

**IN THE HIGH COURT OF KARNATAKA
KALABURAGI BENCH**

DATED THIS THE 04TH DAY OF SEPTEMBER, 2020

BEFORE

THE HON'BLE MR.JUSTICE HANCHATE SANJEEVKUMAR

CRIMINAL PETITION NO.200595/2020

Between:

Toichubek Uulu Bakytbek
S/o Toichubek
Age: about 31 Years
R/o Kapsalamou-4-1-Kazakhspan City &
Country Kyrgyzstan
Now at Ratkalpur Mosque
Bidar-585 4014

... Petitioner

(By Sri Syed Talha Hashmi, Advocate)

And:

The State of Karnataka
Through Bidar Town Police Station
Bidar-585401
Through SPP High Court of Karnataka
At Kalaburagi-585107

... Respondent

(By Sri Prakash Yeli, Addl.SPP)

This Criminal Petition is filed under Section 14(a), (b) & 14(c) of Foreigners Act, 1946 r/w Section 439(1)(b) of Cr.P.C, praying to set aside/modify the Condition No.6 imposed by the Trial Court while granting bail in Crime

No.58/2020 of Gandhi Gunj (CC No.708/2020) on the file of Prl. Civil Judge & JMFC-II, Bidar.

This petition having been heard and reserved for orders on 24.08.2020, coming on for "**Pronouncement of Order**" this day, the Court made the following;

ORDER

(Through Virtual Court)

The above petition is filed under Sections 14(a), 14(b) & 14(c) of Foreigners Act, 1946 ('FA' for short) r/w Section 439(1)(b) of Code of Criminal Procedure, 1973 ('Cr.P.C.' for short) for setting aside/modification of the Condition No.6 imposed by the Prl. Civil Judge & JMFC-II, Bidar ('Trial Court' for short) while granting bail in Crime No.58/2020 of Gandhi Gunj Police Station now culminated into C.C.No.708/2020.

2. The facts of the prosecution case in *nutshell*:

The petitioner is a foreign national and is the citizen of Kyrgyzstan, had come to Bidar District (Karnataka State) on a Tourist Visa and stayed in Bilal Masjid at Bidar. It is alleged against the petitioner that he had come to India on Tourist Visa but had violated

the conditions of Visa and thus, committed the offence of violation of provisions of the FA Act. Therefore, with this accusation the petitioner had violated the provisions of the FA Act by violating the regulations of granting passport and visa, which led in registration of a case against the petitioner in Crime No.58/2020 for the offences punishable under Sections 14(a), 14(b) & 14(c) of FA Act, 1946 and the petitioner was arrested and produced before the Trial Court and he was remanded to custody.

Thereafter, the petitioner had filed bail petition under Section 437 of Cr.P.C. before the Trial Court, which Court by its order dated 12.06.2020 granted bail by allowing the bail petition imposing as many as six conditions. Condition No.6 imposed therein and impugned herein reads thus "The accused shall be kept in near by detention center or if not available shall be kept in detention centre at Bangalore till disposal of this case.". Being aggrieved by said Condition at Sl.No.6,

the petitioner appealed to the Court of the Addl. District & Sessions Judge, Bidar ('Sessions Judge' for short) in CrI.Misc.No.297/2020 for modification of Condition No.6. The learned Sessions Judge has dismissed the petition filed under Section 439(1)(b) of Cr.P.C. refusing to modify Condition No.6 imposed by the Trial Court.

3. Being aggrieved by the said rejection order passed by the learned Sessions Judge, the petitioner knocked the doors of this court seeking modification/relaxation of Condition No.6 stated *supra*.

4. I have heard Mr. Syed Talha Hashmi, learned counsel appearing for the petitioner and Sri. Prakash Yeli, learned Addl. State Public Prosecutor appearing for the State. I have also perused the records made available to this court and gone through the law applicable to the case on hand.

5. The learned counsel for the petitioner vehemently submitted that the Condition No.6 imposed

by the Trial Court is harsh one which curtails the life of and liberty of the petitioner as envisaged in Article 21 of the Constitution of India. Further submitted that even though the petitioner is granted bail and ordered to set at liberty on bail pending the trial, but imposition of Condition No.6 ordering to keep the petitioner in Detention Center is virtually amounting to negating the benefit of bail granted to the petitioner. Further submitted that the petitioner would abide by all other conditions and also would not leave the territory of India till completion of the trial as also the petitioner is unable to leave the territory of country for the reason that his passport and visa were seized by the concerned police. Therefore, submitted the petitioner is ready to face the trial and abide by all the conditions imposed by the Trial Court. Hence, prayed for allowing the petition by modifying / relaxing the Condition No.6 imposed by the Trial Court.

6. Further the learned counsel for the petitioner relied upon the decision of co-ordinate Bench of this Court in CrI.No.8785/2018 decided on 11.04.2019 and submitted that even though for the similar offences foisted under the provisions of the FA Act, 1946, there was no such condition was imposed in the said decision of keeping the petitioner (in the said case) in Detention Center. Further, he relied on the authority of the Madurai Bench of Madras High Court in CrI.OP(MD)Nos.5769, 6013 & 6103/2020, decided on 12.06.2020. Further the learned counsel relies on the order of the Allahabad High Court in Bail.No.2898/2020 dated 02.06.2020 and submitted no such condition of keeping in Detention Center is passed. Therefore, submitted that imposition of condition keeping the petitioner in Detention Center is not correct. Therefore, prayed to set aside/modification/relaxation of the Condition No.6 imposed by the Trial Court.

7. On the other hand, learned Addl. State Public Prosecutor vehemently argued and submitted that the Trial Court has imposed Condition No.6 stated *supra* as per the Guidelines issued by this court in the case of **Babul Khan & Ors vs. State of Karnataka & another** (Crl.P.No.6578/2019, decided on: 19.05.2020) and therefore there is no error committed by the learned Magistrate in imposition condition impugned herein.

8. Further, learned Addl. State Public Prosecutor has taken the court to the Guidelines issued by this court in **Babul's Khan** case (*supra*) at para No.112 and submitted that the Trial Court has not committed any error in imposition such Condition No.6, which well within the realm of law. He further submitted that as per the dictum made by this court in the **Babul's Khan** case (*supra*) at Para No.115, the learned Magistrate has imposed such condition and that is rightly affirmed by the learned Sessions Judge and

thus contended the Condition No.6 impugned does not call for any interference at the hands of this court. Further submitted that this court in **Babul's Khan** case (*supra*) had observed that even though the court has granted bail and enlarged the petitioners on bail in that case, the petitioner cannot be given free movement across the India as per their whims and fancies till the case is decided or till the Government decides whether they have to be deported to their mother country or not. Thus contend that under these circumstances in view of guidelines that any foreign nationals who violates the rules / law relating to visa and passport and are found to be in violation of provisions of FA Act they shall be kept in a Detention Center. On these grounds, prays for dismissal of the petition.

9. In the present case, the petitioner is facing offences under Sections 14(a), (b) & (c) of the FA Act. The petitioner is granted bail on 12.06.2020 and one of

the conditions imposed while enlarging on bail is that the petitioner shall be kept in Detention Center without prior permission of the court. For imposing such condition, the Trial Court has observed in Para No.19 that as per the order of this Court in **Babul's Khan** case (*supra*) such conditions is imposed. Therefore, the Trial Court's decision of imposing of such condition is preceded by the dictum of this Court in **Babul's Khan** case (*supra*). This Court in **Babul Khan's** case (*supra*) after considering all the relevant provisions enunciated in the enactments of Indian Citizenship, 1955, The Passport (Entry Into India), 1920, The Citizenship (Registration of Citizen and Registration of National Identity Card) Rules, 2003 Foreigners (Tribunals) Order, 1964 and under various provisions of Code of Criminal Procedure, 1973 and Indian Penal Code,1860 has made observations at paragraphs No.112 & 115, which reads as follows;

“112. Before parting with this Judgment I feel it just and necessary to issue the following guidelines to the Courts and the concerned authorities on the basis of the above said discussion, though it may not be exhaustive but it may have some help to the authorities in the helm of affairs.

GUIDELINES.

(1) As soon as the offence under Foreigner's Act and other Laws is detected and there is a strong prima facie material to show that the detected person is a foreign national, and if he has no Pass port or Visa, or if the visa is expired, and he has no right to stay in Indian territory, proceedings shall be immediately started to deport him to his nation, without unnecessary delay, from the date of registration of FIR against such person.

(2) The jurisdiction police have to immediately take steps to inform the concerned competent authorities to initiate all proceedings to deport such foreign national to his mother country visa viss other competent authorities also share the details of such person amongst themselves and concerned jurisdictional Court.

(3) If the Court refuses to grant bail to those persons (foreign nationals) in any criminal case, the Court shall keep such person in regular jail, till the disposal of the case.

(4) If for any reason the Courts grants bail including anticipatory bail, in any criminal case where the offender is a foreign national, and the offences are under the Foreigners Act and/or also under any other Laws for the time being in force, and their visa is cancelled or lapsed, or they have no pass port, or they are illegal migrants, then the Courts shall specifically

order to keep them in detention centers , unless the competent authority has passed any orders under section 3(2) (a) to (f) of Foreigners Act 1946, or till further orders of the court or till they are deported to their mother countries.

(Emphasis supplied by me)

(5) If the case registered against the foreign nationals, ended in conviction, they shall be ordered to be kept in regular prison of the stat, till they serve their sentence, and thereafter serving the sentence, they shall be kept in detention centers till, they are deported to their country.

(6) If the case ends up in discharge, release of the accused or acquittal, and their nationality is in dispute before the competent Tribunal, they shall be ordered to be kept in detention centers till they are deported to their country unless they have any right or otherwise entitled to remain in Indian Country, or the competent authority has passed any orders under section 3(2) (a) to (e) of Foreigners Act 1946, the acquittal, discharge or release of the Accused is no bar for concerned competent authorities to question the nationality of that person before the Tribunal.

(7) The public prosecutors, the defence Counsel and the Courts shall make all their efforts to expeditiously deal with such cases by giving priority, for its early disposal, so as to enable other competent authorities to take appropriate steps under the facts and circumstances of each case for deportation of such foreign national accused as early as possible. The Court may also if permissible under law, and applicable to the facts and circumstances of a case may invoke sections

265A to 265L under chapter XXI (A) of Criminal Procedure Code, after following due procedure.

(8) As far as possible where a foreign national is involved in a case, the courts shall make their endeavor to record evidence and guide the write the judgment in English Language, if the accused in such case is not conversant with the local language.

(9) The Central Government and the State Governments shall take all necessary steps to establish as many as necessary Detention Centers, at Cities, Districts, and Taluka places as per the detention Center Manual referred to in this judgment, with all necessary basic facilities, as per the detention centre manual, as per the directions and guidelines of the Apex Court in **Upadhyaya Vs State of A.P. and others reported in (2007)15 SCC 337**, referred to in the body of this judgment in detail, so as case to keep the foreign nationals, till their deportation whenever they are ordered to be kept in detention centers by competent authorities or by the Courts.

(10) In case, of accused foreign/national is a woman, a woman having a child or the child itself, the competent authorities, including jail authorities, detention center and the Courts and Juvenile Justice Boards have to follow the Guidelines of the Hon'ble Apex Court laid down in the Upadhyaya's case noted supra; in addition to the provisions under the Prisons Act and as well Prisons Rules, and Juvenile Justice Act and Rules, strictly and meticulously in their letter and spirit.

(11) If a mother who is a foreign national, is in custody and having infant below the age of six

years or up to six years, the court may order the child to accompany the mother during her custody. If, either of parents got arrested, then the custody of the child may be given to the other parent who is not arrested. If both the parents are arrested and they are in custody in same or in some other case, court may order custody of children to their close relative or to Government shelter home, or to any other organization recognized or undertaking of the government where government or concerned authorities can monitor the well being of the child, as per Juvenile Justice (Care and Protection of Children) Act, 2015 and Rules.

(12) If a foreign national is convicted by the Court, and any application for parole is made, the jail authorities have to take in to consideration the conditions enumerated under section 4 of the Foreigners Act 1946, in additional to the Prisons Act and Rules.

(13) If a Foreign National is found to be an illegal migrant and not a citizen of India, and has been involved in any criminal offences under other law of the land for the time being in force, apart from foreigners act, the State Government or the central Government as the case may be , take immediate necessary steps by exercising their discretion after applying their mind to the facts and circumstances of the case, if necessary and if the circumstances warrants, if the offences are not heinous, or antisocial, or not punishable with imprisonment for more than three years , and or with fine only withdraw those cases under Section 321 of Cr.P.C., so as to enable the concerned authorities to take necessary steps to depart such persons to their mother country, as expeditiously as possible.

(14) The State Legal Services Authority, District Legal Services Authorities, and Taluka Legal Services Committees, shall make a periodical visit to the jails and Detention centers to ensure and satisfy itself that the concerned authorities have taken necessary steps to implement the directions issued by the Apex Court in **Upadhyay's** case and also the detention center manual, so as to take appropriate action to inform the concerned authorities to rectify their mistakes and also the Legal services authorities suo-motu can take appropriate steps in accordance with law, to get the mistakes or errors rectified on the legal side.

(15) The Central Government and the respective state Governments, shall often revise, Detention Center Manual and also the Prisons Act and Rules based on the need of the hour to bring, necessary changes, so as to effectively efficiently implement the very object of such Manual and Laws.

(16) The Central Government, the State Government, the Karnataka State Legal Services Authority, Karnataka Judicial Academy and Police Academy in the State shall take appropriate necessary swift action to sensitize all the stake holders, Judges, Prosecutors, Police Officers, Custom and Immigration Officers (FRRO-FRO), Jail Authorities and Officers delegated in Detention Centers, in this regard.

(17) Registry is directed to send a copy of this Order to the Chief Secretary, Principal Secretary to Home Department, Director General and Inspector General of Police, Karnataka State Legal Services Authority

and Karnataka Judicial Academy, for appropriate necessary steps.”

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“115. However, when the police have invoked Section 14 of the Foreigners Act, the presumption u/s.9 of the Foreigners Act, will come into play, unless it is shown to the court during the course of trial, that the petitioners are not foreign nationals, they should be presumed as foreign nationals. Apart from invoking Section 14A of the Foreigners Act, it is alleged that they were holding the empty cartridges with them and therefore, the police have invoked Section 25 of the Indian Arms Act. However, the major offences are u/s.14A and 14B of the Foreigners Act. The offence u/s.25 of the Arms Act is not punishable either with death or life imprisonment. Therefore, in my opinion, by means of imposing stringent conditions, the petitioners are entitled to be enlarged on bail. However, it is made clear that though the court is enlarging them on bail, they cannot be given free movements to wonder across India as per their whims and fancies, till the case is decided or till the Government decides whether they have to be deported to their mother country. Till that point of time, in my opinion, they shall be kept in Detention Centre with all facilities as noted above and if they are acquitted in the case registered against them, the Government has to take appropriate steps whether the determination of their nationality has to be done by the Competent Authority and whether they are still to be deported to their mother country and thereafter only appropriate decision has to be taken by the Government. Further, if they are convicted for any reason, the Competent Authorities have to take appropriate steps to deport them to their country immediately.”

(Emphasis supplied by me)

10. Further, the Hon'ble Apex Court in the W.P.No.(Civil) No.406/2013 was pleased to pass order on I.A.No.105821/2018 dated 12.09.2018 and 20.09.2019 and issued directions for setting up of Detention Center and accordingly the Central Government had issued directions and also prepared Standard Operating Procedure (SOP) and accordingly the respondent-State has also established Detention Center in Karnataka. This is also observed by this court in **Babul Khan's** case (supra) and therefore keeping the foreign nationals or any suspected foreign nationals for having violated the provisions of the FA Act in the Detention Center is perfectly justifiable.

11. The Detention Centers are not to be construed as putting them into a Jail/Prison. The object behind such establishment of Detention Center and placing foreign nationals against whom cases have been registered under the FA Act, 1946 is just to restrict their movements across India and should not travel

according to their whims and fancies and remain untraceable or absconded or flee away from justice. Therefore, under these facts and circumstances imposition of such condition placing the petitioner in Detention Center cannot be said to be harsh or even illegal and unjustifiable and it is not violative of Article 21 of the Constitution of India. Where reasonable restriction is made and that is found to be reasonable that cannot be said that there is violation of Article 21 of the Constitution of India and in this regard, I am unable to accept the contention urged by the learned counsel for the petitioner that there is violative of Article 21 of the Constitution of India imposing such condition. The State has every power to make such a restrictions as vested under the law keeping the sovereignty of the country.

12. The Madurai Bench of Madras High Court in CrI. OP(MD)Nos.5769, 6018 & 6103/2020, decided on 12.06.2020 is relied upon by the counsel for the

petitioner. The Madurai Bench of Madras High Court while releasing the petitioners therein on bail had also imposed such similar condition at paragraph Nos.23.2 by ordering that it is open to the authorities to require the petitioners (in that case) to stay at the special camp earmarked under Section 3(2)(e) r/w 4(2) of the Foreigners Act, 1946.

13. Section 3(1) & Section 3(2) (e) of the Foreigners Act stipulates as follows;

“3. Power to make orders.-(1) The Central Government may by order make provision, either generally or with respect to all foreigners or with respect to any particular foreigner or any prescribed class or description of foreigner, for prohibiting, regulating or restricting the entry of foreigners into India or, their departure there from or their presence or continued presence therein.

(2) In particular and without prejudice to the generality of the foregoing power, orders made under this section may provide that the foreigner-

- (a) xxxxxx
- (b) xxxxxx
- (c) xxxxxx
- (cc) xxxxx

(d) xxxxxx

(e) shall comply with such conditions as may be prescribed or specified-

- (i) requiring him to reside in a particular place;
- (ii) imposing any restrictions on his movements;
- (iii) requiring him to furnish such proof of his identity and to report such particulars to such authority in such manner and at such time and place as may be prescribed or specified;
- (iv) requiring him to allow his photograph and finger impressions to be taken and to furnish specimens of his handwriting and signature to such authority and at such time and place as may be prescribed or specified;
- (v) requiring him to submit himself to such medical examination by such authority and at such time and place as may be prescribed or specified;
- (vi) prohibiting him from association with persons of a prescribed or specified description;
- (vii) prohibiting him from engaging in activities of a prescribed or specified description;
- (viii) prohibiting him from using or possessing prescribed or specified articles;
- (ix) otherwise regulating his conduct in any such particular as may be prescribed or specified;"

14. Therefore, as per clauses i & ii of Clause-3 of Sub-section 2 of Section 3 of the FA Act gives power requiring any foreign nationals who is facing offences under the FA Act to make him to reside in a particular place or imposing restrictions on his movements. Therefore, making the petitioners to reside in a particular place and imposing restrictions on his movement is as per the statute and therefore there is no unreasonableness while imposing such condition by the Trial Court. This court while considering all aspects in **Babul Khan's** case (*supra*), the Trial Court by following the same, had imposed condition No.6. Therefore, it is virtually in consonance of the law of the country and therefore it cannot be said that there is violation of Constitution of India.

15. Further the imposition of condition of placing the foreigners in a particular place who are facing offences under any enactment made in this country is as per Section 4(1) & (2) of Foreigners Act.

For easy reference Section 4(1) & (2) of the FA Act are extracted as under;

“4. Internees.(1) Any foreigner (hereinafter referred to as an internee) in respect of whom there is in force any order made under clause (g) of sub-section (2) of section 3, directing that he be detained or confined, shall be detained or confined in such place and manner and subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time by order determine.

(2) Any foreigner (hereinafter referred to as a person on parole) in respect of whom there is in force an order under clause (e) of sub-section (2) of section 3 requiring him to reside at a place set apart for the residence under supervision of a number of foreigners, shall while residing therein, be subject to such conditions as to maintenance, discipline and the punishment of offences and breaches of discipline as the Central Government may from time to time by order determine.”

16. When there is a legislative mandate to act upon such mandate, then passing order as per the legislative mandate cannot be termed as illegal or unjustified. In the present case, as discussed above, as

per Sections 3 and 4 of the FA Act, condition No.6 is imposed. Further, as per the dictum of this Court in **Babul Khan's** case (*supra*), the learned Magistrate has imposed condition No.6 and therefore under these circumstances, it cannot be said that the imposition of such condition is unreasonable or illegal. The learned Magistrate has simply followed the dictum of this Court rendered in **Babul Khan's** case (*supra*). Further more, a greater caution is to be exercised while dealing with foreign nationals involved in such offences, the imposition of condition No.6 by the learned Magistrate and then affirmed by the learned Sessions Judge is as per law as stated above. Imposition of such condition is also in the interest of protecting sovereignty of the country. Sovereignty of the country is not only to be preached, but it is also an obligation of practice by every authority. The imposition of condition of putting the petitioner into detention centre is with the object that he/she should not abscond or flee away from justice

and leave the country on the pretext of enlarging on bail. Therefore, such condition is imposed and ordering for putting the petitioner in a detention centre cannot be termed as negating the bail. Putting a foreign national, who violates the law of the country after obtaining bail, in a detention centre is different from putting them in a jail. Therefore, ordering for placing the petitioner in a detention centre till completion of trial and thereafter till deporting to his country is perfectly within the ambit of law as enshrined in the FA Act and also as per the dictum of this Court in **Babul Khan's** case (*supra*). Therefore, the order of the learned Magistrate imposing condition No.6 cannot be said to be unreasonable, illegal or unjustified. Therefore, the petition filed is found to be devoid of merits and thus is liable to be dismissed. Accordingly, the present petition is **dismissed**.

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**Sd/-
JUDGE**