

(2001) 04 CAL CK 0003
Calcutta High Court
Case No: C.R.R. No. 169 of 2001

Dr. Abhijit Sen and
Another

APPELLANT

Vs

Sibendu Basu

RESPONDENT

Date of Decision: April 27, 2001

Acts Referred:

- Constitution of India, 1950 - Article 141
- Criminal Procedure Code, 1973 (CrPC) - Section 205, 342
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141

Citation: 105 CWN 1141

Hon'ble Judges: Debiprasad Sengupta, J

Bench: Single Bench

Advocate: Balai Ch. Roy, Ashim Kr. Roy and Abhijit Bhadra, for the Appellant; Jayanta Kr. Biswas and Sujit Kr. Mitra, for the Respondent

Judgement

Debiprasad Sen Gupta, J.

This revisional application is directed against an order dated 16.12.2000 passed by the learned Chief Metropolitan Magistrate, Calcutta in a proceeding being case No. C/3851/ 2000 under Sections 138/141 of the Negotiable Instruments Act. The aforesaid proceeding was initiated on the basis of a complaint filed by the present opposite party alleging that the accused no. 1 in the petition of complaint issued a cheque on 20.7.2000 amounting Rs. 64,000.00 in favour of the complaint in discharge of existing financial liability. The said cheque was presented for encashment and the same was dishonoured by the Bank. Demand Notice was sent to the drawer of the cheque asking him to make the payment. On failure to make the payment within the stipulated period the cause of action arose and the petition of complaint was filed against the company and two of its directors alleging commission of offence u/s 138 of the N.I. Act

2. On the date fixed for appearance an application u/s 205 of the Code of Criminal Procedure was filed on behalf of the present petitioners. On such application the learned Magistrate passed an order that the application u/s 205 Cr.P.C. would be heard after the appearance of the accused persons. Challenging such order the present revisional application has been preferred.

3. In a judgment of the Hon"ble Apex Court reported in [V.K. Jain Vs. Union of India \(UOI\) and Others](#), it has been held as follows: "All the same, considering the plight of the petitioner to defending prosecution proceedings instituted at various places in India on the strength of the cheques issued by the Company of which he was the Director, we permit the petitioner to move the court concerned (before which the prosecution is pending in any of the cases} for exempting him from personal appearance. This can be done only after making the first appearance in the court concerned. If any such application is filed by the petitioner, we direct the court concerned to exempt him from personal appearance on the following conditions:

1. A counsel on his behalf would be present in the particular court on days when his case is taken up.

2. He will not dispute his identity as the accused in the case.

3. He will be present in court when such presence is imperatively needed.

4. Referring to the aforesaid judgment it is submitted by Mr. Balai Chandra Roy, learned Advocate appearing for the petitioners that the aforesaid judgment does not lay down the law that the accused must first appear and then apply, for exemption. The said judgment is not a precedent for such a proposition. To explain what is a binding precedence Mr. Roy refers to a judgement reported in [The State of Orissa Vs. Sudhansu Sekhar Misra and Others](#), wherein it was held by the Hon"ble Apex Court as follows: "A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. It is not a profitable task to extract a sentence here and there from a judgment and to build upon it."

5. Mr. Roy in support of his contention relies on a judgment reported in [Krishena Kumar and Others Vs. Union of India and others](#), : "The doctrine of precedent, that is being bound by a precious decision, is limited to the decision itself and as to what is necessarily involved in it." "In other words, the enunciation of the reasons or principle upon which a question before a Court has been decided is alone as a precedent. The ratio decidendi is the underlying principle, namely, the general reasons or the general grounds upon which the decision is based on the test or abstract from the specific peculiarities of the particular case which gives rise to the decision."

6. Mr. Roy next relies on a judgment of the Hon"ble Apex Court reported in [Union of India \(UOI\) and Others Vs. Dhanwanti Devi and Others](#), . In the said judgment it was held by the Hon"ble Supreme Court as follows:

It is not everything said by a Judge while giving judgment that constitutes a precedent. The only thing in a Judge's decision binding a party is the principle upon which the case is decided and for this reason it is important to analyse a decision and isolate from it the ratio decidendi. A decision is only an authority for what it actually decides. What is of line essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in the judgment. It would, therefore, be not profitable to extract a sentence here and there from the judgement and to build upon it because the essence of the decision is its ratio and not every observation found therein. It is only the principle laid down in the judgment that is binding law under Article 141 of the Constitution. A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or is put in issue may constitute a precedent, no matter for what reason, and the precedent by long recognition may mature into rule of stare decisis. It is the rule deductible from the application of law to the facts and circumstances of the case which constitutes its ratio decidendi.

7. The next judgment relied upon by Mr. Roy is reported in [Arnit Das Vs. State of Bihar](#), , wherein it was held by the Hon"ble supreme Court as follows:

A decision not expressed, not accompanied by reasons and not proceeding on a conscious consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. That which has escaped in the judgment is not the ratio decidendi. This is the rule of sub silentio, in the technical sense when a particular point of law was not consciously determined.

8. Relying upon the aforesaid judgments Mr. Roy learned Advocate of the petitioners submits that the binding precedent is the ratio or the general principle and not every observation made in a judgment. Ratio decidendi is the underlying principle, namely the general reasons or general grounds upon which the decision is based and the pronounce ment of law, which are not part of the ratio decidendi are classed as obiter dicta, A deliberate judicial decision arrived at after hearing an argument on a question which arises in the case or put at issue only is and not when a judgment is delivered without argument and without reference to the relevant law and without any citation of authority, a binding precedent.

9. Mr. Roy further submits that tested on the principles as stated above, V. K. Jain's (supra) case, so far it directs the petitioner to first appear and then avail of personal exemption u/s Criminal Procedure Code, is not a binding precedent, because it was not a deliberate judicial decision. In the said case scope of Section 205 of the Code was not raised as an issue, no argument was heard on that issue, no reason was given and no decision was arrived at on the point whether an accused was to appear

first and then to apply for personal" exemption.

10. Mr. Joyanta Biswas, learned Advocate appearing for the complainant/ opposite party submits that at the time when the learned Magistrate issues process he is very much competent to grant exemption from personal appearance. According to Mr. Biswas unless the Magistrate while issuing process grants exemption from personal appearance, the accused must appear first and then only may apply for such exemption.

11. Mr. Biswas learned Advocate first relies on the judgment of the Hon"ble Supreme Court in the case of V. K. Jain (supra) in which it has been held by the Hon"ble Supreme Court that the prayer for exemption made by the accused petitioner can only be considered: after the first appearance of the accused.

12. Mr. Biswas also relies on a judgment of this court reported in 1998 Cal, Cr.L.R. (Cal) 393 (V. S. Puri vs. M/s. Sukna Tea Industries), wherein it was held by the learned Single Judge of this court as follows:

Petitioner cannot get an omnibus latitude for not appearing before the Court even once, whereby the case is likely to be frustrated; but at the same time, it must be considered in favour of the petitioner that he must not be pressed for coming to Siliguri every now and then and unnecessarily detained at the place of trial at the cost of his responsibility in office. To make a harmonious position between the two odds, this petition should be rejected and the petitioner should be directed to appear before the learned Magistrate at the earliest and renew his prayer u/s 205 Criminal Procedure Code and in that case the learned Magistrate will pass his order keeping in view the mutual advantages and the requirements of law as enunciated above. But for that the petitioner must appear before the learned Magistrate, obtain bail if the learned Magistrate allows it after judicial consideration and renew his prayer by filing fresh petition for representation and the learned Magistrate shall consider judicially the whole situation and pass necessary orders as he thinks fit in the interest Of justice.

13. Mr. Biswas next relies on a judgment of the Hon"ble Supreme Court reported in [Bibhuti Bhusan Das Gupta and Another Vs. State of West Bengal](#), . Mr. Biswas specifically relies on para 4 of the said judgment which runs as follows:

As a general rule save where the Magistrate dispenses with the personal attendance: of the accused person the first step in a criminal proceeding is to bring him before the Magistrate. The attendance of the accused is secured if necessary by summons or by warrant of arrest. Thereafter the inquiry or trial proceeds in his presence. Section 205 of the Code of Criminal Procedure empowers the Magistrate whenever he issues a summons to dispense with the personal attendance of the accused and permit him to appear by pleader.

Relying upon the aforesaid judgments Mr. Biswas learned Advocate submits that once the process is issued, the accused must appear first before the learned Magistrate and it is only after such appearance he can pray for exemption u/s 205 of the Code of Criminal Procedure.

14. In reply to the aforesaid argument of Mr. Biswas, it is submitted by Mr. Roy, learned Advocate of the petitioner that the decision in the case of Bibhuti Bhusan Dasgupta (supra) relied upon by the learned Advocate of the opposite party does not have any manner of application in the present case. What is the ratio decidendi in the said decision can be deduced from column I at page 383, sub-paragraph (2) of the judgment, which is as follows:

The point in issue is whether the pleader can represent the accused for purposes of Section 342 and whether the examination of the pleader in place of the accused is sufficient compliance with the section in a case where the Magistrate has dispensed with the personal attendance of the accused and permitted him to appear by a pleader.

Mr. Roy submits that in the judgment referred to above the Hon"ble Supreme Court was called upon, to decide this point as there was conflicting decisions of different High Courts on this point. The Hon"ble Supreme Court held that the accused must appear personally when he was being examined u/s 342 of the old Code. According to Mr. Roy the decision in the case of Bibhuti Bhusan Dasgupta (supra) is not a binding precedent for the proposition that the accused must first appear and then apply for personal exemption.

15. As regards the decision in the case of V.S. Puri (supra), which is relied upon by the Id. Advocate of the complainant/opposite party, it is submitted by Mr. Roy that the said judgment was delivered per incuriam. A learned Single Judge of this court without noticing the Division Bench judgment of this court reported in 1989 Cri. L.J. 523 (Ajit Kumar Chakraborty vs. Srerampur Municipality), held that the accused must appear first before the court and obtain bail and thereafter may apply for exemption. Referring to the judgment in the case of Ajit Kumar Chakraborty (1989 Cri.L.J. 523), Mr. Roy submits that in the said judgment the question of first appearance was specifically raised and decided and it was held by the division Bench that there can be no proposition that in order to avail personal exemption u/s 205 Cr.P.C. the accused is to appear first in court and then he may apply for exemption.

16. I have heard the learned Advocates of the respective parties, I have also carefully gone through the judgments referred to above. The judgments referred to by Mr. Roy, learned Advocate of the petitioners relate to the settled principles of law on ratio decidendi, per incuriam or sub silentio as laid down by the Hon"ble Supreme Court. These are all settled principles of law and the judgments referred to are authorities on those principles. But in the judgment of the Hon"ble Supreme Court in the case of [V.K. Jain Vs. Union of India \(UOI\) and Others](#), in similar circumstances

in a case u/s 138 of the N.I. Act, the Hon"ble Supreme Court has permitted the accused to move the concerned court, before which the proceeding is pending, for exemption from personal appearance. The Hon"ble court thereafter specifically held that such prayer for exemption can only made after the first appearance of the accused in the concerned court. The Hon"ble court further directed the concerned court to allow the prayer for exemption, if any such prayer is made after the first appearance of the accused, with certain directions. The facts and circumstances in which the order was passed by the Hon"ble Apex Court in the case of V.K. Jain (supra) are the same as in the present case. In my considered view the Hon"ble Supreme Court is very specific in holding that a prayer for exemption can opnly by made after the first appearance of the accused and such decision is binding upon all the courts in view of Article 141 of the Constitution of India. The present revisional application is accordingly disposed of. The petitioners will be a liberety to appear before the learned Magistrate and after such appearance the learned Magistrate will consider the application u/s 205 of the Code of Criminal Procedure, which has already been filed by them, in accordance in law. I direct the learned Chief Metropolitan Magistrate, Calcutta to proceed with the trial and to conclude the same with utmost expedition.