
(2011) 02 P&H CK 0472

In the Punjab And Haryana At Chandigarh

Case No : C.R.M. No. M-770 of 2011 (O and M)

Bhupinder Singh Chhabra

APPELLANT

Vs

State of Punjab and Another

RESPONDENT

Date of Decision : 01-02-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 116(3), 436, 436(1), 436(2), 436(6)
Negotiable Instruments Act, 1881 (NI) — Section 138
Penal Code, 1860 (IPC) — Section 174, 323, 499, 500

Citation : (2011) 3 RCR(Criminal) 418

Hon'ble Judges : Alok Singh, J

Bench : Single Bench

Advocate : S.S. Sodhi, for the Appellant; Bhavna Gupta, DAG, for the Respondent

Judgement

Alok Singh, J.—On being asked, Ms. Bhavna Gupta, Deputy Advocate General, Punjab, has received notice and has assisted the Court effectively.

2. Present petition is moved seeking regular bail in complaint No. 506/2 dated 12.10.2010 u/s 138 of the Negotiable Instruments Act.

3. Brief facts of the present case are that Petitioner/accused having received summons from the Court has been appearing before the learned Magistrate in the complaint. In fact, two complaints were filed against the Petitioner u/s 138 of the Negotiable Instruments Act by the same complainant for two different cheques and in both the cases Petitioner was on bail and has been appearing. As per the Petitioner, Clerk of his earlier counsel, Sh. Kulwant Singh Arora, had informed the Petitioner that complaint had been dismissed in default due to the non-appearance of the complainant, hence Petitioner stood discharged, therefore, he need not to appear; Clerk of earlier counsel was also paid expenses by the Petitioner for getting the certified copy of the order; in fact, complaint was not dismissed, however, Petitioner could not attend the Court due to the wrong information supplied by the Clerk of the counsel; Petitioner was declared

proclaimed offender vide Court's order dated 14.5.2010. Petitioner is in judicial custody w.e.f. 23.10.2010 and his bail application was dismissed by the learned Magistrate on the ground that earlier Petitioner was declared proclaimed offender, hence there is no justification to enlarge him on bail.

4. Learned Counsel for the Petitioner has vehemently argued that since Petitioner was earlier enlarged on bail in a bailable offence u/s 138 of the Act and his non-appearance was because of wrong information given by the Clerk of the counsel, therefore, he is entitled to be enlarged on bail.

5. Ms. Bhavna Gupta, learned Deputy Advocate General, Punjab, has vehemently argued that since Petitioner has jumped the bail, therefore, Petitioner is not entitled to be enlarged on bail in view of Section 436(2) of the Code of Criminal Procedure (for short the Code"). She has further argued that Petitioner did not appear before the Court on the date fixed even after issuance of warrants and proclamation, hence Petitioner has also committed an offence u/s 174 of the Indian Penal Code, which is punishable for six months, therefore, he is not entitled to be enlarged on bail.

Section 436 of the Code reads 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.

Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

(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 u/s 446.

6. Now, it is no more *res integra* that if an accused for an offence, which is bailable in nature, is arrested or detained or is brought before the Court, he shall be released on bail. It is, thus, clear that every accused of bailable offence is

legally entitled to be enlarged on bail. The right to claim bail in a bailable offence is an absolute and indefeasible right. In bailable offence there is no question of discretion in granting bail. However, if accused of bailable offence is unable to furnish bail within a week he shall be released on personal bond. However, if accused is found to have mis-used the bail or to have violated the conditions of the bail, his bail can be cancelled. However, bail once granted to the accused under the bailable offence cannot be cancelled only because complainant was not heard.

7. Hon''ble Apex Court in the matter of *Rasiklal v. Kishore s/o Khanchand Wadhwani*, 2009 (2) RCR (Cri) 161 had an occasion to interpret the scope of Section 436 of the Code. Hon''ble Apex Court in paragraphs No. 6, 7 and 8 has observed as under:

6. As is evident, the Appellant is being tried for alleged commission of offences punishable under Sections 499 and 500 of the Indian Penal Code. Admittedly, both the offences are bailable. The grant of bail to a person accused of bailable offence is governed by the provisions of Section 436 of the Code of Criminal Procedure, 1973. The said section reads 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, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.

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 u/s 446."

There is no doubt that u/s 436 of the Code of Criminal Procedure a person accused of a bailable offence is entitled to be released on bail pending his trial. As soon as it appears that the accused person is prepared to give bail, the police

officer or the court before whom he offers to give bail, is bound to release him on such terms as to bail as may appear to the officer or the court to be reasonable. It would even be open to the officer or the court to discharge such person on his executing a bond as provided in the Section instead of taking bail from him. The position of persons accused of non-bailable offence is entirely different. The right to claim bail granted by Section 436 of the Code in a bailable offence is an absolute and indefeasible right. In bailable offences there is no question of discretion in granting bail as the words of Section 436 are imperative. The only choice available to the officer or the court is as between taking a simple recognizance of the accused and demanding security with surety. The persons contemplated by Section 436 cannot be taken into custody unless they are unable or willing to offer bail or to execute personal bonds. There is no manner of doubt that bail in a bailable offence can be claimed by accused as of right and the officer or the court, as the case may be, is bound to release the accused on bail if he is willing to abide by reasonable conditions which may be imposed on him.

7. There is no express provision in the Code prohibiting the court from re-arresting an accused released on bail u/s 436 of the Code. However, the settled judicial trend is that the High Court can cancel the bail bond while exercising inherent powers u/s 482 of the Code. According to this Court a person accused of a bailable offence is entitled to be released on bail pending his trial, but he forfeits his right to be released on bail if his conduct subsequent to his release is found to be prejudicial to a fair trial. and this forfeiture can be made effective by invoking the inherent powers of the High Court u/s 482 of the Code. [See: Talab Haji Hussain Vs. Madhukar Purshottam Mondkar and Another, reiterated by a Constitution Bench in Ratilal Bhanji Mithani Vs. Asstt. Collector of Customs, Bombay and Another, .

8. It may be noticed that Sub-section (2) of Section 436 of the 1973 Code empowers any court to refuse bail without prejudice to action u/s 446 where a person fails to comply with the conditions of bail bond giving effect to the view expressed by this Court in the above mentioned case. However, it is well settled that bail granted to an accused with reference to bailable offence can be cancelled only if the accused (1) misuses his liberty by indulging in similar criminal activity, (2) interferes with the course of investigation, (3) attempts to tamper with evidence of witnesses, (4) threatens witnesses or indulges in similar activities which would hamper smooth investigation, (5) attempts to flee to another country, (6) attempts to make himself scarce by going underground or becoming unavailable to the investigating agency, (7) attempts to place himself beyond the reach of his surety, etc. These grounds are illustrative and not exhaustive. However, a bail granted to a person accused of bailable offence cannot be cancelled on the ground that the complainant was not heard. As mandated by Section 436 of the Code what is to be ascertained by the officer or the court is whether the offence alleged to have been committed is a bailable offence and whether he is ready to give bail as may be directed by the officer or

the court. When a police officer releases a person accused of a bailable offence, he is not required to hear the complainant at all. Similarly, a court while exercising powers u/s 436 of the Code is not bound to issue notice to the complainant and hear him.

8. Now next question arises is as to whether accused can be granted subsequent bail if accused has jumped the earlier bail in the bailable offence?

9. Section 436(2) of the Code gives discretion to the Court to 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 where accused has failed to comply with the conditions of the bail bond as regards the time and place of attendance.

10. The word used in Sub-section 2 of Section 436 of the Code is "may" and not "shall". However, it does mean that in every case when accused fails to appear, he shall not be enlarged on bail in a bailable offence. The Court has to find out as to whether the non-appearance before the Court was intentional with object to frustrate the trial or was because of some unavoidable circumstances. If Court finds that nonappearance before the trial Court in a bailable offence was not deliberate or mala fide or with ulterior motive or was, in fact, bona fide and for the sufficient reasons, Court must release such an accused of a bailable offence on bail.

11. Present is the case pertaining to the alleged offence u/s 138 of the Act, for which maximum punishment is two years. If an accused has failed to appear in a complaint case or is found having committed breach of the conditions of the bail granted to him during the trial, can he be kept in judicial custody for longer period saying complaint is still pending and he is not entitled to be released on bail in view of Sub-section 2 of Section 436 of the Code.

12. For example, if accused is facing trial for an offence u/s 323 Indian Penal Code pursuant to the complaint for which maximum punishment awarded is one year and if he is declared proclaimed offender during the trial for his non-appearance subsequent to the grant of the bail, can bail be refused to such an accused and can he be detained in judicial custody during the trial?

Section 436-A of the Code is reproduced hereunder:

436-A. Maximum period for which an under trial prisoner can be detained. - Where a person has, during the period of investigation, inquiry or trial under this Code of an offence under any law (not being an offence for which the punishment of death has been specified as one of the punishments under that law) undergone detention for a period extending up to one-half of the maximum period of imprisonment specified for that offence under that law, he shall be released by the Court on his personal bond with or without sureties:

Provided that the Court may, after hearing the Public Prosecutor and for reasons to be recorded by it in writing, order the continued detention of such person for a period longer than one-half of the said period or release him on bail instead of

the personal bond with or without sureties: Provided further that no such person shall in any case be detained during the period of investigation, inquiry or trial for more than the maximum period of imprisonment provided for the said offence under that law.

Explanation. - In computing the period of detention under this section for granting bail the period of detention passed due to delay in proceeding caused by the accused shall be excluded."

Section 437(6) of the Code reads as under:

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

(1) x x x x

(2) x x x x

(3) x x x x

(4) x x x x

(5) x x x x

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) x x x x

13. After the perusal of Sections 436, 436-A and 437(6) of the Code, this Court opines that:

(i) Every accused of an bailable offence has legal right to be enlarged on bail and if he fails to furnish the bail within a week is entitled to be released on personal bond;

(ii) No accused ordinarily shall be detained for the period more than one half period of the maximum sentence provided for the offence for which accused is facing trial unless Court directs otherwise for the sufficient reasons;

(iii) No accused shall be kept in detention for more than the maximum punishment provided for the offence.

(iv) Even in the non-bailable offence triable by the Magistrate if accused is in judicial custody and trial of an accused of non-bailable offence is not concluded within a period of 60 days from the first day for taking evidence in the case, he shall be released on bail to the satisfaction of the Magistrate unless for reasons to be recorded in writing the Magistrate otherwise directs as per Section 436(6) of the Code.

(v) If an accused does not appear before the Court in breach of the terms of the bail on the date fixed, on his subsequent appearance or arrest, he shall not be kept in judicial custody for unreasonable period and in any case for more than period as opined under Clauses (ii), (iii) or (iv) hereinbefore as the case may be. Ordinarily accused should be released on bail soon after his arrest or appearance before the Court if he furnishes proper explanation for his nonappearance on the previous date with more surety ensuring the appearance before the trial Court facilitating the disposal of the trial.

(vi) However, Court shall be at liberty to pass appropriate orders, pertaining to the bail bonds, surety bonds and personal bonds submitted before the Court while enlarging the accused on bail on his failure to appear on the date fixed, in accordance with law.

14. In the present case, accused is in judicial custody w.e.f. 23.10.2010 for an offence u/s 138 of the Act, for which maximum punishment provided is two years; it means he has already undergone period of more than three months. Refusal to grant bail to the Petitioner shall amount to violation of his fundamental/human rights.

15. Even if argument of the learned Deputy Advocate General, Punjab, is accepted, that accused has committed an offence u/s 174 Indian Penal Code by not appearing before the trial Court, then also offence u/s 174 Indian Penal Code once again is bailable for which accused is legally entitled to be enlarged on bail, as provided u/s 436 of the Code.

16. This Court has come across so many cases wherein if accused has jumped the bail in an offence triable by the Magistrate, Courts are not releasing such an accused on bail and accused are languishing in jails in violation of their rights as contemplated under Sections 436(1), 436-A and 436(6) of the Code.

17. Let accused be released on bail immediately on furnishing his personal bond and one surety of Rs. 10,000/- to the satisfaction of the learned trial Court.