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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 22 .03.2018

DELIVERED ON : 18.04.2018

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Crl. R.C. (MD) No.148 of 2018 & Crl. M.P. (MD) No.1954 of 2018

Pillappan @ Ravikumar

..Petitioner

vs.

State represented by the Inspector of Police

West Police Station

Kumbakonam

Thanjavur District

..Respondent

Criminal Revision Case filed under Section 397 r/w 401 Cr.P.C. seeking to call for the records of the Judicial Magistrate No.II, Kumbakonam in C.C. No.642 of 2007 and set aside the order dated 20.02.2018.

For petitioner : Mr. M. Karunanithi

For respondent : Mrs. S. Bharathi

Government Advocate (Crl. Side)

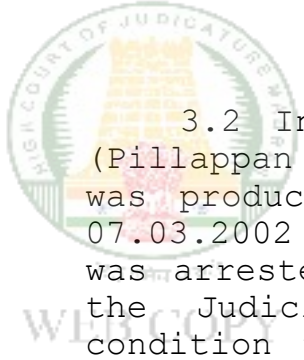
ORDER

This Criminal Revision Case has been filed seeking to call for the records of the Judicial Magistrate No.II, Kumbakonam in C.C. No.642 of 2007 and to set aside the order dated 20.02.2018.

2 This case raises a seminal issue qua the power of the Court to cancel the bail of an absconded accused in a case involving a bailable offence.

3 Shorn of the minute details, the facts germane for deciding this case are as under:

3.1 On 07.03.2002, four accused abducted the de facto complainant posing themselves as CB-CID sleuths. The police rescued the de facto complainant from the said abductors and registered a case in Cr. No.88 of 2002 under Sections 419 and 363 IPC and arrested the accused.



3.2 In this petition, we are concerned with the case of A4 (Pillappan @ Ravikumar) who is the petitioner herein. The petitioner was produced before the Judicial Magistrate No.II, Kumbakonam on 07.03.2002 and was remanded to custody. As the offences for which he was arrested were bailable, the petitioner was released on bail by the Judicial Magistrate No.II, Kumbakonam on 11.03.2002, on condition that he should execute a bond with two sureties. After completing the investigation, the police filed the final report on 17.10.2007 against A.1 to A.4 for the offences under Sections 419 and 363 IPC before the Judicial Magistrate No.II, Kumbakonam and the same was taken on file as C.C. No.642 of 2007 on 19.10.2007.

3.3 On issuance of process, the petitioner appeared before the Trial Court on 14.06.2010 and was continuously appearing on various dates till 27.02.2013. On 27.02.2013, the petitioner did not appear before the Trial Court nor was a petition under Sec. 317, Cr.P.C. (hereinafter referred to as "the Code") filed for condoning his absence. Hence, a non-bailable warrant was issued by the Magistrate for securing his presence. On 11.07.2013, the petitioner surrendered and the warrant was recalled under Sec. 70 of the Code. Again, on 14.12.2015, the petitioner did not appear before the Trial Court and hence, the Trial Court issued non-bailable warrant against him.

3.4 The non-bailable warrant was pending for three years and ultimately, the petitioner was apprehended by the police upon execution of the non-bailable warrant, and was produced before the Magistrate on 20.02.2018. On the date of his production, the Magistrate gave him a notice asking him to show cause as to why his bail should not be cancelled on the ground that he had violated the conditions of bail by not appearing on the hearing dates.

3.5 In response, the petitioner replied that he was not aware of the warrant against him. The Magistrate recorded the explanation given by the petitioner and passed the following order:

"Heard the accused. Records perused. Notice given to accused. He stated that he does not know the pendency of warrant. The said reason is unacceptable as the accused was arrested and released on bail and he executed a bail bond for his appearance. Having executed bail bond for his appearance and having failed to appear as per the conditions of the bail bond. The case is pending for more than 10 years due to the pendency of NBW against the accused. Hence, the said reason is not satisfactory. No sufficient cause is shown. Hence, bail is cancelled."

3.6 The petitioner filed a separate bail application in CrI.M.P.No.2178 of 2018 seeking bail which was dismissed by the Magistrate on 21.02.2018. Challenging the order dated 20.02.2018 cancelling the bail, the petitioner has filed the present revision petition.



4 Heard Mr. Karunanidhi, learned counsel for the petitioner and Mrs. S. Bharathi, learned Government Advocate (Crl. Side) appearing for the respondent-State.

5 Mr. Karunanidhi, learned counsel for the petitioner did not seriously dispute the above summation of facts. He contended that the Magistrate has no power to cancel the bail in a case involving bailable offences and that only the Sessions Court / High Court can cancel the bail in exercise of the power under Sec. 439(2) of the Code. He further submitted that the Magistrate has power under Sec. 437(5) of the Code to cancel the bail in a case involving a non-bailable offence, but, such power cannot be used qua a case involving a bailable offence. Thus, according to him, the impugned order passed by the Magistrate cancelling the bail is liable to be set aside.

6 Per contra, the learned Government Advocate (Crl. Side) refuted the aforesaid contentions.

7 At this juncture, it may not be out of place to dwell a little deep into the different facets of bail.

8 As the word "bail" has not been defined in the Code, it may be appropriate to extract the following passage from the Constitution Bench judgment of the Supreme Court in Sunil Fulchand Shaw vs. Union of India and others [(2000) 3 SCC 409]:

"24.The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word "bail" is surety. In Halsbury's Laws of England [Halsbury's Laws of England, 4th Edn., Vol. 11, para 166.], the following observation succinctly brings out the effect of bail:

The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of his sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned." (emphasis supplied)

9 Thus, bail presupposes that the person is in the custody of the police or the Court. That is why, both Sections 436 and 437 of the Code use the expression "detained without warrant by an officer in charge of a police station or appears or is brought before a Court." Sec. 436 requires the police officer and the Court to release the person on bail if the offence for which he has been detained is bailable in nature. Sec. 437 of the Code empowers the police officer and the Court to release the person on bail, if the offence is non-bailable in nature, of course, with certain riders,



which are not available in Sec. 436 of the Code. In view of the absence of such riders, Sec. 436 of the Code makes it mandatory for the police officer/Court to release the person on bail in a case involving a bailable offence. Thus, Sections 436 and 437 of the Code use the expression "shall/may be released on bail" since in both these eventualities, the accused is in the physical control of the Magistrate by his appearance or he having been produced before the Magistrate by the police.

10 In contra distinction to this expression, Sec. 439 of the Code which confers bail jurisdiction on High Court / Sessions Court, uses the expression "may direct that any person accused of an offence and in custody to be released on bail". Obviously, the person is not in the custody of the Sessions Court / High Court when the bail application is being considered. (Of course, this Court is also aware of the law laid down in *Niranjan Singh and another vs. Prabhakar Rajaram Kharote and others* [(1980) 2 SCC 559] and *Sundeeep Kumar Bafna vs. State of Maharashtra and another* [(2014) 16 SCC 623] and they are not discussed in this order, because, the ratio laid down therein may not apply to the facts of the present case).

11 Sec. 439(1)(a) of the Code empowers the Sessions Court/High Court to impose any condition which it considers necessary. Only by virtue of this power, the Sessions Court / High Court directs the accused to stay in a particular place other than the place where the crime had occurred and report before either a police station or Court, depending upon the facts of each case. Thus, a bail order of the Sessions Court / High Court under Sec. 439 of the Code needs to discuss only the eligibility criteria for grant of bail. In the bail orders of the Supreme Court and several High Courts, after directing the release of the accused on bail, the orders would direct the actual release of the prisoner on bail to the satisfaction of the concerned Magistrate. The amount of bail bond also will not be fixed, because, the financial capability and other factors can be best assessed only by the police officer/Magistrate in whose custody the accused remains. Here, Sec. 441 of the Code steps in and the same reads thus:

"441 Bond of accused and sureties:

1 Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.



2 Where any condition is imposed for the release of any person on bail, the bond shall also contain that condition.

3 If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

4 For the purpose of determining whether the sureties are fit or sufficient, the Court may accept affidavits in proof of the facts contained therein relating to the sufficiency or fitness of the sureties, or, if it considers necessary, may either hold an inquiry itself or cause an inquiry to be made by a Magistrate subordinate to the Court, as to such sufficiency or fitness."

12 A reading of Sec. 441 clearly shows that the Legislature has left it to the discretion of the police officer/Court to fix the amount of the bond and the number of sureties. If the police officer / Magistrate fixes an unreasonable amount, the Sessions Court / High Court has the power to reduce it under Sec. 440(2) of the Code.

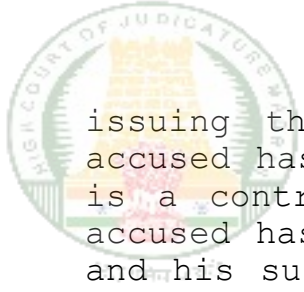
13 When such is the law, why does the High Court fix the bond amount at Rs.5,000 or Rs.10,000/-? The expression "Court" in Sec. 441 of the Code has been interpreted to include the Sessions Court / High Court and the Magistrate, because, it came to the notice of the higher judiciary that exorbitant amounts were being fixed as bond amount by the Magistrates which were resulting in the orders of bail getting obfuscated, resulting in over-crowding of undertrials in prisons. Therefore, superior Courts took upon themselves to fix the bond amount and left the discretion to the Magistrate to test the sufficiency of the sureties alone. The bail order need not kidglove the accused reminding him about his obligation to attend the Court on all the hearing dates, because, Sec. 441 of the Code and Form 45 of the Code statutorily mandate this. Therefore, the accused is bound to appear on all the hearing dates before the Court unless his presence is dispensed with.

14 What happens when on a particular date, the accused does not appear nor a petition is filed by his counsel to dispense with his presence? The answer to this question is available in Sec. 89 of the Code which reads as follows:

"89 Arrest on breach of bond for appearance:

When any person who is bound by any bond taken under this Code to appear before a Court, does not appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him."

15 By virtue of Sec. 89 of the Code, the Court records the absence of the accused and issues a warrant to secure his presence. By his non appearance followed up with the act of the Court in



issuing the non-bailable warrant for securing his presence, the accused has prima facie breached the condition of the bond. A bond is a contract between the accused and the State under which the accused has agreed to appear before the Court on the hearing dates and his sureties have assured the Court that they will ensure that the accused does not commit breach of the bond. In *The State of Maharashtra vs. Dadamiya Babumiya Sheikh, etc.*, [(1972) 3 SCC 85], the Supreme Court has held as under:

"7. A surety bond is a contract and it is a question as to how far its terms can be considered to have been varied by any unilateral act. Each bond, it may be pointed out, has to be construed on its own terms. But in construing the terms of a surety bond for the production of an accused person, the purpose and object of executing it must be kept in view. Such a bond is executed for the purpose of ensuring the presence of the accused concerned in court in which he is standing his trial for a criminal offence at the hearing of the case. But for the execution of such a bond, the accused would have to remain in custody so that the trial may proceed smoothly."

In *Mahadeo Amrut Gajbhiye vs. The State of Maharashtra* [1974 CrL.J. 1075 (V 80 C 332)], Chandurkar J., (as he then was), considered the legal relationship between the State and a person entering into a bond in a criminal case and has observed as under:

"6. It is no doubt true that the matter relating to the grant of bail is governed by the provisions of the Code of Criminal Procedure, but that does not rule out the nature of the legal relationship between the State and the person to be released on the one hand and the State and the surety on the other, which must on the terms of the surety bond itself be governed by nothing more than the general principles relating to the enforcement of a contractual liability. . . ."

16 Normally, a contract requires to bear the stamp prescribed by the Stamp Act, but, in view of Article 13 of the Indian Stamp Act, 1899 read with Article 14 of Schedule II of the Tamil Nadu Court Fees and Suits Valuation Act, 1955, a Court fee of Rs.5/- is affixed on the bail bond. When the terms of a contract are breached, what follows is damages or compensation under Sections 73 and 74 of the Contract Act. Sec. 74 of the Contract Act reads as under:

"74 Compensation for breach of contract where penalty stipulated for:-

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."



As per the above provision, the Court may award reasonable compensation. This may include a genuine/reasonable pre estimate of damages i.e., liquidated damages. The exception to Sec. 74 is a bail bond and the same reads as under:

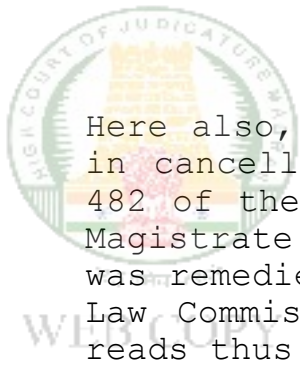
"When any person enters into any bail-bond, recognizance or other instrument of the same nature or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein." (emphasis supplied).

Illustration (c): A gives a recognizance binding him in a penalty of Rs.500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty."

17 It is beyond cavil that the public are interested in dispensation of justice in a criminal case and that can be made possible only if the accused appears for trial as undertaken by him in the bond. The word "recognizance" used above finds place in the heading of Sec. 445 of the Code - Deposit instead of recognizance. Sec. 445 of the Code permits the accused to deposit the bail bond amount straightaway instead of he being entrusted to the custody of his sureties.

18 In the 1898 Code, the accused had an indefeasible right to be released on bail in a bailable offence under Sec. 496 of the Code. In Talab Haji Hussain vs. Madhukar Purshottam Mondkar and another [AIR 1958 SC 376], the question before the Supreme Court was as to whether the Court can cancel the bail that was granted to the accused in a non-bailable offence. The Supreme Court answered the question as follows:

"10. . . . We, therefore, feel no difficulty in holding that, if, by his subsequent conduct, a person accused of a bailable offence forfeits his right to be released on bail, that forfeiture must be made effective by invoking the inherent power of the High Court under Section 561-A. Omission of legislature to make a specific provision in that behalf is clearly due to oversight, or inadvertence and cannot be regarded as deliberate. If the appellant's contention is sound, it would lead to fantastic results. The argument is that a person accused of a bailable offence has such an unqualified right to be released on bail that even if he does his worst to obstruct or to defeat a fair trial, his bail-bond cannot be cancelled and a threat to a fair trial cannot be arrested or prevented. Indeed Shree Purushottam went the length of suggesting that in such a case the impugned subsequent conduct of the accused may give rise to some other charges under the Indian Penal Code, but it cannot justify his re-arrest. Fortunately that does not appear to be the true legal position if the relevant provisions of the Code in regard to the grant of bail are considered as a whole along with the provisions of Section 561-A of the Code."



Here also, the Supreme Court justified the action of the High Court in cancelling the bail under Sec. 561-A of the Code (present Sec. 482 of the Code), but, did not say anything about the power of the Magistrate to cancel the bail in a bailable offence. This situation was remedied in the 1973 Code, pursuant to the recommendation of the Law Commission in its 41st report, the relevant portion of which reads thus:

"39.2 Under Section 496, the right to bail is absolute in case of bailable offences. It has been suggested that where a person released on bail has absconded or has failed to appear before the Court on the date fixed, he shall not be entitled to bail, when brought to Court on any subsequent date. We recommend the acceptance of this suggestion, and further recommend that refusal of bail under such circumstances shall be without prejudice to any action that may be taken under section 514 for forfeiture of the bail bond.

Accordingly, Section 496 may be re-numbered as sub-section (1) and the following sub-section may be added as sub-section (2):

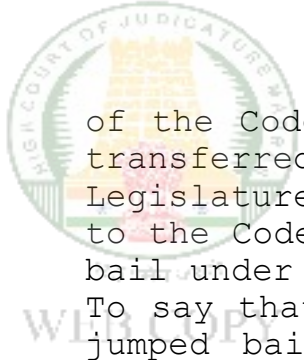
"(2) Notwithstanding anything contained in sub-section (1), where a person who having been released on bail, has failed to comply with the condition of the bail bond as regards the time and place of attendance, the Court may refuse to release him on bail when, on a subsequent occasion in that case, he appears before the Court or is brought in custody. Any such refusal shall be without prejudice to the power of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 514."

The Parliament accepted the aforesaid recommendation and thus was born Sec. 436(2) of the Code. In the original 1973 Code, Sec. 446-A was not available. This provision was introduced by the Code of Criminal Procedure (Amendment) Act, 1980 with effect from 27.12.1980. The reason for including 436(2) and 446-A to the Code is to deal with the cases of jumping bail in cases involving both bailable and non-bailable offences. Sec. 436(2) of the Code reads as follows:

"436. In what cases bail to be taken.

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 446."

19 A bare reading of Sec. 436(2) of the Code shows that if a person had failed to comply with the conditions of the bail bond as regards the time and place of attendance, and subsequently, if he appears or is produced before the Court, the Court can refuse to release him on bail. Here, the expression "Court" can mean only the Court to which the accused had executed the bail bond under Sec. 441



of the Code, including the Court to which the case is subsequently transferred. (See the Explanation in Sec.446 of the Code). The Legislature thought it fit to include a new provision as Sec. 436(2) to the Code, because, the accused, who had jumped bail, cannot claim bail under Sec. 436(1) as a matter of right even in a bailable case. To say that Sec. 436(2) would deny bail only to an accused who had jumped bail in a case involving bailable offence and not to an accused who had jumped bail in a case involving a non-bailable offence, would clearly defeat the very purpose of the provision. Sec. 436(2) of the Code is not a provision for cancellation of bail. It deals with breach of conditions of the bail bond and the consequence of it, viz., that the person cannot, as a matter of right, ask for bail. Under Sec. 437(5) of the Code, there is an independent power to cancel bail to a person involved in a non-bailable offence and who has been granted bail by the Magistrate under Sec. 437(1). However, under Sec. 439(2) of the Code, the Sessions Court / High Court can cancel the bail of a person who has been released on bail under Chapter XXXIII, which means that these Courts can cancel the bail of a person who has been released by the Magistrate even in a case involving a bailable offence. Now, the inherent power of the High Court under Sec. 482 of the Code need not be invoked for cancellation of bail. The lacuna in the 1898 Code that was observed by the Supreme Court in Talab Haji Hussain (supra) has been plugged in the 1973 Code by Sec. 436(2).

20 In any event, the principle of audi alteram partem is a sine qua non for cancelling the bail either under Sec. 437(5) or under Sec. 439(2) of the Code, unless, despite issuance of notice, if the Court is satisfied that the accused is deliberately keeping away from participating in the cancellation proceedings. For instance, if a foreigner released on bail, had illegally slipped away from India, it will be ludicrous for the Court to wait for his return to India in order that he can participate in the proceedings for cancellation of bail.

21 In reality, the problem of bail jumping remains unsolved even after the amendment. The malaise plagues the system even today as could be seen from the Report called for by this Court from one District, viz., Dindigul, which shows that from 1990 to 2018, 2,595 non-bailable warrants are pending execution against the accused who have jumped bail, out of which, 39 warrants are in respect of the offence under Sec. 302 IPC and 125 warrants relate to the offence under Sec. 307 IPC. To put it more pithily, the police arrest the accused and bail is granted by the Court, after which, the accused absconds and if the police once again arrest the accused and produce him in execution of non-bailable warrant, can it be said that the accused should be just like that released on the ground that his bail has not been formally cancelled? In a case where the Magistrate had granted bail, the Magistrate can cancel the bail under Sec. 437 (5) of the Code. In a case where bail has been granted by the Sessions Court/High Court, the Magistrate cannot cancel the bail, unless the superior Court had expressly authorised



the Magistrate to do so, in terms of the law laid down by the Supreme Court in P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560]. In the absence of such an express authorisation, the Magistrate cannot cancel the bail in a case where it has been granted by the superior Court.

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22 The Code was amended again in 1980 vide the Code of Criminal Procedure Amendment Act, 1980 with effect from 27.12.1980. The said amendment introduced Sec. 446-A to the Code and also made consequential changes in Sec. 436. Sec. 446-A of the Code reads as under:

"446-A 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

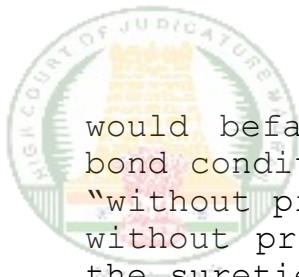
b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its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

Provided that subject to any other provision of this Code he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the Police Officer or the Court, as the case may be, thinks sufficient." (emphasis supplied)

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 (Cr1.) 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 abscondence 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. 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.

26 Supposing, in a given case, bail had been granted by the superior Court, is the Magistrate helpless and powerless to take cognizance of the violation of the conditions of the bail bond? Is it necessary for the Magistrate to write to the superior Court for cancellation of the bail? This was the position prior to the 1980 Amendment Act and that has been removed now by the introduction of Sec.446-A of the Code.



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.

28 In the instant case, the accused is involved in a bailable offence and therefore, the Magistrate need not have cancelled the bail under Sec.437(5) of the Code. He should have recorded a finding of forfeiture of the bond and refused bail under Sec.436(2) of the Code.

29 Coming to the facts of this case, the petitioner has been in custody since 20.02.2018 in a case involving bailable offences, which, in the opinion of this Court, is a sufficient penalty for his having been in abscondence. Hence, the petitioner is directed to be released on bail on condition that he shall appear before the Trial Court at 10.30 a.m. everyday until further orders, on conditions of bond and sureties as determined by the Trial Court in order to ensure his continued participation in the trial.

With the above direction, this Criminal Revision Case stands disposed of. Connected Crl.M.P. is closed.

Sd/-

Assistant Registrar (AS)

/True Copy/



To

WEB COPY

1. The Judicial Magistrate No.II
Kumbakonam
2. The Chief Judicial Magistrate, Tanjore at Kumbakonam
3. The Superintendent, Central Prison, Trichy
4. The Inspector of Police
West Police Station
Kumbakonam
Thanjavur District
5. The Additional Public Prosecutor
Madurai Bench of Madras High Court
Madurai

+1cc to Mr.M.Karunanithi, Advocate, SR.No.61988

cad
RL/7C/14P/SV/MMS/SAR4/20/4/2018

Cr1. R.C. (MD) No.148 of 2018

18.04.2018