



2024:DHC:8035



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**\* IN THE HIGH COURT OF DELHI AT NEW DELHI****Date of Decision: 18<sup>th</sup> October 2024**

+ BAIL APPLN. 4056/2023 & CRL.M.A. 12790/2024, CRL.M.A. 23372/2024

OBI OGOCHUKWA STEPHEN

.....Petitioner

Through: Ms. Rebecca John, Senior Advocate (*Amicus Curiae*) with Mr. Chinmay Kanojia, Mr. Pravir Singh, Ms. Anushka Baruah, Ms. Ajunee Singh and Mr. Nilanjan Dey, Advocates. Mr. Lakshay Yadav, Ms. Kirti Chauhan, Mr. Deepanshu Goswami, Mr. Rohit Sehrawat and Mr. Akshay, Advocates.

versus

STATE OF NCT OF DELHI

.....Respondent

Through: Mr. Amol Sinha, ASC (CrI.) with Mr. Kshitiz Garg, Advocates and SI Rajender Meena, P.S.: Anti-Narcotics Squad, West Distt. Inspector Satish Kumar, FRRO. Mr. Amit Tiwari, CGSC with Mr. Priyanshu, Mr. Chetanya Puri, Advocate for UOI and Insp. Shashank Legal Cell, FRRO.

+ BAIL APPLN. 632/2022, CRL.M.A. 18124/2024, CRL.M.A. 23370/2024

OSCAR ENYI

.....Petitioner

Through: Mr. Lakshay Yadav and Mr. Akshay, Advocates.

versus



2024:DHC:8035



STATE NCT OF DELHI

.....Respondent

Through: Mr. Manoj Pant, APP for the State with Mr. Sachin Rawat, Mr. Mohit Kumar, Mr. Utkarsh Singh, Mr. Shivam Kumar Singh and Mr. Vaibhav, Advocates.

**CORAM:****HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI****J U D G M E N T****ANUP JAIRAM BHAMBHANI J.****CRL.M.A. 12790/2024 in BAIL APPLN. 4056/2023****CRL.M.A. 18124/2024 in BAIL APPLN. 632/2022**

By way of the present applications filed under sections 441 and 445 read with section 482 of the Code of Criminal Procedure 1973 ('Cr.P.C.') and Article 226 of the Constitution of India, the petitioners/applicants seek modification of the conditions imposed upon them for grant of regular bail. The petitioners have not availed the bail so granted till date; and it is their contention that they have been unable to do so, since they are not in a position to fulfil the conditions imposed by the court in their respective bail orders, for the reasons explained in the applications. The petitioners are both Nigerian nationals and it is the contention of the State that both petitioners had entered India on visas, which have run-out a long time ago and that the petitioners have overstayed the term of their visas and are therefore presently illegal residents in India.



2. By way of the present applications, the petitioners have sought modification of the conditions of bail on two counts : *firstly*, the petitioners have sought reduction in the amount of personal bond that they were required to furnish; and *secondly*, the petitioners have sought to be released only on deposit of cash with the court *in lieu of* furnishing a surety bond, as was directed by the court in their respective bail orders.

**PETITIONER - OBI OGOCHUKWA STEPHEN**

3. Briefly, the petitioner in BAIL APPLN. No. 4056/2023 – **Obi Ogochukwa Stephen** – was granted bail *vide* order dated 20.03.2024; and while admitting the petitioner to regular bail the Predecessor Bench of this court had directed him *inter-alia* to furnish a personal bond in the sum of Rs. 1,00,000/- with 02 sureties in the like amount to the satisfaction of the learned Trial Court. By way of CRL. M.A. No. 12790/2024 filed in the said bail petition, petitioner Stephen has sought modification of the bail conditions imposed on two counts : *firstly*, the petitioner prays that the amount of personal bond and surety bond stipulated in order dated 20.03.2024 be reduced from Rs. 1,00,000/- to Rs. 40,000/-; and *secondly*, he seeks that he be released on depositing Rs. 40,000/- cash in court *without anyone furnishing a surety bond on his behalf*.
4. In Status Report dated 12.08.2024 filed by the Foreigners Regional Registration Office ('FRRO'), they have said that petitioner Stephen had *entered India on 31.08.2011* on a Nigerian passport, which passport was valid upto 24.05.2016 holding an *Indian medical visa* which was *valid upto 05.10.2011*; and has over-stayed in India for the



last *about 13 years*. The FRRO have further stated that though the investigating agency, namely the Delhi Police, ought to have also invoked section 14 of the Foreigners Act 1946 ('Foreigners Act'), against the petitioner since he has clearly breached the conditions of his Indian visa, for some reason the FIR does not mention that offence.

5. The FRRO has also stated that petitioner Stephen has submitted incorrect or forged visa and passport details to hotel owners for continuing his stay in various parts of India, which is reflected in the C-Form filed by hotel owners on the portal of the Bureau of Immigration. The FRRO say that on analysing the C-Form, they had opened a Look-Out Circular against the petitioner, since he was in any case liable to be intercepted and interrogated for having forged travel documents. The FRRO contends that the petitioner has also submitted a forged passport to the Investigating Officer, falsely showing that the validity of his earlier Nigerian passport stood extended upto 24.05.2023, which is not the case.

**PETITIONER - OSCAR ENYI**

6. Similarly, the petitioner in BAIL APPLN. No. 623/2022 – **Oscar Enyi** – was granted bail *vide* order dated 26.09.2023; and while admitting him to regular bail the Predecessor Bench had directed him *inter-alia* to furnish a personal bond in the sum of Rs. 1,00,000/- with 02 sureties in the like amount to the satisfaction of the learned Trial Court. Furthermore, *vide* order dated 09.02.2024 passed by the Predecessor Bench in CRL. MA. No. 640/2024, this court modified the bail conditions in order dated 26.09.2023 to the extent that the



petitioner Enyi could be released on bail on his furnishing a personal bond in the sum of Rs. 1,00,000/- with 01 surety in the like amount. By way of CRL. M.A. No. 18124/2024, petitioner Enyi has sought modification of the bail conditions on two counts : *firstly*, the petitioner prays that the amount of personal bond and surety bond stipulated in orders dated 26.09.2023 and 09.02.2024 be reduced from Rs. 1,00,000/- to Rs. 25,000/-; and *secondly*, he seeks that he be released on depositing cash in court *in lieu of furnishing a surety bond from any person*.

7. In Status Report dated 02.05.2022 filed on behalf of the State, it has been said that petitioner Enyi entered India on a visa issued on 17.04.2012 on a Nigerian passport issued on 27.01.2012. The visa expired on 16.10.2012 and his passport expired on 26.01.2017. The status report records that the petitioner has been staying in India without a valid visa for the last about 12 years.

#### **EARLIER PROCEEDINGS BEFORE THIS COURT**

8. Though the court was not averse to reducing the amount of personal bond and surety bond as prayed-for by the petitioners in their respective bail petitions, in its order dated 31.07.2024 passed in BAIL APPLN. No. 4056/2023, this court had expressed reservation on releasing the petitioners on deposit of cash, without any person signing a surety bond assuring the court that she/he would ensure the petitioners' presence for standing trial.
9. As recorded in that order, this court had observed that, conceptually, when an undertrial is released on bail or a convict is granted suspension of sentence, the person is released from the custody of the



court to the custody of a surety; and by furnishing a surety bond, the surety gives the requisite assurance to the court that the person on bail would be produced as and when required by the court for standing trial or for undergoing the sentence awarded. The aforementioned concept has been acknowledged by the Supreme Court *inter-alia* in *Ash Mohammad vs. Shiv Raj Singh*,<sup>1</sup> the relevant extract of which reads as follows :

*“19. Thus analysed, it is clear that though liberty is a greatly cherished value in the life of an individual, it is a controlled and restricted one and no element in the society can act in a manner by consequence of which the life or liberty of others is jeopardised, for the rational collective does not countenance an anti-social or anti-collective act.*

*“20. Having said about the sanctity of liberty and the restrictions imposed by law and the necessity of collective security, we may proceed to state as to what is the connotative concept of bail. In Halsbury's Laws of England [4th Edn., Vol. 11, Para 166.] it has been stated thus:*

*“166. Effect of bail.—The effect of granting bail is not to set the defendant [(accused) at liberty], but to release him from the custody of the law and to entrust him to the custody of his sureties, who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law, and he will then be imprisoned....”*

*“21. In Sunil Fulchand Shah v. Union of India [(2000) 3 SCC 409 : 2000 SCC (Cri) 659] Dr A.S. Anand, learned Chief Justice, in his concurring opinion, observed: (SCC pp. 429-30, para 24)*

*“24. ... Bail is well understood in criminal jurisprudence and Chapter 33 of the Code of Criminal Procedure contains elaborate provisions relating to grant of bail. Bail is granted to a*

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<sup>1</sup> (2012) 9 SCC 446



person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. **The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties.** In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. **The literal meaning of the word 'bail' is surety.**"

(emphasis supplied)

10. This court had therefore observed that in view the foregoing fundamental principle, a prayer that an undertrial be released *only upon depositing cash in lieu of* furnishing a surety bond from a third person, means that there would be no third person taking responsibility that the person on bail would be available for further proceedings in court at a subsequent time.
11. In this backdrop, *vide* order dated 31.07.2024 passed in BAIL APPLN. No. 4056/2023, this court appointed Ms. Rebecca M. John, learned senior counsel as *Amicus Curiae* to assist the court to examine the matter objectively.
12. In order to elicit the stand of the Union of India on its policy for dealing with foreign nationals whose passport and/or visa have expired in the circumstances mentioned above, *vide* order dated 02.08.2024 passed in BAIL APPL. No. 4056/2023, this court had also directed the presence of an Officer from the FRRO, New Delhi to assist the court in the matter.

#### **QUERIES FRAMED**

13. To crystalize the issue involved, the queries that the court seeks to answer by way of the present judgement are the following :



- 13.1 Whether it is *permissible* for a court to *completely dispense with* the requirement that an undertrial/convict must furnish a ‘surety bond’, that is to say a bond signed by a third person, who would be willing to assure the court that the undertrial/convict would remain available for proceedings before the court in a criminal matter ?
- 13.2 Whether it is *permissible* for a court to *substitute* the requirement of furnishing a surety bond with deposit of cash in lieu of surety, without any person signing a bond of assurance that an undertrial/convict would remain available for proceedings before the court in a criminal matter ?
- 13.3 If the answer to query (a) and (b) above is in the affirmative, should the waiver of furnishing surety or substitution of surety with a cash deposit, be granted by a court for the asking, or should such waiver or substitution be guarded, keeping in view the fundamentals for grant of bail or suspension of sentence; and furthermore, should the court be even more cautious in granting waiver or substitution to an undertrial/convict who is a ‘foreign national’ and who has *either* entered India illegally *or* has continued to stay in India without a valid visa/residence permit, during the pendency of a criminal trial or a criminal appeal ?

#### ARGUMENTS OF COUNSEL

14. In the above backdrop, this court has heard Ms. Rebecca M. John, learned senior counsel who is assisting the court as *Amicus Curiae*; Mr. Lakshay Yadav, learned counsel appearing for the petitioners; as





also Mr. Amit Tiwari, learned Central Government Standing Counsel appearing on behalf of the FRRO.

15. The court has also considered the contents of the applications; written submissions filed on behalf of the learned *Amicus Curiae* as well as Status Report dated 12.08.2024 and the brief note filed on behalf of the FRRO.
16. In brief, Ms. John submits that in law, it is permissible for a court to waive the requirement of a prisoner furnishing surety as a condition for grant of bail; and it is also permissible, in an appropriate case, for a court to accept cash in lieu of surety but whether that is to be done in respect of a given prisoner is always in the discretion of the court.
17. To substantiate this submission, learned senior counsel has drawn the attention of this court to section 445 of the Cr.P.C. as well as to Form 45 appearing in Schedule-II to the Cr.P.C., which are relevant to the issue of deposit of *cash in lieu of surety* for admitting a person to bail, or for granting suspension of sentence. Section 445 and Form 45 are extracted below :

*“445. Deposit instead of recognizance. — When any person is required by any Court or officer to execute a bond with or without sureties, **such Court or officer may**, except in the case of a bond for good behaviour, **permit him to deposit a sum of money** or Government promissory notes to such amount as the Court or officer may fix **in lieu of executing such bond.**”*

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**“Form 45**

***Bond and Bail-bond for attendance before officer in charge of police station or court***

*I, (name), \_\_\_\_\_ of \_\_\_\_\_(place), having been arrested or detained without warrant by the Officer in charge*



of \_\_\_\_\_ police station (or having been brought before the Court of \_\_\_\_\_), charged with the offence of \_\_\_\_\_, and required to give security for my 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 herein, I bind myself to forfeit to Government the sum of rupees \_\_\_\_\_.

Dated, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

(Signature)

“I hereby declare myself (or we jointly and severally **declare ourselves** and each of us) **surety** (or sureties) for the above said (name) \_\_\_\_\_ **that he shall attend the Officer in charge of \_\_\_\_\_ police station or the Court** of \_\_\_\_\_ on every day on which any investigation into the charge is made or any trial on such charge is held, that he shall be, and appear, before such officer or Court for the purpose of such investigation or to answer the charge against him (as the case may be), and, **in case of his making default herein, I hereby bind myself (or we, hereby bind ourselves) to forfeit** to Government the sum of rupees \_\_\_\_\_.

Dated, this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_.

(Signature)”

(emphasis supplied)

18. It may be observed that though section 445 of the Cr.P.C. has been replaced by the section 490 of the Bharatiya Nagarik Suraksha Sanhita 2023 (‘BNSS’) with effect from 01.07.2024; and Form 45 is now substituted by Form 47 of the BNSS, such substitution has neither changed the substantive provision nor the contents of the Form as required in law.
19. Learned *Amicus Curiae* has also drawn attention of this court to the following judicial precedents, which shed light on the queries framed



in the present matter. The relevant portions of the precedents cited, are extracted below :

19.1. ***Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) vs. Union of India<sup>2</sup> :***

*“15. But the main reason which motivated the Supreme Court Legal Aid Society to file this petition under Article 32 of the Constitution was the delay in the disposal of cases under the Act involving foreigners. The reliefs claimed included a direction to treat further detention of foreigners, who were languishing in jails as undertrials under the Act for a period exceeding two years, as void or in any case they be released on bail and it was further submitted by counsel that their cases be given priority over others. When the petition came up for admission it was pointed out to counsel that such an invidious distinction between similarly situate undertrials who are citizens of this country and who are foreigners may not be permissible under the Constitution and even if priority is accorded to the cases of foreigners it may have the effect of foreigners being permitted to jump the queue and slide down cases of citizens even if their cases are old and pending since long. Counsel immediately realised that such a distinction if drawn would result in cases of Indian citizens being further delayed at the behest of foreigners, a procedure which may not be consistent with law. He, therefore, rightly sought permission to amend the cause-title and prayer clauses of the petition which was permitted. In substance the petitioner now prays that all undertrials who are in jail for the commission of any offence or offences under the Act for a period exceeding two years on account of the delay in the disposal of cases lodged against them should be forthwith released from jail declaring their further detention to be illegal and void and pending decision of this Court on the said larger issue, they*

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<sup>2</sup> (1994) 6 SCC 731



*should in any case be released on bail. It is indeed true and that is obvious from the plain language of Section 36(1) of the Act [Narcotic Drugs and Psychotropic Substances Act, 1985], that the legislature contemplated the creation of Special Courts to speed up the trial of those prosecuted for the commission of any offence under the Act ... .. Since the number of courts constituted to try offences under the Act were not sufficient and the appointments of Judges to man these courts were delayed, cases piled up and the provision in regard to enlargement on bail being strict the offenders have had to languish in jails for want of trials. As stated earlier Section 37 of the Act makes every offence punishable under the Act cognizable and non-bailable and provides that no person accused of an offence punishable for a term of five years or more shall be released on bail unless (i) the Public Prosecutor has had an opportunity to oppose bail and (ii) if opposed, the court is satisfied that there are reasonable grounds for believing that he is not guilty of the offence and is not likely to indulge in similar activity. On account of the strict language of the said provision very few persons accused of certain offences under the Act could secure bail. **Now to refuse bail on the one hand and to delay trial of cases on the other is clearly unfair and unreasonable and contrary to the spirit of Section 36(1) of the Act, Section 309 of the Code and Articles 14, 19 and 21 of the Constitution.** We are conscious of the statutory provision finding place in Section 37 of the Act prescribing the conditions which have to be satisfied before a person accused of an offence under the Act can be released. .... The offences under the Act are grave and, therefore, we are not inclined to agree with the submission of the learned counsel for the petitioner that we should quash the prosecutions and set free the accused persons whose trials are delayed beyond reasonable time. Alternatively he contended that such accused persons whose trials have been delayed beyond reasonable time and are likely to be further delayed should be released on bail on such terms as this Court considers*



appropriate to impose. This suggestion commends to us ...  
... We, therefore, direct as under:

(i) Where the undertrial is accused of an offence(s) under the Act **prescribing a punishment of imprisonment of five years or less and fine**, such an undertrial shall be released on bail **if he has been in jail for a period which is not less than half the punishment provided for the offence** with which he is charged and where he is charged with more than one offence, the offence **providing the highest punishment. If the offence with which he is charged prescribes the maximum fine, the bail amount shall be 50% of the said amount with two sureties for like amount.** If the maximum fine is not prescribed bail shall be to the satisfaction of the Special Judge concerned **with two sureties for like amount.**

(ii) Where the undertrial accused is charged with an offence(s) under the Act providing for **punishment exceeding five years and fine, such an undertrial shall be released on bail on the term set out in (i) above provided that his bail amount shall in no case be less than Rs 50,000 with two sureties for like amount.**

(iii) Where the undertrial accused is charged with an offence(s) under the Act **punishable with minimum imprisonment of ten years and a minimum fine of Rupees one lakh**, such an undertrial **shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of Rupees one lakh with two sureties for like amount.**

(iv) Where an undertrial accused is charged for the commission of an **offence punishable under Sections 31 and 31-A of the Act, such an undertrial shall not be entitled to be released on bail by virtue of this order.**



*The directives in clauses (i), (ii) and (iii) above shall be subject to the following general conditions:*

*(i) The undertrial accused entitled to be released on bail shall deposit his passport with the learned Judge of the Special Court concerned and if he does not hold a passport he shall file an affidavit to that effect in the form that may be prescribed by the learned Special Judge. In the latter case the learned Special Judge will, if he has reason to doubt the accuracy of the statement, write to the Passport Officer concerned to verify the statement and the Passport Officer shall verify his record and send a reply within three weeks. If he fails to reply within the said time, the learned Special Judge will be entitled to act on the statement of the undertrial accused;*

*(ii) the undertrial accused shall on being released on bail present himself at the police station which has prosecuted him at least once in a month in the case of those covered under clause (i), once in a fortnight in the case of those covered under clause (ii) and once in a week in the case of those covered by clause (iii), unless leave of absence is obtained in advance from the Special Judge concerned;*

*(iii) the benefit of the direction in clauses (ii) and (iii) shall not be available to those accused persons who are, in the opinion of the learned Special Judge, for reasons to be stated in writing, likely to tamper with evidence or influence the prosecution witnesses;*

***(iv) in the case of undertrial accused who are foreigners, the Special Judge shall, besides impounding their passports, insist on a certificate of assurance from the Embassy/High Commission of the country to which the foreigner-accused belongs, that the said accused shall not leave the country and***



**shall appear before the Special Court as and when required;**

(v) **the undertrial accused shall not leave the area in relation to which the Special Court is constituted except with the permission of the learned Special Judge;**

(vi) **the undertrial accused may furnish bail by depositing cash equal to the bail amount;**

(vii) *the Special Judge will be at liberty to cancel bail if any of the above conditions are violated or a case for cancellation of bail is otherwise made out; and*

(viii) *after the release of the undertrial accused pursuant to this order, the cases of those undertrials who have not been released and are in jail will be accorded priority and the Special Court will proceed with them as provided in Section 309 of the Code.*

**“16. We may state that the above are intended to operate as one-time directions for cases in which the accused persons are in jail and their trials are delayed. They are not intended to interfere with the Special Court's power to grant bail under Section 37 of the Act. The Special Court will be free to exercise that power keeping in view the complaint of inordinate delay in the disposal of the pending cases. The Special Court will, notwithstanding the directions, be free to cancel bail if the accused is found to be misusing it and grounds for cancellation of bail exist. Lastly, we grant liberty to apply in case of any difficulty in the implementation of this order.”**

(emphasis supplied)

### 19.2. ***Frank Vitus vs. Narcotics Control Bureau***<sup>3</sup> :

*“2. The appellant is being prosecuted for the offences punishable under Sections 8, 22, 23, and 29 of the Narcotic*

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<sup>3</sup> 2024 SCC OnLine SC 1657



*Drugs and Psychotropic Substances Act, 1985 (short 'NDPS Act'). **The appellant was arrested on 21st May 2014. By the first impugned order dated 31st May 2022, the appellant was ordered to be enlarged on bail subject to various terms and conditions** incorporated in the said order. The terms and conditions incorporated were in terms of the directions issued by this Court in paragraph no. 15 of its decision in the case of Supreme Court Legal Aid Committee Representing Undertrial Prisoners v. Union of India. **The appellant was ordered to be enlarged on bail on his furnishing a bail bond in the sum of Rs. 1,00,000/- with two sureties in the like amount to the satisfaction of the learned Special Judge** under the NDPS.”*

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*“7. **A broader meaning cannot be assigned to the words “interest of justice” in Section 437(3) of Cr. P.C. By borrowing the language used by this Court in the above decisions, we can say that the bail conditions cannot be fanciful, arbitrary or freakish. The object of imposing conditions of bail is to ensure that the accused does not interfere or obstruct the investigation in any manner, remains available for the investigation, does not tamper with or destroy evidence, does not commit any offence, remains regularly present before the Trial Court, and does not create obstacles in the expeditious conclusion of the trial. The Courts have imposed a condition that the accused should cooperate with the investigation when bail is granted before filing the final report or chargesheet. Cooperating with the investigation does not mean that the accused must confess. The conditions incorporated in the order granting bail must be within the four corners of Section 437(3). **The bail conditions must be consistent with the object of imposing conditions.** While imposing bail conditions, the Constitutional rights of an accused, who is ordered to be released on bail, can be curtailed only to the minimum extent required. Even an accused convicted by a competent Court***





*and undergoing a sentence in prison is not deprived of all his rights guaranteed by Article 21 of the Constitution.....”*

(emphasis supplied)

### 19.3. *Ajay Verma vs. Govt. of NCT of Delhi*<sup>4</sup>:

*“2. Mr. Verma’s petition brings to the fore an unfortunate aspect of criminal law. It has been complained by the petitioner that a large number of under-trial prisoners are languishing in jail despite bail orders having been passed in their favour. This continued incarceration is stated to be for various reasons including poverty of the under-trials; financial inability of their relatives to furnish surety bonds or to comply with other conditions which may have been attached to the bail orders including conditions in the nature of requirement of local sureties. Mr. Ajay Verma has stated that imposition of such conditions has been deprecated by the Supreme Court of India in a plethora of judicial pronouncements wherein the court has unfavourably commented on the imposition of such conditions, which may be impossible for these persons to comply with, rendering the order of bail itself nugatory.”*

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*“11. The importance as well as seriousness of the issues flagged by the petitioner were placed before this court by way of a writ petition being W.P.(C) 3465/2010, filed in public interest. In the decision dated 2nd February, 2011 reported at 2011 SCC OnLine Del 543, D.M. Bhalla v. State, following suggestions made before the court which were accepted, have been noted in para 4 which reads thus :*

*“4. However, the purported beneficiary of the bail order is often unable to enjoy the benefit of the same as he/she is unable to meet the terms set out in the bail order and/or is also often unaware of the procedure for relaxation/modification of the bail terms. This inability*

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<sup>4</sup> Order dated 15.12.2017 passed in W.P.(C) 10689/2017 by a Division Bench of this court.



*and some reasons therefore have been mentioned in the Rotary Club case. Therefore, it was proposed that:*

*i. ....*

*ii. ....*

*iii. To facilitate the release on relaxed bail terms or personal bond or acceptance of surety of land, the Gram Pradhan's/SDM's certificate that the prisoner is a permanent resident of the village/subdivision or is the owner of such and such parcel of land would suffice;*

*iv. ....*

*v. ....*

*vi. .... ”*

(emphasis supplied)

20. Arguing on behalf of the petitioners, Mr. Yadav has submitted that since the petitioners are foreigner nationals with no resources or relatives in India, if they are denied the relief prayed-for by way of the present applications, namely of reducing the amount of personal bond and surety, as well as accepting cash in lieu of surety, they would be unable to comply with the bail conditions and would have to remain in judicial custody. Counsel submits, that orders reducing the amount of personal bond/surety bond as well as waiving the requirement of producing a surety are routinely granted by the courts.
21. Learned counsel for the petitioners has also read the judgments of the Supreme Court and of the Division Bench of this court cited above, to argue that they mandate that prisoners should not be deprived of their liberty merely on the ground that they are poor or resource-less or are unable to furnish surety.
22. Mr. Tiwari, learned CGSC appearing on behalf of the FRRO however submits that, as a matter of policy, the Central Government has now suspended the issuance of any X-Category visas to undertrials and



convicts, since they have found that foreign nationals who are undertrials and convicts are misusing such visas to perpetuate their stay in India, even though they have committed serious offences, on the pretext that they are required to face legal proceedings in India; but on being enlarged on bail and being granted special visas, many have been found to indulge in similar offences again.

23. Learned CGSC has also submitted that, especially in case of undertrials or convicts who have entered India without a valid visa or have violated the conditions of their visas by over-staying in the country, it would be against public policy for the Central Government to issue to the same persons any category of visa to continue to stay in the country.
24. It is also the submission of the Central Government, that the court would not be within its jurisdiction while deciding a bail petition, to direct the Central Government to grant a special category visa to the prisoner, since the grant or refusal of visa is a sovereign function vested in the Central Government and no foreign national has a '*right to be granted a visa*' and therefore no foreign national can seek enforcement of any such right through a court order.
25. In the context of the petitioners before this court, learned CGSC has argued that the past conduct of the petitioners, namely of having entered India on specific visas with specific validity, and then having continued to stay in the country long after expiration of the validity of their visas, for more than a decade, disentitles them for grant of any relief in that behalf.



26. Furthermore, it has been argued that since both petitioners have violated the terms of their visas, they have also committed offences under the Foreigners Act, for which they ought to be prosecuted; and therefore, the Central Government opposes the prayers sought by way of the present applications.

### DISCUSSION & CONCLUSIONS

27. Upon a conspectus of the legal landscape, the extant position that emerges is the following :

27.1. In India, it is now the established legal position, affirmed by the Supreme Court in multiple rulings, that once a prisoner is granted bail, they should not be deprived of this right simply for reasons of *poverty* or their *inability* to meet any conditions imposed at the time of granting bail.<sup>5</sup> This principle is based on a core tenet of justice : *viz.* a court should not grant a prisoner freedom with one hand and take it away with the other, by imposing conditions that are impossible for them to meet due to *circumstances beyond their control*;

27.2. Additionally, it also accepted practice that if a prisoner cannot produce surety - namely, a person who would execute a surety bond assuring that the prisoner would be available at the trial or to undergo sentence - this requirement *can be* replaced with a cash deposit or furnishing of other valuable security instead. This interpretation aligns with the understanding of section 445 of the Cr.P.C.;

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<sup>5</sup> *Hussainara Khatoon (IV) v. Home Secy., State of Bihar*, (1980) 1 SCC 98, para 6



- 27.3. Nonetheless, this court maintains that the condition of furnishing surety is not purposeless; and it stems from the fundamental principle of bail, namely of *releasing a prisoner from the court's custody to that of the surety*, whose primary role is to ensure the prisoner's presence for the trial or for undergoing sentence. Thus, the waiver of this requirement cannot be a matter of entitlement, to be granted for the asking;
- 27.4. However, in the interests of individual liberty, the law allows that if a person cannot find a surety due to financial constraints or lack of local contacts (for example, if they are outsiders to the city), they should not be denied the benefit of bail merely because they cannot meet a condition that is beyond their control. This principle is however founded on the *genuine inability* of a prisoner to fulfill a given condition and is not meant to feed-into a *mere excuse* for non-compliance. This court believes that any waiver of a bail condition must not compromise the one most important legal requirement that a prisoner must make himself available for trial and for compliance with a sentence imposed;
- 27.5. The situation becomes more complex when the prisoner is a foreign national. Generally, foreign nationals who run afoul of the law in India may be categorized into three groups. The *first group* includes those who enter India with a valid passport and valid visa but get embroiled in a criminal case during their stay. The *second group* consists of those who enter India with a valid passport and a valid visa but whose passport or visa expires



while they are embroiled in a criminal trial or are serving a sentence. The *third group* involves individuals who enter India without a *valid passport or visa*, commit a crime, and continue to remain in the country, either as undertrials or as convicts;

27.6. In its ruling in the *Supreme Court Legal Aid Committee* case, the Supreme Court clarified that there must be no “*invidious distinction*” in the treatment of Indian nationals and foreign nationals in relation to criminal offenses in India. The Supreme Court also set-down specific criteria for granting bail to foreign nationals accused of offences under the Narcotic Drugs and Psychotropic Substances Act, 1985 (‘NDPS Act’), linking these criteria to the nature of the offense and its corresponding penalties. Notably, each set of conditions outlined by the Supreme Court in that case requires the foreign national to *furnish two sureties* for specified amounts to the satisfaction of the concerned court. It is significant to note that this decision of the Supreme Court arose in the context of the prolonged delays in NDPS Act trials in Maharashtra, where many foreign nationals were held as undertrials without timely completion of their trial proceedings due to insufficient number of Special Judges. While addressing this concern, the Supreme Court had clarified that the directions issued in the *Supreme Court Legal Aid Committee* case were “*intended to operate as one-time directions*” for individuals whose trials were significantly delayed. The Supreme Court further clarified that those



directions were “*not intended to interfere with the Special Court’s power to grant bail under Section 37 of the Act*”<sup>6</sup>;

- 27.7. Furthermore, in its recent judgment in the *Frank Vitus* case, the Supreme Court has distinguished its earlier ruling in *Supreme Court Legal Aid Committee* case and has noted that “*bail conditions cannot be fanciful, arbitrary or freakish*” and are primarily aimed at ensuring that the accused does not disrupt the investigation, destroy evidence, commit further offenses, *or fail to appear before the trial court*, ultimately facilitating an efficient resolution of the trial;
- 27.8. Upon reviewing the Supreme Court’s decisions in the *Supreme Court Legal Aid Committee* and *Frank Vitus* cases, it is clear that while *bail conditions must be achievable by the prisoner*, the court must still enforce those requirements that are necessary to *ensure the availability of the prisoner for trial and for compliance with any sentence imposed*, maintaining the integrity of the judicial process; and
- 27.9. After reviewing the judicial context, this court believes that the conditions imposed for grant of bail or suspension of sentence must pass muster on the anvil of the following criteria: *First*, the conditions must be *necessary* to ensure that the *accused remains available* for trial. *Second*, the conditions must be *necessary to ensure that the integrity* of the judicial process is preserved. *Third*, the conditions *must not be impossible* for the

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<sup>6</sup> *Supreme Court Legal Aid Committee* case, para 16



accused to fulfill. Only then the conditions imposed meet the aforesaid three-fold test, would they be proportionate, fair and correct balance between the right of a prisoner to be able to avail their liberty and for the State to enforce the law.

28. In light of the foregoing, the queries framed above are answered as follows :

28.1. It *is permissible* for a court to completely dispense with the requirement that an undertrial/convict must furnish a surety bond executed by a third person to avail bail or suspension of sentence;

28.2. Waiver of the requirement of furnishing a surety *or* substituting surety with a cash deposit *should not be granted for the asking*; and where granted, such waiver or substitution should be guarded, to ensure that at least the fundamental requirement that an undertrial/convict must remain available to face trial or to undergo the punishment awarded, is not jeopardised. Whether or not the requirement for furnishing surety is to be waived or substituted in a given case, must be tested on the anvil of the three essential tests referred to above; and if after applying such tests, the court is satisfied that the requirement of furnishing surety can be waived or substituted without compromising the judicial process, a court would be well-advised to do so. It must be reiterated however, that the requirement of furnishing surety should be *the norm*, and dispensing with that requirement, *the exception*, to be made





*only* where a prisoner suffers from *genuine inability* to furnish surety;

28.3. Waiver or substitution of surety should be even more guarded where the prisoner is a foreign national, with the obvious heightened level of flight risk;

28.4. Furthermore, substitution of a surety with a cash deposit is an absolute exception, since the intent and purpose of the court in asking for a surety is simply not served by accepting a cash deposit instead. To say that if an accused/convict flees while on bail, the worst that can be done to a surety is to encash the surety bond is not at all a full answer, since in the opinion of this court, the encashment of a surety bond is the *residual obligation* of the surety, the *primary obligation* being to produce the accused/convict when asked by the court. All judgments which hold that the requirement of a surety can be waived, come from the standpoint that poverty or resourcelessness must not stand in the way of a person's liberty. The *purpose of justice is not served, by merely 'encashing' a prisoner's flight-risk*; and merely accepting cash in lieu of surety would not uphold the integrity of the judicial process; and

28.5. In the opinion of this court, before a court waives the requirement of furnishing a surety or substitutes it with a cash deposit, it is necessary to duly consider the facts and circumstances of a given case, and if necessary to seek



appropriate verification, to be satisfied that the prisoner suffers from a genuine inability to furnish surety.

29. In the present case, the material on record indicates that petitioner Stephen entered India in *August 2011* on a Nigerian passport and Indian medical visa. The Indian medical visa was valid upto *October 2011*. His Nigerian passport expired in *May 2016*. Thereafter, petitioner Stephen has overstayed in India for the last about 13 years, without a valid visa. Apart from that, petitioner Stephen is also alleged to have submitted incorrect or forged visa and passport details to hotel owners, as filed by the latter on the portal of the Bureau of Immigration, to extend his stay in India. A Look-Out Circular had also been opened by the FRRO against him. It must also be noted that in the course of the present proceedings, this court had explored the possibility of modifying the bail conditions for petitioner Stephen by requiring Ms. Fatima Umoru, who is stated to be petitioner Stephen's wife and is presently residing at the address furnished by the petitioner, to deposit her own passport or share her bank statements to ascertain if she was really not in a position to stand surety for him. Ms. Umoru however had declined to do either of those things. Accordingly, nobody, including the petitioner's wife *is willing to stand surety for him*.
30. To be sure, it was not the intention of this court to bind the wife or to coerce her to stand surety for petitioner Stephen; but the purpose of making those inquiries was for this court to satisfy itself if petitioner Stephen deserves the confidence of this court to enlarge him on bail by dispensing with the requirement of furnishing a surety bond. In the



circumstances, this court entertains serious doubt as to whether petitioner Stephen would make himself available for trial.

31. Insofar as petitioner Enyi is concerned, the material on record indicates that Enyi entered India *in or about April 2012* on a Nigerian passport and a valid visa. The visa was issued on 17.04.2012 on a passport issued on 27.01.2012. The visa expired on 16.10.2012 and the passport also expired on 26.01.2017. The petitioner has been staying in India without a valid visa after 16.10.2012, the date on which his visa expired.
32. Both petitioners are foreign nationals who have been granted bail *with specified conditions*. They are both required to stand trial in India for serious offences under the NDPS Act. Both claim that they have no established social ties in India.
33. There is however no material to persuade this court that either of the petitioners is facing serious financial hardship, or any genuine inability to produce surety for any justifiable reason.
34. As previously observed, though the law does not prohibit release of a prisoner only on a personal bond, the primary purpose of requiring a surety is to ensure that the prisoner appears at the trial or serves their sentence. *The requirement for a surety can only be waived if circumstances so warrant.* This court believes, that substituting the need for a surety with a cash deposit in the present matters is unacceptable.
35. As recorded above, the court is also informed by the FRRO that until 2020, the Central Government had a policy of issuing X-Category visas for undertrials and convicts, permitting them to remain in India



to face criminal proceedings or to pursue criminal appeals. However, that policy has now been suspended, since it is found that the issuance of these special category visas only serves to prolong the unauthorised stay of such individuals in India, in violation of the provisions of the Foreigners Act.

36. After carefully considering the facts and circumstances concerning the two petitioners before it, this court is of the view that there is no basis or justification to allow their prayers for waiver of surety, or for accepting cash in lieu of surety, which prayers are accordingly *rejected*.
37. However, as a measure of abundant accommodation, this court considers it sufficient to modify the petitioners' bail conditions to the following limited extent :
  - 37.1. **Petitioner Stephen** is permitted to furnish a personal bond with 01 surety in the sum of Rs. 40,000/- (instead of 02 sureties in the sum of Rs. 1,00,000/-); and
  - 37.2. **Petitioner Enyi** is permitted to furnish a personal bond with 01 surety in the sum of Rs. 25,000/- (instead of 01 surety in the sum of Rs. 1,00,000/-).
38. It is made clear that the petitioners would be required to comply with all other conditions imposed *vide* order dated 20.03.2024 passed in BAIL APPL. No. 4056/2023; and orders dated 26.09.2023 and 09.02.2024 passed in BAIL APPL. No. 632/2022.
39. The present applications are disposed-of, in the above terms.
40. Other pending applications, if any, also stand disposed-of.



41. This court would clarify that the observations made in this judgment in relation to petitioner Stephen and petitioner Enyi are only for the purposes of deciding the prayers made in the applications under consideration; and are not to be construed as observations on the merits of their cases pending trial.
42. Before closing the judgment, this court expresses its appreciation for the assistance rendered by Ms. Rebecca M. John, learned senior counsel as *Amicus Curiae* in this matter.

**BAIL APPLN. 4056/2023**

43. The bail petition already stood disposed-of *vide* order dated 20.03.2024.

**BAIL APPLN. 632/2022**

44. The bail petition already stood disposed-of *vide* order dated 26.09.2023.

**ANUP JAIRAM BHAMBHANI, J.**

**OCTOBER 18, 2024**

HJ/V.Rawat