



[2024:RJ-JD:44040]

**HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JODHPUR**



S.B. Criminal Misc(Pet.) No. 7541/2024

Amit Kumar Dave S/o Shri Prithvi Raj Dave, Aged About 40
Years, R/o Keetnod, Tehsil Pachpadra, Dist. Barmer,raj.

-----Petitioner

Versus

1. State Of Rajasthan, Through Pp
2. Ummedsingh S/o Shri Bheekhsingh, R/o Guda Malani,
Dist. Barmer At Present Veela, Behind Purohit
Chhatrawas, Nai Brahmpuri, Jalore, Tehsil And Dist. Jalore

-----Respondents

For Petitioner(s) : Mr. S.P. Sharma.

For Respondent(s) : Mr. Shri Ram Choudhary, P.P.

**HON'BLE MR. JUSTICE ARUN MONGA
Order (Oral)**

24/10/2024

1. Petitioner/accused seeks quashing of an order dated 11.09.2024 passed by the Learned Additional Chief Judicial Magistrate No.2, Jalore, in Criminal Case No.4985/2014, pending under Section 138 of N.I. Act, for dishonour of a cheque for an amount of Rs.26,40,000/-. Learned trial court has forfeited his bail bonds, arrest warrant was issued against him and proceedings under Section 446 Cr.P.C. have been ordered to be initiated separately against his surety.
2. Heard and perused the case file as well as the order impugned herein.
3. On a query posed by the Court regarding the default caused by the petitioner in his personal presence, learned counsel states that on 10.09.2024 and 11.09.2024, the petitioner had to attend to his ailing wife, who suddenly taken very ill. Under these circumstances, he had requested his counsel to take appropriate





steps by filing an application to seek his exemption from personal appearance. However, the learned trial court took a harsh view of the matter, under the impression that the reasons stated by the petitioner in the application were not genuine. He further states that the petitioner had no intention at any stage of causing a delay in the proceedings and that it was under these circumstances, which were beyond his control, that he could not appear on the fateful day, as there was no one else in the family to look after his wife. The petitioner's inability to appear was due to unforeseen circumstances beyond his control. Therefore, his arrest warrant may be converted into bailable warrant, he argues.

4. Learned PP would support the impugned order passed by both the learned court below for the reasons stated therein.

5. Reference may be had to a judgment in **Mohammad Haras Vs. State of Punjab**¹ relevant whereof, for ready reference, is reproduced as below :-

“6. No doubt, learned trial Court has got discretion to cancel the bail, however, it is well settled that before passing such an order, Court 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. Such course has not been adopted by learned Judge, Special Court, Sangrur in the instant case. On this ground alone, impugned order to the extent of cancellation of bail deserves to be set aside.

7. Moreover, cancellation of bail is a serious matter and can have significant impact on the life of a person. Matters of personal liberty ought not to be taken so lightly and in such mechanical manner as in the case herein.

8. In the premise, impugned order is set aside. Earlier bail order stands revived on bail bond and surety bond already furnished by petitioner before learned trial Court. Petitioner is directed to join proceedings before learned trial Court within three weeks from today and shall continue to appear before learned trial Court without default.”

¹ CRM-M No.31385/2023, decided on 07.07.2023



6. As regards the directions issued by the learned trial court to proceed against the sureties under Section 446 Cr.P.C., the same is also a serious procedural fallacy committed by the learned trial Magistrate and cannot be sustained. On this point as well, guidelines enunciated in a judgment titled **Varinder Singh Vs. State of Punjab²**, are relevant. For ready reference, same are reproduced hereinbelow:-

“9. In the light of the statutory provisions of sections 444 and 446 of the Code and, the observations recorded above, I am of the opinion that the following procedure and principles governing the discharge of a surety and when necessary, for forfeiting the bond and the further steps to be taken for imposing the penalty upon the surety need to be kept in mind by the courts :-

A. DISCHARGE OF SURETY

A.1 . Surety can seek discharge at any stage : An individual who has stood surety for someone released on bail has the right to apply to the Court to be discharged from his responsibilities. He can seek a complete discharge from the bond.

A.2. Warrant of Arrest for accused: Upon receiving the application from the surety, the Court will issue a warrant of arrest for the person concerned who was released on bail to be produced before the Court.

A.3 Appearance of the bailed Person: Once the person concerned is brought before the Court through the warrant of arrest or otherwise appears, the Court shall direct the surety bond to be discharged.

A.4. Finding New Sureties: Once the Court orders the discharge of the bond for the surety, the person who was released on bail will be required to find other sufficient surety.

A.5. Consequences of Failure: If the person who was released on bail fails to find other sufficient surety as required, the Court may commit him to jail.

B. FOR FORFEITING THE SURETY BOND AND IMPOSING PENALTY

B.1 Forfeiture of bond and proof :- If a bond is executed for the appearance of an individual before a court or for the production of property and it is proven to the satisfaction of the court that the bond has been forfeited, the court must record the grounds for such proof. Similarly, if a bond is forfeited in any other context, the court must also record the grounds for forfeiture.

B.2 . Notice and penalty :- The court may then call upon the person who is bound by the bond (surety) to either pay the penalty specified in the bond or to show cause why the penalty should not be paid. If





sufficient cause is not shown and the penalty is not paid, the court can take action to impose the penalty.

B.3 Discretionary Remission :- The court has the discretion to remit (reduce) a portion of the penalty and enforce payment only for the remaining amount, implying that forfeiture of the bond by itself does amount to imposition of the penalty and a specific order has to be passed for imposing penalty.

B.4 Civil imprisonment in default of payment of penalty If the penalty imposed is not paid or cannot be recovered, the surety may be liable for imprisonment in a civil jail for a period up to six months.

B.5. Surety's death :- If a surety to a bond dies before the bond is forfeited, his estate is relieved of any liability related to the bond.

B.6. Use of Conviction as evidence :- If a person who has provided security under section 106 or section 11 or section 360 of the Code 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 of the Code (for a minor), a certified copy of the court's judgment can be used as evidence against the surety. The court will presume that the offense was committed by the same person unless evidence to the contrary is provided.”

7. In light of the aforesaid, I am of the view that the impugned order directing the forfeiture of the bail-bonds of the petitioner accused and initiating proceedings against his surety under Section 446 Cr.P.C., *ibid*, has to be necessarily set aside. It is so ordered.

8. The learned trial court has observed in its order assailed herein that in the past hearings also, petitioner had moved applications to seek exemption of personal presence which *inter alia* was the basis of rejecting his application, stating that the reasons assigned for his absence did not seem to be genuine. However, I am of the view that presence of an accused particularly in a matter of the kind in hand, where proceedings are semi-criminal/civil in nature, should ordinarily not be insisted upon, if an application is moved for a particular hearing, unless the trial court needs to either examine the under-trial or his statement is to be otherwise recorded for proceeding further in the matter.



9. Reference may also be had to a judgment in case title **Arun Solanki Vs. State**³, which was coincidentally rendered by me in somewhat similar circumstances, wherein, the learned Magistrate though accepted the application seeking exemption from appearance but imposed a cost of Rs.5,000/- apart from certain other conditions. Relevant excerpts / observations from from the said order, are as below:

“9. The learned trial court’s decision thus reflects a misapplication of judicial discretion. The discretionary power of a court must be exercised judiciously and with due consideration of the circumstances. In this case, the absence of any conduct warranting such stringent conditions by the petitioner indicates an arbitrary use of discretion, thereby necessitating correction.

10. The conditions imposed go beyond the scope of what is necessary to secure the attendance of the accused, as outlined in relevant procedural laws. The trial court’s decision appears to contravene established principles under Sections 205 [corresponding with 228 of BNSS] and 317 [corresponding with 355 of BNSS] of the Criminal Procedure Code, which allow for exemptions from personal appearance without onerous conditions when justified by circumstances.

11. The learned trial court, therefore, should have exercised caution before imposing costs on the petitioner. The imposition of a cost appears arbitrary, as the matter was neither scheduled for recording the petitioner’s statement nor did the petitioner in any way contribute to the delay in the trial, which was set for prosecution evidence. In fact, since the prosecution’s evidence was not present on the scheduled day, the trial court issued bailable warrants against the said witness. The petitioner, on the other hand, took all necessary precautions to ensure that he neither should show any disrespect to the court nor cause any delay in the proceedings, and thus instructed his counsel to file an application seeking exemption from personal appearance in accordance with law.

12. It is undeniable that attending court proceedings requires a person to take time off work, potentially leading to a loss of livelihood. The petitioner’s counsel rightly asserts that the petitioner is barely able to earn his livelihood, and being present in court means forfeiting his daily wage, which

³ Rajasthan High Court - S.B. Criminal Misc. Petition No.4880/2024, dated 26.07.2024





in turn causes his entire family to suffer the consequential penury and hunger.

13. *Being unmindful of the above, the learned trial court, without providing any justification for imposing costs on the petitioner, though allowed the exemption application but required the petitioner's parents to file an affidavit, in addition to directing the petitioner to remain present at every hearing, regardless of whether it was necessary.*

14. *The impugned order is thus clearly arbitrary and must be set aside. It is so ordered.*

15. *In the parting I may hasten to add that the presence of an under-trial is not to satisfy the ego of the court but to ensure that he can safeguard his interests during the trial, and his absence should not prejudice his case or jeopardize his right to a fair trial. Imposing such irrational conditions in a rigid manner, even when the accused's presence is not required, is completely unwarranted. An under-trial/accused's personal presence thus should not be insisted upon when it is not necessary for the progress of the trial.*

16. *It is also made clear that any future application for exemption filed by the petitioner shall be dealt with in accordance with law. He is not required to be present at every hearing unless it is explicitly made necessary by the trial court.”*

10. Resultantly, as an upshot of my discussion and in the light of judgments, *ibid*, the impugned order dated 11.09.2024 is set aside. The original bail bonds of the petitioner accused as well as bonds of his sureties are restored subject to payment of Rs.7,500/-, as cost, to be paid to the complainant. Trial to proceed further, in accordance with law.

11. Disposed of accordingly.

12. Pending application(s), if any, also stand disposed of.

(ARUN MONGA),J

103-Sumit/-

Whether Fit for Reporting: Yes / No