

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

Tr.Crl.P.No.192 OF 2018

ORDER:

This petition is filed under Section 407 of Criminal Procedure Code (for short "Cr.P.C.") to withdraw C.C.No.483 of 2016 pending on the file of the Judicial First Class Magistrate at Koilakuntla, Kurnool District and transfer the same any other Court at Hyderabad.

The sole ground urged in the petition is that the petitioner is facing life threat to appear before the Court at Koilakuntla, where the C.C.No.483 of 2016 is pending.

The case pending before the Court below is for the offence punishable under Section 138 of Negotiable Instruments Act and the appearance of the petitioner is not necessary subject to recording satisfaction of the Magistrate by exercising discretionary power under Section 205 of Cr.P.C.

In "*M/s. Bhaskar Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd. and ors.*¹", the Supreme Court reiterated certain principles regarding exercise of discretion of Magistrate to dispense with appearance of the accused in paragraphs 17, 18 & 19, which are as follows:

"17. 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

¹ AIR 2001 SC 3625

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 co-operate in proceeding with the case? We may point out that the legislature has taken care for 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, bogs 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 to 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.”

(emphasis supplied)

In “**T.G.N. Kumar v. State of Kerala and others**²”, the Supreme Court relying on **M/s. Bhaskar Industries Ltd.** (referred supra) and “**Manoj Narain Agrawal v. Shashi Agrawal**³” held as follows:

“15.It is manifest from the afore extracted passage that dispensation with the personal examination of an accused in terms of the said provision is within the Trial Court's discretion, to be exercised keeping in view certain parameters, enumerated therein and not as a matter of course.

16. It is true that in direction (vii) (supra), the learned Judge has clarified that the stipulations in the preceding paragraphs are not intended to fetter the discretion of the Court to follow any different procedure, if there be

² (2011) 2 Supreme Court Cases 772

³ (2009) 6 SCC 385

compelling need but the requirement of recording 'specific reasons' by the Magistrate for deviating from the directions given in the order, as stipulated in the same paragraph, in our view, is by itself tantamount to putting fetters on the jurisdiction of the Magistrate. This is not warranted in law.”
(emphasis supplied)

In view of the law declared by the Apex Court in the judgments (referred supra), it is clear that the Court can exempt appearance of the accused in cases where the accused is involved in commission of minor offences, but in cases where the longer period of punishment is prescribed and serious offences, the Court cannot grant exemption to the accused from personal appearance by exercising discretion. Therefore, it is abundantly clear that in serious and grave offences, the Magistrate may put on guard to exercise such discretion to exempt the accused from personal appearance on the dates of adjournment in serious and grave crimes.

Therefore, the petitioner is at liberty to file application under Section 205 of Cr.P.C. to dispense with his appearance. If the Magistrate thinks that the appearance of the petitioner, on every date of adjournment, is not necessary, then he may exercise discretionary power to dispense with his appearance. In such case, the question of threat will not arise and the threat is not a ground to exercise power under Section 407 of Cr.P.C.

Therefore, the petitioner is directed to file appropriate application under Section 205 of Cr.P.C. and on filing such application, the Magistrate concerned is directed to dispose of the same within a week, in accordance with law keeping in mind the guidelines formulated by the Apex Court in “**M/s. Bhaskar Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd. and**

ors.” and **“T.G.N. Kumar v. State of Kerala and others”**
(referred supra).

With the above direction, the petition is disposed of. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

JUSTICE M. SATYANARAYANA MURTHY

10.09.2018
Ksp

