

IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA

Cr. Revision No. 161 of 2019

Judgment reserved on 23rd Sept. 2020

Date of Decision 27th November, 2020

Virender Kumar

...Petitioner

Versus

State of H.P. & another

....Respondents

Coram

The Hon'ble Mr. Justice Vivek Singh Thakur, J.

Whether approved for reporting?¹ Yes

For the Petitioner:

Mr. Sahil Malhotra, Advocate
through Video Conferencing.

For the Respondents:

Mr. Desh Raj Thakur, Additional
Advocate General, for respondent
No.1 and Mr. Neeraj K. Sharma,
Advocate, for respondent No.2,
through Video Conferencing.

Vivek Singh Thakur, J.

Petitioner has approached this Court for modification of order dated 12.9.2019 passed by learned Sessions Judge, Mandi in Bail Application No. 187 of 2019, titled Virender Kumar

¹ *Whether Reporters of Local Papers may be allowed to see the judgment?*

vs. State of H.P., whereby condition to surrender the passport by petitioner at the time of granting the bail has been imposed upon the petitioner. Petitioner is also praying for direction to Investigating Officer to return his passport so as to enable him to visit abroad and earn his livelihood.

2 Petitioner is an accused in a case FIR No. 37 dated 9.9.2019, registered in Police Station Women Police Station Mandi at Bhiuli under Sections 498-A, 323, 506 and 34 of Indian Penal Code.

3 On 12.9.2019, in an application preferred by petitioner under Section 438 of Cr.P.C., he, in the event of arrest, was directed to be enlarged on bail on furnishing personal and surety bonds and was also directed to surrender his passport before the Investigating Officer.

4. On 25.9.2019 interim order dated 12.9.2019 was made absolute, subject to further conditions imposed by Sessions Judge, Mandi. Therefore, order dated 12.9.2019 and conditions imposed therein have now merged in order dated 25.9.2019.

5. On 25.9.2019, amongst other conditions imposed, there was condition No.3, whereby petitioner was directed that

he shall not leave the country without prior permission of Investigating Officer/Court.

6 Though, petitioner has prayed for modification of order dated 12.9.2019, instead of 25.9.2019, however ignoring this technicality, present petition is being considered to have been filed for modification of order dated 25.9.2019 wherein order dated 12.9.2019 has merged.

7 Earlier petitioner had also approached the trial Court i.e. Additional Chief Judicial Magistrate, Court No.1, Mandi for release of his passport. Vide order dated 16.1.2020, his application was dismissed by the trial Court on the ground that petitioner was admitted to bail, by imposing condition of surrendering the passport, by learned Sessions Judge, Mandi, and therefore, petitioner should have placed such an application in the Court of learned Sessions Judge, Mandi as the trial Court was not having the power to dilute the condition imposed at the time of granting bail to petitioner by learned Sessions Judge.

8 Learned counsel for petitioner, referring pronouncement of the Apex Court, in case **Abdul Basit @ Raju and others. vs. Mohd. Abdul Kadir Chaudhary and another**, reported in **(2014)10 SCC 754**, that once a Court finally disposes of the issue in consideration and grants relief of

bail to petitioner therein the Court becomes functus officio and Section 362 of Cr.PC applies therein barring the review of judgment and order of Court granting bail to petitioner/accused and therefore, learned Sessions Judge was not having any power to review his order passed in bail application, whereby condition has been imposed upon petitioner to surrender his passport, therefore, petitioner was not having any other remedy except filing the present petition in this Court.

9 Learned counsel for petitioner has also referred judgment of the Supreme Court passed in **Gian Singh vs. State of Rajasthan**, reported in **(1999)5 SCC 694**, whereby in order to avoid irreparable suffering to petitioner/accused therein directions were issued to trial Court to return his passport on execution of a bond by him for a sum of Rs.3 lac with two solvent sureties to the satisfaction of the said Court and petitioner therein was permitted to appear before the trial Court through Advocate except on dates when his presence was indispensable.

10 Learned counsel for petitioner has also placed reliance upon judgment of Karnataka High Court in case **Brijesh Singh and etc. vs. State of Karnataka and etc.**, reported in **2002 Cri.LJ 1362**, wherein after taking into consideration pronouncement of the Supreme Court and undertaking of

petitioner to furnish additional security for taking delivery of passport from the trial Court, to ensure his attendance as and when required on hearing dates in the course of trial proceedings against him, passport of accused/husband was released.

11 It is submitted by learned counsel for petitioner that petitioner is earning his livelihood by serving in Merchant Navy and for that purpose, he is frequently required to go out of India and conditions imposed by learned Sessions Judge to surrender his passport has caused great prejudice and hardship to him as on account of that, he has been restrained to work outside India, which is affecting his fundamental rights to earn livelihood as enshrined under Article 21 of Constitution of India. It is contended by him that keeping in view the antecedents of petitioner and nature of offence alleged to have been committed by petitioner in present case, the condition of surrendering his passport is a harsh condition particularly when investigation is complete and presence of petitioner is not necessary before Investigating Officer and/or also before the Court on every date and further that petitioner is ready to appear before the Court/Investigating Officer as and when it is considered necessary by Court or Investigating Officer.

12 To substantiate the claim that petitioner had been earning his livelihood by serving as a Seaman in Merchant Navy with different Companies, affidavits dated 19.8.2020 and 11.9.2020 have also been filed during pendency of present petition giving details of his employment and earning therefrom.

13 So far as imposition of condition to surrender the passport is concerned, in view of the pronouncements of the Apex Court in **Sunil K. Sinha vs. State of Bihar** reported in **AIR 1999 SC 1533; Chief Enforcement Officer/Enforcement Director and another vs. Jairaj V. Java**, reported in **(2000)9 SCC 232, Hazari Lal Gupta vs. Rameshwar Prasad and another** reported in **AIR 1972 SC 484; Mohammed Kunju and another vs. State of Karnataka** reported in **AIR 2000 SC 6** and **Supreme Court Legal Aid Committee Representing Undertrial Prisoners vs. Union of India and another** reported in **(1995)5 SCC 695**, the Court is empowered to impose such conditions. But imposition of such conditions and release of passport, so surrendered, depends upon facts and circumstances of each case and Court has to pass an appropriate order after taking into consideration given facts and circumstances of the case on its own merits by balancing the individual interest of accused and complainant and also larger

interest of public to ensure the presence of an accused before the Court during trial.

14 It is true that vide order dated 25.9.2019, learned Sessions Judge has finally disposed of bail application preferred by petitioner, and condition of surrendering the passport by petitioner, imposed on 12.9.2019 has also merged and re-affirmed in order dated 25.9.2019, but it is also noticeable that there is condition No.3 enabling the petitioner to seek permission of Investigating Officer or the Court to leave the country and in case such permission is granted to petitioner, the natural corollary thereof would be the entitlement of petitioner to have his passport released from Investigating Officer. In case, petitioner is found entitled for permission to leave the country to earn his livelihood, the Court has to release the passport of petitioner. Needless to say that at the time of passing order of release of passport, the Court may impose condition of furnishing separate surety bond(s) for an amount as considered by Court just and reasonable taking into consideration the entire facts and circumstances of case and petitioner may be directed to ensure his presence on the dates as and when his presence is indispensable during trial with further direction to him to ensure his representation on each and every date of hearing through an

Advocate and failure to ensure that, would definitely be resulted into cancellation of bail for breach of condition imposed upon petitioner at the time of granting the bail.

15 Plea raised on behalf of petitioner that Sessions Court is not empowered to review or recall its earlier orders passed on 12.9.2019 and 25.9.2019 is not applicable in present case for the reason that in order dated 25.9.2019 itself, there is condition that applicant shall not leave the country without prior permission of Investigating Officer/Court entitling the petitioner to file an appropriate application before the same Court to seek permission to leave the country and therefore, allowing or disallowing such application by learned Sessions Court cannot be treated as modification, variation, recalling or review of earlier orders passed by Court at any stretch of imagination, rather, it would be in continuation and in consonance with earlier orders passed by the said Court.

16 Cancellation of bail on re-appreciation of same facts by the same Court would amount to review of earlier order, but, cancellation of bail for breach of condition imposed, at the time of granting bail, does not amount to review or modification of earlier order granting the bail, rather it would be in consonance with and in continuation to the previous order wherein

cancellation of bail on breach of condition is inherent, for the reason that bail is granted subject to certain condition(s), breach whereof would entail cancellation of the bail. At the time of granting bail, normally a condition is imposed and I would say that it is always desirable to impose such condition that in case of violation of breach of any condition imposed upon the accused at the time of granting the bail, his bail shall be liable to be cancelled and in such eventuality, prosecution should be granted liberty to approach the competent Court of law for cancellation of bail in accordance with law. It is not modification or review of the order but an order consequential to the previous order.

17. Similarly, modification of condition(s) imposed at the time of granting bail, after taking into consideration new, additional or other facts, not considered earlier, also does not amount to review of previous order, particularly when order itself contains the condition that conditions, so imposed, may be varied, modified and/or altered suitably as and when it would be deemed fit by the Court in the facts and circumstances of the case.

18. Normally at the time of granting/confirming the bail by the Sessions Court and/or High Court, a condition is imposed that it will be open to prosecution to apply for imposing any such

other or further condition on petitioner as deems necessary in the facts and circumstances of the case and in the interest of justice and also that it shall also be open to trial Court to impose any other or further condition on petitioner as it may deem necessary in the interest of justice. For such condition, imposed at the time of granting the bail, the trial Court shall also be competent to impose any other or further condition on petitioner either *suo moto* or on request of prosecution including modification of condition on the application of accused in changed circumstances as deemed necessary in the interest of justice, as, in view of specific condition contained in order, such addition, modification or alteration in the condition by the trial Court shall be consequential extension of order passed by Court at the time of granting the bail. In present case, unfortunately, no such condition has been imposed by learned Sessions Judge. To some extent, condition No.3 may be taken as a condition empowering the trial Court to consider the case of petitioner for permission to leave India, but, here also, it is not clear that 'Court' referred in the said condition means the Court granting the bail or also includes the trial Court. Therefore, the trial Court has rightly rejected the application filed by petitioner for alteration of condition imposed in order granting the bail to him.

19. Keeping in view the provisions of Section 362 Cr.P.C., it would be desirable that at the time of granting the bail, the Court should incorporate the condition in bail order itself empowering the same Court and the trial Court to impose any other or further condition or alter/modify the conditions already imposed on application of prosecution or the accused as deemed necessary by such Court for ends of justice. Though, it is inherent in order, however, by way of abundant caution, it may also be specifically incorporated in order granting the bail that such bail shall be liable to be cancelled by the competent Court on breach/violation of any condition imposed upon accused at the time of granting the bail and prosecution should be granted liberty to approach the competent Court of law, in that eventuality, for cancellation of bail in accordance with law.

20 Release of passport has been opposed by complainant/wife/respondent No.2 by raising various contentions narrated in reply and submitted by learned counsel representing her during course of arguments. The said contentions are not discussed herein for the reason that this Court is not passing any order for release of passport of petitioner at this stage by directing the petitioner to approach the same Court, which has imposed the condition to seek permission to leave the country

and also for release the passport in case such permission is granted by the said Court. Release of passport shall precede permission to leave India.

21. No opinion with respect to merit of rival contentions raised by parties for seeking and opposing release of passport are being expressed by this Court.

22. In view of aforesaid discussions and in the peculiar facts and circumstances of the case, petitioner is directed to approach the Sessions Court by filing an appropriate application seeking permission to leave the country and also for consequential relief that in case permission, so prayed, is granted to petitioner, for release of his passport.

23. Parties are at liberty to raise all contentions before learned Sessions Judge, who, after taking into consideration all such contentions shall pass an order on its own merits in accordance with law.

Petition stands disposed of in aforesaid terms.

November 27, 2020
(ms)

(Vivek Singh Thakur)
Judge