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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 728/2021, CRL.M.A. 3588/2021 & CRL.M.A. 3589/2021

AIR CUSTOMS

..... Applicant
Through: Mr.Satish Aggarwala, SPP with
Mr.Jasneet Jolly, Advocate.
Versus

BEGAIM AKYNOVA

.....Respondent
Through: Mr.Sajan Shankar Prasad &
Mr.Rohit Kumar Pandey,
Advocates.

CORAM:

HON'BLE MS. JUSTICE ANU MALHOTRA

O R D E R

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04.03.2021

(hearing through Video Conferencing)

CRL.M.A. 3589/2021 (Ex.)

Exemption allowed subject to all just exceptions.

The application stands disposed of.

CRL.M.C. 728/2021

The petitioner, vide the present petition has sought the setting aside of the impugned order dated 06.01.2021 of the learned CMM, New Delhi vide which the learned Trial Court granted permission to the respondent-Begaim Akynova to travel abroad to her home for one year from 06.01.2021 to 05.01.2022 subject to terms and conditions as imposed vide the said order dated 06.01.2021. The contents of that order dated 06.01.2021 are reproduced herein as under:-

“ *Begaim Akynova Vs. Customs*
06.01.2021

Proceedings conducted through video conferencing on Cisco Webex.

***Present: Sh. Vishal Chaddha, Ld. Counsel for the Department.
Sh. Sajan Shankar, Ld. Counsel for the Accused/Applicant Begaim Akynova.***

Reply to the application seeking permission to travel home moved by the accused Begaim Akynova has been filed by the Department. Be taken on record.

Heard. Perused.

Considering the facts as mentioned in the application, the application is allowed and applicant / accused Begaim Akynova is permitted to travel home for one year from today i.e. 06.01.2021 to 05.01.2022 subject to the following conditions :

- 1. that she shall deposit the fine of Rs. 12,00,000/- approximate with the department as fine of Rs. 12 lakhs has been imposed on her by the department.*
- 2. that she will furnish a security amount of Rs. 50,000/- with an undertaking to report back in the Court on or before 06.01.2022 failing which the said amount shall stands forfeited without giving any further notice;*
- 3. that she shall furnish address of her home;*
- 4. that she shall not seek extension of her stay on any ground;*
- 5. that she shall authorize her counsel to receive notice on her behalf during her stay at her home country;*
- 6. that she shall properly instruct her counsel for proceeding further in the case during her outstay and no adjournment shall be sought by her counsel for lack of instruction from her;*
- 7. that she shall surrender back her passport on her return from abroad;*
- 8. that she shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade her from disclosing such facts to the court or to any custom authorities or tamper with the evidence;*
- 8. that she shall not indulge or commit such like offence (s) again – similar to the offence to which she is accused now.*

Application stands disposed off.

Copy of this order be also sent to all the parties through email/Whatsapp. It is certified that the connection during hearing through Cisco Webex was uninterrupted and the voice and video was clear and the APP for the State and Ld. Counsel for the parties appearing through V/C did not raise any objection regarding the quality of V/C.”

The petitioner- Air Customs apart from submitting to the effect that the impugned order dated 06.01.2021 is wholly unreasoned and merely states to the effect considering the facts as mentioned in the application, the prayers are allowed subject to terms and conditions as imposed thereby with reliance having been placed on behalf of the petitioner on the verdict of the Hon'ble Supreme Court in **“Mahipal Vs. Rajesh Kumar @ Polia & Anr.”** a verdict dated 05.12.2019, whereby, vide paragraph 23 thereof, it has been observed to the effect:-

“23. Merely recording —having perused the record and —on the facts and circumstances of the case does not sub-serve the purpose of a reasoned judicial order. It is a fundamental premise of open justice, to which our judicial system is committed, that factors which have weighed in the mind of the judge in the rejection or the grant of bail are recorded in the order passed. Open justice is premised on the notion that justice should not only be done, but should manifestly and undoubtedly be seen to be done. The duty of judges to give reasoned decisions lies at the heart of this commitment. Questions of the grant of bail concern both liberty of individuals undergoing criminal prosecution as well as the interests of the criminal justice system in ensuring that those who commit crimes are not afforded the opportunity to obstruct justice. Judges are duty bound to explain the basis on which they have arrived at a conclusion.”

submitting to the effect that there ought to be a fair adjudication and application of mind at the time of disposal of any prayer by a Court.

It has further been submitted on behalf of the petitioner that there has been a fragrant violation of the judicial comity of Courts and a

travesty violation of justice in the instant case with the respondent having flouted all possible norms and the hierarchy of the judicial system. It has been submitted on behalf of the petitioner that the very same respondent i.e. Begaim Akynova, holder of Khazakistan passport no.8622501 who is petitioner no.2 in CRL.M.C.1529/2020, which was disposed of vide the judgment of this Court dated 31.08.2020. It has been submitted on behalf of the petitioner that the said respondent no.2 of that petition i.e. CRL.M.C.1529/2020 with another petitioner therein named Aida Askerbkova, holder of Kyrgyzstan passport no.AC3167256 had both assailed the order dated 30.05.2020 of the learned ASJ-03, New Delhi in CR No. 881/2019 vide which the order dated 10.12.2019 of the learned CMM, PHC, New Delhi had been upheld declining the prayer of Aida Askerbkova, the petitioner no.1 of CRL.M.C.1529/2020 and of petitioner no.2, Begaim Akynova who is the respondent no.2 to the present petition to travel abroad to their respective hometowns vide which CRL.M.C.1529/2020 was disposed of vide judgment dated 31.08.2020 of this Court and it has been brought forth on behalf of the petitioner that vide judgment dated 31.08.2020 of this Court vide paragraph 24 thereof, it was expressly observed to the effect:-

“24. During the course of the present petition as observed elsewhere hereinabove, it had been submitted on behalf of the petitioner no.2 that her spouse is suffering from COVID-19, taking into account even though the said document of the medical ailment of the husband of the petitioner no.2 has been verified by the Embassy of Kyrgyzstan, the very nature of the ailment of which the spouse of the petitioner no.2 suffers from, makes it incumbent on the sufferer of the said ailment to be away from other persons whilst in quarantine. Apparently thus, the prayer made by the petitioner no.2, cannot be granted as is declined.”

whereby specifically the prayer of Begaim Akynova, holder of

Khazakistan passport no.8622501 seeking to travel abroad to Kyrgyzstan was declined it having been held that the prayer made by her could not be granted and was declined.

Undoubtedly, vide the said order dated 31.08.2020 in CRL.M.C.1529/2020 for reasons detailed therein, the prayer of petitioner no.1 of that petition namely Aida Askerbkova had been granted subject to terms and conditions as imposed thereby with permission having been granted to her to travel Kyrgyzstan for a period of 45 days. The proceedings of CRL.M.C.1529/2020 in relation to the appearances in that case read as under:-

“* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ CRL.M.C. 1529/2020

Judgment reserved on : 22.07.2020

Date of decision: 31.08.2020

AIDA ASKERBEKOVA, holder of Kyrgyzstan Passport No. AC 3167256 & **BEGAIM AKYNOVA, holder of Kazakhstan Passport No. 8622501**
.....Petitioners

Through: Mr.Sajan Shankar Prasad & Mr.Rohit Kumar Pandey, Advocates.

Versus

DEPARTMENT OF CUSTOMSRespondent

Through: Mr.Satish Aggarwala, SSC with Mr.Gagan Vaswani, Advocate.
Ulybek Tulekin, Head of Consular Section, Embassy of Kazakhstan.”

The counsel for Begaim Akynova, holder of Khazakistan passport no.8622501 whose prayer seeking to travel abroad was declined vide

judgment dated 31.08.2020 of this Court, was Mr.Sajan Shankar Prasad, Advocate who is the counsel for the respondent no.2 even today and has joined the proceedings through Video Conferencing. Mr.Sajan Shankar Prasad, Advocate is indicated to be the counsel for Begaim Akynova, the respondent to the present petition as the applicant of the application filed before the learned CMM, New Delhi which was disposed of vide the impugned order dated 06.01.2021.

The record indicates that the application that was filed on behalf of Begaim Akynova, the respondent to the present petition before this Court and the applicant before the learned CMM, New Delhi, filed her application through her counsels **Mr.Rohit Kumar Pandey, Advocate and Mr.Sajan Shankar Prasad, Advocate**, and as depicted through the appearance in the proceedings in CRL.M.C.1529/2020 vide judgment dated 31.08.2020, whereby the prayer made by Begaim Akynova to travel abroad, is expressly declined, **shows the appearance of both Mr.Rohit Kumar Pandey, Advocate and Mr.Sajan Shankar Prasad, Advocate for Begaim Akynova**, the present respondent as well before the learned CMM, New Delhi as per the application placed on record as Annexure-F to the present petition which application reads to the effect:-

“APPLICATION FILED ON BEHALF ON APPLICANT BEGAIM AKYNOVA SEEKING PERMISSION OF THIS HON’BLE COURT TO TRAVEL HOME (ABROAD).

THE APPLICANT ABOVE-NAMED RESPECTFULLY SUBMITS AS UNDER:

BACKGROUND OF CASE:

- 1. That the captioned matter is pending before this Hon’ble Court vide case file bearing number VIII(AP)10/P&I/2566-A/ARRIVAL/2019/1461.*
- 2. That the above-named Applicant Begaim Akynova (hereinafter called as ‘the Applicant’) is the resident of Kazakhstan and had arrived India on 11.09.2019 at T-3 IGI Airport. Subsequently, she was arrested by the*

office of Air Customs and then enlarged on bail by this Hon'ble Court.

3. It was alleged that 1875 grams of gold had been seized from the possession of the applicant, subsequently the Applicant had been enlarged on bail by the Ld. CMM Court with a condition to not travel abroad.

4. Thereafter, the Applicant is regularly appearing before all the tribunals/forums as and when she was asked. The Applicant has preferred an application seeking permission to travel abroad before the Ld. CMM Court in December 2019, however same was dismissed vide Order dated 10.12.2019. Thereafter, the Applicant preferred a revision petition before the Hon'ble Session Court, however considering the excruciating circumstances of the other co-accused Aida Askerbekova, the Applicant chooses not to press on her relief. The Hon'ble Sessions Court passes an order denying the permission to the Applicant therein to travel her home.

5. Thereafter, the Applicant along with the co-accused chooses to preferred an appeal under Section 482 Cr.P.C. before the Delhi High Court wherein vide Order dated 31.08.2020, the Hon'ble High Court allowed the co-accused Aida Askerbekova to travel her home.

6. Subsequently, the forum/Tribunal (Commissioner of Customs office) had imposed a fine of Rs. 12 lakh Indian Rupees (approx.) on the Applicant.

PRESENT APPLICATION/GROUNDS:

a. Since the Applicant has already been penalized by way of humongous penalty by the forum and furthermore the investigation is completed, no further recovery/enquiry or investigation is required as of today, allowing the Applicant to travel abroad would not affect today any proceeding in any manner.

b. Furthermore, the Applicant without prejudice, undertakes to deposit the entire amount imposed on her by way of penalty by the forum before she travels to her home.

c. It is submitted that the Applicant is bound to stay in India since December 2019, it has been more than 1 year for her in India without having any way out to meet her daily basic needs to survive.

d. It is further submitted that the Applicant requires to meet her family

member only after depositing the entire penalized amount, there would be no prejudice for the department if the permission is granted for a particular time period only.

e. Furthermore, considering the unproductive pandemic situations arise throughout the globe, it is exceedingly difficult for the applicants to meet his day to day needs presently in India. Therefore, she may be allowed for a particular period of time only, in which she can grapple-up with the aforesaid unavoidable circumstances and then return back to India.

f. It is further submitted that investigation is already completed, and no further recovery is required at this point of time. Permission to travel her home would not affect the current case in any manner.

g. That in a remarkably similar kind of cases, this Hon'ble Court recently allowed various Applicants to travel their home in these hard times. It is also pertinent to mention herein that in some of those cases recoveries are more than in the present case and those cases were non-bailable contrary to the present case. Considering the present on parity, the Applicant may also be allowed to travel his home for a particular period of time. Copy of one such order is being annexed herein as an **Annexure P-1**.

h. That by way of this application the Applicant undertakes that he will come back to India as and when it is required by this Hon'ble Court. Therefore, she may be allowed to travel his home for making necessary arrangement for his family as well as for her to survive in India.

i. That the Applicant has clean antecedents and has no past history.

7. That considering the global pandemic COVID-19, various countries across the globe started bringing back their citizen lawfully to ensure their welfare and wellbeing. Furthermore, the basic intention of aforesaid exercise is that their citizen does not become a liability on other nations and therefore India and Kazakhstan also arranging various flights in coming days together for their citizens welfare. That considering the aforesaid grounds and on humanitarian ground as well he may be allowed to travel his home.

8. It is submitted that grant of permission to travel abroad would not affect or prejudice the instant case against the accused in any manner. That the Applicant undertakes to honor each and every condition on which the permission by this Hon'ble Court may be granted.

PRAYER :

In view of the above facts and circumstances it is most respectfully prayed to:

*a) allow the instant application by giving him permission to travel his home for a period of **60 days** or for any other particular duration.*

b) The applicants may be allowed to travel abroad with any condition which this Hon'ble Court may deem fit.

c) Any other order as this Hon'ble Court may deem fit in the interest of justice.

for which Accused shall ever pray."

Significantly, it has been chosen to have been submitted through the application, the contents of which have been reproduced hereinabove that the applicant vide paragraph 4 of this application, had preferred an application seeking permission to travel abroad before the learned CMM's Court in December, 2019, however, the same was dismissed on 10.12.2019; that the applicant preferred a revision petition before the Hon'ble Sessions Court considering the excruciating circumstances of the other co-accused Aida Askerbkova, the applicant had chosen not to press on her relief, that the Sessions Court had passed an order denying permission to the applicant to travel to her home but thereafter the applicant has averred in paragraph 5 that the applicant along with the co-accused chose to prefer an appeal under Section 482 of the Cr.P.C., 1973 before the Delhi High Court, wherein vide order dated 31.08.2020, **this Court allowed the accused Aida Askerbkova to travel to her home** and subsequently the Tribunal, Commission of Customs has imposed a fine of Rs.20 lakhs on the applicant.

Significantly, there is not an iota or a whisper of any averment in the application that was filed by the applicant before the learned CMM,

New Delhi to the effect that the prayer made by the present respondent i.e. the applicant before the learned CMM, New Delhi to travel abroad to her hometown was expressly declined vide order dated 31.08.2020 of this Court in CRL.M.C.1529/2020 vide observations in paragraph 24 thereof.

It is sought to be submitted by the learned counsel for the respondent, the very same counsel who has filed the application before the learned Trial Court, which was disposed of vide the impugned order dated 06.01.2021 and who was the counsel for Begaim Akynova before this Court on 31.08.2020 in CRL.M.C.1529/2020 that the said application placed on record as Annexure-F to the present petition reproduced hereinabove had to be filed in view of the changed circumstances before the learned Trial Court.

It is essential to observe that even if the circumstances after the order dated 31.08.2020 had in any manner been changed, it was always open to the applicant to file the application before the Trial Court seeking permission to travel abroad to seek redressal in accordance with law by either seeking a review of the order dated 31.08.2020 of this Court or filing a fresh petition in relation thereto or assailing the order dated 31.08.2020 of this Court before the Hon'ble Supreme Court but in any event there could not have been any concealment of the facts that vide order dated 31.08.2020 in CRL.M.C.1529/2020, the prayer made by Begaim Akynova, holder of Khazakistan passport no.8622501 i.e. the applicant herein in relation to the very same complaint case qua which the allegations had been made against Begaim Akynova and the co-accused in relation to their apprehension on 13.09.2019 at the IGI Airport, New Delhi, with a recovery of 1875 gms of gold from Begaim Akynova holder of Khazakistan passport no.8622501 had been

considered and the same was declined.

Such silence in the pleadings before the learned Trial Court is apparently deliberate and cannot be overlooked. Whilst setting aside the impugned order dated 06.01.2021 of the learned CMM, PHC, New Delhi vide which permission was granted to the respondent herein to travel abroad, which order is hereby set aside in toto, it is essential to observe that most unfortunately there is even a representation for the Department i.e. Department of Customs also on the date 06.01.2021 before the learned Trial Court via counsel Mr.Vishal Chadha, who the learned SPP for the Department of Customs, Mr.Satish Aggarwala present today submits is one of the counsel representing the Customs Department before the District Courts.

Reliance is also sought to be placed on behalf of the petitioner by the learned SPP on the averments in paragraph 5 of the present petition which reads to the effect:-

“5. The respondent filed an application dated 16.12.2020, Annexure-F seeking permission to travel home. Interestingly, the copy of the application was served upon a prosecutor, who at no point of time, had dealt with the present matter either before Ld.CMM, New Delhi, Additional Sessions Judge, New Delhi or this Hon’ble Court. The Special Public Prosecutor filed reply date 21.12.2020, Annexure-G.”

to submit to the effect that the counsel on whom the application was served had at no time dealt with the proceedings neither before the learned CMM, New Delhi nor before the learned ASJ nor before this Court.

Be that as it may, the same itself does not suffice for the learned counsel who put in appearance even on behalf of the Department of

Customs on 06.01.2021 before the learned Trial Court, to have not made any inquiries from the Customs Department specifically in view of the averments in paragraph 5 of the application that had been filed on behalf of the respondent dated 16.12.2020 before the learned Trial Court, in as much as, there is not even a whisper of an averment in the application dated 16.12.2020 filed by the applicant thereof i.e. the respondent herein as to the fate of that application.

In the circumstances of the case, as brought forth through the entire record depicted hereinabove, information be sent to the Chairman, Bar Council of India of the proceedings of the present matter which be sent through the Registrar General of this Court in relation to the manner of which the proceedings in relation to the application filed by Begaim Akynova have been conducted both by the learned counsel for Department of Customs as well as by the learned counsel for the applicant Begaim Akynova i.e. respondent to the present petition.

Furthermore, the learned Trial Court seized of the proceedings on the date 06.01.2021 i.e. the learned CMM, New Delhi, has apparently not chosen to inquire as to what was the fate of the prayer made by the applicant before the learned Trial Court in proceedings before the High Court under Section 482 of the Cr.P.C., 1973 vide order dated 31.08.2020 despite the applicant thereof having mentioned therein that the High Court of Delhi had allowed the co-accused Aida Askerbkova to travel abroad to her home. That the learned Trial Court did not even choose to ascertain the status of the proceedings dated 31.08.2020 in relation to any orders that could or may have been passed and had in fact been passed in the instant case in CRL.M.C.1529/2020 whereby the prayer made by Begaim Akynova to travel abroad had been expressly declined vide

paragraph 24 thereof, also cannot be overlooked.

In the circumstances, the matter be also placed before the Inspecting Committee of Judges of this Court qua the learned Trial Court in relation to the virtual non application of mind in the instant case and disregard to the hierarchy of Courts.

The petition is disposed of accordingly.

ANU MALHOTRA, J

MARCH 04, 2021

'neha chopra'