

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 19.11.2018	Delivered on 26.11.2018
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CORAM:

THE HONOURABLE MR. JUSTICE **N. ANAND VENKATESH****CRL.OP.Nos.25382 & 25834 of 2018**

Prakash ... Petitioner
in Crl.O.P.No.25382/2018

Munusanth ... Petitioner
in Crl.O.P.No.25384/ 2018

.Vs.

1.Deepak Kumar

2.State rep.by
Inspector of Police,
P4, Basin Bridge (Crime)Police Station,
Chennai.

... Respondents
in both Crl.OPs

Prayer in Crl.O.P.No.25832 of 2018: Criminal Original Petition filed under Section 482 of Cr.P.C , to set aside the dismissal order of the Hon'ble Principal Sessions Judge, Chennai passed in Crl.R.C.No.55 of 2016, dated 12.09.2018, by confirming the order in Crl.MP.No.1099 of 2014, dated 20.05.2016 on the file of the learned Xth Metropolitan Magistrate, Egmore, Chennai.

Prayer in Crl.O.P.No.25834 of 2018: Criminal Original Petition filed under Section 482 of Cr.P.C , to set aside the dismissal order of the Hon'ble Principal Sessions Judge, Chennai passed in Crl.R.C.No.54 of 2016, dated 12.09.2018, by confirming the order in Crl.MP.No.1000 of 2014, dated 20.05.2016 on the file of the learned Xth Metropolitan Magistrate, Egmore, Chennai.

(both CrI.Ops)

For Respondents : Mr.C.Raghavan for R2
(both CrI.Ops) Government Advocate (CrI.Side)

COMMON ORDER

These Criminal Original Petitions have been filed challenging the order passed by the learned Principal Sessions Judge, Egmore, Chennai in CrI.R.C.Nos.55 and 54 of 2016, dated 12.09.2018, confirming the order of the X Metropolitan Magistrate, Egmore, Chennai, made in CrI.M.P.Nos.1099 and 1000 of 2014, dated 20.05.2016 respectively, dismissing the applications filed by the petitioners to discharge them from sureties.

2.The learned counsel for the petitioners would submit that the 2nd respondent Police registered a case in Cr.No.844 of 2013, for offences under Section 406, 420 and 414 of IPC against the 1st respondent and another person. Both the accused persons were arrested and were remanded to Judicial custody. Thereafter, the 1st respondent filed a bail petition and since the petitioners are known to the 1st respondent, they were requested to stand as sureties.

3.The bail petitions filed by the 1st respondent was ordered by the X Metropolitan Magistrate Court, Egmore, Chennai on 31.01.2014, and the petitioners also executed bonds, while standing as sureties.

4.The petitioners filed petitions before the X Metropolitan Magistrate Court, Egmore seeking for discharging them as sureties. These petitions were dismissed, and the said orders were also confirmed by the Principal Sessions Court, Chennai. Both the Courts have held that sureties cannot be discharged, without the appearance of the accused person and more particularly, due to the fact that the accused person is absconding and a non bailable warrant is also pending against him.

5.The learned counsel for the petitioners would submit that a surety, at the best, can be bound only to the extent of the surety bond amount given by him, which could be forfeited to the State and a surety cannot be permanently bound, even in a case, where he wants to be discharged. The learned counsel would submit that by compelling the petitioners to continue as sureties against their willingness, will amount to interfering with their liberty, which is guaranteed under Article 21 of the Constitution of India.

6.The learned Government Advocate (Crl.Side) would submit that there is no illegality or infirmity in the order passed by the Court below and the Court below has merely followed the procedure under Section 444 of Cr.P.C and till the accused persons are secured, sureties can never be discharged.

7.This Court has carefully considered the submission made on either side.

8.This case raises an important and interesting question as to whether, a person who stood as a surety for an accused person, at the time when the accused person was released on bail, should continue to be a surety against his willingness on the ground that the accused person is absconding, and until he is secured, the surety will not be discharged?

9.It will be relevant to extract the provisions of Section 444 of Cr.P.C.

Discharge of Sureties:- **1.** *All or any sureties for the attendance and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as relates to the applicants.*

2. On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

3. On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as relates to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to jail".

10.A careful reading of the above provision shows that this provision establishes the procedure for the purpose of discharging a surety. The provisions of this Section is meant for the continuity of the surety bond and for enabling the accused to offer other surety bonds. The extent to which a surety is bound by the surety bond, can be understood by reading the provisions under Section 446 of Cr.P.C, which deals with forfeiture of bond. The Section lays down the procedure as to how, a bond executed can be forfeited. The object of taking surety in a case, where an accused is released on bail, is for the purpose of ensuring the availability of an accused before the Court. Whenever the dates of trial are fixed, the surety shall be liable for the appearance of the accused in the Court for all hearings as may be fixed by the Court.

11. The question is what is the liability of a surety, if in case the accused is not present before the Court during the hearings or the accused absconds. An answer is provided by the Hon'ble Supreme Court in the judgment in **Mohammed Kunju And Another vs State Of Karnataka** reported in [**1999 8 SCC 660**]. The relevant portions of the judgment is extracted hereunder:

"4. On 21.12.1996 he was released when he executed a bond with appellants as his sureties. Subsequently he filed an application for relaxation of the conditions and the Chief Metropolitan Magistrate passed his order thereon dated 13.1.1997 in the following lines:

The earlier condition No. 4 imposed on the accused is hereby relaxed. The accused is permitted to reside in Mysore City at the address furnished by him. However, the accused shall be present before the Commissioner of Police, Bangalore City once in a month. The accused shall be present without fail during the course of trial before the court at Mysore. Till the order is passed, the accused shall be present before the Nasarabad Police Station once in a week. During the remaining period, if the accused has to leave Mysore city he has to obtain prior permission from the Commissioner of Police, Bangalore. In this behalf the same has to be intimated to the Commissioner of Police, Bangalore.

5. *The Nasarabad Police later reported to the magistrate that the accused was not attending the police station as per the order. The accused failed to be present in the court also. The efforts made by the magistrate to get the presence of the accused failed and then a notice was issued to the appellants to produce the accused in court as he was reported absconding. Appellants thereupon expressed their inability to produce the accused. The bail bonds were thus forfeited and each of the appellants was ordered to "pay the surety bond amounting to rupees twenty five thousand to the Government."*

13...... *The controversy stands settled now by the decision of this Court in [Ram Lal v. State of U.P.](#) . Their Lordships, after referring to the wording contained in Form No. 42 of Schedule V of the old [CrPC, 1898](#), have held thus:*

The undertaking to be given by the surety was to secure the attendance of the accused on every day of hearing and his appearance before the Court whenever called upon. The undertaking to be given by the surety was not that he would secure the attendance and appearance of the accused in accordance with the terms of the bond executed by the accused. The undertaking of the surety to secure the attendance and presence of the accused was quite independent of the undertaking given by the accused to appear before the Court whenever called upon even if both the undertakings happened to be executed in the same document for the sake of convenience. Each undertaking being distinct could

be separately enforced.

14. *We have noticed that the wording in the corresponding Form in the new Code is identical (vide Form No. 45 in the second Schedule to the Code) and hence the same principle must follow in the present case also. Thus forfeiture of a bond would entail the penalty against each surety for the amount which he has undertaken in the bond executed by him. Both the sureties cannot claim to share the amount by half and half as each can be made liable to pay the amount of Rs. 25,000/-".*

12. From the above judgment, it is clear that a surety can be bound to the extent of the amount mentioned in the bond, by forfeiting the bond, as per the procedure contemplated under Section 446 of Cr.P.C, whenever an accused does not appear on the date fixed by the Court or he absconds. Therefore, whenever a Court finds that the accused person has absconded and a surety wants to get discharged, the concerned Court can resort to the procedure contemplated under Section 446 of Cr.P.C and forfeit the bond executed by the surety and recover the amount covered by the bond by way of a penalty, from the surety. Beyond this, a Court can never compel a person to be a surety against his willingness. Section 444 of Cr.P.C merely provides for the procedure for discharge of sureties and that procedure cannot be read to the extent that the surety will never be discharged, till the accused

person is brought before the Court. Such a restricted reading of the provision will go against the right of the surety to get himself discharged and to bind him permanently as a surety, affects the very liberty of a person, which is guaranteed under Article 21 of the Constitution of India. Both the Courts below lost sight of this very important aspect.

13. It is also important to take note of the provisions of Section 446-A of Cr.P.C. The same is extracted hereunder:

Cancellation of bond and bail bond:—Without prejudice to the provisions of section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition—

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition:

This provision was included by an amendment in the year 1980, by Act

<http://www.judis.nic.in> 63 of 1980 in order to deal with the menace of jumping bail. This Court

had an occasion to deal with this provision in detail in ***Pillappan @ Ravikumar vs State*** reported in [**2018 (3) CTC 156**]. The relevant portions of the judgment is extracted here under.

"23. To reiterate, Sec. 446-A of the Code was included by the 1980 Amendment in order to curb the menace of bail jumping. It is a trite law that cancellation of bail is not synonymous to cancellation of bail bond and this has been recognised by this Court in Prabakaran vs. State [2010 (2) MLJ (Cri.) 353], wherein, a learned Single Judge of this Court has held in no uncertain terms as under:

"16. Thus, it emerges tacitly clear that prior to the introduction of Section 446-A, the bail bond shall stand cancelled only when the bail is cancelled either under Section 437 or 439 of the Criminal Procedure Code, whereas, now, such cancellation takes place automatically by operation of Section 446-A of the Criminal Procedure Code without there being an order of cancellation of bail.?"

24. Sec. 446 essentially deals with sureties for breach of bond by the accused, whereas, Sec. 446-A deals with the consequences that would befall the accused himself, upon forfeiture, for breach of bond conditions. That is why, Sec. 446-A begins with the expression ? without prejudice to the provisions of Sec. 446?. This means that, without prejudice to the power of the Court to take action against the sureties under Sec. 446 of the Code, the Court can deal with the accused separately under Sec. 446-A of

the Code for breach of bond. When the accused is produced and if he is not able to satisfactorily give reasons as to why he did not appear before the Court, then, the Magistrate/Court is required to record an order of forfeiture and remand the accused to judicial custody under Sec. 309 of the Code. Thereafter, bail is not a matter of right even in a case involving a bailable offence. If the accused is able to give satisfactory reasons for his absence at the time of his production in execution of the non-bailable warrant / appearance, then, there is no necessity to remand him to judicial custody. If the accused seeks time to give his explanation, he can be remanded to judicial custody pending enquiry. The order of forfeiture of bond that has been recorded by the Court will not automatically have any consequence on the sureties under Sec. 446 of the Code, because, a separate notice is required to be given to the sureties to show cause as to why penalty should not be paid by them and only if they are not able to show cause, can the Court proceed to recover the penalty as if it were a fine imposed under the Code. Thus, the consequences of forfeiture of the bond operates differently for the accused and the sureties. The fact that the accused had been in asbcondence for a long period and that he has not been able to give satisfactory explanation for his absence at the time of his production/appearance, is, by itself, a sufficient ground for forfeiture of the bond. What the Court/Magistrate shall record is, the period of

abscondence, explanation given by the accused and the reasons for non acceptance. This, by itself, will complete the forfeiture proceedings qua the accused. Thus, the Magistrate has the option to release the accused on his personal bond with one or more sureties or refuse to release him. If the Magistrate / Court refuses to release the accused, he will have to, perforce, remand him to custody under Sec. 309 of the Code. Thereafter, the accused will have to apply for fresh bail. The accused would have been granted bail in the earlier proceedings judging the gravity of the offence, his antecedents and other factors. In the subsequent bail application, the Court will have to consider an additional factor, viz., the factum of the accused having absconded after availing bail. Thus, the consequences of cancellation of bail and the cancellation of bail bond vis-a-vis the accused are one and the same. Any other interpretation of Sec. 446-A would make it otiose. This Court garners support for this interpretation in the judgment of the Kerala High Court in Mahesh vs. State of Kerala [2009 SCC Online Ker. 6601].

25.*In the case at hand, the petitioner was appearing before the Magistrate from 14.06.2010 onwards and from 14.12.2015, he did not appear. Hence, he was arrested upon execution of the warrant on 20.02.2018. His conduct, ex facie, shows that his non appearance continuously was not on account of sufficient cause or due to inadvertence. However, the Magistrate questioned the petitioner on 20.02.2018. Since his explanation was not*

*satisfactory, the Magistrate remanded him to custody under Sec. 309 of the Code by cancelling his bail. In the opinion of this Court, it was not necessary for the Magistrate to have cancelled the bail at all, because, he was well within his powers even under Sec. 446-A of the Code read with Sec. 309 of the Code to remand him to custody. **For taking action under Sec. 446 of the Code, notice should be issued to the sureties and it should be proved in a separate proceedings that the accused had violated the bail bond for the sureties to make good the bond amount.** (emphasis supplied)*

Proviso to Sec. 446-A(b) of the Code states that the Court may release him in that case upon execution of a personal bond. The expression 'may' has been recently interpreted by the Supreme Court in Pankaj Jain vs. Union of India and another [2018 SCC OnLine SC 160] in connection with Sec. 88 of the Code. Paragraphs 23 and 31 of the said judgment read thus:

"23 Section 88 of the Cr.P.C. does not confer any right on any person, who is present in a Court. Discretionary power given to the Court is for the purpose and object of ensuring appearance of such person in that Court or to any other Court into which the case may be transferred for trial. Discretion given under Section 88 to the Court does not confer any right on a person, who is present in the Court rather it is the power given to the Court to facilitate his appearance, which clearly indicates that use of

word 'may' is discretionary and it is for the Court to exercise its discretion when situation so demands.

31. We thus conclude that the word 'may' used in [Section 88](#) confers a discretion on the Court whether to accept a bond from an accused from a person appearing in the Court or not".

The aforesaid interpretation will apply in all fours to the interpretation of the word 'may' used in proviso to [Sec. 446-A\(b\)](#) of the Code. A fortiori, the Court / Magistrate may not release him and after recording that the bond has been forfeited since the accused had been in abscondence for a long period and that the reason given by him for his abscondence is not satisfactory, the Court / Magistrate can remand him to judicial custody under [Sec. 309](#) of the Code. Thereafter, the accused should have to apply for fresh bail which can be considered on merits by taking into consideration the period of his abscondence and the desirability to grant bail to such a person.

***27.** To recapitulate, if an accused on bail, be it in a case involving a bailable or non-bailable offence, (whether granted by the superior Court or by the Magistrate), does not appear on a hearing date and no petition is filed for dispensing with his presence, non-bailable warrant can be issued under [Sec. 89](#) of the Code. On the appearance of the accused or on his production by the police, what is required to be given is, an opportunity to him to explain as to why he did not appear from that particular date onwards. If he gives a satisfactory*

explanation, he can be let off by recalling the warrant. If his explanation is not satisfactory, the Magistrate/Court is required to record the reasons and give a finding that the bond has been forfeited. On such finding, the bail bond gets automatically cancelled. Thereafter, the Magistrate/Court cannot release him on his own bond in view of the bar under Sec.446-A(b). He may be released under the proviso to Sec.446-A(b) on his executing a bond with fresh sureties, or, he may be remanded to custody under Sec. 309 of the Code. If he is so remanded to judicial custody, he should apply for fresh bail. Thereafter, the Magistrate/Court can issue notice under Sec. 446 of the Code to the sureties separately for payment of penalty. In the bail application filed afresh by the accused either under Sec.436 or 437 or 439 of the Code, the Court will have to consider not only the usual parameters for grant of bail but also the additional factor, viz., his abscondence. " सत्यमेव जयते

14. The above judgment gives a clear picture, with regard to the scope of power given to a Court under Section 446-A of Cr.P.C. Even though, the above judgment deals more with the consequence of an accused person, who does not appear, after being granted bail [bailable or non bailable offence], it can be seen that this Court has observed in more than one place that the sureties will have to make good the bond

amount and the Court is entitled to proceed under Section 446 of Cr.P.C against the sureties for this purpose.

15.If the Court below finds that the accused person has absconded and he is not appearing before the Court, rather than compelling the surety to continue, the Court below should have resorted to the cancellation of bail bond executed by the accused and proceeded further. As per the above judgment, the Magistrate should not have acted in such a helpless manner and should have straightaway resorted to Section 446-A Cr.P.C.

16.In view of the above discussion, this Court is of the considered view that the order of both the Courts below, suffers from illegality and the same requires interference by this Court. Accordingly, the order of the learned X Metropolitan Magistrate, as confirmed by the Principal Sessions Court, Chennai, are hereby set aside. The matter is remanded to the learned X Metropolitan Magistrate Court, Egmore with a direction to the concerned Magistrate to initiate proceedings under Section 446 of Cr.P.C and if the petitioners are willing to make good the bond amount, the same may be realised by way of a penalty and the bond sureties executed by the petitioners may be forfeited. If the petitioners are not

willing to make good the bond amount, the learned Magistrate can resort to the procedure under Section 446 of Cr.P.C for forfeiture of the bond and proceed further in accordance with law. The learned Magistrate is further directed to proceed against the accused person under Section 446-A of Cr.P.C, for the cancellation of the bail bond.

In the result, these Criminal Original Petitions are allowed with the above directions.

26.11.2018

Internet: yes
Index: Yes
Speaking Order/Non Speaking Order

KP

To

1. Xth Metropolitan Magistrate,
Egmore, Chennai.
2. Inspector of Police,
P4, Basin Bridge (Crime)Police Station,
Chennai.
- 3.The Additional Public Prosecutor,
High Court, Madras.

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N. ANAND VENKATESH,. J
KP



Pre-Delivery Common Order made in
CRL.OP.Nos.25382 & 25834 of 2018

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Delivered on: 26.11.2018