

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.37058 of 2012

Arising Out of PS.Case No. -2340 Year- 2010 Thana -null District- PATNA

- =====
1. Anand Swarup Agrawal @ Bada Saheb S/O Late Ram Swaroop Agrawal
 2. Vishal Swarup Agrawal S/O Sri Anand Swarup Agarwal
 3. Akhilesh Kumar Trivedi
- All resident of Water Works Road, Fish Nagar, Lucknow, (U.P.)

.... Petitioner/s

Versus

1. The State Of Bihar
2. Sri Birendra Kumar S/O Late Pravendra kumar, Prop. Of M/s Synerjy, Ashirwad Apartment Lane near Abdul Hai Complex, Exhibition Road, P.S.- Kotwali, District- Patna.

.... Opposite Party/s

=====

Appearance :

For the Petitioner/s : Mr. N. K. Agrawal, Sr. Adv.
Mr. Anujit Sinha, Adv.

For the Opposite Party/s : Mr. Satyanand Shukla, APP

=====

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

ORAL JUDGMENT

Date: 19-01-2015

By the present application filed under section 482 of the Code of Criminal Procedure, the petitioners seek setting aside of the order dated 27th July, 2012 passed by the learned Judicial Magistrate 1st Class, Patna in Complaint Case No. 2340(C) of 2010, whereby an application filed under section 205 of the Code of Criminal Procedure (hereinafter referred to as 'the Code') for exemption from personal appearance of the petitioners has been rejected.

Mr. N. K. Agrawal, learned senior counsel appearing on behalf of the petitioners has submitted that the learned Magistrate has erred in law while passing the impugned order. The petitioners are



officers of a Company incorporated under the Indian Companies Act, 1956. They are busy businessmen. They reside at a far off place in Lucknow (U.P.) The case is not of serious nature and it would be extremely difficult for them to appear in person on each and every date in course of trial. He has further submitted that on a careful perusal of the allegations made in the complaint, it would appear that the ingredients of the offences for which cognizance has been taken are not attracted. The dispute between the parties is purely of civil nature and the complainant ought to have filed a civil suit for recovery of the amount in question. He has submitted that the criminal prosecution of the petitioners is malicious in nature and has been brought to tarnish the image of the petitioners. It has also been submitted that the learned Magistrate has failed to consider that the prosecution is only at the stage of issuance of summons and not at the stage of trial. Learned Magistrate has also failed to appreciate the judgments of the Hon'ble Supreme Court in the case of Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. & Ors. [(2001)7 SCC 401] and S.V. Mazumdar & Ors. Vs. Gujarat State Fertilizer Co. Ltd. & Anr. [(2005)4 SCC 173].

On the other hand, learned counsel for the State has contested the matter. He has justified the order passed by the learned Magistrate. He has submitted that the power conferred on the



Magistrate under section 205 of the Code is discretionary one and no one can claim exemption from personal appearance as a matter of right. He has submitted that the learned Magistrate has taken cognizance of the offences punishable under sections 406 and 420 of the Indian Penal Code and there is allegation against the petitioners that they had cheated the complainant. He has further submitted that while rejecting the application filed on behalf of the petitioners, learned Magistrate has observed that in case of exigency the petitioners may file an application under section 317 of the Code for their exemption from appearance in court.

Regard being had to the rival submissions made on behalf of the parties, I think it appropriate to take into consideration section 205 of the Code, which reads as under :-

“205. Magistrate may dispense with personal attendance of accused.-

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.”

A bare perusal of section 205 of the Code would make it clear that while considering an application under section 205 of the Code, the learned Magistrate has a discretion under this section that he

may dispense with the personal attendance of the accused bearing in mind the nature of case as also conduct of the person summoned.

In Bhaskar Industries Ltd. (Supra), the Hon'ble Supreme Court observed as follows :-

“17. Thus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

18. A question could legitimately be asked — what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not cooperate in proceeding with the case? We may point out that the legislature has taken care of such eventualities. Section 205(2) says that the Magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of Section 317(1) confers a discretion on the Magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such

attendance.

19. The position, therefore, boils down to this: it is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations on him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the Magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a Magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the Magistrate can consider all aspects and pass appropriate orders thereon before proceeding further.”

In S.V. Mazumdar (Supra), the Hon’ble Supreme Court observed as under :-

“13. It has to be borne in mind that while dealing with an application in terms of Section 205 of the Code, the court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence. We make it clear that if at any stage the trial court comes to the conclusion that the accused persons are trying to delay the completion of trial, it shall be free to refuse the prayer for dispensing with personal attendance.”



In view of the law laid down by the Hon'ble Supreme Court, it is clear that in appropriate cases the learned Magistrate can dispense with the personal attendance of the accused provided he is represented by a counsel in that case and he gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case and he has no objection in taking evidence in his absence. The learned magistrate has also to bear in mind the nature of the case as also the conduct of the person summoned. The court may also impose conditions to secure the presence of the accused as and when required.

In the present complaint case, the learned Magistrate has taken cognizance of the offences punishable under sections 406 and 420 of the Indian Penal Code. According to the prosecution case, the complainant had business relationship with M/s Swarup Chemicals Private Limited, a company incorporated under the Indian Companies Act, 1956 of which the accused persons are officers and employees. In course of business transaction petitioner no.1 Anand Swarup Agrawal @ Bada Saheb is said to have remitted a demand draft of Rs.67,500/- to the complainant against the goods supplied to the Company. However, on presentation before the Bank, the demand draft in question was dishonoured because of "Stop Payment" instructions issued to the Bank. The complainant alleges that he has been cheated

by the accused persons with malafide intention.

Upon issuance of summons, the petitioners filed an application under section 205 of the Code seeking their exemption from personal attendance on the following grounds :-

- (i) That the offences alleged are not made out;
- (ii) That the dispute, if any, between the parties is of civil nature;
- (iii) That in any view of the matter, the offence is not of serious nature;
- (iv) That the petitioners being officers of the Company are busy in their business activities and they have to travel all around the country in order to promote the business of the Company; and
- (v) That the petitioners reside at Lucknow in Uttar Pradesh and it would be extremely difficult for them to attend the court on each and every date.

It is pertinent to note here that the learned Magistrate rejected the prayer of the petitioners on the ground that if there would be difficulty in appearance of the accused persons, their personal appearance may be dispensed with under section 317 of the Code.

As noted above, there is no iota of doubt in my mind that the exemption from personal appearance under section 205 of the Code



cannot be claimed as a matter of right but while dealing with an application for exemption the discretion of the court has to be exercised judiciously. In view of the provisions of section 205 of the Code as well as the law laid down by the Hon'ble Supreme Court, as noted above, while dealing with an application under section 205 of the Code, the approach of the court should be to see whether the personal appearance of the accused persons is necessary for disposal of the case. If personal appearance of the accused is not necessary for disposal of the case, it should not be insisted upon. If no purpose is to be served by personal appearance in a case of petty nature, then it would not be proper for the court to insist on personal appearance of the accused.

Admittedly in the present case, the accused persons are officers of the Company in question and it is also admitted fact that they are resident of Lucknow, which is at a distance of about 500 kms from Patna. In the statement made on solemn affirmation, the complainant has replied in answer to the court's question that he had business dealings with the Company in question since last three years and he had received all the payments due in past. The dispute is in respect of only one transaction in which demand draft of Rs.67,500/- has been dishonoured due to 'Stop Payment' instructions.

Without making any comment on the merits of the case, it can be said that certainly the offence alleged is not very serious in



nature. I am of the view that there is no impediment for the trial court to continue with the trial in the present case in absence of the accused persons because if they are exempted on their own application under section 205 of the Code then the evidence recorded in presence of their lawyer and in their absence cannot be challenged as wrongly recorded.

Learned Magistrate has erred in law in holding that in case of difficulty the petitioners may seek exemption from personal appearance under section 317 of the Code. The provisions of section 205 and 317 of the Code are separate and distinct. Section 205 of the Code gives a discretion to the court to exempt a person from personal appearance till such time his personal appearance is necessary for trial whereas section 317 of the Code provides that on any particular date on which an accused is required to be present in person and is unable to attend the court, he may seek exemption from personal appearance for that particular day.

In view of the observations made herein above, the impugned order dated 27th July, 2012 is set aside. The prayer made by the petitioners for exemption from their personal appearance in the court in terms of section 205 of the Code is allowed subject to the condition they give an undertaking on oath to the satisfaction of the learned Magistrate to the following effect :-

- (i) That they would not dispute their identity as a

particular accused in the case;

(ii) That a counsel on their behalf would be present in court on each and every date fixed by the court; and

(iii) That they would raise no objection at any stage in taking evidence in their absence.

It is, however, made clear that if at any stage the learned Magistrate deems the personal attendance of the petitioners to be necessary, she can, in her discretion, direct the personal attendance of the petitioners in terms of section 205(2) of the Code. She can even resort to other steps for enforcing such attendance.

(Ashwani Kumar Singh, J)

Pradeep/-

U		T	
---	--	---	--