

(2009) 07 CAL CK 0055

In the Calcutta High Court

Case No : C.R.A. No. 149 of 2009 and C.R.R. No. 2597 of 2003

Anshul Properties Private Ltd.

APPELLANT

Vs

The State of West Bengal and Another

RESPONDENT

Date of Decision : 30-07-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 181(4), 200, 203, 204, 239
Limitation Act, 1963 — Section 5
Negotiable Instruments Act, 1881 (NI) — Section 131, 138, 141, 141(2)
Penal Code, 1860 (IPC) — Section 120B, 406, 420

Citation : (2009) CriLJ 4628 : (2010) 6 RCR(Criminal) 1284

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : S. Ganguly, Ayan Chakraborty and A. Bhattacharjee, for the Appellant; K. Gupta, Vivek Jhunjunwala and S.S. Roy, for the Respondent

Final Decision : Allowed

Judgement

Partha Sakha Datta, J.—The appeal and the revisional application are being disposed of by this common judgment and order. M/s. Anshul Properties Private Limited which is a company registered under the Companies Act and which is the appellant in CRA No. 149 of 2009 and also the petitioner in CRR No. 2597 of 2003 lodged a petition of complaint with the learned Metropolitan Magistrate, Calcutta being Case No. C/813/1999 against the M/s. Allied Resins Chemicals Limited, a company registered under the Companies Act 1956, one Suroj Ratan Mundhra, Managing Director of the said company, Tapan Sen, P. Ganguly, Ramesh Kr. Vijoy and Goutam Mitra who are said to be the authorised signatories and/or principal officers of the said accused No. 1 company alleging offences u/s 138 read with Section 141 of the N.I. Act. Allegedly towards the discharge of the debt or liability arising out of bill discounting the accused No. 1 company issued in favour of the complainant company a cheque bearing. No. 824177 dated 29th January, 1999 for a sum of Rs. 8,41,123/-. The cheque was signed by the accused No. 2 in his capacity as Chairman and Managing Director of the accused

No. 1. Again another cheque for a sum of Rs. 1,00,000/- being No. 824079 dated 20th July, 1998 was drawn in favour of the complainant company and signed by the accused Nos. 3 and 4 in their capacities as authorised signatories. Both the cheques were drawn on Allahabad Bank, Red Cross Place, Calcutta. Both the cheques were dishonoured on the ground of "exceeds arrangement". Statutory notice was personally delivered at the registered office of the accused No. 1 company on 2nd February, 1999, and one Mr. Goutam Mitra as an employee of the said accused No. 1 company received the notice. No payments having been paid cause of action allegedly arose on 22nd February, 1990 and the petition of complaint was filed on 10th March, 1999 and the learned Magistrate took cognizance of offence and issued process.

2. An application was filed by the accused persons before the learned Magistrate praying for their discharge which was rejected on 28th September, 2001. Against the order of discharge the accused Nos. 2-6 filed a revisional application before the learned Sessions Judge being Criminal Revision No. 225 of 2001, The learned Judge by judgment and order dated 16th August, 2003 allowed the revisional application, set aside the order dated 28th September, 2001 passed by the learned Metropolitan Magistrate, 13th Court, Calcutta and dropped the proceedings against the accused Nos. 2, 3, 4 and 5 on the ground of no sufficient evidence having been made out against them and directed the learned Magistrate to proceed the case against only the accused No. 1 company. The ground of dropping of the proceeding as against the accused Nos. 2, 3, 4 and 5 was that in his examination u/s 200, Cr. P.C. Bijoy Prakash Goel who stood for the complainant did not say as to how the accused Nos. 2-6 were incharge of and responsible to the accused No. 1 company on the date of the commission of the offence. Learned Judge observed that the learned Metropolitan Magistrate did not record as to how he could be satisfied on the basis of examination of the complaint u/s 200, Cr. P.C. that there was sufficient evidence to proceed against the accused Nos. 2-6. According to the learned Judge as the complainant did not say in his examination u/s 200, Cr. P.C. that the accused No. 206 were in-charge and were responsible to the accused No. 1 company for the conduct and business of that company on the date of the commission of the offence the petition of complaint was not maintainable. Against the judgment and order of the learned City Sessions Judge, the complainant company filed an application u/s 482, Cr. P.C. before this Court on 3rd December, 2003 contending inter alia that the order of the learned City Sessions Judge is illegal and contrary to the position of law.

3. The said revisional application being CRR No. 2597 of 2003 was moved on 17th December, 2003 before this Court and there was an order of stay of operation of the impugned order of the learned City Sessions Judge dated 16th August, 2003 for a limited period of three weeks after the Christmas vacation with liberty to the parties to pray for extension and/or modification and/ or cancellation of the said interim order upon notice to the other side. The matter of the fact is that the interim order was not extended thereafter not because of refusal by the Court, but for non-renewal of the prayer.

4. A development took place after the aforesaid revisional application was moved before this Court and stay was granted. Learned Metropolitan Magistrate who was directed by the learned City Sessions Judge to proceed against the accused No. 1 company was not informed of about the pendency of the revisional application and of limited stay granted by this Court by none of the parties to the revisional application, although appearance was made in the revisional application by the Managing Director of the accused No. 1 company. The result was that the learned Magistrate by order dated 22nd February, 2006 dismissed the complaint and acquitted the accused No. 1 u/s 256 of the Cr. P.C. This order of acquittal came to be known to the complainant company when the learned advocate for the accused No. 2, the Managing Director of the accused No. 1 company informed this Court in the presence of the learned advocate for the complainant company in connection with CRR No. 2597 of 2003 on 30th June, 2008 that the petition of complaint had already been dismissed for non-appearance of the complainant resulting in acquittal of the accused No. 1 company u/s 256 of the Cr. P.C. Then Mr. Sandipan Ganguly rose to submit before the Court hearing such submission that he would take necessary instruction from his client.

5. In such circumstances as above, after obtaining certified copy of the order of the learned Magistrate dated 32nd February, 2006 special leave to appeal was preferred along with an application for condonation of delay against the order of acquittal u/s 256 of the Cr. P.C. during the pendency of the revisional application being CRR No. 2597 of 2003 which was preferred by the complainant company against the order of the learned Sessions Judge dated 16th August, 2003 dropping the case as against the accused Nos. 2, 3, 4, 5 and 6.

6. The application being CRAN No. 2480 of 2008 u/s 5 of the Limitation Act was heard in presence of both the parties and this Court by order dated 25th February, 2009 allowed the application u/s 5 of the Limitation Act subject to payment of costs in favour of the accused. Costs have been paid, special leave to appeal was granted and subsequently on 19th November, 2008 Memo of Appeal was filed and accepted.

7. In this scenario as above, the revisional application and the appeal preferred at the instance of the complainant company have been heard together. The point for consideration in connection with the revisional application is whether the learned City Sessions Judge was legally justified in discharging the accused Nos. 2-6 on the ground of absence of averment in the examination of the complainant u/s 200, Cr. P.C. as to how the said accused persons would be responsible to the accused No. 1 company. The point for decision in appeal will be whether the learned Magistrate was legally justified in acquitting the accused No. 1 company u/s 256, Cr. P.C. because of absence of the complainant on 22nd February, 2006.

8. I take up the revisional application first.

9. In the petition of complaint it has been averred at paragraph 2 thereof that

the accused No. 1 is an existing company having its principal office and/or registered office at the aforesaid address and is a manufacturer and/or dealer of chemical and allied substances". Paragraph 3 of the petition of complaint is as follows:

That the accused No. 2 is the Chairman and Managing Director of the Accused No. 1 and the Accused Nos. 3 to 6 are the authorised signatures and/or principal officers of the accused No. 1 and all of them are persons who at the time when the offence as alleged was committed, were in charge of, and were responsible to, the company & for the conduct of the business of the accused No. 1.

10. One Bijoy Kr. Goel on behalf of the complainant company was examined on 25th March, 1999 u/s 200, Cr. P.C. where he stated that the accused persons in discharge of their legal liabilities issued cheques in favour of the complainant company which stood dishonoured by the banker of the accused persons. Demand notice was issued which was received by the accused persons but no payment was made and the case has been filed. Before the learned Magistrate prayer was made by the accused person for discharge of the accused Nos. 2-6 on the ground that what has been averred at paragraph 3 of the petition of complaint has not been translated into pre-summoning statement of the complainant before issuance of process. Therefore, as necessary statement was not made to the effect as above the accused person Nos. 2-6 deserved discharge. By the order dated 28th September, 2001 learned Metropolitan Magistrate, 13th Court, Calcutta rejected the petition. Against such rejection revision was preferred before the Sessions Judge who passed the aforesaid order. The question, therefore, would be whether non-translating into presummoning statement of P. W. 1 u/s 200, Cr. P.C. of the necessary ingredient of Section 141 of the N.I. Act in spite of averment pursuant to the said section having been made in the petition of complaint itself extensively should result in discharge of the accused persons. This is the core of the issue.

11. Mr. K. Gupta, learned advocate appearing for the opposite parties submitted that the rationale of examining complainant and witnesses u/s 200, Cr.P.C. is to enable the Magistrate to find out whether there is prima facie ground to proceed against the proposed accused persons. No matter whatever has been stated in the petition of complaint it is incumbent upon the complainant to state the facts of the case in his pre-summoning statement u/s 200, Cr. P.C. and unless the necessary ingredients that constitute an offence u/s 138 read with Section 141 of the N.I. Act are stated u/s 200, Cr. P.C. the bare averment in the petition of complaint is of no consequence whatsoever; resultantly the petition of complaint must meet with the dismissal. If necessary ingredients as are contained in Section 141 of the N.I. Act are not stated in examination u/s 200, Cr. P.C. then the Magistrate would not be justified in issuing process; and to say that the details of the averments as are there in the petition of complaint are not necessary u/s 200, Cr. P.C. is to make the provision of Section 200, Cr. P.C. nugatory and otiose. My attention in this connection has been drawn to the

decision in *Shankar Finance and Investments v. State of A.P.* reported in 2008 (3) SCC (Cri) 558 : AIR 2009 SC 422, wherein Their Lordships of the Supreme Court observed as follows:

It is now well settled that the object of Section 200 of the Code in providing for examination of the complainant and his witnesses by the Court is to satisfy itself about the existence of a prima facie case against the person accused of the offence and to ensure that such person is not harassed by false and vexatious complaints by issue of process." I have further been taken to *Nirmaljit Singh Hoon Vs. The State of West Bengal and Another*, wherein Their Lordships observed at paragraph 22 of the judgment as follows:

Where a complaint is presented before him, he can u/s 200 take cognizance of an offence made out therein and has then to examine the complainant and his witnesses. The object of such examination is to ascertain whether there is a prima facie case against the person accused of the offence in the complaint, and to prevent the issue of process on a complaint which is either false or vexatious or intended only, to harass such a person. Such examination is provided therefore to find out whether there is or not sufficient ground for proceeding.

Further Mr. Gupta referred to *Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya*, where it was observed that in terms of Section 200, Cr. P.C. the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible thereof. Thus, it is submitted that mere averments in the petition of complaint is not sufficient to entitle the learned Magistrate to issue process against the accused persons and in that view of the matter the learned City Sessions Judge was Justified in discharging the accused persons.

12. Mr. Sandipan Ganguly, learned advocate for the complainant submitted that issuance of process by the Magistrate is only with reference to the petition of complaint. It is the petition of complaint that must make out a prima facie case against the accused persons. If the petition of complaint lacks necessary ingredients prima facie of the offence alleged then the Magistrate can dismiss the complaint u/s 203 of the Cr. P.C. The purpose of examination of the complainant u/s 200, Cr. P.C. is to narrate in brief the offence alleged and pre-summing statement u/s 200, Cr. P.C. must not be necessarily a total replica or image of the petition of complaint. Again, a pre-summing statement u/s 200, Cr. P.C. must not be equated with the examination in chief of the complainant that takes place at the trial. The Magistrate has to read the petition of complaint vis-a-vis the statement of the complainant u/s 200, Cr. P.C. and if upon conjoint reading of the two it would appear before the Magistrate that a prima facie case has been made out then and then only the Magistrate would be justified in issuing the process. It has been submitted further that the statement of the complainant u/s 200, Cr. P.C. has to be necessarily a brief one and may not be the reproduction of what is contended in the petition of complaint. It is submitted that paragraphs 2, 3 and 4 of the petition of complaint contained all necessary averments. The O.P.

No. 2 is the Managing Director of the accused No. 1 and the other opposite parties are the signatories of the cheques issued by accused No. 1 company. I have been taken to the decisions in S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, , Green Earth Asphalt & Power Pvt. Ltd. v. State of Maharashtra reported in (2008) 2 C Cr LR (SC) 469, Chhedi Lal Gupta v. Suresh Damani reported in (2007) 1 C Cr LR (Cal) 692, Smt. Kamala Devi and Others Vs. Smt. Sushila Sharma, , Sona P. Walvekar v. State of W.B. reported in (2008) 1 C Cri LR 108 : 2008 Cri LJ 406 Kanti Bhadra Shah and Another Vs. The State of West Bengal, Subramaniam Sethuraman Vs. State of Maharashtra and Another, , Growth Compusoft Exports Pvt. Ltd. v. State of W.B. 2008 (4) AICLR (Cal) 410, Prakash Amichand Shah Vs. State of Gujarat and Others, and N.S. Giri Vs. The Corporation of City of Mangalore and Others,

Now, the object of examination u/s 200, Cr. P.C. is to ascertain whether there is a prima facie case against an accused person of the offence alleged in the complaint and to prevent the issue of process which is false or vexatious or intended only to harass such a person. Such examination must be to find out whether there is or not prima facie ground to proceed against the accused persons. The decision in Nirmaljit Singh Hoon Vs. The State of West Bengal and Another, was in connection with an offence under Sections 120-B/406/420 of the IPC. In that case the learned Chief Presidency Magistrate upon examination of the witnesses u/s 200, Cr. P.C. observed that no prima facie case was made out. The High Court affirmed the order. The Hon"ble Supreme Court observed that there was sufficient evidence that made out a prima facie case. This was the majority view. The decision rendered in this case is purely fact oriented. The decision in Shankar Finance AIR 2009 SC 422 (supra) was in the context of non-examination u/s 200, Cr. P.C. of the payee in person. The Supreme Court observed that when a power of attorney holder is incharge of the business of the complainant payee and is aware of the prosecution there is no reason why the attorney holder cannot be examined as the complainant. In fact, Shankar Finance (supra) and Nirmaljit Singh Hoon (supra) are not too much of helpful in so far as the issue at hand is concerned. True, in Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, it was observed that in terms of Section 200 of the Cr. P.C. the complainant is bound to make statements on oath as to how the offence has been committed and how the accused persons are responsible thereof. It was further observed that in the event ultimately, the prosecution is found to be frivolous or otherwise mala fide, the Court may direct registration of case against the complainant for mala fide prosecution of the accused. Now, Sabitha Ramamurthy referred to S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, In S.M.S. Pharmaceuticals which is a Three Judge Bench decision of the Supreme Court it has been observed in paragraph 20(a) is as follows:

(a) It is necessary to specifically aver in a complaint u/s 141 that at the time the offence was committed, the person accused was in charge of, and responsible for the conduct of business of the company. This averment is an essential

requirement of Section 131 and has to be made in a complaint. Without this averment being made in a complaint the requirements to Section 141 cannot be said to be satisfied.

13. Again in (c) of the said paragraph 20, it has been observed as follows:

c) The answer to question (c) has to be in affirmative. The question notes that the Managing Director or Joint Managing Director would be admittedly in charge of the company and responsible to the company for conduct of its business. When that is so, holders of such positions in a company become liable u/s 141 of the Act. By virtue of the office they hold as Managing Director or Joint Managing Director, these persons are in charge of and responsible for the conduct of business of the company. Therefore, they get covered u/s 141. So far as signatory of a cheque which is dishonoured is concerned, he is clearly responsible for the incriminating act and will be covered under Sub-section (2) of Section 141.

The Hon"ble Judge who spoke for the Court in Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, also spoke in Green Earth Asphalt and Power Private Ltd. (supra). In this decision, it appears the proceeding was quashed only against the respondent Nos. 4 and 5 because of lack of averment in the petition of complaint but so far as the respondent No. 3 who was the authorised signatory of the company and who signed the cheque was concerned the proceeding was not quashed. Interestingly, it would be profitable to refer to Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, , wherein it was observed that bare averment that a certain person was director of the company and responsible for conduct of the business of the company would not do because in addition to such averment it is also necessary to aver as to in what manner a certain director was responsible for conduct of business of the company or otherwise responsible for it in regard to its functioning. Interestingly, the Hon"ble Judge who spoke for the Court in Saroj Kr. Poddar (supra) observed in second S.M.S. Pharmaceutical Ltd., reported in (2007) 2 Supreme 459 is as follows:

A faint suggestion was made that this Court in Saroj Kumar Poddar Vs. State (NCT of Delhi) and Another, has laid down the law that the complaint petition not only must contain averments satisfying the requirements of Section 141 of the Act but must also show as to how and in what manner the appellant was responsible for the conduct of the business of the company or otherwise responsible to it in regard to its functioning. A plain reading of the said judgment would show that no such general law was laid down therein. The observations were made in the context of the said case as it was dealing with a contention that although no direct averment was made as against the appellant of the said case fulfilling the requirements of Section 141 of the Act but there were other averments which would show that the appellant therein was liable therefore.

The purpose of referring to the aforesaid decisions is only to highlight the point

that the first S.M.S. Pharmaceuticals Ltd. laid down the law as to when process has to be issued. It was laid down that issuance of process would be justified if ingredients of Section 141 is present in the petition of complaint. The decisions in second S.M.S. Pharmaceuticals Ltd., N.K. Wahi Vs. Shekhar Singh and Others, ; Monaben Ketanbhai Shah and Another Vs. State of Gujarat and Others, and N. Rangachari Vs. Bharat Sanchar Nigam Ltd., are all to the effect that the issuance of process would be depending upon existence of averment requisite in the petition of complaint concerning the ingredient of Section 141 of the N. I. Act. Even in Monaben Ketanbhai Shah (supra), it was observed that it is not necessary to reproduce even in the complaint the language of Section 141 verbatim and the complaint is to be read as a whole. If these be the guidelines for issuance of process then the question would be whether dismissal of the petition of complaint which contained in paragraphs 2, 3 and 4 in great details as to how the accused persons could be connected to the accused No. 1 company would be justified only on the ground that there was no reproduction of all those averments in pre -summoning statement u/s 200 Cr. P.C. A bare reading of the petition of complaint does not lead a man of ordinary prudence to hold that it is vexatious, false, or mala fide. The observation in Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, was made in the context of anxiety of the Court that if the necessary statements were not made the prosecution might be frivolous or mala fide. For no reason can one say that the said petition of complaint is mala fide or frivolous. A somewhat similar situation arose in Chhedilal Gupta (supra) and it was held by this Court as follows:

The law relating to vicarious liability and the elements constituting offence punishable under Sections 138 and 141 of the N. I. act are almost settled. The decisions cited by Mr. Bose for the petitioner also reveal the settled principle of law and also the decisions cited by Mr. Bhattacharjee, the learned advocate for O.P. No. 1. The decision in Sabitha Ramamurthy v. R.B.S. Channabasavaradhya (supra) are not properly applicable. In this case the materials disclosed in the complaint showing the involvement of this petitioner and specific averment of taking day-to-day part in the affair and business of the accused firm by this petitioner. Absence of some averment in the statement on oath when the complainant was examined u/s 200 of the Code is not a ground to quash the criminal proceeding against the petitioner and here, I place reliance on the decision of larger Bench of the Supreme Court in Raj Lakshi Mills v. Shakti Bhanko (supra) and S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla and Another, . The decision in Subramaniam Sethuraman v. State of Maharashtra 2005 Cri LJ 4609 (supra) cited by Mr. Bose for the petitioner lays down settled principle as the said decision reveals that after issue of process only the only remedy is available u/s 482 of the Code and Magistrate cannot review or reconsider his decision relating to issue of process." In Smt. Kamala Devi and Others Vs. Smt. Sushila Sharma, it was observed as follows:

The learned Advocate for the petitioners in this connection submits that in the initial deposition the complainant or her father did not speak anything about the

allegation that the ornaments and the articles were retained or seen in the Calcutta residence of the accused persons. He also submits that even subsequent to the filing of the complaint the complainant filed an application before the Court below for issuing a search warrant for recovery of ornaments etc. at Churu and this, according to the learned Advocate for the petitioners, falsifies the allegation in the complaint about retention of some entrusted ornaments and articles in the Calcutta residence of the accused petitioners. This is indeed a factual aspect of the matter the truth or otherwise of which will be decided at the time of trial and the opposite party herein has her own explanation in the matter, as submitted by her learned advocate, but at this stage it is evident that the petition of complaint contains specific averments about bringing and retention of some of the concerned ornaments and articles by the accused persons at their Calcutta residence and that gives jurisdiction to the Calcutta Court in view of Section 181(4) Cr. P.C. It may be that the complainant and her father, have not in their initial deposition, taken u/s 200 Cr. P.C. specifically stated about the Calcutta residence of the accused petitioners but there is nothing in their initial deposition which can be taken as falsifying the averments made in the petition of complaint regarding the Calcutta part of the allegations. In the initial deposition the witnesses may not be very elaborate on details. At this stage it has to be seen whether the initial deposition considered with the complaint and other materials produced, if any, discloses the core incidents showing the factual ingredients of the concerned offence. Moreover at this stage the Magistrate is required u/s 200 Cr. P.C. to record the substance of the deposition.

14. Back to Sabitha Ramamurthy and Another Vs. R.B.S. Channabasavaradhya, to find out under what context the observation was made to the effect that in terms of Section 200 of the Cr. P.C. the complainant is bound to make statements on oath as to how the offence has been committed and how the persons are responsible therefore. The said decision would reveal that neither in the petition of complaint nor in examination u/s 200 Cr. P.C. there was any averment or statement as to how the accused persons were responsible vicariously in the commission of the offence. It was because of absence of any averment in the petition of complaint and that of any statement u/s 200 Cr. P.C. that the said observation came into being. Therefore, the decision in Sabitha Ramamurthy cannot be made applicable to the facts and materials of the case at hand. In Subramaniam Sethuraman Vs. State of Maharashtra and Another, , the Hon"ble Supreme Court observed as follows:

The next challenge of the learned Counsel for the appellant made to the finding of the High Court once a plea is recorded in a summons case it is not open to the accused person to seek a discharge cannot also be accepted. The case involving a summons case is covered by Chapter XX of the Code which does not contemplate a stage of discharge like Section 239 which provides for a discharge in a warrant case. Therefore, in our opinion the High Court was correct in coming to the conclusion once the plea of the accused is recorded u/s 252 of the Code the Procedure contemplated under Chapter XX has to be followed which is to

take the trial to its logical conclusion.

As observed by us in Adalat Prasad's case 2004 Cri LJ 4874 the "only remedy available to an aggrieved accused to challenge an order in an interlocutory stage is the extraordinary remedy u/s 482 of the Code and not by way of an application to recall the summons or to seek discharge which is not contemplated in the trial of summons case.

15. Therefore, it is argued that in terms of S.M.S. Pharmaceuticals even no specific averment is necessary in the complaint for roping a Managing Director or a signatory of the cheque as they inhere strict liability. However, averment was there in respect of all the accused persons in great details in paragraphs 2, 3 and 4 in the petition of complaint. Section 204 Cr. P.C. does not mandate that there must be a thorough reproduction of the petition of complaint in the statement u/s 200 Cr. P.C. Petition of complaint and the statement u/s 200 Cr.P.C. are to be read as a whole. In terms of the decisions cited above it would not be out of place to mention that since the accused persons are said to be the Managing Director and signatories no averment was required strictly in the statement u/s 200 Cr. P.C. It is trite law that in the petition of complaint the complainant is not required to state in the statement u/s 200 Cr. P.C. as to in what manner or how the Directors were responsible. Once the learned Magistrate upon taking cognizance of offence examined the complainant and issued process although by a very brief order learned Magistrate was incapable in terms of Adalat Prasad Vs. Rooplal Jindal and Others, to discharge the accused persons. In a case instituted upon a complaint triable by summons procedure learned Magistrate was powerless, once process was issued, to discharge the accused persons. Therefore, the learned Sessions Court could not give benefit to the accused persons which could not have been granted by the Magistrate. Referring to the decisions in Subramaniam Sethuraman Vs. State of Maharashtra and Another, and Growth Compusoft Exports Private Ltd. (supra), it has been argued by Mr. Ganguly that a decision of the Larger Bench cannot be overlooked to treat latter decision by a Bench of lesser Bench as of binding authority. In the circumstances as above, I am of the opinion that the learned City Sessions Judge was not legally justified in discharging the accused persons by setting aside the order of the learned Magistrate.

16. Accordingly, the revisional application is allowed. The order of the learned City Sessions Judge dated 16th August, 2003 is set aside.

17. Now I take up the appeal.

18. The question now is whether there is merit in the appeal against the order of the learned Magistrate dated 22nd February, 2006 whereby the petition of complaint was dismissed for non-prosecution and consequently the accused No. 1 was acquitted u/s 256 Cr. P.C. It is submitted by Mr. Ganguly, learned advocate appearing for the appellant complainant that the appellant being aggrieved with the order of the learned City Sessions Judge dated 16th August, 2003 preferred

revision before this Court being CRR No. 2597 of 2003 and interim order was also obtained concerning stay of further proceedings of the case in the Court of the learned Magistrate. But no renewal of the prayer of stay was made and stay expired but still then the revisional application preferred against the order of the learned City Sessions Judge discharging the other accused persons was pending. It was because of pendency of the revisional application preferred against the order of the learned City Sessions Judge discharging the other accused persons was pending. It was because of pendency of the revisional application in connection with which notice was also served upon the respondent in the appeal that appellant thought that unless the revisional application was disposed of by the Court, the learned Magistrate would not proceed with the hearing of the case and in such circumstances no steps could be taken before the learned Magistrate. Mr. K. Gupta, learned advocate appearing for the respondent referred to the decisions in S. Rama Krishna Vs. S. Rami Reddy (D) by his LR's. and Others, wherein Their Lordships of the Supreme Court observed as follows:

The provisions of Section 256(1) mandate the Magistrate to acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case. If an exceptional course is to be adopted, It must be spelt out. The discretion conferred upon the learned Magistrate, however, must be exercised with great care and caution.

19. Given a survey of the orders passed by the learned Magistrate from time to time it would reveal that the copy of the order of the City Sessions Judge dated 16th August, 2003 was received by the learned Magistrate in-charge on 4th November, 2000. On 4th November, 2000 the learned Magistrate directed issuance of notice upon the accused No. 1-Company fixing 13th February, 2004. Meanwhile revision against the order dated 16th August, 2003 passed by the learned City Sessions Judge in Criminal Revision No. 225 of 2001 was preferred before this Court on 17th December, 2003 and operation of the order of City Sessions Judge was stayed for a limited period. Meanwhile before the learned Magistrate next date was 13th February 2004 and the order dated 13th February, 2004 would reveal that no service return was received and learned Magistrate directed the re-issuance of notice upon the accused No. 1 - company through Officer-in-Charge, Karaya P.S. Then the next date was 22nd April, 2004. On that day the complainant was absent through a petition but no service return was received and learned Magistrate directed issuance of reminder fixing 9th July, 2004 for service return and appearance. Then the order dated 9th July, 2004 would reveal the same position with the variation that the complainant was absent without steps. Learned Magistrate directed issuance of reminder fixing 2nd September, 2004 for service return and appearance. The same was the position on 2nd September, 2004 and 14th December, 2004. On 14th December, 2004 learned Magistrate was on leave. The position continued to be such till 14th February, 2006 and the learned Magistrate directed the complainant to show cause why the case should not be dismissed for non-prosecution. Show cause was not furnished and accordingly on 22nd February, 2006 was dismissed. The

orders did not reveal that learned Magistrate fixed a date for recording of evidence of the complainant and his witnesses. If on the date of examination of witnesses the complainant was absent, the matter would have been a little different. In the decision in S. Rama Krishna Vs. S. Rami Reddy (D) by his LRs. and Others, , the appellant continued to remain absent from attending the Court for a long time, while the appellant remain present in Court on not less than twenty occasions. Here the situation is a bit different in the sense that revisional application has been pending since 17th December, 2003 and it was because of pendency of the revisional application that the complainant did not take any steps before the learned Magistrate, although he was required to take steps and seek for adjournment on the ground of pendency of the revisional application. In the circumstances it seems to me that appeal has to be looked at from the angle different from what is found in S. Rama Krishna (supra). It has been argued by Mr. Ganguly that by the order impugned the case was not disposed of on merit through a regular trial, and now that the revisional application is also being heard the Court may grant an opportunity to pursue the case before the Magistrate.

20. Having heard the learned advocates for the parties, I am of the opinion that appellant can be legitimately be given a chance to pursue the appeal.

21. Accordingly, the appeal is allowed. The order dated 22nd February, 2006 is set aside. Now the learned Magistrate will proceed with the case in accordance with the law.

22. Urgent xerox certified copy, if applied for, be given to the parties, as expeditiously as possible.