

**2010 M L D 1395**

**[Lahore]**

**Before Nasir Saeed Sheikh, J**

**TASSAWAR RASHEED---Petitioner**

**Versus**

**ADDITIONAL SESSIONS JUDGE, CHAKWAL and others---Respondents**

Writ Petitions Nos.2698 and 2699 of 2009, decided on 1st October, 2009.

**(a) Criminal Procedure Code (V of 1898)---**

---S. 540-A---Penal Code (XLV of 1860), Ss.337-A(i)(ii), 337-F(i)(i) (v)(vi), 337-L(ii), 458, 147 & 149---Constitution of Pakistan (1973), Art.199---Constitutional petition---Shajjah and house-trespass--Exemption from personal appearance---Application for---During trial petitioner filed application to the effect that he should be exempted from his personal appearance under S.540, Cr. P. C. as his work visa to join his employment abroad had been received, Trial Court dismissed said application and his revision petition filed against order of the Trial Court had also been dismissed by the Appellate Court---Validity---Provisions of S.540-A, Cr.P. C. were to be applied by the court of law in view of facts of each case---Duty of an accused would not come to end by just moving an application before the court for seeking exemption from appearance, but would continue thereafter as well---Accused must wait till his application was duly allowed, because the court had not to pass a mechanical order---Trial Court had to see the possibility of its ability to enforce the direction of personal attendance of accused at a subsequent stage---Accused involved in a criminal case who was allowed concession of bail during pendency of the trial, could not be allowed to act at will, making it impossible by the Trial Court to exercise reasonable control over his movement---Accused/petitioner was not entitled to exemption from appearance during the trial---Manner in which the petitioner conducted himself in making the prayer and then leaving abroad without grant of said permission by the Trial Court, had resulted into dismissal of his application---Accused was present before the Trial Court when he moved application for exemption, but he left the country without any order having been passed by the Trial Court on his application, he did not take the court into confidence about his commitment of job abroad in proper manner---Trial Court, in circumstances, was left with no option, but to dismiss his application under S.540-A, Cr. P.C.---Order passed by the two courts below did not call for any interference by High Court in exercise of its constitutional jurisdiction, particularly when the petitioner had misused the concession of bail granted to him by going abroad without seeking permission from the court, when he was facing trial as an accused---Accused was not entitled to any relief---Constitutional petition was dismissed.

PLD 2004 SC 160; PLD 1993 Pesh. 155; 2002 PCr.LJ 947; 1989 PCr.LJ 1652; 1980 PCr.LJ 1; The Crown v. Khushi Muhammad PLD 1953 Federal Court 170 and Said Mian and another v. Mian Said Baghdad and another PLD 1980 SC 318 ref.

**(b) Interpretation of statutes---**

---Provisions of law were to be interpreted and implemented effectively, so that the courts of law should remain the authority to enforce it.

Ch. Afrasiab Khan for Petitioner.

**ORDER**

**NASIR SAEED SHEIKH, J.**---This order will dispose of the instant writ petition as well as Writ Petition No. 2699 of 2009, as both these petitions are filed by Tasawar Rasheed/petitioner and common questions of law and facts are involved therein.

2. Brief facts of the case are that petitioner was facing trial in two different cases before the learned Judicial Magistrate, Chakwal, i.e. F.I.R. No. 145, registered at Police Station Dhuman District Chakwal, on 7-9-2007, for offences under sections 337-A(ii)/337-F(vi)/337-L(ii)/458/147/149, P.P.C. and F.I.R. No. 75, registered at the same Police Station, on 17-5-2008, for offences under sections 337-A(i) and (ii)/ 337-F(i), iii and (v)/337-L(ii)/147/149, P.P.C. During trial the petitioner sought exemption from his personal appearance under section 540-A, Cr.P.C. Consequently, he moved applications before the learned Trial Court in case F.I.R. No.145 of 2007 on 26-9-2008 and in case F.I.R. No.75 of 2008 on 30-10-2008 alleging therein that his work visa, which he previously applied in connection with obtaining a job abroad has been received and he has to join his employment in Dubai, therefore, he may be exempted from personal attendance during trial. Learned trial Court dismissed both the applications through separate orders of even date i.e. 10-11-2008 with following observations:

"Today the accused is absent from the Court and without the permission the accused has been gone abroad. Therefore, the application of the accused for his personal attendance is hereby dismissed."

The petitioner challenged the said orders through two separate revisions and the learned Additional Sessions Judge, Chakwal, dismissed both the revisions vide separate orders of the same date i.e. 17-7-2009 by upholding the orders passed by the learned trial Court, hence, these writ petitions.

3. Learned counsel petitioner while relying upon the cases reported as PLD 2004 SC 160, PLD 1993 Peshawar 155, 2002 PCr.LJ 947, 1989 PCr.LJ 1652 and 1980 PCr.LJ 1 contends that an accused person who is already abroad and is not personally present before the Trial Court in criminal case can seek benefit of section 540-A, Cr.P.C., that term "incapable of remaining before the Court" is thoroughly interpreted in the above-referred judgments and the case of the petitioner is fully covered by the case-law cited by him, that the learned Courts below have

illegally rejected the applications of the petitioner seeking exemption from his personal attendance.

4. The judgment PLD 2004 SC 160 (Haji Aurangzeb v. Mushtaq Ahmad and another) relied upon by the learned counsel for the petitioner is very important and facts of the said case re produced hereunder:

"Petitioner Haji Aurangzeb along with his three sons namely, Abdul Ghaffar, Muhammad Siddique and Liaqat are accused in case F.I.R. No. 448, dated 26-12-2001 registered at Police Station, KTS Haripur under sections 337-A(ii)/34, P.P.C. The challan was presented in the Court on 15-3-2002. It is stated that in the month of July, 2002, Muhammad Siddique co-accused left the country to avail the offer of an employment in Abu Dhabi. In his absence on 5-9-2002, the learned Trial Magistrate was of the view, that accused Muhammad Siddique could not have gone abroad without permission of the Court. On revision, this order was maintained by the Sessions Judge, Haripur. A petition (Crl. M.(Q) No. 48/02) under section 561-A read with section 540-A, Cr.P.C. filed in the Peshawar High Court Circuit Bench, Abbottabad to call in question the order of the trial Magistrate and of the Sessions Judge was also dismissed by a 'learned Single Judge of the High Court. The petitioner-Haji Aurangzeb co-accused solicits leave to appeal from the judgment of the Peshawar High Court Circuit Bench, Abbottabad dated 12-5-2003."

The Hon'ble Supreme Court in para 2 of the said judgment observed as under:--

"It is extremely doubtful if the petitioner can maintain this petition in his own name. There is nothing on record indicating that Muhammad Siddiqi accused who has been denied exemption, has authorized the filing of this petition. The petition is liable to be summarily rejected on this ground alone."

5. In order to stress for the claim of the petitioner for grant of exemption from appearance before the Trial Court, the learned counsel has made reference to the counsel has made reference to the observations made in the separate judgment written by the Hon'ble Sardar Muhammad Raza Khan, J. in the above reported case, which are as under:

"(8) The points of difference between the legislation in India and that in Pakistan, are, that the section inserted by Act XVIII of 1923 was still retained in our Code of Criminal Procedure, while some technicalities and requirements were done away with by certain amendments in the Indian part of the Sub-Continent. What our law requires the Court to appreciate before the grant of exemption is that: (i) there should be two or more accused facing the trial; (ii) that the accused asking for exemption should be "before the Court"; and (iii) that, he be represented by a counsel. As already discussed with reference to law of our country, here the words `before the Court' employ the physical presence of an accused before the Court also give a strong indication of the fact that the accused who at one time was before the Court, has now become, for some reasons or the other, incapable to remain present before the Court for future.

(9) In the conditions given above, I believe that on merit the exemption should have been granted to an accused who has gone abroad to earn his livelihood and who, in view of the prevailing delays in the disposal of cases, cannot wait for the commencement and conclusions of trial."

In spite of the separate judgment written by my lords in the cited case, no indulgence was shown to the case of the accused in the said case whose application for exemption from attendance was dismissed by the Trial Court and the leave to appeal was refused to the said petitioner by the Hon'ble Supreme Court of Pakistan. The learned counsel laid emphasis on the other judgments cited by him in order to persuade this Court for setting aside the orders of the two Courts below but the case-law referred to by him is distinguishable from the facts of instant case.

6. Learned counsel for the petitioner has referred to the judgment reported as 1980 PCr.LJ 1 in support of his contention that the petitioner has a right to be granted exemption in view of the fact that he remained before the Trial Court for sufficient period of time and merely because that on the date of passing of the order dated 10-11-2008 by the learned Judicial Magistrate/Trial Court the petitioner was not present and has proceeded abroad would not stand in the way of his seeking the exemption from further presence which he was requesting through separate application moved before the Trial Court. The case-law relied upon by the learned counsel for the petitioner is distinguishable from the facts and circumstances of the present case in the following manner. In the case reported as 1980 PCr.LJ 1, the accused who was seeking exemption from his attendance before the trial Court was present before it at the time of passing of exemption order. The exemption granted to the petitioner by the trial Court was set aside by the learned Additional Sessions Judge in a revision preferred against order of the trial Court and the High Court set aside the said order of learned Additional Sessions Judge and restored that of the trial Court, granting exemption to the accused.

7. In the judgment reported as 2002 PCr.LJ 947, the accused was also present before the learned trial Court/ASJ and was allowed exemption and then he left for abroad and this order was upheld by this Court and was not interfered with while exercising revisional jurisdiction in the revision petition filed by the complainant.

8. In another case 1989 PCr.LJ 1652 the accused was involved in a murder case. He was a doctor himself and suffered from some heart disease and left for abroad after seeking an NOC from the Police authorities of the country which was placed on record and he moved an application giving a specific authority letter to his brother to move an application on his behalf, seeking exemption from his presence during trial, which trial was pending before the learned Additional Sessions Judge. His application was rejected by the said forum and the High Court set aside the order of the learned ASJ and accepted the application moved by the brother of the accused who was duly authorized to move such application on behalf of the accused and application was moved accordingly. This case is also distinguishable on the basis of the facts stated above. The facts of the case reported as PLD 1993 Peshawar 115 also indicate that at the time of seeking exemption from his presence during trial the accused involved was present before Trial Magistrate when he was granted exemption. Thus, all the reported judgments passed by the High Court and relied

upon by the petitioner's learned counsel are distinguishable from the facts and circumstances of the case.

9. This Court has also observed that the revision petitions dismissed by the learned Additional Sessions Judge, Chakwal, do not bear the signatures of the petitioner and as per judgment of Hon'ble Supreme Court of Pakistan (PLD 2004 SC 160) the maintainability of the said revision petition is open to serious objections. The order passed by the learned trial Court dated 10-11-2008 is in accord with the above to referred authoritative judgment of the Supreme Court of Pakistan, wherein leave to appeal was refused to an accused person who has proceeded abroad in a criminal trial without seeking exemption from his attendance. It would be worth-mentioning that challan in case F.I.R. No.145 of 2007 was submitted in the Court on 14-2-2008; while it was submitted in the Court in case F.I.R. No. 75/2008, on 30-10-2008. The accused petitioner moved an application for the grant of exemption and left for abroad without permission of the Trial Court.

10. An accused involved in a criminal case, who is allowed concession of being released on bail during the pendency of his trial/ appeal cannot be allowed to act at will making it impossible for the trial Court to exercise reasonable control over his movements. This tendency cannot be encouraged with an open by the Courts otherwise the confidence in administration of justice which is now being tried to be rebuilt seriously by the Courts of law will be shaken. Litigants must have respect for will of law being administrated by the Courts and cannot be allowed to jeopardize the authority of the Courts of law making it subservient to their convenience and the procedural supremacy of law is all the more necessary to be ensured in order to bring the system of justice of effective harmony. Had the petitioner been declined bail during the pendency of the case against him, the petitioner could not have gone abroad notwithstanding that a work visa has been issued in his favour. Concept of release of an accused person on bail is particularly defined in the judgment reported as PLD 1953 Federal Court 170 (The Crown v. Khushi Muhammad):--

"The basic concept of the word "bail" is release of a person from the custody of Police and delivery into the hands of sureties, who undertake to produce him in Court whenever required to do so. This is the meaning which has been given to the word "bail" in Standard English Dictionaries as well as in Wharton's Law Lexicon and Stroud's Judicial Dictionary. This is also borne out by the form of bond and bail bonds given in Schedule-V of the Cr.P.C."

Similarly in the judgment reported as PLD 1980 SC 318 (Said Mian and another v. Mian Said Baghdad and another) the Hon'ble Supreme Court of Pakistan laid down that:--

"the word "bail" envisages curtailment of liberties when bail is granted to a person his custody is delivered to his sureties."

11. The provisions of section 540-A, Cr.P.C. are to be applied by the Court of law according to facts of each case. The duty of an accused does not come to end by just moving an application before the Court for seeking exemption from appearance but it continues thereafter as well; he must wait till his application is duly allowed because the Court has not to pass a mechanical order of acceding to each such application whenever moved by an accused. The trial Court has to see

the possibility of its ability to enforce the direction of personal attendance of the accused at a subsequent stage if and when so deemed necessary by the Court in case he is granted exemption from attendance. It shall be advantages to read the last operative part of section 540-A, sub-section (1) of Cr.P.C., which is being reproduced below:---

"540-A. 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, where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such 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) ....."

12. In order to ensure that this last portion of section 540-A of Cr.P.C. practically remains available to the trial Court, the condition of recording of reasons has been incorporated in the section. This recording of reasons may take the form of demand of heavy surety from the accused for his personal reappearance during the trial in case of his leaving for abroad. Provisions of law are there to be interpreted and implemented effectively so that the courts of law remain the authority to enforce it. The accused in the writ petition in hand had violated the law twice and two F.I.Rs. have been registered against him and the trial has commenced. It would be in the fitness of the things that his trial be expedited by the learned Trial Court instead of letting him leave the country and then to sit and wait for his return at his will till the tenure of his job in abroad expires, if not further extended, in case the trial ends up in his conviction. The accused/petitioner deprived the learned Trial Court of a proper opportunity of passing appropriate order on his application for grant of exemption from his personal appearance during the trial. He first moved the application and without waiting for the decision of the learned trial Court proceeded abroad. This conduct of the petitioner by itself is sufficient to put the Court on some caution in respect of his entitlement to leave the country.

13. It is not the entitlement of the petitioner seeking exemption from presence during trial which is as such controverted but the manner in which he conducts himself in making the prayer and then leaving abroad without grant of said permission by the Trial Court which has resulted into dismissal of his application. He was present before the trial Magistrate when he moved an application for exemption but left the country without any order having been passed by the Trial Court on his application, he did not take Court into confidence about his commitment of job abroad in proper manner. The Trial Court was thus left with no option but to dismiss his application under section 540-A, Cr.P.C. A revision petition dated 2-12-2008 has been instituted in the name of the petitioner showing him as petitioner against the order dated 10-11-2008 of the learned Trial Magistrate but the same does not bear his signatures. It is evident that it was signed by somebody else because the signatures of the petitioner in his application dated 30-10-2008 "Annexure-C" are present in his own name whereas the signatures on the revision petition are absolutely different and have no correspondence with the name of the petitioner as well as with his signatures made on his application dated 30-10-2008 moved before the Trial Magistrate "Annexure-C". There is nothing on the record to establish the criminal revision having been

moved before the learned ASJ dated 2-12-2008 under some written authority duly sent by the petitioner from abroad. The revision could have been summarily dismissed by the learned ASJ on this ground as well.

14. In view of the peculiar facts of the instant case and keeping in view the law laid down by the apex Court, orders passed by the two Courts below do not call for any interference by this Court in exercise of writ jurisdiction particularly when the petitioner has also misused the concession of bail granted to him while he went abroad without seeking permission from the Court before whom he was facing trial as an accused, therefore, such accused is not entitled to any relief.

15. With the above observations, both these writ petitions are dismissed in limine.

H.B.T./T-25/L

Petitions dismissed.