
(2015) 12 CAL CK 0033
In the Calcutta High Court
Case No : C.R.R. No. 242 of 2014

Abhijit Chakraborty

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 14-12-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 205, 251, 313, 313(1), 317
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2015) 12 CAL CK 0033

Hon'ble Judges : Shivakant Prasad, J.

Bench : Single Bench

Advocate : Debabrata Acharya and Sital Samanta, for the Appellant

Judgement

Shivakant Prasad, J.—The order dated 06.12.2013 passed by the Additional Chief Judicial Magistrate, Diamond Harbour in C-485 of 2007 in a proceeding under Section 138 of the Negotiable Instrument Act is under challenge in this application.

2. The complaint case No. C-485 of 2007 was initiated at the instance of Atiar Daptary, Proprietor of Daptary Trading Company, Diamond Harbour Road, Sarisha, 24-Parganas South (hereinafter referred as complainant) alleging commission of offence punishable under Section 138 of the Negotiable Instrument Act.

3. It is alleged that to discharge the existing liability a Cheque bearing No. 300010 dated 07.12.2006 was issued in the name of the complainant company by the petitioner on behalf of the firm of the petitioner. The said Cheque was drawn on UCO Bank, 562 G.T. Road (South), Howrah and was duly deposited by the complainant in UCO Bank Ltd., Diamond Harbour Branch for encashment but the same was not honoured. So, a notice dated 22.5.2007 was issued demanding payment which was received by the petitioner on 28.5.2007 but of no effect.

4. The petition of complaint was filed on 11.7.2007 before the learned Additional

Chief Judicial Magistrate, Diamond Harbour. The learned Magistrate took cognizance.

5. On September 23, 2008 the petitioner surrendered before the learned Court and obtained bail.

6. On May 22, 2009 the petitioner was examined under Section 251 of the Code of Criminal Procedure as to substance of accusation punishable under Section 138 of N.I. Act to which he pleaded not guilty and claimed to be tried.

7. The petitioner was all along represented by the learned Advocate during the course of trial as the personal appearance of the petitioner was exempted under Section 205 Cr.P.C. vide Order dated 21.8.2009.

8. It is alleged that the learned Magistrate without considering earlier order of exemption of personal appearance of the petitioner passed the order of issuance of warrant of arrest against the petitioner in connection with the present case.

9. Challenging the order of the learned Magistrate for issuance of warrant of arrest, the petitioner preferred a Criminal Revisional application before the Hon"ble Court being CRR No. 1885 of 2013 which was disposed of by the Hon"ble Justice Tarun Kumar Gupta directing the petitioner to surrender before the learned Court of Judicial Magistrate within two weeks.

10. The petitioner submits that the learned Magistrate erred in law for insisting upon the petitioner to attend at the time of examination under Section 313 of the Code of Criminal Procedure.

11. It is contended on behalf of the petitioner that the statute never provides insistence of attendance of the accused even at the stage of examination under Section 313 of the Code of Criminal Procedure.

12. The learned Magistrate should have dispensed with the personal attendance of the petitioner at the stage of examination of the accused under Section 313 Cr.P.C.

13. Now, the point for consideration is as to whether the order impugned is tenable in law and in fact.

14. It appears from the Order-sheets of LCR that after the process of the Court for the offence alleged under Section 138 of N.I. Act was issued, the accused Abhijit Chakraborty did not appear in response to summon issued to him. As a result, by order dated 05.8.2008 Warrant of Arrest was issued.

15. Order dated 26.9.2008 reveals that the accused/petitioner surrendered and was enlarged on bail. On 22.5.2009 he was examined under Section 251 as to the substance of accusation punishable under Section 138 N.I. Act to which he claimed trial and abjured the accusation against him. The petitioner was allowed to be represented under Section 205 Cr.P.C. on the undertaking that he will not dispute his identity during the trial and on condition that he would appear as and

when directed by the Court. On such term his personal appearance was dispensed with during the evidence. After the complainant evidence was concluded, date was fixed on 04.8.2012 for his examination under Section 313 Cr.P.C. He absented by filing application on the ground that he was pre-occupied with his family affairs. The accused/petitioner was directed to appear positively on 16.2.2013 for payment of costs and for his examination under Section 313 Cr.P.C. i.d. warrant of arrest was to follow but he did not appear on the next date fixed. So, warrant of arrest was issued. During pendency of warrant of arrest, the accused/petitioner surrendered before the learned Court and was admitted on bail by order dated 06.7.2013 and again date was fixed on 06.12.2013 for his examination under Section 313 Cr.P.C. but on that date, the accused/petitioner did not appear and his learned Advocate filed application for dispensing with his personal attendance through learned Advocate under Section 205 Cr.P.C.

16. But the learned Magistrate turned down his prayer with the observation that personal appearance of the accused at the stage of examination under Section 313 Cr.P.C. was not permissible bearing in mind that the accused had filed similar application which was earlier allowed but accused/petitioner misused the privilege given to him, for that warrant of arrest was issued against him. The learned Magistrate was further of the view that petition under Section 205 Cr.P.C. was again filed with the sole object of causing delay in disposal of the case and his personal appearance was essential under Section 313 Cr.P.C.

17. The case is undoubtedly pending since 2007 the conduct of the accused/petitioner is dismal in nature as evident from the Order-sheet. I am of the considered view that the learned Magistrate was absolutely right in rejecting the application insisting upon the personal appearance of the accused for his examination under Section 313 Cr.P.C. The accused had also filed an application dated 16.9.2013 which was fixed on 30.01.2014 for hearing and accused was directed to appear positively on that date. But accused absented by filing petition under section 317 Cr.P.C. which was objected to by the opposite parties/complainant. The learned Magistrate was compelled to issue warrant of arrest as the accused/petitioner disobeyed the order of the Court. Instead, the accused/petitioner preferred this revision.

18. It is true that the petitioner was allowed to be represented under Section 205 Cr.P.C. by his Advocate but that order was also not properly obeyed by the petitioner and for the second time the Court had to issue warrant of arrest and during pendency of warrant of arrest, the accused/petitioner preferred this revision, obviously, with an object in mind to somehow prolong the litigation. The learned Magistrate has directed the petitioner to appear before the Court for his examination under Section 313 Cr.P.C. rightly because the application under Section 205 Cr.P.C. was allowed on condition that the accused/petitioner will appear before the Court as and when call to do so, but the petitioner was successful in flouting the Court's order. It appears from the order-sheet that sometimes the accused/petitioner has been represented under Section 317 Cr.P.C.

19. The provisions of Section 205 Cr.P.C. and Section 317 Cr.P.C. are two different provisions. They have been engrafted by the legislature knowingly well the existence of each other provision. Section 205 Cr.P.C. gives a discretion to the Court to exempt a person from personal appearance till such time his personal appearance was necessary for the trial whereas Section 317 Cr.P.C. is a provision, where, on any particular day where accused is required to be present in person, he is unable to come or appear, he may seek leave and be absent and for this he is to move to the Court under Section 317 Cr.P.C. In operation both the Sections are different and distinct. This is what is the proposition of law on this score.

20. While dealing with the application under Section 205 Cr.P.C. the Court has to consider whether any useful purpose would be served by requiring the personal attendance of the accused or whether progress of the case is likely to be hampered on account of his absence. If the accused/applicant is trying to delay the completion of the trial, the Court would reject prayer for exemption from personal appearance.

21. In this particular case the learned Magistrate had allowed the accused to be represented by his learned Advocate under Section 205 Cr.P.C. but that order was also flouted as there was no representation on his part resulting which warrant of arrest was issued and again he filed application under Section 205 Cr.P.C. which was leniently considered but by allowing such application it cannot be said that the learned Court had no discretion to pass order for his personal appearance at the time of his examination under Section 313 Cr.P.C.

22. It is the clenched position of law that where in a summon case the Court dispensed with the personal attendance of the accused, it may also dispense with his examination under this section if there is no incriminating evidence against the accused. The proviso makes the intention of the legislature clear that where the Court has dispensed with the personal attendance of the accused in a summon case, his examination in clause (b) of Section 313(1) Cr.P.C. may be dispensed with where in a summons case the Court has not exempted, the accused personal appearance, the accused cannot claim exemption. This Court finds that the application under Section 205 Cr.P.C. was allowed for the first time on condition to appear as and when call to do so. The accused/petitioner somehow deferred and flouted the Court's order for which punitive action was taken against him by issuance of warrant of arrest. So this is a case where the accused cannot claim exemption from appearance for his examination under Section 313 Cr.P.C.

23. The order impugned is not devoid of merit. Accordingly revisional application is dismissed with cost of Rs. 5,000/- to the petitioner which must be deposited with the legal services committee of this High Court.

24. A copy of this Order be sent to the Court Trying Magistrate to dispose of the case positively within one month from the date of receipt of this order.

25. LCR be returned at once.

26. Urgent certified photocopy of this Judgment and order, if applied for, be supplied to the parties upon compliance with all requisite formalities.