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Court : Orissa

Decided On : Aug-04-1950

Reported in : AIR1951Ori18

Judge : Ray, C.J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 499

Appeal No. : Criminal Revn. No. 168 of 1950

Appellant : Govinda Chandra

Respondent : State

Advocate for Def. : Adv.-General

Advocate for Pet/Ap. : K.N. Das, Adv.

Disposition : Revision allowed

Judgement :
ORDER

Ray, C.J.

1. The petitioner (Gobinda Chandra Srichanar) has been declared to have forfeited the bail bond executed by him to ensure attendance of accused Bira Naik in Criminal Case No. 389, started by Maguni Biswal of Dhenkanal. On 16-1-1950,

which was one of the dates of hearing, the accused Bira Naik did not attend the Court, and the petitioner, his bailor, fully alive to his responsibility made a representation to the Court that the non-appearing accused was ill. The learned Magistrate did not accept the story of illness but however, was forced to adjourn the case to 30-1-1950. On that date, the accused appeared, and the bailor too appeared and filed a petition asking to be released from the liability of bail bond. It appears from the record that one Banshi Naik executed a bail bond for Bira Naik on 3-3-1950. The petitioner was called upon to show cause why the surety bond should not be forfeited and the payment of Rs. 200 agreed under the bond to be paid in default of the accused's attendance in Court, should not be enforced.

2. Both the Courts below have disbelieved the story of Bira Naik's illness on 16-1-1950, and have found themselves not justified, on any reason whatsoever, to excuse the bailor from the liability.

3. Mr. K.N. Das, the learned counsel for the petitioner, has attacked the proceeding as tainted with illegality. According to him, the suretyship should have, first of all, been forfeited, and then only he could have been called upon to show cause why payment of the amount undertaken should not be enforced. I do not quite follow this argument. If his argument is upheld it would mean that the surety bond should be forfeited without hearing the bailor. That can never be the intention of law. Before forfeiting the bond, the bailor should be given an opportunity to show cause. If he fails to satisfy the Magistrate as to the existence of any sufficient reason disabling him from fulfilling the terms of the bond, he is to be directed to pay. Mr. Das should maintain that at that stage he shall be given further opportunity to show cause. At present, I am not advised to express any opinion on this. But I find no irregularity in the proceeding.

4. But for reasons different from that placed before me, the payment should not be enforced, I have the bond before me. What has been undertaken in that bond is that the petitioner should appear in Court from day to day. It reads like this:

'We the accused have been called upon to furnish securities with one surety of Rs. 200 each in the Criminal Case No. 389 started by Maguni Biswal (Complainant) as against Lambodar Behera, and 5 others. I, therefore, agree that from today till the

disposal of this case I shall appear in Court on 30-12-1949 and on all other dates to which the case is adjourned at 10 O' clock every day and in case I fail to appear I shall have to pay Rs. 1200. If I fail to pay, the State shall realise it by attaching and selling my properties. I execute the Muchalike to this effect. Dated 14-12-1949, Sd. G. C. Srichanar.'

5. The document contains a list of the names of the 6 accused persons. None of them has been made to sign this document by way of execution. This amounts to saying that the accused persons have not bound themselves to appear in Court on condition of forfeiting the sum of Rs. 200 each. As it appears from Criminal P C, Schedule V, Form No. XIII, there should be two bonds, one taken from the accused undertaking to appear on the dates of hearing on pain of forfeiting the bond of any amount fixed by the Court, and the other from the surety chosen by him (accused) undertaking, on accused's failure, to make good the sum forfeited by the accused and, for the matter of that, by him. I cannot conceive that without an accused himself executing a bond, any surety could be thought of. The very conception behind the word 'surety' and the liability implied in that status as recognized by law is to reimburse the loss sustained by the principal on account of failure of performance on the part of the obligor. The principal (i.e., the State in this case) has double remedy-one against the principal obligor and the other against his surety. Not taking a bond from the accused person to appear on the dates fixed amounts to leaving him to act at his own option. If the accused is not bound to appear, there is no meaning requiring the surety to make him appear. It is well established in law that if the principal by his laches or otherwise releases the debtor from the liability sought to be assumed by the surety, his remedy against the surety is frustrated.

6. Execution of a bond is imperative under the Code. Section 499, Criminal P. C., reads:

'Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the

time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.'

The section contemplates two cases: one when the accused is to be released on his own bond, and the other release on bail. Execution of a bond by the accused is imperative, and in the case of release on bail, a bond by one or more sufficient sureties has to be executed in addition. Mark that in the first part of the section the bond is to be for such sum of money as the Court thinks sufficient, and with regard to the sureties' bond in the latter part of para (1) of the section, nothing is mentioned about the 'sum'. This is because surety implies pre-existence of a fixed liability by the obligor (principal) and the surety is to undertake to reimburse the primary obligation. Hence for what sum the surety bond or bonds shall be executed is thereby predetermined. Any surety bond executed without the bond by the accused is not a bail bond within the Code and is not enforceable in the manner prescribed in the Code. Section 502 contemplates release of a surety without entailing release of the accused. If for some reason, the accused, the primary obligor, is released, the surety stands released without anything more.

7. It may be noticed that surety does not thereby acquire an overall control of the accused's person. He is to watch the movements of the accused, and, on apprehension that he may abscond, may inform the Court and seek release of his liability where upon he is not held bound to it but the accused is arrested, and on his arrest the surety is freed from the bond and stands discharged. Where the accused has not been made to execute a bond, the only control on the accused is non-existent and the foundation of the security is knocked from its bottom. The result is unenforceability of the surety bond. Bail means security with sureties whereas the bond, referred to in the first proviso to Schedule 96, is a simple recognisance of the principal without any surety. The word 'bail' is properly applicable to 'security with surety' and not 'surety without security.' In the case of Wadhawa Singh v. Emperor, 29 Cr. L. J. 491-109 I. C. 219: (A.I.R. (15) 1928 Lah. 318), it has been held under no provision of the law can a police officer or a Court take a third party's bond for the appearance of the accused without taking an undertaking (bond) from the accused himself. Such a bond is invalid and the person executing it incurs no legal liability if the accused absconds. I have

considered, in this connexion, the views of the Judges who decided the cases: Indar v. Emperor, 41 Cr. L. J. 958: (A. I. R. (27) 1940 Lah. 339) Nisar Ahmed v. Emperor, A. I. R. (32) 1945 ALL. 389: (47 Cr. L. J 209), and Abdul Aziz v. Emperor, A. I. R (33) 1946 ALL. 116: (47 Cr. L. J. 528). With the greatest deference, I would not agree with them. In Indar's case, (41 Cr. L. J. 958: A. I. R. (27) 1940 Lah, 339), Schedule 99 has not been taken into consideration. In the Allahabad cases, their Lordships have failed to consider that the accused, remaining at large without executing a bond, cannot be said to have been released on bail. To hold otherwise would amount to setting the imperative provisions of Schedule 99 at naught. If the accused has not been released on bail, and has not undertaken to appear on pain of forfeiture of a bond for a certain amount, the consideration for the surety bond fails and the surety's liability is enlarged or subjected to greater risk than be shall be considered to have undertaken under the provisions of Schedule 99 without his consent. The surety's bond, therefore, becomes unenforceable. The Legislature has deliberately used the word 'surety' indicating that his liability is secondary. Besides, on principle, I am bound, sitting in this Court, by the view prevailing in the Patna High Court. The point has bean dealt with in the case of Baidynath v. Emperor, A. I. R. (34) 1947 Pat. 58: (48 Cr. L. J. 324), where it was held that a bond by the surety alone was not contemplated by the Code and there was no power in the Code to forfeit such a bond.

8. In this view of the matter, even if I read this document in the manner in which the learned Advocate-General wants me to read, namely, that he did not bind himself to appear in Court but to cause accused's appearance, I should hold that on account of non-execution of a bond by the accused, the liability of the surety under the sort of bond did never arise. Secondly, if the State Government would insist upon the hidden or implied meaning under this document and should like to enforce the penalty, the bailor is entitled to demand his pound of flesh and to say that, in accordance with the terms of the document, he had appeared on all dates in Court. It having appeared from the record that though the accused did not appear the bailor did not fail to make his appearance, it has to be held that he has fulfilled the terms of the bond and he cannot be held liable.

9. There are two deficiencies in the case that are at the moment irremediable: (i) No bond for appearance has been taken from and executed by the accused: and (ii) that the bailor, bound as he is by the bond, has fulfilled its terms to the effect that he should appear in Court from day to day. He has nowhere agreed to be liable to pay any sum for non-appearance of the accused. The essentiality of the position is that until an accused forfeits his bond of appearance, the question of surety's liability does not arise.

10. In the circumstances, I would get aside the orders of the Courts below calling upon the petitioner to make payment on forfeiting his bond. In my judgment, he is not liable to any penalty whatsoever. The revision is allowed.

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