(2007) 12 DEL CK 0044

In the Delhi High Court

Case No : Criminal M.C. No.: 4922 of 2005

M.D. Jindal APPELLANT

Vs

Angad Paul and Others RESPONDENT

Date of Decision : 14-12-2007

Acts Referred:

Constitution of India, 1950 — Article 32
Criminal Procedure Code, 1973 (CrPC) — Section 167, 205, 205(1), 251, 313
Penal Code, 1860 (IPC) — Section 120B, 406, 409, 420, 468

Citation : (2007) 12 ILR Delhi 15 Supp

Hon'ble Judges : S. Ravindra Bhat, J

Bench : Single Bench

Advocate : Sidharth Luthra, with Mr. Vaibhav Gaggar, for the Appellant; Arun Jaitely Mr. Rajiv Nayar with Mr. H.R. Khar Suhel, Mr. Arindam Ghose, Mr. Chetan Prabhakar and Ms. Rachna Tyagi, for the Respondent

Judgement

S. Ravindra Bhat, J.—The Petitioner in the present proceeding u/s 482, Criminal Procedure Code (hereafter "the Code") seeks quashing of an order of the Metropolitan Magistrate, New Delhi in Criminal Complaint No. 43/2005, passed on 25th August 2005. The Metropolitan Magistrate ("the trial court") had granted permanent exemption from personal appearances to the Respondents; they did not appear in Court in person thereafter. The facts necessary for the adjudication of the present dispute are as follows. The Petitioner had filed a complaint on 01.06. 2004 before the trial court, against the Respondents alleging criminal breach of trust, forgery, criminal intimidation and criminal conspiracy. The Trial Court took cognizance under Sections 409/468/471/477/477A/506 read with Section 120B IPC and issued process to Respondents to appear, in the proceedings. By orders dated 16.02.2005, 02.03.2005, 16.04.2005, 15.07.2005 and 28.07.2005 the trial court granted opportunities to Respondents appear, before it, but they never did so. The Petitioner and Caparo India Ltd. (U.K.) are joint Venture Partners in a closely held public limited company viz. Caparo Maruti Ltd. (CML). The Petitioner was the Chairman of CML until 04.03.2003. The first and second Respondents are the current Chairmen of Caparo India Ltd. (UK) and CML Ltd. The third Respondent is a Director of Caparo Group Ltd., Caparo India Ltd. (UK) and CML Ltd.

2. It is alleged by the petitioner that in December 2001 the Respondents in Conspiracy with the Company Secretary, Sanjay Gandhi and Managing Director of CML, Anil Asthana sought to siphon funds of CML into the accounts of subsidiaries of Caparo India Ltd., (U.K.) owned and controlled by the Respondents. The petitioner alleges that he, upon learning of the same protested against it, To cover their illegal acts, the Respondents in their solely owned companies, allegedly forged Minutes of Board Meeting of CML dated 27.05.2002, 27.08.2002, 16.09.2002, 14.12.2002 and 07.02.2003. The Petitioner, therefore, filed the criminal complaint entitled as M.D. Jindal Versus Angad Paul & others before the Metropolitan Magistrate.

3. The Respondents filed a petition before this court u/s 482, for quashing of Criminal Complaint No. 43/2004 and summoning order dated 4th November 2004 passed by the trial court. In those proceedings before the Metropolitan Magistrate exempted only the Respondents not residing in India from appearing before the Metropolitan Magistrate on 2nd February 2005. This was done on the basis of fact that some of the Respondents were living abroad and did not have adequate time to fly to India as they claimed to have received the summons quite late and asked the other to appear before the Magistrate on 16th February 2005.

4. The Petitioner alleges that though the first and second Respondent were in fact in India on 16th February 2005, having come to attend a felicitation function of the second Respondent at Punjab University, which had been planned well in advanced, they did not appear before the Trial Court. The Counsel for the Respondents admitted their presence in India, but the Metropolitan Magistrate because of the order of the High Court granting exemption took no coercive action. Between March and May 2005, exemption appearances was sought and granted on three occasions, on the ground that the quashing petition filed by the Respondent was pending before the High Court. On 31st March 2005 the High Court dismissed the petition for quashing the proceedings.

5. Between July and August 2005, the Respondents sought exemption from appearances citing the bomb blasts in London as the ground for their inability to come to India; their request was granted. During the proceedings before the Trial Court, the petitioners alleged that the Respondents were deliberately avoiding appearance and that they were in India when they signed sworn affidavits to prefer special leave petition, before the Supreme Court. Meanwhile, on 12th August 2005, the Supreme Court dismissed a special Leave Petition.

6. On 25th August 2005, the Respondents applied for permanent exemption u/s 205 of the Code and the trial court granted permanent exemption. The Magistrate took note of the cases decided by the Supreme Court and various

High Courts to reason that since the accused were not in dispute, that the accused were residing in another country, that the material evidence was largely documentary, that no hindrance will be caused to the trial due to the absence of the accused, the exemption could be granted. He also noted that Mr. Siddharth Luthra, counsel for the complainant, "has not disputed the legal position that the court can exempt the accused even for the first appearance as well as for subsequent dates". However, he observed that the accused must present themselves in case their "presence is imperatively needed". It as this order of the Metropolitan Magistrate that the Petitioner has impugned in this writ petition.

7. Mr. Siddharth Luthra, learned counsel for the Petitioner contended that the impugned order is untenable in the circumstances of the case. It is contended that the law settled through various decisions of the Supreme Court and the various High Court is that; in warrant case, the person should have entered person should have entered personal appearance before the Trial Court at least once before permanent exemption can be granted. He relies on State of West Bengal Vs. Pranab Ranjan Roy, .

8. Learned counsel submitted that the discretion exercised by the trial court, permanently exempting the respondents was injudicious, having regard to the facts of the case. Counsel urged that the order sheet of the trial court discloses that on several dates of hearing, repeated opportunities were granted to respondents to present themselves before the court; yet they deliberately chose to stay away from the proceeding, on one pretext or another. The respondents were in India during July 2005; yet they falsely took shelter of the London bombings to avoid appearing in the criminal court. They had in fact sworn to affidavits, filed in support of the SLP filed in the Supreme Court. The court should have not been unmindful of these facts.

9. It was argued by Shri Luthra that the offences for which cognizance was taken by the trial court, and which the respondent accused are arranged for trial are all serious. The respondents, in the circumstances, could not have been permitted permanent exemption from appearance. Learned counsel placed strong reliance on the decision of the Supreme Court in V.K. Jain Vs. Union of India (UOI) and Others, , which is, according to him, in line with the previous decision, in Pranab Roy''s case, to say that the accused must appear before the court at least once to successfully secure permanent exemption from further appearances, before it.

10. The Respondents aver that all the accused persons mentioned in the complaint, who have been served with the summons, are appearing before the Metropolitan Magistrate from the first instance either personally or through their duly authorized lawyers. They Submit that, there is no way that the trial will be prejudiced or hindered on account of the exemption from personal appearances of the Respondents. They further contended that the Supreme Court while dismissing the SLP filed by the Respondents directed that the trial Court should consider the application for exemption in accordance with law. Pursuant to it and in and in light of the settled legal position, they submit, the magistrate has

passed a detailed and reasoned order exemption them from personal appearance on certain specific conditions. They submit that the Magistrate has ordered the exemption from personal appearances on certain conditions as set in the impugned order. The Respondents have been abiding by all such condition and there is not even an allegation to the contrary. It is relevant to note that after the passing of the Impugned order, the proceedings in the trial have continued and there is no delay on account of the exemptions granted to the Respondents.

11. It is contended by Mr. Arun Jaitely, that the present petition is not maintainable since the exercise of power u/s 205 of the Code is a matter entirety between the Magistrate and the Respondents. It is discretion vested with the Magistrate and is required to be exercised by the Magistrate. It is submitted that no prejudice whatsoever was or would be caused to the petitioner by such exercise of discretion by the Magistrate. The petitioner cannot insist upon the personal appearance of the respondents as a matter of right since such statutory powers are vested with the Magistrate and are to be exercised in the interest and for the proper conduct of the proceedings.

12. Learned counsel for the Respondents submit that the appellate courts have consistently formulated guidelines for exercise of judicial by Magistrates in cases where the presence of the accused is being dispensed with, even from first date of appearances. Such guidelines inter-alia stipulate that where a person is residing outside the country, exemption may be granted. They submit that in the present case the Respondents are all citizens of UK, and are the permanent residents of London. Further, that the impugned order is in the nature of a consent order in as much as the petitioner has neither disputed the factual submission nor the judicial pronouncements advance and relied upon by the Respondents. Being in the nature of a consent order, the impugned order cannot be challenged by the petitioner.

13. It is urged that Section 205(1) does not give even the remotest indication that in order to claim exemption from personal attendance the accused must, at the first instance, appear personally in the Court. On the contrary, the sub section clearly goes to show that even at the stage of issuing summons the Magistrate may, by giving reasons, dispense with the personal attendance of the accused and permit him to appear by his pleader. Placing reliance on Ajit Kumar Chakraborty and Others Vs. Serampore Municipality, they submit that the Magistrate may exercise this discretion even in the absence of any prayer by the accused for exemption from personal attendance.

14. Relying on S.V. Muzumdar and Others Vs. Gujarat State Fertilizer Co. Ltd. and Another, it is contended that question the court has to address while considering an exemption application is whether any useful purpose would be served by requiring the personal attendance of the accused or the progress of the trial is likely to be hampered on account of absence of the accused. Further, that the present petition is not maintainable in view of the settled position of law in M/s. Bhaskar Industries Ltd. Vs. M/s. Bhiwani Denim and Apparels Ltd. and

Others, , that the accused should be granted exemption from personal appearances if the petitioner does not challenged the accused''s identity, ensures that he was will be duly represented by his advocates, that the evidence can be continued in his absence and that the accused has no objection to the progress of the case in his absence and undertakes to be present in the court when such presence becomes imperatively needed. In such cases exemption from appearances can be granted even from the first date of appearance.

15. It is argued that Section 205 of the Code makes no distinction between a summons case and a warrant case as far as regards grant of exemption from personal appearances to an accused is concerned. The respondents urge that the principles and rules governing the grant of exemption from personal appearance remains the same in both kind of cases and there are numerous judicial precedents to support this contention. In fact, judicial precedents support the grant of exemption from personal appearances to an accused even in warrants cases provided the learned Magistrate is satisfied with the facts and circumstances of the case. They refer to the following decision Ajit Kumar Chakraborty and Others Vs. Serampore Municipality, , Shyam Prasad Reddy and Others Vs. State of Andhra Pradesh and Others, , Mrs. Shivani Sadanand Vs. State and Another, and Noorjahan Vs. T.T. Moideen and Others, .

16. Reliance in placed on Dasari House of Publications Pvt. Ltd. vs. M/s. Apple Credit Corporation Ltd. Secunderabad & Anr. 2002 Cri. L.J. 47551 where the Court held that u/s 205 whenever a Magistrate issues summons to the accused, it can dispense with the presence and permit him to appear by his pleader. No further guidelines are mention u/s 205 and it is left to the discretion of the Magistrate to exercise his discretion judicially. The Court further held that once the presence of the accused is dispensed with under s. 205, Cr. P.C. it is open for the Magistrate in his discretion to dispensed with the presence of the accused for examination under S. 313 (1) (b) of the Code as the presence of the accused is not a mandatory one. The Supreme Court while explaining the utility and purpose of the examination of the accused under S. 313 categorically stated that he will not raise the question of prejudice, if any, examination under S. 313 of the Code, at a subsequent stage of the trial or in appeal or in revision, the accused need not appear in the Court even in a warrant case. It set the following guidelines for exercise of discretion u/s 205:

1. If the offences are of serve nature involving moral turpitude, the presence of the accused shall be insisted;

2. Whenever summonses are issued dispensing with his personal presence by the Court and permitting him to take the plea by post, he can be exempted;

3. Where a person is residing outside the country, he may be given exemption;

4. Where a person resides in a place, outside the jurisdiction of the court, he may be given exemption;

5. Exemptions can also be granted to such persons to whom the Magistrate feels that the exemption ha to be given. It shall be given order after recordings elaborate reasons for the same;

6. The guidelines provided by the Supreme Court for exemption under S. 313 shall also be followed for dispensing personal presence of the accused under S. 251 of Cr. P.C.;

7. Such exemptions shall be granted only on an undertaking given starting that he will not claim prejudice to his complaint under Sections 420/406 IPC.

17. It is submitted that Section 205 should be read with Section 317 which empowers the Magistrate to dispense with presence of the accused, at any stage of the proceeding and not just while issuing summons. The factors that must inform the exercise of such discretion, they submit, are the nature of the offence, the propensity of the accused to commit such offence and the nature of the evidence exemption granted by the Magistrate is justified because the complaint file by the petitioner is civil in nature, and is entirely based on records and documentary evidence, therefore no useful purpose is served by requiring the personal appearance of the Respondents.

18. From the above narrative, it is clear that the petitioner''s complaint in this case is about the correctness and propriety of the trial court''s order granting permanent exemption to the respondent-accused. The complaint was filed on 16-4-2004; process was issued on 4-11-2005, returnable on 16-2-2005. This court exempted appearance by two orders dated 23-3-2005, and 7-4-2005, for the appearance dated 16-4-2005, in Cr. MC 415/05 and Cr. MC 854/2005. The trial court continued the exemption on two later dates, i.e. 24-5-2005 and 15-7-2005. In the meanwhile, this court-dismissed Cr. MC 415/2005 on 31-5-2005. The accused therefore preferred special leave petitions to the supreme Court in July, 2005. Curiously, in the application for exemption on 15-7-2005, about their inability to present themselves in the proceedings, inter alia, due to the bomb blasts that occurred in London earlier in the month (of July, 2005). Yet, in the order sheet dated 28-7-2005, the court recorded its dissatisfaction about manner information about the visits and presence of the accused in India was being furnished. It recorded the concession of counsel for accused that one of them was in India on 3-7-2005. Ultimately through the impugned order, it granted permanent exemption to accused from personal appearance.

19. The petitioner relies heavily on two decisions of the Supreme Court, in Pranab Roy, and V.K. Jain. On the order hand, the respondent rely upon the text of Section 205 and 317. For facility of reference, they are confidently extracted below:

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 in 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.

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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 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 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 to trial, or order that the case of such accused be taken up or tried separately.

20. The Supreme Court, in its decision passed in M/s. Bhaskar Industries Ltd. Vs. M/s. Bhiwani Denim and Apparels Ltd. and Others, considered the Section 317. While considering Section 205, Cr. P.C. and powers the Magistrate to dispense with the personal attendance of the accused it was held that:-

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 enourmous 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 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.

Previously, in Basavaraj R. Patil and Others Vs. State of Karnataka and Others, , the Supreme Court had ruled that even statement of accused u/s 313 of the Code can be recorded, if the Circumstances so warrant, and exemption from appearance be granted to him, in any category of cases, including warrant cases.

The decisions in Dasari House of Publications; Ajit Chakraborty; Shyam Prasad Reddy; and Shivani Sadanad support the wide and expensive nature of the power to grant personal exemption, provided the trial court exercises its discretion judiciously, having regard to the circumstances.

21. In Noorjehan (supra) the Kerala High Court held, inter alia, as follows:

A consideration of the above provisions would reveal that in all cases where exemption from the personal attendance is granted and where the plea is one of ''not guilty'' the Court has only to allow the counsel to plead ''not guilty'' of the accused, as such a plea is only of a procedure nature. In cases where the personal attendance of the accused is exempted u/s 205, Cr. P.C. and it is a summons case, the Court has to record the plea of the counsel for and no behalf of the accused even if the plea is one of ''guilty.'' But in warrant cases the Court has to exercise its discretion in a judicial manner considering the nature and gravity of offences and the accepting the plea. Thus the court has the discretion power to exempt the personal appearance of the accused even in warrant cases and to have the plea of the counsel recorded for and on behalf of the accused, when he is specifically authorised for the purpose and in appropriate cases. If after considering all the aspects of the case, the Court holds that the personal attendance of the accused is not essential, the Court can dispense with the personal attendance of the accused and the plea of the counsel can recorded and on the basis of such plea, the Curt can either convict the accused or proceed to have the trial.

22. The decision in V.K. Jain to my mind, is inapposite, because the attention of the Supreme Court was not brought to Section 205 of the Code. Moreover, the Court dealt with the request under Article 32 of the Constitution of India. As regards Pranab Roy (supra), the court there considered whether the accused, who never made an appearance before it, could claim benefit of Section 167. The provisions of Sections 205 and 317 were never examined, or considered.

23. The cumulative effect of the above decision is that the court can exercise discretion at any stage of the proceedings and grant exemption from personal appearance. One important consideration would residence far away, in foreign lands. The court should be alive all circumstances, and exercise its discretion judiciously. The court in his case did take all the factors in mind, i.e. nationality of the respondent, no dispute of his identity, the trial proceedings hinging largely on documents, etc.

24. The above discussion ought to have been dispositive of the proceedings. Yet, one cannot altogether ignore the fact that the July application seeking exemption from appearance was allowed, on the fact that the accused were prevented from coming to India, due to a bomb blast. This however, was incorrect; they were in India. The trial court wad not too happy with the explanation. The impression gained is that at times, the respondents were concealing their activities. Such conduct, when an brought to the notice of the court, should be considered

appropriately when a request for permanent exemption is made. However, these facts were not considered by the trial court.

25. In the above circumstances I am of the opinion that while the trial court''s exercise of discretion cannot be faulted on legal principles, as he applied the relevant criteria, yet there is no discussion of the events which took place in July 2005 and the respondent''s admitted presence. Maybe, ultimately that could have no impact on the request for personal exemption. In the circumstances, the petition deserves to partly succeed. The trial court shall considered that question (i.e. allegation about the petitioner''s presence in India 2005), in the light of the tests indicated in Bhiwani Denim & Apparels, and pass appropriate orders in accordance with law. The exercise shall be completed within four months. The petition is partly allowed; the matter is remitted for consideration of the respondent''s application, afresh, for taking into account the respondent''s explanation for their absence in July, 2005. The status quo regarding their appearance, before the trial court, till determination of the question, upon this remission, shall be maintained. No costs.

