

(2011) 06 KL CK 0166
In the High Court Of Kerala
Case No : Criminal M.C. No. 1734 of 2011

A.V. Mohammed Rafeek

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 16-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 104, 437, 437(3)
Passports Act, 1967 — Section 10(3), 10(3)(e)
Penal Code, 1860 (IPC) — Section 34, 420, 468

Citation : (2011) 3 KLJ 183 : (2011) 3 RCR(Criminal) 708

Hon'ble Judges : Thomas P. Joseph, J

Bench : Single Bench

Advocate : P. Samsudin, for the Appellant; V. Manu (PP), for the Respondent

Final Decision : Dismissed

Judgement

Thomas P. Joseph, J.—Could a criminal court while granting bail to a person accused or suspected of commission of a non bailable offence for which such court is empowered to impose conditions direct such person to surrender in court his passport? That question is raised for a decision in this proceeding. Petitioner is the first accused in C.C. No. 630 of 2008 of the court of learned Judicial First Class Magistrate, Malappuram for offences punishable under Secs. 420 and 468 r/w Sec. 34 of the Indian Penal Code (for short, "the IPC"). Prosecution case is that for the amount allegedly due from petitioner, he issued a cheque on the account maintained by the 2nd accused and thereby committed forgery and cheating. Learned Magistrate granted bail to the petitioner subject to the condition that petitioner surrendered his passport. Petitioner complied with that condition. Later, petitioner filed CMP No. 1260 of 2011 requesting to release the passport for its renewal (learned counsel submits that as per instruction given to him there was also a request to permit petitioner go abroad for business purpose). Learned Magistrate allowed CMP No. 1260 of 2011 by order dated

March 9, 2011 subject to the condition that petitioner executed bond for "10,000/-, deposited "10,000/- as cash security and produced the passport before court after its renewal. That order is under challenge.

2. Learned counsel has contended that the criminal court has no power to "impound" the passport. That power is vested only with the Passport authority under Sec. 10(3) of the Passport Act, 1967 (for short, "the Act"). According to the learned counsel in the circumstance, learned Magistrate was not correct in directing surrender of passport while granting bail and in the order dated March 9, 2011. Learned counsel has placed reliance on the decisions in Suresh Nanda Vs. C.B.I., , Pushpal Swarnkar v. State of Chhattisgarh, 2009 (1) KLD 825 (Chh.) and Jose Peter Vs. C.K. Vijaya Kumar, . Learned Public Prosecutor contends that it is within the power of the criminal court while granting bail in a non bailable offence to impose a condition to ensure presence of the accused in the course of the investigation, enquiry or trial that he shall surrender his passport.

3. Petitioner is accused of commission of offences punishable under Secs. 420 and 468 of the Code which are non bailable. Sec. 437 of the Code deals with power of the court to grant bail in non bailable offences. Offences under Secs. 420 and 468 of the IPC are punishable with imprisonment which may extend to seven years. Under Sec. 437(3) of the Code while releasing a person accused or suspected of commission of an offence punishable with imprisonment which may extend to seven years or more (or in other cases mentioned in that sub section), the court shall impose the conditions,-

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

(b)...

(c)...

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 Sec. 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.

4. Sub Sec. (3) of Sec. 437 of the Code requires the Magistrate or court to impose conditions while granting bail to the petitioner. One condition which learned Magistrate is required to impose is that petitioner shall attend in accordance with the conditions of the bond executed by him. While granting bail, the Magistrate or 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 Magistrate or court shall impose conditions on such person while releasing him 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.

5. 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 man. The Supreme Court, in *Satwant Singh Sawhney Vs. D. Ramarathnam, Assistant Passport Officer, Government of India, New Delhi and Others*, 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 of 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 *Mrs. Maneka Gandhi Vs. Union of India (UOI)* and *Another*, 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 exercise is fair.

6. The preamble to the Act says that it is,

to provide for the issue of passports and travel documents, to regulate the departure from India of citizens of India and other persons and for matters incidental ancillary thereto

Sec. 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.

7. 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 Sec. 104 of the Code which said;

Any court may, if it thinks fit, impound any document or thing produced before it under the code.

The power under Sec. 104 of the Code could be exercised 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 Suresh Nanda's case 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 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 the grant of bail.

8. The Chhattisgarh High Court in Pushpal Swarnkar's case (supra) only made reference to the observations in paragraph 15 of the decision in Suresh Nanda regarding the power of criminal court to impound a 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.

9. The decision in Jose Peter v. Vijayakumar (supra) 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 CPC impound passport of a judgment debtor on the ground that he is likely to leave the country. The question was answered in the negative.

10. 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 according to procedure established by the law. The right to travel abroad could be deprived by a procedure established by the law. Sec. 437(3) of the Code required and enabled the criminal court while releasing a person accused or suspected of commission of a non bailable offence (case against petitioner herein came within that provision) to impose a condition that such person shall attend

in accordance with the conditions of the bond executed under chapter XXXIII of the Code. I stated that 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 charge, and in case of my making default therein...

The Junction 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." (See *Bijayaketan Mohanty v. State of Orissa*, 1982 CrLJ 1954) 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 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 *Hazari Lal Gupta Vs. Rameshwar Prasad and Another*, etc., 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 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.

11. 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 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 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. The next question is whether on the facts and circumstances of the present case, interference is required. Though learned counsel contended that as per instructions he has received petitioner had made a request to the learned Magistrate to permit him go abroad, the impugned order does not reflect that any such request was made. Instead, the order only says that in CMP No. 1260 of 2011, petitioner requested that the passport be returned to him to be presented before the passport authority for renewal. That request has been allowed by the learned Magistrate subject to conditions. Having regard to that, I am not inclined to think that the order (dated March 9, 2011) requires interference. But I make it clear that if petitioner needs to go abroad for any purpose, it is open to him to make an application in that regard before the learned Magistrate. If any such application is preferred, learned Magistrate shall consider the request having regard to the facts and circumstances of the case, the guidelines stated above and pass appropriate orders in that regard.

This Crl. M.C. is dismissed with the above direction.