

**IN THE HIGH COURT OF HIMACHAL PRADESH AT
SHIMLA**

Cr. Appeal No. 247 of 2024

Reserved on: 1.3.2025

Decided on : 9.5.2025

Bihari Lal

... Appellant

Versus

State of H.P. & others

...Respondents

Coram

Hon'ble Mr. Justice Virender Singh, Judge

Whether approved for reporting? yes

For the Appellant : Mr. D.S. Kainthla, Advocate.

**For the Respondents : Mr. H.S. Rawat and Mr.
Mohinder Zharaick, Additional
Advocate General, for
respondents No. 1 and 2.**

**Name of respondent No. 3
stands deleted.**

Virender Singh, Judge

Appellant Bihari Lal has preferred the present appeal, under Section 449 of the Code of Criminal Procedure (hereinafter referred to as 'the Cr. P.C.'), against the order dated 25.5.2023, passed by the Court of learned Special Judge, Kullu, District Kullu, H.P. (hereinafter referred to as 'the trial Court'), in Sessions Trial No. 26 of 2020, titled as, 'State of H.P. vs. Kamal Kumar', whereby, the learned trial

Court has imposed penalty of Rs. 50,000/-, on the appellant, and issued recovery warrant, under Section 421 Cr. P.C.

2. Brief facts, leading to filing of the present appeal, before this Court, as per the record, may be summed up as under:

One Kamal Kumar, S/o Joginder Singh, R/o Amritsar, Punjab (hereinafter referred to as 'the accused') was arrested by the Police, in connection with case FIR No. 50/2020, dated 21.3.2020, registered under Sections 354-A and 506 of Indian Penal Code (hereinafter referred to as 'the IPC') and Section 8 of Protection of Children from Sexual Offences Act (hereinafter referred to as 'the POCSO Act'), with Police Station, Manali, District Kullu.

2.1 Accused Kamal Kumar filed an application under Section 439 Cr. P.C., bearing No. 70 of 2020, before the learned trial Court, which was decided by the learned trial Court, on 29.6.2020, directing the release of said Kamal Kumar on bail, during the pendency of the trial, subject to his furnishing personal bond, in the sum of Rs. 50,000/- with one surety, in the like amount, to the satisfaction of the learned JMFC, Manali, District Kullu, H.P. Consequently, the application for acceptance of personal bond and surety bond,

was allowed on 28.7.2020 by the learned JMFC, Manali, District Kullu, H.P.

2.2 In pursuance of the directions of the learned trial Court, while releasing accused Kamal Kumar on bail, the appellant herein, stood surety by giving solemn undertaking to produce accused Kamal Kumar, before the learned trial Court, on each and every date of hearing. However, accused Kamal Kumar has not put appearance before the learned trial Court, where charge sheet against him was filed. Efforts were made to secure his presence, by issuingailable warrants, but, his presence could not be secured. Consequently, on 17.3.2023, the learned trial Court has passed the following order:

“Accused not present. Perusal of the record shows that surety Bihari Lal of accused was present in the Court on 27.9.2022 and he sought time to produce the accused before this Court on next date of hearing, i.e., on 29.11.2022 and on 29.11.2022 surety did not put appearance before the Court, however, Shri Varun Kant Sharma, Advocate appeared on behalf of surety and undertakes to produce the surety before this Court on next date of hearing, i.e., today. Today neither surety Bihari Lal nor his counsel Shri Varun Kant Sharma, Advocate put appearance before this Court. The accused is also not produced before this Court.ailable warrant issued against accused not received back executed or unexecuted. Now, this Court has no option except to cancel and forfeit the bail bonds furnished by the accused before this Court. Accordingly, the personal and surety bond executed by

accused before this Court are cancelled and forfeited to State of H.P. Let the accused be served through non-bailable warrant for 25.5.2023. Proceedings under Section 446 Cr.P.C. be initiated against accused as well as his surety and notices be issued to them for the date fixed, i.e., 25.5.2023."

2.3 Despite issuance of non-bailable warrants, when, the presence of accused Kamal Kumar could not be secured, learned trial Court has ordered to initiate the proceedings, under Section 82 of the Cr. P.C., against accused Kamal Kumar, vide order dated 6.3.2024. Learned trial Court has imposed penalty of Rs. 50,000/- upon appellant Bihari Lal and recovery warrants were issued to recover the said amount of penalty from the appellant, vide order dated 25.5.2023, which has been assailed, before this Court, by way of present appeal.

3. The impugned order dated 25.5.2023 has been assailed before this Court on the ground that the same has been passed by the learned trial Court, without giving sufficient opportunities to the appellant to explain the non-appearance, and the learned trial Court, according to the appellant, has failed to appreciate the fact that he had made sincere efforts to produce the accused.

4. Penalty of Rs. 50,000/-, which has been imposed by the learned trial Court, has also been called in question,

before this Court, on the ground that said penalty is harsh and the learned trial Court has not considered the fact that the appellant belongs to the BPL family.

5. According to the appellant, the learned trial Court has not considered the fact that due to some unavoidable circumstances, appellant could not put appearance, on the date fixed, before the learned trial Court. Since, the appellant is stated to be a rustic villager, as such, according to him, he was not aware about the fact that he was supposed to file reply to the notice, so issued.

6. On the basis of above facts, Mr. D.S. Kainthla, Advocate, appearing for the appellant, has prayed that the appeal may be accepted, and order impugned herein may be set aside and the proceedings, under Section 446 Cr. P.C., against the appellant, may be dropped.

7. The prayer, so made, was opposed by Mr. H.S. Rawat, learned Additional Advocate General, appearing for the respondent-State, on the ground that on the solemn undertaking of the appellant, the Court of learned JMFC, Manali has ordered to release accused Kamal Kumar from custody, in pursuance of the bail orders, passed by the learned trial Court, and admittedly, appellant could not honour his solemn undertaking and despite issuance of

notice under Section 446 Cr. P.C., no sincere efforts were made by the appellant to procure the presence of accused Kamal Kumar, before the learned trial Court. As such, a prayer has been made to dismiss the present appeal.

8. **As per the record,** it is not in dispute, in this case, that the appellant stood surety to accused Kamal Kumar, who has not put appearance, before the Court, despite the best efforts made by the learned trial Court to secure his presence and ultimately, proceedings under Section 82 Cr. P.C. were initiated against him. This fact is also not disputed, in this case, that the learned trial Court, vide order dated 17.3.2023, has initiated the proceedings, under Section 446 Cr. P.C., against the accused, as well as, the surety (appellant).

9. In the proceedings, which have been initiated against the appellant, in pursuance of order dated 17.3.2023, notice was duly served upon the appellant (surety), as per report dated 24.5.2023. Despite service, when appellant has not put appearance on 25.5.2023, then, the impugned order has been passed. Thereafter, on 27.7.2023, recovery warrants were issued to the Collector, Mandi, to recover the amount of penalty of Rs. 50,000/-, as arrears of land revenue.

10. **The learned trial Court has initiated proceedings, under Section 446 Cr. P.C.,** against the

appellant, as well as, accused Kamal Kumar. Provisions of Section 446 Cr. P.C. are reproduced, as under:

“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.

(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, after recording its reasons for doing so, 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 or section 117 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.

11. Bare perusal of the aforesaid provision shows that Legislature, in its wisdom, has provided civil and penal consequences, in case of forfeiture of the bond. Once, the orders passed in those proceedings culminated into civil, as well as, penal action, against the person, who has violated the solemn undertaking, then, the person, who will be affected by the order, must get reasonable opportunity to contest those proceedings.

12. In this case, the learned trial Court has passed the following order, on 24.2.2022:

"Accused not present.

Correct address not filed. Let accused be called throughailable warrants in the sum of Rs. 1000/- with one surety in the like amount for 13.5.2022. Notice to surety Bihari Lal be also issued to produce the accused in this Court on the date fixed."

13. Thereafter, on 13.5.2022, surety Bihari Lal (appellant) appeared before the Court and sought time to produce the accused. On that day,ailable warrants were ordered to be issued against accused Kamal Kumar. Ultimately, on 17.3.2023, the learned trial Court has passed the composite order (reproduced above) cancelling and forfeiting the bail bonds, furnished by the accused, as well as, by the surety.

14. In the orders, which were passed prior to order dated 17.3.2023, surety (appellant) had put appearance before the Court and made a submission that he shall produce the accused. However, on 29.11.2022, the surety has not appeared, but his counsel had given an undertaking to produce the surety before this Court, on the next date of hearing. However, on 17.3.2023, when neither the surety was present, nor his counsel put appearance before the learned trial Court, then, composite order, cancelling and forfeiting the bail bonds, furnished by the accused, was passed. Meaning thereby, bail bonds furnished by the accused, were forfeited on that day. Thereafter, proceedings under Section 446 Cr. P.C. were ordered to be issued against the accused, as well as, his surety (appellant). Thereafter, proceedings under Section 82 Cr. P.C. were initiated, against the accused.

15. In the proceedings under Section 446 Cr. P.C., issued on 25.5.2023, the impugned order has been passed, due to the non-appearance of the accused, as well as, his surety (accused). The learned trial Court has passed the composite order, as the surety bond, so furnished by appellant Bihari Lal, was neither cancelled nor forfeited to the State, prior to that date. On that date, surety bond, so furnished, was cancelled and forfeited to the State of H.P. On 25.3.2023, penalty of Rs. 50,000/- was imposed on the surety (appellant).

16. Before forfeiting the surety bond, show cause notice is essential, as has been held by the Hon'ble Apex Court in case titled as, '**Ghulam Mehdi versus State of Rajasthan**', reported in AIR 1960 Supreme Court 1185 (AIR 1960 Vol. 47). Relevant paragraph-3 of the judgment is reproduced as under:

"On February 13, 1952 notice was issued to the appellant to show cause why his bond be not forfeited and amount not recovered from him. Head Constable Ramchander was given the process to be served upon him but it could not be served. Then Head Constable Bhairon Lal was directed to effect service but evidently he also did not or could not serve him nor was notice affixed on the door of his residence nor, given to any one of his relatives as required under Sections 70 and 71, Criminal Procedure Code. On February 26, the Public Prosecutor made an application to the Sub-Divisional Magistrate who without notice to the appellant ordered his properties to be attached. The

appellant thereupon filed an appeal under [Section 515](#) of the Criminal Procedure Code in the Court of the District Magistrate, Bharatpur and raised various objections as to the legality of the order of forfeiture but the appeal was dismissed and he took a revision in the High Court and the High Court upheld the order of forfeiture and in regard to the notice under [Section 514 \(1\)](#) Criminal Procedure Code, it held that although no notice had been given, yet no useful purpose would have been served even if the notice had been given when "they have expressed their inability to abide by the terms of the surety bond for the reason that the accused had absconded and had taken shelter in a foreign country i.e., Pakistan. Under these circumstances this point cannot be availed of in favour of the petitioners". Thereupon the appellant made an application under [Article 134\(1\)\(c\)](#) and raised the following two points on which the certificate was granted:--

(i) The bond was vague inasmuch as it was not specified as to in which Court and at what place the accused Salamat Ali was to be produced and

(2) no notice was served on the applicant under [Section 514](#) of the Code of Criminal Procedure.

It is not necessary to go into the first point as in our opinion unless notice is given to the surety under [Section 514 \(1\)](#) to show cause why the surety bond be not paid no proceedings for recovery under [Section 514](#) can be taken. [Section 514 \(1\) & \(2\)](#) is as follows:

[Section 514. \(1\)](#) "Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first class, or, when the bond is for

appearance before a Court, to the satisfaction of such Court, that such 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.

Section 514. (2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate if he be dead." This provision 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. In the present case the appellant was not called upon to show cause why the penalty should not be paid. Before a man can be penalised forms of law have to be observed and an opportunity has to be given to a surety to show cause why he should not be made to pay and as in this case that was not done, proceedings cannot be said to be in accordance with law and should therefore be quashed.

(self emphasis supplied)

17. If the facts and circumstances of the present case are seen in the light of the aforesaid decision of Hon'ble Supreme Court, the learned trial Court has simply issued the notice to surety (appellant) on 24.2.2022, upon

which, surety (appellant) put appearance on 13.5.2022 and sought time to produce the accused in the Court.

18. Thereafter, on 21.7.2022, when, the accused, as well as, surety (appellant) was not present, then,ailable warrants were ordered to be issued to secure their presence. In pursuance of the said order, surety (appellant) appeared before the Court on 27.9.2022 and undertook to produce the accused before the Court. Thereafter, on 17.3.2023, personal and surety bonds of the accused were cancelled and forfeited and proceedings under Section 446 Cr. P.C. were initiated.

19. Hearing of the affected party, i.e. the appellant, is mandatory, as non-affording of such opportunity of hearing would be gross violation of principle of natural justice. Even after forfeiting the surety bond to the State of H.P., the learned trial Court has failed to issue show cause as to why the amount of bail bond be not realized from him, by way of penalty.

20. In view of the above, in the considered opinion of this Court, separate orders were required to be passed by the learned trial Court, firstly, at the time of cancellation of

bail bonds and secondly, at the time of imposing penalty. The legislature, in its wisdom, has used the words “if sufficient cause is not shown for imposing penalty”, then hearing of the person, affected by the said order”, is mandatory.

21. Bare reading of the provisions of Section 446 Cr. P.C. makes out a case, according to which, separate orders are required to be passed by the Court, firstly at the time of cancellation of the bail bonds and; secondly, when the penalty is imposed.

22. In this case, the composite order has been passed by the learned trial Court by depriving the appellant (surety) Bihari Lal to put forward his plea, with regard to non-production of the accused.

23. Admittedly, the composite order, passed by the learned trial Court, in this case, does not pass the judicial scrutiny by this Court. Consequently, this Court is left with no option, but to set aside the impugned order dated 25.5.2023, passed by the learned trial Court, and remand the matter back to the learned trial Court to decide the

proceedings, under Section 446 Cr. P.C. afresh, after issuing notice, as observed above.

24. With these observations, the present appeal stands disposed of, so also the pending application(s), if any.

25. Parties, through their counsel, are directed to appear before the learned trial Court, on 26.5.2025.

26. Record be sent down.

(Virender Singh)
Judge

May 9, 2025
Kalpana