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Neutral Citation No. - 2024:AHC:122307

Court No. - 65**Case :- CRIMINAL MISC. BAIL APPLICATION No. - 59258 of 2022****Applicant :- Ryen @ Ren Chao****Opposite Party :- State of U.P.****Counsel for Applicant :- Abhas Sharma, Pradeep Kumar Mishra, Rajesh Kumar Sharma****Counsel for Opposite Party :- G.A.**

1. The judgment is being structured in the following conceptual framework to facilitate the discussion:

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V	Flight Risk and Foreign Nationals :	A	System of sureties
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I. Introduction :

I-A. The accused:

2. The accused in the instant case is a Chinese national who is facing trial in Case Crime No. 408 of 2022 at Police Station Beta-2, District- Gautam Buddha Nagar under Sections 419, 420, 467, 468, 471, 120B, 201 IPC and Section 14(A), 14(B), 14(C), 14 of Foreigners Act and Section 66D IT Act. The applicant is in jail since 09.07.2022.

3. This is the first bail application filed by the aforesaid Chinese national before this Court. The bail application of the applicant was rejected by the trial court on 07.11.2022.

I-B. FIR:

4. The gravamen of the prosecution case as set out in the FIR is that reports of tampering of E-FRRO reports and fraudulent Visa extensions came to the notice of police authorities. Raids conducted at Taj Hotel led to recovery of various items including a BMW car, Aadhar Cards, ATM Cards, laptops, mobile phones and passports. Subsequent raids during the investigations at a flat in J.P. Greens yielded incriminating articles namely fake Aadhar Cards and Passports. A Chinese national by the name of XUE-FEI @ Koei was arrested and questioned. XUE-FEI @ Koei had forged his identity papers with the collaboration of his business associate Ravi Kumar Natwarlal Thakkar. Police interrogation of Pete Khrienuo

@ Pette disclosed that she had assisted XUE-FEI @ Koei and two other Chinese nationals to illegally obtain false IDs' like voter card, Aadhar card from Nagaland. She had facilitated the illegal entry of two Chinese nationals into the country and also travelled with them and Xue-Fei @ Koei to various places in India. She had purchased Indian sim cards on her ID.

I-C. Investigations:

5. The applicant was not named in the FIR. However during the course of investigations, the police authorities unearthed several incriminatory evidences against the applicant which according to them establish the culpability of the applicant in various offences.

II. Submissions of learned counsels for the parties:

6. Shri Vinay Saran, learned Senior Counsel assisted by Shri Pradeep Kumar Mishra, learned counsel and Shri Abhishek Srivastava, learned counsel for the applicant made the following submissions.

- i. The applicant was a simple workman who extracted chips in a unit set up by a company called HTZN.
- ii. No incriminating article has been recovered from the applicant. The stamp pad in the name of the applicant recovered from the factory premises in the name of the applicant at the pointing out of the co-accused was not used for any fraudulent transaction. Travel tickets which were recovered from the applicant do not connect the applicant with any offence.

iii. The applicant was nominated in the statement of co-accused Ashu Kumar and Pradeep Kumar while in custody of police authorities. The only offence against the applicant (without prejudice to his defence) is that of overstaying the visa which may constitute an offence under Section 14 of the Foreigners Act, 1946. The offence alleged against the applicant are petty in nature.

7. Shri Manish Goyal, learned Additional Advocate General assisted by Shri Rupak Chaubey, learned A.G.A. for the State made the following submissions:

i. The statement of the co-accused made before the police authorities while in the custody of the latter can be relied upon against the applicant in bail application in appropriate cases especially when other credible evidences corroborate the same.

ii. Further credible evidence has also been unearthed against the applicant which directly connects him to various offences for which he is being tried.

iii. The applicant was in-charge of day to day functioning and was in the higher management of the company.

iv. The applicant tried to falsely pose as a workman only to ensure that his illegal activities go undetected. The applicant is a part of a larger criminal organization and an international crime network which has been committing crimes of a serious nature in India. There is no legal documentation of the business of HTZN and it is connected with other fake companies.

v. Various evidences like statements of persons connected with the company, recovered articles, CDRs, documentary evidences and fraudulent transactions clearly point to the guilt of the applicant.

vi. The applicant entered India as an employee of another company who started working for HTZN without any permission.

vii. The applicant remained in India after overstaying his visa only in furtherance of his criminal activities and interests.

viii. The applicant has no regard for Indian laws and is likely to flee the country if enlarged on bail. There are no prospects of getting the applicant extradited or procuring his presence in court if he leaves the territorial boundaries of India.

ix. The offences are grave in nature and pose a threat to national security and the national economy.

8. Shri S.P. Singh, learned Additional Solicitor General of India assisted by Shri R.P.S. Chauhan, learned Central Government Counsel submits that the Government of India does not have treaty arrangement or legal framework with the Peoples Republic of China and in case the applicant escapes from India there is little or no possibility of ensuring his presence in India to face the trial.

III. Rights of Foreign Nationals

9. In today's age of a globalized world order, digital technologies and integrated economies have wrought far reaching changes in human societies and have also brought complex legal challenges in their wake. The character and nature of crime is undergoing a change. Some of these offences impact the national economy or national security in a significant manner. The response of the Indian laws and courts to the emerging legal challenges will be critical.

III-A. Constitutional Rights/Fundamental Rights

10. The Constitution and the Indian system of laws bound India into an indissoluble union and gave irrevocable guarantees of fundamental rights and justice to all citizens. Ancient Indian values of Vasudhaive Kutumbakam are embodied in constitutional law pronouncements of higher courts in modern India. Foreign nationals in India also cherish the ample fruits of liberties in this land. Life and some liberties of such foreign nationals are protected in many ways under the Indian laws.

11. The discussion can profit by reference to authorities in point.

12. While determining the question whether the guarantee of fundamental rights vested in Indian citizens by the Constitution applies to foreign nationals and extent of the protection, the Supreme Court in **Hans**

Muller of Nurenburg Vs. Superintendent, Presidency Jail, Calcutta and others¹ set forth the law as under:

“33. Article 19 of the Constitution confers certain fundamental rights of freedom on the citizens of India, among them, the right “to move freely throughout the territory of India” and “to reside and settle in any part of India”, subject only to laws that impose reasonable restrictions on the exercise of those rights in the interests of the general public or for the protection of the interests of any Scheduled Tribe. No corresponding rights are given to foreigners. All that is guaranteed to them is protection to life and liberty in accordance with the laws of the land. This is conferred by Article 21 which is in the following terms:

“No person shall be deprived of his life or personal liberty except according to procedure established by law”.

(Also See: Judgment of Delhi High Court in **Michal Benson Nwaogu @ Chuna Benson Vs. State²**)

III-B. Right to Fair Trial

13. The defining attributes of criminal trials in India are fairness, transparency, legal aid and endeavours to conclude the same expeditiously.

14. Foreign nationals being away from their home land undoubtedly face certain hardships while facing criminal trial in India. However, constitutional law in India has to evolve in conformity with its earlier precedents to mitigate such hardships and exclude all possibilities of unfairness or miscarriage of justice in a criminal trial. A fair procedure for foreign nationals facing criminal trials is integral to the realization of the guarantees of life and liberty under Article 21 of the Constitution of India assured to such foreign nationals. Article 21 of the Constitution of India insofar as it relates to fair and just

1 1955 SCC OnLine SC 35

2 2024 SCC OnLine Del 665

procedure in criminal trials does not distinguish between Indian citizens and foreign nationals.

15. Right to legal aid and Right to speedy trial were exalted as fundamental rights of citizens of India flowing from Article 21 of the Constitution of India by the Supreme Court in **Hussainara Khatoon and others (I) vs. Home Secretary, State of Bihar**³ and **A.R.Antulay vs R.S.Nayak and Anr.**⁴, **Sheela Barse and ors. vs Union of India and ors.**⁵, **P. Rama Chandra Rao vs State of Karnataka**⁶, respectively.

16. The foreign nationals including the applicant facing trials in India are vested with the following rights which ensure procedural fairness and transparency. These rights are concomitant rights of Article 21 of the Constitution vested in foreign nationals in India.

A. Right to a translator to translate the court proceedings in their native language.

B. Right to legal aid in case the foreign national is bereft of or is desirous of obtaining legal aid.

C. Foreign nationals have a right to communicate with their families as per the arrangements made by the jail authorities/appropriate Government.

D. Right to counsellor/embassy access.

E. Right to a speedy trial.

3 (1980) 1 SCC 81

4 (1992) 1 SCC 225

5 (1986) 3 SCC 632

6 (2002) 4 SCC 578

17. This Court by order dated 12.03.2024 had directed the State authorities and the trial court to ensure that the above facilities are duly provided to the applicant. The response of the State Government in this regard has been most encouraging. By affidavits dated 15.04.2024 and 01.07.2024 respectively the State Government have disclosed that the applicant has been provided a translator and given the option of legal aid. He is also provided with counsellor access and a channel to communicate with his family.

III-C. Right to seek bail: Considerations

18. The foreign nationals are entitled to seek bail as per the applicable laws, and conditionalities as may be imposed in the facts and circumstances of a case.

19. The bail jurisdiction and criteria for grant of bail has been settled more by conventions and practices which entered into judicial precedents over time. While considering grant of bail the courts have to consider various aspects including the likelihood that the accused committed the offence, the nature and gravity of the offence, and the impact on the society. Besides, the Court has also to examine the criminal antecedents of the under trial, likelihood of the accused reoffending and assess whether the accused is a flight risk. The essence of bail jurisdiction is to balance the demands of personal liberty with the imperatives of the court process. Attaining this balance is an exercise undertaken in every bail application.

IV. Merits

A. Likelihood of the applicant committing the offence and material against him:

20. After hearing learned counsels for the parties and upon examination of the record, the following facts are disclosed.

21. The applicant came to India on the strength of a work visa. The name of the applicant's employer company was Shenzhen Luckin Electronic Technology Co. Ltd. However, the applicant never worked in the said company. In fact, the applicant started illegally working for HTZN and got engaged in the business of extracting chips from e-waste. He had no authority in law to do such business in India. The applicant's visa had long expired but he stayed on illegally in the country. The place of residence of the applicant recorded in the Visa is different from the one disclosed to the police during investigations.

22. The HTZN company in which the applicant was depicted as the employee was only a front to carry on unlawful activities and commit offences against Indian laws. The HTZN company was connected with other sham companies in an intricate web of an organized international crime network in India. Fake companies were set up only to disguise their activities and give an impression of lawful businesses. The aforesaid companies were essentially one entity and working with the common object of engaging in various criminal activities in the country. HTZN unlawfully exported

chips to China. The proceeds of the aforesaid exports were not received in India. The said companies also operated illegal gaming apps, laundered money to foreign countries in form of bitcoins. The game apps were used to dupe many small Indian investors of their money. Financial transactions of HTZN with other front companies like Sudden Fix Pvt. Ltd., TD Max and Tiashang Renjion Co. Ltd. have been demonstrated from the bank account details. The well structured crime machinery included persons who facilitated illegal entry of Chinese nationals in India, aided their unlawful exit from India and also created fake identity documents for them.

23. Collectively the entire conglomerate of the sham companies which included Sudden Fix Pvt. Ltd., TD Max and Tiashang Renjion Co. Ltd. run by the applicant and his accomplices were intimately twined together and engaged in various criminal acts. In fact the crime racket had become so big that a hotel was set up which became a hub of such activities. Entry of Indians was barred in the said hotel.

24. The criminal operations of the said companies were executed through the applicant and other accomplices who were both Chinese and Indians. In fact the applicant is part of a larger international mafia engaged in organized criminal activities in India.

25. The applicant tried to pass for a workman. The cloak of ordinariness so created was only to avoid attention to

the applicant. The applicant was in fact a part of the higher management and was also engaged in day to day functioning of HTZN. When the veil was raised it was found that HTZN was in fact an aggregation of Chinese nationals who with their Indian accomplices committed the aforesaid offences.

26. Office of HTZN was not found in the place depicted as the registered office in the ROC documents. The board of Exigo was affixed at the premises of HTZN to create a false impression.

27. Ashu Bhardwaj, the owner of a courier company which had done business with HTZN gave his statement to the police during the investigations. The said statement shows that the applicant had a major role in running of HTZN company. The applicant negotiated the cargo rates, showed chip samples and settled the contract with the said Ashu Bhardwaj for exporting chips to Hong Kong.

28. The recoveries made at the premises of HTZN included the stamp pad of the applicant which is consistent with his higher role in the company. The stamp pads of other sham companies Sudden Fix Pvt. Ltd., Noida, TD Max etc. were also recovered. The said companies do not have any authentic registration or any lawful business to show for, but only provided a cover for illegal activities. In fact legal documentation of the said companies and their transactions are almost entirely absent. Further, foreign currencies including Chinese

currencies and Hong Kong dollar were also recovered from the premises of HTZN.

29. The supervisory role of the applicant in the aforesaid company is also depicted in the statements of Vishal who was the accountant for HTZN and TD Max. The said Vishal has clearly stated that he worked under instructions from the applicant and other co-accused.

30. Packaging materials were paid for by the applicant in cash. The process of extraction of sim cards was undertaken by 35-40 employees of the company. The managerial role of the applicant in running of the company is also evident from the fact that the said 30-35 employees were paid in cash by the applicant. The salaries paid to the aforesaid employees were never accounted for. Cash payments do not create documentary trails and were used to avoid detection and cover up the crime. The said Vishal was frequently directed by the applicant and other principal offenders to create fabricated bills. The said Vishal was asked to obtain bills for purchase of scrap from Exigo. Exigo did not engage in the business of sale of scrap and declined to issue bills. However, payments were still received from Exigo.

31. The applicant along with co-accused Zong Hao Zhe @ Jon and He Zhuang Zhuang @ Johnson created fraudulent bills. Further, the evidence including implicative chats between Ryen, Jon, Johnson, Ravi and Koei disclose that the said Vishal was directed to

fabricate bills for the company. The documentary evidences in this regard shall be tendered as prosecution evidence during the trial.

32. The rent was paid by the applicant and the co-accused Johnson. Particulars of many of the fraudulent transactions committed by the applicant along with other co-accused have come to light during the investigations.

33. Various cryptocurrency purchases were made by Sudden Fix Pvt. Ltd. and Tianshang Renjian Pvt. Ltd. The cryptocurrency transactions by the said companies were in fact a means to launder Indian money and park Indian funds in foreign countries without any sanction in Indian laws or knowledge of competent Indian authorities. These unregulated and illegal transactions lead to drain of the wealth of India.

34. The former scrap suppliers Jatin and Ashif too have demonstrated that the applicant had a decisive role in the business of extracting chips from e-waste and sending them to China. The said Ashif and Jatin have also adverted to the illegal activities of the accused and HTZN.

35. The recoveries made from the person of the applicant included passports, an expired visa, mobile phones and airline tickets. The mobile phones and the sim cards were issued in the name of other Indian nationals. The IMEI numbers of the recovered mobiles and the sim cards used therein have been tallied. The CDRs depict a regular conversations with principal offenders which

depicts close collaboration in the aforesaid fraudulent transactions.

36. The recovered air tickets show that the applicant was a frequent traveller from Delhi to Hong Kong. He was in regular contact with persons in Hong Kong. His residential place his Shenzhen. These were not home visits.

37. The applicant was a regular visitor to the Noida Golf Club. Later on the applicant took membership of the Golf Club. The membership of an exclusive golf facility and repeated visits to the same and frequent foreign travels shows a high flying lifestyle which was funded through the proceeds of crime. The applicant was no ordinary workman he was projected to be. The applicant resided together with other co-accused Jon. The affinity between the aforesaid co-accused clearly shows intimate collaboration in the commission of crimes.

38. Prosecution evidence collected during the investigation is yet to tested in the court. For the purposes of this bail the material is credible enough and points to the culpability of the applicant in the offences. There is strong likelihood that the applicant committed the offence. It is clarified that the above findings are only for deciding the bail application. None of the observations shall influence the trial court and are not liable to be considered in the trial proceedings.

IV-B. Gravity of the offence and impact on society:

39. Material discussed above the evidences against the applicant disclosed commission of economic offences and fraud. Furthermore, the applicant appears to be part of a well organized international crime network of Chinese nationals and local accomplices in India.

40. Economic offences particularly those committed by well organized international crime networks have severe consequences on social cohesion. Economic offences of this nature create a parallel economy and threaten the national economic stability.

41. International criminal networks which are managed by Chinese nationals with Indian accomplices as in the instant case significantly impact the national security. Such international crime syndicates create fifth columnists in the host countries. What aggravates the crime further is that many beneficiaries of the crime proceeds are foreigners living abroad who are not even amenable to Indian law and whose identities are effectively concealed.

42. The narrative has the support of authority in point.

43. The Supreme Court in **P. Chidambaram vs. Directorate of Enforcement**⁷ while examining the issue whether economic offences fell within the category of grave offence held:

“21.However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial

⁷ Criminal Appeal No. 1831/2019 (Arising out of S.L.P.(Criminal) No. 10493 of 2019)

irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused.”

IV-C. Likelihood of the applicant reoffending:

44. The applicant flouted visa conditions, overstayed after expiry of visa and carried on criminal activities in the country. The applicant has shown no respect for Indian laws. Further, in view the ready availability of the said crime network, the applicant is likely to indulge in the aforesaid nefarious activities if released on bail.

V. Flight Risk and Foreign Nationals:

45. Determination of the fact as to whether the bail applicant is a flight risk is of fundamental importance in the criminal justice system. The possibility of an accused fleeing from justice after being enlarged on bail is a real and persisting one. The menace is grave enough to put the credibility of the criminal justice system and the foundations of law in the society at risk. The legislature and the courts have created measures to prevent accused persons escaping justice after being enlarged on bail.

V-A. System of Sureties

46. The purpose of sureties and their importance in the criminal law justice system cannot be stated more eloquently than the following passage in **King vs Porter⁸** :

“It is to the interest of the public that criminals should be brought to justice. Responsibility is fixed on the sureties to see that such a person does not escape. A duty is thus cast on the Court, in accepting or rejecting a surety, to see the sureties are solvent and persons of sufficient vigilance to secure the appearance and prevent the absconding of the accused.”

47. The liability of surety is limited to the extent of forfeiture of surety amount when the accused becomes a fugitive from the court process. This well settled position of law was stated by the Delhi High Court in **Zoro Daniel Vs. State**⁹ , as under:

“8. The liability/responsibility of the surety is to produce the accused as and when required by the Court. If he fails then he has to deposit the surety amount.”

48. The probability of an accused to appear and take his trial was held to be a proper test while examining the grant of bail in **Nagendra Vs. King Emperor**¹⁰. The said observations were cited with approval by the Supreme Court in **Gurbaksh Singh Sibbia v. State of Punjab**¹¹.

“The requirements as to bail are to secure the attendance of the accused at the trial: R.v. Rose(1). The proper test to be applied in the solution of the question, whether bail should be granted or refused, is whether it is probable that the party will appear to take his trial: Re Robinson (2), R. v. Scaife (3)”

49. An elaborate framework of bail bonds and sureties and coercive measures has been provided for in the Criminal Procedure Code to deter the accused from fleeing justice and to ensure their attendance at the trial proceedings without any break.

50. The concept of sureties is founded on the fact that a person has local roots and his sureties are prepared to

9 2012 SCC OnLine Del 1065

10 1924 SCC OnLine Cal 318

11 (1980) 2 SCC 565

stand assurance for his presence in the court during the trial. Surety demands imposed on the accused also serve to prevent him from entertaining any thoughts of escaping justice after being enlarged on bail. The system of sureties has proved to be an effective system which deters the accused from avoiding the trial process.

51. However, the said scheme of deterrence fails when the accused is not dissuaded by the consequences of absconding.

V-B. Coercive jurisdiction of courts

52. The trial courts as a matter of practice have also successfully adopted measures available in law to compel the appearance of the accused persons. These courses of action available with the courts include taking out coercive measures like bailable warrants, non bailable warrants and proceedings for attachment of the properties of the accused as per law. The measures so adopted by the learned trial courts have ensured that the fugitive accused are brought to justice in good time.

53. The concept of sureties undoubtedly is a system of credible deterrence and is serving the process of courts well. But the latter system of enforcing attendance of witnesses by issuance of coercive measures has proved most efficacious if the sureties fail to ensure the presence of the accused.

54. The issue of sureties to be submitted by foreign nationals and amenability of such persons to coercive measures adopted by the Courts in case they flee the

territorial boundaries of India require special and a distinct consideration. The evolution of law in regard to sureties from foreign nationals goes to show that the constitutional courts in India were conscious of the complex nature of the issue.

55. Foreign nationals in India may have difficulties in arranging local sureties and may even fail to do so. Law has been evolved by constitutional courts to mitigate the aforesaid problems faced by nationals to enable them to enjoy the liberty granted by bail.

56. Deposit of passport is a form of surety created by the courts for foreign nationals. (*See: Supreme Court Legal Aid Committee representing undertrial Prisoners Vs. Union*¹²)

57. Another condition which has been accepted by the Supreme Court in **Supreme Court Legal Aid Committee (supra)** relates to a certificate of assurance from Embassy. The relevant directions read thus:

(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;

58. The aforesaid directions have been lately clarified by the judgment of the Supreme Court in **Frank Vitus Vs. Narcotics Control Bureau and Ors.**¹³ by holding thus:

“11. Now, we come to the decision of the Supreme Court Legal Aid Committee¹ relied upon by the High Court. In the first part of paragraph 15, the prayers made in the petition filed before this Court have been set out. We are quoting the relevant part of paragraph 15, which reads thus:

“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 causetitle 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 should in any case be released on bail.” (emphasis added) In the same paragraph 15, directions have been issued which read thus:

“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 31A 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.” (emphasis added) However, paragraph 16 is relevant, which reads thus:

“16. We may state that the above are intended to operate as onetime 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 added)

11.1. The directions contained in paragraph 15 were to operate as onetime directions applicable only to the pending cases of the accused who were in jail on the date of the judgment. These conditions were required to be incorporated in the order while releasing an accused on bail as a onetime measure. Paragraph 16 clarifies that if a bail application is made to the Special Court with a grievance regarding inordinate delay in the disposal of pending cases, the Special Court will be empowered to exercise power to grant bail in light of what is held in paragraph 15. Therefore, it is not necessary that in every case where bail is granted to an accused in an NDPS case who is a foreign national on the ground of long incarceration of more than 50% of the minimum sentence, the condition of obtaining a ‘certificate of assurance’ from the Embassy/High Commission should be incorporated. It will depend on the facts of each case.

12. Even if such a condition is incorporated, on an application made by the accused, the concerned Embassy/High Commission declines or fails to issue the certificate within a reasonable time, say within a period of seven days, the Court always has the power to dispense with the said condition. Grant of such a certificate by the Embassy/High Commission is beyond the control of the accused to whom bail is granted. Therefore, when the Embassy/High Commission does not grant such a certificate within a reasonable time, as explained above, the accused, who is otherwise held entitled to bail, cannot be denied bail on the ground that such a condition, which is impossible for the accused to comply with, has not been complied with. Hence, the Court will have to delete the condition. If the Embassy/High Commission records reasons for denying the certificate and the reasons are based on the adverse conduct of the accused based on material, the Court can always consider the reasons recorded while considering an application for dispensing with the condition. However, the Courts must remember that the accused has no right to compel the Embassy/High Commission to issue such a certificate. There can be very many reasons for recording adversely which again cannot be the basis to deny bail already granted. In such a case, instead of the condition of obtaining such a certificate, the condition of surrendering the passport and regularly reporting to the local police station/Trial Court can always be imposed, depending upon the facts of each case.”

59. The likelihood of a prisoner absconding is one of the questions which a court has to ponder upon while deciding the bail application or fixing the sureties demands, as was held by Delhi High Court in **Charles Sobhraj Vs. State**¹⁴:

“7. The principal purpose of bail being to secure that the accused person will return for trial if he is released after arrest, this consideration is not lost sight of in the provisions of section 445 of the Code. It is only an enabling section, and provides that a Court or officer may permit a person to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing a bond except in cases where the bond is for good behaviour. Surely, we cannot and must not lose sight of the word “may” which indicates that accepting the deposit of money in lieu of surety is left to the discretion of the Court and that consequently the acceptance of deposit of money is not obligatory and the relief is to be granted only where the Court thinks fit to substitute a cash security. While considering the question of fitness, principal purpose of bail as underlined above, would always remain a paramount consideration. In short thus besides the question as to whether the accused can find sureties or not, the Court shall have to keep in mind the question as to whether the prisoner is likely to abscond or not and while meditating on the last question the Court may take into account various factors concerning him like the nature

and circumstances of the offence charged, the weight of the evidence against him, length of his residence in the community, his family ties, employment, financial resources, character and mental condition, his record of convictions, reputation, character and his records of appearance at Court proceedings or flight to avoid prosecution or failure to appear at Court proceedings.”

60. While deciding the bail application of a foreign national, Delhi High Court in **Nastor Farirai Ziso Vs. NCB**¹⁵, opined that the apprehension that the accused may flee the course of justice, cannot be the sole determinative factor for denying benefit of Section 445 Cr.P.C. by holding:

“10. It may be observed that it would be a negation of the principle of rule of law and violative of constitutional mandate and principles of human rights in case benefit of Section 445CrPC is denied to a foreign national merely on the ground that a foreign national is likely to escape, if released on bail. This would lead to incarceration of accused for an unlimited period till conclusion of trial even despite being granted the discretion of bail by the courts. A mere apprehension expressed by the prosecution that the accused may flee the course of justice, cannot be the sole determinative factor for denying benefit of Section 445CrPC without consideration of other circumstances and balancing factors in this regard. This apprehension may still theoretically persist even in a case where surety bond is furnished but the liability of surety is only to the extent of amount mentioned in the surety bond.”

61. Limitations of the sureties system become particularly severe when it comes to foreign nationals being prosecuted in Indian Courts. If such a foreign accused escapes from the territory of India the surety system becomes irrelevant. In fact the fugitive foreigner effectively goes beyond the reach of coercive jurisdiction of Indian courts. The criminal justice process would come to a dead end. This Court had asked the Government of India to produce the international instruments or the legal framework within which warrants and other coercive measures issued by the

learned trial courts in India would be executed against foreign nationals who flee India to avoid criminal trial.

V-C. Stand of Government of India and State Government,

V-D. Applicant as a flight risk: Assessment

62. The affidavit submitted by the Government of India discloses that the issues of securing presence of foreign nationals who are fugitives from Indian law are more complex. The process requires interface of the two sovereign governments and also taking out proceedings/engaging with the judicial system of the foreign country. From the materials in the record it appears that the aforesaid process is cumbersome, time consuming, unpredictable, and often doomed to failure.

63. The innovations evolved by the Courts as substitutes for sureties like deposit of passports would be of little avail in such circumstances.

64. The above noted complexities become acute in respect of certain categories of foreign nationals facing criminal trials in India. In such cases it becomes necessary to assess the flight risk of the said accused in conjunction with the ability of the Government of India to compel the presence of such foreign accused in India country even after they escape the territorial jurisdiction of the country.

65. The brief or even terse response of the Government of India in the affidavit reveals that no credible legal

framework or efficacious system exists to secure the presence of Chinese nationals who while facing criminal trials escape the territory of India.

66. The affidavit filed on behalf of Government of India in the companion bail application viz. **Criminal Misc. Bail Application No. 59242 of 2022(Zong Hao Zhe @ Jon vs. State of U.P.)** asserts that the Ministry of Home Affairs has entered into treaties on Mutual Legal Assistance in criminal cases with many foreign countries. However, the case at hand is not within the scope of such treaties. As per the affidavit India does not have any Mutual Legal Assistance Treaty with the Peoples Republic of China. The affidavit also states that to bring back fugitives or foreign accused who flee to foreign countries after committing criminal offences in India recourse to extradition is taken. However, India and Peoples Republic of China do not have any extradition treaty or arrangement. The affidavit acknowledges that extradition is a long drawn process and in many cases becomes complicated “if the surrender of its own country’s national is involved.” The affidavit lastly admits that the possibility of the applicant fleeing this country cannot be ruled out even if the passport is deposited.

67. The State Government during the course of arguments have forcefully supported the stand of Government of India and further the State Government have reinforced their concerns about the applicant fleeing India to cheat justice which is coupled with the

inability of either Government to ensure his presence in Court.

68. The Government of India have thus asserted their inability to compel the appearance of the applicant in the trial proceedings or to bring him back to Indian shores if he flees to another country. The Government of U.P. have been equally emphatic about the applicant escaping the territorial jurisdiction of India to scuttle the trial proceedings.

69. The applicant along with other Chinese nationals and Indian accomplices indulged in various unlawful activities and laundered money as noticed earlier. The criminal network of the applicant and others helped various Chinese nationals to create fake identity papers, make illegal entry into India and also facilitated their escape. The applicant flouted the visa conditions, and has also over stayed in this country only to carry on the aforesaid unlawful activities and commit criminal offences. The applicant has scant regard for Indian law.

70. A holistic consideration of the facts and the cumulative effect of the above factors lead to a conclusion that the applicant is an unacceptably high flight risk which poses a danger to the process of law.

71. There is another aspect which needs consideration insofar as grant of bail to foreign nationals is concerned. The visa of the applicant was only valid for 90 days and has long expired. Even if the applicant is enlarged on bail, he will not enjoy full liberty associated with Article

21 of the Constitution of India. The applicant will remain an illegal entrant in the country. If the applicant were to be granted bail he was required to be kept in detention centres as per law.

72. The discussion and these observations will be fortified by authorities in point.

73. A Division Bench of this Court in **Mohd. Masroor @ Mansoor @ Guddu vs. State of U.P.** passed in Jail Appeal No. 802 of 2013 held as under:

“45. The appellant has already remained in jail for more than 15 years and has carried out the sentence imposed upon him with regard to the other offences for which we have found him guilty, however, considering the fact that he is an illegal entrant in the country without a valid passport and visa, he can not be released. If there are any centers which may have been earmarked or designated by the Government of India for keeping such illegal entrants, the appellant shall be released from jail and kept in such centers as per law, unless of course his custody is required in any other case in which case the law shall take its own course. However, if there are no such centers, then, there is no other option but to keep the appellant in the prison where he is being kept at present but not as a prisoner who has been convicted of the offences referred hereinabove as he has already undergone the sentence, but, as one who is an illegal entrant in the country, till he is dealt with in accordance with law by the Government of India, in the sense, if he is to be deported back to Pakistan or if some other arrangement is permissible and required to be made in law, till it is made.”

74. Examining the special considerations which apply to foreigners facing trial in India insofar as grant of bail is concerned, the Karnataka High Court in **Babul Khan and another Vs. State of Karnataka**¹⁶ held:

“52. Once a case is registered when it is said that the provisions of bail is also applicable, but the question arises as to what is the procedure that should be followed at the time of granting or refusing bail to such persons under the provisions of Sections 436 to 439 of Cr.P.C. It is quiet natural that under the Foreigners Act, 1946, the foreigners who have violated the provisions of the said Act, they are not supposed to wonder around the country freely as if they are the citizens of the country, even if bail is granted to such persons. The

bail cannot be treated as an authority or license to move around the country as if a legal document by the competent authorities. Therefore, the courts, without hearing the Competent Authorities, and the State, and without imposing necessary conditions, no such bails can be granted to such person to move freely anywhere in India even for a day without Passport or Visa, as he is presumed to be an illegal migrant. Therefore, it goes without saying that, an under-trial prisoner even during the investigation, inquiry and trial, whether he should be given a free hand to move anywhere as he likes, or his movements have to be restricted, or he has to be detained anywhere else is the question i.e., to be considered by the Courts.”

75. Even if the foreign national is being prosecuted only under the Foreigners Act, 1946 various restriction are liable to be imposed and the accused has to be kept in a detention centre after release on bail in **Babul Khan (supra)** by holding:

“55. On meticulous reading and meaningful understanding of the above said provisions, it clears out the doubt that, a foreigner who is presumed to be an illegal migrant cannot remain in India or wonder or move around freely, unless and until he is authorized or permitted by the Competent Authorities to remain in India with certain conditions regulating his conduct with specifications as provided u/s.3 (2) (a) to (g) of the Foreigners Act. This provision empowers the competent authorities for any valid reasons to exercise their powers under section 3(2) (a) to (e), restricting the movements of a foreigner, with specifications. In that eventuality Particularly under Section 3(2)(f) such person shall enter into a bond with or without sureties for the due observance of, or as an alternative to the enforcement of, any or all prescribed or specified restrictions or conditions; noted at sub clause 3(2)(a) to (e). In fact section 3(2) (g) empowers the competent authority that, they can arrest and detain or confine such persons, if no license or permission granted under section 3(a) to (e) and also make a provision for any matter which is to be or may be prescribed and for such incidental and supplementary matters as may be, in the opinion of the Central Government, be expedient or necessary for giving effect to this Act.

56. Therefore, subject to the above said conditions, the court has to examine while granting or refusing bail as to whether the said person has to be detained anywhere else other than regular jails. It goes without saying that, after registration of a criminal case, during investigation, inquiry and trial, the accused persons are entitled to make application for grant of bail as a matter of right. The court has to examine depending upon the facts and circumstances of the case applying the general guidelines for grant of bail and if for any reason, the court comes to the conclusion that the accused is entitled to be released on bail, the court has to examine whether the said person has to be kept in any detention centers during the pendency of investigation, inquiry or trial, even after acquittal or conviction of the said person.

57. As noted above, granting bail, should not be understood that it amounts ratifying or legalizing their illegal stay in the country.

Therefore, the courts have to pass an order only after hearing the Competent Authorities (State) who are empowered to pass appropriate orders u/s.3 (2) of the Foreigners Act to ascertain whether the competent authority has got any grievance to keep the accused persons anywhere else other than the jails till the investigation, inquiry or trial is concluded. Further, the Competent Authorities can put any conditions, to them and on taking bond with or without surety for the due observance of conditions, they can be released on bail. Otherwise, if the accused persons have to be released on bail, the Central Government or the State Government as the case may be, have to make necessary arrangements to detain them in separate detention centers, till they are deported to their countries. This does not mean to say that the courts have no power to keep those persons in jail itself. It all depends upon the facts and circumstances of each case.

58. If the offences are committed apart from the Foreigners Act and Passports Act, and under any other penal laws, for the time being in force, where serious allegations are made, having committed serious heinous offences and if the court on considering the gravity of the offence, nature of allegations made against them and in respect of that if it comes to the conclusion that even for such serious offence, apart from the Foreigners Act and Passports Act, if the court inclines to grant bail, then the court can definitely order to keep them in the jail itself because they should also be treated on par with the other accused persons who have committed similar offences under various other penal laws of the country. If the offence committed either under the Passports Act or the Foreigners Act, and prima facie found that they are the foreign nationals and no other offences under any other penal laws of the country has been committed, in such an eventuality, they should be treated as foreign nationals and till they are deported, normally, they should not be detained in the prison if bail is granted, the court has to direct them to be detained in the separate Detention Centre established by the Central Government or the State Government as the case may be. If for any reason they are not entitle for bail they can be ordered to be kept in regular jails.”

76. The twin non negotiable requirements for the courts in all circumstances are to uphold the Indian Constitution and protect the rule of law in this country. To achieve these goals foreign nationals who are engaged in businesses in India need to be accountable to Indian laws; and foreign nationals who face criminal trials in India have to submit to the jurisdiction of Indian courts. Perception of foreign nationals about their immunity from Indian courts will encourage them act with impunity against Indian laws. Such state of affairs will

undermine the Indian Constitution and laws and have grave consequences for national sovereignty.

77. The memories of foreign entities acting against Indian interests without fear of Indian law are too vivid to be recalled. The exactions of foreign interests working without scruples of international law are too severe to be reprised.

VI. Conclusion:

78. In wake of the preceding discussion the bail application of the applicant is liable to be dismissed and is accordingly dismissed.

79. No further directions will be required as this Court has already directed the trial court to expedite the trial proceedings in the bail application of another accused in consonance with the mandate of Section 309 Cr.PC. and the judgments of this Court in **Bhanwar Singh @ Karamvir Vs. State of U.P.**¹⁷, **Jitendra v. State of U.P.**¹⁸ and **Noor Alam Vs. State of U.P.**¹⁹

80. A copy of this order translated in Mandarin Chinese be provided to the applicant by the State Government.

Parting Observations:

81. Before parting, this Court would like to make some observations. The presence of foreign nationals in India as travellers or traders or otherwise is an extant reality. It is true for other countries as well. Legal issues like criminal trials of foreign nationals though arising in the

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domestic jurisdiction of one country have international ramifications. Criminal trial proceedings in the domestic courts of one country can get linked to the legal system and the Government of another country. There is a need for an international framework of laws which is created by consensus among the comity of nations in order to deal with such issues in a fair, transparent and just manner. For the moment this issue is not within the ken of this Court. However, it is a problem which the Government of India and other members of the comity of nations will have to address.

Order Date :- 31.7.2024
Vandit