

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Criminal Misc. No. 1

Date of decision: []

Capt. []

..Petitioner

Versus

State of Haryana

..Respondent

CORAM: HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:

Mr. []

Ms. []

Advocate

for the petitioner.

Mr. []

for the respondent - State.

Mr. []

for the complainant.

The petitioner is aggrieved by one condition (d) of the order of bail to the effect that she shall surrender/deposit her passport, if any, with the Police/Court and shall not leave India without prior permission of the trial Court imposed by the Additional Sessions Judge, Gurugram vide order dated [] while granting anticipatory bail in case FIR No. [] dated [] registered under Sections 192, 403, 420, 467, 468, 471, 120-B

Learned Senior Counsel for the petitioner submits that the petitioner is Senior Captain with [] and is performing her duties as Pilot. She does not know in advance as to on which flight and to which country, she will have to fly. A self attested copy of flight detail of

the petitioner has been annexed as Annexure P-3 with the petition to show that sometimes the petitioner has flown from Delhi to Dubai; Delhi to Riyadh; Mumbai to Bangkok and so on. Practicably, it is difficult for the petitioner to approach on each and every day to the trial Court to seek prior permission in a short span of time as the petitioner is given a break of only 2-3 days before flying abroad. Learned counsel further submits that the intervening period of stay in India after returning back and to fly again to a destination is very short and it is very difficult and inconvenient in compliance of the condition mentioned in the bail order. Learned counsel also submits that there is no chance of absconding from the trial and she undertakes to abide by all terms and conditions imposed by the trial Court in the bail order or any condition to be imposed by this Court. It is also the argument of learned counsel for the petitioner that the challan has not been presented so far and trial may take long time to conclude. A prayer has been made by the petitioner for grant of permanent permission to travel abroad in discharge of her official duties by relaxing impugned condition (d) in the bail order passed by the Additional Sessions Judge, Gurugram on considering the nature of official duties and profession.

Learned State counsel has raised a preliminary objection that the present petition is not maintainable as in case the petitioner is aggrieved in any manner, firstly she should have approached the lower Court for modification of the condition. Learned State counsel also submits that no blanket permission can be given as the petitioner is involved in a serious offence and there is no emergency and extraordinary reasons for approaching this Court straightway without availing the appropriate remedy

available to her before the lower Court.

Heard arguments of learned senior counsel for the petitioner as well as learned State counsel and have also perused impugned order dated 14.09.2018 passed by the Additional Sessions Judge, Gurugram, whereby, _____ has been released on anticipatory bail with certain conditions.

Admittedly, the petitioner is working as Senior Captain in _____ and facing trial in the FIR as mentioned above, which was registered on the complaint filed under Section 156(3) Cr.P.C. The Chief Judicial Magistrate, Gurugram issued a direction to lodge FIR as it was found to be cognizable offence of misappropriation and cheating against the petitioner being Vice President. The anticipatory bail application filed by the petitioner was allowed with certain conditions, which are as under: -

“(a) that, the applicants-accused shall join the investigation as and when required by the investigating officer and shall attend the same in accordance with the conditions of the bond;

(b) that, the applicants-accused shall not commit an offence similar to the offence of which they are accused or suspected of the commission of which they are suspected;

(c) that, the applicants-accused shall not directly or indirectly make any inducement threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the court or to any police officer or tamper with evidence; and

(d) that, the applicants-accused shall surrender/deposit their passport, if any, with the police/court and shall not leave India without prior

permission of the trial Court."

The petitioner is aggrieved by impugned condition (d), whereby, she has been directed to surrender/deposit her passport and not to leave India without the prior permission of the trial Court. Section 437 of the Code deals with power of the Court to grant bail in non-bailable offences. Under Section 437(3) of the Code, while releasing a person accused, the Court shall impose certain conditions, which are as under: -

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

(b) That such person shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected, and

(c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence.

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. While granting bail, the 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 Court may impose certain conditions on such person while releasing him/her 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 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 _____ 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 excuse is fair.

The preamble to the Act says that it is, "to provide for the issue of passports and travel Crl. M.C. 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 case) 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. 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 case [redacted], 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. [redacted] 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. [redacted] 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 [redacted] 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 [redacted] 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.

[redacted] case did not consider, in view of the observation in paragraph 20 of [redacted] 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 [redacted] he 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

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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 [redacted] 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 [redacted] 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 CrI. M.C. No. _____ 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 _____ 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 CrI.M.C. 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 CrI.M.C. No. 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.

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In the present case, while granting anticipatory bail to the petitioner, a condition has been imposed to surrender his passport before the trial Court. The petitioner is working a Pilot in . . . and her nature of duties are such that she is to fly aeroplane and as per duty roster assigned to her, she is to fly abroad on certain occasions where she is not aware about the next program as only a short notice is there during which it is very difficult for the petitioner to take prior permission and to have the passport in case, the same is deposited.

No doubt, 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/her 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 . . . (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.

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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 and law discussed, the

present petition is allowed and impugned condition (d) of order dated 14.09.2018 passed by the Additional Sessions Judge, Gurugram is set aside.

petitioner is at liberty to move a specific application for release of his passport within a period of two weeks from the date of receipt of certified copy of this order. In case, such an application is moved, the trial Court is directed to consider the application and return the passport forthwith without any delay. It is also directed that the petitioner shall furnish an undertaking in writing before the trial Court in case, long stay is there other than the normal course of her duties prior permission would be taken from the trial Court.

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JUDGE

Whether speaking/reasoned

Yes

Whether Reportable

Yes