

Shaji Vs. State of Kerala

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Court : Kerala

Decided On : Apr-26-2005

Reported in : 2005(3)KLT303

Judge : A.K. Basheer, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 205(1), 313, 313(1), 317 and 482; Indian Penal Code (IPC) - Sections 324 and 447

Appeal No. : Crl. M.C. No. 2493 of 2004

Appellant : Shaji

Respondent : State of Kerala

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : Sajan Varghese, K. and; Liju, M.P., Advs.

Disposition : Petition allowed

Judgement :

ORDER

A.K. Basheer, J.

1. Is it mandatory that the accused should be invariably present in Court to answer the questions put to him under Section 313 of the Code of Criminal Procedure (for

short 'the Code')? The above question has been answered in the negative by Their Lordships of the Supreme Court in *Basavaraj R. Patil and Ors. v. State of Karnataka and Ors.*, AIR 2000 SC 3214.

2. But the same question has cropped up in this case since, the learned Magistrate took the view that the accused could be allowed to answer the questions of the Court without being physically present, only if he was already exempted from personal attendance in the Court. Is this view correct? Is it in accord with the dictum laid down in *Basavaraj's* case

3. The petitioner is being tried before the Judicial Magistrate of First Class, Mannarkkad for offences punishable under Sections 324 and 447 I.P.C. He is presently employed in Jeddah in Saudi Arabia. He had left the country for Jeddah during the pendency of the above case. But his absence did not impede the proceedings of the Court. The applications filed on his behalf on the respective dates of posting to dispense with his presence were allowed by the Court. Thus, the witnesses cited by the prosecution were examined and the evidence was closed.

4. The problem arose when the case was posted for examination of the petitioner/accused under Section 313 of the Code. An application was filed on behalf of the accused to dispense with his 'personal attendance' in Court. An affidavit was also filed by the accused along with a petition to allow his counsel to answer the questionnaire under Section 313 of the Code. It was specifically averred in the affidavit that he was employed in a bakery in Jeddah and he was not in a position to undertake the journey to his village because of the huge expenditure that he might incur. It was further averred that he would not raise any grievances or objections 'at any stage of the case' with regard to the answers given by his counsel under Section 313 of the Code. He further stated that all acts, deeds and things admitted by his counsel for and on his behalf shall be considered as personally done by him. True copies of the petition and the affidavit are on record as Annexures A and B respectively.

5. The learned Magistrate after considering the petition and the affidavit, and also the objections raised by the Assistant Public Prosecutor in his counter-statement,

rejected the plea made on behalf of the petitioner. The order passed by the learned Magistrate is under challenge in this case filed under Section 482 of the Code.

6. In Basavaraj's case (*supra*) Their Lordships of the Supreme Court (by majority) held that the requirement of personal attendance of the accused in Court to answer the questions under Section 313 of the Code, would be the general rule. But if his remaining present in Court would involve undue hardship and large expenditure, the Court could alleviate the difficulties of the accused by allowing his request to permit him to answer the questions without being present in Court. But the Court must be satisfied that the situation in which the accused is placed warrants such a lenient view. The following observations of Their Lordships are apposite:

'We think that pragmatic and humanistic approach is warranted in regard to such special exigencies. 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.'

In this connection, Their Lordships indicated the course which could be adopted by the Court in 'special exigencies'. The Court held that the accused can be permitted to answer the questionnaire under Section 313 of the Code without being physically present in Court, if he swears to an authenticated affidavit that those answers were given by him.

7. It is not in dispute that in the present case the petitioner is employed in Jeddah. It appears that he has got a small job in a bakery. The difficulty of the petitioner to undertake a journey to India to appear before the Court by incurring a huge expenditure can very well be imagined. The Assistant Public Prosecutor has not

disputed the above position in his counter-statement. What has been averred in the counter-statement is only that there is no undertaking that the accused, if convicted, would not raise any objection that his conviction was bad on the basis of the answers given by his counsel to the questions put by the Court under Section 313 of the Code.

8. The learned Magistrate has referred to Basavaraj's case in his order. According to the learned Magistrate, the dictum laid down in Basavaraj's case would apply only if the accused had already been exempted from personal appearance in the Court. Is this view sustainable

9. It is true that in paragraph 25 of the judgment, Their Lordships have observed that an accused who has been exempted from personal appearance can make an application before the Magistrate to allow him to answer the questions under Section 313 of the Code without being physically present in Court. Of course, the proviso to Sub-section (1) of Section 313 postulates that in a summons case the Court may dispense with the examination of the accused under Clause (b) if the Court has dispensed with the personal attendance of the accused. While referring to Clause (b) in relation to warrant cases, Their Lordships have categorically held that the word 'shall' contained therein has to be interpreted as obligatory under normal circumstances. Nevertheless, in 'special exigencies' the Court should adopt a pragmatic and humanistic approach, particularly when insistence for the personal presence of the accused in Court would result in undue hardship and grave prejudice to him. It was in this context that Their Lordships had distinguished and explained the dictum laid down by the Apex Court in *Usha K. Pillai v. Raj K. Srinivas*, AIR 1993 SC 2090, wherein it was held that even in cases where the Court had dispensed with the personal attendance of the accused under Section 205(1) or Section 317 of the Code, the Court cannot dispense with the examination of the accused under Clause (b) of Section 313(1) of the Code because such examination was mandatory. After noticing the dictum laid down in *Usha K. Pillai's* case (*supra*) Their Lordships in *Basavaraj* had ultimately held that in appropriate cases the Court can dispense with the personal attendance of the accused even under Clause (b) of Section 313(1) of the Code. This does not presuppose that the accused must have been already exempted from personal

appearance. A perusal of the provisions contained in Section 317 of the Code clearly shows that the Magistrate can at any stage of an enquiry or trial dispense with the personal attendance of the accused if he is represented by a pleader. In such cases the Magistrate can proceed with the enquiry or trial in the absence of the accused. A careful reading of the entire text of the judgment in Basavaraj's case will undoubtedly show that the view taken by the learned Magistrate is not correct. The relevant portion of the judgment extracted supra would settle the issue.

10. In this context, it is pertinent to note that in Basavaraj's case (which was incidentally a warrant case and the accused were not exempted from personal appearance) the Apex Court had ultimately directed the Trial Court to consider the application if any, that may be filed by the accused to allow them to answer the questions in the light of the dictum laid down in the judgment.

11. Equally unsustainable is the finding of the learned Magistrate that the petitioner was not entitled to apply for exemption from personal appearance again, since his earlier application with a similar prayer was rejected and the said order had become final. It is elementary that in the case of applications for exemption from personal attendance of the accused in the Court be it under Section 205(1) or Section 317 of the Code neither the rule of estoppel nor the principles of res judicata will apply. As noticed earlier, exemption from personal appearance can be granted at the discretion of the Court at any stage of an enquiry or trial. Therefore, the application filed by the petitioner could not have been rejected on the ground that a similar application filed by him was dismissed earlier.

12. However, it is pertinent to note that in this case the prayer made by the petitioner before the Court below was to allow his counsel to answer the questions under Section 313 of the Code on his behalf. The petitioner had specifically averred in the affidavit which was attested at the Consulate General of India in Jeddah that he would not raise any objection at any stage with regard to the answers that might be given by his counsel. He had further stated that 'all acts deeds and things admitted or denied' by his counsel for and on his behalf should be construed as personally done by him.

13. In Chandu Lal Chandraker v. Puran Mal and Anr., 1988 Supp. SCC 570, a similar request made by an accused was rejected by the Trial Court. The High Court agreed with the view taken by the learned Magistrate. Before the Supreme Court it was submitted on behalf of the accused that he did not want to answer any of the questions which would be put to him under Section 313 of the Code and that he would not raise the question of prejudice on account of his non-examination at a subsequent stage of trial, appeal or revision. In view of the above submission made on behalf of the accused, the Supreme Court set aside the order of the Trial Court directing the accused to appear in person to answer the questions under Section 313 of the Code.

14. Learned counsel for the petitioner submits that in view of the above decisions of Their Lordships in Basavaraj and Chandu Lal's case (supra) two options are available to the petitioner; either to make a plea before the learned Magistrate to allow him to answer the questions without being physically present in Court or to forgo his right to give answers at all. Learned counsel submits that the learned Magistrate may be directed to consider the matter afresh in the light of the above decisions of the Apex Court.

15. Having regard to the entire facts and circumstances, I have no hesitation to hold that Annexure B order passed by the learned Magistrate is liable to be set aside. I do so. Learned Magistrate shall consider Annexure A application afresh keeping in view the dictum laid down by the Supreme Court in Basavaraj and Chandu Lal's case (supra) and also the observations made herein above.

The CrI.M.C. is allowed in the above terms.