

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MRS. JUSTICE MARY JOSEPH

FRIDAY, THE 30TH DAY OF OCTOBER 2015/8TH KARTHIKA, 1937

Cr1.MC.No. 1798 of 2013 ()

AGAINST THE ORDER IN SC 1075/2007 of ADDITIONAL DISTRICT COURT Fast
Track 1, TRIVANDRUM

PETITIONER(S)/PETITIONER/2ND ACCUSED:

SAJEEV
S/O.MOHANAN NAIR, T.C.10/950,
KANJIRAMPARA WARD
MANNAMMOOLA, PEROORKADA VILLAGE.

BY ADVS.M/S.SASTHAMANGALAM S. AJITHKUMAR & V.S.THOSHIN

RESPONDENT(S)/RESPONDENT/COMPLAINANT:

THE STATE OF KERALA,
REPRESENTED BY THE C.I. OF POLICE,
PEROORKADA POLICE STATION, THIRUVANANTHAPURAM.

BY PUBLIC PROSECUTOR SMT.MADHUBEN.

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 30-10-2015,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

Cr1.MC.No. 1798 of 2013 ()

APPENDIX

PETITIONER(S) ' EXHIBITS

ANNEXURE-A: CARBON COPY OF THE ORDER DATED 22/04/2013 IN
CRL.M.P.1383/2013 IN S.C.NO.1075 OF 2007.

/TRUE COPY/

P.S. TO JUDGE.

s1.

'C.R'

MARY JOSEPH, J.

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Crl. M.C No.1798 of 2013

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Dated this the 30th day of October, 2015

ORDER

1.The sole question arises for consideration in this petition filed under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'Cr.P.C', for short) is:

Whether the presence of the accused is mandatory for the examination contemplated under Section 313(1)(b) Cr.P.C?

2.The person who has raised this question before this court is the 2nd accused in S.C No.1075/2007. According to him, an application moved by him as Crl.M.P No.1383/2013 after the closure of the prosecution evidence for getting exempted from being personally present for examination under Section 313(1)(b) Cr.P.C was dismissed by the Additional District and Session's Judge, Thiruvananthapuram on 22.04.2013 and therefore, he was aggrieved.

3. The allegation against the petitioner was that he along with the 3rd accused in the case has sold the dinner sets stolen by the 1st accused on 23.06.1999 from the Kowdiar Palace to multiple persons, during the course of his employment there as a store-keeper.
4. The trial in the case was commenced and the examination of the prosecution witnesses was concluded. The case was posted for examination of the accused under Section 313(1)(b) Cr.P.C.
5. The petitioner at the relevant time being employed at Qatar filed Crl.M.P No.1383/2013 supported by his affidavit stating the reason and prayed to exempt him from being personally present for examination under Section 313(1)(b)Cr.P.C and permit his counsel to answer the questions to be put to him on his behalf.
6. The petition was dismissed and the case was posted to 27.04.2013 for pursuing with the examination under Section 313(1)(b) Cr.P.C. Before the Sessions Court, the petitioner, placing reliance upon the dictum laid down by the Apex Court in Basavaraj R. Pattil v. State of Karnataka reported in 2000 KHC 814 S.C (A.I.R. 2000 S.C. 3214) and the dictum of this court in Shaji v. State of Kerala (2005 KHC 799) urged that the Session's Judge has ample power to grant the

exemption to the accused from being personally present to face the examination contemplated under Section 313(1)(b) Cr.P.C and allow his counsel to answer the question. But, the learned Session's Judge dismissed the application and thereby declined his prayer for exemption from personal appearance. In the said circumstances, this application under Section 482 Cr.P.C has come up with the prayer to quash the order dated 22.04.2013 in Crl.M.P No.1383/2013 in S.C No.1075/2007 and to permit his counsel to answer the questions that would be put to him during the examination under Section 313(1)(b) Cr.P.C by the Additional District and Session's Judge, Thiruvananthapuram.

7. Per contra, learned Public Prosecutor had placed reliance upon the dictum in *Anbazzhakan v. Superintendent of Police* reported in 2004 S.C 524, and urged that this court has no jurisdiction in a session's trial case to exempt personal appearance of the accused during examination under Section 313(1)(b) Cr.P.C and allow his counsel to answer questions intended to be answered by the accused himself.
8. After hearing the rival contentions of the counsel on the issue and upon paying heed to the judgments relied upon by them and the

law on the point, the learned Session's Judge found that neither the statutory provisions nor the judge made laws cited by counsel would help the petitioner in his quest for exemption from the examination contemplated under Section 313(1)(b) Cr.P.C.

9. The learned Session's Judge's view on the matter is described in paragraph 5 and 6 of the impugned order and that is worthy of noting hereunder:

“I have gone through the above three decisions and also the provision of law. It is true that the proviso to Sec.313(1) Cr.P.C would enable the court to dispense with the presence of the accused but it is applicable only in summons trial cases. The provisions of law would not allow the Sessions Court to dispense with the presence of the accused when the case is posted for questioning u/s.313 Cr.P.C. The accused was also not under permanent personal exemption as provided under the said proviso.

In view of the dictum laid down in Anbazhakan Vs. Superintendent of Police the earlier dictum laid down by the Hon'ble Supreme Court in Basavaraj R.Pattil Vs State of Karnataka and the subsequent decision rendered by the Hon'ble High Court in Shaji Vs. State of Kerala basing on the Basavaraj R.Pattil's case is not applicable. Furthermore in view of the nature and volume of evidence available on record, answer and

the explanation of the petitioner/2nd accused is highly necessary and indispensable.”

10.The law on the point as contained in Section 313 Cr.P.C is reproduced hereunder for easy reference.

“313. Power to examine the accused.–

(1) 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 summons–case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b).

(2) No oath shall be administered to the accused when he is examined under sub–section(1).

(3) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them.

(4) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in

evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(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.”

11. In the case on hand, the petitioner seeks for exempting him from being personally present in the court to answer the questions proposed to be put by the court with reference to the incriminating materials brought in evidence during trial by the prosecution. For that, he has filed Crl.M.P No.1383/2013 before the Court of Session concerned. The reason for seeking exemption as revealed from the facts sworn to in the affidavit supporting the petition was his urgency to return to Gulf country to join his job. It is submitted across the bar by the learned counsel that the petitioner was personally present before the court during trial for the purpose of identification of his person by the witnesses to the Seizure Mahazar prepared while seizing the stolen dinner sets. According to the learned counsel, if the accused is not permitted to join his workplace at Gulf within the time framework allowed by his employer he must

lost his job and be put to undue hardships.

12.It is pertinent to notice from Section 313 Cr.P.C that the wordings are clear and devoid of any ambiguity. The word 'may' used in Clause (a) of Section 313(1) envisages a situation wherein the court is empowered to question the accused at any stage of the enquiry or trial, if it feels necessary, or in other words the examination contemplated thereunder is a matter left to the discretion of the court. Whereas Clause (b) obliges the court to question the accused before he enters into defence on any circumstances appearing against him in the prosecution evidence. Therefore, the examination of the accused under Section 313(1)(b) Cr.P.C. is no doubt mandatory.

13. I have gone through the impugned order passed by the Additional District & Session's Judge, Thiruvananthapuram. It is disclosed therefrom that the attention of the court was drawn by either parties to various precedents on the point in issue laid down by the Apex Court and this Court. The learned counsel for the petitioner/2nd accused had addressed the Session's Judge placing reliance upon Basavaraj R.Pattil v. State of Karnataka (2000 K.H.C. 814 S.C.) and

Shaji v. State of Kerala (2005 K.H.C. 799) that the court has got ample power to grant exemption to the accused and to allow his counsel to answer the questions to be put under Section 313(1)(b) Cr.P.C. Per contra, the learned Public Prosecutor has argued on the basis of the dictum laid down by the Apex Court in Anbazhagan v. Superintendent of Police (A.I.R 2004 S.C. 524) that the court has no authority in a Sessions trial case to exempt personal attendance of the accused at the stage of examination under Section 313(1)(b) Cr.P.C. and allow his counsel to answer the questions intended to be answered by the accused himself.

14. Upon hearing the rival arguments of the counsel as aforesaid and applying his mind after analyzing the ratios of the cases to which his attention was drawn, the learned Session's Judge has opined that the court has no authority to dispense with the personal presence of the accused in the case in question.

15. Accordingly, the petition filed by the 2nd accused seeking to exempt him from being personally present for answering questions under Section 313(1)(b) Cr.P.C. and allow his counsel to answer the questions on his behalf was dismissed. The learned Session's

Judge's reasoning while disallowing the prayer of the petitioner is reproduced hereunder for convenient reference:

"I have gone through the above three decisions and also the provision of law. It is true that the proviso to Section 313(1) Cr.P.C. would enable the court to dispense with the presence of the accused but it is applicable only in summons trial cases. The provisions of law would not allow the Sessions court to dispense with the presence of the accused when the case is posted for questioning under Section 313(1)(b) Cr.P.C. The accused was also not under permanent personal exemption as provided under the said proviso.

In view of the dictum laid down in *Anbazhagan v. Superintendent of Police*, the earlier dictum laid down by the Hon'ble Supreme Court in *Basavaraj R.Pattil v. State of Karnataka* and the subsequent decision rendered by the Hon'ble High Court in *Shaji v. State of Kerala* basing on the *Basavaraj R.Pattil's* case is not applicable. Further more in view of the nature and volume of evidence available on record, answer and the explanation of the petitioner/2nd accused is highly necessary and indispensable."

16.The reasoning of the learned Session's Judge for arriving at a finding as to disentitlement of the accused for raising such a claim are quadrifoliate as follows:

(1) That exemption from personal appearance during examination under Section 313(1)(b) Cr.P.C can only be availed by accused in summons trial cases and the authority is vested only in courts dealing with such cases and the court in seizin of the case on hand being Sessions Court, is devoid of jurisdiction to deal with.

(2) The accused in the case on hand was not under permanent personal exemption.

(3) In view of Ambazhagan's case (supra) the earlier dictum of Apex Court in Basavaraj and the decision of this court in Shaji v. State of Kerala has become inapplicable.

(4) In view of the nature and volume of evidence available on record in the case on hand, personal explanation by the accused himself is highly necessary and dispensable.

17.The tenability of the reasons can be looked into one by one.

Sub-section (1) of Section 313 starts with the words "in every inquiry or trial". The words 'accused' and 'court' are used in general form without any qualification being attached thereto. Distinction is also not made with respect to the nature and the quantum of evidence on record. Therefore, the plausible conclusion drawn therefrom was that an accused facing inquiry or trial is entitled to explain personally the circumstances appearing in the evidence against him. By virtue of clause (b) of sub-section (1) of Section 313, the Code (Cr.P.C.) makes it obligatory on the court to question the accused generally on the case. Therefore, Section 313(1)(b) Cr.P.C. confers a right on the accused to explain the circumstances having the tendency to culminate him and a corresponding duty on the court to provide him with such an opportunity. The Section makes provision for application of the same irrespective of the nature of the accusation against him and without

any distinction being drawn with reference to the hierarchy of courts and the large volume of the incriminating evidence let in by the prosecution.

18.The proviso to sub-section (1) carves out an exception when it provides that 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) of sub-section (1) of Section 313 Cr.P.C.

19.Therefore, in a summons trial case as envisaged under Chapter XX Cr.P.C., where the Magistrate has dispensed with the personal presence of the accused during inquiry or trial before it, the Magistrate is also under discretion to waive with the examination contemplated under Section 313 (1)(b) Cr.P.C. Therefore, in a case wherein the accused's non-participation in trial was permitted by Magistrate, he/she is also under discretion to decide whether such an accused needs or not to be examined under Section 313 (1)(b) Cr.P.C. Therefore, the reasoning firstly that only the court dealing with summons cases can dispense with the personal presence of the accused and a Sessions Court has no authority under the aforesaid

proviso to dispense with the presence of the accused is totally erroneous and is untenable. So also, the reasoning secondly and fourthly of the learned Session's Judge (supra) that the accused was not under permanent personal exemption and the large volume of evidence available on record and its nature are also factors decisive for the court while considering an application seeking exemption from personal appearance during examination under Section 313(1)(b) Cr.P.C are untenable, as such a distinction is not available in the provision. Therefore, the said observation of the Session's Judge undoubtedly is an outcome of a pure mis-conception of the spirit underlying in Section 313(1)(b) Cr.P.C.)

20. On an analysis of the various provisions of Cr.P.C., it could be gathered that instances are several wherein the Code permit the accused to appear through his pleader in various court proceedings. The Parliament in its wisdom has codified the criminal procedural law in such a way as to give effect to the constitutionally recognized right of an accused to consult and defend through a counsel of his choice.

21. The Preamble to the Constitution states that people of India have

given the Constitution to themselves to secure to all its citizens justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and fraternity assuring the dignity of the individual. Various Articles are incorporated in the Constitution by its forefathers in such a way that there cannot be a divorce for any of the three concepts, i.e. liberty, equality and fraternity from the other. It is for the purpose of ensuring the triconcepts to all citizens that directions to the Legislatures and the Government in the form of Directive Principles of State Policy are incorporated into the Constitution by its framers. Article 22 guarantees the minimum rights which any person under arrest will enjoy. It ensures four safeguards for an arrested person as follows:-

- (1) He is not to be detained in custody without being informed as soon as may be, the grounds of his arrest.
- (2) He shall not be denied the right to consult, and to be defended by a legal practitioner of

his choice.

(3) A person arrested and detained in custody is to be produced before the nearest Magistrate within a period of twenty four hours of his arrest excluding the time taken for his journey from the place of arrest to the Magistrate's Court. (Article 22(2))

(4) No such person is liable to be detained in custody beyond this period without the authority of a Magistrate. (Article 22(2))

22.Rule (2) of Article 22 postulates that a person arrested on the basis of an accusation should be enabled to defend himself by engaging a legal practitioner of his choice and it is mandatory. A trial will only be unfair, if held without the opportunity to defend through a legal practitioner being provided to an accused .

23.Judiciary is the machinery through which the State works out its Constitutional obligations of impartation of justice to its citizens on the basis of equal opportunity. It is therefore that in Cr.P.C. Section 303 was incorporated recognizing the right of the accused in a

criminal case to be defended by a Pleader of his choice. Therefore, in view of Article 22(2) it has become obligatory on the State to make provision for representation of the accused through a legal practitioner of his choice and that has become fructified when Section 303 was brought within the ambit of Cr.P.C.

24. Section 303 Cr.P.C reads:

“Right of person against whom proceedings are instituted to be defended:-- Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this Code, may of right be defended by a Pleader of his choice.”

25. The Section recognizes the right of any person charged with accusation as to commission of any offence to be defended by a lawyer of his choice. Since taking defence through a Pleader of the accused's choice is recognized as his right, a corresponding duty is also cast upon the court to apprise him that such a legal right is available for him and to see that it was availed by him.

26. Article 39 A obliges the State to secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid by suitable legislation or schemes, or in any other way, to ensure that opportunities for

securing justice are not denied to any citizen by reason of economic or other disabilities. Solely on the reason of the accused being a member of an economically weaker section, he ought not to have been denied with his constitutionally recognized right to consult and defend in view of the right of equality before law and equal protection of law enshrined under Article 14 of the Constitution of India and the right to life guaranteed under Article 21 of the Constitution of India. Article 39A of the Constitution reads:

“39A. Equal justice and free legal aid.– The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.”

27. Section 304 Cr.P.C. is the manifestation of the implementation of the directives aforesaid. Section 304 Cr.P.C makes provision for legal aid to accused at the expense of the State in certain cases:– It reads:

“304. Legal aid to accused at State expense in certain cases.– (1) Where, in a trial before the

Court of Session, the accused is not represented by a pleader, and where it appears to the Court that the accused has no sufficient means to engage a pleader, the Court shall assign a pleader for his defence at the expense of the State.

(2) The High Court may, with the previous approval of the State Government, make rule providing for–

- (a) the mode of selecting pleaders for defence under sub-section(1);
- (b) the facilities to be allowed to such pleaders by the Courts;
- (c) the fee payable to such pleaders by the Government, and generally, for carrying out the purposes of sub-section(1).

(3) The State Government may, by notification, direct that, as from such date as may be specified in the notification, the provisions of sub-sections(1) and (2) shall apply in relation to any class of trials before other Courts in the State as they apply in relation to trials before the

Courts of Session.”

28. In cases triable by Court of Session, where the accused has the financial incapacity to make his defence in trial to be held against him and the court is convinced about that, it shall extend the services of a counsel to him and the expenses shall be met from the State Exchequer in accordance with the rules framed by the High Court of the State concerned with the previous approval of the State Government. The State Government is also conferred with the authority to issue notice directing the extension of the provisions providing the legal aid as contemplated in sub-section (1) & (2) of Section 304 Cr.P.C to any class of trials before other courts in the State in the same manner of its application to trials before the Court of Session.

29. It is in the context that the Apex Court has held in *Khatri v. State of Bihar* (A.I.R. 1981 S.C. 928) ; 1981 Crl.L.J. 970 that;

"The State is under Constitutional obligation to provide free legal services to an indigent accused not only at the stage of the trial but also at the stage when he is first produced before the

Magistrate, as also when he is remanded from time to time".

30.The Apex Court was also conceived of the Constitutional directive to the State to impart legal aid to citizen who is in total economic incapacitation to get legal assistance to fight his case in a court of law when it laid down the dictum in the decision cited supra that,

“The trial will be vitiated when the accused persons are not informed about the free legal assistance and they remain undefended during trial.”

31.Therefore, the court being a functionary of the State through which the Constitutional directives are implemented with to the benefit and welfare of the citizen, should be bound to inform the person devoid of legal assistance on account of his poor financial background and provide him with the required legal services by appointing a counsel having the capacity to defend him satisfactorily.

32.This provision makes it clear that the accused's personal participation in inquiry or trial is absolutely unnecessary and the court cannot act arbitrarily in the matter. The court is free to exercise its discretion in the matter reasonably and based on sound

and just legal principles.

33.The various provisions of Cr.P.C. enabling a counsel to represent an accused in proceedings in a court of law are also required to be dealt with in the context.

34.Section 205 Cr.P.C confers discretionary power on the Magistrate issuing summons on finding satisfactory reasons for doing so after recording it, to dispense with his personal appearance and permit appearance through pleader. The Magistrate permitting such dispensation cannot be said to be left without power to insist for accused's personal presence before the court during inquiry or trial, in view of sub-section (2) of Section 205 Cr.P.C. The Magistrate has the authority not only to direct the accused to be personally present at any stage of the proceedings but also when it feels it expedient, to enforce such attendance in the manner in which attendance is sought to be procured under Section 204 Cr.P.C.

35.The Apex court in TGN Kumar v. State of Kerala (A.I.R 2011 S.C 708) directed the courts vested with the power under Section 205 Cr.P.C to,

“..... examine whether any useful purpose would be

served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence.”

36.The court while exercising the power of dispensation of personal presence of the accused in proceedings of enquiry or trial shall not be lethargic in their approach while dealing with applications incorporating such a prayer, and shall not be too technical or stringent in its view. Rather, its approach should be to see in the light of the attending circumstances to which its attention is drawn, whether, personal attendance is absolutely necessary for the purpose of inquiry or trial in progression before it to proceed with and must be cautious and vigilant to give the reasons while declining such prayer. Therefore, a conjoint reading of sub-sections (1) and (2) of Section 205 Cr.P.C makes the situation convincingly clear that ample discretion is conferred on the Magistrate in the matter of dispensation of personal presence of the accused during inquiry or trial before it and ample power at a later stage to revoke its stand to enforce the accused's attendance through process.

37.What is derivative from the aforesaid discussion was that, a

statutory right is there for the accused to get apprised of his entitlement to be defended in a charge containing an accusation against him through a competent pleader and a statutory duty on the courts in seizin of his case to see that it was availed by him. It is also the duty of the court in case of the accused's economic incapacity to engage a lawyer, to facilitate taking defence through the service of him at the expense of the State. Wide discretion is also conferred by Cr.P.C. on the court dealing with inquiry or trial through various provisions contained in it to dispense with the personal attendance of the accused during the course of various proceedings before it, when the service of a counsel has already been availed on his own or imparted to him by the court at the expense of the State. The courts are under discretion to dispense with the personal attendance of the accused during inquiry or trial when he has already engaged a counsel to represent his cause.

38. Section 233 Cr.P.C provides:

“233(1) Where the accused is not acquitted under Section 232, he shall be called upon to enter on his defence and adduce any evidence

he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.”

39. Therefore, the aforesaid Section makes provision in it for the accused to put his defence in the form of a written statement. It means that the accused can remain absent in the proceeding before the court by causing a written statement containing the defence to be put forth through his counsel.

40. Similarly the Code in Section 243 also makes provision for the accused to put his written version through his counsel. It reads:

41.“243(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.”

42.Likewise, Section 247 of the Code provides a similar opportunity for the accused to enter upon his defence through his pleader. It reads:

“247. The accused shall then be called upon to enter upon his defence and produce his evidence; and the provisions of Section 243 shall apply to the case.”

43.The manner in which evidence is to be recorded in inquiries and trials is dealt with in Chapter XXIII of Cr.P.C. Part A specifically incorporates in it provisions explaining the mode of taking and recording evidence. A look at the various provisions of the Cr.P.C contained in the said chapter is also relevant in the context.

44.Section 273 Cr.P.C requires the evidence in a trial to be taken in the presence of accused unless otherwise expressly provided. It reads:–

“273. Evidence to be taken in presence of accused.–
Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

[Provided that where the evidence of a woman below the age of eighteen years who is alleged to have been subjected to rape or any other sexual offence, is to be recorded, the court may take appropriate measures to ensure that such woman is not confronted by the accused while at the same time ensuring the right of cross-examination of the accused.]”

45. Therefore, it is not a strict rule that evidence in all cases should be taken in the presence of accused. Section 273 is self explanatory by the words in usage therein that "except as otherwise expressly provided" and "when his personal attendance is dispensed with, in the presence of his Pleader". It is clear from the words referred supra that Section 273 makes provision for exemption from personal presence of the accused during trial and recording of evidence in the

presence of his Pleader.

46.The Apex Court in *State of Maharashtra v. Praful v. Desai* (A.I.R 2003 S.C. 2053), while construing the meaning of the word 'presence' in usage in the Section has gone to the extent that it is only constructive presence.

47.Unlike in Civil Cases, a memo of appearance is the document of authorization in criminal cases, empowering a counsel to represent the accused and defend him in the case. There will be a declaration in it that he was instructed by his client (accused) to represent him in a particular criminal proceedings against him. Therefore, by virtue of that, sufficient authority is gained by the counsel to defend the accused adequately and to strive his maximum for his acquittal honestly and sincerely.

48.The circumstances, possibly emanate from the discussion supra on the basis of the several provisions of the Cr.P.C. was that a court shall insist for the personal participation of the accused during any inquiry or trial before it only in unavoidable exigencies. The courts are at liberty to dispense with the personal appearance of the accused in any inquiry or trial, on its own motion or upon motion

being made by an accused, since the Cr.P.C. in itself incorporated provisions which enable the accused to be defended through a pleader.

49. In the backdrop of the above discussion, it is apposite now to have recourse to Section 317 Cr.P.C. which reads:–

“317. Provision for inquiries and trial being held in the absence of accused in certain cases. –

(1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not

represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.”

50.The Section makes it clear that a Magistrate in seizin of a case during conduct of enquiry or trial can act in dual capacity, i.e. either upon a motion being made by the accused to get himself exempted from attending the court or on a motion being initiated suo motu.

51.Therefore, at any stage of an inquiry or trial under the 'Code', a court upon being satisfied that a lawyer is there to defend the accused and that the personal attendance of the accused is absolutely unnecessary for the trial or inquiry to be proceeded with either upon application being made by the accused requesting so or after being convinced of the circumstances and recording his reasons for doing so, suo motu dispense with his personal presence. Likewise, if it appears to the Magistrate that the accused by his presence is causing persistent disturbance to the inquiry or trial and preventing it from being conducted in a smooth manner and the said

accused had the blessings of being represented by a counsel, in the interest of justice after recording its reasons for doing so, dispense with his presence in person to face the trial.

52. Therefore, the provisions cited supra make it clear that it is not mandatory for the accused to be personally present in any inquiry or trial and the court is vested with ample discretion to dispense with his personal presence on being convinced from the reasons shown by the accused applying for exemption. It is obligatory for the courts to analyze and identify the circumstances brought to its notice by the accused to see that by insisting upon his personal participation in any proceeding he would be put to greater disadvantages.

53. The circumstances indicated in the provisions mentioned supra open no vista for the accused to contend at a later stage when ultimately trial turns out to his disfavour that he was prejudicially affected by the trial having been proceeded with by his counsel and out of his presence.

54. It is therefore that it is contemplated in sub-section (2) of Section 317 Cr.P.C as follows:

“(2) If the accused in any such case is not represented by a pleader, or if the Judge or

Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.”

55.In a case wherein, the accused had not engaged a lawyer on his own, it is open to the court if found necessary, to adjourn the inquiry or trial to a future date and to proceed with the inquiry or trial after informing the accused of his right to be defended by a Pleader of his choice under Section 303 of the Code and after getting it accomplished. If the Magistrate or Judge has valid reasons to think from the circumstances before him that in the larger interest of the accused and in the better interest of justice the trial or inquiry is conducive to be held in the presence of the accused, he is empowered to make an order supportive of his own reasons that the inquiry or trial of the accused will be taken up or held separately on procurement of his presence.

56.The examination of the accused under Section 313 Cr.P.C also envisages a stage in the inquiry or trial and in view of Section 317

Cr.P.C the courts are under discretion either to dispense with the personal presence of the accused or to insist for his appearance. The only requirement is that the discretion must be exercised based on sound reasoning and upon satisfaction of mind.

57. In this context, it is apposite to have a discussion regarding the object behind the examination of the accused under Section 313(1) (b) in Cr.P.C. It is to provide an opportunity to the accused to be refreshed of the incriminating circumstances brought in evidence through the examination of the witnesses of the prosecution and to explain the same. If he desires, he can also put forward his defence in the examination. It is the duty of the court to examine the accused on all incriminating pieces of evidence in a fair and proper manner. Each material circumstances has to be put to the accused in the form of questions specifically and separately during his examination so as to enable him to explain the same. The statement when recorded, the relevant parts in so far as it supports the case alleged by the prosecution against the accused, can undoubtedly be used against him. If he fails to appear and answer, it will be at his risk to face the legal consequences. When the

opportunity to explain the incriminating circumstances is not imparted to him, those circumstances cannot be relied upon by the prosecution for the purpose of recording his conviction (Lallu Majhi v State of Jharkhand (2003) 2 S.C.C 401).

58.The inadequacy of the examination may not have much consequences. What matters is the omission to put a material piece of evidence. The criteria is to see whether the non-examination of the accused with reference to any circumstances of culpatory nature has resulted in his prejudice.

59.Solely on the reason that the court has inadvertently omitted to put some questions, the trial held in an otherwise proper manner would not be vitiated, unless the accused is able to establish that by the omission of the court to put some questions, he has been put to injustice or that the said omission culminated in his prejudice. If the accused has succeeded in showing that he had a reasonable explanation for a material incriminating evidence brought on record by the prosecution and it could have been explained by him in his favour had his attention been drawn to that aspect by the court while questioning him. In such a circumstance, the settled position of law

emerged from the Apex court while considering (Ghulam Din Buch v State of Jammu and Kashmir (A.I.R 1996 S.C 1568) was that “it will be open to the accused to raise such a question before the appellate court and canvass for a re-consideration of it by the trial court on the ground that the trial was vitiated. In such cases of denial of opportunity to answer material aspects in the evidence, there will be no other paths left open to the court than the one to render the conviction unsustainable. “

60.In the context that in Jai Dev v. State of Punjab (A.I.R. 1963 S.C. 612), the Apex Court has laid down the dictum that "each material circumstance has to be put separately to the accused for his examination.”

61.The Apex court in Ganesh Lal v State of Rajasthan reported in (2002) 1 S.C.C 731 had convincingly clarified the situation when it held that if an accused fails to offer any explanation for his possession of the stolen property in a case built solely on circumstantial evidence, that would help the trial court to draw an inference against the accused in the case, the fact omitted by him to answer being one within his exclusive knowledge.

62. Therefore, a dual purpose is contemplated by the examination of the accused under Section 313(1)(b) Cr.P.C. Rather than affording an opportunity to the accused to explain incriminating circumstances against him, it would also help the court in the matter of appreciation of the entire evidence adduced during trial, on the basis of the answers furnished. *Ratan Singh v State of Himachal Pradesh* (A.I.R. 1997 S.C. 768).

63. Sri. Sasthamangalam S Ajithkumar, the learned counsel for the petitioner has handed over across the bar two decisions of the Apex Court and drew this court's attention to the erroneous way in which the learned Session's Judge has conceived of the dictum therein. The reasoning thirdly of the learned Session's Judge in the impugned order is based on those decisions.

64. Prior to have a look at the way in which the Sessions Court was misconceived, it is apposite and appropriate to have a discussion on the observations made by the Apex Court in those cases.

65. In *Basavaraj R.Pattil and others V. State of Karnataka and others* reported in A.I.R 2000 S.C. 3214, the judges constituting the Bench were divergent in their view while dealing with the issue before it.

The majority view was taken by K.T.Thomas and S.N Variava, JJ and the minority view by R.P.Sethi, J.

66.The majority view laid down by K.T Thomas,J for himself and on behalf of S.N Variava,J is contained in paragraphs 21, 23, 24, 25, 26 and 27 of the judgment (supra) which is reproduced hereunder for convenient reference:

“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?"

“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 "shll" 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.”

“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.”

67.The minority view expressed by R.P.Sethi, J as incorporated in paragraphs 30, 38, 39, 40 and 43 of the judgment is also reproduced hereunder for convenient reference :

“30. The Section is based upon the maxim of audi alteram partem which has been acknowledged as the cardinal principle of natural justice. It is a principle of English Law that the whole burden of proving the evidence is on the prosecution which means the accused can stand-by and do nothing as he is protected from all judicial questioning at the trial. The present section makes a departure from the English Law and allows the Court to put questions to the accused and "thanswers given by him may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed".Examination under the Section is not intended to be an idle formality. It has to be carried out in the interests of justice and fair play to the accused. In Ajmer Singh v. State

of Punjab, 1953 SCR 418 : AIR 1953 SC 76 : (1953 Cri. LJ 521), this Court observed that it was not a sufficient compliance with the Section, to generally ask the accused that, "having heard the prosecution evidence what he has to say about it". The accused must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and the questions put to him must be fair and be couched in a form which even an ignorant or illiterate person may be able to appreciate and understand. Elaborating the scope of Section 342 of the old Code this Court in Rama Shankar Singh v. State of West Bengal, AIR 1962 SC 1239 : (1962 (2) Cri. LJ 296), held (Para 14) : "Section 342 of the Code of Criminal Procedure by

the first sub-section provides, insofar as it is material : "For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court..... shall..... question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence". Duty is thereby imposed upon the Court to question the accused generally in cases after the witnesses for the prosecution have been examined to enable the accused to explain any circumstance appearing against him. This is a necessary corollary of the presumption of innocence on which our criminal jurisprudence is founded. The object of the section is to afford to the accused an opportunity of showing that the circumstances relied upon by the prosecution which may be prima facie against him, is not true or is consistent with his innocence. The opportunity must be real and adequate. Questions must be so framed as to give the accused clear notice of the circumstances relied upon by the

prosecution, and must give him an opportunity to render such explanation as he can of that circumstance. Each question must be so framed that the accused may be able to understand it and to appreciate what use the prosecution desires to make of the evidence against him. Examination of the accused under Section 342 is not intended to be an idle formality, it has to be carried out in the interest of justice and fair play to the accused : by a slipshod examination which is the result of imperfect appreciation of the evidence, idleness or negligence, the position of the accused cannot be permitted to be made more difficult than what it is in a trial for an offence."

"38.The scheme of the Code shows that after the evidence of the prosecution is closed, the local inspection, if any, held and the Court witnesses in terms of Section 311 are examined, the Court would, then and then alone, direct the examination of the accused under Section 313,

upon being satisfied that he was required to personally explain the circumstance appearing in the evidence against him. Such a recourse to examine the accused at this stage cannot in any way termed to be causing him inconvenience or occasioning any harassment. Otherwise in the absence of such examination, and without leading defence evidence, the accused in all probability is likely to be convicted and sentenced for the commission of the offence with which he has been charged and tried by the magistrate or the Court. In that event permitting the examination of the accused personally, is actually for his benefit. There are cases where the accused during the course of his examination under this Section, may place on record any clinching evidence which may not even require him to produce any defence evidence. The accused when personally appearing

can also be in a bargaining position by persuading the Court to take a lenient view despite proof of material circumstances against him. Such a statement by which the accused may admit, any of the allegations or circumstances appearing against him, cannot be made by his pleader. Any such statement made by his counsel cannot bind the accused. The conviction or sentence passed against the accused, without offering him an opportunity of explaining the circumstances would not only violate the maxim of audi alteram partem but also be contrary to the concept of the "due process of law" recognized and accepted by all civilized nations."

"39.Looking at the history of the section, the various conflicting pronouncements of the High Courts in the country and authoritative pronouncements of this Court by three Judge

Bench, the Law Commission recommended the necessity of examination of the accused personally. The recommendation of the Law Commission were accepted by the legislature. The incorporation of the provision necessitating the examination of the accused personally, undoubtedly is the reflection of a conscious decision, which the legislature took in its wisdom.”

“40. There is no dispute to the settled legal position that the Courts only interpret the law and do not legislate it. Where the legislature's intention is clear, there is no scope of reading between the lines or putting an interpretation contrary to the intention of the legislature. Adding to or providing for ancillary measures can be resorted to by the Courts only in grey areas and not in the covered fields. If on its true construction statute leads to anomalous results, the courts have no option but to

give effect to it and leave it to the legislature to amend or alter the law. Any other view, even based on howsoever high, cherished or pious desire cannot be the substitute of specific legislative indictment.”

“43. I am, therefore, convinced that Section 313 of the Criminal Procedure Code does not envisage the examination of the counsel, in places on the accused and the law laid down by this Court by three Judge Bench in 1969 and later on followed in 1973, does not require any reconsideration, particularly by a Bench of the same strength and of a co-ordinate jurisdiction.”

68. Conflicting views were prevalent till the law on the point was settled by the Majority view in Basavaraj's case in the year 2000. The conflicting views as to the requirement of the accused to be personally present for examination under Section 313(1)(b) Cr.P.C was set at rest by the Apex Court endorsed by Majority holding that it is the requirement and general rule that the accused must answer the questions put by court under Section 313 (1) (b) Cr.P.C by

remaining personally present in the court. The court further held that if remaining personally present involves undue hardships and huge expenditure to the accused the court could alleviate the difficulties by dispensing with his presence.

69.The attention of mine was also drawn by Sri. Sasthamangalam S Ajithkumar to K.Anbazzhagan v Superintendent of Police and others (A.I.R 2004 S.C 524) wherein the Division Bench of the Apex Court consisting of S.N Variava, J and H.K Sema, J laid down the dictum, when the legality and justifiability of the decision of the High Court of Madras allowing the application of the accused seeking to dispense with her personal appearance to face the examination under Section 313(1)(b) Cr.P.C and reversed it placing reliance upon various authorities including the Majority View in Basavaraj and emphatically held that in exceptional circumstances the general rule that the accused must answer the questions by personally remaining present in court can be departed/dispensed with. The Apex Court held:

“That order was rendered in exceptional exigency circumstances. The accused was in a far-away country- America and he had to incur a whopping

expenditure and undertake a tedious journey solely for the purpose of answering the court questions. The authority makes it clear that the general rule remains that the accused must answer the questions by personally remaining present in court. It is only in exceptional circumstances that the general rule can be departed/dispensed with. In this case respondent No.2 is holding the position of the Chief Minister of Tamil Nadu. She was available at Chennai. There was no exceptional exigency or circumstances such as her having to undertake a tedious long journey or incur a whopping expenditure to appear in Court to answer the questions under S.313 Cr.P.C. None of the facts, which have weighed with the consideration of the Court in Basavaraj's case (supra), was available in the given case. The grounds given in her application do not make out any case for granting exemption from personally appearing to answer question under S.313. The conduct of the public prosecutor in not opposing such a frivolous application has to be deprecated.”

70.The rival contentions of the respective counsel before the Apex

Court in Anbazhagan's case (supra) and the circumstances which led the court to confirm the order rejecting the claim of the accused in the case before it to dispense with her personal attendance for facing the examination under Section 313(1)(b) Cr.P.C is apposite to to be reproduced hereunder as it would help to have an understanding of the matter in a better way.

“12. Mr.Andhyarujina, learned senior counsel for the petitioner has brought to our notice the manner in which the examination of 2nd petitioner under Section 313 is sought to be done, which, according to him, is unknown to the procedure established by law. The second respondent filed a Crl.M.P.No.230 of 2003 dated 24.2.2003 with the prayer to dispense with the personal appearance and to permit her to answer the questionnaire through the counsel, a copy of which is made available to us. It is averred in paragraph 5 of the application that she has just returned from hectic

election campaign after a week's tour of Thoothukudi district. She has further stated that she is quite exhausted and laid up with fever and the doctor has advised her complete rest for a few days. She is physically incapacitated to attend the court in person to fulfill the requirement of Section 313 Cr.P.C. The physical hardship which the applicant may undergo while answering the questions, will further aggravate physical condition. In paragraph 6 she has further stated that she is making the application not because of the position she is holding but purely on the ground of physical condition. The Public Prosecutor did not oppose the said application. In the aforesaid facts, the trial court allowed the application by an order dated 24.2.2003.

Mr.Venugopal has drawn our attention to the decision of this court rendered in *Basavaraj R. Patil v. State of Karnataka*, where this court

allowed the accused to dispense with personal appearance and make application to the court praying that he may be allowed to answer the questionnaire without making his physical appearance in court under the conditions stipulated therein.”

71. In Anbazhagan's case (supra), the accused was Smt. Jayalalitha, the then Chief Minister of Tamil Nadu. She approached the court for getting exemption from personal appearance to face the inquiry contemplated under Section 313(1)(b) Cr.P.C on reasons that she was exhausted with the public election campaign at District of Thoothukudi, unable to travel and attend the court being affected with fever, and under strict advice of the doctor not to travel. Public Prosecutor did not oppose the application. The Apex Court observed that, the accused, holding the position of the Chief Minister of Tamil Nadu and being available at Chennai, was not under constraint to have a tedious long journey to appear before the court and answer the questions. It was in such a circumstance, the

court declined her prayer to dispense with her personal appearance. On the contrary, in Basavaraj's case (supra), the accused when called upon to answer the questions to be put in the inquiry under Section 313(1)(b) Cr.P.C was employed abroad, i.e., America, a country situated far away and without affording a whopping expenditure and undertaking a tedious journey, he would not have arrived at to attend the court and in such a peculiar circumstance, the court permitted him to abstain from attending the court and thus deviated from the general principle urging him to be personally present in the court to face the examination under Section 313(1)(b) Cr.P.C.

72. Therefore, in Anbazhagan (supra), the Apex court has upheld the general principle while holding that in circumstances of exigencies, a deviation is possible.

73. Therefore, the settled position of law in view of the decisions of which reference is made supra is that the accused should be present before the court to face the enquiry envisaged under Section 313(1)(b) Cr.P.C and in exceptional circumstances of exigencies liable to result in disadvantages to him that he can approach the court seeking exemption from personal appearance and the court on

being satisfied with the reasons put forth is free to grant the relief.

74.It is indicative from the discussion hereinabove of the various provisions of Cr.P.C. with special emphasis to Section 317 Cr.P.C. and of the landmark decisions (Supra) of the Apex Court, courts are at discretion to dispense with the personal presence of the accused under Section 313(1)(b) Cr.P.C on having convinced from the circumstances put forth about the undue hardships and financial loss likely to be caused to the accused. The discussion is indicative of the fact that the reasoning thirdly of the learned Session's Judge suffers from infirmities and will not sustain.

75.Therefore, there is every reason to uphold the argument of Sri.Sathamangalam S Ajithkumar that the learned Session's Judge while dismissing the application seeking dispensation from personal appearance of the petitioner was totally misconceived of the settled position of law. The learned Additional Judge has perceived the dictum of Anbazhagan's case (supra) in a totally erroneous manner and that led him to state in paragraph 5 of the impugned judgment as follows:

“ 5..... In view of the dictum laid down in

Anbazhagan Vs. Superintendent of Police the earlier dictum laid down by the Hon'ble Supreme Court in Basavaraj R.Pattil Vs State of Karnataka and the subsequent decision rendered by the Hon'ble High Court in Shaji Vs. State of Kerala basing on the Basavaraj R. Pattil's case is not applicable. Furthermore in view of the nature and volume of evidence available on record, answer and the explanation of the petitioner/2nd accused is highly necessary and indispensable."

76.The irresistible conclusion possibly be drawn from a reading of the above paragraph is that the court below has thoroughly misconceived the real spirit of the dictum laid down by the Apex court in Anbazhagan (supra) and accordingly was instrumental in discarding the relief to the petitioner on the basis of his mistaken notion. Therefore, there is every reason for this court to exercise the jurisdiction under Section 482 Cr.P.C, which is sought by the petitioner to be exercised in the case on hand. It is true that, alternate remedy is available for the petitioner in the matter. But the Apex Court has held in Punjab State Warehousing Corporation

Faridkot v S.H.Durga Ji Traders reported in (A.I.R 2012 S.C 700) that availability of an alternative remedy of filing an appeal is not an absolute bar in entertaining a petition under Section 482 Cr.P.C. Therefore, this court is absolutely justified in exercising the jurisdiction under Section 482 Cr.P.C in the case on hand wherein the court below has evidently committed an error apparent.

77.It is relevant for this court at this juncture to have also an analysis of the relevancy of the answers to be given by the accused during his/her examination under Section 313(1)(b) Cr.P.C. Prior to going into the aspect of the relevancy and admissibility of the answers so given in the examination, it is proper to have an idea about the purpose of the examination contemplated by the provision. It could be gathered from the aforesaid discussion that if the accused does not avail the opportunity to answer the questions in the examination proposed, consequence liable to follow is that the statement made under Section 313(1)(b) Cr.P.C insofar as it supports the case of the prosecution, can be used against him for rendering conviction. In sub-section(2) of Section 313 Cr.P.C, it is specifically provided that oath shall not be administered to the accused prior to his

examination under Section 313 (1)(b) Cr.P.C. Therefore, evidentiary value will not be there for the answers given by the accused during the examination under Section 313(1)(b) Cr.P.C. By incorporating Section 313(1)(b) Cr.P.C opportunity is given to the accused to explain the circumstances of culpatory nature, brought in evidence by the prosecution and set forth his defence. If the legislative intent was to give evidentiary value to the answers given during the examination under Section 313 (1)(b) Cr.P.C, sub-section (2) would not have been incorporated in the provision. Since the examination of the accused is meant to be conducted without the oath being administered, evidentiary value is not meant to be fastened to the answers given by the accused during the examination under Section 313(1)(b) Cr.P.C.

78. Apart from all the above, Section 315 is there in the Cr.P.C and it makes provision for the accused to render himself to be a competent witness in his cause. The Section for convenient reference is reproduced hereunder.

“315. Accused person to be competent witness.– (1)
any person accused of an offence before a Criminal
Court shall be a competent witness for the defence

and may give evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial:

Provided that–

(a) he shall not be called as a witness except on his own request in writing;

(b) his failure to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise to any presumption against himself or any person charged together with him at the same trial.

(2) Any person against whom proceedings are instituted in any Criminal Court under section 98, or section 107, or section 108, or section 109, or section 110, or under Chapter IX or under Part B, Part C or Part D of Chapter X, may offer himself as a witness in such proceedings:

Provided that in proceedings under section 108, section 109 or section 110, the failure of such person to give evidence shall not be made the subject of any comment by any of the parties or the Court or give rise

to any presumption against him or any other person proceeded against together with him at the same inquiry.”

79. Under the provision, any one accused of an offence shall be a competent witness before a criminal court and he may give evidence on oath. Therefore, the accused if opts to give evidence will be permitted to render evidence on his own cause. The accused shall never be called on to adduce evidence as a witness in any proceedings against him. The court will act only on his own request in writing expressing his desire to adduce evidence. Neither he shall be subjected to any comment nor a presumption shall be liable to be drawn against him for having not chosen to adduce evidence by examining himself before the court.

80. It is pertinent to note that under Section 315 Cr.P.C, the accused is entitled to adduce evidence on oath in disproof of the charges made against him or any person charged together with him at the same trial. Recording of statement in the form of explanation of the incriminating circumstances brought in evidence against him in the trial by the prosecution is that contemplated under the examination under Section 313(1)(b) Cr.P.C. So far as the statement of the

accused supports the case of the prosecution it will be considered by the court alongwith the evidence against him for rendering conviction. In case questions of material nature with reference to the case are not put to the accused by the court, that will operate as a denial of opportunity and the court is precluded from relying upon those pieces of incriminating evidence while considering the matter of conviction of the accused. Elaborate discussion is already had with reference to the various provisions of Cr.P.C. which permit a counsel engaged by the accused himself or appointed by the court on his behalf to defend him. Those are areas where the courts are conferred with discretion in the matter of dispensation of personal attendance of the accused.

81.By the engagement or entrustment of the case, the counsel will be placed at a legal obligation to represent and to defend the accused. By filing the memo of appearance containing the declaration of engagement to represent the cause of the accused before the court, the counsel has gone a further step to the effect of undertaking before the court that he will safeguard the interest of the accused. Section 304 was incorporated in the Code by the Parliament in its

wisdom as a manifestation of the constitutional obligation of the State and it safeguards the right of the accused to be defended by a Pleader in a cause against him. The questioning under Section 313 Cr.P.C has only a limited purpose to be served with. Section 317 Cr.P.C provides that a judge or magistrate if satisfied after recording reasons, can dispense with the personal attendance of the accused before the court at any stage of an inquiry or trial under the Code. Examination of the accused under Section 313 Cr.P.C is also a proceeding in the course of trial and therefore, in view of Section 317 Cr.P.C, the court is under discretion to grant exemption from personal appearance subject to satisfaction of the reasons furnished by the accused. What is emerged from the aforesaid the discussion is that the presence of the accused can be dispensed with by a court on being satisfied of his incapacity or inability from the reasons put forth by him. Therefore, the outcome is that a counsel engaged by the accused or appointed by the court for him, could satisfactorily represent him in the enquiry contemplated under Section 313 Cr.P.C during the course of trial.

82.It was in a context when the Parliament felt it the need of the day to

bring in measures for toning up the criminal justice system especially in the matter of the growing tendency of witnesses being induced or threatened to turn hostile by the accused, and delay tactics. The Code of Criminal Procedure Amendment Bill, 2006 was introduced with a view to achieve the objectives.

83.Clause 29 of the Bill amends Section 313 Cr.P.C. relating to power of the court to examine the accused. The Clause inserts a new sub-section (5) to the said section so as to eliminate delay in trial. Accordingly, the Amendment Act, 2009 has brought sub-section (5) within the purview of Section 313 Cr.P.C . It reads:-

“(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.”

84.Therefore, as per the newly incorporated provision, the court in seizin of a case on being satisfied that the presence of the accused cannot be obtained without an amount of delay or expense, it may permit filing of written statement by the accused and that will be sufficient compliance of Section 313 Cr.P.C. The accused can file

written statement after obtaining permission of the court and that would be sufficient compliance of the requirement contemplated under Section 313(1)(b) Cr.P.C. By virtue of the aforesaid amendment of Cr.P.C., the Section has become self contained in the matter of dispensation of personal attendance of the accused during the examination. Therefore, the law on the point is codified that the accused if intended can seek for the permission of the court to dispense him from being personally present before the court for facing the examination as envisaged under Section 313(1)(b) Cr.P.C and thereby resort to the alternate arrangement of filing his explanation to the questions in the form of a written statement. The court ought to have allowed such a request when placed for it's consideration.

85.The learned Additional Session's Judge, Thiruvananthapuram overlooked all the above aspects while passing the impugned order disallowing the prayer of the accused for dispensing with his personal presence during the examination under Section 313(1)(b) Cr.P.C. The prayer of the accused was that being employed at Gulf at the relevant time, he would have to bear huge expenditure and

undergo a tedious long journey to reach the native place to attend the court and therefore, he may be exempted. The prayer from a prime view point itself is a reasonable one and the court ought to have allowed the same. But, the learned Judge has straightaway dismissed the application filed by the accused seeking exemption from appearance citing erroneous reasons. It is the contemplation of sub section (5) that a court shall not stand in the way of the accused opting to explain the incriminating piece of evidences against him through his counsel. The words in use in the newly incorporated section were “the court may permit filing of written statement”. The object of the amendment and incorporation being avoidance of delay in trial, it will be the choice of the accused to opt the manner in which his explanation regarding the inculpatory circumstances against him shall be furnished. If he applies in manifestation of his desire, the court shall permit him to act accordingly and that shall be sufficient compliance of the purpose intended by the Provision.

86.The guidelines of the Apex court in Basavaraj's case (supra) shall be

resorted to by the courts to deal with the situation contemplated by sub-section (5) of Section 313 and those are to the following effect:

- i) The accused opting to resort to sub-section (5) shall make an application to the Court supported by an affidavit praying that he may be allowed to answer the questions by way of a written statement without making his physical presence in Court on account of justifying exigency. The accompanying affidavit sworn to by the accused shall contain 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.

ii) The Court upon satisfaction of the genuineness of the statements made by the accused in the said application and affidavit shall supply the questionnaire to his advocate (containing the questions which the Court might put to him under Section 313(1)(b) Cr.P.C) and fix the time limit during which the same has to be returned duly answered by the accused.

iii) The affidavit shall also contain an affirmation that the answers were furnished to the counsel by the accused himself.

iv) The accused should affix his signature on all the sheets of the answered questionnaire.

v) 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.

vi) 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.

87. The impugned order disallowing the prayer of the accused to abstain from personal appearance is totally unsustainable as it suffers from illegality, impropriety and correctness and every authority is there for the invocation of the power vested on this court under Section 482 Cr.P.C.

88. In the result, Crl.M.C. is allowed on the following terms:

- i) The impugned order passed by the learned Addl. Session's Judge in Crl.M.P No.1383 of 2013 in S.C No.1075 of 2007 is hereby quashed.
- ii) The matter is remitted back to the learned Addl. Session's Judge for reconsideration of Crl. M.P. No. 1383 of 2013 in S.C. No. 1075 of 2007 in the light of the discussions in this judgment.
- iii) The learned Additional Session's Judge shall take every endeavour to dispose off Crl.M.P.No.1383 of 2013 in S.C.No.1075 of 2007 at the earliest possible opportunity not later than one month from the date of receipt of a copy of the judgment after affording reasonable

opportunity of being heard to either parties to the litigation.

iv) Every endeavour shall be taken by the learned judge to dispose off S.C. No 1075 of 2007 within a period of two months from the date of passing of order in Crl.M.P.No.1383 of 2013.

v) Either parties to S.C.No.1075/2007 shall extend their full co operation in the venture of the court to comply with the direction of this court to have the disposal of the case, within the time framework as stipulated by this court.

MARY JOSEPH, JUDGE.

sl+vdv