

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 18TH DAY OF AUGUST 2015/27TH SRAVANA, 1937

CRL.A.No. 700 of 2015 ()

AGAINST THE ORDER IN CRMC 79/2014 of COURT OF ADDITIONAL SESSIONS
JUDGE-I, THIRUVANANTHAPURAM DATED 05-01-2015

APPELLANT/SURETY NO.1:

ANZIYA,
D/O.SAVAD, ANZIYA MANZIL, KALLAYAL ROAD
VETTOOR.P.O, VETTOOR VILLAGE, CHIRAYINKEEZHU TALUK
THIRUVANANTHAPURAM DISTRICT.

BY ADV. SRI.G.SUDHEER

RESPONDENT/COMPLAINANT:

STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM-682031.

BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
18-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

"C.R."

C.T.RAVIKUMAR, J.

Crl.A.No.700 of 2015

Dated 18th August, 2015

JUDGMENT

This appeal is filed under Section 449 of the Code of Criminal Procedure against an order passed by the Court of Additional Sessions Judge-I, Thiruvananthapuram in Crl.M.C.No.79 of 2014 in S.C.No.957 of 2009. The appellant stood as surety to the accused in the said sessions case. Owing to the absence of the accused proceedings were initiated under Section 446 Cr.P.C. against the appellant and the other surety. Though notice was issued to the appellant he did not appear before the court below. He filed an affidavit. After considering the affidavit the bail bond was forfeited. As against the other surety, after forfeiture of the bail bond, he was imposed with a penalty of ₹ 40,000/- and in default of payment of the penalty he was directed to undergo simple imprisonment in civil prison for a period of one month. Distress warrant was also issued against the appellant herein who is surety No.1 despite the fact that no penalty was imposed on him. It is in the said circumstances that the captioned appeal has been preferred.

2. I have heard the learned counsel for the appellant and also the learned Public Prosecutor.

3. There can be no doubt with respect to the position that when a person stands as a surety to an accused in a criminal case he is bound to procure the presence of the accused for whom he stood as surety as and when the presence of the accused has been required by the court if the accused by himself is not appearing before the court. In a case of serious nature when the accused fails to appear before the court for the trial and when proceedings are initiated, in accordance with law, and notice has been given to the concerned surety requiring the surety to procure the presence of the accused concerned or to assign the reason for not forfeiting the bail bond on imposing penalty, the surety is bound to procure the presence of the accused on the appointed day or to appear and assign the reason for not forfeiting the bond. In this case, despite the receipt of notice the appellant has not chosen to appear before the trial court and he has chosen only to file an affidavit. The bail bond was forfeited going by the impugned order. But, at the same time, a perusal of the order impugned would reveal that after forfeiture no penalty was imposed on the appellant who is the first surety. After

forfeiture as against surety No.2 penalty of ₹ 40,000/- was imposed and in default of payment of the penalty thus imposed he was ordered to undergo simple imprisonment for one month in civil prison. At the same time, without imposition of penalty distress warrant was also issued against the appellant/surety No.1. The word 'distress' denotes a legal seizure of personal chattel from the possession of a wrong-doer as a method of enforcing payment. A perusal of the provisions under Section 446 Cr.P.C. is only appropriate for a proper understanding of the position of law and for a proper disposal of this appeal. A careful scanning of the said provisions would reveal that after an order of forfeiture of the bail bond if penalty was imposed against a surety a date has to be fixed for its payment or to show cause why it should not be paid. Section 446, Cr.P.C. would reveal that it virtually consists of two stages. In the first stage the court is required to record the satisfaction for ordering forfeiture and after recording such forfeiture if penalty is ordered to be paid a date is to be fixed for effecting payment of penalty or to show cause why it should not be paid. This position is evident from a bare perusal of the provisions under Section 446, Cr.P.C. and its explanation and they read thus:-

"446. Procedure when bond has been forfeited.-(1)

Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court or of any Court to which the case has

subsequently been transferred, that the bond has been forfeited,

or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited,

the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show-cause why it should not be paid.

*Explanation :-*A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be, for production of property, before any Court to which the case may subsequently be transferred."

In the decision in **Ghulam Mehdi v. State of Rajasthan (AIR 1960 SC 1185)** the Hon'ble Apex Court has considered the provisions. It is held therein that before a surety becomes liable to pay the amount of the bond forfeited it is necessary to give notice and if surety fails to show sufficient cause, only then the Court should proceed to recover the money. When no opportunity is being given to show cause why he should not be made to pay, the proceedings could not be said to be in accordance with law, it was further held. In this case, after the forfeiture no penalty was imposed on the appellant herein. The expression "the court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid" employed under Section 446(1), Cr.P.C. would

reveal the aforesaid position clear. If sufficient cause is not shown and the penalty imposed by the court is not paid within the said time limit going by the provisions under Section 446(2), Cr.P.C. the court may proceed to recover the same, as if such penalty were a fine imposed by it under the Code. The procedure for recovering a fine is dealt with under Section 421, Cr.P.C. A notice to surety in breach of a bond under Section 446, Cr.P.C. shall be issued in Form No.48 of Schedule II of the Code. As per the same, the surety concerned shall be required to pay the said penalty or show cause why payment of the said sum should not be enforced against him within the time specified in the said notice. Section 446(2), Cr.P.C. reads as follows:-

"446. Procedure when bond has been forfeited.-

(1).....

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code.

Provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months."

It is evident from the proviso to Section 446(2) of the Code that where such penalty is not paid and could not be recovered in the manner

provided under Section 421, Cr.P.C. the person so bound as surety may be ordered to undergo imprisonment in civil jail for a term which may extend to six months by an order of the court. Thus, it is obvious that an order making a surety who is bound by a bond to undergo imprisonment in civil jail arises only if the penalty imposed is not paid or it could not be recovered in the manner provided under Section 421, Cr.P.C. A warrant for the levy of a fine by attachment and sale under clause (a) of sub-section (1) of Section 421, Cr.P.C. shall be directed to a Police officer or other person or persons who is or are to execute the warrant and it shall be in Form No.43 of Schedule II to the Code. Rule 190 of the Criminal Rules of Practice is also relevant in this context. Whereas the court issues a warrant to the Collector of the district, authorising him to realise the amount as arrears of land revenue from the movable or immovable property, or both, of the defaulter under clause (b) of sub-section (1) of Section 421, Cr.P.C. it shall be in Form No.44 of Schedule II to the Code. Thus, a careful scanning of the provisions under Section 446, Cr.P.C. would undoubtedly reveal that it actually enjoins fixation of a date for payment of penalty, if fixed after forfeiture of the bond or to show cause why it should not be paid. In short, it is the failure on the part of the concerned surety to show cause why he should not be made liable to pay the penalty or to pay the penalty within the appointed time that would

make him liable to face the proceedings for recovery under Section 421, Cr.P.C. It is only after exhaustion of such procedures an order can be issued by the court for imprisonment in civil prison for a term which may extend to six months under the proviso to Section 446(2) Cr.P.C. In this case, as noticed hereinbefore, after the forfeiture against the appellant who was the first surety no penalty was imposed. If no penalty was imposed there is no question of ordering for recovery and if no recovery is to be made there is no question of issuing a distress warrant as against the appellant. In the said circumstances, I have no doubt that the impugned order in so far as it relates to the appellant herein was not passed in accordance with law. In the said circumstances, the impugned order to the extent it is applicable to the appellant herein is set aside and the court below is directed to consider it in accordance with law and to proceed further with the proceedings under Section 446, Cr.P.C. against him after putting proper notice to the appellant strictly in terms of the aforesaid provisions.

The appeal is allowed as above.

Sd/-
C.T.RAVIKUMAR
Judge

TKS