



Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION [STAMP] NO.7816 OF 2024

Ms. Cong Ling]	
Chinese National,]	
Aged about 38 years,]	
R/o Shan Dong Sheng,]	
Wei Hai Shi, Send Eng Zhi,]	
Goig Jie, 14 Hao Lou]	
Presently in India]	
Having address at]	
Room No.4, 2 nd Floor,]	
Mutton Wala Chawl,]	
Juhu Koliwada, Santacruz West,]	
Mumbai – 400 004.]	Petitioner

Vs.

1. FRRO]	
Bureau of Immigration]	
Annex Bldg., 3 rd Floor,]	
Badruddin Tayyabji Marg,]	
Behind St. Xavier College,]	
CST, Mumbai – 400 001.]	
2. Union of India, through]	
Assistant Commissioner of]	
Customs, Prosecution Cell,]	
CSMI Airport, Mumbai]	
3. State of Maharashtra]	Respondents

SHAILAJA
SHRIKANT
HALKUDE

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Mr. Anand Sachwani a/w Mr. R.R. Shah, for Petitioner.

Mr. D.P. Singh, for Respondent No.1 – FRRO.

Ms. Anuradha Mane, Special P.P, for Respondent No.2 - Union of India.

Ms. P.P. Bhosale, A.P.P, for Respondent No.3 – State.

Mr. Vaman Pinge, Superintendent of Customs present.

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CORAM : PRITHVIRAJ K. CHAVAN, J.
RESERVED ON : 1st July, 2024.
PRONOUNCED ON: 11th July, 2024.

ORDER:

1. Rule.
2. Rule made returnable forthwith.
3. Learned Counsel for respondent Nos.1 and 2 waive service.
4. With the consent of all the parties, petition is taken up for final disposal at the stage of admission.

5. This is a pathetic plight of an unfortunate Chinese woman who arrived in India by Air China Airlines Flight No. CA 947 on 12th December, 2019 from Beijing. The flight was to be landed at Delhi International Airport, however, it was diverted to *Chatrapati Shivaji Maharaj* Terminus Airport, *Mumbai* (for short “CSMI Airport”) due to bad weather. Upon arrival at Terminal-2, CSMI Airport, *Mumbai*, on specific information, the petitioner was intercepted near Exit Gate of arrival after clearing from Green Channel. She was carrying one black coloured “Samsonite” brand trolley bag as her hand baggage and blue coloured Backpack. She produced counterfoil of Boarding Ticket bearing No. ETKT 9993394394151/1269 of Seat No.43 H showing journey from Beijing to New Delhi. Upon inquiry, she informed the Customs Officials that her flight was diverted and landed at Mumbai due to bad weather at New Delhi. She, *inter alia*, informed the customs officials that diverted flight was to leave back to Delhi after long gap and, therefore, she decided to clear immigration and customs in Mumbai and head to Delhi by another domestic flight to save time.

6. Air Intelligence Unit, Customs, CSMI Airport, Mumbai in the presence of *pancha* witnesses inquired with her whether she was

carrying any prohibited goods, contraband or gold in the baggage or on her person. Upon her search and screening of her baggage, the officials suspected some thing indicating presence of heavy metal in her cabin baggage. Subsequently, it revealed ten yellow metal bars of foreign marking weighing 1 kg each purported to be gold in her baggage. It was seized by following due procedure. Those ten metal bars weighing one k.g each were found to be 24 carat gold weighing about 10,000 grams valued at Rs.3,38,83,200/-.

7. After completing the formalities and recording her statement under Section 108 of the Customs Act, 1962, she was booked under Sections 135 (1) (a) and 135 (1) (b) punishable under Section 135 (1) (i) of the Customs Act, 1962 for procurement and smuggling of gold into India. She was arrested and remanded to judicial custody.

8. The learned Additional Chief Metropolitan Magistrate, 19th Court, Esplanade, Mumbai after recording her plea and having examined the prosecution witnesses, by a judgment and order dated 10th October, 2023 acquitted the petitioner of the offence with which she was charged. It was an acquittal on merits. She was, *inter alia*, directed to furnish P.R. bond in the sum of Rs.50,000/- with

cash bail in the like amount under Section 437-A of the Code of Criminal Procedure.

9. I do not wish to delve deep into the merits of the case, nevertheless, certain pertinent observations made by the learned Additional Chief Metropolitan Magistrate, in the context of the petition, are required to be considered as it would reflect the manner in which investigation was carried out by the respondent No.2.

10. In paragraphs 11, 13 and 48 of the judgment, the learned CMM observed thus;

“11. She had further flight from Delhi to Hongkong on the same day at about 2300 hours. On this background the evidence of prosecution is required to be scrutinized”.

13. It is also required to note that she was not travelling to Mumbai so there was no question of any intelligence received to them about her. Moreover, if any intelligence was received it was to the customs officer at Delhi and they may had given it to Mumbai office. But this is not the case of complainant”.

30. She was asked by putting question no. 10 why she was carrying seized gold into India. She replied that, she brought it to take to Honkong for which she already booked ticket. She is taking it to

Honkong for preparation of jewellery. Therefore if these questions and answers are considered it can be said that, her intention to brought gold into India was not cleared. For purchasing medicine no such huge amount of sale proceed of 10 kg gold is required. On the statement itself the time of its recording is mentioned as 18:15 hours on 13.12.2019. It is not shown whether during recording of statement every question was explained to her and then her answer was translated in English and then that was recorded in the statement. Moreover, in the last page of statement in the last para translating of statement is mentioned and thereafter after signatures again endorsement in the handwriting of translator Lew is made regarding explaining the statement in Chinese.

48. When it is come on record that the accused had not cleared herself from immigration and crossed green channel when the recovery of gold was effected she has not contravened the provisions of Customs Act in respect of seized gold and committed offence under section 135 (1) (a) in respect of non-declaration and evading duty chargeable on seized gold, 135 (1) (b) for acquired possession of said gold which was liable to confiscation punishable under section 135 (1) (i) and section 132 of the Customs Act, 1962 for making any declaration which was false in any material particular. In respect of mens-rea and burden of proof when the seizure itself is not proved no question of application of provisions of these sections. Therefore the prosecution failed to prove by cogent, corroborating and reliable evidence beyond reasonable doubt that accused contravened the provisions of Customs Act in respect of seized gold and committed offence under it is alleged. Hence, from the above discussion, I answer point nos. 1 to 3

in negative and in answer to point no.4, I pass the following order:”

: **ORDER** :

i. Accused Ms. Cong Ling is hereby acquitted of the offence u/sec 135 (1) (a), 135 (1) (b) punishable under section 135 (1) (i) and section 132 of the Customs Act, 1962 vide section 248 (1) of the Code of Criminal Procedure, 1973.

ii. The bail and bonds of accused during trial stand cancelled.

iii. Accused shall furnish a Personal Bond of Rs.50,000/- with Cash Bail in the like amount under section 437-A of the Code of Criminal Procedure, 1973 binding her to appear before the Higher Court as and when such court issues notice in respect of any appeal or petition filed against the judgment or for the period of six months whichever is earlier.”

11. Aggrieved with the judgment of acquittal, respondent No.2 – Union of India through the Assistant Commissioner of Customs, Prosecution Cell, CSMI Airport, *Mumbai* preferred a Criminal Appeal bearing No.839 of 2023 before the Additional Sessions Judge, Mumbai.

12. Learned Additional Sessions Judge by a judgment and order dated 2nd February, 2024 dismissed the appeal preferred by the Customs Department.

13. The petitioner, thereafter, moved a Miscellaneous Application in the Court of Additional Chief Metropolitan Magistrate seeking direction to the respondent No.1 - FRRO to issue Exit Permit to facilitate her to travel back to China. The application has been supported with an affidavit of the petitioner.

14. The learned Additional Chief Metropolitan Magistrate in terms of order dated 7th March, 2024 directed the FRRO officials Mumbai to issue Exit Permit to the petitioner to travel back to her country in accordance with the provisions of law.

15. I heard Mr. Sachwani, learned Counsel for the petitioner and Ms. Anuradha Mane, Special Public Prosecutor who incidentally appeared for respondent No.2 right from the Trial Court, lower Appellate Court and now in this Court.

16. The petitioner was arrested on 13th December, 2019. My attention is invited by the learned Counsel for the petitioner that despite acquittal of the petitioner by the Court of Additional Chief Metropolitan Magistrate of all the charges and an appeal being dismissed by the lower Appellate Court confirming the judgment

and order of acquittal on 2nd February, 2024, respondent No.2 by grossly abusing it's powers and with an ulterior motive is creating hurdle in getting Exit Permit from the respondent No.1 without justification.

17. Learned Counsel for the petitioner would argue that the petitioner had undergone 59 days of custody who was then released on 10th February, 2020. She is a mother of two daughters to whom she has not seen since 2019. He would also argue that the petitioner survived dangerous period of COVID-19 pandemic in the absence of any support from family and relatives.

18. According to the learned Counsel for the petitioner, act of respondent No.2 is gross in nature which shows utter disrespect for law. It's conduct is *mala fide* and also reprehensible.

19. The only so called reason to oppose Exit Permit to the petitioner by the respondent No.2 is that respondent No.2 is under process of challenging the order passed by the learned Additional Sessions Judge in Criminal Appeal No.839 of 2023 before this Court.

20. Admittedly, till date, respondent No.2 has neither challenged the said judgment dated 2nd February, 2024 nor anything is produced on record to show that, in fact, respondent No.2 intends to challenge the impugned judgment and order. Learned Counsel for the petitioner submits that the period of limitation has also expired.

21. Mr. Singh, learned Counsel appearing for respondent No.1 – FRRO, on instructions, made a statement across the bar that the FRRO has no objection to issue Exit Permit to the petitioner, however, in view of the LOC issued by the Customs Department, they are unable to issue the same.

22. Ms. Anuradha Mane, Special P.P appearing for respondent No.2 would argue that they are under process of challenging the impugned judgment and order of acquittal rendered by the learned Additional Chief Metropolitan Magistrate and confirmed by the learned Additional Sessions Judge by dismissing it's Appeal on 2nd February, 2024. She, therefore, strongly objects issuing Exit Permit to the petitioner.

23. It is pertinent to note some vital observations made by the learned Additional Sessions Judge while dismissing the appeal of the respondent No.2 on 2nd February, 2024. While questioning the very maintainability of the appeal, it has been observed that the appeal was not at all maintainable without prior approval of the Chief Commissioner/Principal Chief Commissioner or DGRI/Principal DGRI.

24. Learned Counsel for the petitioner has tendered a Circular No.27/2015-Cus dated 23rd October, 2015 issued by the Government of India, Ministry of Finance (Department of Revenue), Central Board of Excise and Customs, New Delhi. Clause 10 (2) of the said Circular mandates prior approval of the Chief Commissioner/Principal Chief Commissioner or DGRI or Principal DGRI prior to filing an appeal in case of acquittal by the Court. The said clause of the Circular mandates that the appeal needs to be filed under the provisions of Section 378 (4) of the Cr.P.C. It, *inter alia*, requires prior approval of the Chief Commissioner/Principal Chief Commissioner or DGRI or Principal DGRI as already stated. It was incumbent upon the respondent No.2 – Customs Department to seek prior approval which they did not and, therefore, learned

Additional Sessions Judge has rightly observed that the appeal is not maintainable on that count itself.

25. It appears that the Special P.P. Ms. Anuradha Mane who appeared before the lower Appellate Court took a stand that the said Circular is not binding on the Court. It is surprising as to how the Special P.P could make such a statement? More so, when there is a decision of the Supreme Court in case of **Paper Products Ltd Vs. Commissioner of Central Excise**,¹ The learned Additional Sessions Judge has, therefore, rightly placed reliance on the said decision by referring para 5 which is extracted below;

“5. It is clear from the above said pronouncements of this Court that, apart from the fact that the Circulars issued by the Board are binding on the Department, the Department is precluded from challenging the correctness of the said Circulars even on the ground of the same being inconsistent with the statutory provision. The ratio of the judgment of this Court further precludes the right of the Department to file an appeal against the correctness of the binding nature of the Circulars. Therefore, it is clear that so far as the Department is concerned, whatever action it has to take, the same will have to be consistent with the Circular which is in force at the relevant point of time”.

(emphasis supplied)

¹ 1999 (112) E.L.T 765 (S.C.)

26. Circulars issued by the board are binding on the Customs Department and the Department is precluded from challenging its correctness even on the ground if the same are inconsistent with the statutory provisions is the ratio decidendi.

27. As a matter of fact, respondent No.2 ought to have filed an appeal against acquittal before this Court in view of Section 378 (4) of the Cr. P.C apart from the Circular which requires prior approval which is a *sine qua non* for filing an appeal. The learned Additional Sessions Judge has, therefore, rightly observed that he had no jurisdiction to entertain an appeal against acquittal.

28. No sane man will accept the argument of the Special P.P that the respondent No.2 intends to challenge the order of acquittal rendered by the Additional Sessions Judge before this Court in the teeth of the Circular dated 23rd October, 2015 referred hereinabove and the decision in case of **Paper Products Limited Vs. Commissioner of Central Excise** (supra).

29. By a communication dated 18th March, 2024, respondent No.1 - FRRO, Mumbai informed the Joint Commissioner of

Customs, AIU, CSMI Airport, *Mumbai* that the petitioner has approached its office requesting for Exit Permit. It was communicated to the Joint Commissioner of Customs that the petitioner is LOC subject originated by the Joint Commissioner of Customs, *Mumbai* vide Reference No. AIU/GEN/24/2016 (ADMN) dated 23.09.2016 & 23.09.2020 with action to be taken as “Prevent subject from leaving India and inform originator”. FRRO Authority, *inter alia*, informed the Joint Commissioner of Customs that in view of the directions of the Additional Chief Metropolitan Magistrate, 19th Court Esplanade, *Mumbai* vide an order dated 7th March, 2024, Exit Permit was required to be issued to the petitioner. However, since she is a LOC subject, FRRO Authority requested the Customs Department to intimate its objection, if any, within five days.

30. In response, Additional Commissioner, Customs, Mumbai vide communication dated 22nd March, 2024 informed the FRRO, Bureau of Immigration, Mumbai that NOC cannot be issued as the Department is in the process of challenging the order of the Sessions Court passed in Criminal Appeal No.839 of 2023 before the High Court. As already stated, till date, the Customs

Department has not challenged the order. Even otherwise, that could not be a hurdle in issuing Exit Permit to the petitioner as neither any case is pending against her nor has she breached any directions issued by the Courts below. The Customs Department should have exhibited some humanitarian approach and sensitivity in light of the fact that every foreign national has fundamental right of liberty as per Article 21 of the Constitution. Even otherwise, it is not the argument of the Special P.P that interference in the acquittal is essential as it was unsustainable or perverse. It is not even the case of the Customs Department that there has been miscarriage of justice.

31. It seems that Ms. Anuradha Mane, Special PP made an unsuccessful attempt to argue before the lower Appellate Court that there was a prior approval by the Commissioner in the form of noting but the same has not been filed before the Court.

32. It is apparent from the record that conduct of the respondent No.2 is not only wrongful and vindictive but it amounts to gross abuse of its powers in restricting the petitioner to leave for her country without any justification. It has been rightly argued by the

learned Counsel for the petitioner that conduct of the respondent No.2 is reprehensible and unbecoming of a responsible officer/s of the Customs Department. The prosecution does not say that the petitioner had violated conditions of VISA.

33. The petitioner, who is a lady, having left her country way back in 2019 with two children behind should not have been troubled and harassed by the Customs Department as it is apparent from the record. The way and manner in which a foreign national is being treated by the respondent No.2 would reflect in the bilateral relations between two countries. This is nothing but victimizing the petitioner without any reason. This is a fit case in which this Court would invoke its powers under Section 482 of the Cr. P.C for doing complete justice. The power under Section 482 of the Cr. P.C is to be exercised *ex debito justitiae* to prevent abuse of Court. It should not, however, be exercised to stifle legitimate prosecution. The power has to be exercised very sparingly and with circumspection, that too, in the rarest of rare cases. The whole purpose is to advance justice and not to frustrate it. While expressing conduct of the respondent No.2, this Court is not passing any disparaging remarks on the person/s concerned or the

Authorities. Albeit, conduct of the respondent No.2 is apparent from the record. There is sufficient evidence on record bearing on the conduct of the respondent No.2 justifying some remarks which is necessary for the decision of the case as an integral part thereof to animadvert that conduct.

34. Article 21 of the Constitution of India provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The word “person” in Article 21 is wide enough to cover not only citizens of this country but also foreigners who come to this country. The State has an obligation to protect the liberty of such foreigners who come to this country and ensure that their liberty is not deprived except in accordance with the procedure established by law.

35. Notwithstanding the said guaranty under Article 21 of the Constitution, in this case, respondent No.2 – Customs Department acted in a most brazen and perfunctory manner by preferring an appeal before the Additional Sessions Judge despite knowing the fact that in view of the aforesaid Circular as well as Section 378 (4) of the Cr.P.C, appeal would lie before this Court, especially, in light

of the fact that several appeals in identical matters have been preferred by the respondent No.2 before this Court.

36. Our Constitution commands that foreign nationals coming here shall not be discriminated. They will have to be treated equally before the law and their right to live will have to be honoured and protected. They shall not be prosecuted or convicted except for violation of any law in force in India. This is guaranteed under Article 20 of the Constitution.

37. In case of **Anwar Vs. State of Jammu & Kashmir**², it was held that the rights under Articles 20, 21 and 22 are available not only to “citizens” but also to persons which would include “non-citizens”. Article 20 guarantees right to protection in respect of conviction for offences. Article 21 guarantees right to life and personal liberty while Article 22 guarantees right to protection against arbitrary arrest and detention. These are wholly in consonance with Article 3, Article 7 and Article 9 of the Universal Declaration of Human Rights, 1948.

² (1971) 3 SCC 104

38. It would be advantageous to quote para 32, which reads thus;

“32. The word “LIFE” has also been used prominently in the Universal Declaration of Human Rights, 1948. (See Article 3 quoted above.) The fundamental rights under the Constitution are almost in consonance with the rights contained in the Universal Declaration of Human Rights as also the Declaration and the Covenants of Civil and Political Rights and the Covenants of Economic, social and Cultural Rights, to which India is a party having ratified them, as set out by this Court in Kubic Darusz v. Union of India, (1990) 1 SCC 568. That being so, since “LIFE” is also recognised as a basic human right in the Universal Declaration of Human Rights, 1948, it has to have the same meaning and interpretation as has been placed on that word by this Court in its various decisions relating to Article 21 of the Constitution. The meaning of the word “life” cannot be narrowed down. According to the tenor of the language used in Article 21, it will be available not only to every citizen of this country, but also to a “person” who may not be a citizen of the country”.

39. The petitioner herein, who is a non-citizen is entitled to get Exit Permit. Respondent No.2, apart from the fact that the petitioner who has already been given a clean cheat by two Courts below and there being no prospects or possibility of reversing the

decisions, should have viewed the matter in a humanitarian angle with sensitivity in light of the fact that apart from her right to life and liberty, she had already spent more than five years in India with two daughters left back in her country.

40. In a recent decision, in case of **Edwin Andrew Minihan Vs. Union of India**,³ Kerala High Court on identical facts directed FRRO to take necessary steps to allow the petitioner to travel to Ireland in light of the fact that the petitioner therein has been acquitted by at least two Courts below. Merely because, 4th respondent intends to challenge the judgment before the Supreme Court through a Special Leave Petition would not be a hurdle in permitting the petitioner to return back to country. The third respondent was directed to take necessary steps to allow the petitioner to travel to Ireland as per law and subject to all other statutory and imperative requirements being satisfied, without any avoidable delay, but not later than two weeks from the date of a copy of this judgment.

41. For the foregoing reasons, apart from the right of the petitioner to get Exit Permit within two weeks from the date of

³ AIROLINE 2024 KER 38

passing of this order, she needs to be adequately compensated for the mental agony, trauma and sufferings undergone by her due to the conduct of the respondent No.2. Respondent No.2 – Union of India shall pay an amount of Rs.10,00,000/- to the petitioner.

42. Having taken into consideration the totality of the peculiar facts of this case and the circumstances, the Petition succeeds and, therefore, following order is expedient.

: ORDER :

(a) Petition is allowed.

(b) Respondent No.2 shall issue no objection certificate to respondent No.1 for issuing Exit Permit to the petitioner within one week from the date of passing of this order.

(c) Respondent No.2 shall pay compensation of Rs.10,00,000/- (Rs. Ten Lakh only) to the petitioner before her departure from this country.

(d) The amount of compensation shall be recovered from the salary of the concerned official responsible for filing appeal before the wrong forum and not challenging the same before this Court till date.

43. Rule is made absolute in the aforesaid terms.

44. All the concerned to act upon an authenticated copy of this order.

[PRITHVIRAJ K. CHAVAN, J.]