

**Criminal Revision**

Present:

**The Hon'ble Justice Ashim Kumar Roy****C.R.R. No. 3178 of 2009**

With

**CRAN No. 3139 of 2009****Robin Paul**

versus

**Mr. G. K. Roy & Anr.****Judgment On : 27-01-2010.****Point:**

**PERSONAL APPEARANCE:** Accused is ill- Whether personal appearance be dispensed with- pragmatic and humanistic approach is warranted if the accused is not able to reach the venue of the trial due to illness- Provident Fund Act, 1925, S.14- The Code of Criminal Procedure, 1973-S. 313.

**Fact:** The petitioner has been facing his trial for an offence punishable under Sections 14(1-B)/14A(1) of the Provident Fund Act. The said case was instituted in the year 2001 and at the stage of examination of the petitioner under Section 313 of the Code of Criminal Procedure he moved an application seeking exemption under Section 205 of the Code of Criminal Procedure and for examination there-under through his learned lawyer on the ground of his illness. However, the Learned Magistrate rejected his application, hence this criminal revision.

**Held:**

A very pragmatic and humanitarian approach is to be taken for ends of justice and the benefit of the proviso to Section 313 (1) of the Code of Criminal Procedure is to be extended to him, although this is a warrant case. No prejudice shall be caused to the prosecution if the accused is permitted to answer the question, which the Court might put to him during his examination under Section 313 of the Code, without insisting him to be physically present in Court, by supplying the questionnaire to his advocate containing such questions. Before the petitioner's such prayer is allowed he shall

make necessary application supported by affidavit sworn by him in the manner as laid down by the Hon'ble Apex Court in the case of Keya Mukherjee Vs. Magma Leasing Limited & Anr. (supra). It is further directed in this regard the Trial Court must follow the direction given by the Hon'ble Apex Court and specified in paragraph 22 of the aforesaid decision of the Hon'ble Supreme Court.

Paragraph – 4,5

Case:

(2008)2CCrLR(SC)646 (Keya Mukherjee Vs. Magma Leasing Limited & Anr.)

For Petitioner : Mr. Krishnendu Gooptu  
Mr. C. K. Saha

For State : Mr. Swapan Kumar Mullick

**The Court:**

The petitioner has been facing his trial for an offence punishable under Sections 14(1-B)/14A(1) of the Provident Fund Act before the Learned Chief Judicial Magistrate, Jalpaiguri. The said case was instituted in the year 2001 and at the stage of examination of the petitioner under Section 313 of the Code of Criminal Procedure he moved an application seeking exemption under Section 205 of the Code of Criminal Procedure and for examination thereunder through his learned lawyer on the ground of his illness. However, the Learned Magistrate rejected his such application, hence this criminal revision.

2. Both the learned advocates appeared on behalf of the petitioner as well for the State were present in Court, but none appeared on behalf of Provident Fund Authority, although notice was duly served.

3. It is true the case in connection with which the petitioner is seeking exemption at the stage of his examination under Section 313 of the Code of Criminal Procedure, relates to a case punishable with imprisonment for a term which may extend upto 3 years and is a warrant case and

not a summons case. Therefore, his personal examination under Section 313 of the Code cannot be dispensed with nor the accused be permitted to be examined through his learned lawyer, even when his personal attendance during the trial has been dispensed with by the Court earlier. Admittedly, in this case the accused was never enjoying any exemption under Section 205 of the Code. However, the accused has sought for such exemption at the stage of his examination under Section 313 of the Code on the ground that he was seriously ill having suffered a massive attack of Cerebrovascular stroke with right side hemiparesis and as a result he has been lying completely bed ridden due to paralysis. The necessary medical papers in support of such claim have been filed with this criminal revision and the authenticity of the same has not been disputed by the learned advocate of the State. I have no reason to doubt the genuineness of the statement of the accused as to his illness. Thus, indisputably if the accused is now insisted to be present in Court for his examination under Section 313 of the Code of Criminal Procedure by undertaking a long journey from his present place of residence at Kolkata to Jalpaiguri, obviously that would cause enormous hardship to him and might be a serious threat to his health. In this connection it would be more apposite to refer to the decision of the Hon'ble Supreme Court in the case of Keya Mukherjee Vs. Magma Leasing Limited & Anr., reported in (2008) 2 C Cr LR (SC) 646, where the Apex Court held as follows;

“Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion. (para 20)

At the same time it should be borne in mind that the provision is not intended to nail him to any position, but to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word “may” in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence,

without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him. (para 21)

But the situation to be considered now is whether, with the revolutionary change in technology of communication and transmission and the marked improvement in facilities for legal aid in the country, is it necessary that in all cases the accused must answer by personally remaining present in court. We clarify that this is the requirement and would be the general rule. However, if remaining present involves undue hardship and large expense, could the court not alleviate the difficulties. If the court holds the view that the situation in which he made such a plea is genuine, should the court say that he has no escape but he must undergo all the tribulations and hardships and answer such questions personally presenting himself in court. If there are other accused in the same case, and the court has already completed their questioning, should they too wait for long without their case reaching finality, or without registering further progress of their trial until their co-accused is able to attend the court personally and answer the court questions? Why should a criminal court be rendered helpless in such a situation? (para 22)

The one category of offences which is specifically exempted from the rigour of Section 313 (1)(b) of the Code is “summons cases”. It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a “summons case”. Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty. Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences. Even in cases involving less serious offences, can not the court extend a helping hand to an accused who is placed in a predicament deserving such a help? (para 23)

Section 243 (1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide Section 247). Even the accused involved in offences exclusively triable by the Court of Session can also exercise such a right to put in written statements (Section 233 (2) of the Code). It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth. (para 24)

We think that a 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. How could this be achieved? (para 25)

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. (para 26)

If the court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the court to supply the questionnaire to his advocate (containing the questions which the court might put to him under Section 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact at the appropriate place in the questionnaire (as a matter of precaution the court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the court, he shall forfeit his right to seek personal exemption from court during such questioning. The Court has also to ensure that the imaginative response of the counsel is intended to be availed to be a substitute for taking statement of accused.” (para 27)

4. Now, in the light of the above observations of the Hon'ble Supreme Court, I am of the opinion, in the fact and circumstances of the present case also a very pragmatic and humanitarian approach is to be taken for ends of justice and the benefit of the proviso to Section 313 (1) of the Code of Criminal Procedure is to be extended to him, although this is a warrant case. I am of the further opinion, no prejudice shall be caused to the prosecution if the accused is permitted to answer the question, which the Court might put to him during his examination under Section 313 of the Code, without insisting him to be physically present in Court, by supplying the questionnaire to his advocate containing such questions.

5. Accordingly, I set aside the impugned order and direct if within two weeks from this date the petitioner makes an application to the Court praying for permitting him to answer the questions that might be put to him his examination under Section 313 of the Code of Criminal Procedure without making his physical presence in Court, then in that case the Court shall allow his such prayer. However, I make it clear that before the petitioner's such prayer is allowed he shall make necessary application supported by affidavit sworn by him in the manner as laid down by the Hon'ble Apex Court in the case of Keya Mukherjee Vs. Magma Leasing Limited & Anr. (supra). It is further directed in this regard the Trial Court must follow the direction given by the Hon'ble Apex Court and specified in paragraph 22 of the aforesaid decision of the Hon'ble Supreme Court.

6. This criminal revision, thus, stands allowed.

In view of the disposal of main criminal revisional application, an application for extension of interim order being CRAN No. 3139 of 2009 has become infructuous and accordingly stands disposed of.

7. Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.

**( Ashim Kumar Roy, J. )**