

Sultan Singh Jain vs The State on 1 August, 1951

Equivalent citations: AIR1951ALL864, AIR 1951 ALLAHABAD 864

Author: Raghubar Dayal

Bench: Raghubar Dayal

ORDER

B. Dayal, J.

1. This is an application under Section 551A, Cr. P. C. for ordering the exemption of the applicant from personal attendance at the hearings of a case under Sections 420, 120B and 109, Penal Code, on the ground that the trial of the case will require a very large number of hearings and that on account of the applicant's frequent presence his business will be practically ruined.

2. I have not heard the learned counsel for the parties on the merits as to how far, in the circumstances of this case, the applicant should be granted exemption, as I find that the Division Bench case of M.G. Desai v. Emperor, A. I. R., (19) 1932 ALL. 504 goes against the applicant. It was held in that case :

"This Court will only act on its inherent powers where those powers can be exercised without conflict with the existing law."

It was held that the case of the applicant did not come within the provisions of Section 540A, Cr. P. C. The application for exemption was rejected and, it was also remarked :

"This is one of those cases which may act hardly on a particular person ; but in our opinion it would create a most dangerous precedent to grant exemption to the applicant for reasons which are not covered by Section 540A, Cr. P. C."

It has been held in the case of Ummal Hasanath, In re, A.I.R. (34) 1947 Mad. 483, in Madho Rao v. Iswardas Sheoratan, A. I. R. (36) 1949 Nag 334 and in Rajkumar Singh v. State, A.I.R. (38) 1951 Madh. B. 28, that in cases to which Section 540A, Cr. P. C. does not apply the Court can exercise its inherent powers under Section 561A in proper cases and exempt accused from personal attendance. It appears to me that in the circumstances the case of M.G. Desai v. Emperor, A.I.R. (19) 1932 ALL. 504, may require reconsideration and that, therefore, this application be laid before a larger Bench. I, accordingly, order that the papers be laid before the Hon'ble the Chief Justice for referring the case to a larger Bench.

OPINION OF THE FULL BENCH Malik, C.J.

3. There are two cases pending against the applicant in the Court of a Magistrate first class at Meerut. The applicant had made two applications before the learned Magistrate under Section 540A Cr. P. C. for exemption from personal appearance in Court. The ground given was that the applicant had certain government contracts to execute and his continued presence in Meerut would be detrimental to government work. The Magistrate dismissed the applications. Copy of the order of the Magistrate has not been filed in this Court.

4. It is not necessary for us in this case to decide what the words "incapable of remaining before the Court" in Section 540A mean. It, however, appears to us that the mere fact that the presence of the accused at the place where the trial was being held would be detrimental to government work does not make the accused "incapable of remaining before the Court" and therefore the applications were rightly rejected.

5. The applications having been dismissed by the lower Court, two applications were filed in this Court under Section 561A, Cr. P. C. The prayer made in these applications was that the applicant be exempted from appearance in the Court of the learned City Magistrate, in whose Court the cases against the applicant are pending.

6. These cases had come up before a learned Judge of this Court before whom the decision in *M.G. Desai v. Emperor*, A. I. R. (19) 1932 ALL. 504 was cited. The learned Judge referred the cases to a larger Bench for decision of the question whether that case was rightly decided. It was observed in that case that "this Court will only act in its inherent powers where these powers can be exercised without conflict with the existing law This is one of those cases which may act hardly on a particular person. But in our opinion it would create a most dangerous precedent to grant exemption to the applicant for reasons which are not covered by Section 540A, Cr. P. C."

7. The learned Government Advocate has urged that an application under Section 561A of the Code could be filed in this Court only if the Magistrate has no jurisdiction to grant exemption. He concedes that in a proper case the Magistrate could at the request of the accused grant him exemption from personal attendance, and that, therefore, if the applicant was dissatisfied with the order passed by the Magistrate he should have come up to this Court in revision under Section 439 of the Code and this Court could have then set aside or modified the order passed by the Magistrate in case the Court was of opinion that the order was erroneous. We agree with the objection raised by the learned Government Advocate. We are of opinion that a Court has got powers to exempt in proper cases an accused from personal attendance at the hearings of the case unless it was necessary at a certain hearing that the accused should be personally present, and that this application under Section 561A is misconceived.

8. There is no section in the Criminal Procedure Code which provides that the accused must be present at every hearing of the case, though there are several sections in the Code which show that the presence of the accused at certain stages of the proceedings is specifically provided for. It is, however, one of the vital principles of the administration of criminal justice, which is universally

acknowledged, that in a criminal trial the Court should not proceed ex parte against an accused person. Their Lordships of the Judicial Committee in the case of *Basil Ranger Lawrance v. Emperor*, A. I. R. (20) 1933 P. C. 218 said :

"It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused ; and for this purpose trial means the whole of the proceedings, including sentence, There is authority for saying that in cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is invariable, (inviolable ?) unless possibly the violent conduct of the accused himself renders it lawful to continue in his absence." Though the case went up to their Lordships from Nigeria, the general principle underlying their decision applies to all criminal trials. Here, we have no such division of crime as felony and misdemeanour. The serious offences, however, are warrant cases, more serious of which are exclusively triable by Sessions Court, while the less serious cases are summons cases and some of them are even triable summarily. The other division is between cognizable and non-cognizable offences.

9. The rule that the trial should be in the presence of the accused is, no doubt, mainly for the protection of the interest of the accused. This does not, however, mean, as has been urged by Mr. Chaturvedi, that if the accused wants to absent himself from Court, the Magistrate is bound to grant his prayer. If, however, an accused person has prayed for exemption and the Court has granted him exemption from personal attendance, it is not open to the accused to whom such exemption was granted to complain that the exemption was wrongly granted to him and the trial, therefore, should be held to be null and void. In *Aditya Pd. Bagchi v. Jogendra Nath*, A. I. R. (35) 1948 ALL. 393, the learned Judges held that "the trial of an accused person in his absence cannot be held to be null and void if the attendance of the accused person is dispensed with by the Court upon his own application and if he is represented by a pleader of his choice during such absence."

If an accused person gets an order from the Court excusing his attendance he should not be allowed to complain that his attendance should not have been excused.

10. While, therefore, it cannot be denied that the presence of the accused at the trial is necessary, the Code itself shows that the trial Court has a discretion in certain circumstances to exempt the personal attendance of the accused. There is no specific section to that effect except Section 205, Criminal P. C., but it is implied in some of the other sections in the Code. For example, S 353, Criminal P. C., provides for recording of evidence in the presence of the accused and is as follows:

"Except as otherwise expressly provided all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader."

11. We agree with the view expressed by a Division Bench of this Court in *Aditya Pd. Bagchi v. Jogendra Nath*, A. I. R. (35) 1948 ALL. 393, of which one of us was a member that the scope and

extent of Section 205, Criminal P. C., is limited to the stage of the commencement of a trial and applies to a summons issued by a Magistrate under Section 204, Criminal P. C. The words "or when his personal attendance is dispensed with" in Section 353, do not necessarily refer back merely to a case where the summonses were originally issued under Section 205, in which the presence of the accused was dispensed with and he was allowed to appear through pleader. It was held in Aditya Pd. Bagchi's case, that the exemption in Section 205 "should not be extended to cover the powers of a Magistrate for exemption of the attendance of an accused person at any other stage except when the Magistrate is issuing process at the commencement of the proceedings."

The reference in Section 353, to the power of a trial Court to dispense with the personal attendance of an accused, therefore clearly implies that the trial Court has such a power of granting exemption.

12. Section 366 of the Code deals with a later stage that is the time when the judgment is to be pronounced in the case. There the accused has to attend in person unless his personal attendance during the trial has been dispensed with and the sentence that the Court proposes to pass is one of fine only or the Court intends to acquit him.

13. Upto the year 1923, these were the only provisions in the Code relating to exemptions from personal attendance of accused persons. Section 540A was added in the Code in the year 1923 by the Amendment Act XVIII [18] of 1923. It could not be seriously urged that before Section 540A was enacted the trial Courts had no power to exempt an accused person from personal attendance unless at the first instance when the summons was issued under Section 204, the Magistrate had under Section 205, provided for his presence by pleader and had not insisted on his attendance in person. Questions must have arisen in a large number of cases about exempting accused persons from personal attendance in Court and no case has been cited in which it was held that the trial Court had no such power even if there were good grounds for exemption. Several cases were cited before us, *Emperor v. G.W. King*, 15 Ind. Cas. 96 (Bom.) a decision of the Bombay High Court, *Raj Rajeshwari Debi v. Emperor*, 17 Cal. W. N. 1248, a decision of the Calcutta High Court and *In re Kandamani Devi*, 45 Mad. 359, in which exemption from personal attendance was granted by the Court. We may say with great respect that we do not agree with all that was said in those cases, but the fact remains that the Courts, before the amendment of the Code in 1923, were exercising the power of granting exemptions in proper cases from personal attendance by accused persons. Section 540A was enacted only to meet a special type of case and under certain special circumstances; but, so far as we can see, it was not intended that the power that the Courts were already exercising of granting exemption in proper cases was intended to be taken away and restricted to the provisions of Section 540A only. That section, therefore, applies only to cases which come under its provisions. The requirements of that section are that where an accused person is incapable of remaining before the Court and there are more than one accused persons in the case and the person who is so incapable is represented by a pleader, the Court may dispense with the attendance of such an accused and proceed with such inquiry or trial in his absence or the Court may adjourn such Inquiry or trial or order that the case of such accused person be taken up and tried separately. That section does not provide for a case where there is a single accused, nor does it make any provision for a case where the accused person is not incapable of remaining before the Court but for some reason which the Magistrate considers reasonable he prays for exemption on dates when his presence is not essential

and is represented by a pleader. We are, therefore, of the opinion that Section 540A was not intended to lay down the whole law as regards the power of a Magistrate to grant exemption to an accused person from personal attendance in Court and that the section must be confined to the circumstances mentioned in the (sic) itself. This point was not considered by the learned Judges in *M.G. Desai v. Emperor*, A.i.r. (19) 1932 ALL. 504 The application in that case was made to the lower Court, so far as we can find from the paper book of the case which we have got before us, under Section 540A and the learned District Judge was of the opinion that "grant of leave or exemption is governed by Section 540A and no other," and as the learned Judge was of the opinion that the case did not come under Section 540A, he rejected the application. The view expressed by the learned District Judge seems to have been upheld by the learned Judges who decided the case of *M.G. Desai*. We do not agree with the law laid down in that case and to the extent to which it is contrary to the opinion expressed by us, it must be deemed to be overruled.

14. We are, therefore, of the opinion that these applications have no force and must fail and they are, therefore, dismissed.