

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH**

203

CWP-11919-2020

Date of decision: 24.09.2020

Jai Prakash and another

.....Petitioners

Versus

District Commissioner and another

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN KUMAR TYAGI

Present: Mr. Jatinder Nagpal, Advocate
for the petitioners.

Mr. Gaurav Jindal, Addl. A.G., Haryana
for the respondents.

ARUN KUMAR TYAGI, J (ORAL)

(The case has been taken up for hearing through video conferencing.)

The petitioners have filed the present petition under Article 226/227 of the Constitution of India for issuance of a writ or direction in the nature of certiorari for quashing/setting aside impugned order dated 09.07.2020 (Annexure P-2) passed by the District Magistrate, Yamuna Nagar. The petitioners have further sought issuance of directions restraining the respondents from putting their property on sale/auction and from dispossessing them from the same.

Briefly stated, the petition has been filed on the averments that convict Anshul Kamboj @ Khanna, who was convicted and sentenced on 19.05.2018 by learned Additional Sessions Judge, Yamuna Nagar in case FIR No.96 dated 27.02.2016 registered under Sections 148, 149, 324, 307, 120-B and 326 of the Indian Penal Code, 1860 (for short, "IPC") and Section 25 of the Arms At, 1959 at Police

Station City, Yamuna Nagar was ordered to be released on parole for a period of four weeks for repair of his house. The petitioners stood surety and furnished surety bonds in the sum of Rs.1 lakh each for his release. Said Anshul Kamboj @ Khanna was required to surrender in the jail on 01.05.2020. However, under order dated 02.04.2020 of the High Power Committee his parole period was extended requiring him to surrender on 22.05.2020. The said Convict did not surrender on which on letter written by the Superintendent, District Jail, Yamuna Nagar show cause notice was issued to the petitioners. The petitioners filed joint reply dated 09.07.2020 mentioning that they had got the said prisoner arrested by CIA Staff on 10.06.2020. District Magistrate, Yamuna Nagar forfeited surety bonds and ordered realization of amount of Rs.1 lakh each from the property of the petitioners under the Punjab Land Revenue Act, 1887 without taking into consideration the efforts made by the petitioners for getting convict Anshul Kamboj @ Khanna arrested and by ignoring their financial status and other facts and circumstances involved. The impugned order dated 09.07.2020 is liable to be set aside. Under the garb of the impugned order, the respondents are trying to dispossess the petitioners from their residential house for auction/sale of the same. The said Anshul Kamboj @ Khanna is liable to be visited with penal consequences under Section 9 of the Haryana Good Conduct Prisoner's (Temporary Release) Act, 1988 and Rule 10 of the Haryana Good Conduct Prisoner's (Temporary Release) Rules 2007. The petitioners being sureties may not be harassed for the wrong doing/over-stay by the convict/prisoner.

The petition has been contested and opposed by the

respondents in terms of reply filed by way of affidavit of Mukul Kumar, IAS, Deputy Commissioner/District Magistrate, Yamuna Nagar on behalf of respondents No.1 and 2. In the reply it has been submitted that on the request/information of the Jail Superintendent, Yamuna Nagar show cause notice dated 01.06.2020 was issued to the petitioners to show cause as to why their surety bonds may not be forfeited. The petitioners submitted their reply dated 09.07.2020 praying that the amount of surety bonds be not forfeited on the pretext that CIA Staff arrested the convict with their help. Reply submitted by the petitioners was not found to be satisfactory. Order dated 09.07.2020 was passed after giving proper opportunity of personal hearing and examining all the facts and circumstances. The respondents have accordingly prayed for dismissal of the petition.

I have heard learned counsel for the petitioners and learned State counsel for the respondents and gone through the relevant record.

Learned counsel for the petitioners has submitted that the petitioners got the convict arrested with the help of CIA Staff. The petitioners have been saddled with huge liability by passing the impugned order in mechanical manner without examining the facts and circumstances involved. The impugned order being illegal may be set aside.

On the other hand learned State Counsel has argued that order dated 09.07.2020 was passed by the District Magistrate, Yamuna Nagar after giving proper opportunity of personal hearing and examining all the facts and circumstances. Reply submitted by the petitioners was not found to be satisfactory. The impugned order does

not suffer from any illegality. Therefore, the petition may be dismissed.

In the present case the petitioners stood surety and furnished surety bonds agreeing to pay amount of Rs.1 lakh each in case of default in surrender by the convict before the jail authorities on the date fixed. The convict did not surrender before the jail authorities on the date fixed on which the surety bonds furnished by the petitioners were forfeited to the State. Show cause notice was given to the petitioners who submitted reply dated 09.07.2020 praying that the amount of surety bonds be not forfeited as the CIA Staff arrested the convict with their help. District Magistrate, Yamuna Nagar found the reply to be unsatisfactory and imposed the penalty without any remission vide impugned order dated 09.07.2020.

Section 446 of the Cr.P.C. provides the procedure when bond has been forfeited and the same 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, 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.

(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, after recording its reasons for doing so, 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 this section 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.”

Sub-section (3) of Section 446 of the Cr.P.C. empowers the Court to remit any portion or even the whole of the penalty mentioned in a bail bond and enforce payment in part only. The sub-section gives discretion to the Court but does not indicate what facts and circumstances are to be taken into consideration in the exercise of that discretion. However, the discretion conferred by the section is a judicial discretion. The Court which forfeits the bond has to necessarily consider all facts and circumstances before imposing the penalty and is required by sub section (3) of Section 446 of the Cr.P.C. to record reasons before reducing the penalty. There may be situations where the accused might have been prevented from appearance in Court due to valid reasons beyond his control. Instances may be numerous and variegated depending on factual situation which cannot be enumerated. Ordinarily, if the surety appears in response to the notice issued by the Court and succeeds in producing the accused or assists in arrest and

production of the accused before the Court within a reasonable time, he is entitled to some consideration in the matter of enforcement, though the Court may quite reasonably enforce some part of the penalty for the actual failure of the accused to surrender forthwith and the consequent trouble caused to the Court. In such cases it will also be relevant to consider whether the surety acted irresponsibly and there was any connivance or negligence on the part of the surety. *(See Dayal Chand Vs. State of Rajasthan : 1982 Criminal law Journal 1008).*

The High Court may interfere in exercise of its revisional jurisdiction under Sections 397 and 401 of the Cr.P.C. against order passed by Sessions Judge/Additional Sessions Judge in appeal under Section 449 of the Cr.P.C. and also against order passed by Sessions Judge/Additional Sessions Judge in cases triable by them as the case may be and the Sessions Judge may interfere in exercise of his appellate jurisdiction under Section 449 of the Cr.P.C. against order passed by the Magistrate. The Appellate or Revisional Court, as the case may be, can always consider whether there are circumstances warranting remission of penalty.

In the present case impugned order dated 09.07.2020 was passed by the District Magistrate, Yamuna Nagar and appeal against the same will lie before learned Sessions Judge, Yamuna Nagar at Jagadhari. Since the petitioners have equally efficacious remedy of filing appeal before learned Sessions Judge, Yamuna Nagar at Jagadhari, the present petition under Article 226 of the Constitution of India is not maintainable.

In view of the above discussion the present petition is

hereby dismissed as being not maintainable. However, the petitioner shall be at liberty to avail his remedy of filing appeal against the impugned order before learned Sessions Judge, Yamuna Nagar at Jagadhari and the time taken in the present proceedings shall be liable to be excluded in accordance with law.

24.09.2020

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**(ARUN KUMAR TYAGI)
JUDGE**

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