

**(2009) 09 CAL CK 0033**  
**In the Calcutta High Court**  
**Case No : C.R.R. No. 1069 of 2009**

Shri Bijay Kumar Bhattar

APPELLANT

Vs

Trimurti Associates Pvt. Ltd. and Another

RESPONDENT

**Date of Decision :** 23-09-2009

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 205, 251, 256, 305, 340  
Limitation Act, 1963 — Section 5  
Negotiable Instruments Act, 1881 (NI) — Section 138

**Citation :** (2011) 7 RCR(Criminal) 1302

**Hon'ble Judges :** Ashim Kumar Roy, J

**Bench :** Single Bench

**Advocate :** Sudipta Moitra and Kushal Paul, for the Appellant; Ayan Bhattacharjee, for O.P. No. 1, for the Respondent

## **Judgement**

Ashim Kumar Roy, J.—A proceeding relating to an offence punishable u/s 138 of the Negotiable Instruments Act was instituted against the petitioner and two others on the basis of a complaint made to the Court by the opposite party No. 1 being represented by one of its erstwhile Director Pawan Kumar Agarwal. After the said Pawan Kumar Agarwal left the company he was substituted by one Sri Vinay Kumar Gupta. Against such substitution petitioner moved the Sessions Court as well as the High Court but they lost there. Thereafter, the said Sri Vinay Kumar Gupta tendered his evidence by way of affidavit annexing therewith the Board Resolution whereby he was authorized to represent the complainant company. Since the Trial Court rejected the objection raised by the accused against acceptance of such evidence, hence this criminal revision challenging the said order.

2. At the time of hearing of this application a supplementary affidavit has been filed on behalf of the petitioner accompanied by certified copy of the entire order sheets relating to the impugned case, viz. the Case No. C/313/1996 pending before the Learned Metropolitan Magistrate, 11th Court, Calcutta and it was urged the same were not available when the main criminal revision was moved

and consideration of the same are very much essential for just decision of the case. It was prayed that the said supplementary affidavit be treated as the part of the main criminal revision when this Court allowed such prayer.

3. Now, with reference to the certified copy of the order sheets filed along with the supplementary affidavit it was pointed out before this Court that in connection with the said case by an order passed on May 18, 2001, the Trial Court acquitted the accused persons u/s 256 of the Code due to the non-appearance of the complainant and on the self-same day the complainant filed an application for recalling of such order of dismissal but that application was rejected by the Learned Court on June 1, 2001. It has been further pointed out subsequently the proceeding relating to the Complaint Case No. C/313 of 1996 which has been ended in acquittal of the petitioner as aforesaid has been restored pursuant to an order passed in connection with Criminal Revision No. 148 of 2001 by the Learned Judge, VIII Bench, City Sessions Court, Calcutta, and the said order was communicated to the Trial Court on 7th of May, 2002 and accordingly the trial relating to the aforesaid complaint case which was ended in acquittal once again commenced.

Both in the averment made in the supplementary affidavit as well as in the submissions made by the Learned Counsel appearing on behalf of the petitioner it was categorically urged that the petitioner was never aware of any such revisional application in which the aforesaid order of acquittal, passed by the Trial Court on 18th of May, 2001, was reversed. It was submitted not only the said order was passed by the Learned Judge, City Sessions Court, VIII Bench, Calcutta without the knowledge of the accused persons in whose favour the order of acquittal was passed and without giving them any opportunity of hearing, the said order was otherwise illegal and without jurisdiction. It was contended since the aforesaid order u/s 256 of the Code amounts to an order of acquittal and is an appealable order and appeal lies before the Hon"ble High Court, the Learned Judge, VIII Bench, City Sessions Court, Calcutta, in exercise of its revisional jurisdiction is not legally empowered to interfere with such an order of acquittal and to reverse the same. Mr. Moitra submitted since the order of the revisional Court is absolutely illegal and without jurisdiction all consequential orders, namely, the commencement of trial before the Learned Metropolitan Magistrate, 11th Court, Calcutta as well as all orders passed in connection therewith cannot be sustained.

It may be noted following the filing of the aforesaid supplementary affidavit and submissions of the Learned Counsel appearing on behalf of the petitioner that the aforesaid criminal revision being Criminal Revision No. 148 of 2001 was heard and disposed of ex parte, setting aside the order of acquittal of the present petitioner, without any notice to them this Court called for the records relating to the said criminal revision, accordingly the same has been brought and perused by this Court.

4. Against the impugned order is concerned whereby the Learned Trial Court

Permitted submission of evidence on affidavit of one Sri Vinay Kumar Gupta, who has substituted Pawan Kumar Agarwal, representing the complainant company, Trimurti Associates Pvt. Ltd., Mr. Moitra made the following submissions;

(a) The name of Sri Vinay Kumar Gupta was not in the list of the witnesses.

(b) The said Sri Vinay Kumar Gupta was examined to fill up the lacunas in the complainant's case.

(c) Whatever has not been stated in his evidence by Pawan Kumar Agarwal, the person who was representing the complainant's company initially, have now been brought on records through Sri Vinay Kumar Gupta, who has now substituted him.

On the other hand, the Learned Counsel appearing on behalf of the complainant company has vehemently urged it may be that the order of acquittal was set aside in exercise of its revisional jurisdiction by a Court although appeal lies against the same but as the order of acquittal was absolutely illegal there was no wrong. He further submitted that the aforesaid order whereby the order of acquittal has been set aside was passed in the year 2002 but till date the same was never challenged and on the other hand the accused persons submitted to the said order and participated in the trial commenced once again pursuant to such order. He further submitted that the accused persons earlier had the occasions to move this Hon'ble High Court on different pleas but at no point of time they ever raised any question as regards to the same. He further pointed out the aforesaid order whereby the order of acquittal has been set aside although was passed in the year 2002 but now the petitioner is moving this Court against the same nearly after 7 years, without any application for condonation of delay u/s 5 of the Limitation Act which is not legally permissible. According to him the aforesaid complaint case u/s 138 of the Negotiable Instruments Act involving dishonour of cheque of Rs. 12,02,088/- was instituted in the year 1996 but due to the deliberate mala fide attempt of the accused persons the trial could not have been concluded. He prays for dismissal of the instant criminal revisional application, which according to him has no merit.

5. Having regards to the records relating to the Criminal Revision No. 148 of 2001, I find that by a Judgement and order passed on April 23, 2002 in connection with the aforesaid criminal revision the Learned Judge, City Civil and Sessions Court, VIII Bench, Calcutta set aside the order of acquittal u/s 256 of the Code of Criminal Procedure passed in connection with the Case No. 313 of 1996 by the Learned Metropolitan Magistrate, 11th Court, Calcutta on May 18, 2001. Now nearly after long 7 years the petitioner has challenged the said order whereby the order of acquittal has been set aside by the City Sessions Court, Calcutta by filing a supplementary affidavit in connection with the instant criminal revision. Although, the aforesaid order has been challenged by way of filing a supplementary affidavit nearly 7 years after, admittedly beyond the prescribed period of limitation, but there was no application for condonation of

delay. It is the specific averment made in the supplementary affidavit and has been categorically alleged by the learned advocate of the petitioner that the petitioner Bijay Kumar Bhattar was not aware about such revisional application. It has been submitted no notice of the said criminal revisional application was served upon him and accordingly he had no knowledge about such criminal revision and such order was made to their prejudice denying opportunity of hearing to them. However, from the perusal of the Lower Court Records relating to the said criminal revision, viz. Criminal Revision No. 148 of 2001, I find that the notice of the said criminal revision was duly served upon the accused persons and one Ms. Sonali Bose, Advocate and one K.A. Bhandari, Advocate entered appearance on behalf of Bijay Kumar Bhattar in the said criminal revision by filing Vakalatnama executed by the petitioner Bijay Kumar Bhattar and memo of appearance before the Chief Judge, City Sessions Court, Calcutta on September 28, 2001. Thereafter the said learned Counsel Sonali Bose in connection with the said criminal revision attended the Court and filed Hazira on behalf of the petitioner on 7th of January, 2002 and 11th of March, 2002. Subsequently, by an order passed on 11th of March, 2002 the Learned Chief Judge, City Sessions Court, Calcutta transferred the matter to the Court of the Learned Judge, VIII Bench, Calcutta for disposal. It appears from the record on that day the petitioner was duly represented by his lawyer Sonali Bose. I further find from the records, thereafter on April 3, 2002 an application was filed by the Learned Lawyer of the petitioner Sonali Bose praying for further time for filing of objection as on the said date the objection was not ready and her such prayer was allowed and hearing was adjourned till April 12, 2002. On April 12, 2002 the Learned Lawyer Sonali Bose filed Hazira on behalf of the petitioner. Thus, from the face of the records it is evident the allegations made in the supplementary affidavit and whatever has been submitted by the Learned Counsel of the petitioner before this Court that the petitioner was never aware about the aforesaid criminal revision and had never served with any notice about the said proceedings and had no opportunity to defend him is not correct. Accordingly, the statement of the deponent made in Paragraph 6 of the said supplementary affidavit that the petitioner was not aware of any criminal revisional application preferred by the complainant/respondent No. 1 against the order of acquittal passed by the Learned Court below on May 18, 2001, affirming that such statement contained in Paragraph 6 are true to his knowledge which he derive from the accused/petitioner is not true. Thereafter, when the matter was restored in the file of the Learned Metropolitan Magistrate, 11th Court, Calcutta pursuant to the order of the Learned Sessions Judge, VIII Bench, Calcutta, since June 28, 2002 the accused persons were regularly represented in the Trial Court by their Learned Lawyer. The said accused persons subsequently moved an application praying for their discharge before the Trial Court but after having lost there moved a criminal revision before the City Sessions Court, Calcutta and then having failed to succeed moved this Hon'ble High Court, but never alleged anything as aforesaid. Thus, there cannot be any doubt that the petitioner was very much aware about the aforesaid Criminal Revision being No. 148 of 2001

and the order passed in connection therewith on April 23, 2002, whereby the Learned Judge set aside the order of acquittal passed by the Trial Court and the same was very much within his knowledge and his allegation that he was not aware about the same is patently false and he had not voluntarily challenged the said order and accepted the same.

6. Be that as it may, it is true that no revision lies before a Sessions Court against an order of acquittal passed u/s 256 of the Code of Criminal Procedure by a subordinate Magistrate Court and such order of acquittal is an appealable order and appeal lies before the High Court. However, in the case at hand it is an admitted position that the party affected by such order of the City Sessions Court whereby the order of acquittal has been reversed, the petitioner herein, has not challenged the said order for long 7 years before any higher forum, and on the other hand when pursuant to such order of the City Sessions Court the trial once again commenced he very much took part in the trial. The petitioner also from time to time challenged different orders passed in connection with the said trial, cross-examined the witnesses. Now, when by filing this supplementary affidavit in connection with the instant criminal revisional application, the petitioner after long 7 years challenged the said order of Sessions Court and prayed for quashing of the same, whereby the order of acquittal has been reversed that too without filing any application for condonation of delay, it has been categorically contended that he has no knowledge even about the aforesaid criminal revision far less the said order, but the records of the revisional Court shows otherwise and it is evident from the records that the petitioner was very much aware of the said proceedings and have full knowledge and notice thereof and his claim that he has no knowledge about the same is absolutely false. This is a case where legality of an order has been challenged before this Court not only 7 years after the expiry of the prescribed period of limitation but the explanation tendered for such long delay is evidently false. Although there is no legal bar to challenge an order even after the expiry of prescribed period of limitation by the party affected by such order by filing appropriate application and showing sufficient cause for such delay and in such circumstances a Court can always condone the delay. But at the same time if it is found the cause shown by the party for delay is patently false such application for condonation of delay must be dismissed outright. Of course there is no question of limitation when a Court suo moto exercise its revisional jurisdiction but in the instant case the question of suo moto exercise of power by this Court does not at all arise as the order in question has been challenged by the petitioner and brought to the notice of the Court by filing a supplementary affidavit.

7. It is well settled that in a summons case due to the non-appearance of the complainant an order of acquittal u/s 256 of the Code is not at all automatic. In the case of Associated Cement Co. Ltd. v. Keshvanand reported in 1998 SCC (Cri) 475, where the challenge was against an order of acquittal passed u/s 256 of the Code of Criminal Procedure, the Apex Court in Paragraph 17 thereof observed as follows;

Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice. (Para 17)

Accordingly, an order u/s 256 of the Code cannot be made automatically on the mere absence of the complainant, but such power has to be exercised judicially and fairly without impairing the cause of administration of criminal justice. Such power can be invoked unless the Court finds for some good reasons it would be proper to adjourn the hearing to some other dates, in other words before taking recourse to the provisions of Section 256 of the Code, the Court has to come to a conclusion that there is no justifiable reason to adjourn the hearing of the case. Therefore, even when the complainant is absent, the Court before exercising its discretion u/s 256 of the Code has to record that there is no good reason for which it would be proper to adjourn the hearing of the case to some other dates. However, in the present case such order u/s 256 of the Code has been made in the following terms;

Representative of accused No. 1 is present on call. Rests of the accused persons are absent u/s 205 Cr.P.C. Complainant took no step and found absent on repeated call till 11.05 A.M. Hence,

Ordered,

That the instant case be and same is hereby dismissed for default and the accused are hereby acquitted u/s 251 Cr.P.C.

8. Having gone through the said order, in my opinion, the approach of the Learned Court was clearly erroneous and not in accordance with law. Although on that day the accused company was represented u/s 305 of the Code and the other two accused persons were represented u/s 205 of the Code and were absent still the Learned Magistrate made such order of dismissal without forming any opinion that there is no good reason to adjourn the hearing of the case to some other date. The Learned Magistrate has also not recorded any finding justifying dismissal of the case. In my opinion, the Learned Magistrate should not

have resorted to the provisions of Section 256 of the Code in a situation as aforesaid and in the manner so mechanically.

9. There is no controversy that no criminal revision lies before the Learned Judge, City Civil & Sessions Court, Calcutta against an order of acquittal passed by a subordinate Court. Nevertheless, in my opinion, even though the order of the Learned Judge whereby he upset the order of acquittal may be lacking jurisdiction but there cannot be any doubt the Sessions Court has passed a just and correct order inasmuch as the order he upset was patently erroneous and illegal. Since I have no doubt that outcome of interference with the aforesaid order of revisional Court would be revival of an illegal order the question of interference with the same does not at all call for in the interest of justice. In this connection it would be apposite to rely on the following decisions of the Apex Court as well as of this Court.

- (a) Maharaja Chintamani Saran Nath Shahdeo Vs. State of Bihar and Others, ,
- (b) Maharaj Bahadur Singh v. Kurani Mai reported in XXXII CWN 57.

Now, to be very brief, I am not inclined to interfere with the order passed by the Learned Judge, VIII Bench, City Sessions Court, Calcutta, whereby he set aside an order passed u/s 256 of the Code by the Trial Court for the following reasons;

- (a) The order passed by the Trial Court u/s 256 of the Code is wholly erroneous and illegal. The said order was passed mechanically and without assigning any reason.
- (b) The order passed by the City Sessions Court was in consonance with the decision of the Apex Court.
- (c) The petitioner who allegedly affected by such order never challenged the same and remain silent for long 7 years and when challenged the same after 7 years the cause shown by him for not challenging the order earlier found to be patently false.
- (d) For ends of justice the aforesaid order does not deserve to be interfered.
- (e) Although the order passed by the revisional Court is lacking of jurisdiction but same does not deserve to be interfered with as any interference would amount to revival of an illegal order.

10. Now, coming to the ground on which the order impugned was initially challenged, I am of the opinion that there is no legal bar to tender evidence on affidavit of any particular witness, who has been substituted the person, who was representing the complainant company in connection with a proceeding relating to an offence punishable u/s 138 of the Negotiable Instruments Act. Whether by examination of such witness an attempt has been made by the complainant to improve its case or to fill up the lacunas in the case are pure question of facts and although such point can always be agitated before the Trial Court but it is not open to the accused to invite this Court to enter into the same when the trial

is under progress. So far as the contention of the petitioner that the name of the opposite party No. 2 was not included in the list of the witnesses is without any substance. In fact he has been substituted in the place of the person who was earlier representing the complainant company and thus the question of his name being included in the list of witnesses does not at all arise. There is also no legal bar to examine any person as witness even though his name is not appearing in the list of witnesses. Moreover, substitution of the opposite party in place of the person who was initially representing the complainant's company has been affirmed by this Court.

This criminal revisional application has no merit and accordingly stands dismissed.

I, however, find as the learned advocate of the petitioner declined to cross-examine the opposite party No. 2 herein, the Learned Trial Court has closed his evidence, in my view, the accused persons must be given the reasonable opportunity to cross-examine a witness for his defence. Thus, the order impugned so far that relates to closer of the evidence of opposite party No. 2 is concerned is set aside and the Trial Court is directed to give reasonable opportunity to the petitioner to cross-examine the opposite party No. 2 in accordance with law.

I find that aforesaid complaint case relating to an offence punishable u/s 138 of the Negotiable Instruments Act instituted in the year 1996 is still pending for long 13 years, I, therefore, direct the Trial Court to conclude the trial of the case positively within two months from the date of communication of this order. The trial must be proceeded on day to day basis. I further direct before proceed any further with the trial the Learned Magistrate must give the reasonable opportunity to the accused persons to cross-examine the opposite party No. 2. Both the parties are directed to appear before the Court below within two weeks from the date and in their presence the Learned Magistrate shall fix a date for cross-examination of the opposite party No. 2.

11. Now before concluding, having regards to the statement made in Paragraph 6 of the supplementary affidavit filed in connection with the instant criminal revision, which according to the deponent is true to his knowledge derived from the petitioner, that the petitioner had no knowledge about the Criminal Revision No. 148 of 2001 in the file of the Learned Judge, VIII Bench, City Sessions Court, Calcutta and as it appears from the perusal of the records of the said criminal revision that such statement is not at all correct, let a notice be issued calling upon the petitioner as well as the deponent of the said supplementary affidavit to show cause as to why they should not be proceeded in terms of Section 340 of the Code of Criminal Procedure. The office is directed to take immediate steps in this regard and to get the said notice served upon the petitioner as well as the deponent through the respective police station within whose jurisdiction they are residing. Let this matter be listed for hearing two weeks after long vacation under the heading "for orders".

The Office is further directed to communicate this order to the Court of the Learned Metropolitan Magistrate, 11th Court, Calcutta at once. It is also directed that the Lower Court Records be sent down to the respective Court below.

Criminal Section is directed to deliver urgent Photostat certified copy of this Judgement to the parties, if applied for, as early as possible.