

Ashok M. Javeri and Another Vs Surajbhan Jain

Court: Orissa High Court

Date of Decision: Aug. 1, 1994

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€” Section 205, 205(1), 311, 313, 313(1)
 Negotiable Instruments Act, 1881 (NI) â€” Section 138

Hon'ble Judges: A. Pasayat, J

Bench: Single Bench

Advocate: S.P. Mishra, S. Latif, R.K. Mishra and S.S. Das, for the Appellant; A.C. Mohanty and R.K. Swain, for the Respondent

Judgement

A. Pasayat, J.

Petitioners call in question (Correctness of order passed by learned Sub-Divisional Judicial Magistrate, Titilagarh (in short

"SDJM") rejecting prayer for dispensing with their personal attendance, and allowing their representation through lawyer to answer Questions put

by the Court u/s 313, Code of Criminal Procedure, 1973 (in short, "Code of Criminal Procedure").

2. Background facts, filtering out unnecessary details are as follows:

On the basis of a complaint filed by Surajbhan Jain, the opposite party in this case. ICC Case No. 37 of 1989 was instituted. The dispute relates

to dishonour of a cheque, and the Petitioners are facing trial for commission of offence punishable u/s 138 of the Negotiable Instruments Act, 1981

(in short "the Act"). After closure of evidence from the side of complainant, an application was filed on behalf of the Petitioners with a prayer to

permit them to be represented through a counsel at the time of examination u/s 313, Code of Criminal Procedure. The ground indicated was that

they are partners of a firm and are stationed at Bombay, and their persona appearance would cause hardship to them. Since they were allowed to

be represented u/s 205, Code of Criminal Procedure, they sought exemption in terms of proviso to Clause (b) of Sub-section (1) of Section 313,

Code of Criminal Procedure. Their motion was opposed by the complainant opposite party. Making reference to Section 205, Code of Criminal

Procedure and Section 313, Code of Criminal Procedure, and various decisions of the apex Court and of this Court the learned SDJM rejected

the prayer of the Petitioners.

3. The stand of the Petitioners in the revision application is that dispensation of personal attendance in a summons case as set out in proviso to

Clause (b) of Sub-section (1) of Section 313, clearly shows that the Court is empowered to accept the prayer in a given case. The learned SDJM

has misinterpreted the view expressed by the apex Court, and erroneously held that examination personally is mandatory unless the accused is a

company or a judicial person. Shri A.C. Mohanty, learned Counsel appearing for the opposite party supported the order submitting that the view

expressed by the learned SDJM is in conformity with the view expressed by the apex Court and this Court.

4. For resolution of the controversy, reference to Section 205 and Sub-section (1) of Section 313, Code of Criminal Procedure so far as relevant

is necessary. They read 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 manner hereinbefore provided.

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).

Sub-section (1) of Section 313 was introduced in its present form pursuant to the recommendation made by the 41st Report of the Law

Commission. The words "in every inquiry or trial" puts the matter beyond any shadow of doubt that it applies also to summons cases. The old

Sub-section (1) of Section 342 of the Code of Criminal Procedure, 1898 (in short, the "old Code") has now been divided into two Clauses (a)

and (b). Clause (a) uses the expression "may" to indicate that the matter is left to the discretion of the Court to put questions to the accused at any

stage of the inquiry or trial whereas Clause (b) uses the expression "shall" to convey that it is necessary for the Court to examine the accused after

the witnesses for the prosecution have been examined before he is called on for his defence. The proviso is a new provision which came to be

added to Sub-section (1) with a view to enabling the Court to dispense with the examination of the accused under Clause (b) in a summons case it

the Court has already dispensed with his personal attendance at an earlier point of time. Therefore, if the Court on completion of the prosecution

evidence finds that there are certain circumstances appearing in the evidence against the accused, the Court is obliged by Clause (b) to question the

accused before he is called on for his defence. This provision is general in nature and applies to all inquiries and trials under the Code of Criminal

Procedure. The purpose is to give the accused an opportunity to explain the circumstances appearing against him in evidence tendered by the

prosecution so that the said explanation can be weighed vis-à-vis the prosecution evidence before the Court reaches its conclusion in that behalf.

This is specifically provided in Sub-section (1) itself that the purpose is to enable the accused to explain the circumstances appearing in the

evidence against him. On a plain reading of Section 313(1) of the Code of Criminal Procedure it is clear that the Court is empowered by Clause

(a) to question the accused at any stage of the inquiry or trial while Clause (b) obligates the Court to question the accused before he enters of his

defence on any circumstance appearing in the prosecution evidence against him. This is statutory recognition of the salutary rule of and; alteram

patern and gives a statutory recognition to the principles of natural justice. It is intended for the benefit of the accused person.

The section is expressly designed to secure that the Court in the interest of strict justice, should, by the frame of its questions, perform a double

duty, namely, that it should: (i) communicate to the accused to the full extent that may be found necessary in each particular case, what is alleged

against him in the evidence for the prosecution and (ii) ascertain from him what explanation or defence, in law or in fact, he wishes to put forward

in respect thereof The provisions embodied in the section enable an accused to explain the circumstances appearing against him in the evidence.

But it is intended not merely for his benefit. It is a part of a system for enabling the Court to discover the truth.

5. The newly added proviso is in the nature of an exception to Clause (b) of Sub-section (1) of Section 313 of the Code of Criminal Procedure. It

applies only to summons cases. In such a case, if 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 Clause (b) of Sub-section (1) of Section 313. In cases where personal attendance of

the accused has been dispensed with u/s 205(1), the Magistrate can dispense with the mandatory requirement of Clause (b) of Section 311 only in

summons cases, that is the cases other than warrant cases.

6. It is not in dispute that the case at hand is a summons case, as the offence u/s 138 of the Act is punishable with imprisonment for a maximum

term of one year. When the accused is a company or a judicial person, it is open to examine a person conversant with the facts of the case. It

would thus appear that the mandate of Section 313(1)(b) demands that the accused person, if not a company or other judicial 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 mandatory requirement of the said provision. This position has been elaborately stated by the apex

Court in *Usha K. Pillai v. Rai K. Srinivas and Anr.* (1993) 6 OCR (SC) 486, *Bibhuti Bhusan Das Gupta and Another Vs. State of West Bengal*,

while dealing with provisions of the said Code apex Court held that accused's examination u/s 342 (corresponding to Section 313, Code of

Criminal Procedure) becomes necessary when at the close of the prosecution evidence the Magistrate finds that there are incriminating

circumstances requiring an explanation by the accused. There are exceptional cases when an examination of the accused personally u/s 342, is not

necessary or possible. Where the accused is a company or other judicial person it cannot be examined, personally. It may be that the Court may

then examine a director or some other agent and its behalf. In *Udayanath Barik and 15 Ors. v. State* 1989 (II) OLR 1, it was observed that the

only exception to personal examination of the accused is where the accused is a company or a judicial person.

7. The learned SDJM appears to have proceeded on the basis that unless the accused is a judicial person or a company examination of

representing lawyer to answer the questions put u/s 313 is impermissible. He has not dealt with the proviso which in a summons case permits

dispensation of examination under Clause (b). It is submitted on behalf of the Petitioners that they shall not claim any prejudice if their examination

is dispensed with. It is further submitted that there is also no necessity of their representing through lawyer to answer the questions put by the

Court. In *Chandu Lal Chandraker v. Puran Mal and Anr.* AIR 1989 SC 2163, apex Court recorded concession of counsel appearing for an

accused that he did not want to answer any questions which were going to be put to him by the trial Court u/s 313, Code of Criminal Procedure

and that he will not raise the question of prejudice on account of his non-examination at subsequent stage of trial. Similar concession is made by the

learned Counsel for the Petitioners. Since the learned SDJM has not considered the prayer keeping in view the proviso to Sub-section (1) of

Section 313, Code of Criminal Procedure, I direct re-consideration of the matter When the matter is taken up for re-consideration, concession by

the Petitioners in this Court as indicated supra shall be kept in view by the learned SDJM.

The revision application is accordingly disposed of.