Sr. No. 5

HIGH COURT OF JAMMU & KASHMIR AND LADAKH AT JAMMU

CRM(M)No. 364/2022

Reserved on : 26.04.2023
Pronounced on : 29.05-2023

Makhan Lal age 65 years S/O Brij Lal R/O W. No. 1, Indra Nagar R.S. Pura Jammu. …. Petitioner(s)

Through :- Sh. Jagpaul Singh, Advocate.

V/s

Union Territory of Jammu & Kashmir through SHO Police Station Samba. ….Respondent(s)

Through :- Sh. Vishal Bharti, Dy. AG.

Coram: HON'BLE MR. JUSTICE MOHAN LAL, JUDGE

J U D G M E N T

1. Petitioner has invoked the Inherent Jurisdiction of this court under the provisions of section 482 of the Code of Criminal Procedure (hereafter referred as the **'Code'**) for quashment of the order dated 15.02.2022 rendered by the trial court of Ld. Pr. Sessions Judge Samba in criminal challan titled "UT of J&K **Vs.** Sandeep Sharma and Anr." for commission of offences punishable u/ss 8/21/22/25/29 of NDPS Act, whereby, the application of the petitioner seeking release of cash security of ₹ 100000/- (Rs. One Lac) deposited for grant of interim bail was dismissed.

2. Aggrieved of and dissatisfied with the impugned order dated 15-02-2022, petitioner has assailed it's legality, propriety and correctness and has sought its setting aside/quashment on the following grounds:-

(i) that in a Criminal Challan titled "UT of J&K **V/s** Sandeep Sharma and Anr." bearing FIR No. 31/2020 for commission of offences u/ss 8/21/22/25/29 NDPS Act pending disposal before the Court of Ld. Pr. Sessions Judge Samba, son of the petitioner namely Sandeep Sharma is one of the accused and is presently lodged in Central Jail Kot Bhalwal Jammu;

(ii) that the son of petitioner applied for interim bail for his medical treatment for a period of one month, Ld. Pr. Sessions Judge Samba vide it's order dated 21-01-2021 granted interim bail to the son of the petitioner for a period of 30 days from the date his surgery is conducted, on furnishing of surety and personal bonds besides the cash security of an amount of Rs. 100000/-;

(iii) that before the expiry of the aforementioned period of one month, son of the petitioner applied for the extension of the interim bail for his further treatment which remained pending before the court of Ld. Pr. Sessions Judge Samba till 20-08-2021;

(iv) that after dismissal of the said application seeking extension of interim bail, son of the petitioner could not cause his appearance on the date of hearing, and warrants were issued against him, and on

31-08-2021 a police constable from Samba Police Station visited the house of the petitioner and told him that warrant has been issued against the son of the petitioner and he is required to come to police station Samba, and on the next day the son of the petitioner came to police station samba, he was arrested and later produced in the court;

(v) that on 10-09-2021, petitioner moved an application seeking release of the amount of Rs. 100000/- deposited as cash security for securing interim bail, however, Ld. Pr. Sessions Judge Samba vide its order dated 15-02-2022 dismissed the application of the petitioner;

(vi) that the impugned order dated 15-02-2022 has been passed by the trial court in a very causal and mechanical manner without application of mind, the bail and personal bonds furnished by the petitioner in terms of order dated 21-01-2021 passed by the trial court are still intact and never forfeited and there is no question of forfeiture of cash security as the trial court did not pass any order for forfeiture of cash security, there is no condition in order dated 21-01-2021 that in case of failure of the petitioner to surrender it would automatically result in forfeiture of cash security and once the accused has put up his appearance before the trial court, it cannot direct forfeiture of cash security when the bail and personal bonds of accused are intact.

3. Heard Ld. Counsel for petitioner and Ld. Dy. AG for respondent. I have gone through the relevant provisions of law governing the field and have also bestowed my thoughtful consideration to the material aspects involved in the case. Section 446 of Code of Criminal Procedure (Cr.PC) deals with the provision of Procedure When Bond Has Been Forfeited. For the sake of brevity, Section 446 is reproduced hereunder:-

> **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.**
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> 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.
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> **(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. [1] 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.]
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> **(3)** The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.
>
> (4)……

(5)……

4. High Court of Madras in a case titled Prapbakaran—Petitioner **Vs.** The State represented by Inspector of Police, Lavindapadi Police Station Erode District—Respondent [2010(1) MWN (Cr.) 368] relied by Ld. Counsel for petitioner, while considering the scope and import of section 446 of the Code of Criminal Procedure in para 10 of the judgment at pages 182 &183 held has under:-

> **10.** I regret, I am unable to pursued myself to agree with the said view taken by Orissa High Court as well as Delhi High Court wherein the Ld. Judges have taken the view that where there is failure of the accused to appear before the court no further enquiry or proof is necessary or contemplated for recording satisfaction. In my considered opinion mere failure to appear before the court in the absence of any willingness on part of the accused would not amount to a "breach". Manifestly there has to be animus on part of accused not to abide by or comply with the terms and conditions of the bond. Such animus alone makes the failure of accused to appear, a breach in terms of Section 446 of the Code. Such animus on the part of accused could be ascertained only after affording sufficient opportunity to the accused. On receipt of notice if the accused satisfies the court that he was prevented from appearing before the court due to sufficient reasons, the court may not record such satisfaction holding, that the accused has committed a breach of bond, the language "proved to the satisfaction" needs to be underscored, which clears doubt, if any, that term "proof" held within it "disproof" by accused/surety also. Such proof or disproof of animus can be arrived at only after sufficient opportunity to the accused/surety. Such opportunity shall satisfy the Principles of Natural Justice **"Audi Alteram Partem**" which is not alien to criminal law as it has the sanction of the constitution of India. Therefore, before recording such satisfaction, notice to the accused is necessary and further enquiry should follow. On such enquiry only, the court has to get satisfied himself on proof as to whether there was any breach of the terms of bond and after so satisfied that breach has taken place then only such recording of satisfaction of the court will indicate breach of the term bond.

In 1994 CriLJ 491 [Narata Ram—Petitioner **v** State Of Himachal Pradesh—Respondent] relied by Ld. Counsel for petitioner, High Court of Himachal Pradesh while considering the scope and import of section 446 of the Code of Criminal Procedure (Cr.PC) in paras 6,7,8&10 of the judgment held as under:-

> **6.** The fact that surety bond in the sum of Rs. 5000/- in respect of each one of the accused persons was executed by the petitioner and that he had undertaken to produce the accused persons before the Court and the fact of their failure to appear on any one of the dates, fixed for hearing is not disputed. Also, there is no controversy that the responsibility of surety arises from the execution of the surety bond by him and it is not contingent upon execution of a personal bond by the accused. Thus, the forfeiture of the personal bond of the accused is not a condition precedent to the forfeiture of the bonds executed by the sureties. [See: Ram Lal v. State of U.P.,

1980 Cri LJ 826: (AIR 1979 SC 1498)]. Perusal of Section 446 of the Code of Criminal Procedure contemplates two stages. The first stage is for the Court to satisfy itself that bond has been forfeited. The second stage relates to the realisation of the forfeited amount of the bond. **For this purpose, it has to give him notice either to pay the penalty or to show cause why it should not be paid.** It is imperative to note that if there are sufficient circumstances before the Court, on the basis of which it can accept or reject the cause shown, it need not take any evidence.

7. It is also settled law that a notice to the surety cannot be issued, unless the order of forfeiture is passed. **Thereafter, the Court has to consider the grounds made out by the surety in support of his case and after considering the case, on merits, if the Court is dissatisfied with the reasons shown, an order has to be made for the realisation of the penalty.** I am supported in my view by the observations made in the case of Dhanvir v. State, 1975 Cri LJ 1347 (Him Pra).

8. In the instant case, a show-cause notice was issued to the petitioner on 25th May, 1992, pursuant to the order passed by the Sub-Divisional Judicial Magistrate. Close examination of the said order shows that none of the accused could be served for want of correct address nor either of them was otherwise present and, therefore, prosecution was ordered to furnish correct address of the accused, within seven days and get it served for their appearance on 1st July, 1992 through non-bailable warrants. It further shows that notice to Ashok Kumar, Advocate, who identified the personal bonds of the accused, was also issued. Further, this order discloses that the petitioner showed his inability to produce either of the accused persons and this led to the order directing the forfeiture of the bonds by initiating proceedings under Section 446 of the Code of Criminal Procedure separately. The Court below further directed the issuance of show-cause notice to the petitioner as to why the amount under the bonds be not forfeited to the State of Himachal Pradesh. Lastly, this order also shows that the petitioner was afforded another opportunity to produce the accused persons on 1st July, 1992. It was on the next date -- 1st July, 1992 that the final order imposing part penalty of Rs. 2000/ - in case of each surety bond was passed. It would be pertinent to note that no fresh order forfeiting the bonds of the petitioner in respect of each surety bond was passed, nor any fresh show-cause notice was issued on 1st July, 1992, pursuant to the petitioner having expressed his inability to produce either of the accused persons in the Court.

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.

Ratio of the judgments of **"Prapbakaran"& "Narata Ram"** (Supra) make the legal proposition manifestly clear, that before recording such satisfaction that breach has been committed, the court is required to issue notice and after affording opportunity to offer any explanation, if the court is not satisfied with the said explanation offered by the accused, then the court has to record such satisfaction that the terms of the bond have been breached which alone signifies the forfeiture of bond. Ratios of the judgments (Supra) squarely apply to the facts of the case in hand. In the case in hand, it is apt to reiterate here, that impugned order dated 15-02-2022 rendered by the court of Pr. Sessions Judge Samba does not signify that the provisions of Section 446 of Cr.PC has been complied with full rigor and the court has recorded the grounds of such proof in regard to forfeiture of surety bond/ cash surety to pay the penalty of ₹ 100000/- (Rs. One Lac) or show cause why the penalty should not be paid by the accused, as no notice to the accused before forfeiture of the bond has been issued, thereby, principles of natural justice has been violated. In the net result, the petition is allowed, whereby, the impugned order dated 15-02-2022, whereby, the cash security of petitioner has been forfeited, stands set aside/quashed. It is accordingly ordered, that CrMP No. 51/2021 CNR No. JKSB010004222021 r/w bail application No. 02/2021 on the files of Ld. Pr. Sessions Judge Samba stand revived/restored. Resultantly, the Ld. Trial Court of Pr. Sessions Judge Samba would deal with the said applications of the petitioner afresh for releasing the cash amount of surety of ₹ 100000/- (Rs. One Lac) deposited in bail application No. 02/2021, forfeited and deposited in Government Treasury, after affording the opportunity of being heard to the accused strictly in accordance with the provisions of law governing the field.

5. Disposed off accordingly.

(MOHAN LAL)
JUDGE

Srinagar:
29.05.2023
Issaq

Whether the order is speaking? Yes/No
Whether the order is reportable? Yes/No