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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CRL.M.C. 3172/2009 and Crl.M.A. No. 10658/2009 (stay)

RAM PRATAP BARASIA Petitioner
Through: Mr. S.C. Aggarwala, Adv.
versus

M/S INDO RAMA SYNTHETICS (INDIA) LTD. Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE V.K. JAIN

1. Whether the Reporters of local papers
may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be
reported in the Digest? Yes

% **ORDER**
03.11.2009

Judgment (ORAL)

This is a petition under Section 482 of the Code of Criminal Procedure for quashing the complaint filed against him by the respondent under Section 138 of Negotiable Instruments Act or to allow his statement under Section 313 Cr.P.C. to be recorded through his son and attorney Sh.Sushil Kumar Barasia.

2. It has been stated in para 7 of the petition that petitioner is aged about 90 years is totally a blind person besides being a resident of Calcutta, and therefore, is not in a position to attend the Court at Delhi.

Medical papers of the petitioner have been filed as Annexure 'B' to the petition.

3. No one has appeared for the respondent despite service of notice of the petition upon the respondent for 24th September, 2009. The notice bears the stamp of the respondent company besides signatures of the receiving official dated 21st September, 2009. Since the respondent has not come forward to contest the petition, there is no reason for not accepting the averments made in the petition.

4. In *Chandu Lal Chandraker v. Puran Mal & Anr.*, 1988 (Supp) SCC 570, the Trial Court rejected the request of appellant/accused to record his statement through his counsel. The order of the Trial Court was challenged by him in the High Court. On rejection of his petition by the High Court, he came to Supreme Court by way of a Special Leave. His counsel before the Hon'ble Supreme Court stated on instructions that the appellant did not want to answer any of the questions which were going to be put to him by the Trial Court under Section 313 Cr.P.C. and further stated that he will not raise the question of prejudice, if any, caused to him on account of his non-examination at subsequent stage of the trial, in appeal or revision. In view of the statement, the Hon'ble Supreme Court set aside the order of the Trial Court directing personal appearance of the appellant.

5. In *Delhi Development Authority v. Amarjit Singh*, 1985 *Criminal Law Journal* 154, a Division Bench of this Court held that in an

appropriate case, an accused, who has been exempted from personal appearance, can be examined through his counsel.

6. In *Basavaraj R. Patil and others v. State of Karnataka and others*, AIR 2000 Supreme Court 3214, the accused were facing trial for the offences punishable under Sections 3 and 4 of Dowry Prohibition Act and Section 498-A of Indian Penal Code. An application was filed by their counsel in the Trial Court for dispensing with questioning of accused No.1 and accused No. 4 on the ground that one was in America and the other was a student studying in Gadag. On that application, physical appearance of accused Nos. 1 and 4 was dispensed with and their counsel was given opportunity to make statements on their behalf. The prosecution resulted in acquittal of all the accused. On a revision petition being filed before the High Court, the learned Single Judge took the view that the Trial Court had no discretion to dispense with the examination of the accused. The order of acquittal was, therefore, set aside with the direction for fresh decision after examination of those accused whose statements had not been recorded. During the course of the decision, the Hon'ble Supreme Court *inter alia* observed as under:-

"21. However, if remaining present involves undue hardship and large expense, could the Court the Court not alleviate the difficulties. If the Court holds the view that the situation in which he made such a plea is genuine, should the Court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in Court. If

there are other accused in the same case, and the Court has already completed their questioning,

should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the Court personally and answer the Court questions? Why should a criminal Court be rendered helpless in such a situation?

24. We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in Clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How this could be achieved?

25. If the accused (who is already exempted from personally appearing in the Court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters: (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers, (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during

such questioning, (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

26. If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire [as a matter of precaution the Court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for answers]. If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning."

7. Therefore, it cannot be said that in every case, it is obligatory for the Court to procure personal appearance of the accused in the Court to record his statement under Section 313 Cr.P.C. Let us take a situation where the accused is totally immobile and is not in a position even to move from his bed or a case where the physical condition of the accused on account of some serious ailment is such that he cannot personally be present except at the cost of endangering his life. Can it be said that even in such a situation, the Court must insist upon physical presence of the accused in the Court for recording his statement? The answer obviously has to be in negative. The purpose of recording statement of an accused is to draw his attention to every

inculpatory material so as to enable him to explain it. The provision is, therefore, mainly intended to benefit the accused though examination of the accused also helps the Court in coming to a just and appropriate conclusion. It is the accused who can complain of prejudice to him on account of his having not been given an opportunity to explain the circumstances that appear against him in evidence.

8. Therefore, in a given case if the accused himself comes to the Court with a plea that insisting upon his personal presence would, instead of being beneficial to him, was likely to result into his disadvantage and causing serious hardship and inconvenience to him, it is open to the Court, in an appropriate case, to evolve a methodology which, while avoiding the inconvenience and prejudice that shall be caused to the accused in attending the Court, would adequately serve the purpose behind recording his statement under Section 313 Cr.P.C.

9. Since the petitioner is an old man, aged about 90 years, residing in Calcutta and is stated to be bed ridden and totally blind, this is an appropriate case where his statement under Section 313 Cr.P.C. should be allowed to be recorded through his son and attorney Sh.Sushil Kumar Barasia who also is a co-accused with him.

10. Though in case of *Basavaraj R. Patil (supra)*, the Hon'ble Supreme Court did not direct recording of statement of accused through his counsel or attorney and rather directed supply of questionnaire to his Advocate for being answered by the accused,

under his signature, it is not necessary to adopt the same course of action in every case in which such a prayer is made by the accused. The mechanism, to be evolved in a particular case, has to be decided taking into consideration the facts of the case, including the nature of the offences alleged to have been committed by the accused and the circumstances which are preventing him from attending the Court except at the cost of serious hardship and inconvenience to him. As noted earlier, a Division Bench of this Court has already held that an accused in a summons case, which has been exempted from personal appearance, can be examined through his counsel. If the accused can be examined through his counsel, there is no reason why he cannot be allowed through his attorney, particularly when the attorney happens to be his son and co-accused, who is fully posted with the facts of the case.

11. Hence, it is directed that statement of petitioner under Section 313 Cr.P.C. shall be recorded through his son and attorney Sh.Sushil Kumar Barasia subject to the conditions that (i) a Special Power of Attorney shall be filed by the petitioner before the Trial Court stating therein that his son and attorney Sh.Sushil Kumar Barasia is fully posted with the facts relating to this complaint case, authorizing him to answer questions on his behalf under Section 313 Cr.P.C. and agreeing to remain bound by the answers given by his attorney on his behalf;

(ii) The petitioner shall file an undertaking stating therein that no

prejudice would be caused to him in any manner by dispensing with his personal appearance during questioning under Section 313 Cr.P.C. nor would he raise any grievance on that account either before the Trial Court or before a higher Court in any proceedings.

Crl. M.C. No. 3172/2009 and Crl.M.A.No.10658/2009 stand disposed of.

V.K. JAIN, J

NOVEMBER 03, 2009
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