

Criminal Revision

PRESENT:

THE HON'BLE MR JUSTICE KALIDAS MUKHERJEE

Judgment on 03.09.2010

CRR NO. 1699 OF 2010

Bijay Agarwal

Vs.

The State of West Bengal & Anr.

Points:

Appearance of accused- In a summon case whether the first appearance of the accused can be dispensed with- Code of Criminal Procedure, 1973-S.205

Facts:

The complainant filed the case against the accused for the commission of the alleged offence under Sections 427, 114, 506(II) and 447 of the Indian Penal Code. The accused filed an application under Section 205 Cr.P.C. praying for dispensing with his personal appearance in Court. The alleged offences are triable by summons procedure and the learned Magistrate without considering the merits of the application under Section 205 Cr.P.C. directed the petitioner to make his first appearance before the Court.

Held:

In the instant case the learned Magistrate insisted on the first appearance of the accused without entering into the merits of the application under Section 205 Cr.P.C. It is the discretionary power of the learned Magistrate, but, there must be sound exercise of judicial discretion. The discretion has to be exercised with reference to the contentions raised in the application under

Section 205 Cr.P.C. From the aforesaid decisions it is clear that the accused can very well make his first appearance in Court through his lawyer and even his application for dispensation of his personal appearance can very well be taken into consideration by a Court without insisting on his first appearance. The learned Magistrate committed material irregularity in insisting on the first appearance of the accused without disposing of the application under Section 205 Cr.P.C. The impugned order is set aside. The learned Magistrate is directed to hear the parties on the application under Section 205 Cr.P.C. without insisting on the first appearance of the accused and pass necessary order according to law. Para 9 and 10

Cases cited:

Sudip Bandyopadhyay Vs. State of West Bengal and another, 2010 (3) CHN (Cal) 145; Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. and others, 2001(7) SCC 401

For the Petitioner : Mr. Sandipan Ganguly

Ms. Sreyasi Biswas

Mr. Cedric Fernandez

For the O.P.No. 2 : Mr. Debabrata Acharya

For the State : Sk. Kasem Ali Ahmed

KALIDAS MUKHERJEE, J.:

1. This is an application under Section 397/401 of the Code of Criminal Procedure assailing the order dated May 4, 2010 passed by the learned Judicial Magistrate, 6th Court, Alipore in connection with the complaint case No. AC-3361/2009 wherein the learned Magistrate was pleased to direct the petitioner to appear personally before the Court without

adjudicating the application under Section 205 of the Code of Criminal Procedure.

2. The complainant filed the case against the accused for the commission of the alleged offence under Sections 427, 114, 506(II) and 447 of the Indian Penal Code. After the filing of the case the learned Court issued summons under Sections 427 and 453 of the Indian Penal Code as stated in paragraph 4 of the application. In pursuance thereof the accused filed an application under Section 205 Cr.P.C. praying for dispensing with his personal appearance in Court.

3. It is the contention of the petitioner that he is a business man and the Managing Director of M/S. Gee Pee Infotech Pvt. Ltd. which deals in manufacturing of mobile phones and accessories and exports their goods to various parts of India and abroad. In connection with such business the petitioner has to travel in different parts of India as well as abroad. It has been contended in the application that it would cause much hardship to him to attend the learned Court on each and every occasion in connection with the present case. In the application it has also been stated that – (a) An Advocate on his behalf would be present in the Learned Court whenever the case is taken up in his absence.

(b) The petitioner is not disputing his identity as the petitioner/accused in this case.

(c) The petitioner will not dispute any evidence recorded in his absence by the learned Court but recorded in the presence of his learned Advocate.

(d) The petitioner would be present on any day when his presence is required by the learned Court.

With this averment the accused/petitioner filed an application under Section 205 Cr.P.C. before the learned Court below.

4. Learned Counsel appearing for the petitioner submits that the alleged offences are triable by summons procedure and the learned Magistrate without considering the merits of the application under Section 205 Cr.P.C. directed the petitioner to make his first appearance before the Court. It is contended that the relief prayed for in the said application has been negated by the order impugned and such direction for first appearance keeping the application pending cannot be made. It is submitted that the learned Magistrate has the discretion, but, such discretionary power has not been exercised, in as much as, the application under Section 205 Cr.P.C. was not heard on merits. It is submitted that the matter may be sent back to the learned Court below with the direction to hear out the application under Section 205 Cr.P.C. without insisting on the first appearance of the accused before the Court.

5. The learned Counsel appearing for the O.P. No. 2 submits that in the application under Section 205 Cr.P.C. the accused has made an undertaking to appear before the Court as and when such direction may be made by the learned Court. It is contended that the learned Magistrate has the discretionary power to make any order for the appearance of the accused at any stage of the proceeding.

6. The learned Counsel appearing for the State submits that there is no perversity, illegality or absurdity in the impugned order passed by the learned Magistrate. It is contended that the learned Magistrate has the jurisdiction to insist on the first appearance of the accused under sub-Section 2 of Section 205 Cr.P.C. to appear at any stage of the proceeding. It is contended that there is no scope to interfere with the impugned order.

7. The learned Magistrate by order dated 04.5.2010 observed that the personal appearance of the accused was required first and then the hearing of

the petition under Section 205 Cr.P.C. will be made for ends of justice. In the case of *Sudip Bandyopadhyay Vs. State of West Bengal and another reported in 2010 (3) CHN (Cal) 145* similar matter came up for consideration. The observation made in paragraph 3 of the said case is set out hereunder:-

*“3. In the case at hand, the petitioner has been sought to be prosecuted under section 202(4) of the Kolkata Municipal Act, 1980, for which punishment prescribed is an imprisonment for a term that may be extended upto six months and with fine not exceeding Rs.50,000/-. Therefore, the alleged offence is a summons case as not related to an offence punishable with death, imprisonment for life or imprisonment for a term exceeding two years. It is well-settled in such case an accused can very well make his first appearance in the Court through his lawyer and even his application for dispensation of his personal appearance can very well be taken into consideration by a Court without insisting him to make first his appearance in Court. Thus, the order impugned cannot be sustained and same is accordingly set aside. In this connection the decision of the Hon’ble Supreme Court in the case of *Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. & Ors.*, reported in 2001(7) SCC 401, can be referred very well.”*

8. In the case of *Bhaskar Industries Ltd. Vs. Bhiwani Denim & Apparels Ltd. and others reported in 2001(7) SCC 401* it has been observed by the Hon’ble Apex Court in paragraph 17 as follows:-

“17. Thus, in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. The Magistrate is empowered to record the plea of the accused even when his counsel makes such plea on behalf of the accused in a case where the personal appearance

of the accused is dispensed with. Section 317 of the Code has to be viewed in the above perspective as it empowers the court to dispense with the personal attendance of the accused (provided he is represented by a counsel in that case) even for proceeding with the further steps in the case. However, one precaution which the court should take in such a situation is that the said benefit need be granted only to an accused who gives an undertaking to the satisfaction of the court that he would not dispute his identity as the particular accused in the case, and that a counsel on his behalf would be present in court and that he has no objection in taking evidence in his absence. This precaution is necessary for the further progress of the proceedings including examination of the witnesses.”

9. In the instant case the learned Magistrate insisted on the first appearance of the accused without entering into the merits of the application under Section 205 Cr.P.C. It is the discretionary power of the learned Magistrate, but, there must be sound exercise of judicial discretion. The discretion has to be exercised with reference to the contentions raised in the application under Section 205 Cr.P.C. From the aforesaid decisions it is clear that the accused can very well make his first appearance in Court through his lawyer and even his application for dispensation of his personal appearance can very well be taken into consideration by a Court without insisting on his first appearance.

10. In view of the discussion aforesaid, I find that the learned Magistrate committed material irregularity in insisting on the first appearance of the accused without disposing of the application under Section 205 Cr.P.C. The impugned order is set aside. The learned Magistrate is directed to hear the parties on the application under Section 205 Cr.P.C. without insisting on the

first appearance of the accused and pass necessary order according to law.

The application is disposed of accordingly.

11. Let a copy of this order be sent to the learned Court below immediately.

12. Urgent Photostat certified copy, if applied for, be handed over to the parties as early as possible.

(Kalidas Mukherjee, J.)

