

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

+ **CRL. M.C. 2116/2010**

% Reserved on: 24th February, 2011

Decided on: 15th March, 2011

UNITED PHOSPHORUS LTD. Petitioner

Through: Mr. Rajeev K. Virmani, Sr.
Advocate with Mr. Rajeev M.
Roy & Ms. Monika Hooda,
Advocates

versus

SUNITA NARAIN & ANR Respondents

Through: Mr. Raghenth Basant, Advocate
Mr. Pawan Bahl, APP for the
State.

Coram:
HON'BLE MS. JUSTICE MUKTA GUPTA

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

MUKTA GUPTA, J.

1. A complaint was filed by the Petitioner against the Respondent Nos. 1 and 2 and two others *inter alia* alleging false and defamatory imputation made and published intentionally to harm the reputation of the Petitioner. On the

said criminal Complaint No. 1811/1996, the learned trial court took cognizance and exempted the Respondent No.1 from personal appearance during the trial. When the matter was fixed for examination of the Respondent No.1, an application was filed by her for exemption from personal appearance for the purpose of examination under Section 313 Cr.P.C. and allowing her examination under Section 313 Cr.P.C. in writing in response to a questionnaire provided by the Hon'ble Court. By the said application, the Applicant/Respondent No.1 had stated that she was a Director of the Respondent No.2 and the publisher of a fortnightly magazine namely "Down to Earth" an active participant, nationally and internationally, in civil society through her work due to which she has extensive time consuming professional commitments and that no prejudice would be caused to the Applicant by dispensing with her personal appearance before the Hon'ble Court for the purpose of examination and that she undertakes that she would not raise any grievance at any stage of the case in relation to the examination procedure prayed for. On the said application, the learned trial court passed the impugned order dated 3rd June, 2010 exempting the Respondent No.1 from personal appearance before the Court and permitting the filing of written statement by her in terms of sub-Section (5) of Section 313 Cr.P.C. as sufficient compliance of Section 313 Cr.P.C.

2. The grievance of the Petitioner/Complainant is that the Respondent No.1 cannot be granted exemption from personal appearance for recording of her statement under Section 313 Cr.P.C. merely on the ground that she is a high-profile social activist and is busy in her commitments. The learned trial court failed to exercise judicious discretion and granted her exemption from personal appearance as a matter of routine. Moreover, the exemption granted was not for the entire trial as the order clearly granted exemption to the Respondent No.1 from personal appearance till further orders. The exemption from personal appearance granted during the trial does not permit the Court to *ipso facto* grant exemption from appearance for recording of the statement under Section 313(1)(b) Cr.P.C. While exercising the discretion, the Court ought to have spelt out the reasons for exercise of the said discretion even though the conditions precedent as envisaged in the said Section were not satisfied. By this method, the explanation given by Respondent No.1 would have evolved out of legal advice and would be thus prejudicial to the Petitioner. The learned trial Judge has proceeded on the premise that in view of Section 313(5) Cr.P.C., he was obliged to permit the exemption of Respondent No.1 from personal appearance. This interpretation adhered to by the learned trial court for Section 313(5) Cr.P.C. is impermissible. As per the learned trial court's interpretation, once the proviso to Section 313(1)(b)

comes into play, then sub-Section (5) also comes into play. The interpretation rendered by the learned trial court to sub-Section (5) has rendered the word 'shall' in Section 313(1)(b) otiose. Reliance is placed on *Keya Mukheree vs. Magma Leasing Limited & Anr.*, 2008(8) SCC 447, to contend that only in cases of undue hardships and involving large expense, the Court can permit examination by way of written statement to alleviate the difficulties of the accused. The justifying exigencies have been duly described by the Hon'ble Supreme Court and the case of the Petitioner does not fall within the said ambit. It is, thus, prayed that the impugned order be set aside.

3. Learned counsel for the Respondent on the contrary contends that at the stage of examination of the accused under Section 313 Cr.P.C., the issue is between the Court and the accused. The present petition is filed by the Complainant who has no *locus standi* as no prejudice is caused to him if the explanation of the Respondent is given by way of a written statement. By this way if at all any right is affected, it is the right of the Respondent as an accused and prejudice, if any, is caused to the Respondent. No right of the Complainant is prejudiced. The contentions raised and the grounds urged by the Petitioner are contrary to the provision of Section 313(5) Cr.P.C. and by this petition, the Petitioner actually lays a challenge to the vires of Section

313(5) Cr.P.C. which is not permissible in the present petition. Sub-Section (5) to Section 313 Cr.P.C. was introduced by way of an amendment with effect from 31st December, 2009. This provision was introduced to obviate any hardship faced by the accused. The Hon'ble Supreme Court in *Basavaraj R. Patil & Ors vs. State of Karnataka & Ors., 2000 (8) SCC 740* recognized and accepted the hardship caused to the accused which has been followed in *Keya Mukherjee (supra)*. It is stated that by introducing Sub-Section (5) of Section 313 Cr.P.C. the legislature has given statutory recognition to the right of the accused to give explanation by a written statement. Sub-Section (5) to Section 313 Cr.P.C. is not limited in its application to proviso to 313(1)(b) Cr.P.C. In the application filed, the Respondent/Applicant had complied with the mandate of the Hon'ble Supreme Court laid down in *Basavaraj R. Patil & Ors (supra)*. If the contention of the Petitioner is to be accepted then the very intention and purpose of introducing sub-Section (5) to Section 313 Cr.P.C by way of an amendment is negated. Even before the amendment, the Hon'ble Supreme Court in *Basavaraj R. Patil (supra)* has held that a humanistic approach should be followed. The fundamental objection of the Petitioner to allow the Respondent/accused to file a written statement is misconceived as the same was permitted even before the amendment by virtue of Sections 233(2) and 243(1) Cr.P.C. Once the Respondent/Applicant has given an

undertaking that it would not raise any plea of prejudice by this method, no prejudice is caused to the Petitioner/Complainant and thus, the interference under Section 482 Cr.P.C. by this Court is unwarranted.

4. I have heard learned counsels for the parties. Section 313 Cr.P.C. provides: -

“Power to examine the accused – (i) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court –

(a) May at any stage, without previously warning the accused put such questions to him as the Court considers necessary;

(b) Shall after the witnesses for the prosecution have been examined and before he is called on for his defence question him generally on the case.

Provided that in a summon-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause(b)

(2).....

(3).....

(4).....

(5) The Court may take help of Prosecutor and Defence Counsel in preparing relevant questions which are to be put to the accused and the Court may permit filing of written statement by the accused as sufficient compliance of this Section”.

5. Sub-Section (5) was introduced in Section 313 Cr.P.C. by Code of Criminal Procedure(Amendment) Act,2008 with effect from 31st December,

2009. The purpose behind the said amendment was to give statutory recognition to the procedure facilitating the examination of the accused. The Law Commission in its 154th report in 1996 while evaluating the purpose of Section 313 of the Code reiterated the need for this provision as a valuable safeguard to the accused in the trial processes and observed:

“We are of the view that the Court can take the assistance of the prosecutor and defence counsel and prepare the questions which are to be put in a concise form to the accused under Section 313. The Court can also permit the filing of the written statements by the accused as sufficient compliance with Section 313.

6. This statutory recognition of the accused to file a written statement has also been provided for in warrant cases in Sections 233(2) and 243(1) Cr.P.C., which read as under:

233. “Entering upon defence: (2) If the accused puts in any written statement, the Judge shall file it with the record”.

243. Evidence for defence: (1) The accused shall then be called upon to enter upon his defence and produce his evidence; and if the accused puts in any written statement, the Magistrate shall file it with the record.

7. In *Basavaraj R. Patil(supra)* followed in *Keya Mukharjee(supra)* the hon’ble Supreme Court held:

“17. The above approach shows that some dilution of the rigour of the provision can be made even in the light of a contention raised

by the accused that non-questioning him on a vital circumstance by the trial court has caused prejudice to him. The explanation offered by the counsel of the accused at the appellate stage was held to be a sufficient substitute for the answers given by the accused himself.

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is "for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him". In Jai Dev v. State of Punjab MANU/SC/0134/1962 : [1963]3SCR489 Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus:

"The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to inquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word "may" in Clause (a) of Sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under Clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a

circumstance about which the accused was not asked to explain cannot be used against him.

21. But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could 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?

22. The one category of offences which is specifically exempted from the rigour of Section 313(1)(b) of the Code is "summons cases". It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a "summons case". Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty. Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences. Even in cases involving less serious offences, can not the court extend a helping hand to an accused who is placed in a predicament deserving such a help?

23. Section 243(1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the

court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide Section 247). Even the accused involved in offences exclusively triable by the Court of Session can also exercise such a right to put in written statements (Section 233(2) of the Code). It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth.

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 could this 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 an answer.) 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.

27. In our opinion, if the above course is adopted in exceptional exigency it would not violate the legislative intent envisaged in Section 313 of the Code.

8. In the complaint filed by the Petitioner, the Respondents are facing trial for offences punishable under Section 500, 501 and 502 IPC which are summons trial cases. As per the proviso to sub-Section (1) of Section 313 CPC, in a summons case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under

clause (b). It would be highly irrational to hold that in a summons case on one hand the Magistrate has the power even to dispense with the statement under Section 313 Cr.P.C. and on the other the statement can only be recorded only if the accused is personally present. In *Basavaraj R.Patil(supra)* the Hon'ble Supreme Court was dealing with a warrants case trial in which the objection of the Complainant to the exemption of the accused for personal presence for examination under Section 313 of the Code through the Advocate was upheld by the High Court in an appeal against acquittal. Their Lordships while dealing with the issue held that no criminal court can be rendered absolutely powerless to deal with a situation like this i.e. if the accused is in a far away country and has to incur whopping expenditure and undertake a tedious long journey for answering the Court question, he can be allowed to answer the question through the counsel. The exigencies noted by their Lordships could only be illustrative and not exhaustive.

9. The contention of the learned counsel for the Petitioner that by the interpretation rendered by the learned trial court the word 'shall' in Section 313(1)(b) has been rendered otiose is meritless. As held in *Basavaraj R.Patil(supra)* 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 the works to his prejudice and disadvantage, the Court should in appropriate cases relieve him of such hardship and at the same time adopt a measure to comply with the requirements under Section 313 in a substantial manner. The mandate in clause (b) to Sec. 313(1) is for taking the explanation of the accused and not for his personal presence. Section 313 of the Code embodies the principle of *audi alteram partem* and was enacted for the benefit of the accused. A beneficial provision for the accused, even if capable of two interpretations, then the one favouring the accused should be preferred.

10. The contention of the Petitioner that Respondent No.1 would in view of her exemption from personal appearance, be able to give her explanation on the basis of legal advice and would be thus prejudicial to the Petitioner is misconceived. Section 233(2) and 243(1) of the Code enables the accused in trial of a warrants case to tender a written statement. Sub-Section (5) of Section 313 of the Code is a further statutory recognition to the right of the accused to file a written statement already permitted under Sections 233(2) and 243(1) Cr.P.C. There is no bar in the Code that the said written statements permitted to be filed cannot be on the basis of legal advice. Moreover, Section 313 was enacted for the benefit of the accused i.e., for affording him

the opportunity to explain the circumstances appearing in evidence against him. Its non-compliance can be objected to only by the accused as prejudice if any, is caused to him. The Petitioner cannot be permitted to complain of any alleged prejudice as appearance or non-appearance for examination of the accused under Section 313 in no way adversely affects the Petitioner. The Court at this stage has to see the prejudice, if any, caused to the accused. The Respondent No.1 has stated that she has professional constraints coupled with the fact that she has given an assurance that no prejudice would be caused to her and that she would not raise any grievance on account of her exemption from personal appearance for her examination under Section 313 of the Code, thus, the order of the learned trial court in allowing the Respondent No.1 to be examined by way of written statement suffers from no illegality.

11. The interference by the Court under Section 482 of the Code is unwarranted in the present petition. Section 482 of the Code warrants the exercise of the inherent jurisdiction to give effect to an order under the Code or to prevent abuse of process of Court or otherwise to secure the ends of justice. It is to be exercised *ex debito justitiae* i.e. to do substantial justice. The power under the section, though wide, has to be exercised sparingly, carefully, with caution and only when such exercise is justified by the

parameters laid down as was held by the Hon'ble Supreme Court in *CBI vs. Ravi Shankar Srivastava*, 2006 CrL. L.J. 4050. The grant of exemption from personal appearance is an interlocutory order and interference by the Court with such an order in exercise of jurisdiction under Section 482 of the Code has to be done in exceptional circumstances. As held by their Lordships while dealing with warrant case that the requirement of personal presence in the Court to answer the questions would be the general rule however if the exigencies so demand the Court may grant exemption from personal appearance. The present case is a summons trial case, wherein the Court can even exempt the examination under Section 313 of the Code, thus to hold that no exemption from personal appearance be granted for giving an explanation under the Section would be contrary to the spirit of the Section.

12. I find no merit in the present petition. The same is, accordingly, dismissed.

(MUKTA GUPTA)
JUDGE

MARCH 15, 2011
dk