

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.520 of 2022

Biswajit Mohapatra

....

Petitioner

Mr. S.K. Jena, Advocate

-versus-

State of Orissa and another

....

Opposite Parties

Mr. S.N. Mishra, A.G.A.

CORAM:

JUSTICE B. P. ROUTRAY

ORDER

31.03.2022

Order No.

01.

1. Heard Mr. S.K. Jena, learned counsel for the Petitioner as well as Mr. S.N. Mishra, learned A.G.A. for the State-Opposite Party.

2. The Petitioner challenges the order dated 8.2.2022 of the learned J.M.F.C., Chandikhole in 1CC No.253/2021 wherein his prayer under Sec.205, Cr.P.C. has been rejected and the proceeding is concerning offence under Sec.138 of N.I. Act.

3. Perusal of the impugned order reveals that the learned Magistrate has rejected the prayer on the ground that the provision under Sec.251, Cr.P.C. cannot be complied with without appearance of the accused. This does not appear to be a valid reason to reject the prayer under Sec.205 of the Cr.P.C. of the accused because appropriate conditions can be made to that effect.

4. The Hon'ble Supreme Court in the case of ***Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd. and Others, (2001) 7***

SCC 401 have observed that in summons case such as one involving offence under Section 138 of N.I. Act, the court may dispense with the personal attendance of the accused either throughout or at any particular stage of the proceedings after taking an undertaking from the accused that he would not dispute his identity and a counsel on his behalf would be present in court and he would have no objection in taking evidence in his absence. The relevant observations are as follows:-

“14. The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but then his counsel must be present in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just for the sake of seeing him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court in that particular case.

15. These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of the banks, it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.

.. .. XX XX

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.

... XX XX

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 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.”

5. In concurring the above view, the Supreme Court in the case of ***TGN Kumar v. State of Kerala and Others, (2011) 2 SCC 772*** observed as follows:-

“8. The Section confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during the trial. It is manifest from a plain reading of the provision that while considering an application under Section

205 of the Code, the Magistrate has to bear in mind the nature of the case as also the conduct of the person summoned. He shall 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. (See: *S.V. Muzumdar & Ors. Vs. Gujarat State Fertilizer Co. Ltd., (2005) 4 SCC 173*, para-13). Therefore, the satisfaction whether or not an accused deserves to be exempted from personal attendance has to be of the Magistrate, who is the master of the court in so far as the progress of the trial is concerned and none else.

9. In *Bhaskar Industries Ltd. (supra)*, this Court had laid down the following guidelines, which are to be borne in mind while dealing with an application seeking dispensation with the personal appearance of an accused in a case under Section 138 of the N.I. Act:

"19. ... xx xx"

10. We respectfully concur with the above guidelines and while re-affirming the same, we would add that the order of the Magistrate should be such which does not result in unnecessary harassment to the accused and at the same time does not cause any prejudice to the complainant. The Court must ensure that the exemption from personal appearance granted to an accused is not abused to delay the trial."

6. This Court in the case of *Debasis Samantaray v. State of Orissa, 2003 II OLR 219* has held that the power of the magistrate under Section 205(1) Cr.P.C. can be exercised by a magistrate not only at the stage of issuance of summons to the accused, but also at subsequent stage even after issuance of N.B.W. This court has held as follows:-

".. xx .. xx The ratio of the aforesaid decisions is that the power under Section 205(1), Cr.P.C. can be exercised by a Magistrate not only at the stage of issuance of summons to the accused, but also at subsequent stage even after issuance of N.B.W. Law is no more res integra that even if an application under Section 205, Cr.P.C. is rejected at an earlier stage, such petition can be allowed at a subsequent stage by invoking the provisions of Section 273 and 317, Cr.P.C. Thus, it can be safely concluded that an application under Section 205, Cr.P.C. is maintainable even though the accused has not appeared

personally and the Magistrate should not hesitate to extend the discretion only on that ground.”

7. This being an offence under Section 138 of the N.I. Act and keeping in view the law settled on the point, no special reason is seen to deny the prayer of the accused dispensing his personal attendance in the court. The learned Magistrate is not justified in his approach in the impugned order to reject the prayer of the Petitioner made under Section 205 of the Cr.P.C. The impugned order is set aside and the accused – Petitioner is granted with the benefits of Section 205 of the Cr.P.C. subject to such conditions to be fixed by the learned Magistrate upon production of certified copy of this order.

8. The CRLMC is accordingly disposed of.

9. It is open for the Opposite Party No. 2 – complainant to seek for modification/clarification, if any, in case any specific prejudice is caused to him since this order has been passed without service of notice on him.

10. An urgent certified copy of this order be granted on proper application.

(B.P. Routray)
Judge