

SRI RAMESHWAR YADAV & ORS.

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v.

THE STATE OF BIHAR & ANR.

(Criminal Appeal No. 387 of 2018)

MARCH 16, 2018

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[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Code of Criminal Procedure, 1973 – ss. 205 and 482 – Second respondent filed complaint against her husband and the accused-appellants (parents-in-law and two others) u/s. 498A IPC and s.4 of the Dowry Prohibition Act – Magistrate summoned the accused-appellants as well as the husband of the complainant-second respondent – Accused-appellants filed application to dispense with their physical appearance in the case – Application rejected by the Magistrate u/s. 205 – Order of the Magistrate challenged u/s.482 before the High Court, which was dismissed – On appeal, held: The observation of the High Court that the accused-appellants have filed application u/s. 205 at a subsequent stage after appearing before the Court is factually incorrect – Application u/s. 205 was filed by the accused-appellants prior to the appearance in the Court – The grant of exemption from personal appearance in the Court on each and every date was required to be considered in view of the fact that application was filed much before their appearance in the Court – Further, Magistrate had not rejected the application on the ground that application is not entertainable after appearance of the accused-appellants before the Court – The views of the High Court for rejecting the application were unfounded – On the other hand Magistrate also, while rejecting the application, failed to consider the actual grounds given by the accused-appellants for seeking exemption – In application the grounds were that appellant no.1, father of complainant’s husband, appellant no.2 (wife of appellant no. 1), appellant no.3 and 4 were residing at Pune – The distance between residence of the accused-appellants and the place of trial at Patna is 1750 kms – Taking into consideration the entire facts and circumstances and the grounds taken by the appellants in their application u/s. 205 and s.482, sufficient grounds were made out for granting exemption from

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A *personal appearance of the accused-appellants in the trial – Penal Code, 1860 – s. 498-A – Dowry Prohibition Act, 1961 – s.4.*

Allowing the appeal, the Court

B **HELD: 1. The observation of the High Court that the accused has filed application under Section 205 Cr.P.C. at a subsequent stage after appearing before the court is factually incorrect. The application was filed by the accused under Section 205 Cr.P.C. on 17.01.2013. Thus, the application under Section 205Cr.P.C. was filed prior to the appearance in the court and the same would have very well been considered by the Magistrate despite their appearance in the court after obtaining the pre-arrest bail. The grant of exemption from personal appearance in the court on each and every date was required to be considered in view of the fact that application was filed on 17.01.2013 much before their appearance in the court. Further, the Magistrate had not rejected the application on the ground that application is not entertainable after appearance of the accused before the court. Thus, the aforesaid ground given by the High Court for rejecting the application is unfounded. [Para 10] [1060-H; 1061-A-C]**

E **2. There is one more reason due to which the High Court’s order cannot be sustained. The High Court in its order observed that there is another provision that is Section 317 Cr.P.C. which gives discretion to the court to exempt a person from personal appearance. The High Court observed that the remedy available to the accused was under Section 317 Cr.P.C. and not under Section 205 Cr.P.C. Section 317 Cr.P.C. empowers the Magistrate, at any stage of inquiry or trial for reasons to be recorded to exempt attendance of the accused. There is no impediment in the power of the Magistrate to consider the application of accused for their exemption from personal appearance. [Paras 10, 11] [1061-C-E]**

G **3. Now, advertng to the reasons given by the Magistrate for rejecting the application. First reason given by the Magistrate is that all the accused appear hale and hearty and there is no suffering from any type of disease which may be impediment in appearing before the court. Application was not filed by the accused on the ground that they suffer from any physical illness and hence the said reason given by the Magistrate is wholly out**

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of place. The second reason is that accused and complainant should be present before the court on each and every date expecting good sense prevail between them. This is not a valid ground for not considering actual grounds given by the accused for seeking exemption. Third ground given was regarding conciliation which requires the appearance of the accused desirable. With regard to this ground it is sufficient to notice that application under Section 482 Cr.P.C. was not filed by the husband of complainant whose pre-arrest bail was already rejected. The appellants, thus, were not pressing application under Section 482 Cr.P.C. for husband of complainant who could have very well participated in the proceedings. Thus, the above ground was also not available for rejection of the application. [Paras 12, 13] [1061-F-H; 1062-A-B]

4. In the application the grounds which were given by the appellants was that, appellant No.1 husband of complainant is retired Army personnel and residing in Pune with his wife that is appellant No.2. Appellant Nos.3 and 4 were also residing at Pune. Husband of complainant was working at Hyderabad. The Magistrate has not considered the grounds which were taken by the appellants for seeking exemption. It was on the record before the High Court that distance between residence of the accused and the place of trial at Patna is 1750 kms. It was further stated that appellant No.3 was a business man and running Company in Pune and appellant No.4 was a student of BCA in Pune. Taking into consideration the entire facts and circumstances and the grounds taken by the appellants in their application under Section 205 Cr.P.C. as well as in the application under Section 482 Cr.P.C. filed before the High Court, sufficient grounds were made out for granting exemption from personal appearance of the appellants in the trial. The Magistrate committed error in not advertng to the grounds taken for praying the exemption and rejected the application on the reasons which were unfounded. The Magistrate under Section 205 sub-Section (2) Cr.P.C. is empowered at any stage to direct personal appearance of the accused hence as and when personal appearance of the accused is required the Magistrate is empowered to issue necessary orders if so decides. [Para 13] [1062-B-E]

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A CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 387 of 2018.

From the Judgment and Order dated 17.04.2017 of the High Court of Judicature at Patna in Criminal Misc. No. 42524 of 2013.

Rakesh Kumar, Adv. for the Appellants.

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Ms. Abha R. Sharma, Abdullah, Advs. for the Respondents.

The Judgment of the Court was delivered by

C **ASHOK BHUSHAN, J.** 1. This appeal has been filed against the judgment dated 17.04.2017 of the Patna High Court by which judgment application filed by the accused-appellants under Section 482 of the Code of Criminal Procedure challenging the order dated 13.08.2013 passed by the Sub- Divisional Judicial Magistrate, Patna has been dismissed by the High Court.

2. Brief facts necessary to be noted for deciding the appeal are:

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The second respondent filed a complaint in the Court of Sub-Divisional Judicial Magistrate, Patna alleging offence committed by the accused as well as Arnesh Kumar, her husband. The Magistrate vide order dated 11.10.2012 finding a prima facie case under Section 498A IPC and Section 4 of the Dowry Prohibition Act summoned the accused as well as Arnesh

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Kumar, husband of the complainant. The accused as well as Arnesh Kumar filed an application for anticipatory bail during the pendency of the said application. Non-bailable warrants were issued by the Magistrate on 23.12.2012. All the accused that is appellants as well as Arnesh Kumar filed an application dated 17.01.2013 praying for recall of non-bailable

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warrant and dispensing with their physical appearance in the case. It was appellants' case that said application was filed because appellant No.1, father of Arnesh Kumar is a retired Army Official residing in Pune with appellant No.2 and other appellants were also residents of Pune, Maharashtra and they have to come from a distance. It was prayed by the accused that they be exempted from the personal appearance in

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the case. All the accused except Arnesh Kumar, husband of complainant were granted anticipatory bail. Anticipatory bail was granted by the District and Sessions Judge, Patna on 21.06.2013 to all the accused except Arnesh Kumar, husband of the complainant. The Sub-Divisional Magistrate by order dated 13.08.2013 rejected the application filed by the accused under Section 205 Cr.P.C.

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3. While rejecting the application on 13.08.2013, the Magistrate gave the following reasons: A

(i) Petitioners appear to be hale and hearty and are not suffering from any type of disease which may be impediment in appearing before the court.

(ii) Nature of offences requires that accused-petitioners and also the complainant should be present before the court preferably on each and every date expecting good sense prevails upon them. B

(iii) Their appearance is also desirable for the purpose of conciliation since the very enactment of Section 498A of IPC and Dowry Prohibition Act primarily meant for restoration of conjugal harmony. C

4. Challenging the order dated 13.08.2013, an application under Section 482 Cr.P.C. was filed which has been dismissed by the Patna High Court. The High Court dismissed the application taking a new ground that a prayer for exemption from personal appearance under Section 205 Cr.P.C. can only be made at the stage of first appearance of the accused. Once the accused appears before the court in person without making any application for dispensing with the personal appearance under Section 205 Cr.P.C., at a subsequent stage, such an application would not be maintainable. Aggrieved by the said order this appeal has been filed. D E

5. We have considered the submissions of the learned counsel for the parties and perused the records.

6. Section 205 Cr.P.C. and Section 317 Cr.P.C. which are relevant in this case are extracted: F

“Section 205. Magistrate may dispense with personal attendance of accused.— (1) 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. G

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided. H

- A **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.
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- C (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 or tried separately.”
- D 7. The Magistrate has rejected the application filed under Section 205 Cr.P.C. on different grounds as noticed above. The High Court took entirely new grounds for dismissing the application filed under Section 482 Cr.P.C. without adverting to the grounds which were taken by the Magistrate for declining the prayer.
- E 8. We first take up the grounds given by the High Court for rejecting the application. The High Court has observed that prayer for exemption from personal appearance under Section 205 Cr.P.C. can only be made at the stage of first appearance of the accused and once the accused appears before the court in person without making any application for dispensing with the personal appearance under Section 205 Cr.P.C. at a subsequent stage, such an application would not be maintainable.
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- G 9. The High Court has noticed that the accused had already appeared after obtaining the order of pre-arrest bail and furnishing bond and sureties to the satisfaction of the court. The pre-arrest bail was granted to the accused by the District and Sessions Judge by order dated 21.06.2013 and thereafter the accused appeared before the court as has been noticed in paragraph 8 of the judgment of the High court itself.
- H 10. The observation of the High Court that the accused has filed application under Section 205 Cr.P.C. at a subsequent stage after appearing before the court is factually incorrect. The application was

filed by the accused under Section 205 Cr.P.C. on 17.01.2013. Thus, the application under Section 205 Cr.P.C. was filed prior to the appearance in the court and the same would have very well been considered by the Magistrate despite their appearance in the court after obtaining the pre-arrest bail. The grant of exemption from personal appearance in the court on each and every date was required to be considered in view of the fact that application was filed on 17.01.2013 much before their appearance in the court. Further, the Magistrate had not rejected the application on the ground that application is not entertainable after appearance of the accused before the court. We, thus, are of the view that aforesaid ground given by the High Court for rejecting the application is unfounded. There is one more reason due to which the High Court's order cannot be sustained.

11. The High Court in its order observed that there is another provision that is Section 317 Cr.P.C. which gives discretion to the court to exempt a person from personal appearance. The High Court observed that the remedy available to the accused was under Section 317 Cr.P.C. and not under Section 205 Cr.P.C. Section 317 Cr.P.C. which empowers the Magistrate, at any stage of inquiry or trial for reasons to be recorded to exempt attendance of the accused. The Magistrate was not powerless to consider the prayer under Section 317 Cr.P.C. as per the view taken by the High Court. Thus, we do not find any impediment in the power of the Magistrate to consider the application of accused for their exemption from personal appearance.

12. Now, we advert to the reasons given by the Magistrate for rejecting the application. As noticed above, first reason given by the Magistrate is that all the accused appear hale and hearty and there is no suffering from any type of disease which may be impediment in appearing before the court. Application was not filed by the accused on the ground that they suffer from any physical illness and hence the said reason given by the Magistrate is wholly out of place. The second reason is that accused and complainant should be present before the court on each and every date expecting good sense prevail between them. We fail to see this as any valid ground for not considering actual grounds given by the accused for seeking exemption. Third ground given was regarding conciliation which requires the appearance of the accused desirable.

13. With regard to this ground it is sufficient to notice that application under Section 482 Cr.P.C. was not filed by the husband, Arnesh Kumar

A whose pre-arrest bail was already rejected. The present appellants, thus, were not pressing application under Section 482 Cr.P.C. for Arnesh Kumar, the husband who could have very well participated in the proceedings. Thus, the above ground was also not available for rejection of the application. In the application the grounds which were given by the appellants was that, appellant No.1 father of Arnesh Kumar is retired
B Army personnel and residing in Pune with his wife that is appellant No.2. Appellant Nos.3 and 4 were also residing at Pune. Arnesh Kumar, the husband was working at Hyderabad. The Magistrate has not considered the grounds which were taken by the appellants for seeking exemption. It was on the record before the High Court that distance between
C residence of the accused and the place of trial at Patna is 1750 kms. It was further stated that appellant No.3, Ashok Kumar Yadav was a business man and running Company in Pune and appellant No.4 was a student of BCA in Pune. Taking into consideration the entire facts and circumstances and the grounds taken by the appellants in their application under Section 205 Cr.P.C. as well as in the application under Section
D 482 Cr.P.C. filed before the High Court, we are of the view that sufficient grounds were made out for granting exemption from personal appearance of the appellants in the trial. The Magistrate committed error in not advertng to the grounds taken for praying the exemption and rejected the application on the reasons which were unfounded. The Magistrate
E under Section 205 sub-Section (2) Cr.P.C. is empowered at any stage to direct personal appearance of the accused hence as and when personal appearance of the accused is required the Magistrate is empowered to issue necessary orders if so decides.

14. In the result, the appeal is allowed, the judgment and order of
F the High Court dated 17.04.2017 as well as order of the Sub- Divisional Judicial Magistrate dated 13.08.2013 are set aside, application filed by the appellants under Section 205 Cr.P.C. is allowed. The personal appearance of the appellants is exempted. This, however, shall not preclude the Magistrate to pass appropriate orders under Section 205(2)
G Cr.P.C. if and when personal appearance of the appellants is required.