Before Anoop Chitkara, J.

MAHIDUL SHEIKH—*Applicant*

versus

STATE OF HARYANA—*Respondent*

CRM No.33030 of 2021 in

CRA-S No.363 of 2020

January 14, 2022

Criminal Procedure Code, 1973—S.389—Narcotics Drugs and Psychotropic Substances Act, 1985—S.37—Suspension of sentence—Offence Under NDPS Act—Suspension Of Sentence—Mere recovery of surety amount by way of penalty is not equivalent of producing accused to face trial—Offence under NDPS Act—Suspension of sentence—Fixed deposit or electronic transfer, or creating lien over bank account, in place of cash or sureties is likely to improve possibility of accused's attendance—Whether it can be option in every case that accused instead of furnishing surety, either handover a fixed deposit in favour of Court or electronically transfer bond money in account of Court; where such facility is available? Held, yes—Fixed deposit or electronic transfer, or creating a lien over bank account, in place of cash or sureties is likely to improve possibility of accused's attendance because they would be aware that their money is safe and accruing interest and failure to appear shall lead to the forfeiture of money—Hence, applicant be released on bail subject to his furnishing personal bond of Rs.One Lakh and furnishing of two sureties of Rs.Five lakhs each.

Held that, fixed deposit or electronic transfer, or creating a lien over the bank account, in place of cash or sureties is likely to improve the possibility of the accused's attendance because they would be aware that their money is safe and accruing interest. They would also keep in mind that failure to appear shall lead to the forfeiture of the money. It is further likely to motivate them not to default even once. In contrast, the risk of losing money handed over by cash to stock sureties is enormous. There is hardly any assurance or likelihood of the refund of money taken by a stock surety.

(Para 51)

Randeep S. Dhull, Advocate
for the applicant-appellant(s).

Manish Bansal, D.A.G., Haryana.

J.S.Mehndiratta, Advocate
for the Amicus curiae.

ANOOP CHITKARA, J.

FIR No.	**Dated**	**Police Station**	**Sections**
695	07.11.2017	Badshahpur, Gurugram	21 Narcotics Drugs and Psychotropic Substances Act, 1985, (NDPS Act)

Criminal case no. before trial Court	NDPS Case No.2 of 13.02.2019/2.2.2018

(1) The applicant-appellant, a resident of West Bengal, convicted for possessing 220 grams of heroin (Diacetylmorphine), which is an intermediate quantity, and sentenced to imprisonment for ten years and a fine of Rs. One Lac has come up before this Court under section 389 of Code of Criminal Procedure, 1973 (CrPC) seeking suspension of sentence.

(2) The facts relevant in deciding the present application is that on 07.11.2017, the police party received secret information that three persons, who were present in a room, are involved in drug trafficking, and at that point of time if a raid is conducted, they could be apprehended. After completing the procedural requirements, the police raided the said place and found two persons, including the applicant-Mahidul Sheikh. The room was searched in the presence of the owner of the premises, and one bag was found. The search of the bag led to the recovery of 220 grams of heroin. Apart from that, the police also allegedly recovered Rs.14,39,780/-. Subsequently, the police registered the FIR captioned above and arrested the accused. During the trial, learned Special Judge allowed the prosecution and convicted the applicant under Section 21(b) NDPS Act. The Court sentenced him to undergo rigorous imprisonment for ten years and pay a fine of

Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for one year further. The cash amount recovered was ordered to be forfeited to the State.

(3) Learned Counsel for the applicant-convict argued that the quantity of 220 grams of heroin (Diacetylmorphine) is less than commercial and thus, rigors of section 37 of Narcotics Drugs and Psychotropic Substances Act, 1985 (NDPS Act) do not apply, and application for suspension of sentence is to be considered similar to the general offences. Learned Counsel for the applicant-convict has further argued that the applicant is the first offender and has already undergone two years of the sentence, and the quantity involved is intermediate, whereas the Court has imposed the maximum sentence apart from forfeiting the money recovered from the house.

(4) Mr. Randeep S. Dhull, Ld. Counsel submitted that the applicant be permitted to offer a fixed deposit in place of surety. He further submits that the fear of forfeiture of money will encourage him to surrender if this Court upholds the conviction.

(5) Mr. Manish Bansal, Ld. Counsel appearing for State opposes the suspension of sentence and contends that grant of bail encourages the drug peddlers, and the drug menace is spreading day by day. The more forceful contention on behalf of the State is that the convict resides in a faraway place, and in case of dismissal of the appeal, it would be challenging to arrest him if he does not surrender to face the sentence.

(6) Mr. Jasdev Singh Mehndiratta, Ld. Amicus Curiae, submitted that not suspending the sentence only because the convict is a native of a distant State would violate Article 21 of the Constitution India, which extends to all persons residing anywhere in India and even encompasses a foreigner. Ld. Amicus further argued that given the advent of online identification, while granting bail with sureties, the "Court" or "the Arresting Officer" should give a choice to the accused to either furnish surety bonds or give a fixed deposit, impliedly informing the accused of Section 445 CrPC.

(7) Section 2 (vii-a) of the NDPS Act defines commercial quantity as the quantity greater than the quantity specified in the schedule. Section 2 (xxiii-a) defines a small quantity as a quantity less than the quantity specified in the table of the NDPS Act. The remaining

quantity falls in an undefined category, generally called an intermediate quantity. All Sections in the NDPS Act, which specify an offence, also mention the minimum and maximum sentence, depending upon the quantity of the substance. The commercial quantity mandates a minimum sentence of ten years of imprisonment and a minimum fine of Rupees One hundred thousand, and bail is subject to the riders mandated in S. 37 of NDPS Act. When the quantity is less than commercial, the restrictions of Section 37 of the NDPS Act will not attract, and the factors for bail become similar to those under any regular offence.

(8) As per the table, prescribing small and commercial quantities, annexed with the notification issued under NDPS Act, quantity greater than 250 grams of heroin falls in the commercial quantity. The weight of the heroin allegedly involved in the present case is 220 grams, which is less than the commercial quantity. Given this, the restrictions of Section 37 of the NDPS Act do not apply in the present case.

(9) In ***Sami Ullaha*** versus ***Superintendent Narcotic Control Bureau***[1] the Hon'ble Supreme Court holds that in intermediate quantity, the rigours of the provisions of Section 37 may not be justified.

(10) The applicant has undergone approximately one year during the trial. After that from the date of sentencing, that is w.e.f13.01.2020, he is continuing in prison. Thus, the applicant has completed two years of the sentence. A Coordinate Bench of this Court, while admitting the appeal against conviction, had stayed recovery of fine during its pendency.

(11) The convict did attend the trial and committed himself to Court to face the sentence. It establishes that the accused did not abscond during the trial, which would be an additional circumstance while considering the suspension of sentence.

(12) In ***Dadu @ Tulsidas*** versus ***State of Maharashtra***[2] a three-member bench of Hon'ble Supreme Court holds,

[24]. Judged from any angle, the Section in so far as it

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[1] (2008) 16 SCC 471
[2] (2000) 8 SCC 437,

> completely debars the appellate courts from the power to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32A in so far as it ousts the jurisdiction of the Court to suspend the sentence awarded to convict under the Act is unconstitutional…
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> [27]. Under the circumstances the writ petitions are disposed of by holding that (1) Section 32A does not in any way affect the powers of the authorities to grant parole; (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act; (3) Nevertheless, a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act as dealt with in this judgment.

(13) A cumulative assessment of all factors does not justify further incarceration of the accused, nor will it achieve any significant purpose. Without commenting on the merits, the applicant makes a case for suspension of sentence. Thus, in the peculiar facts and circumstances, the execution of the sentence of imprisonment is suspended. The order is subject to executing a bond for attendance. In case of dismissal of the appeal, the applicant shall surrender to serve the imprisonment. Terms and conditions as set out in this order shall be over and above and irrespective of the contents of the form of bail bonds in chapter XXXIII of CrPC.

(14) The legal proposition that now needs an answer is whether it can be an option in every case that accused instead of furnishing surety, either handover a fixed deposit in favour of the Court or electronically transfer the bond money in the account of the Court; where such facility is available?

ANALYSIS OF LAW ON FIXED DEPOSIT INSTEAD OF BOND AMOUNT:

(15) In ***Abhishek Kumar Singh*** versus ***State of Himachal Pradesh***[3] the High Court of Himachal Pradesh analyzed the scope of furnishing fixed deposits in place of cash while granting bail under S.

[3] 2020 SCC Online HP 3296,

439 CrPC to the accused with an option to give a fixed deposit in place of surety. In ***Manish Lal Srivastava*** versus ***State of Himachal Pradesh***[4] the scope of deposits was analyzed under S. 438 CrPC.

(16) Grant of bail, which includes suspension of sentence, is a promise by the accused to 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 their sureties, undertaking to produce the accused before the concerned Court if they default to appear. Section 74 of the Indian Contract Act, 1972, provides compensation for breach of contract where a penalty is stipulated. The perfect insight is its illustration (c), which reads as follows, "*A' gives a recognizance binding him in a penalty of Rs. 500 to appear inCourt on a certain day. He forfeits his recognizance. He is liable to pay the wholepenalty.*"

(17) In ***Pillappan @ Ravikumar*** versus ***State***[5] 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."

(18) It is beyond cavil that the sole purpose of a bond is to ensure the accused's presence to attend the trial and surrender to undergo the sentence of imprisonment. The Courts insist upon sureties to prevent impersonation. Furthermore, it is easier for a local surety to identify and trace the accused. The most prominent factor for the prevalence of local surety was the pressure from within the community of the accused, which would make them appear before the Courts. However, with the advent of identification through AADHAR, starting from 2010, the problems of concealment of identities or impersonation

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[4] CrMP(M) 1734 of 2020, ICL 2020 (12) HP 496,
[5] 2018 LawSuit (Mad) 1475

have been resolved.

(19) The revolutionary journey of homo-sapiens from foragers to agrarians resulted in dependence on one another and the communities. After around ten millenniums, the sapiens are passing through the revolution of information technology, virtual realities, self-driven autonomous vehicles, real-time live locations, and things that may be unimaginable today. The world these days is rapidly moving towards globalization and digitalization. With exponential growth in technology and the opening up of borders, people worldwide are travelling more and more, covering huge distances. Persons live far away from their ancestral places. It exposes them to the risk of being arraigned as accused in locations distant from native places or places of residence. People switch over jobs much more frequently, shift residences overnight, and are frequently on the move. People have started relying on the dedicated digital services and platforms run by highly skilled and talented professionals. The dependence of individuals on communities appears to be decreasing day by day. The pendulum of an era not only appears to have reached the farthest point, but probably the individuals now are less dependent upon the societies and the communities than ever before. The generation 'Z' neither would like to stand as someone's surety nor ask a stranger to stand as their surety. Against this backdrop, the youth neither appears inclined to take favours nor return. Given this, requesting someone to stand as surety might be seeking favours and may not appeal to the younger generation.

(20) The menace of securing sureties by payment is well known within the legal fraternity. The people have established a flourishing business of procuring sureties. Substituting surety with fixed deposit or bank transfer or bank lien is likely to addressthe corrupt system of unscrupulous stock sureties, throwing them out of highly questionable and unethical practices. The monetary bail has the edge over surety bonds, given unique identity details, electronic passports, face recognition gadgets, and GPS location. The technology has obsoleted the identification through sureties.

(21) It appears that the Legislature was conscious of the menace of stock sureties, and probably 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."

(22) 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 her, 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."

(23) Further, if the legislative intention was only to use cash deposit, then using the word "money" was sufficient, and there was no requirement to use the word "Government promissory notes". Thus, the words "Government promissory notes" denote something other than money because money is currency notes, and even its most expansive definition would again include currency notes. Therefore, in no case, the term money would exclude currency notes. So, what was the need for the legislature to use the term "Government promissory notes specifically". A promissory note is a financial instrument wherein the drawer promises a definite sum of money to its drawee or the bearer, either on-demand or at a specified future date. It is something other than money, i.e., currency notes. Thus, the legislature never expressly stopped fixed deposits from being taken as a promise of appearance before the concerned Court.

(24) Section 269-ST of Income Tax Act, 1961, various other statements, policy decisions, and the executive instructions issued by the Central Government reveal that the Country is moving from a cash-driven economy to a cashless economy. Thus, to ask an accused to handover a fixed deposit or make an electronic transfer, or bank lien would be in tune with the Legislative intentionunder Section 445 CrPC.

(25) In ***Hussainara Khatoon*** versus ***Home Secretary, State of***

Bihar[6] 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….

(26) In ***Moti Ram*** versus ***State of M.P***[7] 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 absurdem*.

JUDICIAL PRECEDENTS ON S. 445 CrPC:

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[6] (1980) 1 SCC 81
[7] (1978) 4 SCC 47,

(27) In ***Rajballam Singh*** versus ***Emperor***[8] 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."

(28) In ***R. R. Chari*** versus ***Emperor***[9] 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 mayhave 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."

(29) In ***Niamat Khan*** versus ***Crown,***[10] High Court of Nagpur observed,

> [4]. … Even under Section 513, Criminal P.C (1898) the

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[8] AIR 1943 Patna 375,
[9] 1948 AIR(All) 238,
[10] 1949 LawSuit (Nag) 42,

> accused could only be asked to deposit the amount of security instead of executing abond. 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 asurety….

(30) In ***State of Mysore*** versus ***H VenkataramaKotaiyah***[11] 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.

(31) In ***Krishna Kumar and others*** versus ***State of Karnataka*** [12],

> [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.

(32) In ***Gokul Das*** versus ***The State of Assam***[13] 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

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[11] 1968 CrLJ 696,
[12] 1979 SCC OnLine Kar 118
[13] 1981 CrLJ 229,

without surety or sureties of the like amount.

(33) In ***Afsar Khan*** versus ***State by Girinagar Police, Bangalore***[14] 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.

[14] 1992 Cr.LJ 1676

(34) In ***Parades Patra*** versus ***State of Orissa***[15] Orissa High Court observed:

> [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.

(35) In ***Charles Shobhraj*** versus ***State***[16] 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) I KB 369, it is to the interest of the public thatcriminals 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.
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> [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

[15] 1994 (1) Crimes (HC) 109
[16] 1996 (63) DLT 91

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.

(36) In ***Alluvdin*** versus ***Inspector of Police*** [17] Madras High Court observed,

> [3]. Section 441 Cr.P.C. reads that before any person is released on bailor 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.

(37) In ***Shokhista*** versus ***State***[18] Delhi High Court observed,

> [5]. …The accused is a foreign national and is not able to

[17] 2001 CrLJ 2672,
[18] 2005 LawSuit (Del) 1316,

> 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.

(38) In ***Srinjay Kumar Singh*** versus ***State of Nagaland***[19] KohimaBench of Gauhati High Court observed,

> [4]. After hearing the counsel for the parties at length and upon perusal of the bail order dated 28.2.07, I am of the considered opinion that the rider to furnish surety from a permanent resident of Dimapur having immovable properties is too harsh as the accused is not a resident of Dimapur and it is not possible for him to obtain such a surety being a resident of Chittaranjan in the District of Burdwan, West Bengal and also the rider to furnish local surety is tended to defeat the very order of bail.
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> [5]. The learned Counsel for the petitioner has relied upon the decisions of the Apex Court as, in the case of *AIR 1978 Supreme Court 1594, Moti Ram and Ors. v. State of Madhya Pradesh* as well as the decision of the Hon'ble Gauhati High Court in the case of *Amit Kr. Jain v. State of Nagaland as reported in (2005) 2 GLT 161.*
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> [6]. Considering the decisions rendered by the Apex Court and also on this Court, I am of the considered opinion that the order granting bail dated 28.2.07 needs to be modified

[19] 2007(32) R.C.R.(Criminal) 516,

> to the extent that instead of furnishing surety from a permanent resident of Dimapur having immovable properties, the accused be allowed to deposit cash surety or bank surety to such an amount as may deem fit and proper and to the satisfaction of the ADC (J), Dimapur, as provided under Section 445 Cr.P.C. It is also directed that the Court below while passing fresh modified order of bail dated 28.2.07 shall also impose condition that the accused shall report once a week before the Deputy Residential Commissioner, Nagaland House, Kolkata and upon reporting, the DRC, Nagaland House, Kolkata shall submits a report to the Superintendent of Police, Dimapur.

(39) In ***Maha Ahmad Yusuf*** versus ***State of U.P.***[20] Allahabad High Court observed,

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

(40) In ***Sakthivel*** versus ***The State*** in Crl.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.

(41) In ***Navaneetha Krishnan*** versus ***State***[21] 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

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[20] 2015 (5) R.C.R.(Criminal) 13
[21] 2015 (2) MadWN (Cri) 53,

> 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.
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> [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.

(42) In ***Sagayam @ Devasagayam*** versus ***State***[22] 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.

(43) In ***Endua @ Manoj Moharana*** versus ***State***[23] 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

[22] 2017(3) MLJ (Cri) 134,
[23] 2018(72) Orissa Cri. R.611

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.

(44) In ***Ubaidulla*** versus ***State of Kerala***, (Crl. MC. No. 3400 of 2020, decided on 5-8-2020), Kerala High Court observed,

> (5).I find merit in the submissions made by the learned counsel for the petitioner. The very purpose of Section 445 Cr.P.C,, 1973 providing for deposit instead of recognizance, is to ensure that a person is not denied an opportunity to be enlarged on bail merely for the reason that he is unable to execute bond, with or without sureties. Section 445 Cr.P.C, 1973 provides for deposit of a sum of money or Government Promissory Note to such amount as the Court may fix in lieu of executing the bond.

(45) In ***Yan Hao*** versus ***State of Telangana***, (Criminal Petition No. 1966 of 2021, decided on 23.3.2021), Telangana High Court permitted a Chinese national to furnish two cash sureties of Rs.10,000/- each apart from a personal bond amount of similar amount.

(46) In ***David Morrison*** versus ***State of Uttarakhand***[24]

[24] 2021 (1) Crimes 230,

Uttarakhand High Court permitted to deposit the cash amount.

(47) 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 depositing a sum of money or Government promissory notes 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 rider to furnish local surety is tended to defeat the very order of bail. [Srinjay Kumar Singh v. State of Nagaland, 2007(32) R.C.R.(Criminal) 516, Para 4].

(c) The discretionary power exercised by the Magistrate or the Court, as the case may be, under sections 441 CrPC, 1973 and 445 CrPC, is mutually exclusive and not concurrent. [Endua @ Manoj Moharana v. State, 2018(72) Orissa Cri. R.611, Para 9].

(d) 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].

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

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

(g) 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 VenkataramaKotaiyah, 1968 CrLJ 696, Para 4].

(h) 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].

(i) Cash deposit instead 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 a certain amount with or without surety or sureties of the like amount. [Gokul Das v. The State of Assam, 1981 CrLJ 229, Para 14].

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

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

(l) The foreign national accused who cannot furnish a local surety is not debarred from being admitted to bail. [Shokhista v. State, 2005 LawSuit (Del) 1316, Para 5].

(m) 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:

(48) In ***Sajal Kumar Mitra*** versus ***State of Maharastra***[25] 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.

(49) There is an absence of comprehensive data demonstrating the role of sureties in bringing the accused to justice. It is also true that the purpose of a cash bond is not to enrich the State's coffers but to secure the accused's presence. Mere recovery of surety amount by way of penalty is not equivalent of producing the accused to face trial.

(50) S. 445 CrPC mandates an accused to execute bonds by

[25] 2011 CrLJ 2744

officers and Courts, with or without sureties. An officer directs an accused to execute bonds only when the Court issues Bailable Warrants or when such officer arrests an accused in a bailable offence, orarrests in a non-bailable offence and when such an accused is armed with an order of anticipatory bail. Section 445 CrPC further provides that Court or such officer may permit the accused to deposit a sum of money or Government promissory notes of such amount, instead of executing such bond. Thus, for S. 445 CrPC, the Legislature does not distinguish Officers from Courts.

(51) Fixed deposit or electronic transfer, or creating a lien over the bank account, in place of cash or sureties is likely to improve the possibility of the accused's attendance because they would be aware that their money is safe and accruing interest. They would also keep in mind that failure to appear shall lead to the forfeiture of the money. It is further likely to motivate them not to default even once. In contrast, the risk of losing money handed over by cash to stock sureties is enormous. There is hardly any assurance or likelihood of the refund of money taken by a stock surety.

(52) In appeals and revisions, the higher Courts ask a convict or an accused to furnish bonds under sections 389, 390, and 397 CrPC. The provisions contained in Chapter XXXIII of CrPC apply to all bails and bonds. Thus, S. 445 CrPC applies to all bails, including those granted under sections 389, 390, 397, 436, 437, 438, and 439 CrPC. The similarity between Sections 436 to 439 of the CrPC is that all these relate to bails, be it by an officer empowered to release on bail in bailable offences or release under bails granted by Courts. Furthermore, S. 445 CrPC provides for the deposit of a sum of money or Government promissory notes in all bonds except the case of a bond for good behaviour.

(53) The pragmatic approach is that while granting bail with sureties, the “Court” and the “Arresting Officer” should give a choice to the accused to either furnish surety bonds or to handover a fixed deposit, or direct electronic money transfer where such facility is available, or creating a lien over his bank account. The accused should also have a further option to switch between the modes. The option lies with the accused to choose between the sureties and deposits and not with the Court or the arresting officer.

(54) Given above, the applicant shall be released on bail in the

case mentioned above, subject to his furnishing a personal bond of Rs. Rs. One Lac (INR 1,00,000/-),, and furnishing of two sureties of Rs. Five lacs each (INR 5,00,000/-), to the satisfaction of the concerned Trial Court/Duty Magistrate. Before accepting the sureties, such Court must satisfy that in case the accused fails to appear in Court, then such sureties are capable toproduce the accused before the Court, keeping in mind the Jurisprudence behind the sureties, which is to secure the presence of the accused.

(55) In the alternative, the petitioner may furnish a personal bond of Rs. One Lac (INR 1,00,000/-), and hand over to the attesting Magistrate, a fixed deposit(s) for Rs. One Lac only (INR 1,00,000/-), made in favour of Chief Judicial Magistrate of the concerned district. Such Fixed deposits may be made from any of the banks where the stake of the State is more than 50%, or any of the well-established and stable private banks, with the clause of automatic renewal of principal, and the interest reverting to the linkedaccount.

(56) Such a fixed deposit need not necessarily be made from the account of the applicant. If such a fixed deposit is made in physical form, i.e., on paper, then the originalreceipt shall be handed over to the concerned Court. If made online, then its printout, attested by any Advocate, and if possible, countersigned by the accused, shall be filed, and the depositor shall get the online liquidation disabled. The applicant or his Advocate shall inform at the earliest to the concerned branch of the bank, that it has been tendered as surety. Such information be sent either by e-mail or by post/courier, about the fixed deposit, whether made on paper or in any other mode, along with its number as well as FIR number. After that, the applicant shall hand over such proof along with endorsement to the concerned Court. It shall be total discretion of the applicant to choose between surety bonds and fixed deposits. It shall also be open for the applicant to apply for substitution of fixed deposit with surety bonds and vice-versa. Subject to theproceedings under S. 446 CrPC, if any, the entire amount of fixed deposit, less tax deducted at source, if any, shall be endorsed/returned to the depositor(s). Such Court shall have a lien over the deposits up to the expiry of the period mentioned under S. 437-A CrPC, 1973, or until discharged by substitution as the case may be.

(57) The attesting officer shall, on the reverse page of personal bonds, mention the permanent address of the applicant along with the

phone number(s), WhatsApp number (if any), e-mail (if any), and details of personal bank account(s) (if available), and in case of any change, the Applicant shall immediately and not later than 30 days from such modification, intimate about the change of residential address and change of phone numbers, WhatsApp number, e-mail accounts, to the Registry of this Court.

(58) The furnishing of the personal bonds shall be deemed acceptance of the all stipulations, terms and conditions of this bail order.

(59) Given the nature of the offence, the applicant shall surrender all weapons, firearms, ammunition, if any, along with the arms license to the concerned authority within ten days of release from prison and inform the Investigator about the compliance. However, subject to the Indian Arms Act, 1959, the applicant shall be entitled to renew and take it back in case of acquittal in this case.

(60) Within ten days of release from prison, the applicant shall procure a smartphone and inform its IMEI number and other details to the SHO/I.O. of the Police station mentioned before. The applicant shall always keep the phone location/GPS on the "ON" mode. Whenever the Investigating officer asks to share the location, the applicant shall immediately do so. The petitioner shall neither clear the location history, WhatsApp chats, calls nor format the phone without permission of the concerned SHO/I.O.

(61) During the appeal's pendency, if the petitioner repeats or commits any offence where the sentence prescribed is more than seven years or violates any condition as stipulated in this order, it shall always be permissible to the respondent to apply for cancellation of this order of suspension of sentence.

(62) Any Advocate for the petitioner and the Officer in whose presence the petitioner puts signatures on personal bonds shall explain all conditions of this bail order in any language that the petitioner understands.

(63) 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.

(64) There would be no need for a certified copy of this order for furnishing bonds, and any Advocate for the Petitioner can download this order along with case status from the official web page of this Court and attest it to be a true copy. In case the attesting officer wants to verify the authenticity, such an officer can also verify its authenticity and may download and use the downloaded copy for attesting bonds.

(65) The application stands allowed in the terms mentioned above.

Sanjeev Sharma, Editor ILR