**IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA**

**Criminal Appeal No. 9 of 2026**

**Date of Decision: 20.3.2026**

Hitesh Kumar .…….Appellant

Versus

State of Himachal Pradesh … Respondent

Coram:
**Hon'ble Mr. Justice Sandeep Sharma, Judge.**
Whether approved for reporting?

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|---|---|
| **For the Appellant:** | Mr. Jagmohan Sharma, Advocate. Vice Mr. Kush Sharma, Advocate. |
| **For the Respondent**: | Mr. Rajan Kahol & Mr. Vishal Panwar, Additional Advocates General and Mr. Ravi Chauhan & Mr. Anish Banshtu, Deputy Advocates General. |

**Sandeep Sharma, Judge**(oral):

**Cr.MP(M) No. 2466 of 2024**

For the reasons stated in the application, this Court is convinced and satisfied that delay in maintaining the accompanying appeal is neither intentional nor willful, rather same has occurred on account of circumstances, which were completely beyond the control of the applicant, as such, delay, if any, occurred in filing the accompanying appeal, is condoned. The application is disposed of.

**Cr.Appeal No. 9 of 2026**

Be registered.

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By way of instant criminal appeal, challenge has been laid to order dated 1. 7.2023, passed by learned Additional Judge Rohru, District Shimla, Himachal Pradesh, in Cr.MP No. 246 of 2021 titled as ***State of H.P. Versus Hitesh Kumar (surety)***, whereby penalty to the tune of Rs.1,00,000/- has been imposed upon the appellant on account of his failure to cause presence of the accused in the aforesaid sessions trial. ,

**2.** Precisely, the facts of the case, as emerge from the record, are that at the time of enlarging the accused on bail in the trial, appellant stood surety to the accused named herein above and since appellant failed to cause presence of the accused during the pendency of the trial, court below held him guilty in the proceedings under Section 446 Cr.PC initiated against him and accordingly, imposed penalty to the tune of Rs. 1,00,000/- and issued warrant of recovery to the Collector returnable for 16.8.2023. In the aforesaid background, appellant has approached this Court in the instant proceedings, praying therein to set-aside aforesaid order imposing penalty or reduce the penalty while exercising power under Section 446 of Cr.PC.

**3.** Having heard learned counsel for the parties and perused material available on record, this court though finds no illegality in the impugned order dated 1.7.2023, because in the event of non-appearance of the accused in trial, it was the duty of the surety

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(appellant) to cause presence of the accused. In case surety of the accused fails to cause his presence, surety amount mentioned in the surety bonds is liable to be recovered from him. Since in the case at hand, appellant furnished surety in the sum of Rs.1,00,000/- at the time of enlargement of accused on bail and he failed to cause his presence during trial, learned court below had no option but to initiate proceedings under Section 446 Cr.P.C against the surety /appellant.

**4.** Question, which now remains to be considered is, 'whether this court can reduce the amount of penalty imposed by learned court below or not?

**5.** Before finding answer to the same, Section 446(iii) Cr.P.C, may be taken note of, which reads as under:

> "446. Procedure when bond has been forfeited.
> (1) Where a bond under this Code is for appearance, or for production of property, before a Court and it is proved to the satisfaction of that Court, or of any Court to which the case has subsequently been transferred, that the bond has been forfeited, or where, in respect of any other bond under this Code, it is proved to the satisfaction of the Court by which the bond was taken, or of any Court to which the case has subsequently been transferred, or of the Court of any Magistrate of the first class, that the bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. Explanation.- A condition in a bond for appearance, or for production of property, before a Court shall be construed as including a condition for appearance, or as the case may be,

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for production of property, before any Court to which the case may subsequently be transferred.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same as if such penalty were a fine imposed by it under this Code. 1 provided that where such penalty is not paid and cannot be recovered in the manner aforesaid, the person so bound as surety shall be liable, by order of the Court ordering the recovery of the penalty, to imprisonment in civil jail for a term which may extend to six months.]

(3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(4) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(5) Where any person who has furnished security under section 106 or section 117 or section 360 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 448, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and,; if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved."

**6.** Section 446 Cr.P.C, clearly empowers a court to, at its discretion, remit any portion of penalty in peculiar facts and circumstances of the case.

**7.** In the case at hand, court below directed the appellant to deposit sum of Rs.1,00,000/- as penalty, which appears to be on higher side, especially when it clearly emerges from the record that

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during the pendency of the trial, he was not aware of passing of such order.

**8.** Careful perusal of S.446 (i) Cr.P.C reveals that it is in two part, first part deals with the forfeiture of bond and second part, with payment of penalty. After having forfeited bonds furnished by an accused or a surety, court can either impose penalty of entire surety amount or it may be decided by the court after hearing the surety. In the case at hand, it has been averred on behalf of the appellant/surety, that he is not in a position to pay entire amount of surety bond i.e. Rs. 1,00,000/- and in the event of his being compelled to do so, he may have to sell his property as a consequence of which the entire family of surety would be ruined.

**9.** Otherwise also, while passing order with regard to imposition of penalty, for not causing appearance of the accused, crucial issue is to find out whether the accused had failed to appear for genuine and justifiable reason and also whether the sureties were at fault in not securing attendance of the accused. All the attending circumstances are to be taken into consideration by court, while imposing the penalty consequent upon forfeiture.

**10.** Since in the case at hand, appellant made sincere efforts to cause presence of the accused in the trial, and on account of order of imposition of penalty by learned court below, serious prejudice may

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be caused to him and his family, learned court below while imposing penalty, ought to have been little considerate/lenient. Reliance is placed upon judgment passed by Kerala High Court in **Jameela Khader** v. **State of Kerala**, 2004 Crl. L.J. 3389, wherein, it has been held as under:

> "7. As mentioned earlier, the petitioners were directed to show cause why penalty should not be imposed on them for their failure to produce the accused before the Court on the date fixed for hearing. Su-section (2) of Section 446 provides that if the sureties do not show sufficient cause and they do not pay the penalty imposed on them, the Court may proceed to recover the same as though it is a fine imposed by the Court under the Code. If recovery becomes impossible, the sureties are liable to suffer imprisonment in civil jail for a term which may extend to six months.
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> 8. There is no dispute that sub-Section (3) of Section 446 empowers the Court to use its discretion to remit any portion of the penalty and enforce payment of only part of the penalty. Clause 3 of Section 446 reads as hereunder:¬
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> "3) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in party only."
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> It is true that the above provision does not specify at what state the Court can remit the penalty. But the preceding clause make it clear that the Court can impose penalty only after recording proof of forfeiture and after issuing show cause notice.
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> 9. The short question are:
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> (1) Can the Court which forfeits the bond of the surety remit or order part payment of the penalty after imposing such penalty?
>
> (2) Can the Criminal Court reopen or review its earlier order of imposition of penalty to invoke the power of discretion as provided under Sub-Section (3) of Section 446?."
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> 10. On a perusal of the provisions in Section 446, it is evident that a bond which has been executed either for appearance of accused or production of property shall be forfeited the moment it is proved that a condition in the bond has been violated. For instance, if the accused fails to appear on the day on which he has been directed to appear, the Magistrate is empowered to forfeit the bond of the accused as well as that of the sureties forthwith. Of course, the Court must be satisfied that the condition in the bond has been violated. Thus it can be seen that the power vested with the Court to forfeit the bond is unfettered. However, clause (1) of Section 446 provides that the Court shall record the grounds of proof of forfeiture. Thereafter the Court may call upon any person bound by such bond to pay the penalty or to show cause why it should not be paid. Thus clause (1) of Section 446 clearly indicates that the forfeiture of a bond for breach of any of the conditions is almost an

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inevitable or automatic consequence. It is then for the surety to explain the reasons for the breach. Clause (2) of Section 446 stipulates that if sufficient cause is not shown and the penalty is not paid the Court may proceed to recover it. The proviso to clause (2) deals with the consequences of failure to pay the penalty. The person who is bound as surety is liable to suffer imprisonment in civil jail if he fails to pay the penalty imposed.

11. A reading of the above two clauses of Section 446 clearly shows that forfeiture of the bond and payment of penalty would follow as a natural consequence for breach of any of the conditions of the bond. The quantum of penalty may be the entire amount covered under the bond or it may be as decided by the Court after hearing the surety. It is provided in clause (1) that "the Court may call upon any person bound by such bond to pay the penalty thereof or to show cause why it should not be paid" (emphasis supplied). Nevertheless, the Court can exonerate the surety from payment of penalty, if it is satisfied that there are valid reasons for the failure to produce the accused or the property. The Court can exercise its discretion in the matter after hearing the surety. The court can remit any portion of the penalty and direct the surety to pay only a portion thereof."

12. But incidentally, it may be noticed that by the subsequent introduction of Section 446-A in the Code, the situation is slightly different. If the bond is executed for appearance of an accused and the bond is cancelled due to his failure to appear, then the court can forfeit the bond. His release can be ordered "upon the execution of a fresh personal bond.....with one or more of such sureties". No penalty is envisaged under Section 446-A. More importantly the provisions contained in Section 446-A are "without prejudice to the provisions of Section 446".

13. However, the question that has arisen in this case is at what stage the court can use its discretion to remit a portion of the penalty if the bond is cancelled under Section 446. Evidently the court which forfeits the bond has to necessarily consider all facts and circumstances before imposing the penalty. There may be situations where the accused might have been prevented from appearance in Court due to valid reasons beyond his control. Instances may be numerous and variegated depending on factual situations which cannot be enumerated. But the crucial issue is to find out whether the accused had failed to appear before the Court for genuine and justifiable reasons and also whether the sureties were at fault in failing to procure the attendance of the accused. All the attendant circumstances have to be considered by the Court while imposing the penalty consequent on the forfeiture. Question of remission of penalty or enforcement of payment only in part is also to be considered at that stage. In my view, the discretion has to be exercised at the time when the penalty is imposed and not at any later stage. In that view of the matter, the order impugned cannot be faulted.

14. But learned counsel for the petitioners submits that the Court can exercise the power of discretion at any stage. He places reliance on a few reported decisions in support of his contention.

15. In Balraj S. Kapoor v. State of Bombay, AIR 1954 Bombay 365, it was held that the Court can remit a portion of the penalty invoking its discretionary power under Section 514(5) of 1898 Code (Section 446(3) of the 1973 Code) even at a subsequent stage.

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16. In Sualal Mushilal v. State, AIR 1954 M.P. 231, it was held that the power to remit a portion of the penalty in exercise of its power under Clause (5) of Section 514 of the 1898 Code (corresponding to Section 446(3) of 1973 Code) could be exercised so long as the payment of any portion of the penalty remains unenforced. Though the circumstances which justify remission of a portion of the penalty have to be considered by the Court before it proceeds to consider the answer of the surety to the show cause notice, still the Court could remit any portion of the penalty if such circumstances occur subsequent to the order of recovery so long as the amount was not totally recovered.

17. In Moola Ram v. State of Rajasthan, 1982 Crl.L.J. 2333, the High Court of Rajasthan held as follows:

> "Even after passing the final order forfeiting the bond for appearance in Court and for recovery of the whole amount of penalty under the bond, the Court under Section 446(3) can remit any portion of the penalty so long as the amount is not totally recovered. There is nothing in Section 446(3) to show that an order remitting any portion of the penalty and enforcing payment of part thereof can be passed by the Court only at the time it passed the final order directing forfeiture of the bond and realisation of the amount thereof as penalty."

In the above decision the learned Single Judge had followed Balraj Kapoor's case and Sualal Mushilal's case mentioned supra.

18. Sri. Mohammed Anzar, learned counsel for the petitioners submits that judicial precedents mentioned above are unanimous in the view that the court which imposes the penalty after forfeiture of the bond can remit the penalty or direct that only a portion thereof be paid. This can be done even at a subsequent stage. But I find it difficult to agree with the above proposition.

19. In **Balraj Kapoor's** case (supra), the learned Judge of the Bombay High Court had observed that:

> "..... it seems to me that the better View is that the Court is called upon to require the surety to pay the amount of the penalty or to remit a portion of the penalty as soon as the bond is forfeited. It is at that stage that the Court is called upon to consider the question as to whether the entire amount of the penalty should be ordered to be paid or only a portion of the amount should be ordered to be paid.....

The question whether the discretion is to be exercised at a subsequent stage or at the stage when the Court calls upon the surety to pay the amount of the penalty is, I think, not free from difficulty. It is, I think, possible to take the view that the Court may, in its discretion, remit a portion of the penalty and enforce payment in part only even at a subsequent stage. But I would prefer to say that the Court can insist upon the payment of the entire amount of the penalty or may make an order remitting a portion of the penalty as soon as the bond is forfeited and the Court is called upon to apply its mind to the matter....."

20. I am inclined to agree with the above observation in the judgment, though it was ultimately held by the learned Judge that the Court can remit the penalty even at a subsequent stage.

21. There is yet another reason to take the above view. A criminal Court does not have the power to review or re-open its own order. In this

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> case the order that was passed imposing a penalty of Rs. 5,000/- each had become final. Therefore, the Court could not have reopened or reviewed its own earlier order as requested by the petitioners.
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> 22. However, the discretion vested in the Court by virtue of Clause (3) of Section 446 can be exercised by the appellate or revisional court if the order is challenged as provided under the Code. The appellate or revisional Court, as the case may be, can always consider, even at a later stage, whether there are circumstances warranting remission of penalty.
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> 23. It is contended by the learned Public Prosecutor that in the case on hand, the petitioners had a remedy to challenge the impugned order before the Sessions Court by filing an appeal. It is contended that this petition under Section 482 of the Code cannot be entertained since the petitioners had not resorted to the remedy available to them. It is true that an appeal is provided under Section 449 of the Code which enables the aggrieved party to file an appeal against "all orders passed under Section 446". If the impugned order is passed by a Magistrate, an appeal shall lie to the Sessions Court. In the case of an order made by a Court of Sessions, an appeal lies before the High Court. Therefore there is force in the contention of the learned Public Prosecutor that the petitioners are not without any remedy as provided under the Code.
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> 24. But in the peculiar facts and circumstances of this case, I am not inclined to direct the petitioners to approach the Appellate Court. This Court can always consider the question whether an order passed by the inferior court is just or legal. If there is any illegality or irregularity, this Court can always interfere in order to meet the ends of justice.

**11.** Co-ordinate Bench of this court in similar facts and circumstances also remitted portion of penalty imposed by learned court below in Cr. Appeal No. 221 of 2021 titled **Ram Singh** v. **State of Himachal Pradesh**, decided on 18.11.2021, observing as under:

> "Prima facie, this Court does not find any infirmity with the order passed by learned Court below because when the appellant stood surety for the accused and thereafter accused did not appear in the Court of law to face the trial, but natural, the appellant has to face the consequences. However, during the course of arguments this fact has gone un-rebutted that the appellant is poor person and he had made sincere effort to locate the whereabouts of the accused and as such, the amount of penalty imposed upon the appellant can be said to be on higher side."

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**12.** Consequently in view of detailed discussion made herein above and the law taken into consideration, this court, is of the view that the discretion vests in this court, under S.446 (iii) Cr.P.C, to remit the penalty. Since in the instant case, appellant/surety is not a man of sufficient means, quantum of penalty imposed by learned court below while forfeiting sureties exercising power under S.446 Cr.P.C, deserves to be modified.

**13.** Accordingly, the present appeal is allowed and order dated 1.7.2023, passed by learned Additional Judge Rohru, District Shimla, Himachal Pradesh, in Cr.MP No. 246 of 2021, is modified to the extent that the appellant/surety shall pay penalty of Rs.10,000/- only, which shall be deposited within two months with the learned trial Court, from the date of passing of this order.

The appeal stands accordingly disposed of, alongwith all pending applications, if any.

**(Sandeep Sharma),**
**Judge**

March 20, 2026
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