

**131 IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CRM-M-11910-2018

Date of decision: March 21, 2018

Rohit Kumar @ Chidya

...Petitioner

Versus

State of Haryana

...Respondent

CORAM: HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. A.D.S. Sukhija, Advocate
for the petitioner.

RAJ SHEKHAR ATTRI, J.(ORAL)

Through the instant petition preferred under Section 438 of Code of Criminal Procedure, petitioner has sought anticipatory bail in case bearing FIR No.361 dated 02.10.2016, under Sections 18 A and 18 C of the Drugs and Cosmetics Act and Section 21 of the Narcotic Drugs and Psychotropic Substances Act, registered at Police Station Ambala Cantt.

Petitioner was on bail but on 29.01.2018, he could not appear before the trial court. It is stated that his maternal uncle has died in District Gonda, Uttar Pradesh and he had gone there. During his absence, his bail was cancelled.

Notice of motion.

On the asking of the court, Mr. Ashok Muthreja, DAG, Haryana, accepts notice on behalf of the respondent-State.

Heard.

At the time of dealing with the bail and cancellation of bail, the court has to keep in mind the following principles:-

- a) accused be taken as innocent upto his conviction;
- b) accused is a human being and may be subject to various

constraints beyond his control;
c) a judge has to adopt humanitarian approach.

In criminal matters, generally, the bail orders are cancelled and bail bonds are forfeited to the State immediately on the absence of the accused. Neither a show cause nor an opportunity of being heard is afforded to him with regard to his absence. His absence may or may not be willful or may be result of any circumstances beyond his control.

Although, under the provisions of Section 437(5) of the Code of Criminal Procedure, a magistrate has got power to cancel the bail yet it is well settled law that before passing such an order, the learned magistrate is required to issue notice to the accused so as to afford him an opportunity to explain as to why the bail should not be cancelled but such course has not been adopted by learned magistrate in the case in hand, therefore, it is on this ground alone, the impugned order to the extent of cancellation of bail deserves to be *set aside*.

At this stage, it should be noticed that forfeiture of bond as indicated in Section 446 of the Criminal Procedure Code is by the default of the accused, who has committed breach of the condition imposed. Such forfeiture originates from the conduct of the accused and there is no need or occasion for the Court to pass any order to forfeit such bond. Section 446 of the Code which deals with forfeiture of bonds reads as under:-

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, (Emphasis supplied)
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, (Emphasis supplied)

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.

(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."

(3) The court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under Section 106 or Section 117 or Section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under Section 448, a certified copy of the judgment of the court by which he was convicted of such offence may be used as evidence in proceedings under against his surety or sureties, and, if such certified copy is so used, the court shall presume that such offence was committed by him unless the contrary is proved.

The language "has been forfeited" employed in more than one place in Section 446 of the Code would clearly reflect the same. Under this provision, the Court is required only to record its satisfaction on proof that such forfeiture has taken place and then to call upon the person to pay penalty thereto in terms of the bond. If sufficient cause is not shown, the Court shall impose penalty.

In my considered opinion, mere failure to appear before the court, in the absence of any willfulness on the part of the accused, would

not amount to “a breach” in terms of Section 446 of the Code. Manifestly, there has to be an animus on the part of the accused not to abide by or comply with, the terms and conditions of the bond. Such animus alone makes the failure of the accused to appear, a breach in terms of Section 446 of the Code. Such animus on the part of the accused could not be ascertained only after affording sufficient opportunity to the accused.

Similar view has been taken by Himachal Pradesh High Court in *Narata Ram v. State of Himachal Pradesh, 1994 Cri. L.J. 491*, in para 10. It has been observed in Para No.10:-

" The scheme of Section 446 of the Code of Criminal Procedure envisages two stages, as indicated above. No doubt, accused did not appear nor they could be produced by the petitioner and non-bailable warrants had been issued for their appearance on 1st July, 1992, the Court below had also afforded an opportunity to the petitioner to produce the accused on 1st July, 1992. Had this last opportunity to produce the accused been afforded, the portion of the order dated 25th May, 1992, directing the forfeiture of the amount under the bonds was legal and valid and for the reasons stated above, the Court could be deemed to have satisfied regarding the existence of reasonable grounds for directing the forfeiture of the bond. Here, a composite order was passed. The petitioner could have produced the accused on 1st July, 1992 and had he complied with the order to this effect, the circumstances would not have attracted the issuance of order forfeiting the bonds. Thus, in such circumstances, the Court cannot be deemed to have satisfied itself as to the existence of grounds for directing the issuance of forfeiture of the bonds on 25th May, 1992. In other words, the trial Court committed an illegality by exercising jurisdiction improperly, which had also not been noticed by the appellate Court."

In para 13 of the said judgment, the Himachal Pradesh High Court has gone to the extent of saying that issuance of notice to the individual to afford an opportunity is part of principles of natural justice

which states that no adverse order could be passed to affect any party without affording sufficient opportunity of being heard.

In view of the said position, I am of the firm view that before recording such satisfaction that breach has been committed, the learned Magistrate is required to issue notice and after affording an opportunity to offer any explanation, if the Magistrate is not satisfied with the said explanation offered by the accused, then, he has to record such satisfaction that the terms of the bond have been breached which alone signifies the forfeiture of the bond.

A close scrutiny of Section 446 of the Code, in the absence of Section 446-A, would go to show that despite the breach of the bond by the accused, the bond does not stand cancelled and such cancellation shall follow only when the bail order itself is cancelled. Having noticed this, the legislature thought it fit to introduce Section 446-A of the Code, which reads as follows:-

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.

Under the said provision, now it has been provided that if once the bond is forfeited for breach of a condition, the said bond shall stand automatically cancelled. Such cancellation takes place as soon as the Magistrate after affording opportunity to the accused and the sureties, records his satisfaction that the bond has been forfeited and that the explanation of the accused has not been accepted. Thus, no more order is required to be passed by the Magistrate to cancel the bond. Until such cancellation takes place, the bond executed by the accused and the sureties shall survive. These provisions of Section 446-A are without prejudice to the provisions under Section 446 Cr.P.C.

In this view of the matter, the petition is allowed subject to the following conditions:-

- (i) that the petitioner shall make himself available for interrogation by the police as and when required;
- (ii) that the petitioner shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the accusation against him so as to dissuade him from disclosing such facts to the Court or to any police officer;
- (iii) that the petitioner shall not leave India without the prior permission of the trial Court.
- (iv) that the petitioner will seek regular bail on the presentation of challan in Court.

(RAJ SHEKHAR ATTRI)
JUDGE

March 21, 2018
m. sharma

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No