

In Chamber

Case :- BAIL No. - 2898 of 2020

Applicant :- Sagynbek Toktobolotov & Ors.

Opposite Party :- State of U.P.

Counsel for Applicant :- Pranshu Agrawal, Sufiyan Mohammad

Counsel for Opposite Party :- G.A.

Hon'ble Jaspreet Singh, J.

The Court has heard Sri Pranshu Agarwal, learned counsel for the applicant and Shri J.S. Tomar, learned AGA via video conference.

On application for Amendment in the memo of Bail Application

At the outset, it will be relevant to mention that the learned counsel for the applicants had moved an application for amendment in the bail application and had sought to add two more Sections, in the bail application, with which the applicants have been challaned and remanded.

The copy of the amendment application was served on the learned A.G.A. on 30.05.2020 who has received his instructions and all necessary documents in respect of the above bail application.

The learned A.G.A. has filed his written instructions, as well as the copy of the case diary, which is taken on record.

Considering the amendment application, it is not disputed by the learned A.G.A. that two Sections namely Section 3 (3) of Passports (Entry into India) Act, 1920 and Section 51 of Disaster Management Act, 2005, which as per the learned counsel for the applicants were inadvertently left out, are also pressed against the applicants, hence the application for amendment shall stand allowed.

The bail application shall be considered in respect of the two above mentioned Sections as well which have been inadvertently left out which will find place in the later part of the order.

The learned counsel for the applicants shall carry out the necessary amendments in terms of circular of the High Court dated 14.04.2020.

On merits

The applicants before this Court are foreign nationals who are in Jail since 18.04.2020. All the applicants are citizens of Kyrgyzstan and all of them have been accused of offences under Sections 188 I.P.C., Section 3 of Epidemic Disease Act, 1897, Section 12(3) of the Passport Act, 1967 and Sections 3(2) and Section 3 (3) Passports (Entry into India) Act, 1920 and Section 14/14-C of the Foreigners Act, 1946 and Section 51 of the Disaster Management Act, 2005. All the above applicants are accused in Case Crime No. 81 of 2020

As per the averments contained in the First Information Report, the Administration on 22.03.2020 had imposed Section 144 C.r.P.C. within the area of Lucknow Commissionarate. It is alleged that the same was widely publicised amongst the public. Information was received that in a Markaz Mosque situated at Dr. B. N. Verma Road within P.S. Kaiserbagh, District Lucknow, 6 foreign nationals who had entered India on a tourist Visa were being given shelter in the said mosque by its Manager namely Ali Hasan. The aforesaid foreign nationals had attended the religious congregation at Nizamuddin in New Delhi and thereafter had come to Lucknow and without getting their medical examination done, they were residing in the Markaz Mosque.

It is also alleged that the Manager of the Mosque had given shelter to these foreign nationals for the purposes of propagating and disseminating religious discourse and these persons have violated the norms and were staying at one place. It is also alleged that the local

police/Administration were not informed regarding these 6 foreign nationals. The applicants were medically examined and on 31.03.2020 and they were kept at the Lok Bandu Hospital under 14 day's quarantine under medical supervision. It is alleged that the applicants have deliberately violated the Government Orders and have worked against the provisions of law and for the aforesaid they have been accused of having committed offence under the Sections as hereinabove mentioned.

Before dealing with the respective submissions of the parties, it would be relevant to notice that Corona Virus (hereinafter referred to as COVID-19) was declared as a pandemic as it affected various countries across the world. Respective countries resorted to stern measures for the containment of the disease and for the benefit of their citizens. The aforesaid disease assumed a gigantic proportion and consequently assessing the sensitivity and severity of COVID-19, the Government of India had announced a nation wide lockdown. The aforesaid lockdown resulted in cessation of all modes of transport, both inter-state and Intra-State, air travel both domestic as well as international was also prohibited and all persons were directed to stay within their homes and only certain sections of the Society who were engaged and dealing with essential services were permitted to work while remaining activities including all other economic activities not prescribed as the essential services were brought to a stand still.

It is in this backdrop that Sri Agarwal has submitted that the applicants are absolutely innocent and merely by fortuitous circumstances have been implicated without any fault. It has further been submitted that all the applicants are valid passport holders and were granted valid Visa to arrive in the territory of India. The applicants arrived at New Delhi on different dates and thereafter all the applicants reached Lucknow on 13.03.2020. It is the specific case of the applicants that they had provided all the necessary details regarding their travel and stay within the territory of India including at Lucknow with the Foreigner Regional Registration

Office, Lucknow (hereinafter referred to as FRRO), Lucknow which is under the Ministry of Home Affairs, Government of India.

Sri Agarwal has also submitted that all the applicants had duly filled in Form-C, copies of which relating to each of the applicants has been annexed as Annexure No. 3. It has been submitted that from the perusal of Form-C, it would indicate that the name of the respective applicant, the address, city, mobile numbers, personal details as well as various other details including the passport and Visa including its number, date of issue, its expiry, place of issue and period of its validity have been clearly mentioned. The said Form-C was duly filled in by each of the applicant and was submitted before the appropriate authority. The learned counsel for the applicants has also specifically stated that apart from submitting Form-C with the FRRO Office, the requisite details in respect of the arrival of the applicants in Lucknow and their programme details were also sent to the Officer of Intelligence Bureau posted at the FRRO Office namely Sri Tiwari on his whatsapp mobile number and the screen shot of the said message sent has also been annexed as Annexure No. 4 with the bail application.

It is also submitted that the applicants arrived in Lucknow on 13.03.2020 and as per their disclosed programmes, they were to stay in Lucknow for a period of 22 days. It is during this period that on 22.03.2020 initially a Janta Curfew was observed and thereafter the Government of India announced a National Lockdown due to which the movement of the applicants was completely restricted and they were confined to the place of their stay and could not more or travel out of Lucknow or even the Country and thus by circumstances the applicants were confined and because of certain perceptions against the members who attended the Markaz congregation at New Delhi, the applicants have been framed and various Sections have been imposed against the applicants even though they are completely innocent and are facing incarceration on foreign soil since 18.04.2020.

Sri Agarwal has submitted that since the applicants had already submitted their details including the place of residence at Lucknow, accordingly, the Government already had the details and whereabouts of the applicants. It is in view of the aforesaid, that the police visited the Markaz Mosque at Dr. B.N. Road, Lucknow and from there the applicants were taken in custody. It has been stated that they were taken to the Lok Bandu Hospital where they were put in quarantine for 14 days and during this period they were tested thrice and on all the occasions, all the applicants tested negative for COVID-19 and thereafter they have been put in Jail on 18.04.2020 under the sections as mentioned above.

Sri Agarwal has vehemently urged that all the aforesaid Sections which have been levied against the applicants are apparently not met out, inasmuch as, it is not a case where the applicants entered within the territory of India either on a false passport or under false details. The applicants have not violated any Government Order and the Sections which have been imposed against the applicants are allailable entailing a sentence of 6 months to one year and fine or both except Section 14 and 14-C which provides for a sentence which may extended to 5 years and fine. It has been submitted that the Visa of all the applicants in question was valid till their intended period of stay and only on account of lockdown, their movement was prohibited. On account of COVID-19 lockdown in India which commenced from 25th March till 14th April, 2020 and was thereafter extended from 15.04.2020 till 03.06.2020 and again from 04th May till 17th May, 2020 and yet again was extended from 18th May to 31st May, 2020. Therefore, it cannot be said that the applicants have stayed in the territory of India for a period exceeding the period for which the Visa was issued to them or the applicants violated the condition of Visa deliberately. Any violation, if any, though, not admitted, is purely on account of the pandemic and the affected countries have passed orders to deal with such over stay in the country.

Sri Agarwal has also submitted that the applicants are innocent persons and there is no chance for the applicants to abscond as their passports have already been impounded by the police and they are ready to comply with any condition as imposed by the Court and neither there is any criminal history against any of the applicants and consequently, they are languishing in jail since 18.04.2020 and are entitled to be enlarged on bail.

Sri Tomar while vehemently opposing the bail application has submitted that the applicants came to the Country under a tourist Visa. A person who enters the territory of India under a tourist Visa is not entitled to participate or undertake any religious seminar or involve oneself in any religious discourses. It has also been submitted that the applicants while being within the territory of India did not disclose that they attended the Markaz congregation at Nizamuddin in New Delhi and the fact that thereafter since some persons from the Markaz Congregation in New Delhi had tested positive of COVID-19 and various announcements were made on public platforms requiring all persons who had attended such a congregation to voluntarily come forward for testing for COVID-19 to contain the spread of virus but all the applicants did not come forward and they remained a threat to the society at large.

Sri Tomar has also submitted that it is only when the police received information regarding the foreign nationals being given shelter in the Markaz Mosque at Lucknow that the applicants were rounded and were medically examined and as per the guidelines issued by the Ministries of Home Affairs and Health Affairs, the applicants were put in quarantine for 14 days. It has been further submitted by Sri Tomar that the applicants who are foreign nationals and having no permanent abode in India, hence, if the applicants are enlarged on bail, it will be difficult to keep a track and chances of them absconding and not being available for trial looms large, thus, under the aforesaid circumstances, it would be appropriate that the applicants are not enlarged on bail, coupled with the

fact that the investigation is still underway and the charge sheet has yet not been filed.

The Court has given anxious considerations to the rival submissions and also perused the record. The question before the Court for consideration is whether in the facts and circumstances, the applicants are entitled to be granted bail, who are foreign nationals.

In order to answer the aforesaid questions, it will be important to note that Article 21 of the Constitution of India uses the word 'personal liberty'. The addition of the word 'personal' before the word 'liberty' as used in Article 21 indicates that it is an anti-thesis of physical restraint or coercion. It is a basic right of an individual to be free from restrictions or encroachment on his person.

Article 21 is often termed as the heart and soul of the fundamental rights as enshrined in Part III of the Constitution. Needless to mention that Article 21 guarantees every man whether he be a citizen of the country or a foreigner that he shall not be deprived of his personal life and liberty except in accordance with the procedure established by law.

Thus, it would be seen that personal liberty is a very precious fundamental right and it can be curtailed only when it becomes imperative according to the peculiar facts and circumstances of the case and that too only in accordance with the procedure established by the law.

Liberty of a person ought not to be lightly dealt with, since deprivation of liberty has immense impact on the mind of a person. Personal liberty in our country has been exalted to a high pedestal and is also important to any civilized society. Our constitution has conferred certain rights on every human being and certain rights on citizens, however, every person is entitled to equality before the law and equal protection of law. So also no person can be deprived of his life or personal

liberty except in accordance with the procedure established by law, and in this context, every person would include a foreign national as well.

The applicants who have prayed for bail even though are foreign nationals, cannot be deprived of their personal liberty except in procedure established by law and that they are also entitled to equal protection of law and equality before law. Therefore, unless and until extreme circumstances are pointed out, it cannot be considered that the parameters for considering a bail application for a national or a foreigner would be on a different footing before the Court of law.

The law does not permit any differentiation between Indian nationals and foreign citizens in the matter relating to grant of bail. What is permissible while considering the facts and circumstances of each case, the Court can impose different conditions which may be necessary to ensure that the accused is made available for facing the trial and an application for bail cannot be rejected solely on the ground the applicants are foreign nationals.

It is now fairly well settled and does not require much elaboration that the object of bail is neither punitive nor preventive. Deprivation of liberty is considered a punishment unless it is required to ensure that an accused person will stand trial when called upon. It would be quite contrary to the concept and idea of personal liberty as enshrined in our Constitution that any person should be punished in respect of any matter upon which he has yet not been convicted or that in any circumstances, he would not be deprived of his liberty only upon the belief that he may tamper with the evidence or a witness if he is granted the liberty, save in extraordinary circumstances. In our criminal jurisprudence, bail is the Rule and committal to the Jail is an exception. Speedy justice is also a fundamental right which has been recognized by the Apex Court flowing from Article 21 of the Constitution of India.

Apparently, from the material available on record, the learned A.G.A. could not dispute that all the applicants entered the country with a valid passport and a valid Visa. The record indicates that the applicants arrived in India between the months of December, 2019 and March, 2020. All the applicants arrived in Lucknow on 13.03.2020 and all of them had given prior information regarding their programme of stay at Lucknow for a period of 22 days. The validity of Visa of the applicant no. 1 is till 24.06.2020, while the Visa of the applicant no. 2 was valid till 22.05.2020, the validity of Visa of the applicant no. 3 was till 02.06.2020, validity of the Visa of the applicant no. 4 was till 26.05.2020, the validity of the Visa of the applicant no. 5 is till 20.02.2021 and the Visa of the applicant no. 6 is also valid till 17.02.2021.

The record also indicates that the Form-C submitted by the applicants with the FRRO has indicated the address as Dr. B.N. Verma Road, Markaz Wali Maszid, Aminabad Road, Lucknow. In the aforesaid Form-C under the head of other details, it is clearly mentioned regarding their stay at Delhi in Nizamuddin. The learned A.G.A. could not dispute the aforesaid fact nor could give a reply to the clear averments made in the bail application that the aforesaid Form-C was duly submitted before the FRRO as well as sent on the whatsapp mobile of Intelligence Officer Sri Tiwari, as specifically mentioned in paragraph 6 and 7 of the bail application.

It also could not be disputed by the learned A.G.A. that the stay of the applicants in the country was under a valid passport and Visa which is valid up to the months of May, 2020 and June, 2020 in respect of some of the applicants and even up to the year 2021 in case of two applicants but the fact remains that as per the declared itinerary of the applicants they were to remain in Lucknow w.e.f. 13.03.2020 a period of 22 days, thus, in any case, their stay in the city of Lucknow was scheduled till 05.05.2020. The Visa of the applicant no. 1 is to expire on 24.06.2020 while that of applicant no. 2 on 22.06.2020, that of the applicant no. 3 on 22.06.2020

that of the applicant no. 4 on 26.05.2020 and that of the applicant nos. 5 and 6 in the month of February, 2021. It is also not disputed that the national lockdown became effective from 25.03.2020 for 21 days till 14.04.2020 and then extended from time to time, in phases, till 31st May, 2020 when lockdown 4.0 came to be an end. Neither any material could be pointed out at this stage by the learned A.G.A. to indicate that the applicants were engaged in activity regarding propagating or disseminating any religious discourse.

Also to be noted that the applicants were tested thrice and each time they all tested negative for COVID-19. The efforts of the administration and the police establishment while dealing with containment of COVID-19 pandemic and enforcement of law and order has been praiseworthy, however, that in itself does not give a blanket clearance to all their acts rather each case, as it comes before the Court, has to be seen and judged on its own peculiar facts and circumstances and the material placed before it.

In the aforesaid backdrop if the Sections with which the applicants are accused of are noticed, it would indicate that Section 188 I.P.C. entails a maximum sentence of 6 months or fine or both. Section 3 of the Epidemic Act is merely an enabling Section and the punishment is correlated to Section 188 I.P.C. Section under the Passport (Entry into India), 1920 entails a sentence for a term which may up to 5 years or penalty or with both. While the offence under Section 12 (3) of the Passport Act entails a sentence of 3 months or fine or both, while under Section 51 of the Disaster Management Act, 2005, the punishment as prescribed is upto 1 year or fine or both.

The parameters for grant of bail has been the subject matter of various decisions of the Apex Court and it is now fairly well settled that various factors which are kept in mind while considering the application for grant of bail includes the nature of seriousness of the offence, the stage

of the investigation, severity of punishment, a reasonable possibility of the presence of the accused being secured at the trial, reasonable apprehension of the evidence being tampered or circumstances regarding chance of the witness being influenced.

The Court gainfully relies upon the decision of the Apex Court in the case of *Anil Kumar Yadav Vs. State (NCT of Delhi) and another reported in 2018 (12) SCC Pg. 129* wherein the Apex Court relying upon earlier decision has held as under :-

17. While granting bail, the relevant considerations are: (i) nature of seriousness of the offence; (ii) character of the evidence and circumstances which are peculiar to the accused; and (iii) likelihood of the accused fleeing from justice; (iv) the impact that his release may make on the prosecution witnesses, its impact on the society; and (v) likelihood of his tampering. No doubt, this list is not exhaustive. There are no hard-and-fast rules regarding grant or refusal of bail, each case has to be considered on its own merits. The matter always calls for judicious exercise of discretion by the Court.

18. While considering the basic requirements for grant of bail, in *State of U.P. v. Amarmani Tripathi* [*State of U.P. v. Amarmani Tripathi*, (2005) 8 SCC 21 : 2005 SCC (Cri) 1960 (2)] , this Court has held as under: (SCC p. 31, para 18)

“18. It is well settled that the matters to be considered in an application for bail are (i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence; (ii) nature and gravity of the charge; (iii) severity of the punishment in the event of conviction; (iv) danger of the accused absconding or fleeing, if released on bail; (v) *character, behaviour, means, position and standing of the accused*; (vi) likelihood of the offence being repeated; (vii) *reasonable apprehension of the witnesses being tampered with*; and (viii) *danger, of course, of justice being thwarted by grant of bail* [see *Prahlad Singh Bhati v. State (NCT of Delhi)* [*Prahlad Singh Bhati v. State (NCT of Delhi)*, (2001) 4 SCC 280 : 2001 SCC

(Cri) 674] and *Gurcharan Singh v. State (NCT of Delhi)* [*Gurcharan Singh v. State (NCT of Delhi)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41]]. While a vague allegation that the accused may tamper with the evidence or witnesses may not be a ground to refuse bail, if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail will be refused. We may also refer to the following principles relating to grant or refusal of bail stated in *Kalyan Chandra Sarkar v. Rajesh Ranjan* [*Kalyan Chandra Sarkar v. Rajesh Ranjan*, (2004) 7 SCC 528 : 2004 SCC (Cri) 1977] : (SCC pp. 535-36, para 11)

‘II. The law in regard to grant or refusal of bail is very well settled. The court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merit of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind. It is also necessary for the court granting bail to consider among other circumstances, the following factors also before granting bail; they are:

(a) The nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence.

(b) Reasonable apprehension of tampering with the witness or apprehension of threat to the complainant.

(c) Prima facie satisfaction of the court in support of the charge. (See *Ram Govind Upadhyay v. Sudarshan Singh* [*Ram Govind Upadhyay v. Sudarshan Singh*, (2002) 3 SCC 598 : 2002 SCC (Cri) 688] and *Puran v. Rambilas* [*Puran v. Rambilas*, (2001) 6 SCC 338 : 2001 SCC (Cri) 1124] .)’”

(emphasis in original

19. The test to be applied for grant of bail was also considered in *Jayendra Saraswathi Swamigal v. State of T.N.* [*Jayendra Saraswathi Swamigal v. State of T.N.*, (2005) 2 SCC 13 : 2005 SCC (Cri) 481] , wherein it was held as under: (SCC pp. 21-22, para 16)

“16. ... The considerations which normally weigh with the court in granting bail in non-bailable offences have been explained by this Court in *State v. Jagjit Singh* [*State v. Jagjit Singh*, (1962) 3 SCR 622 : AIR 1962 SC 253 : (1962) 1 Cri LJ 215] and *Gurcharan Singh v. State (NCT of Delhi)* [*Gurcharan Singh v. State (NCT of Delhi)*, (1978) 1 SCC 118 : 1978 SCC (Cri) 41] and basically they are — the nature and seriousness of the offence; the character of the evidence; circumstances which are peculiar to the accused; a reasonable possibility of the presence of the accused not being secured at the trial; reasonable apprehension of witnesses being tampered with; the larger interest of the public or the State and other similar factors which may be relevant in the facts and circumstances of the case.”

Considering the rival submissions, material available on record as well as balancing the apprehensions of both sides, the nature of accusations against the applicants, severity of punishment if the applicants are convicted and also to ensure their presence at trial, hence, this Court at this stage, without expressing any opinion on merits, is of the considered view that the applicants are entitled to be enlarged on bail.

Any observations made by this Court in the order shall not be taken as an expression on the merits of the case and the material considered by this Court is only for the purposes of adjudication of the bail application and shall not affect the trial.

The registry of this Court has pointed out certain defects. Learned counsel for the applicants has given undertaking to cure the same soon after the COVID-19 lockdown ends. In this regard. the High Court has issued

certain guidelines in terms of Circular dated 14.04.2020. The relevant portion thereof reads as under:-

"2. However, during the lock down period, the requirement of an affidavit/e-affidavit/scanned Notary Affidavit shall not be mandatory in the case of BAIL APPLICATIONS and ANTICIPATORY BAIL APPLICATIONS. In lieu thereof, Counsel shall have to submit, in the e-filed petitions, the Adhar Card Number, full details of the card holder like name, parentage, age and address, as also the mobile number linked to the adhar card, of the person wanting to act as the deponent in the matter along with a declaration of that applicant/petitioner/pairokar affirming the correctness of the disclosures and averments made in the application/petition. In case of civil matters, a prayer for dispensing with the requirement of filing an affidavit may be made along with the urgency application which shall also be considered simultaneous with the issue of urgency.

3. This waiver or relaxation is subject to a proper affidavit being filed, in hard copy, within a period of 15 days from the date the lock down is lifted. No further time shall be granted for the purpose. In case a proper affidavit is not filed as specified above, the said case shall stand dismissed automatically and any order passed therein, shall stand recalled, without any reference to the Court. A communication, in this regard shall be sent by the Registry to the Court(s) below/authorities concerned, forthwith for consequential action."

The aforesaid order passed by this Court shall be subject to compliance of the aforesaid guidelines of the aforesaid Circular dated 14.04.2020.

Hence, this order shall be subject to the adherence of the said circular dated 14.04.2020.

Let the applicants **Sagynbek Toktobolotov, Sultanbek Tursunbaiuulu, Ruslan Toksobave, Zamirbek Maraliev, Aidyn Taldu**

Kurgan @ Aidyn Kairbex & Dauren Taldu Kuragn @ Dauren Zhe Xenbekov involved in Case Crime No., 81 of 2020 under Sections 188 I.P.C., Section 3 of Epidemic Disease Act, 1897, Section 12 (3) of the Passport Act, 1967 and Sections 3 (2) and Section 3(3) of Passports (Entry into India) Act, 1920 and Section 14/14-C of the Foreigners Act, 1946 and Section 51 of the Disaster Management Act, 2005, Police Station-Kaiserbagh. District Lucknow be released on bail on their furnishing a personal bond of Rs. 50,000/- each and one reliable solvent surety to the satisfaction of the Court concerned and the following conditions are being imposed in the interest of justice.

- (i) The applicants will not leave the country without prior written permission of the Court and shall furnish an undertaking to the said effect.
- (ii) Each applicant will also deposit a sum of Rs. 11,000/- in the C.M. Covid-19 Relief Fund and shall submit a receipt in this regard before the Court concerned.
- (iii) Each applicant shall file an undertaking to the effect that he shall not seek any adjournment on the dates fixed for evidence when the witnesses are present in court. In case of default of this condition, it shall be open for the trial court to treat it as abuse of liberty of bail and pass orders in accordance with law.
- (iv) Each applicant shall remain present before the trial court on each date fixed, either personally or through their counsel. In case of his absence, without sufficient cause, the trial court may proceed against them under Section 229-A of the Indian Penal Code.
- (v) In case, the applicants misuse the liberty of bail during trial and in order to secure their presence a proclamation or a look out notice be issued and the applicants fail to appear before the court on the date fixed in such proclamation, then, the trial court shall initiate proceedings against them, in accordance with law.

(vi) The applicants shall remain present, in person, before the trial court on the dates fixed for (i) opening of the case, (ii) framing of charge and (iii) recording of statement under Section 313 Cr.P.C. If in the opinion of the trial court, absence of the applicant is deliberate or without sufficient cause, then it shall be open for the trial court to treat such default as abuse of liberty of bail and proceed against them in accordance with law.

A copy of this order shall be sent to the Senior Superintendent of Police, Lucknow/Deputy Inspector of General, Lucknow to ensure that the investigation is expedited as soon as possible and direct the Investigating Officer to take all the steps for speedy trial of the case.

Order Date: 02.06.2020

Asheesh