

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

**CRM-M-29501-2018 (O&M)
Date of Decision: 17.7.2018**

Naresh Kumar @ Neshi

.....PETITIONER(s).

VERSUS

State of Punjab

....RESPONDENT(s).

CORAM:- HON'BLE MR. JUSTICE RAJ SHEKHAR ATTRI

Present: Mr. Prateek Pandit, Advocate
for the petitioner.

Mr. Saurav Khurana, DAG, Punjab.

RAJ SHEKHAR ATTRI, J.(Oral)

The present petition has been filed under Section 438 Code of Criminal Procedure for grant of anticipatory bail to the petitioner in case FIR No.18 dated 26.2.2016 registered for the offences punishable under Sections 379 Indian Penal Code and 21(1) Mines and Minerals (Development and Regulation) Act, 1957 at Police Station Sadar, Kapurthala.

Notice of motion.

On the asking of this Court, Mr. Saurav Khurana, DAG, Punjab, who is present in Court, accepts notice on behalf of the State.

Learned counsel for the petitioner submits that the petitioner was facing trial for the offence under Section 379 IPC and 21(1) of Mines

and Minerals (Development and Regulation) Act, 1957. He further submits that on 3.5.2018, the petitioner could not appear in the Court due to ill health and his counsel before the trial court moved an application for exemption from personal appearance and that application was allowed by learned trial Court vide order dated 3.5.2018 and the case was adjourned to 25.5.2018. However, on 25.5.2018, he again could not appear before the trial Court as he mistook the date and the case was adjourned to 28.5.2018 and the bail granted to the petitioner was cancelled and his bail bonds were forfeited to the State and he was ordered to be summoned through non-bailable warrants of arrest.

I have heard the learned counsel for the parties and gone through the material available on record.

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

- a) accused shall be presumed innocent unless he is proved guilty beyond reasonable doubt
- b) he is a human being and may be subject to various constraints beyond his control;
- c) a Judge has to adopt a 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 juncture, it should be noticed that forfeiture of bond as indicated in Section 446 of the Criminal Procedure Code is by the act 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 Court is required to issue notice and after affording an opportunity to offer any explanation, if the Court 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.

Keeping in view the facts and circumstances of the case, the present petition is allowed and the petitioner is directed to surrender and join the proceedings before the learned trial Court on or before 27.7.2018 and on his doing so, he be enlarged on anticipatory bail subject to the satisfaction of the learned trial court.

July 17, 2018

Paritosh Kumar

**(RAJ SHEKHAR ATTRI)
JUDGE**

***Whether speaking/reasoned:
Whether Reportable:***

***Yes/No
Yes/No***