

IN THE HIGH COURT OF SINDH AT KARACHI

BAIL APPLICATION NO.1449/2008

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

Applicant : Aijaz-ul-Haq,
Through: Mr. Shamshad Ali Qureshi advocate.

Respondent : The State,
Through: Mr. Abdullah Rajput, APG.
Mr. Usman Tufail Shaikh advocate.

Date of hearing : 29.02.2016.

Date of announcement : 14.03.2016.

ORDER

Through instant application, applicant/surety seeks return of surety documents. Relevant facts are that Aijaz-ul-Haq was granted interim pre-arrest bail by order dated 20.12.2008 subject to furnishing surety of Rs.500,000/- to the satisfaction of the Nazir of this Court. Pursuant to that one Shamsul-Haq submitted surety; subsequently by order dated 06.05.2009 bail of accused was confirmed subject to deposit of bank guarantee in the sum of Rs.65,00,000/- including Rs.500,000/- already deposited, within two weeks and bail application was disposed-of. Endorsement dated 20.05.2009 by Nazir on order dated 05.05.2009, reflects that "no one turned up to furnish bank guarantee hence the case file is returned as per requisition slip dated 19.05.2009." Records further reflects that by order dated

26.05.2009 direction of substitution of surety in the shape of security was ordered. Endorsement of Nazir dated 06.08.2009 shows that "Security offered which is under process for verification."

2. Further, Order dated 30.06.2010 indicates that because of non-compliance interim order was recalled; and again by order dated 20.07.2010 bail dismissal order was recalled with direction to furnish surety within three days. Endorsement dated 29.07.2010 made by Nazir reflects that "Surety offered today on 29.07.2010 sent for verification and valuation." It appears that subsequently none appeared on behalf of applicant, meanwhile application for return of surety documents was submitted by applicant Liaquat Ali on the plea that although he submitted surety papers, same were verified but such process was not completed, bond was not executed hence surety papers are not required further.

3. Learned counsel for complainant contends that since applicant submitted property documents as surety on behalf of accused Aijaz-ul-Haq along-with his affidavit containing therein that he is ready to furnish surety and would produce the accused on each and every date of hearing, contents of affidavit and bail bond as required under section 514 Cr.P.C, are same; applicant/surety was bound to produce the accused, thus surety is required to be attached. He has submitted photocopy of affidavit of surety as well as Surety bond alongwith copy of definitions of Bond and Affidavit provided in Black's Law Dictionary.

4. I have heard the respective counsel and have meticulously examined the available material and record.

5. At the very outset, I felt it quite appropriate to refer relevant provision(s) of Chapter XXIX of the Criminal Procedure Code as the same directly deal with the issue in hand.

498. Power to direct admission to bail or reduction of bail: The amount of every bond executed under this Chapter shall....., or that the bail required by a police officer or Magistrate be reduced.

499. Bond of accused and sureties : (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.

(2) If the case so requires, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

(emphasis supplied)

From the above, it is clear that release of an accused is subject to execution of *bond* by the accused himself or by one or more sufficient sureties to *satisfaction of Court of Police Officer*, as the case may be.

6. At this point, it is relevant to have a reference to meanings of terms '*bond*' and '*affidavit*' which per Black's Law Dictionary is:

“Bond:

*A written obligation, made by owner of real property, to repay a loan under specific terms, usually accompanied by a mortgage placed on land **as security**.*

A deed whereby the obligator obligates himself, his heirs, executors and administrators, to pay a certain sum of money to another at a day appointed.”

“Affidavit:

A written or printed declaration or statement of facts, made voluntarily, and confirmed by the oath or affirmation of the party making it, taken before a person having authority to administer such oath or affirmation.”

The above terms, *in no way*, could be taken as synonym to each other hence the term ‘*affidavit*’ cannot substitute the requirement of *execution of bond*.

7. A written declaration *even* on Oath to the effect that one is ready and *ready / prepared* to stand surety for an accused shall not dress him up as ‘*surety*’ nor shall it be sufficient for release of the accused on **bail** because such declaration shall continue the status of an ‘*offer*’ unless accepted by the Court, thereby allowing him (willing person to stand surety) to execute the requisite bond.

8. In other words, the release of an accused on bail, is a *legal act* of the Court whereby the custody is handed over to the surety under certain terms/conditions. Through such process the Court hands over the custody of accused to surety who (surety) agrees to take the custody of accused knowing that failure to abide by terms and conditions for *such custody* shall result into *forfeiture* of his bond. There

can be no denial to the legal proposition that a mere offer creates no liabilities upon its maker unless accepted and parties thereto proceed further. A reference to the case of Gulam Rasool v Nusrat Rasool (PLD 2008 SC 146) , being helpful, is made wherein it is observed that:

11. Be that as it may, a promise ripens into an agreement **only after an offer is accepted** but every promise is not necessarily an agreement. There is difference between the contract and a promise as a valid contract creates obligation and is capable of enforcement in law whereas a mere promise to render service or to hand over certain property immovable or movable to a person without any consideration may not create a contractual obligation to be enforced in law. It is thus.....The promise to perform certain act neither creates a contractual obligation nor a legal right and thus a promise in absence of essential terms of consideration may have no binding force and legal effect. The acceptance of a proposal may bring into existence a promise but to have an agreement it is essential that there should be consideration for promise without which the promise may not have the legal status of an agreement.

(Emphases supplied)

In matter of delivery of custody of accused into hands of surety, it shall always be necessary that not only an offer to stand surety by one is accepted by the Court, but such agreement is followed by execution of bond as has been insisted by Section 500 of the Criminal Procedure Code that:

500. Discharge from custody: (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer incharge of the jail and such officer on receipt of the order shall release him.

Further, if the principle of *reading down* is followed, it shall allow inclusion of provisions, *relating to discharge of bonds* (Section 502

Cr.PC) and *even* Chapter XLII (provisions as to bonds), including forfeiture of bond), for understanding and exploring the issue, *in hand*. At *no place* the legislature have left a room for an *offer* (even on Oath) to be taken as '*bond*' which (*execution of bond*) is mandatory requirement for release of an accused on bail (delivery of custody into hands of surety).

9. Thus, it is pertinent that the Chapter XXIX and even Chapter XLII of the Criminal Procedure Code *nowhere* permits to hold any other person liable for *jumping of the accused* except the one who has executed a bond to satisfaction of the Court which (*satisfaction*) does include identification of person (surety) and verification of his/her documents, *offered as security*. A reference to the case of Hakim Ali Zardari v State (PLD 1998 SC 1) wherein it has been observed:

'Said case was followed in the case of R.R. Chari v Emperor (AIR 1948 Allahabad 238) where it was observed as below:

'The language of section 499, Criminal Procedure Code 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 Magistrate for the amount which he might have fixed.**

In the case of Rajaballam Singh (45 Cr.L.J 1944 and AIR 1943 Patna 375) it was further observed, that Chapter XXXIX of the Code of Criminal Procedure contemplates the execution of a bond with sureties and form of the bond is prescribed in Schedule V, Form No.42 of the Code.

According to section 497 of Cr. P.C a Criminal Court may order release of a person on bail, who is accused of any non-bailable offence, after his arrest or detention or on his any such construction. Entire emphasis of section 499 of Cr.P.C is on execution of a bond by the person being released on bail, and by his one or more sufficient sureties.'

It is a matter of record that accused was granted interim pre arrest bail by this Court; he was on bail but at subsequent stage bail was confirmed subject to enhancement of surety in addition to already furnished surety but due to non-compliance of final order such order was recalled. The record further shows that subsequently again dismissal order was set aside and applicant was directed to submit surety. In result of such *last* direction of this Court for furnishing surety, the present applicant /surety submitted his *affidavit* along-with property documents whereby offering himself to stand as surety for accused, however, same were sent to verification without acceptance thereof or execution of *bonds*. No doubt affidavit was furnished by surety but the role of the surety was to commence from the acceptance of surety and execution of the bond which (offer) *undisputedly* has not been accepted by this Court. In nutshell till such time it was not accepted nor it resulted into execution of *bond* by applicant/surety hence there was no delivery of custody of accused into hands of surety within meaning of Section 502 of the Criminal Procedure Code. In absence thereof, the request of the present applicant/surety for return of his *offered document* cannot be declined

nor it can be withheld on the plea that affidavit was filed. Accordingly, application is allowed. Offered surety documents shall be returned to the surety on proper identification.

Imran/PA

JUDGE