

IN THE HIGH COURT OF ORISSA AT CUTTACK
CRLA No.1065 of 2023

Dr. Hemangini Meher ... **Appellant**

Mr. Devashis Panda, Advocate.

-versus-

Sangita Naik & another **Respondents**

Mr. Sonak Mishra,
Additional Standing Counsel.

CORAM:
JUSTICE S.K. SAHOO

ORDER
05.12.2023

Order No.

04.

This matter is taken up through Hybrid arrangement (video conferencing/physical mode).

Heard learned counsel for the appellant and learned counsel for the State.

This Criminal Appeal has been filed under section 14-A(2) of the S.C. & S.T. (PoA) Act read with section 482 of the Cr.P.C. challenging the order dated 28.08.2023 passed by the learned Special Judge, Kalahandi, Bhawanipatna in C.T. Case No.1064 of 2021 (Special Act) in rejecting the petition under section 205 of Cr.P.C. filed by the appellant Dr. Hemangini Meher dispensing with her personal appearance in the case.

The case was instituted on the basis of the written report presented by one Sangita Naik before the I.I.C., Bhawanipatna Town Police Station on 30.09.2021 and accordingly, the case under sections 294/341/323 of the I.P.C. was registered and on completion of investigation,

charge sheet was submitted on 20.03.2022 against the appellant under sections 341/323 of the I.P.C. read with section 3(2)(va) of the S.C. & S.T. (PoA) Act.

The prosecution case, in short, is that on 30.09.2021 at about 9.00 a.m. when the informant had come from Th. Rampur along with one pregnant lady Khiramani Jhadia to the District Headquarters Hospital, Bhawanipatna, at that time the appellant asked the informant when she came to the hospital. The informant replied that she had come since one hour. Then the appellant alleged to have given a slap on the face of the informant and also abused her.

During the course of investigation, the I.O., who is the S.D.P.O. (Sadar), Bhawanipatna served notice under section 41(A) of Cr.P.C. on the appellant and ultimately, on completion of the investigation, finding prima facie case, the charge sheet was submitted.

The appellant filed a petition under section 205 of Cr.P.C., inter alia, taking the grounds that she is a public servant and used to attend patients in all emergency and non-emergency cases and her attendance in field in attending patients is essential and therefore, her personal appearance may be dispensed with. It is further stated that the appellant may be allowed to be represented through her counsel and she undertook to appear as and when her personal appearance would be required by the learned trial Court.

The learned trial Court, in the impugned order, held that nowhere in the petition under section 205 of Cr.P.C., it is mentioned that the appellant, being a medical officer,

is remaining busy for round the clock in her profession and no single evidence has been supplied to prove the averments taken in the petition under section 205 of Cr.P.C. and therefore, allowing the petition under section 205 of Cr.P.C. would be like granting a blank cheque, which would affect the process of Court in framing of charge and other proceeding in which the presence of the appellant would be highly required. Accordingly, the petition filed by the appellant under section 205 of Cr.P.C. was rejected.

Mr. Devashis Panda, learned counsel for the appellant contended that the offences alleged against the appellant are not serious offences and the appellant is a lady and she is a Government doctor, specialised in Gynecology and specific averments have been taken in the petition under section 205, Cr.P.C. as to how she used to attend her public duty in emergency as well as non-emergency cases and her attendance for the public field is very much necessary and therefore, in a minor case of this nature, it was not proper for the learned trial Court to disallow the petition and insist on personal appearance of the appellant, particularly when an undertaking was given by the appellant to appear before the learned trial Court as and when required. He relied on the decision of this Court in the case of **Benjamin Roul -Vrs.- Sajal Das reported in 2017 (II) ILR CUT 964.**

Learned counsel for the State on the other hand supported the impugned order and prayed for dismissal of this appeal in limine as it holds hardly any merit.

Section 205 of the Cr.P.C. deals with power of a

Magistrate to dispense with personal attendance of the accused. Sub-section (1) states that at the time of issuance of summons under section 204 of the Cr.P.C., if the Magistrate thinks that the personal attendance of the accused is not necessary, he may dispense with such personal attendance and permit him to appear by his pleader. No doubt section 205 of the Cr.P.C. does not specify as to in which cases the Magistrate can pass the order for dispensing with the personal attendance of the accused and it gives complete discretion to the Magistrate but the terms used in that sub-section "if he sees reasons so to do" obviously do not mean unrestrained exercise of choice, rather it must be done with sound discretion, i.e., with knowledge and prudence and the Magistrate must pass a reasoned order.

The Hon'ble Supreme Court, speaking through His Lordship Hon'ble Mr. Justice Arijit Pasayat, in the case of **Reliance Airport Developers (P) Ltd. -Vrs.- Airports Authority of India reported in (2006) 10 Supreme Court Cases 1** held that 'discretion' vested in judges cannot be held to be whims or fancy or personal caprice, rather it means judicial and judicious discretion and accordingly observed as follows:

"27. "Discretion" undoubtedly means judicial discretion and not whim, caprice or fancy of a judge. (See **Dhurandhar Prasad Singh v. Jai Prakash University [(2001) 6 SCC 534]**) Lord Halsbury in **Susannah Sharpe v. Wakefield [1891 AC 173 : (1886-90) All ER Rep 651 (HL)]** considered the word "discretion"

with reference to its exercise and held :
(All ER p. 653 F-G)

"[D]iscretion means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion : **Rooke's case [(1598) 5 Co Rep 99b, 100a : 77 ER 209]** according to law, and not humour. It is to be not arbitrary, vague, and fanciful, but legal and regular, and it must be exercised within the limit to which an honest man competent to the discharge of his office, ought to confine himself."

(See **Kumaon Mandal Vikas Nigam Ltd. v. Girja Shankar Pant [(2001) 1 SCC 182 : 2001 SCC (L&S) 189]**, SCC p. 197, para 22.)"

The power under section 205 of the Cr.P.C. has to be exercised considering the circumstances of the case, conditions of the accused and the necessity for his personal attendance etc. The Magistrate cannot be arbitrary or capricious while using his judicial discretion and must adjudge the circumstances with his judicial conscience, weighing all the relevant factors, so as to come to a definite conclusion if personal attendance of an accused is indispensable before the Court. The Court ought to be even more careful and circumspect when attendance of a public servant is sought for. The Presiding Officer of the Court has a bounden duty to balance the mandate of the law and requirements of general public and then decide the fate of a petition filed under section

205 of the Cr.P.C. by an accused who also happens to be a public servant, more particularly, the Government servants who are enjoined with a duty to safeguard the lives and health of people.

In the case of **S.V. Muzumdar -Vrs.- Gujarat State Fertilizer Co. Ltd. reported in (2005) 4 Supreme Court Cases 173**, the Hon'ble Supreme Court has held that while dealing with an application in terms of section 205 of the Code, the Court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the trial is likely to be hampered on account of his absence.

In the case of **K. Narayan Patra -Vrs.- Gopinath Sahu reported in (1991) 4 Orissa Criminal Reports 486**, it was held that Courts should be generous in exempting accused persons from personal appearance. Such appearance is the rule in criminal cases of serious nature, involving moral turpitude, and punishable with imprisonment for a considerable length of time. Court has to weigh inconvenience likely to be caused to the accused if he is required to be absent from his vocation, profession, trade, occupation and calling for attendance in Court, against prejudice likely to be caused if he does not appear in Court. Whenever personal attendance is insisted upon, there is indubitably some harassment to the accused and the Courts have to see that this harassment not out of proportion to the seriousness of the allegation, the severity of possible punishment on conviction, nature of allegation as they stand out prima facie.

In case of **Kamaljeet Singh Ahluwalia -Vrs.- State of Orissa reported in Vol. 85 (1998) Cuttack Law Times 372**, this Court had the occasion to lay down the following guidelines as to how a Magistrate should exercise his power under section 205 of the Cr.P.C.:

“(i) Personal appearance of the accused in a criminal trial is the normal rule and exempting from personal appearance is an exception which can be resorted to in suitable cases by due exercise of judicial discretion;

(ii) when the alleged offence(s) involves moral turpitude, relates to grievous offences or prescribes considerable length of substantive sentences, the Court exercising the discretion shall take the total fact and circumstances into consideration and through a speaking and reasonable order exercise the discretion judiciously;

(iii) no hard and fast rule or straight jacket formula can be prescribed as to where exemption shall be granted and when it is to be refused. It all depends upon the facts and circumstances and the wisdom of the Court;

(iv) when there is no prospect of quick disposal of the case, no question involves identity of the accused, direction for personal appearance may cause harassment as in the case of Paradanasini ladies, old, ailing or infirm persons or Government servants or business man, Court should consider their case keeping in view to the totality of all circumstances; and

(v) a liberal construction of the provisions of law be made unless the converse is necessary in the interest of justice.”

In the case of **Benjamin Roul (supra)**, this Court was considering the rejection of petition under section 205 of Cr.P.C. of an accused charged under section 406 of the I.P.C. and after discussing the law laid down, it has been held that the learned Magistrate has neither taken the social status of the petitioner, his age, nor the necessity of personal attendance and after considering the nature of accusation in the case, the learned Magistrate has not exercised the judicial discretion properly and he should not have mechanically rejected the application of the petitioner and accordingly, this Court set aside the order passed by the learned Magistrate and allowed the prayer of the petitioner.

Though it is no doubt true that every accused, irrespective of gender, race, caste, creed and other considerations, is equally accountable in the eye of law, but some procedural leniency can be afforded to people who are considered to be vulnerable. In the case of **R. Annapurna -Vrs.- Ramadugu Anantha Krishna Sastry reported in (2002) 10 Supreme Court Cases 401**, the Hon'ble Supreme Court was in seisin over a matter where certain women were accused under section 406 and 420 of the I.P.C., wherein it adopted a lenient approach towards them and held as follows:

“7...We are disposed to afford some more reliefs to the respondents. We notice that among the respondents some of them are

ladies. So, if any of the respondents would apply before the trial court for exempting them from personal appearance, the trial court shall exempt them from personal appearance on the following conditions:

1. He or she would not dispute his or her identity as the particular accused mentioned in the charge-sheet.
2. A counsel on their behalf would be present in the court whenever the case is taken up.
3. They would be present in the court on the date when such presence becomes imperatively needed."

In the case in hand, there is no dispute the appellant is a Government doctor, specialised in Gynecology and during the course of investigation, the I.O. did not think it proper to arrest her for which notice under section 41(A) of Cr.P.C. was served on the appellant and she abided by the terms and conditions of the notice. It has also not been pointed out as to what useful purpose would be served by pestering on her personal presence before the learned trial Court on every date of trial. The offences under which charge sheet has been submitted are not serious offences and the punishment prescribed for the offence under section 341 of the I.P.C. is simple imprisonment which may extend to one month, or with fine which may extend to five hundred rupees, or with both and the punishment prescribed for the offence under section 323 of the I.P.C. is for a term which may extend to one year, a fine of up to one thousand rupees, or both. So far as the offence under section 3(2)(va) of the S.C. &

S.T. (PoA) Act is concerned, under which charge sheet has been submitted, it is prescribed that the offence shall be punishable with such punishment as specified under the Indian Penal Code for the offence and shall also be liable to with fine.

In view of the nature of accusation against the appellant, the age of the appellant and the fact that she is a lady and a public servant and a doctor, whose presence is very much necessary in the hospital, I am of the humble view that the grounds assigned for rejection of the petition under section 205 of Cr.P.C. vide impugned order dated 28.08.2023 passed by the learned Special Judge, Kalahandi, Bhawanipatna in C.T. Case No.1064 of 2021 (Special Act) are not sustainable in the eye of law and accordingly, the same is hereby set aside.

The learned trial Court shall dispense with the personal appearance of the appellant and she shall furnish an undertaking to the satisfaction of the learned trial Court that the counsel on her behalf would be present in Court throughout the proceeding and that the petitioner shall have no objection in taking the evidence in her absence and further she would personally attend as and when her attendance is required by the learned trial Court.

The CRLA is accordingly allowed.

Issue urgent certified copy as per rules.

(S.K. Sahoo)
Judge