

A.F.R.

Court No. - 25

Case :- U/S 482/378/407 No. - 4136 of 2015

Applicant :- Arvind Kejriwal

Opposite Party :- The State Of U.P And Ors.

Counsel for Applicant :- Mahmood Alam, Mohd. Rijwan Khan

Counsel for Opposite Party :- Govt. Advocate

Hon'ble Aditya Nath Mittal, J.

Heard learned counsel for the petitioner, Shri Rishad Murtza, learned Government Advocate and perused the record.

This petition has been filed with the following prayers:-

- (i) to quash the order dated 12.08.2015 in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" in pursuance of the Charge Sheet No.122 of 2014 dated 09.07.2014 in Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi.
- (ii) to stay the entire criminal proceedings in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" in pursuance of the Charge Sheet No.122 of 2014 dated 09.07.2014 in Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi, during pendency of the present case.
- (iii) to order to concerned Hon'ble Court for deciding the pending application of the applicant filed under the proviso of Section 239 Cr.P.C. in Criminal Case No.360 of 2014, "State of U.P. vs. Arvind Kejriwal" bearing Case Crime No.608 of 2014, under Section 125 of the Representation of People Act, 1951, Police Station-Kotwali Musafirkhana, District-Amethi, pending before the learned Judicial Magistrate, Musafirkhana, District-Amethi.

Learned counsel for the petitioner has submitted that the petitioner is the Chief Minister of Delhi against whom a case under Section 125 of Representation of People Act has been registered. The

application for discharge under Section 239 Cr.P.C. has been moved which has not yet been decided and the application for personal exemption filed under Section 205 Cr.P.C. has wrongly been rejected. It has also been submitted that the petitioner is ready to file the undertakings before the Court that whenever his personal appearance is required, he shall appear personally.

Learned counsel for the petitioner has relied upon the provisions of Section 88 Cr.P.C., which reads as under:-

"88. Power to take bond for appearance. *When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial".*

The main question for consideration is that whether after taking cognizance and issuance of the process, may be summons or warrant, the exemption application under Section 205 or 317 Cr.P.C. is maintainable without personal appearance and without furnishing bail bonds?

In the present case, it is admitted that till now the petitioner has not appeared before the court below and has also not filed any personal bond with or without sureties. The application for exemption under Section 205 Cr.P.C. was moved, which has been rejected by order dated 12.08.2015. The similar application was also moved previously, which was also rejected on 20.07.2015.

Learned counsel for the petitioner has relied upon the judgment of this Court rendered in ***Santosh Chauhan & others vs. State of U.P. & another reported in [(2011) (4) ALJ 121]***, in which, this Court has considered the scope of Section 205 Cr.P.C. but nowhere it has been held that without submitting the personal bond or sureties, the exemption under Section 205 Cr.P.C. can be granted.

Learned counsel for the petitioner has further relied upon the case ***Roitong Singpho vs. Sajjan Kumar Agarwal reported in AIR 2009 (NOC) 129 (GAU)***, in which, the Hon'ble Gauhati High Court has

held that the Court has to take into account the magnitude of sufferings, which a particular accused person may have to bear with, in order to make himself present in the Court and the discretion must be exercised judiciously. The Gauhati High Court as well as Allahabad High Court have relied upon the case *M/s. Bhasker Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd and others reported in AIR 2001 (SC) 3625*.

In the case of *M/s. Bhasker Industries Ltd. vs. M/s. Bhiwani Denim and Apparels Ltd and others reported in AIR 2001 (SC) 3625*, the Hon'ble Apex Court has considered the scope of Sections 205 (2), 251 and 317 Cr.P.C. and has held in paras-12, 13, 14, 15, 16, 17 and 19 as under:-

“12. We cannot part with this matter without advertising to the plea made by the second accused before the trial court for exempting him from personal appearance. He highlighted two factors while seeking such exemption. First is that the offence under Section 138 of the Negotiable Instruments Act is relatively not a serious offence as could be seen from the fact that the legislature made it only a summons case. Second is, the insistence on the physical presence of the accused in the case would cause substantial hardships and sufferings to him as he is a resident of Haryana. To undertake a long journey to reach Bhopal for making his physical presence in the court involves, apart from great hardships, much expenses also, contended the counsel. He submitted that the advantages the court gets on account of the presence of the accused are far less than the tribulations the accused has to suffer to make such presence in certain situations and hence the court should consider whether such advantages can be achieved by other measures. Therefore, he relied on Section 317 of the Code. It reads thus:

"317 provision for inquiries and trial being held in the absence of accused in certain cases.- (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up for trial separately."

13. Sub-section (1) envisages two exigencies when the court can proceed with the trial proceeding in a criminal case after dispensing with the personal attendance of an accused. We are not concerned with one of those exigencies i.e. when the accused persistently disturbs the proceedings. Here we need consider only the other exigency. If a court is satisfied that in the interest or justice the personal attendance of an accused before it need not be insisted on, then the court has the power to dispense with the attendance of that accused. In this context a reference to Section 273 of the Code is useful. It says that "except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in presence of the accused or, when his personal attendance is dispensed with, in the presence of his pleader." If a court feels that insisting on the personal attendance of an accused in a particular case would be too harsh on account of a variety of reasons, can't the court afford relief to such an accused in the matter of facing the prosecution proceedings?

14. The normal rule is that the evidence shall be taken in the presence of the accused. However, even in the absence of the accused such evidence can be taken but then his counsel must be present in the court, provided he has been granted exemption from attending the court. The concern of the criminal court should primarily be the administration of criminal justice. For that purpose the proceedings of the court in the case should register progress. Presence of the accused in the court is not for marking his attendance just for the sake of seeking him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court in that particular case.

15. These are days when prosecutions for the offence under Section 138 are galloping up in criminal courts. Due to the increase of inter-State transactions through the facilities of

the banks it is not uncommon that when prosecutions are instituted in one State the accused might belong to a different State, sometimes a far distant State. Not very rarely such accused would be ladies also. For prosecution under Section 138 of the NI Act the trial should be that of summons case. When a magistrate feels that insistence of personal attendance of the accused in a summons case, in a particular situation, would inflict enormous hardship and cost to a particular accused, it is open to the magistrate to consider how he can relieve such an accused of the great hardships, without causing prejudice to the prosecution proceedings.

16. Section 251 is the commencing provision in Chapter XX of the Code which deals with trial of summons cases by magistrates. It enjoins on the court to ask the accused whether he pleads guilty when the "accused appears or is brought before the magistrate". The appearance envisaged therein can either be by personal attendance of the accused or through his advocate. This can be understood from Section 205(1) of the Code which says that "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."

17. Thus, in appropriate cases the magistrate can allow an accused to make even the first appearance through a counsel. The magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.

19. The position, therefore, bogs down to this: It is within the powers of a magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings

in a summons case, if the magistrate finds that insistence of his personal presence would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the magistrate feels that dispensing with the personal attendance of the accused would only be in the interests of justice. However, the magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course. We may reiterate that when an accused makes an application to a magistrate through his duly authorised counsel praying for affording the benefit of his personal presence being dispensed with the magistrate can consider all aspects and pass appropriate orders thereon before proceeding further.”

I have gone through the judgment and considered the law laid down by the Hon'ble Apex Court in the aforesaid case. The aforesaid case relates to the proceedings under Section 138 N.I. Act, which is a summon case, while in the present case, the charge-sheet has been filed against the petitioner for the offence punishable under Section 125 of Representation of People Act, 1951 and the offence punishable under Section 125 of Representation of People Act is punishable with a term of three years or with fine or with both. Therefore in view of the provisions of Section 2 (x) of Cr.P.C., it is a warrant case because the term of imprisonment is exceeding two years. It is not disputed that the provisions of Code of Criminal Procedure are applicable regarding the offence punishable under the Representation of People Act, 1951.

As far as the provisions of Section 88 Cr.P.C. are concerned, as quoted above, such provisions can be availed only in case the person for whose appearance or arrest the summon or warrant has been issued to present in such Court. Section 88 Cr.P.C. also does not speak to exempt the accused without executing the bond with or without sureties for his appearance in the Court. In view of the provisions of Section 90 Cr.P.C., this provisions is also applicable only to every summon and every warrant of arrest issued under this Code. Admittedly, the petitioner has not yet appeared personally before the Court. Therefore,

he cannot get the benefit of Section 88 Cr.P.C.

Article 14 of the Constitution of India provides equality before the law and equal protection of laws. When the Constitution has not distinguished between the powerful and powerless persons, then certainly the courts also cannot grant any special concession to any powerful person like in this case where the petitioner is the Chief Minister of N.C.T. Delhi. Law is equal for all and equal protection has to be granted to all. There is no such provision in the Code of Criminal Procedure which provides that the trial of warrant case can proceed even in the absence of the accused or without his appearing personally and submitting the bail bonds. It is not disputed that on the subsequent dates of hearing, the personal appearance of the accused may be exempted if sufficient cause is shown provided the accused is represented by a pleader. But at the same time, the Code of Criminal Procedure empowers the Trial Court to direct the personal attendance of such accused.

In the present case, the First Information Report was lodged against the petitioner regarding the offence punishable under Section 125 of Representation of People Act and after the investigation, the charge-sheet has been filed against him for the offence punishable under Section 125 of Representation of People Act. Section 125 of Representation of People Act, 1951 reads as under:-

“125, Promoting enmity between classes in connection with election. Any person who in connection with an election under this Act promotes or attempts to promote on grounds of religion, race, caste, community or language, feelings of enmity or hatred, between different classes of the citizens of India shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both.”

The present case relates to the alleged speech of the petitioner on 02.05.2014 in connection with an election which allegedly attempts to promote feelings of enmity or hatred between different classes of the

citizens of India. The politicians are required to observe more caution in their speeches as they have to rule the country and they should promote the spirit of common brotherhood, fraternity and harmony amongst all the people of India transcending religious, linguistic and regional or sectional diversities. The politicians as a citizen of India have also to abide by fundamental duties as provided in Article 51-A of the Constitution of India, apart from the restrictions and guidelines imposed by Representation of People Act, 1951, because they are not above the Constitution.

But what we are experiencing now a days is that some of the politicians have no control over their fire-brand speeches with a view to attract or misguide the voters in their favour. Such tendency should be discontinued because the public of India has now become much more aware about the real truth. The politicians must use the Parliamentary Language. However, these observations shall not affect the merits of the present case.

The procedure for trial of warrant case by the Magistrate is contained in Chapter-XIX of the Code. Section 238 Cr.P.C. Specifically provides that when in any warrant case instituted on a police report, the accused appears or brought before the Magistrate, on the commencement of trial, the provisions of Section 207 Cr.P.C. shall be complied. The language of the aforesaid provision of Section 238 Cr.P.C. also envisaged that either the accused should appear or he should be brought before the Magistrate. This provision also does not classify that on the commencement of warrant trial, the accused has liberty to appear through counsel. Because it is a warrant trial, therefore, the accused has to appear in the Court and the accused cannot claim exemption under Section 205 Cr.P.C. till he has furnished bonds with or without sureties as per the direction of the Trial Court.

The question whether after taking cognizance and issuance of the process, may be summon or warrant, the exemption application under Section 205 or under Section 317 Cr.P.C. is maintainable without

personal appearance and without furnishing bail bonds is, therefore, decided accordingly that in case of an accused is warrant trial, the provisions of Section 205 or Section 317 Cr.P.C. will not apply unless the accused has been granted bail and he has furnished bail bonds.

This petition has been filed under Section 482 Cr.P.C.. The scope of 482 Cr.P.C. has been considered by Hon'ble the Apex Court in various judgments.

The power under Section 482 Cr.P.C. is not to be exercised in a routine manner, but it is for limited purposes, namely, to give effect to any order under the Code, or to prevent abuse of process of any Court or otherwise to secure ends of justice. Time and again, Apex Court and various High Courts, including ours one, have reminded when exercise of power under Section 482 Cr.P.C. would be justified, which cannot be placed in straight jacket formula, but one thing is very clear that it should not preempt a trial and cannot be used in a routine manner so as to cut short the entire process of trial before the Courts below. If from a bare perusal of first information report or complaint, it is evident that it does not disclose any offence at all or it is frivolous, collusive or oppressive from the face of it, the Court may exercise its inherent power under Section 482 Cr.P.C. but it should be exercised sparingly. This will not include as to whether prosecution is likely to establish its case or not, whether the evidence in question is reliable or not or whether on a reasonable appreciation of it, accusation would not be sustained, or the other circumstances, which would not justify exercise of jurisdiction under Section 482 Cr.P.C. I need not go into various aspects in detail but it would be suffice to refer a few recent authorities dealing all these matters in detail, namely, *State of Haryana and others Vs. Ch. Bhajan Lal and others 1992 Supp (1) SCC 335, Popular Muthiah Vs. State represented by Inspector of Police (2006) 7 SCC 296, Hamida vs. Rashid @ Rasheed and Ors. (2008) 1 SCC 474, Dr. Monica Kumar and Anr. vs. State of U.P. and Ors. (2008) 8 SCC 781, M.N. Ojha and Ors. Vs. Alok Kumar Srivastav and Anr.*

(2009) 9 SCC 682, State of A.P. vs. Gourishetty Mahesh and Ors. JT 2010 (6) SC 588 and Iridium India Telecom Ltd. Vs. Motorola Incorporated and Ors. 2011 (1) SCC 74.

In *Lee Kun Hee and others Vs. State of U.P. and others JT 2012 (2) SC 237*, it was reiterated that Court in exercise of its jurisdiction under Section 482 Cr.P.C. cannot go into the truth or otherwise of the allegations and appreciate evidence, if any, available on record. Interference would be justified only when a clear case of such interference is made out. Frequent and uncalled interference even at the preliminary stage by High Court may result in causing obstruction in the progress of inquiry in a criminal case which may not be in public interest. It, however, may not be doubted, if on the face of it, either from the first information report or complaint, it is evident that allegation are so absurd and inherently improbable on the basis of which no fair-minded and informed observer can ever reach a just and proper conclusion as to the existence of sufficient grounds for proceeding, in such cases refusal to exercise jurisdiction may equally result in injustice, more particularly, in cases, where the complainant sets the criminal law in motion with a view to exert pressure and harass the persons arrayed as accused in the complaint.

However, in this matter, after investigation, Police has found a prima facie case against accused and submitted charge-sheet in the Court below. After investigation the police has found a prima facie case of commission of a cognizable offence by accused which should have tried in a Court of Law. At this stage there is no occasion to look into the question, whether the charge ultimately can be substantiated or not since that would be a subject matter of trial. No substantial ground has been made out which may justify interference by this Court under Section 482 Cr.P.C.

In view of the above, I do not find any error of law or perversity in the order dated 12.08.2015, by which, the application for exemption has been rejected.

As far as the prayer to stay the entire criminal proceedings is concerned, I also do not find any sufficient ground to stay the aforesaid criminal proceedings because in view of the provisions of Chapter-XIX of Code of Criminal Procedure, the accused has a right to move the application for discharge under Section 239 Cr.P.C. and if that application is rejected then certainly the Magistrate is empowered to frame the charge as provided under Section 240 Cr.P.C. Therefore, the prayer no. (ii) is also misconceived.

As far as prayer (iii) is concerned, there is already specific provision of Section 239 Cr.P.C. to decide the application for discharge and for that the orders of this Court are not required. But certainly, before deciding the application under Section 239 Cr.P.C., the appearance of the accused in the Court for filing of the bond with or without sureties is necessary. Therefore, this prayer is also misconceived.

In the last, learned counsel for the petitioner has prayed that the accused is ready to appear personally in the Court and file the bail bonds, therefore, some protection may be granted to him.

Considering the request of learned counsel for the petitioner, it is provided that if the petitioner, Arvind Kejriwal, surrenders before the court below within four weeks from today and moves an application for bail, the same shall be considered and disposed of expeditiously in accordance with law and in terms of law laid down in the case of *Smt. Amrawati and another vs. State of U.P., 2005; Cr.L.J.755*, which has been affirmed by Hon'ble the Apex Court in *Lal Kamendra Pratap Singh vs. State of Uttar Pradesh and Ors. reported in (2009) 4 SCC 437*. Till then, no coercive action shall be taken against the petitioner.

The petition stands disposed of accordingly.

Order Date :- 27.8.2015
Suresh/