

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH.**

CRM-M No.20538 of 2018
Date of Decision: 13.07.2018

Bikramjeet VirkPetitioner

Versus

Central Bureau of InvestigationRespondent

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Sandeep Verma, Advocate
for the petitioner.

Mr. Sukhdeep Singh Sandhu, Advocate
for the respondent-CBI

DAYA CHAUDHARY, J.

Petitioner-Bikramjeet Virk has approached this Court by way of filing the present petition under Section 482 Cr.P.C for setting aside impugned order dated 03.01.2018 (Annexure P-1) passed by the Chief Judicial Magistrate, Chandigarh (Designated Special Court for CBI cases at Chandigarh), whereby, the application filed by him for release of his passport in case FIR No.RCCHG20140019 dated 01.12.2014 registered under Sections 420, 467, 468, 471 of IPC and Section 24 of the Emigrants Act, 1983 has been dismissed.

Briefly, the facts of the case, as mentioned in the petition, are that while granting regular bail to the petitioner on 17.01.2017 by the trial Court, a condition was imposed to surrender his passport before the trial Court and accordingly he surrendered his passport.

Petitioner moved an application for release of his passport which was dismissed vide order dated 03.01.2018 on the ground that the case is at the initial stage and examination of prosecution witnesses is yet to commence after framing of charge and no ground is made out to modify the condition of bail requiring the accused petitioner to surrender his passport at this stage.

Said order dated 03.01.2018 passed by the Chief Judicial Magistrate, Chandigarh has been challenged before this Court by raising various grounds.

Learned counsel for the petitioner submits that the petitioner is having experience of business activities in relation to manpower recruitment. He being engaged with the foreign recruitment has to visit foreign companies for business and is facing a lot of difficulty on account of his passport having been in custody of the Court. Learned counsel also submits that as per Article 21 of the Constitution of India, the right to go abroad cannot be deprived of except to the procedure prescribed under law. Learned counsel also submits that the impugned order has been passed without any application of judicious mind and hence, the same is liable to be set aside. Learned counsel further submits that the petitioner is to apply for permission to visit foreign country and for that, the passport is required to be submitted before the concerned authority. The reasonable conditions can be imposed that the petitioner can leave the country with permission of the trial Court but by surrendering the passport before the trial Court, the same is detrimental to his interest and the same is violative of Article 21 of the Constitution of India.

Learned counsel for the petitioner has relied upon the judgment

of Hon'ble the Apex Court in case ***Suresh Nanda vs C.B.I 2008(1) RCR (Criminal) 897***, judgment of this Court in case ***Gaurav Kirpal vs Central Bureau of Investigation (CRR No.3672 of 2017, decided on 16.11.2017)***, judgment of Madras High Court in case ***Kakulammarri Kalyan Srinivasa Rao vs The Central Bureau of Investigation, Bank Securities and Frauds Cell rep. by its Superintendent of Police, Bangalore, Karnataka 2017(3) MLJ (Criminal) 97***, judgment of Kerala High Court in case ***A.V. Mohammed Rafeek vs The Union of India (Crl. M.C. No.1734 of 2011, decided on 16.06.2011)*** and judgment of Delhi High Court in case ***Bina K. Ramani vs State (Crl. M.C. No.3605 of 2009, decided on 05.02.2010)*** in support of his arguments.

Mr. Sukhdeep Singh Sandhu, learned counsel for the respondent-CBI has filed reply in the Court and the same is taken on record.

Learned counsel for the respondent has opposed the submissions made by learned counsel for the petitioner on the ground that the petitioner has not made proper application for modification of terms and conditions for release of his passport and he is at liberty to move application for release of his passport with certain terms and conditions. The application moved by the petitioner has rightly been dismissed by taking into consideration the evidence which has come against him on record during investigation. There is a possibility of his running from the Court proceedings. Learned counsel also submits that the petitioner has filed an application before the trial Court for release of his passport only on the ground of competency of the Court to impound any document by relying upon the judgment of Hon'ble the Apex Court in ***Suresh Nanda's*** case (supra) holding that the trial Court has no power to impound the passport

under provisions of Sections 102 and 104 of Cr.P.C. No specific prayer was made by the petitioner.

Heard the arguments of learned counsel for the petitioner as well as learned counsel for the respondent-CBI.

Admittedly, the petitioner moved an application on 03.07.2017 before the trial Court for release of his passport by challenging the competency of the Court to impound the passport but no ground has been mentioned as to whether he has prayed for release of his passport to visit any country. Said application has been dismissed on the ground that the trial is at the initial stage as the prosecution witnesses have not been examined and no ground to modify the condition of bail requiring the accused to surrender his passport is made out. A ground has also been mentioned that there is a possibility that accused may flee in order to escape judicial proceedings initiated against him.

Petitioner is accused of commission of offences punishable under Sections 420, 467, 468, 471 IPC and Section 24 of the Emigrants Act, 1983. Offence under Section 471 IPC is bailable and the offences under Sections 420, 467 and 468 IPC are non-bailable. Section 437 of the Code deals with power of the court to grant bail in non-bailable offences. Offences under Sections 420 and 468 of the IPC are punishable with imprisonment which may extend to seven years. Under Section 437(3) of the Code, while releasing a person accused, “the Court shall impose certain conditions :-

(a) that such person shall attend in accordance with the conditions of the bond executed under this chapter,

(b)

(c)

and may also impose, in the interest of justice, such other conditions as it considers necessary.” Even in the case of non bailable offences other than falling under sub sec.(3) of Section 437, the court or Magistrate may in its/his discretion impose conditions while granting bail to the person accused or suspected of commission of such offence.

Sub sec.(3) of Section 437 of the Code requires the Magistrate or court to impose conditions while granting bail to the petitioner. One condition which learned Magistrate is required to impose is that petitioner shall attend in Crl. M.C No.1734 of 2011 accordance with the conditions of the bond executed by him. While granting bail, the Magistrate or court has to ensure that the accused or person suspected of commission of the offence is available for **investigation, enquiry and trial**. To ensure that, the Magistrate or court shall impose conditions on such person while releasing him on bail. In non bailable offences falling outside the scope of sub sec.(3) of Sec. 437 of the Code, the power to impose condition is discretionary.

When a person is made to surrender his passport, it curtails his right of movement beyond the country. Article 21 of the Constitution of India says :

“ No person shall be deprived of his life or personal liberty except according to procedure established by law.”

The expression “personal liberty” is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of a person. The Supreme Court, in *Satwant Singh v. Asst. Passport Officer* [(1967) 3 SCR 525] held that “personal liberty” guaranteed under Article 21 Crl. M.C. No.1734 of 2011 encompassed a right of locomotion, of the right to travel abroad. Every person living in India has a fundamental right to

travel, even outside India. Refusal by the Government to issue a passport without a valid law prescribing reasonable restrictions was held to be an arbitrary exercise of the executive power infringing the equality clause of the Constitution. After the decision in Satwant Singh's case the Parliament passed the Passport Act, 1967 regulating conditions for the grant and refusal of passport and providing grounds for impounding passport. Even after passing of the said Act, in *Maneka Gandhi v. Union of India* [(1978) 1 SCC 248] the Supreme Court held that the right to travel abroad is not only encompassed in the right to liberty under Article 21 of the Constitution, but that right could only be denied if the procedural law which governed its exercise is fair.

The preamble to the Act says that it is, "to provide for the issue of passports and travel documents, to regulate the departure from India of citizens of India and other persons and for matters incidental ancillary thereto."

Section 10(3) of the Act empowers the passport authority to "impound or cause to be impounded or revoke a passport or travel document" in the circumstances stated therein. Thus, power to impound a passport is given to the passport authority under the Act.

The Supreme Court in *Suresh Nanda's* case (supra) was not considering the power of criminal court to direct a person accused or suspected of commission of a non cognizable offence while he is released on bail to surrender his passport in court to ensure his presence at the investigation, enquiry or trial of the case. Instead, the Supreme Court was only considering the scope and ambit of Section 104 of the Code which

said;

“ Any court may, it thinks fit, impound any document or thing produced before it” under the code. The power under Section 104 of the Code could be exercised CrI. M.C. No.1734 of 2011 only with respect to a document produced before the court and not, regarding a document not produced before it. In Wharton’s Law Lexicon, the word “impound” is given the meaning, “to place in the custody of the law”. Per Oxford Dictionary the word means “to take legal or formal possession of”. In **Suresh Nanda’s** case (supra), the Supreme Court considered the distinction between “seizing” and “impounding” and held that impounding is of the document which is seized. It was held that after enactment of the Act which is a special Act, a passport seized (by the CBI in that case) could be impounded only under Sec.10(3) of the Act and that so far as Sec. 104 of the Code is concerned to the extent it related to documents coming under Sec. 10(3) of the Act, the maxim, ‘generalia specialibus non derogant’ applied. In that case the officials of the CBI conducted a search and seized the passport of appellant. That document was retained by the CBI. Appellant moved the court of Special Judge to release the passport. The Special Judge CrI. M.C. No.1734 of 2011 allowed the application. That order was set aside by the High Court in revision. The Supreme Court set aside the order of the High Court on the principle above stated. Suresh Nanda was not a case of the criminal court imposing a condition while granting bail in a non bailable offence to surrender the passport. The Supreme Court was not considering the power of criminal court in view of Sec. 10(3) of the Act, to impose a condition to surrender the passport while granting bail in a non bailable offence. Instead, that question was left open as is clear from the observation in paragraph 20 (of

Suresh Nanda's case) that :

“We, however, make it clear that we are not expressing any opinion on the merit of the case and are not deciding whether the passport can be impounded as condition for the grant of bail.”

The Chhattisgarh High Court in Pushpal Swarnkar v. State of Chhattisgarh 2009(1) KLD 825 (Chh.) only made reference to the observations in paragraph 15 of the decision in Suresh Nanda regarding the power of criminal court to impound the passport under Sec. 104 of the Code which observation, I stated above is made in an entirely different context. Pushpal Swarnkar's case did not consider, in view of the observation in paragraph 20 of Suresh Nanda quoted above whether the criminal court can, while releasing a person accused or suspected of commission of a non bailable offence to impose a condition to surrender the passport.

The decision in Jose Peter v. Vijayakumar 2009(3) KLT 96 also cannot help petitioner in his contention. There, the question considered and decided was only whether a civil court, in execution of a decree could, invoking Sec. 151 of the Code of Civil Procedure impound passport of a judgment debtor on the ground that he is likely to leave the country. The question was answered in the negative.

Even after enactment of the Act, in view of Article 21 of the Constitution as explained in Maneka Gandhi's case (supra) the right to travel abroad is encompassed in the right to personal liberty which cannot be deprived except in accordance with the procedure established by the law. The right to travel abroad can be deprived by following procedure established by the law. Sec. 437(3) of the Code requires and enables the criminal court while releasing a person accused or suspected of commission

of a non bailable offence by imposing a condition that such person shall attend in accordance with the conditions of the bond executed under chapter XXXIII of the Code. Even in the matter of non bailable offences not falling within sub sec.(3) of Sec. 437 of the Code, the Magistrate or court has the discretionary power to impose condition while granting bail. The person to whom bail is granted has to execute a bond in Form No.45 given in the second schedule of the Code. The relevant provision of the bond in Form No.45 states.” and required to give security for any attendance before such officer or court on condition that I shall attend such officer or court on every day on which any investigation or trial is held with regard to such Crl. M.C. No.1734 of 2011 charge, and in case of my making default therein.....”

The function of the criminal court under Sec. 437 of the Code is not merely to impose a condition in the bond that the person accused or suspected of commission of a non bailable offence and to whom bail is granted attended before the officer or court. The court has to ensure that the condition is complied. The court has to enforce it. The court has to ensure that the accused who is released on bail and who has a passport does not flee from justice. The “majesty of the law is affected when a wrong doer escapes its mighty clutches-whether arising out of a voluntary or involuntary situation.” The court has to preserve the majesty of the law. That could be done, in the case of a person holding a valid passport by directing him to surrender the same in court. That the passport authority may, if proceeding in respect of an offence alleged to have Crl. M.C. No.1734 of 2011 been committed by the holder of the passport or travel document are pending before a criminal court in India impound or cause to

be impounded or revoked such document under Sec.10(3)(e) of the Act does not deprive the power and duty of the criminal court to enforce its order by appropriate direction. The Supreme Court in *Hazarilal Gupta v. Rameswar Prasad and another* [AIR 1972 SC 484] has held that sections 496, 497 and 498 of the (old) Code are not exhaustive of powers of the court in regard to terms and conditions of bail particularly when the High Court dealt with cases of that type, it was within the power of court to direct surrender of passport and that if the appellant (in that case) wanted to retain the passport the court might not have granted him bail. Viewed in that line, I am to hold that it is within the power of the criminal court while releasing a person accused or suspected of commission of a non bailable offence on bail under Sec. 437 of the Code to impose a condition that such person shall Crl. M.C. No.1734 of 2011 surrender his passport in court. The power granted by the Code under Sec. 437 of the Code to impose conditions including restriction on movement while granting bail in non bailable offence can be taken as procedure established by law as stated in Article 21 of the Constitution. In that view, with great respect I disagree with the view expressed in *Pushpal Swarnkar's* case.

But the criminal courts have to take extreme care in imposing such condition. It cannot mechanically, and in every case where an accused has a passport impose a condition for its surrender. Law presumes an accused to be innocent till he is declared guilty. As a presumably innocent person he is entitled to all the fundamental rights guaranteed to him under the Constitution. At the same time, interest of the society has also to be protected. The court has to strike a balance between personal liberty of the accused guaranteed under Article 21 of the Constitution, investigation rights

of the police and the interest of the Crl.M.C. No.1734 of 2011 society. The criminal court has to consider possibility of the accused if released on bail, fleeing justice and thereby thwarting the course of justice which affects the majesty of the law, as also the individual rights of the accused. The court has to consider antecedents of the person accused or suspected of commission of the offence, nature of the offence he is said to have committed, necessity for his presence for investigation, duration of investigation and such other relevant factors. The court has to decide whether notwithstanding the personal liberty of the accused, interest of justice required that his right of movement should be restricted during the pendency of the case by directing him to surrender his passport. If necessary, it is open to the criminal court direct the accused to execute bond in case he has to go abroad for any purpose, for appropriate amount with sureties undertaking to appear before the Investigating Officer or court as the case may be as and when required to do so. These are though not Crl. M.C. No.1734 of 2011 exhaustive, some of the matters to be borne in mind by the court while deciding whether there should be a condition to surrender the passport or when there is a request to release the passport already surrendered in court.

Section 10(3)(e) of the Passport Act specifically deals with impounding of passport whereas Section 104 Cr.P.C., allows the Court to impound the document to produce before the Court. The Passport Act overrides the provision of Cr.P.C., for the purpose of impounding passport. In the present case in hand, the order directing to surrender the passport indefinitely amounts to impounding of the passport itself.

In the present case, while granting regular bail to the petitioner

on 17.01.2017 by the trial Court, a condition was imposed to surrender his passport before the trial Court. The application was moved by the petitioner to release his passport by relying upon the judgment of Hon'ble the Apex Court in **Suresh Nanda's** case (supra) and also the law laid down by Madras High Court in case **Veenita Gupta vs State 2011(1) RCR (Criminal) 915** that the Magistrate or police has no power to impound the passport under provisions of Sections 102 and 104 of Criminal Procedure Code. The power to impound passport vests with passport authorities under Section 10 of the Passport Act as it is a special Act.

The application moved by the petitioner has been rejected on the ground that he may flee from the country to evade judicial proceedings and that the trial is at the initial stage as the statements of the witnesses are still to be recorded and the application was dismissed on the ground that there cannot be modification of condition of bail to surrender his passport at this stage. In the application moved by the petitioner, neither any permission has been sought to visit any country nor any date has been mentioned. Simply, it has been mentioned that the condition be modified to surrender passport being in violation of Article 21 of the Constitution of India.

As per Section 102(1) of Criminal Procedure Code, the power of police officer is there to seize certain property. The police may have the power to seize a passport under Section 102(1) of the Criminal Procedure Code but it does not have the power to impound the same. Impounding of a passport can only be done by the passport authority under Section 10(3) of the Passports Act, 1967. There is a difference between seizing of a document and impounding a document. A seizure is made at a particular moment when a person or authority takes into his possession some property

which was earlier not in his possession. Thus, seizure is done at a particular moment of time. However, if after seizing of a property or document, the said property or document is retained for some period of time, then such retention amounts to impounding of the property or document. In the Law Lexicon by P. Ramanath a Aiyar (2nd Edition), the word “impound” has been defined to mean “to take possession of a document or thing for being held in custody in accordance with law”. Thus, the word “impounding” really means retention of possession of a good or a document which has been seized.

Hence, while the police may have power to seize a passport under Section 102 Criminal Procedure Code if it is permissible within the authority given under Section 102 of Criminal Procedure Code, it does not have power to retain or impound the same, because that can only be done by the passport authority under Section 10(3) of the Passports Act. Hence, if the police seizes a passport (which it has power to do under Section 102 Criminal Procedure Code), thereafter the police must send it along with a letter to the passport authority clearly stating that the seized passport deserves to be impounded for one of the reasons mentioned in Section 10(3) of the Act. It is thereafter the passport authority to decide whether to impound the passport or not. Since impounding of a passport has civil consequences, the passport authority must give an opportunity of hearing to the person concerned before impounding his passport. It is well settled that any opportunity of hearing to a party vide *State of Orissa v. Binapani Dei AIR 1967 SC 1269*.

The trial Court cannot impound a passport. No doubt, Section 104 Criminal Procedure Code states that the Court may, if it thinks fit,

impound any document or thing produced before it but this provision will only enable the Court to impound any document or thing other than a passport as impounding a “passport” is provided for in Section 10(3) of the Passports Act. It is a settled law that the special law prevails over the general law. The Passports Act is a special law while the Criminal Procedure Code is a general law. Hence, impounding of a passport cannot be done by the Court under Section 104 Criminal Procedure Code though it can impound any other document or thing.

For the reasons recorded here-in-above, the present petition is disposed of and impugned order 03.01.2018 passed by the Chief Judicial Magistrate, Chandigarh (Designated Special Court for CBI cases at Chandigarh) is set aside. However, the petitioner is at liberty to move a specific application for release of his passport within a period of 15 days from the date of receipt of certified copy of the order. In case, such an application is moved, the trial Court is directed to decide the same in accordance with law within a period of two weeks thereafter.

However, it is directed that in case, the petitioner, if at any point of time, intends to go abroad, he will seek necessary permission from the concerned Court, as and when so required. On filing such an application, the trial Court shall decide the same expeditiously in accordance with law. The petitioner is also directed to furnish an undertaking in writing before the trial Court that he will make himself available during the course of trial as and when required by mentioning the place, where he is likely to stay and the countries he proposes to visit and the date of departure and date of return. This condition will be deemed to have been incorporated as a condition of the bail during pendency of trial. The petitioner would ensure

that the trial of the case shall not be adjourned or deferred on the ground that he is to travel abroad.

13.07.2018
gurpreet

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned

Yes/No

Whether Reportable

Yes/No