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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Reserved on: 01.08.2023
Pronounced on: 01.09.2023

+ **W.P.(CRL) 2098/2023 & CRL.M.A. 19540/2023**

DR. S. JAITLEY & ANR. Petitioners

Through: Petitioners-in-person

versus

STATE (NCT OF DELHI) Respondent

Through: Ms. Nandita Rao, ASC
 (Criminal) for the State along
 with Mr. Amit Peswani,
 Advocate and with SI
 Ranvijay, P.S. Lahori Gate

CORAM:**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****Index to the Judgment**

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SWARANA KANTA SHARMA, J.

1. The instant writ petition under Article 226/227 of the Constitution of India read with Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of petitioners seeking appeal/repeal/revision/alteration/modification/setting aside, in full or in part, of order dated 08.06.2023 passed by learned Principal District & Sessions Judge (Central), Tis Hazari Courts, Delhi.

FACTUAL BACKGROUND

2. The petitioner no.1, who is 75 years of age, is an accused in case FIR bearing no. 16/2020, registered at Police Station Lahori Gate, Delhi on 12.01.2020 under Sections 376/506 of the Indian Penal Code, 1860 ('IPC') which is pending trial before the Court of learned Additional Sessions Judge, Central, Tis Hazari Courts, Delhi.

3. As disclosed in the petition, the petitioner no. 1 herein had sought transfer of the aforesaid case from the court of the learned ASJ by way of Transfer Petition (Crl.) No. 30/2023 wherein the grievances of the petitioner no. 1 were summarized. However, the impugned order dated 08.06.2023 was passed whereby the learned District Judge had recorded that the petitioner no. 1 does not wish to



press the transfer petition and he was directed to attend the Trial Court proceedings through physical or virtual mode as per his health conditions. It was ordered that when appearing virtually, he would supply supporting medical documents.

4. The impugned order dated 08.06.2023 passed by learned District Judge is reproduced as under:

“...Affidavit dated 05.06.2023 of the applicant has been filed wherein he has undertaken that he will appear in the Court on each date of hearing, either virtually or physically, as per his health condition. In case, he appears virtually, he will file supporting medical documents. The petitioner, who has joined virtually today, reiterates the averments made in his affidavit and submits that he does not press the present transfer petition.

In the aforesaid facts and circumstances, the present transfer petition is disposed of as not pressed with the directions that the petitioner shall join the proceedings on each date of hearing preferably physically and in case of virtual hearing, he will furnish a proper medical certificate and it will be the discretion of the trial court to reject the medical certificate if the same is not issued by a recognized hospital or medical practitioner...”

SUBMISSIONS ON BEHALF OF THE PARTIES

(i) The Case of Petitioners

5. It is the case of petitioners herein that petitioner no. 1 was forced to submit to such conditions, and that the impugned order was passed in violation of rights of the petitioner. It is also stated that it is in violation and is contrary to this Court’s Office Order and Adopted Policy dated 05.06.2023 and contrary to the policy, rules and regulations adopted by the Hon’ble Chief Justice of India and policy



enforcement requests to all High Court Chief Justices by the Hon'ble Chief Justice of India.

6. It is argued by petitioner no. 2, who appears in person, that the impugned order be set aside as it is impossible and impractical for petitioner no. 1 to appear on each date of hearing physically in the Trial Court due to his advanced age and health conditions. It is stated that the learned District Judge also did not discuss or adjudicate upon the merits of the case since the petitioner was forced to state that the transfer petition was not pressed. She also states that after passing of the impugned order, the case was listed before the learned Trial Court on 05.07.2023, and the learned counsel for the petitioner was not granted even a day's time to submit medical certificate of petitioner no. 1, and a medical certificate of the same date i.e. 05.07.2023 was insisted upon by the learned ASJ, as a condition of approving Video-Conferencing attendance for that day. The petitioner no. 1 was unable to attend the proceedings through Video-Conferencing and in his absence, the complainant's arguments were heard. It is stated that the petitioners were harassed and were forced to call a doctor who had seen, evaluated and provided a medical certificate which was submitted along with personal appearance exemption application to the learned ASJ. However, the learned ASJ, instead of passing an order on the application, adjourned the matter to 31.07.2023. It is also argued that with the introduction and advancement of conducting judicial hearings in virtual space, the virtual facility provided by the technology has been embraced by all. It is stated that by imposing a condition to bring fresh medical certificate on every date of hearing



in case the petitioner wishes to join through Video-Conferencing is contrary to and in direct violation of this Court's Orders and in violation of other Rules and Regulations applicable to this Court and all subordinate Courts. It is, therefore, stated that the order passed is illegal and is liable to be set aside.

(ii) Arguments on behalf of Complainant

7. Learned counsel for the complainant, on the other hand, states that the present petition has been filed only to delay the proceedings and to harass the complainant/victim. It is also stated that the petitioner no. 1 is hale and hearty and is not suffering from any health ailment. It is stated that there is no infirmity in the order passed by the learned District Judge and that on every date of hearing in case the petitioner no. 1 is unable to appear physically, he should produce a medical certificate so that he can be exempted from physical appearance and be allowed to appear through Video-Conferencing. It is also stated that the petitioners herein only want to delay the trial and, therefore, the petition be dismissed with cost.

8. This Court has heard arguments advanced by petitioners, who appear in person, and by learned counsel for complainant. The material placed on record has also been perused.

ISSUE BEFORE THIS COURT

9. This Court has been approached to adjudicate as to whether the petitioner no. 1, who is 75 years of age and is facing trial for an



offence under Section 376 of IPC, be permitted to appear through Video-Conferencing and whether the condition imposed for preferably appearing physically on every date of hearing and to produce his medical certificate of illness whenever he wants to appear through Video-Conferencing, is maintainable in law and contrary to the policy of the Hon'ble Apex Court and this Court whereby the learned counsels and parties have been permitted to appear through virtual modes.

10. In a nutshell, the petitioners by way of present petition pray that petitioner no. 1 be permitted to appear virtually due to his health conditions and age before the learned Trial Court without any conditions and order dated 08.06.2023 be set aside.

LAW ON PRESENCE OF AN ACCUSED FACING TRIAL BEFORE THE COURT

(i) Trial should be Conducted in Presence of Accused: Fundamental Principle

11. As a fundamental principle of criminal law, the trial of criminal case must take place in the presence of the accused which is essential to ensure fairness to both the accused and the victim. Being present before a court of law allows the accused to directly participate in the Trial Court proceedings and also provides a sense of satisfaction to the victim that the legal proceedings are taking place as per law.



12. The law in this regard finds expression in Section 273 of Cr.P.C. which stipulates that generally, all evidence presented during a trial must be taken in the presence of the accused. Section 273 of Cr.P.C. reads as under:

“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.

Explanation.- In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code...”

(ii) Power of Courts to Grant Exemption from Personal Appearance to Accused

13. It is also true that the law incorporates provisions that grant the courts, the discretion to exempt an accused from personal appearance. The law regarding exempting an accused from personal appearance is contained under Sections 205 and 317 of Cr.P.C., which read 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.

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 and 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...”

14. While Section 205 of Cr.P.C. deals with the power of Magistrate to dispense with the personal attendance of accused right from the stage of commencement of proceedings before Magistrate, Section 317 of Cr.P.C. confers power upon both the Magistrate as well as Sessions Judge to grant exemption from personal appearance to the accused at any stage of inquiry or trial. However, both the Sections also provide the power to the concerned Courts to later direct the personal attendance of the accused at any stage.

15. The law on this point was discussed by the Hon’ble Apex Court in case of *Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd.* (2001) 7 SCC 401 and *Puneet Dalmia v. CBI* (2020) 12 SCC 695. The relevant observations of Hon’ble Apex Court in *Bhaskar Industries Ltd.* (*supra*) in this regard read as under:

“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.**

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.

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)

16. The decision as to whether exemption from personal appearance should be granted to an accused or not depends exclusively on the basis of facts and circumstances of each case and the discretion exercised by the Courts in this regard is to be done after taking into account several factors which may include nature of allegations, conduct of the accused, place of residence of the accused and the distance to be travelled for the purpose of physical appearance before the Court, physical condition of the accused, necessity for personal appearance, et al.

17. The law also mandates that while granting exemption to an accused, the Courts must also ensure that such a liberty is not misused by the accused, by imposing appropriate conditions such as (i) obtaining undertaking from the accused that he would not dispute his identity as an accused in the case, (ii) his counsel shall remain



present before the Court on all dates, (iii) he would not object to any evidence being taken in his absence, etc.

VIRTUAL HEARINGS: COURT POLICIES & GUIDELINES

18. In the present case, however, the petitioner no. 1 has not sought total exemption from his personal appearance before the learned Trial Court, rather he has prayed for grant of exemption from physical appearance and allow him to appear virtually before the learned Trial Court on every date of hearing.

19. In this background, this Court takes note of the order dated 29.05.2023 passed by Hon'ble Division Bench of this Court, headed by the Hon'ble Chief Justice, in *W.P. (C) 17194/2022*, wherein it was observed as under:

“...3. This High Court has taken a policy decision to permit each & every individual to appear through virtual mode. There is no bar in the Petitioner addressing the Court virtually.

4. Resultantly, the application is allowed. The concerned Court/ MM-7, North-West District is directed to permit each & every individual – who intends to appear virtually in Court, to appear through virtual mode, including the Petitioner herein.

5. Let the Registrar General communicate the Full Court decision – which permits individuals to appear virtually, to all the Metropolitan Magistrates and also to all District Courts...”



20. It will also be appropriate to reproduce the Office Order of this Court dated 05.06.2023, referred to by the petitioners in the instant petition. The same reads as under:

**“ HIGH COURT OF DELHI: NEW DELHI
OFFICE ORDER**

No. 01/RG/DHC/2023

Dated: 05.06.2023

Sub: Directions regarding Hybrid Hearing in Delhi District Courts issued by the Hon'ble Full Court, High Court of Delhi.

In partial modification of the previous directions issued vide office order No.2551/DHC/Gaz/G-2/2022 dated 11.05.2022 in respect of Hybrid Hearing in District Courts, it is informed that the Hon'ble Full Court, High Court of Delhi has been pleased to order that:

" that the District Courts in Delhi, **shall permit any of the parties and/or their counsel to appear through hybrid/videoconferencing mode during Court proceedings, without there being any requirement of a prior request for the same.**

The hearings shall be conducted in hybrid/video-conferencing mode in conformity with the High Court of Delhi Rules for Video Conferencing for Courts, 2021 and also bearing in mind the provisions of the Live Streaming and Recording of Court Proceedings Rules of the High Court of Delhi, 2022.

The judicial officers, while conducting hearings through hybrid/video-conferencing mode, shall ensure that in the categories of cases mentioned hereunder, no person other than the parties and counsel of a particular case, digitally accesses or joins the proceedings of that particular case:

- i. Matrimonial matters, child adoption and child custody including transfer petitions arising thereunder.
- ii. Cases concerning sexual offences, including proceedings instituted under Section 376, Indian Penal Code, 1860 (I PC).
- iii. Cases concerning gender-based violence against women.



iv. Matters registered under or involving the Protection of Children from Sexual Offences Act, 2012 (POCSO) and under the Juvenile Justice (Care and Protection of Children) Act, 2015.

v. Matters registered under or involving the Medical Termination of Pregnancy Act, 1971.

vi. In-camera proceedings as defined under Section 327 of the Code of Criminal Procedure, 1973 (CrPC) or Section 153 8 or Order XXXIIA of the Code of Civil Procedure, 1908 (CPC).

vii. Matters where the bench is of the view, for reasons to be recorded in writing that publication would be antithetical to the administration of justice.

viii. Cases, which in the opinion of the Bench, may provoke enmity amongst communities likely to result in a breach of law and order.

ix. Recording of evidence, including cross-examination.

x. Privileged communications between the parties and their advocates; cases where a claim of privilege is accepted by the Court; and non-public discussions between advocates.

xi. Any other matter in which a specific direction is issued by the Court.

Further in a given case, the Court may for reasons to be recorded in writing, direct the parties and/or their Counsel to appear physically where in the opinion of the Court the physical presence of the parties/counsel in the court is required or where the court is otherwise of the opinion that the matter should be heard physically in the court.

The decision taken in the Full Court dated 25.04.2022 in this respect accordingly stands modified.

The Ld. Judicial Officers in all the District Courts are requested to strictly adhere to the aforesaid directions...”

(Emphasis supplied)

21. As revealed from a bare perusal of the aforesaid Office Order, it directs all the District Courts in Delhi to allow ‘any of the parties’ or their counsels to appear through ‘hybrid/video-conferencing mode’ during ‘any Court proceedings’ without there being any prior request



made to the Court. The order further directs the judicial officers to ensure that while conducting the hearings through hybrid/virtual mode, only the concerned parties/counsels remain present in the Court through virtual mode in certain cases, which includes cases concerning sexual offences such as Section 376 of IPC. Thus, a joint reading of the Order reflects that it would undoubtedly apply to an accused who is facing criminal trial in a case involving charge under Section 376 of IPC. The Order, however, also clarifies that the Courts can also direct the parties or their counsel to appear physically if such presence is essential or where the Court is of the opinion that matter should be heard physically, and record reasons for such direction.

ANALYSIS AND CONCLUSION

22. One of the primary objectives of the Court is to ensure expeditious progress of the trial in a criminal case. However, as also expressed by the Hon'ble Apex Court on several occasions, if it becomes evident that the trial can continue effectively and fairly even in the absence of the accused, it will be incumbent upon the courts concerned to consider the same. If it becomes apparent that the presence of accused is not essential for the purpose of speedy trial, the court can exercise its discretion accordingly. While exercising such discretion, the courts can take into account the magnitude of the sufferings of an accused and in case, if the accused is old and suffering from ailments, insisting on his physical presence on each and every date of hearing might cause significant hardship to the accused.



23. While it is important to uphold the principles of justice and fair trial, it is equally vital to give due consideration to factors such as age and health conditions of the accused. In such cases, if the trial can proceed effectively with the accused remaining present before the court through alternative means such as Video-Conferencing and representation by legal counsel, the court should be flexible in considering prayers made to this effect by the accused.

24. The courts should strive to strike a balance between the rights of accused and the practicalities of the legal process. Imposing conditions that compel an elderly accused, such as the 75 years old accused in the present case, to remain present physically before the court on every date of hearing rather than allowing him to join the court proceedings virtually, and to produce medical certificate of illness every time when he wishes to appear virtually, in the given facts and circumstances of the case, will be impractical and unjust.

25. This Court also remains conscious of the fact that petitioner no. 1 has not prayed for exemption from his personal appearance before the learned Trial Court, rather has only sought exemption from his physical appearance before the Court considering his age and health conditions. Thus, in cases where appearing before the Court and joining the proceedings in a criminal trial through virtual modes do not compromise the integrity or fairness of the trial, the courts should be flexible in embracing modern technology and allowing virtual appearances.

26. In view of the forgoing discussion, this Court is inclined to set aside the impugned order dated 08.06.2023 passed by learned District



Judge insofar as it contains directions qua physical/virtual presence of petitioner no. 1. In the aforesaid circumstances, this Court directs as under:

- i. The petitioner no. 1 shall remain present on every date of hearing virtually i.e. through Video-Conferencing before the learned Trial Court and counsel on behalf of petitioner no. 1 will remain present physically before the Court.
- ii. This Court has noted that it is a criminal trial and the identity of the accused is of utmost importance. Only because the accused is appearing through Video-Conferencing he will not dispute his identity during cross-examination, etc., or at any other stage of trial since he himself is seeking exemption from personal appearance in physical form and requests that he be allowed to appear through Video-Conferencing.
- iii. The petitioner no. 1 will not seek adjournment on any date of hearing, except in most unavoidable circumstances regarding which an application in writing will be moved by his counsel before the learned Trial Court.
- iv. The accused will not be required to furnish a medical certificate of illness on every date of hearing since he has been permitted to appear through Video-Conferencing.
- v. In case the learned Trial Court will be of the opinion that the physical presence of petitioner no. 1 is essential, for some reasons which shall be recorded by the concerned Court, such an order regarding the dates on which he will be required to appear in person before the learned Trial Court will be passed



in presence of the learned counsel for petitioner no. 1 or petitioner no. 1 himself or anyone present on his behalf at least three days prior to such date fixed for his appearance before the Court.

vi. In case petitioner no. 1 has difficulty in appearing before the Court due to his any physical disability, the same will be taken into account by the learned Trial Court.

27. Accordingly, the present petition along with pending application stands disposed of in above terms.

28. A copy of this order be forwarded to the concerned Trial Court for information and compliance.

29. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

SEPTEMBER 1, 2023/zp