

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

**Cr.MP(M) No. 1017of 2020
Reserved on: 22.07.2020
Date of Decision: 30.07.2020**

Abhishek Kumar Singh ...Petitioner.
Versus
State of Himachal Pradesh ...Respondent.

Coram:

The Hon'ble Mr. Justice Anoop Chitkara, Judge.

*Whether approved for reporting?*¹ **YES.**

For the petitioner: Mr. Vinod Chauhan, Advocate.

For the respondent: Mr. Nand Lal Thakur and Mr. Ashwani Sharma,
Additional Advocates General, Mr. Manoj
Bagga, Deputy AG, Mr. Ram Lal Thakur,
Assistant A.G., Mr. Rajat Chauhan Law Officer

Amicus Curiae: Mr. Rajiv Jiwan Sr. Advocate, with Ms. Anubhuti
Sharma and Ms. Ragini Dogra Advocates.

COURT PROCEEDINGS CONVENED THROUGH VIDEO CONFERENCE

Anoop Chitkara, Judge.

The petitioner, a permanent resident of West Bengal, who is under incarceration for more than six months for committing a white-collar crime, has come up before this Court, seeking regular bail.

2. Based on a complaint, the police arrested the petitioner on 10th January 2020, in FIR No. 68 of 2019, dated 25.08.2019, registered under Sections 420, 120-B of Indian Penal Code, 1860, (IPC), in Police Station Nirmand, District Kullu, Himachal Pradesh, disclosing cognizable and non-bailable offences.

3. Earlier, the petitioner had filed a petition under Section 439 CrPC before the concerned Sessions Court. However, vide order dated 23.3.2020, Ld. Additional Sessions Judge, Kinnaur at Rampur Bushehar, HP, dismissed the

¹ **Whether reporters of Local Papers may be allowed to see the judgment?**

petition, primarily because the amount involved is enormous and there is possibility of tampering the evidence.

4. I have read the status report(s) and heard counsel for the parties, as well as Ld. Amicus Curiae.

FACTS:

5. Briefly, the allegations against the petitioner are that he made phone calls from various numbers to the complainant, befooled him to share one-time passwords (OTPs) received by him, and subsequently withdrew Rs. 9,87,000/- from his bank accounts.

PREVIOUS CRIMINAL HISTORY

6. As per status report, the petitioner has a similar case registered against him.

SUBMISSIONS:

7. The learned Counsel for the bail petitioner submits that the time already spent in jail would be somewhere half of the actual term the accused is likely to undergo in case of conviction. Ld. Counsel on instructions further contends that in the event this bail petition is allowed, then such release should be on cash security instead of surety bonds because the accused does not know anyone who resides nearby to stand as surety. In the current situation, no one from West Bengal can travel to furnish surety bonds.

8. On the contrary, Mr. Nand Lal Thakur, Additional Advocate General, contended that white-collar criminals are termites weakening the very foundation of the system. He further argued that the Police have collected sufficient prima facie evidence, which connects him with the commission of the offence. He also submitted that if this Court is inclined to grant bail, then such a bond must be subject to very stringent conditions.

ANALYSIS AND REASONING:

9. Pre-trial incarceration needs justification depending upon the offense's heinous nature, terms of the sentence prescribed in the statute for such a crime, probability of the accused fleeing from justice, hampering the investigation, criminal history of the accused, and doing away with the victim(s) and

witnesses. The Court is under an obligation to maintain a balance between all stakeholders and safeguard the interests of the victim, accused, society, and State.

10. In **Gurbaksh Singh Sibbia and others v. State of Punjab**, 1980 (2) SCC 565, a Constitutional bench of Supreme Court holds in Para 30, as follows:

“It is thus clear that the question whether to grant bail or not depends for its answer upon a variety of circumstances, the cumulative effect of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail.”

11. In **Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav**, 2005 (2) SCC 42, a three-member bench of Supreme Court holds:

“18. It is trite law that personal liberty cannot be taken away except in accordance with the procedure established by law. Personal liberty is a constitutional guarantee. However, Article 21 which guarantees the above right also contemplates deprivation of personal liberty by procedure established by law. Under the criminal laws of this country, a person accused of offences which are non-bailable is liable to be detained in custody during the pendency of trial unless he is enlarged on bail in accordance with law. Such detention cannot be questioned as being violative of Article 21 since the same is authorised by law. But even persons accused of non-bailable offences are entitled for bail if the court concerned comes to the conclusion that the prosecution has failed to establish a prima facie case against him and/or if the court is satisfied for reasons to be recorded that in spite of the existence of prima facie case there is a need to release such persons on bail where fact situations require it to do so. In that process a person whose application for enlargement on bail is once rejected is not precluded from filing a subsequent application for grant of bail if there is a change in the fact situation. In such cases if the circumstances then prevailing requires that such persons to be released on bail, in spite of his earlier applications being rejected, the courts can do so.”

12. In **State of Rajasthan, Jaipur v. Balchand**, AIR 1977 SC 2447, Supreme Court holds,

2. The basic rule may perhaps be tersely put as bail, not jail, except where there are circumstances suggestive of

fleeing from justice or thwarting the course of justice or creating other troubles in the shape of repeating offences or intimidating witnesses and the like by the petitioner who seeks enlargement on bail from the court. We do not intend to be exhaustive but only illustrative.

3. It is true that the gravity of the offence involved is likely to induce the petitioner to avoid the course of justice and must weigh with us when considering the question of bail. So also the heinousness of the crime.

13. In **Gudikanti Narasimhulu v. Public Prosecutor, High Court of Andhra**

Pradesh, (1978) 1 SCC 240, Supreme Court in Para 16, holds:

“The delicate light of the law favours release unless countered by the negative criteria necessitating that course.”

14. In **Dataram Singh v. State of Uttar Pradesh**, (2018) 3 SCC 22, Supreme Court holds,

1. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception.

6. However, we should not be understood to mean that bail should be granted in every case. The grant or refusal of bail is entirely within the discretion of the judge hearing the matter and though that discretion is unfettered, it must be exercised judiciously and in a humane manner and compassionately. Also, conditions for the grant of bail ought not to be so strict as to be incapable of compliance, thereby making the grant of bail illusory.

15. While deciding bail, the Courts cannot discuss the evidence threadbare. The difference between the order of bail and a final verdict is similar to a sketch and a painting. However, some sketches would be detailed and paintings with a few strokes.

16. The Police have recovered an amount of Rs. 78,000/- and after that, the accused is in judicial custody for the last more than six months.

17. Any detailed discussions about the evidence may prejudice the case of the prosecution or the accused. The nature of the offence also does not restrict bail. Suffice it to say that due to the reasons mentioned above, this Court believes that further incarceration of the accused during the trial is neither warranted nor will achieve any significant purpose.

18. Without commenting on the merits of the case, the fact that the investigation is almost complete and the accused is in jail for a considerable period, coupled with the ongoing situation due to the Covid-19 pandemic, would make out a case for bail.

19. The possibility of the accused influencing the course of the investigation, tampering with evidence, intimidating witnesses, and the likelihood of fleeing justice, can be taken care of by imposing elaborative and stringent conditions.

20. Given the above reasoning, the Court is granting bail to the petitioner, subject to strict terms and conditions, which shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC, 1973.

21. Ld. Counsel on instructions received from the petitioner had contended about his inability to arrange any person to stand surety for him and furnish surety bonds. Ld. Counsel further submitted that the petitioner may be released either on furnishing personal bond with a cash deposit of Rs. One Lac, (INR 100,000/-), instead of surety bonds. To conclusively answer this proposition of law, the Court had requested Mr. Rajiv Jiwan Sr. Advocate, Ms. Anubhuti Sharma, and Ms. Ragini Dogra Advocates to assist Pro Bono.

22. Grant of bail is subject to the accused promising the Court to attend the trial and comply with the conditions stipulated in the order. The accused accepts such a contract by furnishing bail bonds, and so do her sureties. S. 74 of Indian Contract Act, 1972, provides compensation for breach of contract where a penalty is stipulated and clinching the issue, its illustration (c) reads as follows, "A gives a recognizance binding him in a penalty of Rs. 500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty."

23. In **Pillappan @ Ravikumar v. State**, 2018 LawSuit (Mad) 1475, Madras High Court observed,

[15] By virtue of Sec. 89 of the Code, the Court records the absence of the accused and issues a warrant to secure his presence. By his non appearance followed up with the act of the Court in issuing the non-bailable warrant for securing his presence, the accused has prima facie breached the condition of the bond. A bond is a contract between the accused and the State under which the accused has agreed to appear before the Court on the hearing dates and his sureties have assured the Court that they will ensure that the accused does not commit breach of the bond.

24. It is beyond cavil that the sole purpose of a bond is to ensure presence of accused to attend the trial. In rapidly changing times, people travel more, covering long distances. It exposes them to the risk of being arraigned as accused in locations far away from native places. With unique identity details, monetary bail is even better. It would also address the unethical system of unscrupulous stock sureties, throwing them out of questionable practices.

25. Even the Legislature was aware of the menace of stock sureties and with a view to curb it, the Parliament, vide amendment of 2005, inserted S. 441-A CrPC, 1973, which reads as follows:

441-A. Declaration by sureties. - Every person standing surety to an accused person for his release on bail, shall make a declaration before the Court as to the number of persons to whom he has stood surety including the accused, giving therein all the relevant particulars.

26. In its farsightedness, the legislature kept provision for the situations when an accused does not find any surety or none is ready to stand surety for him, by incorporating S. 445 of CrPC, 1973, which reads as under:

S. 445. Deposit instead of recognisance. - When any person is required by any Court or officer to execute a bond with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing such bond.

27. The world is passing through the 4th technological revolution, with future unfolding before us, and entering the internet of things. The database of AADHAR, PAN, and Passports ensures individuals' identity, obsoleting the identification through sureties.

28. *Siddhant Maniktala*, in his paper 'Relevance of sureties in criminal jurisprudence when every person in India has an identity', (*Supremo Amicus*, Volume 17), writes,

Aadhaar may replace surety bond as a means of getting bail because his identity has been established and with the personal data secured with the UIDAI, it will not be difficult to track down the accused in case of his fleeing from justice. It seems much important and a much crucial reform to liberalise bail laws in India. After the introduction of Aadhar, solely generated by UIDAI, (Unique Identification Authority of India) which is a unique identification proof of an individual, the need of surety for granting bail becomes debatable.

29. The right to life guaranteed by Article 21 of India's Constitution includes the right to live with dignity. Begging or pestering before someone to stand as a surety, comes at the cost of pride.

30. In **Maneka Gandhi v. Union of India**, AIR 1978 SC 597, a seven-member bench of Supreme Court held that obviously, procedure cannot be arbitrary, unfair or unreasonable. (Para 43).

31. Way back in 1980, in **Hussainara Khatoon v. Home Secretary, State of Bihar**, (1980) 1 SCC 81, a three-member bench of Supreme Court holds,

4. ... If the court is satisfied on a consideration of the relevant factors that the accused has his ties in the community and there is no substantial risk of non-appearance, the accused may, as far as possible, be released on his personal bond. Of course, if facts are brought to the notice of the court which go to show that having regard to the condition and background of the accused his previous record and the nature and circumstances of the offence, there may be a substantial risk of his non-appearance at the trial, as for example, where the accused is a notorious bad character or a confirmed criminal or the offence is serious (these examples are only by way of illustration), the court may not release the accused on his personal bond and may insist on bail with sureties....

32. Earlier, in **Moti Ram v. State of M.P.**, (1978) 4 SCC 47, Supreme Court, after referring to the provision for suspension of sentence of those convicted by trial Courts, holds,

27. The slippery aspect is dispelled when we understand the import of Section 389 (1) which reads:

389 (1): Pending any appeal by a convicted

person the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail, or on his own bond.

The Court of appeal may release a convict on his own bond without sureties. Surely, it cannot be that an under-trial is worse off than a convict or that the power of the court to release increases when the guilt is established. It is not the court's status but the applicant's guilt status that is germane. That a guilty man may claim *judicial liberation pro tempore without sureties* while an under-trial cannot is a *reductio ad absurdum*.

33. Moti Ram is a judgement of one of the unique species containing the logical incantations dwelling on Section 441(2) and (3) while adverting to Section 389(1) of CrPC, and wealth is excavatable on the issue of furnishing cash bond.

34. **JUDICIAL PRECEDENTS ON S. 445 CrPC:**

a) In **Rajballam Singh v. Emperor**, AIR 1943 Patna 375, Patna High Court observed,

[2] In this particular case and in others the District Magistrate has demanded a cash deposit as a condition to the release of the accused. That is not what the law contemplates or authorises.

b) In **R. R. Chari v. Emperor**, 1948 AIR(All) 238, Allahabad High Court observed,

4. The language of S. 499, Criminal P.C. makes it perfectly clear that what that section contemplates is the furnishing of a personal bond by the accused person and a bond by one or more sufficient sureties. The accused as well as the sureties have, therefore, to execute only bonds which are sufficient in the mind of the amount which he might have fixed. This is also the view taken by the Patna High Court in 1943 AIR(Pat) 375 and I respectfully agree with it. Section 513 provides for a concession to an accused person who is unable to produce sureties. That section also makes it clear that the Magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money in lieu of executing a personal and giving surety of some persons.

That section, however, does not authorise a demand of cash by a Magistrate. Under these circumstances, even though an offer may have been made in this case by the counsel for the applicant, that offer was made after the Magistrate apparently had made up his mind to demand cash security. It will not be covered by the terms of S. 513, Criminal P.C. and the demand of cash security in this case was clearly illegal."

c) In **Niamat Khan v. Crown**, 1949 LawSuit (Nag)-42, High Court of Nagpur observed,

4. ... Even under Section 513, Criminal P.C. (1898) the accused could only be asked to deposit the amount of security instead of executing a bond. This provision is meant for the benefit of the person who is required to execute a bond in case where he may not be able to find a surety....

d) In **State of Mysore v. H Venkatarama Kotaiyah**, 1968 CrLJ 696, Mysore High Court observed,

[4] Section 513, Criminal P.C. states that when any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer, may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond. According to this section, if the accused wants to deposit any sum of money, it is open to the Court to accept the same. But the law does not empower the Court to insist on cash deposit to be made by the accused.

e) In **Krishna Kumar and others v. State of Karnataka**, 1979 SCC OnLine Kar 118,

3. It is also clear that on the Court requiring a person to execute a personal bond with sureties or without sureties, it is at the option of the accused persons to furnish cash deposit in lieu of the bond or sureties that the Court may make an order under Section 445. In the instant case, it is clear from the orders that the learned Magistrate has asked for securities in all the forms available under both the sections which is impermissible.

f) In **Gokul Das v. The State of Assam**, 1981 CrLJ 229, Gauhati High Court observed,

14. From the relevant provisions of the Criminal Procedure Code, there is no doubt that cash deposit in lieu of execution of a bond by the accused is an alternative system of granting bail and can be stated to be no less efficacious than granting bail of certain amount with or without surety or sureties of the like amount.

g) In **Afsar Khan v. State by Girinagar Police, Bangalore**, 1992 Cr.LJ 1676, Karnataka High Court observed,

[7] A reading of the entire Chapter which deals with the provisions relating to bail, does not say that when a person is released on bail, the Court can also insist upon him to give cash security. After all, the object of granting bail is to see that the liberty of an individual is extended. Of course, when an accusation is made against a person, in the event of his release, it is the duty of the Court to see that the interest of the State and the public is safeguarded. For that purpose, the Court is empowered to insist upon appearance of the accused whenever so required either by the Police or Court either for investigation or to take up trial. During this period the Court can also warn the accused of his activities or movements in any way causing a fear or resulting in tampering with the prosecution evidence. While the Court exercises its discretion, whether it is under S. 437 or 438 or 439, it shall exercise the same properly and not in an arbitrary manner. The discretion exercised shall appear a just and reasonable one. It is true that no norms are prescribed to exercise the discretion. Merely because, norms are not prescribed for the Court to exercise discretion under Ss. 437, 438 or 439 that does not mean the discretion shall be left to the whims of the Court. Guiding principle shall be as indicated earlier with sound reasoning and in no way opposed to any other law. The Legislature has given this discretion to the Court keeping full faith in the system of administration of justice. While administering justice; it is the duty of the Court to see that any order to be passed or conditions to be imposed shall always be in the interest of both the accused and the State. The conditions shall not be capricious. On the other hand, it shall be in the aid of giving effect to the very object behind the discretion.

h) In **Parades Patra v. State of Orissa**, 1994 (1) Crimes (HC) 109,

10. ...From this it can be reasonably inferred that it is not the mandate of the Code that the Magistrate should insist on cash security additional to personal bond with or without sureties.

i) In **Charles Shobhraj v. State**, 1996 (63) DLT 91, Delhi High Court observed,

[6] But then, all said and done, a few things need to be noticed. The object of requiring an accused to give security for his appearance in Court is not to secure the payment of money to the State, for that is a secondary consideration, but to secure the presence of a person facing trial. Thus the primary consideration is the personal element of the surety or sureties concerned as the Court expects the surety to see that the accused appears on the date fixed and also that the surety will take steps for getting the accused arrested in case of any attempt on the part of the accused to abscond or to avoid attendance in Court. As observed by Alvorstone, Lord Chief Justice of England in *King v. Porter*, (1910) 1 KB 369, it is to the interest of the public that criminals should be brought to justice, and therefore that it should be made as difficult as possible for a criminal to abscond. Responsibility is fixed on the sureties to see that such a person does not escape. A duty is thus cast on the Court, in accepting or rejecting a surety, to see the sureties are solvent and persons of sufficient vigilance to secure the appearance and prevent the absconding of the accused.

[7] The principal purpose of bail being to secure that the accused person will return for trial if he is released after arrest, this consideration is not lost sight of in the provisions of section 445 of the Code. It is only an enabling section, and provides that a Court or officer may permit a person to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix in lieu of executing a bond except in cases where the bond is for good behaviour. Surely, we cannot and must not lose sight of the word "may" which indicates that accepting the deposit of money in lieu of surety is left to the discretion of the Court and that consequently the acceptance of deposit of money is not obligatory and the relief is to be granted only where the Court thinks fit to substitute a cash security. While considering the question of fitness, principal purpose of bail as underlined above, would always remain a paramount consideration. In short thus besides the question as to whether the accused can find sureties or not, the Court shall have to keep in mind the question as to whether the prisoner is likely to abscond or not and while meditating on the last question the Court may take into account various factors concerning him like the nature and circumstances of the offence charged, the weight of the evidence against him, length of his residence in the community, his family ties,

employment, financial resources, character and mental condition, his record of convictions, reputation, character and his records of appearance at Court proceedings or flight to avoid prosecution or failure to appear at Court proceedings.

j) In **Alluvdin v. Inspector of Police**, 2001 CrLJ 2672, Madras High Court observed,

3. Section 441 Cr.P.C. reads that before any person is released on bail or released on his own bond, a bond for such sum of money as the Court thinks sufficient shall be executed by such person. Section 441 does not speak about deposit of any cash security. Only in certain contingencies, where the accused is unable to secure sureties for his release, he is permitted to deposit a sum of money or Government promissory Note as the Court may fix in lieu of executing such bond, under Section 445, Cr.P.C.

k) In **Shokhista v. State**, 2005 LawSuit (Del) 1316, Delhi High Court observed,

5. ...The accused is a foreign national and is not able to furnish a local surety. The same does not debar her from being admitted to bail. The provision of local surety is nowhere mentioned in the Code of Criminal Procedure and surety can be from any part of the country or without. In the present case, since the accused is a foreign national and is facing investigation under Sections 4, 5 and 8 of the I. T. P. Act and in view of the fact that the Petitioner is ready and willing to make a deposit in cash in lieu of the surety in addition to a personal bond, I am of the opinion that the ends of justice would be met in permitting her to do so. Consequently, I admit the Petitioner to bail on her furnishing a personal bond in the sum of Rs. 20,000/- and a cash deposit of the like amount in lieu of the surety to the satisfaction of the Trial Court. The Petitioner shall not leave the country without prior permission of the trial court and shall deposit her pass-port with the trial court.

l) In **Maha Ahmad Yusuf v. State of U.P.**, 2015 (5) R.C.R.(Criminal) 13, Allahabad High Court observed,

6. The cash deposit is equally efficacious as other system in view of Section 445 Cr.P.C.

m) In **Sakthivel v. The State**, Cr.I.O.P.No.835 of 2015, Madras High Court observed,

15. Either under Section 438, or under Section 437, 439 of Cr.P.C., it is not that the Courts have no power to impose such bail condition. But the condition should not be imposed for the sake of imposing condition. It must have some objective. It must be reasonable. It should not be oppressive in nature. It should be performable, executable. In imposing condition, the Court must take into account the individual's position, financial capacity and his role in the case.

n) In **Navaneetha Krishnan v. State**, 2015 (2) MadWN (Cri) 53, Madras High Court observed,

17. While granting bail, the Court can direct the accused to execute bail bond. As per Section 440 Cr.P.C., 1973 the bond amount should not be excessive. When a person so directed to execute the bond either with surety or without surety is not able to furnish the sureties, then under Section 445 Cr.P.C., 1973 he has the option to offer cash security. But even then, it must be a reasonable amount. It should not be an arbitrary, excessive amount. It should not be in the nature of deprivation of grant of bail by fixing a heavy amount as surety amount. If heavy amount is directed to be deposited as cash security, the bailee/accused will not be in a position to comply it. If heavy amount is demanded from the surety, then the bailor will not be forthcoming. And 'haves' will go out, while 'have nots' will remain in jail.

18. Reading sections 440, 441 and 445 Cr.P.C., 1973 together, it is clear that straightaway a Court cannot direct the accused to deposit cash security. First of all, the Court has to direct execution of bail bond by the sureties in case if the release is not on his own bond. Only in lieu of that deposit of cash security could be directed (see Section 445 Cr.P.C., 1973). Thus, the Court cannot straightaway direct the accused to deposit cash security.

o) In **Sagayam @ Devasagayam v. State**, 2017(3) MLJ (Cri) 134, Madras High Court observed,

40. Under the Code, there is provision for offering Cash surety (See Section 445 Cr.P.C.). Even in fixing the cash surety, the amount should not be excessive. (See Section 440(1) Cr.P.C.). In the first instance, Court cannot demand Cash surety from the accused. The offer to make cash surety

must come from the accused.

p) In **Endua @ Manoj Moharana v. State**, 2018(72) Orissa Cri. R.611, Orissa High Court observed,

9. The discretionary power exercised by the Magistrate or the Court, as the case may be, under sections 441 Cr.P.C., 1973 and 445 Cr.P.C., is mutually exclusive and not concurrent. On the Court requiring a person to execute a personal bond with sureties or without sureties, it is at the option of the accused to furnish cash deposit in lieu of executing such bond that the Court may make an order under section 445 of Cr.P.C., 1973

10. The order of bail should not be harsh and oppressive which would indirectly cause denial of bail thus depriving the person's individual liberty. While granting bail, insisting on good behaviour or prompt attendance, executing personal bond, further to safeguard his good behaviour and personal attendance may be supported by insisting upon additional sureties as the Court deems fit but insisting upon cash security is incorrect and indirectly results in denial of bail. The entire chapter of Cr.P.C. which deals with the provisions relating to bail nowhere says that when a person is released on bail, the Court can also insist upon him to give cash security. The power has to be exercised in a proper and judicious manner and not in an arbitrary, capricious or whimsical manner and the discretion exercised shall appear to be just and reasonable one. It is the duty of the Court to see that any order to be passed or conditions to be imposed while granting bail shall always be in the interest of both the accused and the State.

35. From the survey of the judicial precedents mentioned above, the following fundamental principles of law relating to the choice of the accused to furnish surety bonds or secure recognizance by cash deposit, emerge:

a) **The object of requiring an accused to give security for his appearance in Court is not to secure the payment of money to the State. The principal purpose of bail is to secure that the accused person will return for trial if he is released after arrest, this consideration is not lost sight of in the provisions of section 445 of the Code.** [Charles Shobhraj v. State, 1996 (63) DLT 91, Para 6 & 7].

b) **The discretionary power exercised by the Magistrate or the**

Court, as the case may be, under sections 441 Cr.P.C., 1973 and 445 Cr.P.C., is mutually exclusive and not concurrent. [Endua @ Manoj Moharana v. State, 2018(72) Orissa Cri. R.611, Para 9].

c) **A reading of the entire chapter which deals with the provisions relating to bail, does not say that when a person is released on bail, the Court can also insist upon him to give cash security.** [Afsar Khan v. State by Girinagar Police, Bangalore, 1992 Cr.LJ 1676 (7), Para 7].

d) **Court cannot demand cash deposit as a condition of bail.** [Rajballam Singh v. Emperor, AIR 1943 Patna 375, Para 2].

e) **The offer to make cash surety must come from the accused.** [Sagayam @ Devasagayam v. State, 2017(3) MLJ (Cri) 134, Para 40].

f) **If the accused wants to deposit any sum of money, it is open to the Court to accept the same.** [State of Mysore v. H Venkatarama Kotaiyah, 1968 CrLJ 696, Para 4].

g) **The Magistrate is not bound to accept cash, but may permit an accused person to deposit a sum of money.** [R. R. Chari v. Emperor, 1948 AIR(All) 238, Para 4].

h) **Cash deposit in lieu of execution of a bond by the accused is an alternative system of granting bail and can be stated to be no less efficacious than granting bail of certain amount with or without surety or sureties of the like amount.** [Gokul Das v. The State of Assam, 1981 CrLJ 229, Para 14].

i) **The cash deposit is equally efficacious as other system in view of Section 445 CrPC.** [Maha Ahmad Yusuf v. State of U.P., 2015 (5) R.C.R.(Criminal) 13, Para 6].

j) **This provision is meant for the benefit of the person who is required to execute a bond in case where he may not be able to find a surety.** [Niamat Khan v. Crown, 1949 LawSuit (Nag) 42, Para 4].

k) **The accused is a foreign national and is not able to furnish a local surety. The same does not debar her from being admitted to bail.** [Shokhista v. State, 2005 LawSuit (Del) 1316, Para 5].

l) **It is not the mandate of the Code that the Magistrate should insist on cash security additional to personal bond with or without sureties.** [Parades Patra v. State of Orissa, 1994 (1) Crimes (HC) 109, Para 10].

SUBSTITUTION OF BONDS AT ANY STAGE:

36. In **Sajal Kumar Mitra v. State of Maharashtra**, 2011 CrLJ 2744, High Court of Bombay observed,

[10] In my view, the learned Magistrates have power to release the accused on bail initially on furnishing cash bail and, thereafter, asking him to furnish solvent sureties in appropriate cases.

37. There is an absence of comprehensive data demonstrating the role of sureties in bringing the accused to justice. On failure to produce, the mere recovery of surety amount by way of penalty is not equivalent of producing the accused to face trial.

38. The purpose of a cash bond is not to enrich the State's coffers but to secure the accused's presence. An Advocate is an officer of the Court and a vigilant watcher of the interest of her client. Owing allegiance to the Constitution of India and being a professional, it's her onerous duty to apprise the accused of the existence of the provision of a cash deposit in the statute.

39. We are already late in encouraging deposits in place of sureties. Cash surety improves the possibility of the accused's attendance because she is aware that her money is safe and accruing interest on FD. It is further likely to motivate her not to default even once, in contrast to the handing over of cash to stock sureties, with hardly any assurance of its refund.

40. Given the advent of online identification, the pragmatic approach is that while granting bail with sureties, the Court should give a choice to the accused to either furnish surety bonds or give a fixed deposit, with a further option to switch over to another, impliedly informing the accused of the existence of her right under S. 445 of Code of Criminal Procedure, 1973. Choosing between sureties and deposits, accused is the Queen and let her be.

41. In **Hussainara Khatoon v. Home Secretary, State of Bihar**, 1980 (1) SCC 81, a three-member bench of Supreme Court holds,

11. While concluding, it seems desirable to draw attention to the absence of an explicit provision in the Code of Criminal Procedure enabling the release, in appropriate cases, of an under-trial prisoner on his bond without sureties and without any monetary obligation. There is urgent need for a clear provision. Undeniably, the thousands of under-trial prisoners lodged in Indian prisons today include many who are unable to secure their release before trial because of their inability to produce sufficient financial guarantee for their appearance.

Where that is the only reason for their continued incarceration, there may be good ground for complaining of invidious discrimination. The more so under a constitutional system which promises social equality and social justice to all of its citizens. The deprivation of liberty for the reason of financial poverty only is an incongruous element in a society aspiring to the achievement of these constitutional objectives. There are sufficient guarantees for appearance in the host of considerations to which reference has been made earlier and, it seems to me, our law-makers would take an important step in defence of individual liberty if appropriate provision was made in the statute for nonfinancial releases.

BOND AMOUNT MUST BE AFFORDABLE:

42. In **Moti Ram v. State of M.P.**, (1978) 4 SCC 47, Supreme Court holds,

29. If sureties are obligatory even for juveniles, females and sickly accused while they can be dispensed with, after being found guilty, if during trial when the presence to instruct lawyers is more necessary, an accused must buy release only with sureties while at the appellate level, suretyship, is expendable there is unreasonable restriction on personal liberty with discrimination writ on the provisions. The hornet's nest of Part III need not be provoked if we read 'bail' to mean that it popularly does, and lexically and in American Jurisprudence is stated to mean, viz. generic expression used to describe judicial release from custodia juris. Bearing in mind the need for liberal interpretation in areas of social justice, individual freedom and indigent's rights, we hold that bail covers both release on one's own bond, with or without sureties. When sureties should be demanded and what sum should be insisted on are dependent on variables.

30. Even so, poor men – Indians are, in monetary terms, indigents – young persons, infirm individuals and women are weak categories and courts should be liberal in releasing them on their own recognisances – put whatever reasonable conditions you may.

31. It shocks one's conscience to ask a mason like the petitioner to furnish sureties for Rs. 10,000. The magistrate must be given the benefit of doubt for not fully appreciating that our Constitution, enacted by "We, the People of India", is meant for the butcher, the baker and the candle-stick maker - shall we add, the bonded labour and pavement dweller.

43. The Court has a formidable task of performing the tight rope locomotion by embarking on determination of the cash surety in consonance with the

accused's monetary status. It should not be such as to precipitate the misery on the poor accused and deprive her of personal liberty despite being admitted to bail.

44. Given above the petitioner shall be released on bail in the FIR mentioned above, subject to his furnishing a personal bond of Rs. One Lac only (INR 1,00,000/-), and shall either furnish two sureties of a similar amount to the satisfaction of the Chief Judicial Magistrate/Ilaqua Magistrate/Duty Magistrate/the Court exercising jurisdiction over the concerned Police Station where FIR is registered, or the aforesaid personal bond and fixed deposit(s) for Rs. One Lac only (INR 1,00,000/-), made in favour of Chief Judicial Magistrate, Reckongpeo, Kinnaur, H.P., from any of the banks where the stake of the State is more than 50%, or any of the stable private banks, e.g., HDFC Bank, ICICI Bank, Kotak Mahindra Bank, etc., with the clause of automatic renewal of principal, and liberty of the interest reverting to the linked account. Such Fixed Deposit need not necessarily be made from the account of the petitioner. If such a fixed deposit is made manually, then the original receipt has to be deposited. If made online, then the copy attested by any Advocate has to be filed, and the depositor shall get the online liquidation disabled. It shall be total discretion of the petitioner to choose between surety bonds and fixed deposits. During the trial's pendency, it shall be open for the petitioner to apply for substitution of fixed deposit with surety bonds and vice-versa. Subject to the proceedings under S. 446 CrPC, if any, the entire amount of fixed deposit along with interest credited, if any, shall be endorsed/returned to the depositor(s). The Court shall have a lien over the deposits until discharged by substitution, and otherwise up to the expiry of the period mentioned under S. 437-A CrPC, 1973.

45. The furnishing of the personal bonds shall be deemed acceptance of the following and all other stipulations, terms, and conditions of this bail order:

- a) The petitioner to give security to the concerned Court(s) for attendance. Once the trial begins, the petitioner shall not, in any manner, try to delay the trial. The petitioner undertakes to appear before the concerned Court, on the issuance of summons/warrants by such Court. The petitioner shall attend the trial on each date, unless exempted, and in case of appeal, also promise to appear before the higher Court, in terms of Section 437-A CrPC.

- b) The attesting officer shall mention on the reverse page of personal bonds, the permanent address of the petitioner along with the phone number(s), WhatsApp number (if any), email (if any), and details of personal bank account(s) (if available).
- c) The petitioner shall join investigation as and when called by the Investigating Officer or any Superior Officer. Whenever the investigation takes place within the boundaries of the Police Station or the Police Post, then the petitioner shall not be called before 8 AM and shall be let off before 5 PM. The petitioner shall not be subjected to third-degree methods, indecent language, inhuman treatment, etc.
- d) The petitioner shall cooperate with the investigation at all further stages as may be required, and in the event of failure to do so, it will be open for the prosecution to seek cancellation of the bail granted by the present order.
- e) The petitioner shall not influence, browbeat, pressurize, make any inducement, threat, or promise, directly or indirectly, to the witnesses, the Police officials, or any other person acquainted with the facts of the case, to dissuade them from disclosing such facts to the Police, or the Court, or to tamper with the evidence.
- f) In addition to standard modes of processing service of summons, the concerned Court may serve the accused through E-Mail (if any), and any instant messaging service such as WhatsApp, etc. (if any). [Hon'ble Supreme Court of India in Re Cognizance for Extension of Limitation, Suo Moto Writ Petition (C) No. 3/2020, I.A. No. 48461/2020- July 10, 2020].
- g) The concerned Court may also inform the accused about the issuance of bailable and non-bailable warrants through the modes mentioned above.
- h) In the first instance, the Court shall issue summons and may send such summons through SMS/ WhatsApp message/ E-Mail.
- i) In case the petitioner fails to appear before the Court on the specified date, then the concerned Court may issue bailable warrants, and to enable the accused to know the date, the Court may, if it so desires, also inform the petitioner about such Bailable Warrants through SMS/ WhatsApp

message/ E-Mail.

j) Finally, if the petitioner still fails to put in an appearance, then the concerned Court may issue Non-Bailable Warrants to procure the petitioner's presence and send the petitioner to the Judicial custody for a period for which the concerned Court may deem fit and proper to achieve the purpose.

k) In case of non-appearance, then irrespective of the contents of the bail bonds, the petitioner undertakes to pay all the expenditure (only the principal amount without interest), that the State might incur to produce him before such Court, provided such amount exceeds the amount recoverable after forfeiture of the bail bonds, and also subject to the provisions of Sections 446 & 446-A of CrPC. The petitioner's failure to reimburse the State shall entitle the trial Court to order the transfer of money from the bank account(s) of the petitioner. However, this recovery is subject to the condition that the expenditure incurred must be spent to trace the petitioner alone and it relates to the exercise undertaken solely to arrest the petitioner in that FIR, and during that voyage, the Police had not gone for any other purpose/function what so ever.

l) The petitioner shall intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, within 10 days from such modification, to the Police Station of this FIR, and also to the concerned Court.

m) The petitioner shall abstain from all criminal activities. If done, then while considering bail in the fresh FIR, the Court shall take into account that even earlier, the Court had cautioned the accused not to do so.

n) In case of violation of any of the conditions as stipulated in this order, the State/Public Prosecutor may apply for cancellation of bail of the petitioner. Otherwise, the bail bonds shall continue to remain in force throughout the trial and also after that in terms of Section 437-A of the CrPC.

o) During the trial's pendency, if the petitioner repeats the offence or commits any offence where the sentence prescribed is seven years or more, then the State may move an appropriate application for cancellation

of this bail, either before this Court or before the concerned Sessions Court and even such Sessions Judge/Additional Sessions Judge shall be competent and entitled to cancel this bail.

46. In case the petitioner finds the bail condition(s) as violating fundamental, human, or other rights, or causing difficulty due to any situation, then for modification of such term(s), the petitioner may file a reasoned application before this Court, and after taking cognizance, even before the Court taking cognizance or the trial Court, as the case may be, and such Court shall also be competent to modify or delete any condition.

47. The learned Counsel representing the accused as well as the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order to the petitioner, in vernacular.

48. This order does not, in any manner, limit or restrict the rights of the Police or the investigating agency, from further investigation in accordance with law.

49. Any observation made hereinabove is neither an expression of opinion on the merits of the case, nor shall the trial Court advert to these comments.

50. The Court attesting the bonds shall not insist upon the certified copy of this order. Any Advocate for the petitioner may download this order from the website of this Court, and attest it, which shall be sufficient for furnishing bonds and the record. The Court Master shall handover an authenticated copy of this order to the Counsel for the Petitioner and the Learned Advocate General if they ask for the same.

51. The SHO of the concerned Police Station or the Investigating Officer shall arrange to send a copy of this order, preferably a soft copy, to the victim, at the earliest.

52. In return of the freedom curtailed for breaking the law, the Court believes that the accused shall also reciprocate through desirable behavior.

53. I express my gratitude to counsel for the parties, Ld. Amicus Curiae Mr. Rajiv Jiwan Sr. Advocate, Ms. Anubhuti Sharma Advocate, Ms. Ragini Dogra Advocate, for excellent assistance, and also to my Research Assistant Ms. Kalyani Acharya for outstanding research.

The petition stands allowed in the terms mentioned above. All pending applications, if any, stand closed.

**(Anoop Chitkara),
Judge.**

July 30, 2020 (ps)