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IN THE HIGH COURT OF DELHI AT NEW DELHI

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CRL.M.C. 4878/2022

KAPIL S/O HARPRASHAD

..... Petitioner

Through: Mr. Sanjeev Kr. Baliyan, Adv.
DHCLSC

versus

STATE (NCT OF DELHI)

..... Respondent

Through: Mr. Hemant Mehla, APP for the State
with SI Dinesh Kumar, PS Jyoti
Nagar.

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Date of Decision: 16th January, 2023

CORAM:

HON'BLE MR. JUSTICE DINESH KUMAR SHARMA

J U D G M E N T

DINESH KUMAR SHARMA, J. (Oral)

1. This is an application seeking release of the petitioner on furnishing personal bond only.
2. Learned counsel for the petitioner submits that the accused-petitioner has already been in custody for the last over 5 years. It has been submitted that the petitioner was granted bail by the learned Sessions Court vide order dated 02.05.2022 on furnishing his personal bond in the sum of Rs. 20,000/- with two sureties of the like amount. The

petitioner was not able to fulfill the bail conditions and therefore an application under section 441 Cr.P.C. dated 28.05.2022 was moved. On this application, the learned Trial Court was pleased to direct that the petitioner may be released on furnishing of personal bond in the sum of Rs. 10,000/- with two sureties of the like amount. However, the petitioner was still not able to comply and furnish the two sureties of Rs. 10,000/- each. Subsequently the petitioner moved yet another application before the learned Trial Court seeking his release on personal bond only which was partly allowed vide order dated 11.07.2022 and the number of sureties were reduced from two to one.

3. Aggrieved and unable to provide any surety the petitioner has now moved this Court praying that he may be released on bail on furnishing his personal bond as his parents are old and infirm and as he has no other person to stand as surety for him. Learned counsel for the petitioner submits that the petitioner was a mere daily wager at the time of his arrest and belongs to very poor strata of society. It has been further submitted that the petitioner is the sole bread earner of the family, and the sustenance of his old and ailing parents are dependent on him.
4. In the status report filed on 08.10.2022, the SHO PS Jyoti Nagar has verified that the petitioner is a resident of House No. 10/15, Kabul Nagar, Behta Hazipur, Loni Ghaziabad, U.P.
5. Learned counsel for the petitioner submits that as per his instructions, the material witnesses have already been examined. The order dated 02.05.2022 also indicates that the material witnesses have already

been examined and they have not fully supported the case of the prosecution.

6. The petitioner is in custody since 23.07.2017 i.e., for the last over 5 years. He has been granted bail vide order dated 02.05.2022. However, despite having a bail order in his favour he still remains incarcerated merely because he has been unable to furnish surety. The petitioner cannot be punished for not being able to afford to procure the bail amount or manage a surety of sufficient prosperity.
7. In ***Moti Ram v. State of M.P., (1978) 4 SCC 47***, the Supreme Court has *inter alia* held as under:

“24. Primarily Chapter XXXIII is the nidus of the law of bail. Section 436 of the Code speaks of bail but the proviso makes a contradistinction between ‘bail’ and ‘own bond without sureties’. Even here there is an ambiguity, because even the proviso comes in only if, as indicated in the substantive part, the accused in a bailable offence ‘is prepared to give bail’. Here, ‘bail’ suggests ‘with or without sureties’. And, ‘bail bond’ in Section 436(2) covers own bond. Section 437(2) blandly speaks of bail but speaks of release on bail of persons below 16 years of age, sick or infirm people and women. It cannot be that a small boy or sinking invalid or pardanashin should be refused release and suffer stress and distress in prison unless sureties are haled into a far-off court with obligation for frequent appearance: ‘Bail’ there suggests release, the accent being on undertaking to appear when directed, not on the production of sureties. But Section 437(2) distinguishes between bail and bond without sureties

25. Section 445 suggests, especially read with the marginal note, that deposit of money will do duty for bond ‘with or without sureties’. Section 441(1) of the Code may appear to be

a stumbling block in the way of the liberal interpretation of bail as covering own bond with and without sureties. Superficially viewed, it uses the words 'bail' and 'own bond' as antithetical, if the reading is literal. Incisively understood. Section 441(1) provides for both the bond of the accused and the undertaking of the surety being conditioned in the manner mentioned in the sub-section. To read 'bail' as including only cases of release with sureties will stultify the sub-section; for then, an accused released on his own bond without bail i.e. surety, cannot be conditioned to attend at the appointed place. Section 441(2) uses the word "bail" to include "own bond" loosely as meaning one or the other or both. Moreover, an accused in judicial custody, actual or potential, may be released by the court to further the ends of justice and nothing in Section 441(1) compels a contrary meaning."

8. In ***Hussainara Khatoon and Others (I) v. Home Secretart, State of Bihar, (1980) 1 SCC 81***, the Supreme Court held as under:

3. Now, one reason why our legal and judicial system continually denies justice to the poor by keeping them for long years in pre-trial detention is our highly unsatisfactory bail system. It suffers from a property oriented approach which seems to proceed on the erroneous assumption that risk of monetary loss is the only deterrent against fleeing from justice. The Code of Criminal Procedure, even after its re-enactment, continues to adopt the same antiquated approach as the earlier Code enacted towards the end of the last century and where an accused is to be released on his personal bond, it insists that the bond should contain a monetary obligation requiring the accused to pay a sum of money in case he fails to appear at the trial. Moreover, as if this were not sufficient deterrent to the poor, the courts mechanically and as a matter of course insist that the accused should produce sureties who will stand bail for

him and these sureties must again establish their solvency to be able to pay up the amount of the bail in case the accused fails to appear to answer the charge. This system of bails operates very harshly against the poor and it is only the non-poor who are able to take advantage of it by getting themselves released on bail. The poor find it difficult to furnish bail even without sureties because very often the amount of the bail fixed by the courts is so unrealistically excessive that in a majority of cases the poor are unable to satisfy the police or the Magistrate about their solvency for the amount of the bail and where the bail is with sureties, as is usually the case, it becomes an almost impossible task for the poor to find persons sufficiently solvent to stand as sureties. The result is that either they are fleeced by the police and revenue officials or by touts and professional sureties and sometimes they have even to incur debts for securing their release or, being unable to obtain release, they have to remain in jail until such time as the court is able to take up their cases for trial, leading to grave consequences, namely, (1) though presumed innocent, they are subjected to psychological and physical deprivations of jail life, (2) they are prevented from contributing to the preparation of their defence, and (3) they lose their job, if they have one, and are deprived of an opportunity to work to support themselves and their family members with the result that the burden of their detention almost invariably falls heavily on the innocent members of the family. It is here that the poor find our legal and judicial system oppressive and heavily weighted against them and a feeling of frustration and despair occurs upon them as they find that they are helplessly in a position of inequality with the non-poor.....”

8. In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the

existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account.....

9. Following the above enumerated settled law, a Coordinate Bench of this Court vide order dated 01.06.2022 in “**Sehnaz vs State**”, CRL.A. 447/2020, and order dated 08.07.2021 in “**Azad Khan vs. State (NCT of Delhi)**”, CRL. M.C. 1438/2021, on similar grounds, released the accused on bail on furnishing of personal bond only, without any sureties.
10. In the present case the petitioner could not enjoy the fruits of bail only because he failed to furnish the surety. I consider that keeping the accused in custody for his inability to furnish surety would be against the ethos of the Constitution and the law.
11. Taking into account the totality of the facts and the settled law on this issue, this Court deems it appropriate that once bail has been granted, it would be against the ethos of the Constitution of India and criminal law jurisprudence if the applicant/ petitioner is unable to enjoy its benefit in true letter and spirit. Each day of freedom counts, and it

would be a travesty of justice if the applicant/ petitioner is made to languish in jail merely for the reason that he could not furnish surety.

12. Accordingly, it is directed that the petitioner may be released on bail on his furnishing only a personal bond in the sum of Rs.10,000/- to the satisfaction of the concerned Jail Superintendent/ Duty MM and subject to the following condition:

i) In case of change of residential address or contact details, the petitioner shall promptly inform the same to the concerned IO as well as to the concerned Court.

13. Accordingly, the present petition stands disposed of in the above terms.

14. Copy of this order be communicated to the concerned Jail Superintendent electronically for information.

DINESH KUMAR SHARMA, J

JANUARY 16, 2023

Pallavi