

Johny Wilson Vs. State of Rajasthan

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Court : Rajasthan

Decided On : Jul-17-1985

Reported in : 1986CriLJ1235; 1986(1)WLN484

Judge : M.C. Jain and; G.K. Sharma, JJ.

Appellant : Johny Wilson

Respondent : State of Rajasthan

Advocate for Pet/Ap. : Shri. Neelkamal Bohra

Judgement :

M.C. Jain, J.

1. This bail application has come up for hearing before us on the orders of Hon'ble the Chief Justice on reference having been made by Shri K. S. Lodha, J., as he found himself unable to fall in line with the two decisions of this Court in Jumma Khan v. State of Rajasthan 1983 Rajasthan LR 382 decided by Shri G. K. Sharma, J. (one of us) and Surendrasingh v. State of Rajasthan 1981 W.L.N. (UC) 40 decided by Shri N. M. Kasliwal, J.

2. We may state the few relevant facts. The applicant Johny Wilson was challaned in the court of Additional Chief Judicial Magistrate, No. 1, Jodhpur on Aug. 20, 1977 after investigation. 24-8-1977 was fixed for scrutiny of challan. But on that

date, the accused absented and jumped bail and continued to remain absconding up to 4-8-83 i.e. for about 6 years. Thereafter, on arrest, he was produced by the police on 5-8-83. He was released by the order of the Sessions Judge, Jodhpur on 27-8-83. The accused again absented on 14-2-84 and continued to abscond till 2-1-85, on which date, he himself surrendered before the court and submitted an application for bail, which was rejected and he was sent to the judicial custody. Thereafter, an application was moved before the learned Sessions Judge, Jodhpur, who by his order dated Jan. 15, 1985 rejected the bail application looking to the conduct of the accused-applicant that he had absconded twice for a considerable period and the learned Sessions Judge also considered that it would not be proper to enlarge the accused on bail as it is likely that he may abscond and thereby the trial of the case may be protracted. Thereupon, the accused has moved this bail application under Section 439, Cr. P.C.

3. On behalf of the applicant, it was contended before Shri K. S. Lodha, J. that the applicant had already been granted bail, the forfeiture of the bonds does not amount to the cancellation of the bail already granted to him and the applicant is entitled to be released on bail on his again furnishing personal and surety bonds in accordance with the direction of the original order dated 27-8-83 under Section 447, Cr. P.C., The courts-below were wrong in refusing bail to him. In support of his contention, reliance was placed on the aforesaid two decisions. The learned Judge expressed his inability to agree with the said two decisions and observed that the two decisions are based on Section 447, Cr. P.C. and it has been found that the Magistrate was empowered to demand a fresh surety bonds in accordance with the directions of the original order. However, the learned Judge observed that unfortunately, the provisions contained in Section 436(2) as also Section 446A, which had been inserted by Act No. 63 of 1980, had not been brought to the notice of the learned Judges and he concluded that the view taken by the learned Judges in the aforesaid two cases, does not appear to be in consonance with the provisions of Sections 436(2) and 446A, Cr. P.C. It is in these circumstances, this application has come up for consideration before us.

4 We have heard Shri Neelkamal Bohra, learned Counsel for the applicant and Shri Niyazuddin Khan, learned Public Prosecutor for the State.

5. Shri Neelkamal Bohra, learned Counsel for the applicant submitted that Section 447 deals with the procedure, when any surety to a bond under the Code becomes insolvent or dies, or when any bond is forfeited under the provisions of Section 446. In these circumstances, Section 447 empowers the Court to order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order and in case, such security is not furnished, the court is empowered to proceed as if there has been a default in complying with the original order. The applicant was admitted to bail by the learned Sessions Judge. The forfeiture of the bonds under Section 446, Cr. P.C. does not affect the bail order. The bail order continues to have force and under the original bail order, after forfeiture of the bond, furnishing a fresh security, can be ordered under Section 447, Cr. P.C. According to Shri Bohra, it was wrong on the part of the courts-below not to have ordered furnishing the fresh security under Section 447, So, on that basis, his submission is that the courts-below have acted wrongly and the applicant may be ordered to furnish fresh personal and surety bonds and in the alternative, the applicant may otherwise be enlarged on bail.

6. The aforesaid contention is refuted by Shri Niyazuddinkhan, learned Public Prosecutor and he submitted that after forfeiture of the bonds, the accused is not entitled to be released on furnishing fresh personal and surety bonds as of right, in a bailable as well as non-bailable offences, irrespective of the fact, that the order admitting the accused to bail, is passed by the superior court. This submission is made in view of the provisions contained in Sections 436 and 446A, Cr. P.C. He urged that the provision contained in Section 447, is simply an enabling provision and not a mandatory provision. The court could proceed to act under Section 446A or 447 Cr. P.C. but where the court feels that the circumstances are such, which do not warrant the exercise of discretion in favour of the accused under Section 447 or Section 446A, the court is empowered to refuse bail. It is only with this object in view that the Criminal P.C. was amended in the year 1980. Shri Niyazuddinkhan also submitted that the two decisions referred to by the learned single Judge, do not lay down that the court cannot refuse bail when once the forfeiture of bond is taken place. What the two decisions laid down is that, under Section 447, Cr. P.C. the court is empowered to order furnishing fresh security.

7. We have considered the rival submissions advanced before us.

8. Before referring to the relevant provision of the Criminal P.C. and dealing with the rival submissions, we may first consider the ratio of the two cases referred to by the learned single Judge.

9. In Surendrasingh's case (*supra*), the applicant was released on bail by the learned Sessions Judge and he was to appear before the Magistrate on 7-2-1981. But he could not appear on that date on account of his illness. His bail-bonds were forfeited and non-bailable warrant was issued. On 23-2-81, he moved an application for cancellation of the warrant of arrest and prayed that fresh bail may be granted to him. The learned Magistrate dismissed the application taking the view that when the bail-bonds had been forfeited, he had no jurisdiction to cancel the warrant of arrest. He then moved the High Court under Section 482, Cr. P.C. From the perusal of the decision, it would appear that the learned Magistrate proceeded to dismiss the application, without considering the ground of illness on merits, merely on the ground that he had no jurisdiction to cancel the warrant of arrest when he had already passed the order forfeiting the bail bonds. Kasliwal, J. observed that the Magistrate took an erroneous view of law in holding that he had no jurisdiction to cancel the warrant of arrest. It was stated that under Sub-section (2) of Section 70, Cr. P.C. there is a provision that every such warrant shall remain in force until it is cancelled by the Court, which issued it or until it is executed. Kasliwal, J. further observed that apart from that, under Section 447, the Magistrate is empowered to demand a fresh security in accordance with the directions of the original order. After making this observations, the order of the Magistrate was set aside and it was directed that on furnishing a personal and surety bonds, the warrant of arrest shall be cancelled. The learned Judge has not held that in view of Section 447, Cr. P.C. the Magistrate had no power to refuse bail and he had simply to order furnishing of a fresh security bond under Section 447, Cr. P.C. when the bond is forfeited.

10. In Jumma Khan's case (*supra*), the applicant was released on bail by the Magistrate. But subsequently the bail-bonds were forfeited and an application under Section 447, Cr. P.C. was moved. That application was rejected. Thereafter,

a petition under Section 482, Cr. P.C. was moved in the High Court. The learned Judge placed reliance on Surendrasingh's case (supra). It was observed that the reason mentioned by the learned Magistrate in the order is not correct and Section 447, Cr. P.C. empowers the Magistrate to demand fresh surety in accordance with the directions of the original order. The petitioner had surrendered before the Magistrate and requested for an order to be passed under Section 447, Cr. P.C. The order of the learned Magistrate was set aside and the petitioner was ordered to be released on furnishing fresh bail bonds. This case too, does not lay down that bail cannot be refused even on valid grounds. What it lays down is that Section 447, empowers the Magistrate to demand fresh surety in accordance with the directions of the original order. It appears that the learned single Judge, from the observations made in these decisions felt that the ratio of these cases is that the Magistrate has to proceed only under Section 447, Cr. P.C. and order furnishing fresh surety and on that basis the learned Magistrate has no power to refuse bail.

11. As the matter has been referred to us, we would like to decide the same in the light of the submissions made before us.

12. We may first of all consider the relevant provision relating to bail and bail-bonds. The provisions as to bail and bonds, have been made in Chapter XXXIII from Section 436 to Section 450. The relevant provisions for our purposes are Sections 436, 437(5), 439(2), 446A and 447. Section 436 deals with the cases when bail is to be taken i.e. in cases relating to bailable offences and Section 437 deals with the cases of non-bailable offences. Section 439 deals with the special powers of the High Court or the Court of Session regarding bail. Section 446 deals with the procedure, when bond has been forfeited. Section 437(5) and Section 439(2) are provisions relating to cancellation of bail. What Sections 446A and 447 provide, shall be considered elaborately hereinafter.

13. In order to appreciate and adjudicate upon the controversy and also for facility of reference it would be proper to read Sections 436, 437(5), 439(2), 446A and 447. These provisions are as under :

436. In what cases bail to be taken.--(1)When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail:

Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further that nothing in this section shall be deemed to affect the provisions of Sub-section (3) of Section 116 or Section 446A.

(2) Notwithstanding anything contained in Sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof under Section 446.

437. When bail may be taken in case of non-bailable offence.--

(1)to(4)

(5) Any Court, which has released a person on bail under Sub-section (1) or Sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

439. Special powers of High Court or Court of Session regarding bail.--

(1)

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

446A. Cancellation of bond and bail-bond.--

Without prejudice to the provisions of Section 446, where a bond under this Code is for appearance of a person in a case and it is forfeited for breach of a condition :

(a) the bond executed by such person as well as the bond, if any, executed by one or more of his sureties in that case shall stand cancelled; and

(b) thereafter no such person shall be released only on his own bond in that case, if the Police Officer or the Court, as the case may be, for appearance before whom the bond was executed, is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition :

Provided that subject to any other provision of this Code, he may be released in that case upon the execution of a fresh personal bond for such sum of money and bond by one or more of such sureties as the police officer or the Court, as the case may be thinks sufficient.

447. Procedure in case of insolvency or death of surety or when a bond is forfeited.--When any surety to a bond under this Code becomes insolvent or dies, or when any bond is forfeited under the provisions of Section 446, the Court by whose order such bond was taken, or a Magistrate of the first class may order the person from whom such security was demanded to furnish fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.'

14. It may also be stated that the Law Commission, while recommending revising of Section 496, Cr. P.C. observed in its 41st Report in para 39.2, that:

Under Section 496 the right to bail is absolute in case of bailable offences. It has been suggested that where a person released on bail has absconded or has failed to appear before the Court on the date fixed, he shall not be entitled to bail, when brought to Court on any subsequent date. We recommend the acceptance of this suggestion, and further recommend that refusal of bail under such circumstances shall be without prejudice to any action that may be taken under Section 514 for forfeiture of the bail-bond.

15. Sub-section (2) to Section 436, is added as per the recommendation of the Commission. The Criminal P.C. was amended by Ordinance No. 12 in the year 1980 and the Ordinance was replaced by the Code of Criminal Procedure (Amending Act No. 63 of 1980). The Statement of Objects and Reasons to the Ordinance shows that the object was to make it more difficult for habitual criminals committing serious offences to obtain bail and the Ordinance replaced by the Act, was promulgated with a view to enabling the law enforcing agencies to deal effectively with anti-social elements, habitual criminals and those creating enmity between different groups and communities. It is with this aim in view, the amendments were made in Sections 436, 437, 446 and a new Section 446A was inserted.

16. We are required to construe and interpret Section 447 along with Sections 436, 437(5), 439(2) and 446A, Cr. P.C. While interpreting these provisions, we are of the view that we should adopt such a canon of construction, so that, the meaning given to the provisions may present a harmonious picture reflecting the legislative intent avoiding seeming anomalies and inconsistencies.

17. It is said that the task of interpretation of a statutory enactment is not a mechanical task it is more than a mere reading of mathematical formula because few words possess the precision of mathematical symbols. It is an attempt to discover the intent of the legislature from the language used by it and it must always be remembered that language is at best an imperfect instrument for the expression of human thought and as pointed out by Lord Denning. 'It would be idle to expect every statutory provision to be 'drafted with divine prescience and perfect clarity'.

18. Judge Learned Hand, said : '...it is true that the words used, even in their literal sense are the primary and ordinarily the most reliable source of interpreting the meaning of any writing; be it a statute, contract or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that 'statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'

19. What is the crucial question with which we are confronted, is whether after forfeiture of bond by the Court before whom, the appearance is to be made under the bond, the accused is entitled as of right to seek an order for furnishing fresh security under Section 447, Cr. P.C. or even under Section 446A, Cr. P.C. and whether the Court has no power to refuse to release him, when once his bail and surety bonds are forfeited under Section 446 Cr. P.C. and stood cancelled under Section 446A Cr. P.C. A bare look to the provisions of Sections 436, 437, 438, 439, 446A and 447, Cr. P.C. would indicate that in Section 436, the legislature has used the expression 'shall' for releasing the person-accused of a bailable offence on bail but in the remaining aforesaid provisions, the legislature has used the word 'may'. This shows that the legislature is alive to use of different word i.e. under the other provisions, the legislature left it to the discretion of the court to pass an order or not to pass an order under the other provisions. When discretion has been conferred on the court, then, it would mean that the court may or may not exercise the discretion in favour of the accused. It is true that forfeiture of the bail-bond does not amount to cancellation of bail. The legislature has not used the word 'cancellation'. In Sections 437(5) and 439(2), a discretion is given to the court-concerned to direct that any person, who had been released on bail be arrested and committed to custody. When any such order is passed, it amounts to cancellation of bail. What is to be seen is that even when the cancellation of bail is not so ordered under Section 437(5) or 439(2), Cr. P.C. what is the effect of cancellation of bail and bail bonds. Under Sub-section (2) of Section 436, when the accused has failed to comply with the conditions of the bail-bonds, the court is empowered not to release him on bail. Sub-section (2) of Section 436, thus, clearly provides that it is within the discretion of the court to release the accused on bail or refuse him bail, when he fails to comply with the conditions of the bail-bond regarding the time and place of attendance. Sub-section (2) begins with non obstante clause and as such, Sub-section (2) over-rides Sub-section (1) in the eventuality when there is failure to comply with the conditions of bail-bond, as regards the time and place of attendance. The second proviso to Sub-section (1) further lays down that the provisions of Section 446A shall not in any way be affected by Section 436, Cr. P.C., which would mean that Section 446A shall be having an overriding effect.

20. As already stated, Section 446A has been newly inserted w.e.f. Sept. 23, 1980 by the Code of Criminal Procedure (Amending Act No. 63 of 1980). It provides that when a bond for appearance of a person in a case under the Code is forfeited for breach of a condition, then his personal and surety bonds shall stand cancelled. Section 446A shall operate without prejudice to Section 446 i.e. for forfeiture of the bonds, action is open to be taken under Section 446, Cr. P.C. when bail-bonds stand cancelled under Clause (a) of Section 446, Clause (b) provides, how the court is required to proceed. The 'Court' in the main Clause (b) as well as in its proviso is the court for appearance before whom the bond was executed. Clause (b) is couched in negative language and it prohibits the release of such person whose bond for appearance stand cancelled if the court is satisfied that there was no sufficient cause for the failure of the person bound by the bond to comply with its condition, i.e. when the breach is wilful, deliberate, and without any sufficient cause. Then such a person shall not be released by the court before whom he is required to appear only on bond. But the proviso empowers that court to release that person, in that case, upon the execution of a fresh personal bond and surety bond for such sum of money as the court thinks sufficient. The proviso also uses the expression 'may', which denotes that the exercise of the power under the proviso is discretionary and if the circumstances warrant, the court is free not to exercise the power in favour of the person for releasing him on fresh personal bond and surety bond. The exercise of the power under the proviso is subject to the other provisions of the Code, if the court releases the person upon fresh personal and surety bond, then the State or the aggrieved party may proceed to get the order set aside or to move for cancellation of bail under the relevant provision. In case, the power is not exercised in favour of the person for his release, then that aggrieved person can move the higher court as the order under the proviso is clearly made subject to the other provisions of the Code. To our mind, if the legislature did not intend to confer discretion on the Court, the legislature would have used different expression making it obligatory for the court to release the person upon the execution of a fresh bond and surety bond. It is clear that the legislature did not make it obligatory, which means that it is left to the discretion of the court depending on the facts and circumstances of each case to exercise the power in favour of the person or not. It is also noteworthy that

variance in the amount of personal bond or surety bond can be made by the court, in case, discretion is exercised in favour of that person. Whatever, sum of money is thought sufficient by the court, the person may be asked to execute the personal and surety bonds for that sum. Such an interpretation of Section 446A, Cr. P.C., in our opinion, would in accord with the legislative intent as the legislature intended to make the provisions of bail stringent and difficult. In case the persons are allowed to be released on bail as of right, despite forfeiture of bonds, in our opinion, the legislative intent would be rendered nugatory and the trial of the cases, would be protracted at the sweet-will of the accused. It is true that it is open to the other side to move the competent court for cancellation of bail, where power is exercised in favour of the accused, but that does not mean that the court before whom the person is required to appear is powerless and allow the accused to protract the trial at his sweet-will, even when his bond for appearance stands forfeited and cancelled. The cancellation of bail order is an independent provision, which can be resorted to, on the grounds other than non-appearance. But under Section 446A, Cr. P.C. the court can exercise the control over the accused for his regular appearance by exercising the discretion against him. Despite the bail order passed by any court, the discretion can be so exercised by such court, if the circumstances so warrant under Section 446A.

21. So far as Section 447, Cr. P.C. is concerned, in our opinion, this provision deals with surety and makes a provision for three situations viz. (1) insolvency of surety, (2) death of surety and (3) forfeiture of bond under Section 446, Cr. P.C. In case, of insolvency or death, the person from whom such security was demanded, may be ordered to furnish fresh security in accordance with the directions of the original order. So far as the third situation is concerned, we are of the opinion that the matter is covered by Section 446A, Cr. P.C. and Section 447 to that extent, could be suitably amended. However, to our mind, there is no inconsistency between the two provisions. Section 447 is an enabling provision empowering the court to demand fresh security in accordance with the directions of the original order. The court may act under Section 447, Cr. P.C. or may act under Section 446A, Cr. P.C. for demanding fresh security. The corresponding Section of Section 447, of the Criminal P.C. 1898 is, Section 514A. Before introduction of Section 514A, a view was taken by some courts that when the bond was forfeited, the

person from whom security was demanded, could not be required to find fresh security without fresh proceedings. By introduction of Section SWA, this dis-ability was removed. So, now under Section 447, Cr. P.C. or for that matter under Section 446A, fresh security can be demanded from the person from whom the security was demanded.

22. Thus, on consideration of the aforesaid provisions, we are of the opinion and accordingly, we hold that when a bond for appearance in a case of a person is forfeited for breach of a condition, his bond and surety bond shall stand cancelled and such person will not be entitled as of right to be released on bail upon the execution of fresh personal or surety bond. It would be within the, discretion of the court to release him or not to release him upon the execution of fresh personal or surety bond. In case, the court releases him, the fresh security may be demanded from him in accordance with the directions of the original order or the court may order for higher amount. In our opinion, therefore, the contention advanced by Shri Neelkamal Bohra, learned Counsel for the applicant has no force.

23. It may also be stated that after the rejection of the application by the trial court, the applicant had already approached the Sessions Court and the Sessions Court has examined the case on merits. On his being taken into custody, the applicant had moved the Sessions Court for bail for the reasons stated above, the Sessions court did not think it proper to enlarge the applicant on bail. We cannot lose sight of the fact that the applicant by his own conduct protracted the trial of the case by absconding for the first time for a period of about 6 years and second time, for a period of about 1 year. The trial has been considerably protracted on account of the said conduct of the applicant. In the circumstances, the applicant has forfeited the concession to remain on bail. In our opinion, the application for bail has been rightly rejected by the learned Sessions Judge.

24. The application is, therefore, rejected. The trial court, however, is directed to expedite the trial of the case.