last warning to return to work on or before 15<sup>th</sup> September, 2016. It is mentioned in the said e-mail, that if the petitioner did not return on or before 15<sup>th</sup> September, 2016, they will have no other option but to find some alternative person in his place. Learned counsel for the respondent no.2, disputes the e-mail. According to him, the petitioner himself is the owner of Evoluz Inc. It is not in dispute, that there are Domestic Violence proceedings, which are also pending before the learned Magistrate Court, Pune, between the parties. When the petition came up before this Court, the petitioner was directed to implead the original complainant as respondent no.2, considering the fact, that the petitioner is a Canadian National and that there were matrimonial proceedings also pending between the parties. Pursuant to the same, the complainant was impleaded as a party respondent no.2 and notice was issued, pursuant to which respondent no.2 appeared before this Court, today, with her

Advocate. In order to protect the interest of the respondent no.2 (complainant), the petitioner was directed to file an affidavit-cum-undertaking, pursuant to which he has filed the aforesaid affidavit-cum-undertaking. The relevant portion of the affidavit-cum-undertaking is reproduced hereinunder:-

“.....

1. I undertake to this Hon'ble Court to deposit original property papers concerning the following two properties in this Hon'ble Court till conclusion of the trial concerning RCC No.203 of 2014, pending in the Court of Ld. J.M.F.C., Court – 6, Pune and Domestic Violence Act proceedings pending in the court of Ld.J.M.F.C., Pune. I further undertake not to create any third party rights, interests, and/or transfer the rights in respect of the aforesaid two properties during pendency of RCC No.203 of 2014. I say that similarly I have neither created any third party rights, interest and/or transferred any right in respect of the following two properties :-

1. Flat No. 703, A-wing, Penta Galaxy S.R.A. Co-operative Housing Society Ltd., admeasuring 580 Sq. ft. Fire Brigade, Antop Hill, Mumbai – 400 037.
2. 2 (two) Cottahs, 8 (eight) Chhitaks 00 (zero) sq. ft. along with structure lying and situated at Mouza Nonadanga, J.L. No. 10, R.S. Khaitan No. 224, 225 Dag No. 502, K.C. Ward No. 108,

Police Station – Tiljala, Kolkatta – 700 100, Dist.: 24-Parganas (South), West – Bengal.

1. In the event of my failure to deposit the amount of maintenance, passed by the Court of Ld. 31<sup>st</sup> J.M.F.C., Pune in Criminal M.A. No. 7273 of 2014 and which was modified subsequently by the Ld. District Judge – 16 and Addl. Sessions Judge, Pune by order dated 26.2.2016 in Criminal Appeal No. 338 of 2015 and upon any execution proceeding being initiated in respect of the aforesaid two properties, I shall not object to the levy of execution proceeding so initiated by the Respondent No. 2.
2. I say that I shall deposit the passport of my mother bearing No. J9086370 in this Hon'ble Court till conclusion of R.C.C. No. 203 of 2014, pending in the Court of Ld. J.M.F.C. Court-6, Pune.
3. ....
4. ....”
8. The petitioner has further undertaken that he shall be represented in the trial court in R.C.C.No.203 of 2014 through his Advocate and that he shall not seek any adjournment on account of he being out of India and that he will not dispute his Advocate's identity nor will he

claim prejudice or object to the trial being conducted in his absence. The petitioner has further stated that his statement under Section 313 will be recorded through his Advocate and he will not claim prejudice for not being physically present in the trial Court. The petitioner has also undertaken to remain present in the trial Court at the time of pronouncement of the Judgment in R.C.C.No.203 of 2014. The petitioner in his application, being Exhibit – 85 had sought permission to travel to Canada from 15<sup>th</sup> August, 2016 to 15<sup>th</sup> December, 2016 and hence I am, considering this petition, only for the limited period, as specified in the order below.

9. Considering the aforesaid and the facts of this case, the petitioner is permitted to travel to Canada on the following terms and conditions:-

### **ORDER**

- (i) The petitioner is permitted to travel to Canada from 15<sup>th</sup> September, 2016 to 15<sup>th</sup> December, 2016;
- (ii) A copy of the affidavit-cum-undertaking filed in this Court today, be submitted in the trial Court where R.C.C.No.203 of 2014 and 31<sup>st</sup> Judicial Magistrate First Class, Pune, where Domestic

Violence Case being Criminal Miscellaneous Application No.7273 of 2014, are pending;

(iii) The petitioner to deposit the original property papers concerning the two properties, mentioned in Clause – 1(i) and (ii) of the affidavit-cum-undertaking, on 14<sup>th</sup> September, 2016 in the Registry of this Court;

(iv) The passport of the petitioner's mother also to be deposited in the Registry of this Court on 14<sup>th</sup> September, 2016;

(v) The petitioner shall also file an undertaking in the Court of learned Judicial Magistrate First Class, Pune in R.C.C.No.203 of 2014, stating therein, that he shall be represented in the trial Court through his Advocate and that he shall not seek any adjournment on account of he being out of India and that he shall not dispute his identity, nor shall he claim any prejudice being caused to him on account of the trial being conducted in his absence and that he has duly instructed his Advocate to have his statement recorded under Section 313 of the Code of Criminal Procedure through him and that he shall not claim any prejudice for not being physically present in the trial Court at the time of recording of his statement under Section 313,

and that he undertakes to remain present at the time of the pronouncement of the judgment in the R.C.C.No.203 of 2014, before he leaves India;

(vi) The petitioner to file a similar undertaking in the Domestic Violence proceedings, pending in the Court of learned JMFC, Pune i.e. in the Criminal Miscellaneous Application No.7273 of 2014, before he leaves India;

(vii) The trial of R.C.C.No.203 of 2014, is expedited;

(viii) The petitioner is at liberty to file an application seeking extension of time, if required in the trial Court, if the need so arises, requiring him to overstay in Canada beyond 15<sup>th</sup> December, 2016;

(ix) The petitioner to furnish details of the address and contact numbers, where he would be residing in Canada, during the said period to the Investigating Officer and the trial Court. The said details to be furnished by the petitioner, before his departure to Canada.

10. Needless to state, that the petitioner is always at liberty to challenge the maintainability of the proceedings, which are pending before the trial Court.

11. The petition is allowed in the aforesaid terms and is accordingly disposed of.

12. All concerned to act on the authenticated copy of this order.

**REVATI MOHITE DERE, J.**