

F.R.

# IN THE HIGH COURT OF SIKKIM

## CRIMINAL REVISION PETITION NO.17 OF 2003

Smt. Kanta Theeng  
Resident of Upper Sichey  
Gangtok, East District,  
Sikkim.

... **Petitioner/  
Surety.**

### **Versus**

The State of Sikkim  
(service through Ld. Public  
Prosecutor, Sikkim High Court). ... **Respondent.**

**Coram: Hon'ble Mr. Justice N. S. Singh, Judge.**

Present : Shri D.K. Singh, Advocate for the petitioner.

Shri N.B. Khatiwada, Public Prosecutor  
assisted by Shri J.B. Pradhan, Addl. Public  
Prosecutor for the State-respondent.

**Date of Judgment : 08.12.2003.**

## **J U D G M E N T**

**SINGH, J.**

The order dated 29<sup>th</sup> May 2003 passed by the learned Sessions Judge, East & North at Gangtok in Criminal Appeal No.14 of 2003 dismissing the appeal of the present petitioner, Smt. Kanta Theeng and affirming the orders dated 19<sup>th</sup> March 2003 and 20<sup>th</sup> March 2003 passed by the learned Chief Judicial Magistrate, East & North at Gangtok in

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Criminal Case No.63 of 2002 is the subject matter under challenge in this revision petition.

**2.** The facts of the case, in a short compass, are as follows: -

The present petitioner, Smt. Kanta Theeng stood surety for the accused Subhash Chandra Bhakta in connection with Singtam P.S. Case No. 5(3)2001 under Sections 170/384/34 of the Indian Penal Code in terms of the related order dated 23<sup>rd</sup> March 2001 passed by the learned Sessions Judge, East & North at Gangtok in Criminal Misc. Case No.36 of 2001 and in that regard, the present petitioner, Smt. Kanta Theeng executed a surety bond for a sum of Rs.20,000/- on 23<sup>rd</sup> March 2001 before the learned Sessions Judge, East & North at Gangtok. The case was tried by the learned Chief Judicial Magistrate, East & North at Gangtok and on 19<sup>th</sup> March, 2003, the accused Subhash Chandra Bhakta was absent in the Court without showing any cause for which the learned Chief Judicial Magistrate, East & North at Gangtok issued Non-Bailable Warrant of Arrest against the accused and also show-cause notice to the present petitioner for her appearance on

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20<sup>th</sup> March 2003. However, the accused Subhash Chandra Bhakta appeared before the learned Chief Judicial Magistrate, East & North at Gangtok on that day, i.e. 19<sup>th</sup> March 2003 at 3:30 p.m. and the accused was remanded to judicial custody till 20<sup>th</sup> March 2003 and further directed the sureties including the present petitioner, Smt. Kanta Theeng to file show-cause by 20<sup>th</sup> March 2003 and accordingly, the present petitioner submitted the show-cause by contending, inter alia, that the petitioner does not reside/live in close proximity of the accused Subhash Chandra Bhakta and was out of touch and apart from that the petitioner is in extreme financial difficulty as she is the only earning member of the family and, she be excused from being penalised. But the learned Chief Judicial Magistrate, East & North at Gangtok was of the view that the grounds assigned by the accused in his show-cause are not satisfactory and accordingly, the same stands rejected and directed the sureties including the present petitioner, Smt. Kanta Theeng to deposit the forfeited bail bond amount of Rs.20,000/- and accordingly, the petitioner deposited the forfeited bail bond amount on 21<sup>st</sup> March 2003. Being dissatisfied with the order dated 19<sup>th</sup> March 2003 and 20<sup>th</sup> March 2003 passed by

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the learned Chief Judicial Magistrate, East & North at Gangtok, the present petitioner preferred an appeal before the learned Sessions Judge, East & North at Gangtok under Criminal Appeal No.14 of 2003 which was also rejected by the learned Sessions Judge, East & North at Gangtok. Being aggrieved by the impugned order dated 29<sup>th</sup> May 2003 passed by the learned Sessions Judge, East & North at Gangtok in connection with the criminal appeal, the present petitioner filed this revision petition.

**3.** The present petitioner, Smt. Kanta Theeng questioned the validity of the impugned order dated 29<sup>th</sup> May 2003 with the following grounds: -

“ I : FOR THAT the Learned District and Sessions Judge erred in law in failing to appreciate that the order of forfeiture of the Surety Bond was per se illegal because the Accused had already appeared and surrendered and was already in Judicial Custody when the impugned Order of forfeiture of Surety Bond was passed.

II : FOR THAT the Learned Sessions Judge erred in law in failing to appreciate that the earlier Order dated 20.3.2003 was for appearance of the Surety only.

III : FOR THAT the Learned District and Sessions Judge may kindly have taken

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into judicial consideration that there was no delay caused to the Judicial proceeding and that the Accused persons have since been acquitted.

IV : FOR THAT the Learned District and Sessions Judge erred in law in failing to take into judicial consideration the principles of law laid down by the Hon'ble Supreme Court in A.I.R. 2000 S.C. P/6 in its application to the facts of the present case.

V : FOR THAT the Learned District and Sessions Judge may kindly have tempered the hard rigours of the law with a quality of mercy. ”

4. Supporting the case of the petitioner, Mr. D. K. Singh, learned counsel contended that both the learned Courts below misappreciated and misconceived the provisions of law laid down under Section 446 of the Cr.P.C. while passing the impugned orders inasmuch as the learned Courts below failed to consider the real facts and circumstances of the case while passing the impugned orders. It is not the case of absconding of the accused person, Shri Subhash Chandra Bhakta inasmuch as on the said day when the learned Chief Judicial Magistrate, East & North at Gangtok issued Non-Bailable Warrant of Arrest against the accused Subhash Chandra Bhakta, the accused himself appeared at 3:30 p.m. on that day, but the learned Chief Judicial Magistrate, East & North at Gangtok was of the view that it

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was a willful disobedience of the orders of the Court and it may be right or wrong that the accused was remanded to judicial custody, but it caused a great prejudice to the present petitioner, Smt. Kanta Theeng, the surety who has been served a short show-cause notice and directed to deposit the forfeited bail bond amount of Rs.20,000/- on the same day, i.e. on 20<sup>th</sup> March 2003, Mr. D. K. Singh argued.

**5.** Heard also Mr. N. B. Khatiwada, learned Public Prosecutor who, in his usual frankness submitted that an appropriate Order be passed from the end of this Court.

**6.** Before entering into other merit of the case in depth this Court requires to see and examine the nature of the bond/bail bond/surety bond executed by the accused Subhash Chandra Bhakta and the present petitioner, Smt. Kanta Theeng for just determination of the real points in controversies between the parties. I have perused the original bonds executed by the accused as well as by the present petitioner in the Court of the learned Chief Judicial Magistrate, East & North at Gangtok in connection with the case. For better appreciation in the matter, the bond and bail

N. B. Khatiwada

bond/~~and~~ the surety bond executed by the accused and the present petitioner are reproduced as hereunder: -

“ IN THE COURT OF

**BOND AND BAIL BOND**

(Before a Magistrate)

I Subash Chandra Bhakta S/o B. D. Bhakta of Krishi Bhawan Area, Tadong being brought before a Magistrate of \_\_\_\_\_ and required to security for my attendance in his Court, do bind myself to attend the Court mentioned above on every day of the hearing fixed in the case and in case of my making default therein, I bind myself to forfeit to the Government the sum of Rs.20,000/- (Rupees Twenty thousand ) only.

Date this 23<sup>rd</sup> day of March 2001

Sd/-  
(Signature)

**BAIL BOND**

I Mrs. Kanta Thing d/o Shri D. B. Lama working in IPR Deptt., Govt. of Sikkim, Gangtok of Upper Sichey, Gangtok hereby declare myself (or we jointly and severally declare ourselves) surety for the said \_\_\_\_\_ that he shall attend at the Court of \_\_\_\_\_ on every day of the hearing fixed in the case against him and in case of his making default therein, I bind myself (or we bind our selves) to forfeit to the Government of Sikkim the sum of Rs.20,000/- (Rupees Twenty thousand ) only.

Date this 23<sup>rd</sup> day of March 2001

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Sd/-  
(Signature of Surety) ”

7. A bare perusal of the nature of the bonds executed by both the accused and surety, particularly, the bail bond/surety bond shows that there is no whisper in the said bonds to the effect that in which Court or Magistrate, the accused is to appear on everyday of hearing fixed in the case as well as that of undertaking made by the present petitioner to the effect that the accused Subhash Chandra Bhakta is to attend such Court? It may be mentioned that no fresh bond and the bail bond were executed either by the accused or by the present petitioner/surety in the Court of the Chief Judicial Magistrate (E & N), Gangtok in connection with the related case. In my considered view, both the learned Courts below had lost the sight of these irregularities and omissions appearing in the related bonds as discussed above while passing the impugned orders. On this ground alone, these impugned orders deserve to be quashed.

8. On further perusal of the impugned orders dated 19<sup>th</sup> March 2003 and 20<sup>th</sup> March 2003 passed by the learned Chief Judicial Magistrate, East & North at Gangtok, it

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appears to me that the learned Chief Judicial Magistrate did not pass any order pertaining to the forfeiture of the bail bond/surety bond executed by the present petitioner, Smt. Kanta Theeng in the present case. It is well settled that when the bond has been forfeited by a speaking and reason order of the Court concerned, the Court may call upon any person bound by such bond to pay the penalty thereof or to show cause why the forfeited bond amount should not be paid. In the instant case, the bond executed by the present petitioner/surety has not been forfeited except the order of show cause notice to her and the direction to deposit the forfeited bail bond amount of Rs.20,000/-. In my considered view, the mandatory provision of Section 446 of the Cr.P.C. was overlooked by both the learned Courts below while passing the impugned orders. Apart from that it is noteworthy to opine that the said bond executed by the present petitioner, Smt. Kanta Theeng is not executable in the eye of law as highlighted above. It is on record that the accused Subhash Chandra Bhakta for whom the present petitioner executed the surety bond was acquitted under the related judgment dated 19<sup>th</sup> March 2003 passed by the learned Chief Judicial Magistrate, East & North at Gangtok in Criminal Case No.63 of 2002.

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9. According to me, in terms of the provisions of Section 446 of the Cr.P.C.; before issuance of show cause notice to the person-surety, the Magistrate is to satisfy himself that there is a prima-facie material for such forfeiture of bond and, before forfeiture and issue of distress warrant, an opportunity should be given to the person-surety. In other words, two ingredients are to be fulfilled, the first one is the proof that the bond has been forfeited and record of the grounds of proof and, second step is calling upon the person-surety to pay penalty or to show cause as to why necessary orders should not be passed in terms of the related bond(s) and the reasons for that satisfaction must be recorded in writing. This is the real legal meaning and the procedure to be followed by a competent Court/Magistrate in terms of the provisions of law laid down under Section 446 of the Cr.P.C. But, in the instant case, both the learned Courts below lost the sight of these legal procedures while passing the impugned orders.

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10. For the reasons, discussions and observations made above, I am of the view that the petitioner could make out a case to justify interference of the impugned order dated 29<sup>th</sup> May 2003 passed by the learned ~~District and~~ Sessions

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Judge, East & North at Gangtok in Criminal Appeal No.14 of 2003 and the orders dated 19<sup>th</sup> March 2003 and 20<sup>th</sup> March 2003 passed by the learned Chief Judicial Magistrate, East & North at Gangtok in Criminal Case No.63 of 2002.

**11.** In the result, the present revision petition is allowed, thus setting aside the impugned orders passed by both the learned Courts below with a direction to the learned Chief Judicial Magistrate, East & North at Gangtok to refund the forfeited surety bond amount of Rs.20,000/- to the present petitioner as early as possible preferably within 3 weeks from the date of receipt of this Judgment and Order. No order as to costs.

**12.** The Registry is directed to transmit the related case records to the concerned Courts below along with copies of this judgment.

N. S. Singh

( N. S. Singh )  
Judge  
08-12-2003