

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.2614 of 2022

Prafulla Chandra Mohapatra @ Prusty ..... Petitioner

Mr. Debasnan Das, Advocate

-Versus-

State of Odisha

..... Opposite Party  
Mr. Tapas Kumar Praharaj,  
Standing Counsel

CORAM:  
JUSTICE R.K. PATTANAIK

DATE OF JUDGMENT:22.03.2023

1. The petitioner challenges order dated 6<sup>th</sup> September, 2022 passed in CT (SPL.) POCSO No.127 of 2020 by the learned Adhoc Additional District and Sessions Judge (FTSC), Jajpur for having erroneously adopted the procedure specified in Section 329 Cr.P.C. on the grounds inter alia that the same is not tenable in law and hence, deserves to be set aside.
2. In fact, the petitioner stands chargesheeted under Section 376(3) IPC besides Section 14(A) of Child Labour (Prohibition) Act along with Section 6 of the POCSO Act read with Section 3(1)(r) and 3(2)(v) (va) of SC & ST (PoA) Act. The impugned order dated 16<sup>th</sup> September, 2022 by the learned court below relates to a direction for appearance of the petitioner in connection with the proceeding under Section 329 Cr.P.C.
3. Heard Mr. Das, learned counsel for the petitioner and Mr. Praharaj, learned counsel for the State.

4. Mr. Das, learned counsel for the petitioner submits that the petitioner suffers from Dementia since last 6 years as certified by the Medical Board and the said fact was intimated to the learned court below by stating that he is a person of unsound mind and hence to be proceeded with in terms of Section 329 Cr.P.C. An application on behalf of the petitioner was moved in that respect for consideration. In the said proceeding, as per Mr. Das, the learned court below directed the petitioner to physically appear in order to decide the future course of action which is not in accordance with law. It is submitted that since the Medical Board has already certified the petitioner to be suffering from Dementia with definitive cognitive impairment behaviour and psychological symptom which is generally a late stage of manifestation of such disease and duly diagnosed by the doctors of Capital Hospital and AIMS, Bhubaneswar, there was no need of any further examination and hence, the direction of the learned court below is not in accordance with law and while contending so, Mr. Das cites a decision in the case of **State of Gujarat Vrs. Manjuben Kasturbhai Nanjibhai Kunvariya** reported in (2020) 79 OCR (Guj.) 382.

5. Mr. Praharaj, learned counsel for the State on the other hand submitted that the procedure which has been followed by the learned court below is according to law since the physical presence of the petitioner is necessary in order to decide and determine, whether, unsoundness of mind renders him incapable in entering into defence as the same is a requirement under law in view of Section 329(2) Cr.P.C.

6. The other grounds have not been pressed into service by Mr. Das, learned counsel for the petitioner and the challenge is confined to the procedure followed by the learned court below while dealing with the matter under Section 329 Cr.P.C. The CRLMC No.2614 of 2022

question is, whether, the procedure so adopted by the learned court below in the present case is in accordance with law?

7. The relevant provision of Section 329 Cr.P.C. is reproduced herein below:

“(1) If at the trial of any person before a Magistrate or Court of Session, it appears to the Magistrate or Court that such person is of unsound mind and consequently incapable of making his defence, the Magistrate or Court shall, in the first instance, try the fact of such unsoundness and incapacity, and if the Magistrate or Court, after considering such medical and other evidence as may be produced before him or it is satisfied of the fact, he or it shall record a finding to that effect and shall postpone further proceeding in the case.

(1A) If during trial, the Magistrate or Court of Sessions finds the accused to be of unsound mind, he or it shall refer such person to a psychiatrist or clinical psychologist for care and treatment, and the psychiatrist or clinical psychologist, as the case may be shall report to the Magistrate or Court whether the accused is suffering from unsoundness of mind: Provided that if the accused is aggrieved by the information given by the psychiatric or clinical psychologist, as the case may be, to the Magistrate, he may prefer an appeal before the Medical Board which shall consist of (a) head of psychiatry unit in the nearest government hospital; and (b) a faculty member in psychiatry in the nearest medical college.

(2) If such Magistrate or Court is informed that the person referred to in sub-section (1A) is a person of unsound mind, the Magistrate or Court shall further determine whether unsoundness of mind renders the accused incapable of entering defence and if the accused is found so incapable, the Magistrate or Court shall record a finding to that effect and shall examine the record of evidence produced by the prosecution and after hearing the advocate of the accused but without questioning the accused, if the Magistrate or Court finds that no prima facie case is made out against the accused, he or it shall, instead of postponing the trial, discharge the accused and deal

with him in the manner provided under section 330: Provided that if the Magistrate or Court finds that a prima facie case is made out against the accused in respect of whom a finding of unsoundness of mind is arrived at, he shall postpone the trial for such period, as in the opinion of the psychiatrist or clinical psychologist, is required for the treatment of the accused. (3) If the Magistrate or Court finds that a prima facie case is made out against the accused and he is incapable of entering defence by reason of mental retardation, he or it shall not hold the trial and order the accused to be dealt with in accordance with section 330.”

8. After having gone through the whole of the provision and the purpose sought to be achieved, the conclusion is that a person of sound mind is to be prosecuted and not otherwise where for the mental incapacity to defend, the trial must have to be deferred unless he or she is discharged when the Court finds absence of a prima facie case against him or her. To be more precise, in view of sub-section(2) of Section 329 Cr.P.C., if the Magistrate or Court is informed that a person to be tried is of unsound mind, it shall determine, whether, such unsoundness renders him incapable to defend and if the accused is so found, the said finding should be recorded and thereafter, examine the record of evidence produced by the prosecution and then to proceed either to discharge him in case no prima facie case is established and dispose of the matter in the manner prescribed in Section 330 Cr.P.C. or postpone the trial if a prima facie case is made out for such period as is required for his treatment. So, therefore to determine the mental faculty of the accused and whether he is capable to defend himself, it shall have to be assessed by the Court and for the said purpose his examination is necessary and the same is the statutory mandate. Merely by referring to the medical papers and certificate of the Medical Board, a Court is not to pass any such order either discharging him or postponing the trial. The opinion of the Medical Board has been submitted

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before the learned court below to show that the petitioner is suffering from Dementia but in the considered view of the Court, his physical presence is essential for examination and to take a decision as to if he is capable of entering into defence. In **Manjuben Kasturbhai Nanjibhai Kunvariya** (supra), it is held that the court's attention should be drawn to the unsoundness of mind of an accused so that there can be a fair trial and the procedure under Section 329 Cr.P.C. is followed. The Court in the aforesaid decision discussed the duty of the trial court and also the rights of the accused with reference to Article 21 of the Constitution of India. There is no denial to the settled position of law that if an accused suffers from any disability affecting his cognitive capacity, the procedure as prescribed in Section 329(2) Cr.P.C. has to be followed and in order to assess whether he can defend himself during the trial or not, it has to be determined and for the said purpose, the learned court below in the case at hand was justified in insisting upon the petitioner's physical presence which is as per and in accordance with law and thus, it calls for no interference.

9. Hence, it is ordered.

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10. In the result, the CRLMC stands dismissed.

(R.K. Pattanaik)  
Judge

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