

USHA K. PILLAI

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v.

RAJ. K. SRINIVAS AND ORS. ETC.

APRIL 30, 1993

[A.M. AHMADI AND S. MOHAN,JJ.]

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Section 313 (1) Cr. P.C.—Scope of—Whether the trial Magistrate is legally right in examining the Advocate of the accused in his place in a warrant case.

The daughter of the appellant was married to the respondent and a girl child was born out of the wed-lock. The couple went to the U.S.A. alongwith the child, but the latter was sent back on her mother's behests. While the child was in the custody of the appellant the mother also came back, and committed suicide, leaving the child in the custody of the appellant.

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Meanwhile the first respondent married an American girl and embraced christianity. Thereupon the appellant applied to the local court for appointment as guardian of the child. The respondent appeared in court but took the child to U.S.A. forcibly, and entrusted her to the custody of his newly wedded wife.

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On being appointed as guardian of the child the appellant filed a complaint of kidnapping against the respondent and three others. The respondent applied for exemption from personal appearance in the proceedings in criminal court. The permission was granted subject to the condition that he will appear whenever called upon to do so.

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On the completion of the evidence, the advocate of the respondent sought permission for examination under section 313 Cr. P.C. in place of the respondent. Thereupon the appellant sought direction for personal appearance of the respondent for being examined under Section 313 Cr. P.C. The Magistrate dismissed the application of the appellant.

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This Court examined the provision of Sub Section (1) of Section 313 Cr. P.C. and,

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HELD: Introduced in its present form pursuant to the recommendations made in the 41st Report of the Law Commission, sub section (1) of

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A Section 313 begins with the words: "In every inquiry or trial." (472-B)

B The old sub-section (1) of Section 342 has been divided into two clauses (a) & (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 mandatory for the court to examine the accused after the witnesses for the prosecution have been examined. (472-C)

C The proviso was 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 if the court has already dispensed with this personal attendance 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 upon to enter his defence. (472-D)

D Section 313 (1) applies to all inquiries and trials under the code, to give the accused an opportunity to explain the circumstances appearing against him. The trial court is empowered by clause (a) to question the accused at any stage of inquiry or trial, while clause (b) obligates it to question the accused before he enters his defence. The rule of *audi alteram partem* incorporated therein is intended for the benefit of the accused. (472-F)

E The proviso is in the nature of an exception to clause (b) of sub section (1) of Section 313 Cr. P.C. and applies to a summons case. Where the personal presence of the accused has been dispensed with, the magistrate can dispense with the mandatory requirement of clause (b). (472-G)

F Since the offence under section 363 IPC is punishable with imprisonment for a term exceeding two years it is a warrant case, so even if the court has dispensed with the personal attendance of the accused, the examination of the accused u/s 313 Cr. P.C. is mandatory. The examination of a lawyer would not be sufficient compliance with the mandate of the said provision. (473-B)

G *Bibhuti Bhushan Das Gupta & Anr. v. State of West Bengal, A.I.R. (1969) S.C. 381= [1969] 2 SCR 104, referred to.*

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In that case this court pointed out that the privilege of making a statement under Section 342 of the old code, is personal to the accused. This requirement cannot be satisfied by examining his pleader in his place, as the right of the pleader to represent the accused does not extend to the pleader answering questions under section 342 (now 313) Cr. P.C. (473-E)

This court set aside the impugned order and directed the trial magistrate, to pass appropriate orders in regard to the examination of the respondent under section 313 (1) (b) Cr. P. C. (474-D)

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 398 of 1993.

From the Judgment and Order dated 12.3.1992 of the IVth Metropolitan Magistrate, Hyderabad in CrI. M.P. No. 92/92 in C.C. No. 234 of 1985.

WITH

Writ Petition No. 623 of 1993.

(Under Article 32 of the Constitution of India)

K.K. Venugopal, L.K. Pandey and S. Anand for the Petitioner.

D.P. Gupta, Solicitor General and Ms. A. Subhashni for the Respondents.

The Judgment of the Court was delivered by

AHMADI, J. Special leave granted.

The brief facts leading to this appeal are that the appellant's daughter Geetha married respondent No. 1 (original accused No. 1) sometime in October 1976 according to Hindu rites and thereafter left for Ireland. A daughter was born to the couple on July 27, 1978 in Ireland. She was named Nivedita. In April 1979, the couple along with the child moved to the United States of America; the Child travelling on an Irish passport. In October 1979 Geetha wrote to her mother, the appellant, expressing her desire that Nivedita should be brought up under her care in India. On the appellant expressing her willingness to look after the child, Nivedita was sent to India via Bombay where the appellant received her. The child then remained in the custody of the appellant. In March 1980 Geetha returned to

- A India presumably because her husband had developed intimacy with an American girl and had started to ill-treat her. Within a week after her arrival in India she committed suicide by setting herself on fire. Nivedita continued to remain in the care and custody of the appellant. The first respondent married the American girl, with whom he had developed intimacy, sometime in the year 1983-84 and embraced Christianity. Thereupon the appellant filed an application in the Court of the Chief judge, City Civil Court, Hyderabad, being O.P. No. 203 of 1984, for appointing her as the guardian of the person of the minor child under the provisions of Guardians and Wards Act, 1890, Respondent No. 1 entered an appearance in the said proceedings through his Advocate and sought time to file a counter. Later, he returned to India on December 14, 1984. After reaching India he obtained a duplicate passport for Nivedita and thereafter with the help of his associates picked up Nivedita from her school ignoring the protests of the Head Mistress of the School. The Head Mistress immediately filed a complaint with the commissioner of police and informed the appellant about the same who in turn lodged a First Information Report in that behalf. On enquiry the appellant's son traced respondent No. 1 and his three companions (who had assisted him in procuring the child) at the Madras Airport. Despite his entreaties, respondent No. 1 forcibly took the child to U.S.A via Singapore. Since then Nivedita is in the custody of respondent No. 1 and his newly married wife Maureen. After thus removing the child from the lawful custody of the appellant, respondent No. 1's Advocate withdrew from the guardianship proceedings. The Court, however, appointed the appellant as the guardian of the person of Nivedita. The appellant also filed a complaint alleging kidnapping against respondent No. 1 and his three companions who had aided and abetted him in the Court of the IVth Metropolitan Magistrate, Hyderabad, which came to be numbered as C.C.No. 234 of 1985. Process was issued in the said proceedings and the accused persons were duly served. The respondents thereafter moved an application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter called 'the Code') for quashing the process on the plea that in law a father is entitled to his daughter's custody and hence cannot be liable under section 363, IPC. In that application the High Court directed that the child be produced before it. However, the child was not produced before the Court and the Court ultimately dismissed the application against which a Special Leave Petition was filed in this Court. This Court also rejected the Special Leave Petition. On the other hand while the application under Section 482 of the Code was pending in the High Court, the father of respondent No. 1 filed an application for rescinding the order appointing the appellant as the guardian of the person of Nivedita. In the meantime, the Superior Court in New Jersey, U.S.A., was moved which court passed an order permitting respondent No. 1 to retain the custody of the child on the ground that the Indian Courts had violated the due process clause. The Chief Judge, City Civil Court, Hyderabad, ultimately dismissed the father's application for rescinding the
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earlier order by which the appellant was appointed the guardian of the person of the child. As stated earlier the Superior Court, New Jersey, having permitted respondent No. 1 to retain the custody of Nivedita, the child's step-mother Maureen applied for permission to adopt Nivedita who had by then been converted to Christianity. On that permission being granted the adopted mother and respondent No. 1 sent the Child to a Christian school. In the complaint lodged against respondent No. 1 and his associates, respondent No. 1 applied for exemption from personal attendance which was granted on condition that he will appear whenever called upon to do so by the court. Respondent No.1 was thus represented in the said complaint through his Advocate. In the said criminal complaint after framing the charge for kidnapping evidence of the prosecution witnesses was recorded in the presence of the Advocate for respondent No. 1 and the other respondents and on completion of the evidence respondent No. 1's Advocate sought permission to be examined in place of respondent No. 1 under section 313 of the Code. This permission was granted and he was examined under section 313 of the Code. On completion of the examination the appellant not being satisfied with some of the replies given by the Advocate filed an application praying that respondent No. 1 should be directed to personally appear in Court and be examined under section 313 of the Code. The learned Magistrate dismissed the said application whereupon the present appeal has been filed on the plea that no appeal or revision lay against the order impugned herein. These are the averments on which the present appeal is founded. The question then is whether the learned Magistrate was right in examining the Advocate of respondent No. 1 in place of respondent No. 1 himself under section 313 of the Code?

Sub-section (1) of section 313 reads as under:

“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;

case in Section 2(w) and a warrant-case in section 2(x) of the Code. A warrant case is defined as one relating to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. Since an offence under section 363 IPC is punishable with imprisonment for a term exceeding two years it is a warrant-case and not a summons-case. Therefore, even in cases where the court has dispensed with the personal attendance of the accused under section 205(1) or section 317 of the Code, the court cannot dispense with the examination of the accused under clause (b) of section 313 of the Code because such examination is mandatory. If the accused is a company or a juridical person it may be open to examine the 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 juridical 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 mandate of said provision.

A similar question arose for consideration in *Bibhuti Bhushan Das Gupta & Anr. v. State of West Bengal* [AIR (1969) SC. 381 = [1969] 2 SCR 104] under the provisions of the old Code. In that case this Court noticed that the accused was not personally examined under section 342 of the Code. It was submitted that the trial was vitiated as the accused was not personally examined as required by section 342 of the old Code. The said argument was sought to be repelled on the ground that the examination of the pleader was sufficient compliance with the said provision since the pleader was authorised to appear on behalf of the accused and do all acts which the accused could personally do. Dealing with this submission this court on a reading of Section 342 pointed out that the privilege of making a statement under that section is personal to the accused and the requirement cannot be satisfied by examining his pleader in his place. The right of the pleader to represent the accused does not extend to the pleader answering questions under section 342 in place of the accused person. The submission that such a view will cause inconvenience and harassment to the accused was also repelled in the following words:

“We are not impressed with the argument that an accused person will suffer inconvenience and harassment if the Court cannot dispense with his attendance for purposes of section 342. The examination under the section becomes necessary when at the close of the prosecution evidence the magistrate finds that there are incriminating circumstances requiring an explanation by the accused.”

A Proceeding further this Court observed as under

“There are exceptional cases when an examination of the accused personally under section 342 is not necessary or possible. Where the accused is a company or other juridical person it cannot be examined personally. It may be that the Court may then examine a director or some other agent on its behalf.”

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It is another matter that in that case this Court did not interfere with the conviction and sentence on the ground that the non-examination of the accused had not caused any prejudice and in the absence of material showing prejudice the conviction and sentence could be sustained by virtue of old section 537 (section 465 of the new Code).

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In the result the order impugned in the present appeal/writ petition of the learned Magistrate cannot be allowed to stand, more so in the instant case for the reason that the accused may raise the plea of violation of the due process clause if the order is sought to be executed in the foreign court. We, therefore, set aside the order of the learned Magistrate and direct him to pass appropriate orders in the light of this judgment in regard to the examination of the accused under section 313(1) (b) of the Code. As the prosecution is pending since long, the learned Magistrate will take it up immediately.

SPS.

Appeal disposed of.