HIGH COURT OF SINDH, KARACHI

Cr. Misc. Application No.22 of 2017

PRESENT:

MRS. JUSTICE KAUSAR SULTANA HUSSAIN

Jan Nisar Zafar

Vs.

The State

Applicant:	through Mr. Inayat Hussain, Advocate
State:	through Mr. Ghullam Abbas, APG
Date of Hearing:	14.03.2018
Date of Order:	02.05.2018

ORDER

***KAUSAR SULTANA HUSSAIN,* J.** This Criminal Miscellaneous Application bearing No.22/2017 under section 561-A r/w section 516-A is directed against the order dated 02.12.2016 passed by learned VIth Additional District & Sessions Judge, Karachi South in Bail Application No.601/2016 of crime No.68/2016 of Mithadar u/s 489-F PPC, whereby the learned Additional District & Sessions Judge forfeited the surety furnished by the applicant for the accused namely Tanveer Qayyum Paracha after ad-interim pre-arrest order passed by the same Court in favour of accused Tanveer.

2. The facts necessary for the disposal of the instant Cr. Misc. Application are that the applicant stood surety for accused Tanveer Qayyum Paracha in crime No.68/2016 of PS Mithadar u/s 489-F PPC in the sum of Rs.5,00,000/- and deposited Defence Saving Certificates of the like

amount with the Nazir of the Court on 13.04.2016, when the bail was granted to accused. On 17.05.2016 the said bail order was cancelled by the learned trial Court due to absence of accused. Before this on 16.05.2016 the matter was fixed and accused was present but he left the Court without seeking permission after handing over an application for adjournment to the Reader, therefore, the matter was adjourned to next date i.e. 17.05.2016 when neither the accused appeared before the Court nor his counsel moved condonation application for his absence, hence bail order was recalled. Than on 02.12.2016 surety amount of applicant/surety was forfeited through impugned order.

3. I have heard the learned counsel for applicant/surety, who contended that the impugned order is based on mis-appreciation of law, facts and material available on record. He further argued that the learned trial Court has passed the harsh order and the reasons for forfeiture of full surety amount is neither within four corners of law, proper or justified but the same appears to be arbitrary. The learned counsel for applicant/surety has contended that the learned trial Court did not consider the reply of the applicant/surety to the notice issued against him u/s 514 Cr.PC. Per learned counsel for applicant/surety there are number of decisions of the Hon'ble apex Courts on the point involved in the instant application. He has relied upon a decision reported in ***PLD 1963 SC 47 (Full Bench decision) led by the then Hon'ble Chief Justice A.R Cornelius in the case of Dildar another Vs the State***. It was held in the said decision that:

> *"Taking all these circumstances into account, we find that the two appellants had indeed forfeited their bonds but we consider at the same time that the full amount of the bonds need not have been required form them and that, in all the circumstances, their default will be adequately punished by requiring each of them to pay a sum of Rs.1,000/- and we allow the appeal to that extent. The bonds will be forfeited to the extent of Rs.1,000/- each."*

4. The learned counsel for applicant/surety argued that, in the said decision (supra) the surety amount was Rs.5,000/- which was reduced to Rs.1,000/- by the Hon 'ble Supreme Court i.e. 1/5th of active amount. The learned counsel for applicant/surety has further relied upon the case laws reported in ***(i) PLD 1963 SC 47, (ii) 1997 P.Cr.L.J 1927, (iii) 1976 P.Cr.L.J 1283, (iv) 1986 P.Cr.L.J 2028 and (v) 1988 P.Cr.L.J 447***. Per learned counsel for the applicant/surety the Courts have taken a lenient view in these case laws. He lastly prayed for setting aside the impugned order as it is harsh order.

5. On the other hand the learned APG fully supported the order in question. Per learned APG no illegality has been pointed out by the learned counsel for applicant/surety in the order impugned here in this Cr. Misc. Application. He prayed for dismissal of present Cr. Misc. Application of the applicant/surety.

6. After hearing the arguments of both the sides and perusal of record available, I am of the view that standing surety for someone is an act of benevolence and kindness until it is established that the surety has got the accused released on bail for any ulterior motive, the surety is not to be treated harshly and not be punished severely without there being extraordinary circumstances. It is held in ***2009 P.Cr.L.J 962 and 1997 P.Cr.L.J 554*** that for full forfeiture of the surety bond, it is necessary that an opportunity be afforded to the applicant/surety to produce accused before the Court and after arrest of accused he was granted bail and fresh bail bond was furnished by another surety than the previous surety in these circumstances stood absolutely as his responsibility to produce accused in the Court.

7. Under section 514 Cr.PC, three steps are required to be followed before passing final order for forfeiture of bond (i) where the bond was for

appearance of an accused as soon as accused would absent in violation of the bond executed by him or his surety, the first step to be taken by the Court as to satisfy itself that accused had violated the terms and conditions of the bond and if the bond is liable to be forfeited, the Court would pass order for its forfeiture while recording the reasons in that respect, (ii) second step to be taken by the Court is to call upon the person bound by such bond to pay the penalty thereof or to show cause as to why the penalty should not be paid; (iii) third step to be taken by the Court is if instead of making the payment, the person bound by the bond would offer explanation then by recording reasons, he would be asked as to why the offer made by him should or should not be accepted.

8. In regard of imposition of fine the Hon'ble Supreme Court has decided in a case reported in ***2011 SCMR 929*** that:

> *"When the surety has made general efforts to produce the accused before the trial Court but could not do so after some time then a lenient view has to be taken. In dealing with the case of sureties who were in default a balance has to be held between under leniency which might lead to abuse of the procedure and interference with the course of justice in a large number of cases."*

9. In the instant case the learned VIth Additional District & Sessions Judge, Karachi South granted pre-arrest bail in favour of accused on 13.04.2016, then on 16.05.2016 the accused was present in Court but at 10:30 he left the Court due to his illness after giving adjournment application to the Reader, upon which the learned trial Court has adjourned the matter for next day i.e. 17.05.2016 and on that day when accused was not present, his interim pre-arrest bail order was recalled. On 27.05.2016 this Court has granted protection bail to the accused for seven days and on 30.05.2016 the learned trial Court has granted bail u/s 497 Cr.PC.

10. From above material record it is clear that the accused was absent only on 17.05.2016, whereas he was present before the Court just one day before the mentioned date up to 10:30 am. The learned VIth Additional District Judge, Karachi South without giving any warning notice to surety on very next day cancelled the ad-interim pre-arrest bail order. It appears that surety was cancelled in hurried manner as the surety is not to be treated harshly nor punished severely without having there being extraordinary circumstances calling for full forfeiture of the surety bond. I, therefore, set aside the order dated 02.12.2016 with directions that minor penalty commonsrating the circumstances, as already discussed above, be imposed by the trial Court. Order, accordingly.

Dated: 02.05.2018 ***JUDGE***