CASE NO.:
Appeal (crl.) 858 of 2001

PETITIONER:
M/S. BHASKAR INDUSTRIES LTD.

Vs.

RESPONDENT:
M/S. BHIWANI DENIM & APPARELS LTD. ORS.

DATE OF JUDGMENT: 27/08/2001

BENCH:
K.T. Thomas & K.G. Balakrishnan

JUDGMENT:

THOMAS, J.

Leave granted.

A Sessions Judge, overlooking a legal interdict, interfered with an interlocutory order and created a situation for the trial magistrate to remain nonplussed. That order of the Sessions Judge was sought to be rectified at the behest of the appellant who, for that purpose, moved the High Court. But a learned single Judge of the High Court declined to interfere. Now the trial magistrate might be under a dilemma as to what is the proper course for him to adopt.

The facts lie in a narrow compass. Appellant company filed a criminal complaint before the court of Judicial Magistrate of First Class, Bhopal (M.P.) against 15 accused for the offence under Section 138 of the Negotiable Instruments Act. The first accused in the complaint is a company having its registered office at Bhiwani in Haryana. Second accused is the Managing Director of that company. All the remaining accused are persons said to be associated with the first accused - company and they are all living in far distant places from Bhopal, some are in Haryana while some others are in Chandigarh and some others are in New Delhi. The magistrate took cognizance of the offence and issued summons to the accused. It is not necessary to narrate what happened to the summons issued to the various accused except in the case of the second accused, because this appeal is now restricted to the order concerning the second accused who is arrayed as the second respondent in the special leave petition.

On 28.4.2000 the trial magistrate recorded that the notice issued to the second accused (Subhash Sahni) was received back with the report that he was not seen at his residence the address of which was shown on the notice. When other members of the said house refused to accept the notice it was affixed on the house. On the said circumstances the magistrate issued bailable warrants to the accused. Second accused filed an application for

exemption from personal appearance. Pending the same, the magistrate ordered him to be released on bail if arrested and directed him to be present in the court for the purpose of furnishing security by executing a bond for Rs.5,000/-.

All the accused filed a revision petition before the Sessions Court against the order passed by the magistrate on 28.4.2000. Learned Sessions Judge (Shri Ranjit Singh, VIth Additional Sessions Judge, Bhopal) minuted that the advocate for the second accused had given an undertaking that he shall appear before the trial court on behalf of his client. After recording the above submission made by the advocate the Sessions Judge passed an order the operative part of which is as follows:

From the analysis of evidence above (sic) it is clear that the impugned order of the trial court is not in accordance with law. Thus, the question under consideration is decided in negative. On the basis of the aforesaid analysis I reach a conclusion that the impugned order of the trial court being not in accordance with law does not deserve to be maintained. Therefore, this revision petition is allowed and the impugned order of the trial court dated 28.4.2000 is set aside.

When he set aside the order of the magistrate dated 28.4.2000, what should the magistrate do thereafter as against second accused? We could not discern it, and we can imagine the dilemma of the magistrate as to the course to be adopted thereafter. If a Sessions Judge chooses to pass such a vague and confusing order what could the subordinate court do. The confusion got confounded when the Sessions Judge set aside the order of the magistrate without substituting with any other direction or order and consequently the stage was set in a quandary. It was the said order which the respondent-complainant challenged before the High Court. But the confused situation was not defused by the High Court as learned single Judge declined to interfere with the order of the Sessions Court.

Dr. Abhishek M. Singhvi, learned senior counsel for the appellant/complainant first contended that the respondents could not move the High Court in revision against the order dated 28.4.2000 which was purely an interlocutory order. At the first blush we thought that the contention was sustainable, but there are two drawbacks for the appellant to raise such a contention. First is that the appellant did not raise any such contention before the High Court and hence it is not permissible for him to raise it for the first time in this appeal by special leave. Second is that it is difficult, in the absence of other materials, to decide positively whether the order dated 28.4.2000 is an interlocutory order only.

The interdict contained in Section 397(2) of the Code of Criminal Procedure (for short the Code) is that the powers of revision shall not be exercised in relation to any interlocutory order. Whether an order is interlocutory or not, cannot be decided by merely looking at the order or merely because the order was passed at the interlocutory stage. The safe test laid down by this Court through a series of decisions is this: If the contention of the

petitioner who moves the superior court in revision, as against the order under challenge is upheld, would the criminal proceedings as a whole culminate? If it would, then the order is not interlocutory in spite of the fact that it was passed during any interlocutory stage.

A three Judge Bench of this Court in Madhu Limaye vs. State of Maharashtra {AIR 1978 SC 47 = 1977 (4) SCC 551} laid down the following test: An order rejecting the plea of the accused on a point which, when accepted, will conclude the particular proceeding, will surely be not an interlocutory order within the meaning of Section 397(2). This was upheld by the four Judge Bench of this Court in V.C. Shukla vs. State through CBI (AIR 1980 SC 962 = 1980 Supple. SCC 92).

The above position was reiterated in Rajendra Kumar Sitaram Pande & ors. vs. Uttam and anr. {1999 (3) SCC 134}. Again in K.K. Patel and anr. vs. State of Gujarat and anr. {2000 (6) SCC 195} this Court stated thus:

It is well-nigh settled that in deciding whether an order challenged is interlocutory or not as for Section 397(2) of the Code, the sole test is not whether such order was passed during the interim stage (vide Amar Nath v. State of Haryana, Madhu Limaye v. State of Maharashtra, V.C. Shukla v. State through CBI and Rajendra Kumar Sitaram Pande v. Uttam). The feasible test is whether by upholding the objections raised by a party, it would result in culminating the proceedings, if so any order passed on such objections would not be merely interlocutory in nature as envisaged in Section 397(2) of the Code. In the present case, if the objections raised by the appellants were upheld by the Court the entire prosecution proceedings would have been terminated. Hence, as per the said standard, the order was revisable.

At any rate the objection regarding maintainability of the revision petition should have been raised before the court which invoked such a revisional jurisdiction. Inasmuch as the same was not done we leave that question undecided now.

We cannot part with this matter without adverting 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 re corded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.

Sub-section (1) envisages two exigencies when the court can proceed with the trial proceedings 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 of 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 the 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, cant the court afford relief to such an accused in the matter of facing the prosecution proceedings?

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 seeing 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.

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.

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.

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.

A question could legitimately be asked - what might happen if the counsel engaged by the accused (whose personal appearance is dispensed with) does not appear or that the counsel does not co-operate in proceeding with the case? We may point out that the legislature has taken care for such eventualities. Section 205(2) says that the magistrate can in his discretion direct the personal attendance of the accused at any stage of the proceedings. The last limb of Section 317(1) confers a discretion on the magistrate to direct the personal attendance of the accused at any subsequent stage of the proceedings. He can even resort to other steps for enforcing such attendance.

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.

In the result, we allow this appeal and set aside the order passed by the Sessions Judge on 30.6.2000 (in Criminal Revision Petition 197/2000). However, this course is adopted without prejudice to the rights of the second accused to move a fresh application seeking relief under Section 317 of the Code. If any such application is filed the magistrate shall pass orders thereon before proceeding further in the light of the observations made in this judgment.

J
(K.T. Thomas)

J
(K.G. Balakrishnan)

August 27, 2001.