

Court No. - 32

**Case :- CRIMINAL MISC ANTICIPATORY BAIL
APPLICATION U/S 438 CR.P.C. No. - 142 of 2021**

Applicant :- Mirza Shafiq Hussain Shafaq And Another

Opposite Party :- State Of U.P And Another

Counsel for Applicant :- Umang Srivastava

Counsel for Opposite Party :- G.A., Siraj Ahmad Khan

Hon'ble Siddharth.J.

Order on Criminal Misc. Modification Application No. 4 of 2022

This modification application has been filed praying for modification of condition no. 3 of the order dated 07.01.2021 passed by this Court exempting the applicant no. 1 from depositing the passport and further direction to the authority concerned to release the passport of the applicant no. 1 deposited in pursuance of the aforesaid order of this court.

Learned counsel of the applicants has submitted that the applicants were enlarged on interim anticipatory bail by the order dated 07.01.2021 on certain conditions. Condition no. 3 was regarding the deposit of passport before the S.S.P / S.P concerned. The applicant no. 1 is stated to be lecturer in Husainabad Government College, Lucknow and is a renowned Urdu scholar / writer and orator attending National and International Level Seminars. He is also writer and translator of several books and invitation for releasing a book at Kuwait in the first week of May, 2022 has been received by the applicant no. 1. It has been stated that the applicant no. 1 has been implicated in this case on account of matrimonial dispute. He will not absconded if his passport is released by this court.

Learned counsel of the applicants has placed reliance upon the judgment of the High Court of Punjab and Haryana in the case of ***Capt. Anila Bhatia vs. State of Haryana, 2018 0 Supreme (P & H) 2550***, wherein the High Court relying upon number of judgments of different courts and Hon'ble Supreme Court has held as follows :-

"8. 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."

9. 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 5 of 14 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 excuse is fair.

10. The preamble to the Act says that it is, "to provide for the issue of passports and travel Crl. M.C. No.1734 of 2011 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.

11. 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 Crl. 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 6 of 14 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 Crl. 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 7 of 14the grant of bail."

12. 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.

13. 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.

14. 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 8 of 14 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....."

15. 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 9 of 14 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.

16. 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 10 of 14 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."

A perusal of the aforesaid judgment shows that the condition of deposit of passport may be onerous in the case of applicant no. 1, hence considering the arguments of the counsel for the applicant no. 1 and material brought on record and for the reasons given hereinabove by the courts, the present application is allowed and the condition no. 3 of the interim bail application is hereby modified and deleted. The authority with whom the

applicant no. 1 has deposited his passport shall release the same provided applicant no. 1 moves an application supported by his affidavit along with proof that he is still required to go abroad on some future date and in case passport is released in his favour he will not misuse the liberty granted to him and will appear before the trial court as and when required.

The modification application is ***allowed***.

Order Date :- 27.5.2022

Rohit