

Usman Vs. State of Kerala

Usman Vs. State of Kerala

SooperKanoon Citation : sooperkanoon.com/728040

Court : Kerala

Decided On : Mar-29-2005

Reported in : 2005(4)KLT348

Judge : K. Hema, J.

Acts : Negotiable Instruments Act - Sections 138; [Code of Criminal Procedure \(CrPC\)](#) , 1973 - Sections 17, 82, 83, 106, 360, 441, 445(2), 446, 446(1), 446(2), 446(3), 448 and 514

Appeal No. : Crl. R.P. No. 565 of 1996

Appellant : Usman

Respondent : State of Kerala

Advocate for Def. : K. Thavamony, Public Prosecutor

Advocate for Pet/Ap. : P. Vijaya Bhanu and; Alan Pappali, Advs.

Disposition : Petition allowed

Judgement :

ORDER

K. Hema, J.

1. It is noticed that different criminal courts adopt different procedure in a proceedings under Section 446 of the Code of Criminal Procedure ('the Code' for short). Quite often, courts commence proceedings under Section 446 of the Code, even without being satisfied of the pre-requisites. Orders are seen passed which may not reflect the grounds of 'proof of satisfaction of the court that 'the bond has been forfeited'. Courts also do not advert to in the orders, anything regarding such 'proof, though recording of the grounds of 'proof of satisfaction is mandatory under the section.

2. On the mere failure of accused in appearing in court either for a day or more, certain courts pass orders 'to forfeit' the bond under Section 446 of the Code, as though 'forfeiture' is an event to follow the court's order. In many cases, courts also order 'penalty', as if it is a punishment awarded by the court under Section 446 of the Code for breach of terms of bond. It is also noticed that when an accused appears, court puts certain questions to him and record the questions and answers, and immediately proceed to forfeit the bond and impose a penalty, without giving sufficient opportunity to show cause.

3. A cluster of questions therefore, shoots up before me. Under what circumstances can a court initiate proceedings under 446 of Code of Criminal Procedure (the Code, for short)? What is the most essential pre-requisite for commencing proceedings under Section 446 of the Code? What is meant by the expression 'the bond has been forfeited' under Section 446 of the Code? Who forfeits the bond? Can a court issue order 'to forfeit' a bond under Section 446? What does the term 'penalty' used in Section 446 of the Code mean? Can a court award a penalty, as a punishment for breach of condition of bond under Section 446 of the Code? How much time a court is expected to give to the accused to show cause? In short, what are the essentials to be borne in mind while proceeding under Section 446 of the Code

4. Before considering these questions, I shall briefly narrate the facts in this case: Petitioner is an accused in a case for offence under Section 138 of the Negotiable Instruments Act before a Magistrate's court. He was released on bail on his executing bond for Rs. 10,000/- with two solvent sureties each for like sum on his

undertaking to appear before the court on all dates of posting. But on a particular day when the case was posted for evidence, petitioner and his counsel were absent. No application was also filed to excuse his absence. Though witnesses were present they could not be examined. Trial court cancelled the bail bond, since condition in the bail bond was violated. But, petitioner appeared before court on the fifth day of passing of the order cancelling bond.

5. Learned Magistrate put certain questions to him regarding his absence and recorded the questions and answers. Petitioner submitted that he was not in station as he was away in Bangalore. The court held that there was no satisfactory and convincing reason for his absence and hence it was wilful. It was also found that petitioner wilfully violated condition of bail. The court observed that though it granted sufficient time to offer reason for his absence, he did not give satisfactory reasons. Hence the court immediately ordered to forfeit the bond and also imposed penalty of Rs. 9000/-simultaneously. The balance of Rs. 1000/- was remitted. Trial court further ordered thus: 'if the petitioner fails to remit penalty and if coercive steps which are taken to realise the said amount go futile, the petitioner was ordered to undergo imprisonment in civil jail for a term of six months'.

6. The said order was challenged before sessions court, but it was confirmed in appeal and hence this revision. Sri. Alan Pappali, learned Counsel appearing for petitioner strongly assailed the order of the court below on the ground that the trial court committed an illegality by not giving an opportunity to petitioner to show cause. Though it is possible to dispose of this revision on this sole ground itself, certain other grave illegalities strike my attention, which I cannot leave out. Hence I shall make a deeper probe into the various aspects touching the procedure laid down in Section 446 of the Code to dispose of this case.

7. I shall proceed with my task now. Section 446 can first be extracted as follows:

'Section 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.

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.

(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:

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.

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under Section 106 of Section 17 or Section 360 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, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.'

8. Section 446 of the Code, as the title itself reveals, lays down the 'procedure when bond has been forfeited'. It contains the procedure to be followed when a court is satisfied that the bond has been forfeited. Before a court initiates proceedings under Section 446 of the Code to recover the penalty, the court must be satisfied that 'the bond has been forfeited'. Such forfeiture must have been 'proved' to the satisfaction of the court. Thus, the 'proof of satisfaction of forfeiture of a bond is the most essential pre-requisite for commencing proceeding under Section 446 of the Code. Such proof must precede commencement of proceedings under Section 446 of the Code. Without such 'proof, no proceedings under Section 446 of the Code shall be initiated.

9. But, when can a court arrive at a satisfaction that 'the bond has been forfeited' To give an answer, the meaning of the term 'forfeit' is to be understood first. The word 'forfeit' as per Black's Law Dictionary, Fifth Edition means, 'to lose, or lose the J right to, by some error, fault, offence, or crime; to incur a penalty; to become liable to the payment of a sum of money, as the consequence of a certain act.' As per 'New Webster's Dictionary of the English Language, Deluxe Encyclopedic Edition' 'forfeit' means: to lose the right to, by some fault, crime, or neglect; a fine; a penalty'.

10. The expression 'forfeiture of bond' in the present context therefore, takes in two things. One is an act, fault or error. The other is, incurring a penalty as a consequence of such act, fault or error. This is what is indicated in the language of Form No. 48 of Schedule II of the Code also. I shall explain. Form No. 48 contains the form of show cause notice to be issued to a surety under sub-section.(1) of Section 446 of the Code, after being satisfied of forfeiture of bond. The relevant portion of Form No. 48 reads thus:

'you became surety for...(name) of...(place) that he should appear before this Court on the ...day of...and bound yourself in default thereof to forfeit the sum of rupees...to Government; and whereas the said (name) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees.... You are hereby required to pay the said penalty...'

11. It is discernible from the wordings of Form No. 48 that if the accused fails to appear before court and by reason of such 'default', the accused or surety forfeits certain sum of money, such a person can be required to pay the 'aforesaid sum' as the penalty incurred by them. This would show that a penalty incurs as a result of forfeiture of certain amount of money etc., referred to in Form No. 48. But, how much shall be such amount? How can a court fix such penalty? Form No. 45 of schedule II of the Code gives an idea on this. It is the form of bond which is to be executed by the accused and surety or sureties under Section 441 of the Code.

12. The terms of the bond in Form No. 45, specify that the accused shall attend and appear in court on every day etc., and in case of making default therein, the accused binds himself 'to forfeit' to Government, the sum of rupees specified in the bond. In the second part of the bond, the surety also declares that the accused shall attend and appear before the court concerned on every day on which any trial on the charge is held for the purpose of answering the charge against him and in case of the accused making any default therein, they bind themselves 'to forfeit' to Government the sum of rupees specified therein.

13. It is also held in *State of Uttar Pradesh v. Mohammad Sayeed* : 1957 CriLJ888 the relevant form 'sets forth the contents of a bond to be executed by an accused and his surety. The bond is of two parts -- one part to be signed by the accused and the other part to be signed by his surety or sureties. Both the accused and sureties in executing such a bond guarantee the attendance of the accused in court whenever called upon to answer the charge against him and in case of default also bind themselves to forfeit to Government the specified sum of money mentioned therein'.

14. Thus, it is clear that in the case of a bond for appearance, the amount which an accused or surety forfeits is the same amount as is specified in the bond which is fixed by the court while releasing the accused on bail. It is such sum of money which the accused or surety is bound to forfeit to the Government on breach of terms of bond. It is such 'aforesaid sum' that they are called upon to pay as penalty under Sub- section of Section 446 of the Code, as seen from Form No. 48 read with Form No. 45.

15. Another aspect is also evident from Form No. 45, 48 and Section 446 of the Code. That is, the person who 'forfeits' the bond-amount is the person who executes the bond. The bond is forfeited by the accused and not by the court. This is what is indicated by the usage of the expressions, 'you have forfeited' in Form No. 48, 'the accused binds himself to forfeit', 'they bind themselves to forfeit' etc., in Form No. 45. Thus, the bond is forfeited by the person who executes the bond and not by the court. Forfeiture is not an event which takes effect as a consequence of a court's order.

16. Nothing contained in Section 446 gives any power to a court 'to forfeit' a bond as if forfeiture is the outcome of the court's order. But, it is often noticed that courts pass orders under Section 446 of the Code such as, 'I hereby forfeit the bond', 'this Court forfeits the bond' etc., as if forfeiture of bond is an incident to follow a court's order. I could not come across with anything in Section 446 of the Code which empowers a court to issue any such order to forfeit a bond. Therefore, any order passed by a court indicating that the bond is forfeited by court and not by accused is clearly illegal and contrary to the provision contained in Section 446 of the Code.

17. Having examined the meaning of the word, 'forfeit', I shall once again revert back to the same question, when can a bond be said to have been forfeited? I shall analyse another facet of it. I have already held that to arrive at a conclusion that a bond has been forfeited, the 'default' by the accused plus a consequential incurring of penalty by the accused or surety must be established. So, it follows that the most crucial aspect to be established to find that a 'bond has been forfeited' is the 'default' on the part of the accused.

18. But, what is meant by 'default' in the present context? Is it a mere non-appearance of accused? Before I proceed to answer these questions, I shall profitably bear in mind, what the Supreme Court cautioned in the decision in *State of Bihar v. M. Homi* : 1955 CriLJ1017 . In the said decision rendered by a three-Judges bench, the Supreme Court held that the terms of bond have to be carefully construed in favour of the person who executed the bond while deciding whether there was violation of the terms. The Supreme Court held in *State of Bihar v. M. Homi* : 1955 CriLJ1017 as follows:

'In view of the clear provision in the bond the terms of which being penal in nature must be very strictly construed, it could not be said that the contingencies contemplated by the parties had occurred. There was no judgment or order of the Judicial Committee upholding either in part or in whole the sentence against the accused. As the terms of the bond so construed could not be said to have been fulfilled, the penalty stipulated had not been occurred. It must therefore be held that the proceedings taken against the sureties were entirely misconceived.'

19. It is also worthy to understand what the Supreme Court held in *State of Maharashtra v. Dadamiya Babumiya Sheikh* : 1971 CriLJ1274 . It was observed thus:

'A surety bond is a contract.... Each bond, has to be construed on its own terms. But in construing the terms of a surety bond for the production of an accused person, the purpose and object of executing it must be kept in view. Such a bond is executed for the purpose of ensuring the presence of the accused concerned in court in which he is standing his trial for a criminal offence at the hearing of the case. But for the execution of such a bond, the accused would have to remain in custody so that the trial may proceed smoothly. Looked at from this point of view surety bonds in criminal cases must be held to be designed to an extent to serve a public purpose. In some cases it is of course said that surety bonds call for a strict construction. But the construction must not be so unduly strained as to result in defeating its essential purpose. Each bond has of course to be construed on its own terms, subject to what has just been stated.'

20. It is clear from the above discussion that a bond for appearance is a contract, the terms of which are penal in nature. A breach of the terms leads to a serious consequence of penalty. Hence, the terms of the bond have to be construed cautiously and carefully so as to ensure that it will not result in defeating the essential public purpose of a bond. The main object of executing the bond is to guarantee the presence of the accused in court as stated in the bond. It is also the purpose that the accused shall not remain in jail during pendency of trial and at the same time, the trial will proceed smoothly. A bond for appearance is insisted upon and executed to guarantee presence of the accused in court during trial and for a

smooth running of trial.

21. So, it is only when the accused absents himself from court with a view to defeat the purpose of the bond that he can be said to have forfeited the bond. A joint reading of terms of bond in Form No. 45 and the wordings in Form No. 48 shows that as per the terms of the bond, the accused or the surety as the case may be, may incur a penalty only under certain circumstances. It occurs when the accused fails to appear before court and 'by reason of such default', the accused or surety forfeits the bond-amount. So, necessarily, the absence of accused must be such 'default' which gives rise to forfeiture of bond-amount, and thereby the penalty. But, it is needless to say that a mere non-appearance before court due to reasons beyond a person's control will not be sufficient for any person to incur a penalty. Such a default cannot be said to be with a view to defeat the object of the bond.

22. No law normally punishes an individual for an unintentional act or omission. No law is ever harsh to anyone who innocently fails or omits to do something by an inadvertent mistake or error. This is specially so, when a person i.e., the surety is penalised for the fault of another i.e., the accused. A surety incurs a penalty mainly due to the failure of accused to appear and such default. But, an accused can be absent from court on a particular day or even on several dates for a number of reasons.

In some cases, such reasons may be genuine yet, in some other cases, those may not be so.

23. But, a surety may not even know whether the accused was absent in court on a particular day or other. He cannot, and is not expected to keep a constant watch of the proceedings. Though technically, he is bound by the bond and by reason of the accused's default, he is also bound to forfeit the bond-amount, the court must be satisfied that the accused or surety has by such default of the accused, incurred penalty. So, 'default', in that sense, must be something more than a mere non-appearance of accused in court.

24. Thus, to arrive at a satisfaction that a 'bond has been forfeited', a mere finding that an accused was absent and that it was wilful may not be sufficient. The court must satisfy itself that the absence was not only wilful, but such default was with a view to hinder the course of a smooth trial and to defeat the purpose of bond also. The court must also be satisfied that the default was such that it could result in forfeiture of bond-amount and thereby a liability to pay penalty. But, how can a court reach such satisfaction? How can the court have proof of such satisfaction? This shall be my next probe.

25. A court can have satisfaction and proof of the relevant facts in a number of ways. When the court finds that the accused is absent, the court may initiate steps to procure presence of accused for trial. The court may issue notice to sureties to appear before court or to produce the accused. A surety may be informed and heard on the absence of the accused. If he seeks time to produce the accused, sufficient time may be granted to him to produce the accused. The court may, if necessary, direct him to file a statement in writing or even an affidavit, if so needed. The court may also insist for production of documents to support his submissions, if the situation so demands. The court may issue warrant against the accused. It may initiate proceedings under Section 82 and 83 of the Code, if found necessary.

26. So, in short, the court must make an enquiry into the circumstances under which the accused failed to appear. This is done by the court to satisfy itself whether the default of the accused was sufficient to incur a penalty. But, during this process, a court will also have 'proof of satisfaction that 'the bond has been forfeited'. It is in such circumstances that a court can say that 'it is proved to the satisfaction of the court that the bond has been forfeited'. It is then that the court will have 'proof of satisfaction of forfeiture.

27. Having been satisfied of the essential factors or the pre-requisites, the court shall proceed with the first step under Section 446 (1) of the Code. A proceedings under Section 446 of the Code commences by recording the grounds of proof of satisfaction that the bond has been forfeited. The court must record not merely how it was satisfied that the bond has been forfeited, but it must also record as to

how it was 'proved' that the bond has been forfeited. The court shall record the grounds of such 'proof and it is only thereafter that the court can proceed any step further under Section 446 of the Code. Recording of the grounds of such proof is an inevitable legal requirement under Sub-section.(1) of Section 446 of the Code. This is mandatory. Failure to comply with this mandate is not a mere irregularity, but it is clearly illegal.

28. The second step under Sub-section.(1) of Section 446 of the Code is calling upon the person bound by the bond to pay the penalty thereof or to show cause why it should not be paid. In this regard, a notice in the prescribed form ie., Form No. 48 of Schedule II of the Code may be issued to the surety. Though no specific form of notice is prescribed for the accused, records and court proceedings in the case shall reveal that the accused was also called upon to show cause, as required under Section 446(1) of the Code. But, under no circumstance, court shall proceed to forfeit the bond or impose any penalty against an accused or the surety, immediately on recording of questions and answers given by the accused on his failure to appear in court.

29. The court is bound to grant sufficient time to the surety and to the accused, as the case may be, to show cause. But, how much is such time? Form No. 48 shows that a minimum of two days time shall be given to show cause and for payment of penalty. It is worded thus: 'You are hereby required to pay the said penalty or show-cause, within...days from this date, why payment of the said sum should not be enforced against you.' The expression 'days' used in plural in Form No. 48 indicates that the time to be given to show cause is more than a day and a minimum of two days.

30. A close reading of Form No. 48 reveals that more than a day's time ie., at least two days' time must be given to the surety to show cause. Though Section 446 of the Code does not specify how much is the exact time to be given, it can be inferred from the form of notice in Form No. 48, that a surety .must get minimum of two days' time to show cause under Section 446 of the Code. But, such time shall be given not only to the surety but to the accused as well. There is no reason why such opportunity shall be denied to the accused alone,

31. So, the court must ensure that the person who is called upon to show cause under Section 446(1) of the Code gets a minimum of two days to show cause. If the accused or the surety, as the case may be, appears in court or is brought to court, he may be called upon to show cause or pay the penalty and the court shall adjourn the case as aforesaid by giving a minimum of two days' time to show cause. It is also desirable that the accused or the surety is directed to file a statement in writing in reply to the show cause. At any rate, the court must listen to what they have to say in the matter after granting sufficient time.

32. The court shall hear the accused or the surety, as the case may be, and then only decide whether it should proceed with the next step under Section 446 of the Code. 'Justice may be blind, but she has very sophisticated listening devices', said Edgar Argo. The courts must remember that the procedure contained in Section 446 (1) of the Code is not merely a facet of natural justice, but it is a legal requirement also. If such opportunity is not given to the person against whom the court proceeds to recover penalty, the entire proceedings will be vitiated. Because, the court can recover penalty, only if sufficient cause is not shown.

33. Learned Counsel for appearance placed reliance upon *Ghulam Mehdi v. State of Rajasthan* (AIR 1969 SC 1185) and argued that failure in giving notice is illegal. The relevant portion from the decision is as hereunder:

'Section 514 Cr.P.C. shows that before a surety becomes liable to pay the amount of the bond forfeited it is necessary to give notice why the amount should not be paid and if he fails to show sufficient cause, only then can the Court proceed to recover the money. When no opportunity has been given to a surety to show cause why he should not be made to pay, the proceedings cannot be said to be in accordance with law and should therefore be quashed.'

34. If the court is satisfied on hearing the surety or accused that there was no wilful default on the part of the accused so as to defeat the purpose of the bond, and by reason of such default, bond has not been forfeited and the penalty is not incurred, the court shall not recover any penalty from either the accused or the surety. In short, the court cannot proceed any further and the court is bound to drop further proceedings. A court gets jurisdiction to recover penalty from the

accused or surety under Section 446 of the Code, only if the bond is forfeited by the accused and the accused or surety has thereby, incurred penalty by the default of the accused. If penalty is not incurred, there is no question of recovery of any penalty or even a part of it.

35. The language of Sub-section 2 of Section 446 of the Code is very clear on this aspect and it provides that the court can proceed to recover the penalty only if sufficient cause is not shown and penalty is not paid. Sub-section 3 of Section 446 of the Code reveals that even in cases where penalty is incurred, the court need not recover the whole penalty. Depending on the facts and circumstances of each case, the court, at its' discretion, may remit a portion of penalty mentioned, and enforce only payment in part of such penalty by virtue of Section 446(3) of the Code. Thus, even if the accused or the surety has incurred a liability to pay penalty, in fit cases, the court need enforce only part-payment of the penalty.

36. Now, having said so much on penalty and having referred to the term 'penalty' in various context, I find that the expression 'penalty' used in Section 446 of the Code requires further clarification. Form No. 48 reveals that as per the show-cause notice itself, a surety is called upon to pay the penalty. It reads as follows: 'and whereas the said (name) has failed to appear before this Court and by reason of such default you have forfeited the aforesaid sum of rupees-You are hereby required to pay 'the said penalty' or show-cause, within...days from this date, why payment of the said sum should not be enforced against you'. Section 446(1) of the Code also shows that a person bound by the bond is called upon to pay the 'penalty thereof and Form No. 48 refers to 'the said penalty'.

37. That means, penalty has already arisen and court is only calling upon the person to pay the penalty. But, nothing contained in Section 446 of the Code provides, reveals or even implies that the court can 'award' or 'impose' a penalty under the section as if it is a punishment imposed by the court for breach of bond. Penalty arises automatically, as a consequence of forfeiture of bond-amount and default of the accused as already adverted to in this order. It is the same amount which is referred to in the bond that transforms or crystallises itself into the penalty which the accused or surety is liable to pay. The court only calls upon such person

to pay 'the said penalty' or the 'penalty thereof which is incurred by him.

38. The court can only recover the penalty which is already crystalised, but it cannot order a penalty as a punishment. Only recovery of penalty that is contemplated under Section 446 (2) and (3) of the Code, but not any passing of order of penalty by the court. In such circumstances, any order passed by the court, making it appear that penalty or part of penalty is a punishment awarded by court is illegal. Section 446 does not refer to any such imposition of penalty by court.

39. Before I part with my discussion on the scope of Section 446 of the Code, I find that it will not be complete, if I do not mention another aspect also. I held earlier in this order that a court can proceed under Section 446 of the Code, only if it is satisfied that the bond has been forfeited and thereby, penalty is incurred. I also held that when the accused or surety appears and satisfies the court subsequently that they had not incurred any penalty, the court shall drop further proceedings against them and in such cases, the court shall not recover any penalty, either in whole or in part. But, the question is, having once found that the bond has been forfeited and penalty is incurred, can the court in the same proceedings hold later that no penalty is incurred? If the court were to do so, will it amount to review of its earlier order

40. In my view, it will not. First of all, there arises no question of any review of any order in a situation like this. Under Section 446(1), the court is only recording the grounds of proof of satisfaction that the bond has been forfeited. Such recording is not an order to forfeit. Under Section 446(1) of the Code, the court is not passing any 'order' to forfeit any bond. The recording of the grounds referred to in Section 446 (1) involves only proof of court's satisfaction of certain facts and the grounds of such proof. But, such satisfaction arrived at by the court at that stage is only a prima facie satisfaction, without junction of the relevant person or persons and without hearing them and also based on certain unimpeached materials. So, such satisfaction need not always be correct.

41. The court can, therefore, at a subsequent stage, reach a conclusion that its earlier prima facie satisfaction was not correct. When the accused or surety

appears and satisfies the court that they did not incur any liability to pay penalty, the court can certainly act upon such subsequent satisfaction. In such a case, the court must be convinced that its earlier satisfaction was not fully correct. This eventuality may arise when the court finds that the documents, endorsements or other materials which are relied upon by the court earlier to reach and prima facie satisfaction were not genuine or correct. There can be other reasons also. But, that does not mean that in such situation, the court was reviewing any earlier order passed in the proceedings.

42. In the light of all what has been said in this order, I find that trial court committed various illegalities in the procedure adopted by it under Section 446 of the Code. Records reveal that petitioner failed to appear before court, but it was only once. He appeared voluntarily thereafter on the very fifth day and co-operated with the trial. (The trial was completed and he was acquitted also). From all these facts, it will be clear that petitioner did not have any intention to defeat the purpose of bond, and that by reason of his default, he had not forfeited the bond. But, the trial court punished the accused for his non-appearance for just one day. It even ordered the accused to imprisonment for six months. That is not what is intended by Section 446 of the Code.

43. The court in fact, did not even ascertain whether the bond has been forfeited by petitioner or not. As a consequence, the court also did not record the grounds of 'proof of satisfaction of forfeiture of bond, though it is an inevitable requirement even for commencing a proceeding under Section 446 of the Code. But, the court illegally passed an order as though forfeiture of bond has to take place as a consequence of the court's order and forfeited the bond. The court put certain questions to petitioner with respect to his absence, recorded the questions and answers, and immediately thereafter, proceeded to forfeit the bond and impose the penalty as if it is a punishment, without affording sufficient opportunity to petitioner to show cause.

44. Trial court also ordered thus: 'If the counter petitioner failed to remit the penalty amount and all coercive steps taken to realise the said amount went futile then the counter petitioner has to undergo imprisonment in the civil jail for a term of six

months.' This order is in total violation of the proviso to Sub-section 2 of Section 445 of the Code. The said provision does not permit the court to order imprisonment against any accused.

45. The court also committed a grave error in passing a conditional order of imprisonment at a premature stage. Though the proviso to Section 446(2) says down that under certain contingencies, a person can be ordered to be imprisoned in civil jail, the court cannot pass such an order even before such eventualities arise. This is mainly because, the term for which a person can be imprisoned may vary, depending upon certain future events that may follow. For example, if the accused or surety pays a substantial amount of the penalty or the court recovers a major portion of it, the court will not be justified in imposing the maximum imprisonment of six months that too, much in advance.

46. The term of imprisonment which a court can order only extends to six months, but it need not always be the maximum. Therefore, no court shall pass an order under proviso to Section 446(2) of the Code, before the court exhausts all steps to recover penalty and ultimately, it fails. But, the trial court did otherwise. This is also illegal.

47. Thus, various illegalities run through every web of the impugned order. I therefore set aside the same. Consequently, all further action based on the order challenged in this revision, automatically fail.

Petition is allowed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com