
(1994) 09 MAD CK 0087

In the Madras High Court

Case No : Criminal O.P. No. 15422 of 1992 and Criminal M.P. No. 8288 of 1992

Sri Arunagirinatha Sri Gnanasambanda Desika Paramacharya
Swamigal, Madurai Adheena Karthar

APPELLANT

Vs

State by Sub-Inspector of Police

RESPONDENT

Date of Decision : 14-09-1994

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 173(2)
Penal Code, 1860 (IPC) — Section 505(b)

Citation : (1995) 1 LW(Cri) 186

Hon'ble Judges : Janarthanam, J

Bench : Single Bench

Advocate : C.S. Dhanasekaran, for the Appellant; A.N. Rajan, Government Advocate, for the Respondent

Judgement

Janarthanam, J.—The Sub-Inspector of Police, Mayiladuthurai (Respondent-complainant) filed a final report u/s 173(2) of the Code of Criminal Procedure (for short "the Code") against the Petitioner-accused for alleged offence u/s 505(b) of the Indian Penal Code, which was taken on file as C.C. No. 261 of 1989 on the file of the Judicial Magistrate No. I, Mayiladuthurai.

2. After service of process, the Petitioner accused entered appearance through a counsel of his choice to defend him in trial. He, in fact during the course of trial, filed an application u/s 205 of the Code praying for his personal, appearance being dispensed with and he be represented by his counsel. The trial Magistrate allowed such an application and his presence during the course of trial right through had been dispensed with and he had been represented by his counsel.

3. When the case reached the stage of his examination u/s 313 of the Code, he appeared to have filed an application stating that he did not want to answer any questions, which were to be put to him by the trial Court and further stated that he would not raise the question of prejudice, if any, to be caused to him, on account of his non-examination at the subsequent stage of trial, appeal or

revision.

4. The applications so filed was stated to have been dismissed. Aggrieved by such dismissal, the Petitioner-accused filed a revision before Court of Session, East Thanjavur Division at Nagapattinam, which, in turn, without the same being numbered, was rejected, by order dated 18.9.1992 on the ground that a revision against an interlocutory, order, was not maintainable on the face of the sanguine provisions adumbrated u/s 397(2) of the Code.

5. The aggrieved Petitioner-accused resorted to the main former action u/s 482 of the Code praying for the very same relief, as had been done by him in the trial Court, in the sense of the questions to be put to him u/s 313 thereof to be answered by his counsel, without himself raking up the question of any prejudice having been caused to him either during the stage of trial, appeal or revision.

6. He also filed the latter action praying for stay of further proceedings in the said Calendar Case, pending disposal of the main former action.

7. This Court passed an order on 25.11.1992 as follows:

Notice of motion returnable by three weeks. Interim stay till then.

8. Arguments of Mr. C.S. Dhansekarn, learned Counsel for the Petitioner accused and Mr. A.N. Rajan, learned Government Advocate (Crl. side) were heard.

9. It is not as if the question, as now posed in these actions, had not at all come up for consideration before the apex Court of this Country, anterior in point of time. But the plain fact is that such a question came to be canvassed in decisions more than one.

10. In Chandu Lal v. Puran Mal (AIR 1988 S.C.2163) , the Appellant was an accused in the Criminal case, pending before the trial Court. The trial Court has dispensed with the Appellant's personal appearance u/s 205 of the Code and has permitted him to be represented at the trial through his counsel. On the conclusion of the trial, learned Magistrate directed the Appellant to appear personally before the Court for recording his statement as contemplated by Section 313 of the Code. The Appellant's request that his statement may be recorded through his counsel was rejected by the trial court and he was directed to appear before the Court. The Appellant challenged the order of the Magistrate before the High Court by means of a miscellaneous petition u/s 482 of the Code. The High Court rejected the petition and refused to interfere with the order of learned Magistrate. The Appellant has challenged the order of the Magistrate and the High Court in the appeal before the Supreme Court.

(a) A Division Bench of the Supreme Court observed:

... The Appellant does not want to answer any of the questions which are going to be put to him by the trial Court u/s 313 of the Code of Criminal procedure and he further states that he will not raise the question of prejudice, if any, caused to him on account of his non-examination at subsequent stage of trial, in appeal or

revision. In view of this statement, we are of the opinion that it is not necessary for the Appellant to appear before the trial Court. We accordingly set aside the order of the trial Court and High Court, directing the Appellant to appear before the trial court for making statement u/s 313 of the Code of Criminal Procedure.

11. Another Division Bench of the Supreme Court, in the case of Usha K. Pillai Vs. Raj K. Srinivas and others, took a contrary view, as expressed in paragraph 5 therein thus:

4. The newly added proviso is in the nature of an exception to Cl.(b) of Sub-sec(1) of Section 313 of the Code. It applies to a summons-case, it states in no uncertain terms that in a summons-case where the Court has dispensed with the personal attendance of the accused it would be open to the Court to dispense with the examination of the accused under Cl.(b) of Section 313(1) of the Code. Even in cases where the personal presence of the accused has been dispensed with u/s 205(1) or Section 317 of the Code the Magistrate can dispense with the mandatory requirement of Cl.(b) only in a summons-case, i.e., a case other than a warrant case. This is clear on a plain reading of the definitions of a summons in case in Section 2(w) and a warrant-case in Section 2(x) of the Code. A Warrant-case is defined as one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Since an offence u/s 363, I.P.C., is punishable with imprisonment for a term exceeding two years it is a warrant-case and not a summons-case. Therefore, even in cases where the Court has dispensed with the personal attendance of the accused u/s 205(1) or Section 317 of the Code, the Court cannot dispense with the examination of the accused under Cl.(b) of Section 313 of the Code, because such examination is mandatory. If the accused is a company or a juridical person it may be open to examine the person conversant with the facts of the case. It would thus appear that the mandate of S. 313(1)(b) demands that the accused person, if not a company or other juridical person, must be personally examined to explain the incriminating circumstances appearing against him in the prosecution evidence and the examination of his lawyer would not be sufficient compliance with the mandate of said provision.

12. The view, as above, had been taken by the Division Bench of the Supreme Court, following the view, as entertained by its Full Bench, in the case of Bibhuti Bhusan Das Gupta and Another Vs. State of West Bengal, Such being the case, it goes without saying that the view, as taken by the Division Bench of the Supreme Court in the case of Usha K. Pillai (supra) is to be preferred, as the binding precedent by this Court under Article 141 of the Constitution of India, in preference to the view as taken in the case of Chandu Lal (supra).

13. Admittedly, the Petitioner-accused had been tried for the alleged offence u/s 505(b) of the Indian Penal Code, which is a warrant-case, in as much as such an offence is punishable for three years.

14. On the above exposition of law, emerging from the Supreme Court, it goes

without saying that the Petitioner-accused cannot be allowed to be represented by his counsel for answering the questions to be put to him u/s 313 of the Code. To put it otherwise, his personal appearance cannot at all be dispensed with and he has to necessarily appear before the trial Court for answering the questions to be put to him u/s 313 of the Code.

15. In this view of the matter, the main former action deserves to be dismissed and the same is accordingly dismissed. Consequently the latter action for stay is also dismissed.