MOHAMMED KUNJU AND ANR. A

v.

STATE OF MAHARASHTRA

OCTOBER 29, 1999

[K.T. THOMAS AND M.B. SHAH, JJ.] B

Code of Criminal Procedure, 1973 : Sections 444, 446.

Bail—Sureties—Liability of—Foreign national—Trial of—Bail granted on specified conditions—Surety by two persons—Bond of rupees twenty thousands C *by each surety—One of the conditions of bail subsequently relaxed—Accused jumped bail—Forfeiture of bail bonds—Penalty on sureties—Order to surety to pay amount of bond—Order of penalty unsuccessfully challenged in appeal before Court of Session—High Court entertained further appeals but dismissed on merits—Appeal before Supreme Court—Held, modification of bail* D *condition does not absolve the surety of his liability—Both sureties cannot claim to share the amount half and half—Each surety is liable to pay the amount of surety given by him—Court has power to grant remission—Remission granted to both sureties—Each surety directed to pay penalty of rupees five thousand only.*

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ss.449 (i) and (ii)—Order passed by Magistrate under clause (i)—Appeal before Court of Session—Held, no further appeal lies to High Court—Clause (ii) will not apply in such cases.

A foreign national, on trial, was released on bail by the Chief Metropolitan Magistrate, Bangalore City on conditions specified in the bail F **order. In conformity with the conditions imposed each of the two appellants furnished a surety bond for Rs. 25,000. On an application filed by the accused the Chief Metropolitan Magistrate relaxed a condition imposed earlier on the accused while passing the bail order. The accused jumped bail and the appellants expressed their inability to produce the accused. The bail bonds** G **were thus forfeited and each of the appellants was ordered to pay the surety bond amounting to rupees twenty five thousand to the Government. The appeals preferred by the appellants were dismissed by the Session Court. The High Court entertained further appeals but dismissed them on merits. Hence these appeals.**

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A **Disposing the appeals, the Court**

HELD : 1. If there is forfeiture of the bond executed by the surety due to the default of the accused in making appearance before the court it is open to the court concerned to resort to the steps contemplated in Sections 446 of the Code of Criminal Procedure as against the sureties, besides the accused
B **himself. The most essential element of the bail order is for ensuring the attendance of the accused in the court whenever required. In fact, that is the hub of the order and the other conditions are only subsidiary thereto. So long as that core postulate remains unchanged a surety cannot take advantage of any subsequent modification effected in respect of any other conditions. If a**
C **surety is not agreeable to abide by the modified conditions he must apply to the court under Section 444(1) of the Code to discharge him. Until the surety is discharged he is bound by the bond and any modification or even deletion of a condition of the order cannot absolve him from his liability in respect of the unaltered conditions. [253-A-B; 252-G, H]**

D *State of Bihar* **v.** *Homi,* **AIR (1955) SC 478, distinguished.**

2. The forfeiture of a bond would entail penalty against each surety for the amount which he has undertaken in the bond executed by him. Both the sureties cannot claim to share the amount by half and half as each can be made liable to pay the amount of Rs. 25,000. [253-G-H]
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Ram Lal **v.** *State of U.P.,* **AIR (1979) SC 1498, relied on.**

3. Under section 446 (3) of the Code of Criminal Procedure it is within the discretion of the court to grant remission and to decide the extent of the
F **remission. Such a discretion must be exercised judicially and for good reasons. In the present case, though the offences charged against the foreign national are not trivial they are nevertheless not very serious comparatively. He slipped out of the country without anybody's knowledge. There is no allegation that the appellant had any remote scent that the accused was preparing to escape from India, nor that he had connived with the accused jumping out the bail.**
G **Therefore, remission is granted to the extent that each appellant need to pay Rs. 5,000 as penalty. [254-A, B, C, D, E]**

Madhu Limaye **v.** *Metropolitan Magistrate & Ors.,* **[1984] Suppl. SCC 699, referred to.**

H **4. The order in this case was passed by the Chief Metropolitan**

Magistrate and hence the appeals preferred by the appellants before the Session Court were according to law. Clause (ii) of section 449 will not apply in any case where the appeal lies to the Session Court as the said clause deals with a different situation when the original order has been passed by the Session Court in which case the appeal normally lies to the High Court. In the present case only one appeal can be preferred and that was actually filed and was disposed of by the Session Court by a judgment. It is not an order falling within the ambit of clause (ii). Hence no further appeal could have been maintained. As the High Court had considered the appeal on merits the impugned order is treated as one passed in exercise of the revisional jurisdiction of the High Court. [251-C, D, E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1133-34 of 1999.

From the Judgment and Order dated 4.9.1998 of the Karnataka High Court in Crl. A. No. 856 and 864 of 1998.

C.N. Sree Kumar and P. Sureshan for the Appellants.

K.K. Tyagi for Nagaraja for the Respondent.

The Judgment of the Court was delivered by

THOMAS, J. Leave granted.

Two persons stood as sureties for bailing out a foreign national who was arraigned before a criminal court at Bangalore. But that foreigner, when released from jail, slipped out of India with the result that the two sureties are now in jeopardy. The criminal court proceeded against them for failure to produce the accused in court. The magistrate imposed a penalty of Rupees twenty five thousand on each of the sureties. They have been thenceforth approaching all the tiers of judicial hierarchy, one after the other, for escaping from the penalty and through that route they have reached this court now.

The accused, for whom the appellants became sureties, is one Mohan Dharmaraja. He was under indictment for the offences mentioned in Section 466 and 471 of the Indian Penal Code besides a few other offences under the Registration of Foreigners Act and The Passports Act, 1967. He was arrested on 26.11.1995 and remained in jail for nearly thirteen months until he was allowed to be released on bail as per the order passed by the Chief Metropolitan Magistrate, Bangalore City on 18.12.1996. The conditions for the bail, as per

A the said order, were the following :

(i) The accused should furnish a personal bond of Rs. 25,000 and to furnish two local sureties for the same amount.

(ii) The accused should furnish his Bangalore residential address to the investigating officer.

B

(iii) The accused should not tamper with the prosecution witnesses.

(iv) The accused should not leave Bangalore City without the prior permission from the Bangalore City Police Commissioner, till the trial is completed.

C

On 21.12.1996 he was released when he executed a bond with appellants as his sureties. Subsequently he filed an application for relaxation of the conditions and the Chief Metropolitan Magistrate passed his order thereon dated 13.1.1997 in the following lines :

D

"The earlier condition No. 4 imposed on the accused is hereby relaxed. The accused is permitted to reside in Mysore City at the address furnished by him. However, the accused shall be present before the Commissioner of Police, Bangalore City once in a month. The accused shall be present without fail during the course of trial before the court at Mysore. Till the order is passed, the accused shall be present before the Nasarabad Police Station once in a week. During the remaining period, if the accused has to leave Mysore city he has to obtain prior permission from the Commissioner of Police, Bangalore. In this behalf the same has to be intimated to the Commissioner of Police, Bangalore."

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The Nazarabad Police later reported to the magistrate that the accused was not attending the police station as per the order. The accused failed to be present in the court also. The efforts made by the magistrate to get the presence of the accused failed and then a notice was issued to the appellants to produce the accused in court as he was reported absconding. Appellants thereupon expressed their inability to produce the accused. The bail bonds were thus forfeited and each of the appellants was ordered to "pay the surety bond amounting to rupees twenty five thousand to the Government."

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Appellants preferred appeals before the Session Court against the aforesaid order, but the Sessions Judge dismissed the appeals. Thereafter

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they filed further appeals before the High Court of Karnataka purportedly under Section 449 of the Code of Criminal Procedure 1973 (for short the Code). Surprisingly, the High Court entertained such second appeals and dismissed them on merits. Section 449 of the Code reads thus :

> "**It Appeal from orders under section 446.**—All orders passed under section 446 shall be appealable,—
>
> (i) in the case of an order made by a Magistrate, to the Sessions Judge;
>
> (ii) in the case of an order made by a Court of Session, to the Court to which an appeal lies from an order made by such Court."

The order in this case was passed by the Chief Metropolitan Magistrate and hence the appeals preferred by the appellants before the Session Court were according to law. Clause (ii) of Section 449 will not apply in any case where the appeal lies to the Session Court as the said clause deals with a different situation when the original order has been passed by the sessions court in which case the appeal normally lies to the High Court. In the present case only one appeal can be preferred and that was actually filed and was disposed of by the Session Court by a judgment. It is not an order falling within the ambit of clause (ii). Hence no further appeal could have been maintained.

Be that as it may, as the High Court had considered the second appeal on merits we are disposed to treat the impugned order as one passed in exercise of the revisional jurisdiction of the High Court.

The main argument advanced by the learned counsel in these appeals is that the bonds signed by the appellants as sureties would have remained valid only during the time the bail order remained unaltered. According to the learned counsel, when the Chief Metropolitan Magistrate altered the condition by his order dated 13.1.1997, without notice to the appellants, the court should have directed a fresh bond to be executed to comply with the altered conditions. In other words, the aforesaid plea is to the effect that with the alteration of condition the bail-bond stood discharged.

In support of the above contention learned counsel cited the decision of this Court in *State of Bihar* v. *Homi,* AIR (1955) SC 478. In that case a person was convicted by the trial court under Section 120B and 420 of the IPC and was sentenced to rigorous imprisonment for four years and a fine of

A rupees one lakh. The conviction and sentence were upheld by the Patna High Court. The convicted person wanted to appeal to the Judicial Committee of the Privy Council and hence he prayed for suspension of the sentence. Government of Bihar granted an order suspending the sentence subject to a condition that he should execute a bond for rupees fifty thousand with two sureties for rupees twenty five thousand each. He executed the bond with two B sureties in 1946, binding himself for payment of the above amount in case the accused "fails to furnish proof by the 1st December 1946 of his having taken all necessary steps for filing of the appeal and to surrender to the Deputy Commissioner of Singhbhum within three days of the receipt of the notice of the order or judgment of the Judicial Committee if by the said order or C judgment the sentence is upheld either partly or wholly." Thereafter a lot of changes occurred in India, including the advent of independence and the passing of the Constitution of India. As a consequence thereof the jurisdiction of Privy Council was transferred to the Federal Court. The appeal preferred by the convinced person was dismissed by the Federal Court. In the meanwhile, the accused had migrated to Pakistan. When steps were taken against the D sureties in that case this Court held that the terms of the bond were not fulfilled inasmuch as no judgment was delivered by the Judicial Committee of the Privy Council and hence the sureties cannot be held liable for any penalty.

The above case cannot be treated as precedent for holding that if any E one of the conditions of bail is modified by the court the bail bond would automatically stand discharged. The above decision is to be understood in the light of the peculiar facts when a surety bond was executed during pre-independence which was sought to be enforced in the post-constitution period. That apart, strictly on the terms of the bond executed in the above case the liability of the surety could have arisen only if judgment was F delivered by the Judicial Committee. Such a contingency did not happen as the Privy Council was divested of its jurisdiction to deal with appeals filed from India.

Even otherwise we cannot approve the contention that any modification G of the conditions of bail would result in substitution of the bail order. The most essential element of the bail order is for ensuring the attendance of the accused in the court whenever required. In fact, that is the hub of the order and the other conditions are only subsidiary thereto. So long as that core postulate remains unchanged a surety cannot take advantage of any subsequent modification effected in respect of any other conditions. If a H surety is not agreeable to abide by the modified conditions he must apply to

the court under Section 444(1) of the Code to discharge him. Until the surety is discharged he is bound by the bond and any modification or even deletion of a condition of the order cannot absolve him from his liability in respect of the unaltered conditions. If there is forfeiture of the bond executed by the surety due to the default of the accused in making appearance before the court it is open to the court concerned to resort to the steps contemplated in Section 446 of the Code as against the sureties, besides the accused himself.

Learned counsel then contended that as the bond was executed by the accused with two sureties the upper limit of the amount which the court can realise from both the sureties together cannot exceed the amount which the accused has stated in his bond. In other words, when the accused executed a bond for Rs. 25,000 the sureties can be made liable to pay the said amount either jointly or severally, according to the counsel. The acceptability of the aforesaid contention depends upon the wording of the bond executed by the appellants. There was a controversy earlier as to whether the bond is a single one supported by two sureties or the bond executed by a surety is different from that of the accused. The controversy stands settled now by the decision of this Court in *Ram Lal* v. *State of U.P.*, AIR (1979) SC 1498. Their Lordships, after referring to the wording contained in Form No. 42 of Schedule V of the old Code of Criminal Procedure, 1898, have held thus :

> "The undertaking to be given by the surety was to secure the attendance of the accused on every day of hearing and his appearance before the Court whenever called upon. The undertaking to be given by the surety was not that he would secure the attendance and appearance of the accused in accordance with the terms of the bond executed by the accused. The undertaking of the surety to secure the attendance and presence of the accused was quite independent of the undertaking given by the accused to appear before the Court whenever called upon even if both the undertakings happened to be executed in the same document for the sake of convenience. Each undertaking being distinct could be separately enforced."

We have noticed that the wording in the corresponding Form in the new Code is identical (vide Form No. 45 in the second Schedule to the Code) and hence the same principle must follow in the present case also. Thus forfeiture of a bond would entail the penalty against each surety for the amount which he has undertaken in the bond executed by him. Both the sureties cannot

A claim to share the amount by half and half as each can be made liable to pay the amount of Rs. 25,000.

Lastly, learned counsel made a plea for remission of the penalty. No doubt Section 446(3) of the Code empowers the court to grant such remission. It is within the discretion of the court to grant remission and to decide the B extent of the remission. Such a discretion must be exercised judicially and for good reasons. Learned counsel cited the decisions of this Court in *Madhu Limaye* v. *Metropolitan Magistrate and Ors.*, [1984] Suppl. SCC 699. A three Judge Bench of this Court considered the plea advanced by a surety who was proceeded against as the accused—some foreign nationals - escaped from C India. They were students charged with offences of "trivial nature" in 16 cases altogether. This Court held that in such circumstances "the ends of justice will be met by imposing a token penalty of Rs. 100". In the present case, though the offences charged against the foreign national are not trivial they are nevertheless not very serious comparatively. The accused slipped out of the country without anybody's knowledge and thereby rendered himself D beyond the reach of the appellant. The court could have imposed the condition to surrender his passport as a measure to prevent him to escape out of India. There is no allegation that the appellant had any remote scent that the accused was preparing to escape from India, nor that he had connived with the accused jumping out the bail.

E In the above circumstances we are of the view that some remission can be granted to the appellants. To meet the ends of justice a remission is granted to the extent that each appellant need pay Rs. 5,000 as penalty. If the appellants have already paid any amount in excess thereof they can apply and get refund of the excess portion from the court concerned. Appeals are F disposed of accordingly.

T.N.A. Appeals disposed of.