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IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3136 of 2022

Pratima Das Adhikari and Another Petitioners
Mr. Bigyan Kumar Sharma, Advocate

-Versus-

State of Odisha Opposite Parties
Mr. T.K. Praharaj, SC
Mr. S.S. Mohanty, Advocate for informant

CORAM:
JUSTICE R.K. PATTANAİK

DATE OF JUDGMENT:01.12.2022

1. In the instant case, the petitioners have approached this Court invoking its inherent jurisdiction under Section 482 Cr.P.C. challenging the correctness, legality and judicial propriety of impugned order dated 23rd September, 2022 under Annexure-2 passed in G.R. Case No.2525 of 2011 by Smt. S. Mishra, J.M.F.C., Bhubaneswar on the grounds inter alia that the same is not tenable in law and hence, liable to be interfered with and set aside with a consequential direction to allow and receive written statements from them in terms of Section 313(5) Cr.P.C.

2. Heard Mr. B.K. Sharma, learned counsel for the petitioners, Mr. T.K. Praharaj, learned SC and Mr. S.S. Mohanty, learned counsel for the informant.

3. At present, the petitioners are facing trial for offences under Section 498-A IPC and Section 4 of the Dowry Prohibition Act and

after the prosecution evidence was closed, they moved an application dated 27th January, 2022 (Annexure-1) before the learned court below seeking its permission to examine them as per Section 313(5) Cr.P.C., however, after hearing both the sides, the impugned order dated 23rd September, 2022 (Annexure-2) was passed which is under challenge on the ground that under the circumstances, denial of the same tantamount to miscarriage of justice and in violation of the salutary principles of nature justice.

4. Mr. Sharma, learned counsel for the petitioners submits that such a provision under Section 313(5) Cr.P.C has received statutory recognition by the introduction of the Code of Criminal Procedure (Amendment) Act, 2008 with effect from 31st December, 2009 which is intended to benefit the accused and also for the court in reaching at just conclusion. It is further contended that a provision for filing written statement is already in statute through Sections 233(2) and 243(1) Cr.P.C. to be followed in Sessions trial and warrant cases by Magistrates respectively which are in consonance with the spirit of law to provide an opportunity to the accused to explain the circumstances appearing against him and in so far as Section 313(5) Cr.P.C. is concerned, it has been introduced to achieve a similar purpose and objective which is a constitutionally recognized right for an accused to consult and defend properly. According to Mr. Sharma a request was made to the learned court below to receive the written statements from the petitioners in accordance with Section 313(5) Cr.P.C. under the pressing circumstances but the same was not appreciated in proper perspective which led to the passing of the impugned order under Annexure-2. In support of contention, Mr. Sharma, learned counsel for the petitioners placed reliance on the decisions, such as, **Keya Mukherjee Vrs. Magma Leasing Ltd.** and

another AIR 2008 SC 1807 and **United Phosphorus Ltd. Vrs. Sunita Narain and Another** decided in CRL.M.C. No.2116 of 2010 and disposed of on 15th March, 2011 by the Delhi High Court.

5. Mr. Mohanty, learned counsel for the informant on the other hand would submit that the learned court below did not commit any wrong or illegality in denying the petitioners exemption and their request for receiving written statements as per Section 313(5) Cr.P.C. It is contended by Mr. Mohanty that there has been considerable delay in the completion of trial which is pending since long handsomely contributed by the petitioners. It is claimed that the petitioners should be directed to appear in person for the purpose of recording of their statements under Section 313(1)(b) Cr.P.C. It is pleaded that the petitioners have adopted all possible means to prolong the litigation by filing numbers of applications at different point of time. According to Mr. Mohanty, learned counsel for the informant, an element of discretion is involved to invoke Section 313(5) Cr.P.C. as the expression 'may take the help of Prosecutor and defence counsel in preparing relevant questions' appears therein leaving the Magistrate to take a decision whether to dispense with the presence of an accused at that stage of the proceeding. It is claimed that examination of an accused under Section 313(1)(b) Cr.P.C. may be dispensed with in a summons case but cannot be in a warrant cases and while contending so, the following decisions in **Usha K. Pillai Vrs. Raj K. Srinivas and others AIR 1993 SC 2090** and a judgment of Delhi High Court in **Raja @ Dayanand Vrs. State of NCT of Delhi 2019 (3) CCC 596 (Delhi)** besides **Keya Mukherjee (supra)** and **Dakshinamoorthy and others Vrs, Union of Territory of Pondicherry 2002 CRI. L.J. 2359** have been placed reliance on.

6. As per Section 313(5) Cr.P.C., the court may receive the assistance of the Prosecutor and defence counsel to prepare relevant questions which are to be confronted to the accused at the time of his examination in terms of sub-section (1)(b) thereof and it may also permit him filing written statement as sufficient compliance of the said provision, a mechanism which has been inserted by Act of 2009 (w.e.f. 31st December, 2009). Any question may be put to an accused in course of an enquiry or trial at the discretion of the court as per clause (a) of Section 313(1) Cr.P.C. but it is mandatory under clause (b) thereof to examine him generally on the case after the prosecution evidence is concluded and before he is called to submit defence. As per the proviso to sub-section (1) of Section 313 Cr.P.C., in a summons case, such examination may be dispensed with, where the court had exempted him from personal attendance. Such dispensing with examination of an accused is not available in a warrant triable case. The purpose of introducing a provision in 2008 by way of sub-section (5) of Section 313 Cr.P.C. is only to ensure that there is sufficient compliance of the statutory mandate at the time of recording of the statement of an accused confronting him all the incriminating materials so as to receive due explanation in respect thereof.

7. An application was moved by the petitioners to examine them in terms of Section 313(5) Cr.P.C. by stating that petitioner No.1 has been advised against climbing stairs and place of height and in so far as petitioner No.2 is concerned, he is staying in USA and is unable to physically appear before the court due to pandemic situation. Mr. Sharma, learned counsel for the petitioners submits that petitioner No.2 has to incur huge expenditure to travel all the way from USA to India for the purpose of his recording of

statement under Section 313(1)(b) Cr.P.C. and therefore, under the above circumstances, application under sub-section(5) thereof was moved which is also in the light of the decision of the Supreme Court in **Basavaraj R. Patil and others Vrs. State of Karnataka and others 2000(8) SCC 740** which was later subscribed in **Keya Mukherjee**(supra), the decisions by which exemption from attending the court at the time of recording of statement under Section 313(1)(b) Cr.P.C. was recognized and accepted long before introduction of sub-section (5) by the Code of Criminal Procedure (Amendment) Act, 2008. In such view of the matter, according to Mr. Sharma, learned counsel for the petitioners, the learned court below grossly erred in disallowing examination in the manner contemplated under the statute in exceptional circumstances.

8. In **Usha K. Pillai** (supra), examination of an accused in a warrant case is held to be mandatory which is not in dispute. In **Raja @ Dayanand** (supra), in the facts and circumstances of the case, the Delhi High Court concluded that examination is to be in person barring few situations where statement under Section 313 Cr.P.C. of the accused cannot be recorded by calling him personally except with undue delay and inconvenience. In **Keya Mukherjee** (supra), the Apex Court held and observed that in case of examination of accused under Section 313 Cr.P.C., exemption from personal attendance is statutorily provided in summon cases and it can be extended to other cases if it works hardship to him and there the procedure to be followed as laid down in **Basavaraj R. Patil** (supra). The ratio in **Usha K. Pillai** (supra) is that examination of accused in a warrant triable case cannot be dispensed with by examining the lawyer appearing for him as that would not be sufficient compliance of Section 313 (1)(b) Cr.P.C.

9. The petitioners claim for their examination in terms of sub-section (5) of Section 313 Cr.P.C. and do not claim for its exemption. The reason behind such examination is that petitioner No.1 is sick and her medical condition does not permit her to appear before the court. In respect of petitioner No.2, it has been claimed that he is not in India but staying in United States of America and therefore, his statement should be recorded in the manner as prescribed in Section 313(5) Cr.P.C. After having gone through the decisions (supra), it has to be concluded that examination under Section 313(1)(b) Cr.P.C. cannot be dispensed with and recorded through the represented counsel even though personal attendance has been exempted under Section 205 Cr.P.C. or Section 317 Cr.P.C. in warrant cases. None of the decisions so relied upon by Mr. Mohanty, learned counsel for the informant prohibit such examination under Section 313(5) Cr.P.C. rather in **Raja @ Dayanand** (supra), it has been allowed in certain situations and held that statement under Section 313(1)(b) Cr.P.C. may be recorded not by calling the accused to appear personally where undue delay and inconvenience would occasion as a result thereby. That apart, the Apex Court in **Keya Mukherjee** (supra) suggested such a course of action by referring to the decision of **Basavaraj R. Patil**. Both the aforesaid decisions have been rendered at a time prior to the amendment to Section 313 Cr.P.C. introduced in 2009. In **Basavaraj R. Patil** ibid, the Supreme Court discussed elaborately as to the special circumstances under which examination of an accused may be held who is not able to physically appear before the court for certain reasons and observed in the following words that “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

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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 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 other 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?”

10. In the aforesaid decision, it is further held that the provision mainly intended to benefit the accused and as its corollary to benefit the court in reaching at final conclusion and at the same time, it has to be borne in mind that the provision is not to nail the accused to any position but to comply with the most salutary principle of natural justice enshrined in the maxim '*audi alteram partem*'. In order to meet such exigencies, the amendment was purposefully introduced in Section 313 Cr.P.C. by including subsection (5) for receiving written statement and taking the help and assistance of the Prosecutor and defence counsel in preparing the relevant questions to be put to the accused. Even similar provisions for receiving written statements are in place in Sections 232 and 243 Cr.P.C. and no prejudice can be claimed by the prosecution either.

11. Whether the learned court below, in the facts and circumstances of the case, was justified in demanding physical

presence of the petitioners at the stage of their examination under Section 313(1)(b)Cr.P.C? It is reiterated that examination of an accused is not dispensed with in a warrant triable case unlike summons cases and it cannot also be recorded through a counsel, rather, relevant questions may be put to him and written statement received during his examination which is a procedure incorporated by way of amendment to be adopted under exceptional circumstances where he is unable to attend the court.

12. The prayer to receive statements from the petitioners in terms of Section 313(5) Cr.P.C. was rejected on the ground that case to be triable by a warrant procedure and that apart, such exemption cannot be permitted. In the considered opinion of the court, the learned court below was required to examine the request of the petitioners in the spirit of law considering the intent and purport of Section 313(5) Cr.P.C. and. The Court perused the application (Annexure-1) moved before the court below which has not mentioned in detail, the real difficulties to be physically present with an assurance that such examination would not be challenged later on the ground of prejudice. It has been claimed that petitioner No.2 is in USA and for that the details of the place of residence and other facts ought to have been brought to the notice of the learned court below so also with regard to petitioner No.1, who is stated to be having some health issues. In any case, no such occasion ever arose for the learned court below to demand the same since it was of the view that such examination in absence of physical presence of the petitioners is impermissible.

13. The Court is of the inescapable conclusion that since the amended law has come into force and much before, such a procedure was put in place by judgmental law in **Basavaraj R. Patil** and followed in **Keya Mukherjee** (supra), the learned court CRLMC No.3136 of 2022

below fell into serious error to hold that examination in terms of Section 313(1)(b) Cr.P.C cannot be permitted in absence of the petitioners for being a warrant triable case. In fact, the court below was required to find out the reasons with all details from the petitioners for the purpose of their examination in the manner prescribed in Section 313(5) Cr.P.C. As a consequence, the order of rejection deserves to be set aside and accordingly, it is ordered.

14. In the result, the petition stands allowed.

15. As a necessary corollary, the impugned order dated 23rd September, 2022 under Annexure-2 passed in G.R. Case No.2525 of 2011 by Smt. S. Mishra, J.M.F.C., Bhubaneswar is hereby quashed with a consequential direction that the petitioners are to submit and narrate details of the health condition of petitioner No.1 supported by medical papers and whereabouts of petitioner No.2 with regard to his stay and place of residence in USA before the learned court below and in the event the same is furnished, the learned J.M.F.C. shall consider it and pass appropriate orders on the application filed under Section 313(5) Cr.P.C. keeping in view the settled position of law and in the light of the direction and observations made hereinabove.

(R.K. Pattanaik)
Judge

U.K. Sahoo