**IN THE HIGH COURT AT CALCUTTA**
**CIRCUIT BENCH AT JALPAIGURI**
**Appellate Side**

Present:

**The Hon'ble Justice Biswaroop Chowdhury**

***CRM (R) 4 of 2025***

***Shaista Hanif @ Gouri Dey***

***VERSUS***

***State of West Bengal***

For the petitioner: Mr. Ratan Banik, Adv.
Mr. Saptarshi Banik, Adv.

For the State : Mr. Nilay Chakraborty, Ld.P.P. ,Adv
Mr. Biswarup Roy, Adv

**Last Heard On: April 11, 2025**

**Judgment on: April 22, 2025**

**Biswaroop Chowdhury,J:**

This is an application under Section 439 of the Code of Criminal Procedure read with Section 483 of the Bharatiye Nagarik Suraksha Sanhita 2023 filed by the petitioner who is in custody in connection with Kharibari police station Case No. 322 of 2023 dated 15/11/2023 under Section 14(A) of the Foreigners Act 1946 corresponding to G.R. Case No. 4326 of 2023.

It is the contention of the petitioner that she is a Citizen of India by birth and she has all respect to the law of the land, and a permanent resident of the address mentioned in the cause title of the present petition. It is further contended that the petitioner was born as an Indian Citizen as Gowri Dey to her parents-Suresh Chandra Dey and Suarnabala Dey in the year 1962 at Silchar District-Cachar, in the State of Assam. They were 10(ten) Siblings and after her mother passed away, her father abandoned her and refused to take her responsibility. Being deprived of Parent's affection, her upbringing was looked after by her various elder Siblings time to time, and she spent the said intermediate years in various places of Assam and West Bengal. Thereafter she moved to her sister's place at Sodepur, District-North 24 Parganas in the State of West Bengal. In Sodepur she befriended a person with whom she moved to Mumbai in 1978. At Mumbai she met one Md. Hanif with whom he got married and thereafter she was taken to Karachi Pakistan in 1980, wherein she was converted and in the same year she was taken to Saudi Arabia. In the meanwhile she gave birth to her minor son Master Aryan. However she has never waived or relinquished her citizenship of India. It is also contended that the petitioner has immovable property within the jurisdiction of Sub-Registrar-Behala Police Station Maheshtala District-South 24 Parganas obtained by a Deed of Gift Vide No-I-152 for the year 1987 registered with the office of ADSR Behala dated 17/01/1989.

Heard Learned Advocate for the petitioner and Learned Advocate for the opposite party state of West Bengal . Perused the materials in the case diary.

Learned Advocate for the petitioner submits that the petitioner is a citizen of India by birth. Learned Advocate further submits that the petitioner left India after her marriage but have not relinquished Indian citizenship. Learned Advocate also submits that as the petitioner is in custody for more than 500 days and she has relatives in West Bengal and has residence at the address mentioned in the cause title, and immoveable property in South 24 Parganas, district the prayer for bail made by the petitioner be allowed. It is submitted that there is a marriage ceremony of the relative of the petitioner thus this issue may also be considered.

Learned Advocate for the opposite party State of West Bengal submits that the petitioner has entered India merely with a Pakistani Passport and without obtaining VISA to enter India, thus she is liable to have committed offence under Section 14A of the Foreigners Act 1946. Learned Advocate refers to different materials in the case diary.

Upon perusing the materials in the case diary it is an admitted position that the petitioner obtained passport and VISA to enter into Nepal and from Nepal when she tried to enter India she was apprehended at the check post, thus it is clear that the petitioner did not infiltrate to India through Pakistan Border which is prohibited. Thus she did not come through a clandestine route.

Upon consideration of the submission of the Learned Advocate that the petitioner was compelled to leave India pursuant to her marriage and compelled to reside at Pakistan this Court may have sympathy for the petitioner but once a Pakistani Passport is found in the name of the petitioner there is no scope at this stage to hold that the petitioner is a citizen of India. In this regard it is necessary to refer the provisions contained in Section 9 (2) of the Citizenship Act 1955.

Section 9(2) of the Citizenship Act 1955 provides that if any question arises as to whether, when or how any [citizen of India] has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence as may be prescribed this behalf.

It is held in different judicial pronouncements that the Central Government is vested by Section 9 (2) of the Citizenship Act 1955 with exclusive jurisdiction to determine the question whether an Indian Citizen has lost the Indian citizenship by having voluntarily acquired the citizenship of a foreign state and this question cannot be determined by any Court.

Hence at this stage it is only to be looked into as to whether the petitioner who holds Pakistani Passport and tourist visa of Nepal is involved in an offence under Section 14 (A) of Foreigners Act 1946 as per Kharibari P.S. Case No. 322/23 dated 15-10-2023.

Section 14-A of the Foreigners Act 1946 provides as follows:

14-A 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 punishment 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 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.

Thus from the plain reading of Section 14-A the Foreigners Act 1946 it will appear than an offence is committed only when a person enters into India restricted for his entry. In order to enter into India there must be an entry point from where citizens of other country can enter in accordance with law or citizens of India who have been to other countries with lawful permit may enter India through the said entry point.

It will appear from the statement of the witnesses that the petitioner along with her son came from the Nepal Side at Panitanki new Bridge where checking of documents were done, and asked as to whether she could enter India or not. Hence at the entry point itself the petitioner asked as to whether she could enter India. On being asked to produce documents the petitioner could produce the Pakistani Passport and tourist visa issued by the Nepal Government. Thus it is clear that the petitioner did not enter India by deceitful means by misleading the members of the Sahastra Seema Bal. The act of the petitioner in coming to the members of the checking team and asking as to whether she can enter India goes to show her bona fide. It was open to the authority to refuse permission at the entry point and make her return to Nepal in due process of law. When a person acts bona-fide criminal law should not be set into motion.

However as charge sheet has already been submitted and trial has commenced it would not be proper to make further observation with regard to the merits of the case but it is necessary to decide as to whether petitioner should be granted bail. In order to decide as to whether an accused should be granted bail it is necessary to consider the nature of offence, and severity of punishment if convicted, apprehension to abscond or tamper with evidence.

In the instant matter the punishment provided under statute is minimum 2 years and maximum eight years and the petitioner has already undergone detention for one year five months. As the witnesses are Government officers there is no chance to tamper evidence. Where the statute does not provide any bar bail may be granted but the fact that the accused is a foreigner whether without Indian Visa it would be reasonable to keep the petitioner on bail and whether there is chance to abscond these aspects require consideration.

In this regard it is necessary to consider some judicial pronouncements.

In the case of Swapna Akter @ Swapna Aktar VS State of West Bengal reported in 2014 SCC Online Cal-15876 a Learned Judge of this Hon'ble Court observed as follows:

'After giving anxious consideration to the conduct of the petitioner and to the charge against her under Section 14 of the Foreigners Act, this Court finds that the petitioner was admittedly in knowledge of the fact that her Visa in support of her stay in India expired in 2013. She was illegally staying in the country for nearly six months before being detained on 20th January, 2014. It is further noticed by this Court that, according to the Investigating Officer's report the petitioner failed to give correct particulars initially regarding her identity on the date of her detention, i.e. 20th of January, 2014. This Court also could not be enlightened by the State on the status of the child of the petitioner reportedly on treatment in India in spite of strenuous assertions on that count by the Ld. Counsel for the petitioner.

It is co-incidental that the petitioner came to be detained in connection with another case being Uttarpara P.S. Case no.472 of 2013 failing which she would have continued her stay without authority of law in the country.

On the other hand, the only charge against the petitioner is u/s 14 of the Foreigners Act. From the materials on record it has been brought to the notice of this Court that the petitioner is not accused of committing any other illegal act/acts.

It is also a matter of record that charge sheet in respect of the offence u/s 14 of the Foreigners Act has been filed and the detention of the petitioner for the purpose of investigation is not a necessity.

The only requirement in law now is the presence of petitioner during trial.

The other difficulty pertains to the petitioner remaining on bail without a valid Visa. However, her passport admittedly is valid till the year 2017.

This Court respectfully notices the ratio of the decision in Nagendra Vs. King Emperor reported in AIR 1924 (CALCUTTA) pg.476 to the effect that bail is not to be withheld as a punishment and the object of bail is to secure the attendance of the accused at the trial.

This Court also notices the observations of the Hon'ble High Court of Delhi in the matter of Lambert Kroger Vs. State (supra) that although the possibility of fleeing from trial may be more in the case of a foreign national it cannot be said that an accused cannot be granted bail merely because he is a foreign national. The Hon'ble High Court of Delhi further observed that there is no law which authorizes or permits discrimination between a foreign national and Indian national in the matter of granting bail and, the Court can impose different conditions to ensure that the accused will be available for facing trial.'

In the case of Chuks Collins Vs State of Himachal Pradesh reported, 2020 SCC Online HP 4476 the Hon'ble Court while releasing a foreign national on bail was pleased to observe as follows:

'4. While dealing with the bail applications of foreign nationals, the most significant challenge the Courts face is to secure their presence. Code of Criminal Procedure, 1973, (CrPC), has classified two types of offences, bailable and non-bailable. Section 2(a) of the CrPC defines bailable as the offences shown as 'bailable' in the First Schedule of CrPC or any other law. All the left-out crimes are deemed to be Non-bailable. In bailable offenses, a Police officer is under an obligation to release the accused on bail, subject to her furnishing bail bonds. It means that a foreign national cannot be denied bail in a bailable offence. Therefore, the question of securing her presence is not an absolute condition. However, in heinous and bone-chilling crimes, all which certainly are non-bailable, the presence of the accused must be ensured by the Courts, before granting the bail. Thus, while dealing with bail petitions of accused who are not the citizens of India, the most important parameter to keep in mind is the gravity of the offence. Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule, and S. 2 (xxiii-a), defines a small quantity as the quantity lesser than the quantity specified in the schedule of NDPS Act. The remaining quantity falls in an undefined category, which is now generally called as intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention that minimum and maximum sentence, depending upon the quantity of the substance. Commercial quantity mandates minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act.

JUDICIAL PRECEDENTS:

5. In *Lachhman Dass v. Resham Chand Kaler*, (2018) 3 SCC 187, Supreme Court holds,

"10. ...The law under section 439 Cr.P.C is very clear and in the eye of the law every accused is the same irrespective of their nationality."

6. In *Gurbaksh Singh Sibbia and others v. State of Punjab,* 1980 (2) SCC 565, A Constitutional bench of Supreme Court holds, .

"30. ...It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail"

7. In *Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav*, 2005 (2) SCC 42, a three-member bench of Supreme Court holds,

"18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorized by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so."

9. In *Gudikanti Narasimhulu v. Public Prosecutor,* High Court of Andhra Pradesh, AIR 1978 SC 429, Supreme Court holds:

"Bail or jail ?" - at the pre-trial or post-conviction stage - belongs to the blurred area of the criminal justice system and largely hinges on the hunch of the bench, otherwise called judicial discretion. The Code is cryptic on this topic and the court prefers to be tacit, be the order custodial or not. And yet, the issue is one of liberty, justice, public safety and burden of the public treasury, all of which insist that a developed jurisprudence of bail is integral to a socially sensitised judicial process. As Chamber Judge in this summit court I have to deal with this uncanalised case- flow, *ad hoc* response to the docket being the flickering candle light. So it is desirable that the subject is disposed of on basic principle, not improvised brevity draped as discretion. Personal liberty, deprived when bail is refused, is too precious a value of our constitutional system recognised under Article 21 that the crucial power to negate it is a great trust exercisable, not casually but judicially, with lively concern for the cost to the individual and the community. To glamorize impressionistic orders as discretionary may, on occasions, make a litigative gamble decisive of a fundamental right. After all, personal liberty of an accused or convict is fundamental, suffering lawful eclipse only in terms of 'procedure established by law'. The last four words of Article 21 are the life of that human right.

2. The doctrine of Police power, constitutionally validates punitive processes for the maintenance of public order, security of the State, national integrity and the interest of the public generally. Even so, having regard to the solemn issue involved, deprivation of personal freedom, ephemeral or enduring, must be founded on the most serious considerations relevant to the welfare objectives of society, specified in the Constitution.

In the case of Dataram Singh VS State of Uttar Pradesh reported in (2018)3 SCC P-22 the Hon'ble Supreme Court observed as follows:

"... A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

2. There is no doubt that the grant or denial of bail is entirely the discretion of the judge considering a case but even so, the exercise of judicial discretion has

been circumscribed by a large number of decisions rendered by this Court and by every High Court in the country. Yet, occasionally there is a necessity to introspect whether denying bail to an accused person is the right thing to do on the facts and in the circumstances of a case."

Thus upon considering the judicial decisions it is clear that a bail can be granted to a foreign national either for offences under Foreigners Act 1946 or any other statute unless there is prohibition with regard to grant of bail in any statute. However the Court has to satisfy itself that there is no reasonable apprehension to abscond.

In the instant matter the petitioner is having pass-port, and the statute Foreigners Act 1946 does not distinguish between persons whose visa has expired, and those who have entered India without Visa. However caution should be exercised while granting bail so that there is no reasonable apprehension to abscond.

Upon considering the judicial decisions and the nature of allegation against the petitioner from the case diary the period of detention which is more than one year five months and that the petitioner being an aged lady of 62 years and her child at present being kept at children home this Court is of the view that there is no reasonable apprehension to abscond hence the petitioner should be released on bail. Thus I allow the prayer for bail made by the petitioner.

Hence the petitioner be released on bail with two sureties of Rs. 10,000/- each one of which must be local subject to the satisfaction of Learned Trial Court.

The petitioner upon being released shall comply the following conditions.

1. The petitioner shall not leave the jurisdiction of Siliguri Court without permission from the Learned Trial Court.
2. The petitioner shall intimate her address where she has decided to reside before Learned Trial Court and to the Kharibari Police Station, and shall not change the residence without the permission of Learned Trial Court.
3. The petitioner shall give the mobile phone number to Kharibari Police Station and shall not change the said number without leave of the Learned Trial Court.
4. The petitioner shall apply for VISA before the competent authority.
5. The petitioner may meet her child at the children home where her child is kept once a week upon intimating Kharibari Police Station and the concerned Police Station within the jurisdiction of which she will be residing. She may appear before the Juvenile Justice Board or child welfare Committee as the case may be if called, however prior intimation shall be given to the concerned Police Stations.
6. The petitioner shall attend Court on all dates fixed unless there is a very exceptional circumstance.

7. The copy of the passport of the petitioner shall be furnished to the Foreigners Regional Registration Officer along with the particulars of the case number instituted against petitioner. One copy of the endorsement shall be filed by Kharibari Police Station in Court and the other shall be given to the petitioner.

Such endorsement should be obtained after an interval of two months. On completion of trial intimation shall be given to Foreigners Regional Registration Officer. Particulars of case number and this order shall be intimated to Nepal Government.

With regard to the submission of Learned Advocate for the petitioner that his client intends to attend marriage ceremony of his relative as there is no supplementary affidavit giving the particulars as to the date of the ceremony and dates of stay at the relative’s residence and date of return but simply two marriage invitation cards no order is being passed on such submission, however liberty is granted to the petitioner to make such prayer before Learned Trial Court with necessary particulars.

Urgent certified copy shall be issued.

**(Biswaroop Chowdhury,J:)**