

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-25963-2023(O&M)
Date of Decision:22.05.2023

Suresh Kumar and another

..... Petitioners

Versus

The State of Haryana and another

..... Respondents

CORAM : HON'BLE MR. JUSTICE HARPREET SINGH BRAR

Present: Mr. Rajesh Gupta, Advocate for the petitioners.

HARPREET SINGH BRAR, J. (Oral)

1. Present petition has been filed under Section 482 Cr.P.C. for quashing of FIR No. 0400 dated 06.08.2017 (Annexure P-5), under Sections 448, 452, 506 IPC (Sections 451, 341, 379, 34 IPC added later on), registered at Police Station Rai, District Sonipat. Further prayer has been made for quashing of order dated 21.08.2022 (Annexure P-6) whereby learned Judicial Magistrate 1st Class, Sonipat framed charges against them under Sections 448, 452, 451, 411, 506, 379, 34 IPC.

FACTUAL BACKGROUND

2. Brief facts of the case are that the petitioner was allotted Industrial Plot No. 1426, Phase V, Industrial Estate Rai, measuring 450 Square Meters on 10.12.2004 and conveyance deed was executed on 24.05.2006 by HSIDC. Petitioner No.1-Suresh Kumar, who is proprietor of M/s SS Paper Industries, and his son namely Sandeep Kamboj-petitioner

No.2, were running their business since 2004. The petitioners defaulted in repayment of bank loan which they had taken from Punjab National Bank. The bank auctioned the property in question to respondent No.2. S.A. No. 4517 of 2014 was filed before the learned Debts Recovery Tribunal, Chandigarh in this regard. A civil suit No. 1478 of 2017 was filed by petitioner No.1 on 21.02.2017. The learned Civil Judge (Junior Division), Sonapat, vide order dated 27.02.2017, restrained respondent No.2 from alienating the suit property i.e. the factory in question and dispossessing petitioner No.1. The case was adjourned to 18.03.2017. The interim order was operative till 09.10.2017 when the stay granted in favour of petitioner No.1 was vacated. The zimni orders passed in this context have been placed on record as Annexures P-3 (Colly) and Annexure P-4.

3. On 06.08.2017, an FIR was registered against the petitioners alleging therein that when respondent No.2 reached the factory in question, the possession of which was taken by him from Punjab National Bank on 15.07.2017, he found the locks to be broken and that petitioner No.1 had thrown their goods out of the factory and took possession thereof. The copy of the said FIR has been placed on record as Annexure P-5. Learned trial Court, finding a prima facie case, framed charges against the petitioners vide order dated 21.08.2018 as stated above. The copies of order framing charges and the charge-sheet have been placed on record as Annexures P-6 to P-8.

OBSERVATION AND ANALYSIS

4. After hearing learned counsel for the petitioners and perusing the record with his able assistance, this Court does not find it to be a case which falls within the parameters laid down for exercising jurisdiction under Section 482 of the Code of Criminal Procedure (hereinafter referred to as

‘the Code’ for short) and quash the impugned FIR (Annexure P-5) along with all consequential proceedings. However, learned counsel for the petitioners referred to zimni orders dated 23.05.2022 and 18.01.2023 which are Annexures P-9 and P-10 respectively. A perusal of the above orders clearly indicates that the complainant and other PWs are not coming forward to depose before the learned trial Court. Bailable warrants had been issued against complainant Dalip and warrants of arrest had been issued against PW Gulzar.

5. Undisputedly, the FIR in the present case was registered on 06.08.2017 under Sections 448, 452, 506 IPC (later on added Sections 451, 341, 379, 34 IPC) at Police Station Rai, District Sonipat. Almost six years have passed and the petitioners are regularly appearing before the trial Court but the prosecution has not been able to produce its witnesses for all these years. In the totality of circumstances, this Court deems it a fit case where the personal appearance of the petitioners is required to be dispensed with. The failure of the prosecution to produce its witnesses and conclude the trial in almost five years has put the petitioners through unjustified suffering and inconvenience.

6. Section 273 of the Code explicitly states that all evidence taken during the trial shall be taken in presence of the accused. This provision is primarily for safeguarding the interest of the accused. Sections 205 and 317 of the Code bestow the discretion upon the Courts to exempt an accused from personal appearance at all stages of the proceedings in the trial in appropriate cases. However, the same cannot be claimed by an accused as a matter of right; it is a matter of the discretion of the Court. Section 205 of the Code provides as under:

"205. Magistrate may dispense with personal attendance of accused.

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

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

Section 317 of the Code provides as under:

"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 any 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 interest 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."

7. Both the aforementioned provisions authorise the Court to dispense with personal attendance of the accused and permit him to appear through his counsel. Further, the Court can exercise its discretion at any

stage of the proceedings. The Court has the power to order the personal attendance of the accused if it becomes indispensable at a later stage.

8. It is no longer *res integra* that in cases which are not of a serious nature, the trial Court should be generous in exempting the accused from appearing in person. Reliance can be placed on the judgment rendered in **Chintamani Das v. State of Orissa (2016) SCC OnLine Ori 971**, which is reproduced as under:-

“6. Law is well settled that the power under Section 205 of the Cr.P.C. has to be exercised in regard to the circumstances of the case, condition of the accused and the necessity for his personal attendance etc. The discretion vested in the Magistrate should be exercised according to rules of reasons and justice and not in an arbitrary manner. In the criminal cases which are not of serious in nature, the Magistrate should be generous in exempting the accused from personal attendance. The Court is required to consider in such cases the inconvenience likely to be caused to the accused if he is required to remain absent from his profession, occupation and trade. If no useful purpose would be served in insisting upon the personal appearance and the progress of the trial would not be hampered in any manner due to such absence, the personal appearance of the accused shall not be insisted upon.”

9. A two Judge Bench of the Hon’ble Supreme Court in **S.V. Muzumdar v. Gujarat State Fertilizer Co. Ltd 2005(2) RCR (Criminal) 860**, speaking through Justice Arijit Pasayat, has laid down the law that while deciding on the issue of exemption, the Court has to consider whether any useful purpose would be served by requiring the personal attendance of

the accused or whether progress of the trial is likely to be hampered on account of his absence.

10. Further, a two Judge Bench of the Hon'ble Supreme Court has laid down the ratio in **M/s. Bhaskar Ind. Ltd. v. M/s. Bhiwani Denim & Apparels Ltd., 2001(4) RCR (Criminal) 137** that the accused need not appear before the Magistrate and that the Magistrate can allow the accused to make even the first appearance through his counsel. Speaking through Justice K.T. Thomas, their lordships held that:

“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 seeking 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 within in order to make himself present in the Court in that particular case.....

"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 as 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."

11. The conditions on which an accused can be granted exemption from personal appearance are well settled. This Court in **K.K. Vij v. Gautam Goel 2005(2) RCR (Criminal) 455** has enumerated the parameters for grant of exemption, which are reproduced as under:-

"6. It, thus, emerges out that the power under Section 317 Criminal Procedure Code to grant exemption to an accused from personal appearance can be exercised by the Court for the reasons like:-

(a) if the evidence can be taken in the absence of the accused but in the presence of his counsel;

(b) there is no obstruction caused to the primary concern of the Court in relation to the administration of criminal justice;

(c) the Court would keep in view that the presence of the accused is not required merely to mark his presence but to expedite the trial;

(d) the magnitude of the sufferings which the accused may have to bear in order to make himself present in the Court, cannot be altogether overlooked;

(e) the accused is willing to give an undertaking that he would not dispute his identity and he will have no

objection in taking evidence in his absence and in the presence of his counsel etc.”

12. Moreover, even the examination of the accused under section 313 of the Code can be done through counsel and similarly, the defence counsel can represent the accused in other effective hearings. While setting aside the order of the trial Court and the High Court directing the accused to appear before the trial Court for making his statement under Section 313 of the Code, a two Judge Bench of the Hon'ble Supreme Court in **Chandu Lal Chandrakerv. Puran Mal 1988 SCC(Cri) 907**, held that even the statement of the accused under Section 313, in appropriate cases, could be dispensed with if he furnishes an undertaking that he would not raise any objection of prejudice caused to him due to non-examination under Section 313 at any subsequent stage of trial, appeal, or revision. In such a situation, after recording the statement of the counsel on behalf of the accused that he shall not raise any question of prejudice, it would not be necessary for the accused to appear before the trial court.

13. A two Judge Bench of the Hon'ble Supreme Court in **Puneet Dalmia Vs. Central Bureau of Investigation, Hyderabad 2020(12) SCC 695**, speaking through Justice M.R. Shah, had made the following observation:

“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.”

14. The Madras High Court in **Dr. Zubaida Begum Vs. State** **2016(2) MLJ (Criminal) 490** has observed the following:-

“14. The Court cannot use its discretion under Section 205(2) Cr.P.C. just to see the face of the accused or just gather crowd in the Court. In fact, too much gathering in the Criminal Court is a nuisance to the Court, lawyers and prosecution and court staff. It will distract the court from its concentration. Therefore, liberal usage of the power under Section 205(1) Cr.P.C. has been advocated.

15. When time is so important for the Court, it is also so important to the accused. He has to eke out his livelihood. Attend to his work, without wasting his time from morning to evening in the Court when the case is posted for not making effective progress, such as plea of the accused is to be recorded, where identification of the accused is involved, where his examination under Section 313 Cr.P.C. is to be done, where he has to be questioned on the proposed sentence. But even then when the case is very simple in nature, his counsel himself could answer the questions under Section 313 Cr.P.C. and the presence of the accused need not be insisted upon. The defence counsel can always receive copies under Section 207 Cr.P.C. and give acknowledgement.”

15. The charges on the accused are a relevant consideration while deciding on an application for exemption from personal appearance. For

example, a two Judge Bench of the Hon'ble Supreme Court in **Lily Begum v. Joy Chandra Nagbanshi 1994(2) SCC 39**, denied exemption from personal appearance as the allegations on the accused were of a serious nature (Section 376, 417, 506 IPC). The Court opined that granting exemption in such cases would lead the public into losing confidence in the justice system.

16. The learned trial Court should exercise the powers conferred on it under Sections 205 and 317 generously and liberally and grant exemption from personal appearance, except in a case where the presence of the accused is imperative, especially when demanding personal appearance would cause serious strain and inconvenience. The idea behind taking a liberal approach towards granting exemption from personal appearance is to allow the case to be tried expeditiously.

17. The trial Court, while dealing with a prayer for exemption from personal appearance must examine if there is a reason for rejecting such prayer and the same must be recorded. However, it is pertinent that the Court ensures that on being granted such relief, the accused gives an undertaking to satisfy the Court that he would not dispute his identity as an accused in the concerned case, that his counsel would be present in the Court on his behalf, that he has no objection to a plea being recorded on behalf of a counsel and that he has no objection to recording of evidence in his absence. This undertaking would ensure the future proceedings carry on unhindered.

CONCLUSION

18. It is a settled law that every accused is presumed to be innocent until proven guilty. The presumption of innocence is a facet of Article 21 of Constitution of India.

19. Keeping in view the principles enunciated in the aforementioned decisions, this Court is of the considered opinion that the following parameters can be applied for grant of exemption from personal appearance by the Courts while exercising power under Sections 205 and 317 of the Code. The personal appearance of the accused should be dispensed with when the accused is:-

- i) a woman;
- ii) an elderly person;
- iii) a person with disability;
- iv) when accused is facing inconvenience and unjustified ordeal on account of delay in trial attributable to the prosecution;
- v) facing extreme hardship i.e. economic and physical;
- vi) required to travel a long distance to attend the trial.

These instances are not exhaustive but only illustrative.

20. When the presence of an accused becomes indispensable at any subsequent stage of an inquiry or trial, the Court has ample powers to secure his presence in such eventuality. It must be noted that a one size fits all approach cannot be taken while exercising the powers under Section 205 and 317 as each case is required to be assessed on its own facts and circumstances.

21. The Hon'ble Supreme Court in **Bhaskar Industries (supra)** had held that it is well within the power of the Magistrate to dispense with the personal appearance of the accused either throughout or at any stage of the proceedings in a summons case if they are of the view that the accused would face unjustified suffering or trouble and the advantage being derived out of their presence is nominal. Same principles were extended to warrants case by the decision in **Puneet Dalmia (supra)**.

22. The Courts are empowered to impose any other condition which they may deem fit and proper in the facts and circumstances of the case in the interest of justice. For example, if the trial is being delayed on account of the absence of the accused when the witnesses are required to identify him, the accused can be directed to be present for this purpose. If the Courts become liberal in granting exemption from personal appearance, it would reduce the avoidable footfall in the Courts and would facilitate the effective dispose of the trial. The Courts should only order appearance of the accused when it becomes indispensable.

23. In the light of the above discussion, the prayer for quashing the FIR in question as also the order framing charges against the petitioners is declined. However, the personal appearance of the petitioners before the trial Court is exempted, subject to the following conditions:

- i) Petitioners shall be represented through their counsel;
- ii) shall not delay/stall the trial proceedings;
- iii) shall not dispute their identity as accused;
- iv) shall have no objection if the prosecution evidence is recorded in their absence but in the presence of their counsel;

- v) shall appear before the trial Court as and when required; and
- vi) any other condition which the trial Court may impose.

24. With the aforesaid observations, the present petition is disposed of.

(HARPREET SINGH BRAR)

JUDGE

22.05.2023

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Whether speaking/non speaking	Yes/No
Whether reportable/non reportable	Yes/No