

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.09.2020

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.8207 of 2020
and
Crl.MP.Nos.4075 & 5515 of 2020

The Assistant Commissioner of Customs,
Prosecution Unit (Air),
New Custom House,
Meenambakkam, Chennai ... Petitioner

Vs.

Chang Sic ... Respondent

PRAYER:

Criminal Original Petition filed under Section 482 of Cr.P.C. praying to set aside the order dated 15.05.2020 in Crl.MP.No.116 of 2020 in O.S.No.116 of 2019 on the file of the learned Judicial Magistrate, Special Court for Customs Act, Alandur, Chennai.

For Petitioner: Mr.M.P.Kumar,
Special Public Prosecutor(Customs)

For Respondent: Mrs.D.Kamachi

O R D E R

This petition has been filed challenging the order passed in Crl.MP.No.116 of 2020 in OS.No.116 of 2019 dated 15.05.2020 thereby directed the petitioner to return the passport of the respondent herein on certain conditions.

2. Mr.M.P.Kumar, Special Public Prosecutor(Customs) appearing for the petitioner submitted that the respondent is a foreign national who arrived to Chennai from Korea via Hongkong by Cathay Pacific Flight was intercepted by the Intelligence Officer of the petitioner and recovered four Nos. gold bars each with foreign marking "ARG UAE" 1 kg 999.9 FINE GOLD ARG MELTER ASSAYER bearing Nos.A14411, A14412, A 14424 and A14425 respectively to be of 24 karat purity, totally weighing 4 kgs worth of Rs.1,33,52,000/-. Hence, he was arrested for the offences under Sections 135(1) (a), 135 (1) (b), 135(1) (i) (a) of Customs Act, 1962 and remanded before

the Judicial Magistrate, Special Court for Customs, Alandur, Chennai. His passport was also seized and produced before the Court. Thereafter, he was released on bail and the application filed by the respondent for return of his passport was allowed by the Judicial Magistrate, Special Court for Customs Act, Alandur in CrI.MP.No.116 of 2020 by order dated 15.05.2020.

2.1 He further submitted that the respondent being foreign national, the learned Magistrate without considering the counter filed by the petitioner mechanically allowed the petition and directed to return the passport. The respondent made statement voluntarily admitted that he was aware that smuggling gold into India by way of concealment and without declaration to Customs is an offence and that he committed the offence for monetary benefits. His presence is very much required for further investigation and also departmental proceedings. If the passport is returned to the respondent, he may flew away India and the entire proceedings will be stalled. Further he also relied upon the judgment of this Court in CrI.RC.Nos.468 & 469 of 2019 dated 19.07.2019 in support of his contention.

3. Per contra, Mrs.D.Kamachi, the learned counsel for the respondent filed counter and submitted that the respondent is a South Korean citizen and he had business contacts in India. He was issued with e-Visa by Indian Consulate at Seoul on 08.10.2019 for a period of one year which expires on 06.10.2020 with multiple entry. On his arrival he was arrested on 28.11.2019 at Chennai International Airport due to seizure of 4 kg of gold bars from him. He had valid original passport which was also detained by the petitioner. On the basis of the remand report, the respondent was produced before the learned Magistrate and he was remanded to judicial Custody. Thereafter he was released on bail on certain conditions.

3.1 He further submitted that as per his e-Visa conditions, he cannot stay more than 180 days on each visit to India. As a foreign national, as per the ETA visa he cannot stay in India after 24.04.2020. Now he has to report before the Foreigners Regional Registration Office(FRRO) before expiry of 180 days. Due to detention of his passport, he could not able to report before the authority concerned. Therefore, the respondent filed petition in CrI.MP.No.116 of 2020 for return of his passport. The learned Magistrate rightly observed that offence does not pertaining to the passport Act and as such ordered to return of his passport on certain conditions. He further submitted that the respondent's stay is illegal as per Section 14 of Foreigners Act, 1946 without Registration Request to FRRO, Chennai. Now the respondent is on bail and he has to stay in hotel.

Therefore, he needs physical possession of his passport for his accommodation in view of Rule 14 of Registration of Foreigners Rules, 1992. He also furnished his address in India as per Registration of Foreigners Act and its Rules. He also undertakes to appear in person before the Court or authority concerned for adjudication and trial. He also submitted that the respondent will take steps to file petition for compounding the offence under Section 137(3) of Customs Act, if possible once my visa is extended by FRRO, Chennai.

4. Heard Mr.M.P.Kumar, Special Public Prosecutor (Customs) appearing for the petitioner and Mrs.D.Kamachi, learned counsel for the respondent.

5. The respondent was arrested and remanded to judicial custody in the proceedings in O.S.No.116 of 2019 on the file of the petitioner for the offences under Sections 135(1) (a), 135 (1) (b), 135(1) (i) (a) of Customs Act, 1962 and remanded to judicial custody with allegation that he was in possession of four Nos. gold bars each with foreign marking "ARG UAE" 1 kg 999.9 FINE GOLD ARG MELTER ASSAYER bearing Nos.A14411, A14412, A 14424 and A14425 respectively to be of 24 karat purity, totally weighing 4 kgs worth of Rs.1,33,52,000/-. His passport was also seized by the respondent and produced before the learned Judicial Magistrate, Special Court for Customs, Alandur, Chennai. The respondent is a South Korean national and he visited India on his e-Visa ETA.No.901F0047J issued by Indian Consulate at Seoul dated 08.10.2019 for a period of one year ends on 06.10.2020 with multiple visits. Therefore, the respondent filed petition in CrI.MP.No.116 of 2020 for return of his passport and the same was allowed by the learned Judicial Magistrate, Special Court for Customs, Alandur, Chennai on the following conditions:

- (i) The petitioner shall execute a bond for Rs.10,000/- along with two sureties on 03.06.2020.
- (ii) If he travel abroad he shall inform the same to this court with correct address.
- (iii) Furnish the photo copy of the passport and he shall undertakes to return the passport as and when required by this Court
- (iv) He shall comply the adjudicating proceedings before the concerned authority.

It is challenged only on the ground that if the passport is returned to the respondent, he will flew away from India and there is possibility of abscond and he will not return to India for investigation. He will escape from the clutches of Court and abscond. The learned Special Public Prosecutor relied upon the order passed by this Court in CrI.RC.Nos.468 & 469 of 2019 dated 19.07.2019 and the relevant portion of which is extracted as follows:

8. Now coming to the issue at hand, a solution has to be found within the parameters of law to deal with the case of the petitioners. The petitioners will have to face proceedings under the Customs Act for the alleged violations. Therefore, their passports cannot be handed over to them at this juncture.

9. In order to strike an harmonious balance between the necessities of law and the requirements of the petitioners to have their stay in India validated so as to avoid being prosecuted under the Foreigners Act, 1946, the FRRO, Chennai, who is present before this Court made some welcome suggestions. He stated that his office is ready and willing to extend the petitioner's Visas for a reasonable period as required by the DRI, which is the prosecuting agency.

10. In view of the above, this Court issues the following directions:

(a) The learned Additional Chief Metropolitan Magisterial, E.O.- II, Egmore, Chennai is directed to hand over the passports of the petitioners to the Senior Intelligence Officer, DRI, T.Nagar, Chennai-600017, under due acknowledgment.

(b) The DRI, Chennai is directed to submit a proforma for issue of Look Out Circular to the FRRO, Chennai to prevent the petitioners from fleeing India.

(c) The Senior Intelligence Officer, DRI, Chennai shall submit the passports of the petitioners to the FRRO, Chennai with a request to extend their Visas for a reasonable period.

(d) The petitioners shall pay the prescribed fee for the extension of their Visas at the office of the FRRO, Chennai.

(e) After FRRO, Chennai extends the Visas, the order extending Visas shall be furnished to the petitioners and the passports shall be handed over to the Senior Intelligence Officer, DRI, T.Nagar, Chennai, who, in-turn shall deposit the same back with the Additional Chief Metropolitan Magistrate, E.O.-II, Egmore, Chennai. Photocopies of their passports shall be furnished by the DRI to the petitioners.

(f) After all the legal proceedings are over and if the presence of the petitioners

in India is not required, the DRI shall take steps with the FRRO to withdraw the Look Out Circular. After the Look Out Circular is withdrawn, the Additional Chief Metropolitan Magistrate, E.O.II, Egmore, Chennai shall hand over the passports to the petitioners for them to leave India.

This Court, instead of returning the passport to the foreign national, directed the trial court to handover the passport to the authorities concerned for extension of visa for a reasonable period. This Court also directed the Customs Authority to submit a proforma for issuance of Look Out circular to prevent the foreign national from fleeing India. It is relevant to extract Section 3 of Foreigners Act, 1946 as follows:

"3. Power to make orders:

(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into 2[India] or, their departure therefrom or their presence or continued presence therein.

2(b) shall not depart from 2[India], or shall depart only at such times and by such route and from such port or place and subject to the observance of such conditions on departure as may be prescribed"

Accordingly, the authority concerned by order can prohibit the foreigner that he shall not depart from India.

6. It is relevant to extract Section 14 of Foreigners Act, 1946, as follows:

14A. Penalty for entry in restricted areas, etc.

- Whoever-

(a) enters into any area in India, which is restricted for his entry under any order made under this Act, or any direction given in pursuance thereof, without obtaining a permit from the authority, notified by the Central Government in the Official Gazette, for this purpose or remains in such area beyond the period specified in such permit for his stay; or

(b) enters into or stays in any area in India without the valid documents required for such entry or for such stay, as the case may be, under the provisions of any order made under this Act or any direction given in pursuance thereof, shall be punished with imprisonment for a term which shall not be less than

two years, but may extend to eight years and shall also be liable to fine which shall not be less than ten thousand rupees; and if he has entered into a bond in pursuance of clause (f) of sub-section (2) of section 3, his bond shall be forfeited, and any person bound thereby shall pay the penalty thereof, or show cause to the satisfaction of the convicting court why such penalty should not be paid by him.

14B. Penalty for using forged passport.—

Whoever knowingly uses a forged passport for entering into India or remains therein without the authority of law for the time being in force shall be punishable with imprisonment for a term which shall not be less than two years, but may extend to eight years and shall also be liable to fine which shall not be less than ten thousand rupees but may extend to fifty thousand rupees.

14C. Penalty for abetment.—Whoever abets any offence punishable under section 14 or section 14A or section 14B shall, if the act abetted is committed in consequence of the abetment, be punished with the punishment provided for the offence.

7. The respondent came to India by ETA business visa. His entry was on 28.11.2019, and the permission to stay expired on 28.04.2020. Therefore his stay at India became illegal under Section 14 of Foreigners Act without Registration Request to FRRO, Chennai prior to valid e-visa period, namely 25.04.2020. Since the petitioner was arrested and his passport was seized, he was not able to register his request for extension of his visa at FRRO, Chennai. That apart, the offence registered as against the petitioner are not related to the passport of the petitioner. Therefore, the learned Judicial Magistrate, Special Court for Customs, Alandur, Chennai rightly ordered to return his passport on certain conditions. However, this Court impose further conditions as follows:

(i) The respondent shall not depart India till the completion of proceedings in O.S.No.116 of 2019 on the file of the petitioner / complainant.

(ii) The respondent is at liberty to make Registration Request to FRRO, Chennai for extension of his visa in accordance with law.

(iii) The petitioner / complainant is directed to complete the process if any initiated by the respondent for compounding the offence as per Section 137(3) of Customs Act within a period of three months.

(iv) The respondent shall furnish his residential address in India to the petitioner / defacto complainant forthwith.

8. With the above directions, this Criminal Original Petition is disposed of. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

- 1.The learned Judicial Magistrate,
Special Court for Customs Act,
Alandur, Chennai
- 2.The Special Public Prosecutor,
(Customs),
High Court, Madras-104.
- 3.The Additional Chief Metropolitan Magistrate EO.II,
Egmore, Chennai.
- 4.The Superintendent of Customs
Prosecution Unit-Air,
New Custom House,
Meenambakkam, Chennai-87.

+1cc to M/s.Kamachi, Advocate SR.30420

LN(CO)
CB(24/09/2020)

CRL.O.P.No.8207 of 2020

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