

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE P.D.RAJAN

FRIDAY, THE 22ND DAY OF MAY 2015/1ST JYAISHTA, 1937

CRL.A.No. 2504 of 2010 ()

**AGAINST THE ORDER IN M.C.29/2005 IN SC 1675/2010 OF ADDL. SESSIONS
COURT FOR TRIAL OF ABKARI ACT CASES, NEYYATTINKARA DATED 22-09-2005**

APPELLANT(S)/SUERTIES::

- 1. VASANTHA, D/O.SUMATHI,
MUTTATHARA VILAKATHU VEEDU, VALLMCODE DESOM
KALLIYOOR VILLAGE, THIRUVANANTHAPURAM.**
- 2. UNNI, S/O.APPU,
UDAYAMVILAKATHU VEEDU,
VALLAMCODE DESOM
KALLIYOOR VILLAGE,
THIRUVANANTHAPURAM.**

**BY ADVS.SRI.G.SUDHEER
SMT.M.JAYASREE**

RESPONDENT(S)/COMPLAINANT::

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

BY PUBLIC PROSECUTOR SMT.SEENA RAMAKRISHNAN

**THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 22-05-2015, THE
COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

STK

“C.R.”

P.D. RAJAN, J.

Crl. Appeal No.2504 of 2010

Dated this the 22nd day of May, 2015

JUDGMENT

The question under challenge in this appeal is the legality of the order of forfeiting the bail bond without giving show cause notice to the 2nd surety is sustainable in Law?

The appellants were sureties of the accused in S.C.1675/2001 of the Additional Sessions Court Neyyattinkara (Abkari Act Cases) for offence punishable under Section 55(a) of the Abkari Act. The accused in the above case was released on bail executing a bond for ₹.10,000/- each. During trial accused absconded and notices were issued to the sureties. Notice against first surety was served and no notice to the second surety. The appellants neither appeared before court nor shown any reason for their non appearance. In the circumstance, bond amount was forfeited and directed to recover the penalty amount as fine under the code of criminal procedure.

2. The accused subsequently appeared before trial court and took bail on 7.12.2005 on executing fresh surety bond. The case against the accused (SC 1675/01) was tried in the Additional Sessions Court and he was acquitted by that Court. It is true that the accused was released on bail by the trial court on executing a bond for ₹.10,000/- each with two solvent sureties. The condition in the bond was that the person released on bail should appear before court as and when called for to answer the charge. The accused failed to appear before court as per the bond and M.C.29/2005 was registered against the sureties and bond was forfeited on 22.09.2005 and directed to pay ₹.10,000/- each.

3. Section 446 of the Code of Criminal Procedure read as follows:

“446 (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 the 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.

(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)”

4. The Court has to exercise extreme caution while forfeiting surety bonds. When a bond under the Code for appearance or production of property is executed 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 before forfeiting the bond, 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. I have perused the lower court records, nothing has been stated in the order of the lower court with regard to the satisfaction of the court or the ground of proof while imposing penalty. Show cause notice was served on the 1st appellant. But the show cause notice to the 2nd appellant was not served. The mandatory requirement of the principle of natural justice is that a person against whom an adverse order is passed must be given an opportunity of being heard. Therefore, before forfeiting the surety bond, the primary responsibility on behalf of the court is to give notice to the surety to show cause as to why the surety bond be not forfeited.

5. The importance of notice was considered by the Apex Court in **Ghulam Mehdi v. State of Rajasthan AIR 1960 SC 1185** held that:

“Section 514 Cr.P.C., shows that before a surety becomes liable to pay the amount of the bond forfeited it is necessary to give notice why the amount should not be paid and if he fails to show sufficient cause, only then can the Court proceed to recover the money. When no opportunity has been given to a surety to show cause why he should not be made to pay, the proceedings cannot be said to be in accordance with law and should therefore be quashed.”

6. The peculiarity in this case is that no notice was served on the 2nd appellant. Section 446 Cr.P.C., shows that before a surety becomes liable to pay the forfeited bond amount, it is necessary to give notice why the amount should not be paid and if he fails to show sufficient cause, then only the Court can proceed to recover the bond amount. When no opportunity has been given to a surety to show cause, the proceedings cannot be said to be in accordance with law. Without considering that aspect, the sureties were directed to pay a penalty of ₹10,000/- each. When there are two or more persons in a surety bond, the court shall give show cause notice to all sureties and brought to their notice about the violation of

bail condition. One factor noticed by this court is that in some cases the trial court service show cause notice to one surety alone. This amazing discovery is an alarming situation in large number of cases in the trial court, amounts to denial of justice which create heavy monetary loss and burden to the poor. The above provision under Section 446 shows that before a surety becomes liable to pay any sum as per the forfeited bond, it is necessary to give notice to all sureties why the amount should not be paid and if he fails to show cause, then only the court can proceed to recover the money. Therefore, the trial court committed a grave illegality by non-issuing show cause notice to the second surety.

7. The indications in Section 446(3) empowers the court in certain circumstances at its discretion to remit any portion of penalty and take a lenient view in conformity with certain situation. Where the accused has been arrested or surrendered before court subsequently and amount forfeited is excessive, then the surety is unable to pay huge amount, the court will be justified in invoking

Section 446(3) of the Code of Criminal Procedure in proper cases. In this case, the accused appeared before court and took bail on 07.12.2005 and he was acquitted by the Sessions Judge in S.C.1675/2001 after trial. There was no notice to second surety, Unni, which is an illegality committed by the trial court. This is a good ground to set aside the forfeiture against the second appellant. Since, the accused appeared before court and obtained regular bail, the first appellant is entitled to get remission under Section 446(3) of the Code of Criminal Procedure. In the result, the penalty amount of the 1st appellant is reduced to ₹1000/- (Rupees One thousand only) and the forfeiture against the 2nd appellant is set aside.

This appeal is partly allowed.

STK

**P.D. RAJAN,
JUDGE**