

**Emperor Vs. Harihar Kalwar**

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**SooperKanoon Citation :** [sooperkanoon.com/466503](http://sooperkanoon.com/466503)

**Court :** Allahabad

**Decided On :** Sep-03-1931

**Reported in :** AIR1932All122; 136Ind.Cas.65

**Appellant :** Emperor

**Respondent :** Harihar Kalwar

**Judgement :**

ORDER

**Sulaiman, J.**

1. On 15th February 1931, the Magistrate issued an order under Section 117(3) Criminal P.C., against Hari Har accused to execute a personal bond in Rs. 1,000, with two sureties in like amounts, each in cash, for keeping the peace until the conclusion of the inquiry.

2. The Sessions Judge modified the order on 24th February 1931, and ordered his release on his executing a bond for Rupees 1,000 with two sureties, in like amounts to the satisfaction of the Court concerned. The accused however was not released, because he was involved in another offence. When the District Magistrate was moved, he pointed out that the Sessions Judge had no power to interfere with the order under Section 107, read with Section 117(3), Criminal P.C., but might have reported to the High Court. When the matter came up again before the Sessions Judge, he had admitted that he had mistaken the order to be an

order of bail and had wrongly amended it. He passed a fresh order on 12th March that unless the original order was amended by the Magistrate in the light of the observations contained in his order dated 24th February 1931 the record be submitted to the High Court with the recommendation that the words in cash' be deleted. On receipt of this direction, the Magistrate on 19th March amended his previous order and substituted 'two reliable sureties in moveable properties' instead of 'two cash sureties.' The Magistrate this time used the word 'securities' without carefully reading his previous order which had said 'sureties.' Then on 21st March the Sessions Judge again expressed an opinion that a surety in cash' had no meaning at all. He directed the record to be submitted to the High Court, and asked for the explanation of the Magistrate. The Sessions Judge gave his reasons for holding that it is not open to a Magistrate to direct that the property which is offered as security by the sureties be of a particular nature. The Magistrate submitted his explanation and the District Magistrate added a supplementary explanation, stressing that the Magistrate was not bound to accept security of immovable property, which would cause considerable difficulty in realization in case of forfeiture. After this the Sessions Judge passed a fresh order on 25th March 1931 submitting the record to the High Court along with a copy of the previous order passed by him in the case of another accused person, dated 7th July 1930, which gave fuller reasons in support of his view.

3. The case went backwards and forwards on so many occasions because there was a difference of opinion between the Sessions Judge and the Magistrate as to the nature of the security that can be demanded.

4. No reported case has been brought to my notice which would throw light on this divergence of views.

5. It is to be noted that both Section 117 and Section 118 refer to the execution of a bond by the accused 'with or without sureties'. The expression security' is not used. The sections do not contemplate the furnishing of a registered hypothecation bond as good security. It obviously requires guarantees given by the sureties.

6. Section 118 applies equally to an order to give security for keeping the peace under Section 107 and for maintaining good behaviour under Sections 108, 109 and 110, Criminal P.C.

7. In Schedule 5 a form is given for the execution of a bond by sureties for the accused's good behaviour. The form merely requires a written undertaking given by the sureties that in case of the accused making default, they bind themselves jointly and severally to forfeit to His Majesty a particular sum of money. It does not go on to add that they are hypothecating any property for that sum. It seems to me that the same form is intended for sureties for the accused's keeping the peace. It is therefore obvious that what the Code requires is that there should be sureties able to make good the amount. These persons should be reliable and be possessed of such status, means or property that the amount would be recovered by seizure of their properties or, if arrested, they would make good the amount.

8. No doubt under Section 514, Criminal P.C. when there is a forfeiture of the bond, the Magistrate cannot proceed by attaching and selling any immovable property of the surety but can only seize his moveable property. But if the penalty cannot be recovered by attachment and sale of the moveable properties the person can be arrested and imprisoned. This in many cases would be just as effective to compel him to pay up, provided, of course, he has the means. It therefore, does not follow that a person cannot be a good surety unless he is actually possessed of moveable properties sufficient to yield the amount of his bond. Indeed, moveable properties which can be easily removed or transferred may in most cases be the flimsiest security. It may equally well happen that a person is of respectability and good social status and possessed of considerable immovable property and one who can be relied upon to procure the amount in case of the accused's default, and yet he may not for the time being be in possession of moveable properties of the value of the bond. There would be no reason to reject such a person merely because some inconvenience might be felt afterwards in recovering the amount from him. It would be unfair to accused persons if any general rule or practice were laid down that no person who is not possessed of sufficient moveable properties should be accepted as a surety.

9. It would not be improper for a Magistrate in case of doubt to permit a surety who has signed the bond in the form mentioned above also to execute separately a registered bond hypothecating immovable property in order to satisfy the Magistrate that he is possessed of sufficient means. But neither such a registered security bond is necessary under the provisions of the Code, nor is a Magistrate bound to accept such security if offered.

10. The Magistrate has to satisfy himself as to the means and station in life of the surety as well as his character. He has to exercise his discretion in accepting him but that discretion must not be exercised in an arbitrary manner. The primary consideration is whether the surety is likely to fulfil the undertaking given by him.

11. The amended order of the Magistrate says: 'two reliable sureties in moveable property'. Although I do not agree with all that the Sessions Judge has said, I agree with him that in the order itself there should be no restriction as regards moveable property. So far as the order goes, the Magistrate should follow the words of Section 117 and not introduce the restrictive words 'in moveable property.' When sureties are produced, the Magistrate should consider whether, having regard to all the circumstances, they are fit persons to be accepted or not. When they have been accepted the bond executed by them should be in the form given in the schedule. If the Magistrate has any apprehension that the sureties may part with their properties and be unable to fulfil the undertaking, he may by way of precaution accept a hypothecation bond from them as a condition precedent to their being accepted as reliable sureties.

12. I accordingly order that the words 'in moveable property' after the word 'sureties' in the order of the Magistrate dated 19th March 1931 be deleted.