

Bench: D Jain, A K Ganguly, H Dattu

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1854 OF 2008

TGN KUMAR -- APPELLANT

VERSUS

STATE OF KERALA & ORS. -- RESPONDENTS

JUDGMENT

D.K. JAIN, J.:

1. Challenge in this appeal, by special leave, is to the order dated 4th September, 2008 passed by a learned Single Judge of the High Court of Kerala in Crl. M.C. No.1977 of 2007 whereby a number of general directions have been issued to all the criminal courts, which are called upon to hold trials, particularly in cases involving an offence under Section 138 of the Negotiable Instruments Act, 1881 (for short "the N.I. Act"), as also in all other cases involving offences which are technical in nature and do not involve any moral turpitude.

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2. In view of the controversy at hand, it is unnecessary to state the facts giving rise to this appeal in detail, except to note that the present case arises out of a complaint filed under Section 138 of the N.I. Act. On being summoned by the Magistrate, the accused preferred a petition before the High Court under Section 482 of the Criminal Procedure Code, 1973 (for short "the Code"), inter alia, praying for dispensing with her personal appearance before the Magistrate. As afore-stated, the High Court, while allowing the said application, and permitting the accused to

appear before the Trial Court through her counsel, felt that there was great need for rationalising, humanising and simplifying the procedure in criminal courts with particular emphasis on the attitude to the "criminal with no moral turpitude" or the criminal allegedly guilty of only a technical offence, including an offence under Section 138 of the N.I. Act.

Relying on the decision of this Court in Bhaskar Industries Ltd. Vs.

Bhiwani Denim & Apparels Ltd. & Ors.¹ and of the Kerala High Court

in Saseendran Nair Vs. General Manager²; K.S.R.T.C. Vs. Abdul

Latheef³ ; Raman Nair Vs. State of Kerala⁴; Noorjahan Vs. Moideen⁵

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(2001) 7 SCC 401

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1996 (2) KLT 482

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2005 (3) KLT 955

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1999 (3) KLT 714

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2000 (2) KLT 756

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and Helen Rubber Industries & Ors. Vs. State of Kerala & Ors.⁶, the

learned Judge has issued the following 'rules of guidance', with a

direction that these can and must certainly be followed by the court

below in the instant case as also by all criminal courts which are called

upon to deal with trials under Section 138 of the N.I. Act:-

"i) Hereafter in all 138 prosecutions, the very fact that the prosecution is one under Section 138 of the Negotiable Instruments Act shall be reckoned as sufficient reason by all criminal courts to invoke the

discretion under Section 205 Cr.P.C and only a summons under Section 205 Cr.P.C shall be issued by the criminal courts at the first instance. In all pending 138 cases also applications under Section 205 Cr.P.C shall be allowed and the accused shall be permitted to appear through their counsel.

ii) The plea whether of guilty or of innocence can be recorded through counsel duly appointed and for that purpose personal presence of the accused shall not be insisted.

iii) Evidence can be recorded in a trial under Section 138 of the Negotiable Instruments Act in the presence of the counsel as enabled by Section 273 Cr.P.C when the accused is exempted from personal appearance and for that purpose, the personal presence of the accused shall not be insisted.

iv) Examination under Section 313(b) Cr.P.C can be dispensed with under the proviso to Section 313(1) and if the accused files a statement explaining his stand, the same can be received by the court notwithstanding the absence of a provision similar to Section 233 and 243 6

1972 K.L.T. 794

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Cr.P.C in the procedure for trial in a summons case. The power and the obligation to question the accused to enable him to explain the circumstances appearing in evidence against him must oblige the court in such situation to accept and consider the written statement made by the accused.

v) To receive the judgment also, it is not necessary or essential to insist on the personal presence of the accused if the sentence is one of fine or the judgment is one of acquittal. After the pronouncement of judgment, the case can be posted to a specific date with directions to the accused to appear in person to undergo the sentence. By that date, it shall, of course, be open to the accused to get the order of suspension of the superior court produced before court.

vi) Where warrants are to be issued in a 138 prosecution, ordinarily a bailable warrant under Section 88 Cr.P.C must be issued at the first instance before a non-bailable warrant without any stipulations under Section 87 Cr.P.C is issued.

vii) The above stipulations can only be reckoned as applicable in the ordinary circumstances and are not intended to fetter the discretions of the court to follow any different procedure if there be compelling need. In such event, the orders/directions of the Magistrate shall clearly show the specific reasons as to why deviations are resorted to.

viii) Needless to say, any person having a grievance that the above procedure has not been followed unjustifiably shall always have the option of approaching this Court for directions under Section 482 Cr.P.C. The Sessions Judges and the Chief Judicial Magistrates must also ensure that these directions are followed in letter and spirit by the subordinate courts. Commitment to human rights and the yearning to ensure that courts are user friendly are assets to a modern judicial personality and

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assessment of judicial performance by the superiors must make note of such commitments of a judicial officer.

ix) Even though the above directions are issued with specific reference to prosecutions under Section 138 of the Negotiable Instruments Act, they must be followed in all other cases also where the offence alleged is technical and involves no moral turpitude."

3. Being aggrieved with the order granting a general exemption to the accused from personal appearance before the Trial Court, the complainant has filed this appeal.

4. On 17th November, 2008, while granting leave in this matter, a bench of two learned judges referred the instant case to a larger Bench, posing the following question for determination:

"One of the questions which arises for consideration in this special leave petition is as to whether the High court in exercise of its jurisdiction under Sections 482 and 483 of the Code of the Criminal Procedure and/or under Article 227 of the Constitution of India could issue guidelines directing all courts taking cognizance of offences under section 138 of the Negotiable Instruments Act inter alia to invoke the discretion under Section 205 of the Code of Criminal Procedure and only with a further direction that summons under Section 205 shall be issued at the first instance. Keeping in view importance of the question involved as also the various decisions of this Court upon which the learned Judge of the High Court has placed reliance, in our opinion, we think that this is a matter which should be heard by a larger Bench. It is directed accordingly."

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This is how the present appeal has been placed before this Bench.

5. Having heard learned counsel for the parties, we are convinced that the impugned order is unsustainable.

6. Section 205 of the Code, which clothes the Magistrate with the discretion to dispense with the personal appearance of the accused, reads as follows:

"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."

7. 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

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be hampered on account of his absence. (See: S.V. Muzumdar & Ors.

Vs. Gujarat State Fertilizer Co. Ltd. & Anr.7) . 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.

8. 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. ...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 on 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."

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(2005) 4 SCC 173

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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.

9. In light of the afore-extracted legal principles, the impugned order is

clearly erroneous in as much as the discretion of the Magistrate under Section 205 of the Code cannot be circumscribed by laying down any general directions in that behalf. In Manoj Narain Agrawal Vs. Shashi Agrawal & Ors.⁸, this Court, while observing that the High Court cannot lay down directions for the exercise of discretion by the Magistrate under Section 205 of the Code, had echoed the following views:

"Similarly, the High Court should not have, for all intent and purport, issued the direction for grant of exemption from personal appearance. Such a matter undoubtedly shall be left for the consideration before the learned Magistrate. We are sure that the Magistrate would exercise his jurisdiction in a fair and judicious manner."

10. It is equally trite that the inherent powers of the High Court under Section 482 of the Code have to be exercised sparingly with ⁸ (2009) 6 SCC 385

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circumspection, and in rare cases to correct patent illegalities or to prevent miscarriage of justice. In Madhu Limaye Vs. The State of Maharashtra⁹, a Bench of three learned Judges of this Court had observed that:

"...the following principles may be noticed in relation to the exercise of the inherent power of the High Court.....: -

- (1) That the power is not to be resorted to if there is a specific provision in the Code for the redress of the grievance of the aggrieved party;
- (2) That it should be exercised very sparingly to prevent abuse of process of any Court or otherwise to secure the ends of justice;
- (3) That it should not be exercised as against the express bar of law engrafted in any other provision of the Code."

11. Similarly, while it is true that the power of superintendence conferred on the High Court under Article 227 of the Constitution of India is both administrative and judicial, but such power is to be exercised sparingly and only in appropriate cases in order to keep the subordinate courts

within the bounds of their authority. In any event, the power of
superintendence cannot be exercised to influence the subordinate

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(1977) 4 SCC 551

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judiciary to pass any order or judgment in a particular manner. In Jasbir

Singh Vs. State of Punjab¹⁰, this Court observed that:

"So, even while invoking the provisions of Article 227 of the Constitution, it is provided that the High Court would exercise such powers most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority. The power of superintendence exercised over the subordinate courts and tribunals does not imply that the High Court can intervene in the judicial functions of the lower judiciary. The independence of the subordinate courts in the discharge of their judicial functions is of paramount importance, just as the independence of the superior courts in the discharge of their judicial functions. It is the members of the subordinate judiciary who directly interact with the parties in the course of proceedings of the case and therefore, it is no less important that their independence should be protected effectively to the satisfaction of the litigants." (See also: Trimbak Gangadhar Telang & Anr. Vs. Ramchandra Ganesh Bhide & Ors.¹¹; Mohd. Yunus Vs. Mohd. Mustaqim & Ors.¹² and State, New Delhi Vs. Navjot Sandhu & Ors.¹³.)

12. As regards direction (iv) *supra* to accept and consider the written
statement made by the accused, in our opinion, it is again not in accord
with the language of Section 313 of the Code as also the dictum laid
down by this Court in Basavaraj R. Patil & Ors. Vs. State of Karnataka

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(2006) 8 SCC 294

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(1977) 2 SCC 437

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(1983) 4 SCC 566

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(2003) 6 SCC 641

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& Ors.14. Section 313 of the Code deals with the personal examination of

the accused, and provides that:

"313. Power to examine the accused.--(1) In every inquiry or trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court--

(a) may at any stage, without previously warning the accused, put such questions to him as the Court considers necessary;

(b) shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally on the case:

Provided that in a summons-case, where the Court has dispensed with the personal attendance of the accused, it may also dispense with his examination under clause (b)."
(emphasis supplied by us)

13.On the plain language of Section 313, it is evident that in a summons

case, when the personal appearance of the accused has been dispensed

with under Section 205 of the Code, a discretion is vested in the

Magistrate to dispense with the rigour of personal examination of the

accused under Section 313 of the Code as well.

14. In Basavaraj R. Patil & Ors. (supra) while advocating a pragmatic and

humanistic approach in less serious offences, Thomas, J. speaking for the 14

(2000) 8 SCC 740

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majority in a Bench of three learned Judges, explained the scope of

clause (b) to Section 313(1) of the Code as follows :

"The word "shall" in clause (b) to Section 313(1) of the Code is to be interpreted as obligatory on the court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the court should, in appropriate cases, e.g., if the accused satisfies the court that he is unable to reach the venue of the court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved?

If the accused (who is already exempted from personally appearing in the court) makes an application to the court praying that he may be allowed to answer the questions without making his physical presence in court on account of justifying exigency the court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

- (a) A narration of facts to satisfy the court of his real difficulties to be physically present in court for giving such answers.
- (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.
- (c) An undertaking that he would not raise any grievance on that score at any stage of the case."

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

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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 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.

17. Thus, in the instant case, we have no hesitation in holding that the High Court exceeded its jurisdiction under Section 482 of the Code and/or Article 227 of the Constitution by laying down the afore-extracted general directions, which are inconsistent with the clear language of Sections 205 and 313 of the Code, as noted above. We feel that in light of the afore-noted guidelines laid down by this Court, further directions on the same issue by the High Court were wholly uncalled for. In this

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regard, the following observations in S. Palani Velayutham & Ors. Vs.

District Collector, Tirunelveli, Tamil Nadu & Ors.15, are quite apt:

"The courts should avoid the temptation to become authoritarian. We have been coming across several instances, where in their anxiety to do justice, the courts have gone overboard, which results in injustice, rather than justice. It is said that all power is trust and with greater power comes greater responsibility."

18.In light of the foregoing discussion, the appeal is allowed, and the impugned order containing general directions to the lower courts is set aside. However, we direct that if the accused moves the trial court with an application under Section 205 of the Code for exemption from personal attendance within four weeks of the receipt of a copy of this judgment, the exemption granted to her by the High Court shall continue to be in force till her application is disposed of by the trial court.

..... (D.K. JAIN, J.)

..... (ASOK KUMAR GANGULY, J.)

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(2009) 10 SCC 664

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..... (H.L. DATTU, J.)

NEW DELHI;

JANUARY 14, 2011.

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