

(2008) 08 CAL CK 0004

Calcutta High Court

Case No: C.R.R. No. 1147 of 2008

Mr. Ravindra Kumar and Another

APPELLANT

Vs

State of West Bengal and
Another

RESPONDENT

Date of Decision: Aug. 13, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 205, 233(2), 247, 313, 313(1)
- Negotiable Instruments Act, 1881 (NI) - Section 138

Citation: (2008) 4 CALLT 311 : (2009) 3 CivCC 238 : (2009) CriLJ 130

Hon'ble Judges: Ashim Kumar Roy, J

Bench: Single Bench

Advocate: Joymalya Bagchi and Koushik Chatterjee, for the Appellant; Jayanta Nath Saha and K.P. Tewari for O.P. No. 2 and S.S. Roy, for the Respondent

Judgement

Ashim Kumar Roy, J.

Since a common question of law involved in both the criminal revisions viz. C.R.R. No. 1147 of 2008 and C.R.R. No. 1148 of 2008, both the matters are taken together for hearing.

2. Heard Mr. Joymalya Bagchi, the learned Counsel appearing for the petitioner with Mr. Koushik Chatterjee. Mr. Jayanta Nath Saha, learned advocate appearing with Mr. K.P. Tewari on behalf of the opposite party No. 2 in both the matters and Mr. S.S. Roy, the learned advocate, appearing for the State in C.R.R. No. 1147 of 2008 and Mr. Swapan Kumar Mullick, the learned advocate for the State appearing in C.R.R. No. 1148 of 2008. Perused the impugned order as well as the other materials on record and the case laws relied upon by the parties.

3. The subject matter of challenge in both the aforesaid criminal revisions is an order passed by the learned Metropolitan Magistrate, 9th Court, Calcutta in connection with a proceeding relating to an offence punishable u/s 138 of the

Negotiable Instruments Act, rejecting the prayer of the petitioners who were enjoying exemption u/s 205 of the Code of Criminal Procedure, for dispensation with their personal attendance for their examination u/s 313(b) of the Code of Criminal Procedure.

4. Upon perusal of the impugned Judgment, I find the learned Magistrate rejected the petitioners prayer for exemption from their personal appearance for their examination u/s 313(b) of the Code of Criminal Procedure relying on the decisions of this Hon"ble High Court in the case of [Keya Mukherjee Vs. Magma Leasing Limited and Another](#), and in the case of Sukhendu Dutta and Anr. v. State of West Bengal and Anr. reported in 2006 (1) C Cr. LR (Cal) 348.

5. It may be mentioned that the aforesaid decisions of this Court in the case of Keya Mukherjee v. Magma Leasing Limited and Anr. (supra) has been challenged before the Hon"ble Apex Court in Criminal Appeal No. 620 of 2008 (Arising out of SLP (Cri) No. 1477 of 2008) in the case of Keya Mukherjee v. Magma Leasing Limited and Anr. When the Apex Court upheld the order passed by this Hon"ble High Court and in Paragraphs 23, 24, 25, 26 and 27 observed as follows, the same are quoted below;

The one category of offences which is specifically exempted from the rigour of Section 313(1)(b) of the Code is "summons cases". It must be remembered that every case in which the offence triable is punishable with imprisonment for a term not exceeding two years is a "summons case". Thus, all other offences generally belong to a different category altogether among which are included offences punishable with varying sentences from imprisonment for three years up to imprisonment for life and even right up to death penalty. Hence there are several offences in that category which are far less serious in gravity compared with grave and very grave offences. Even in cases involving less serious offences, can not the Court extend a helping hand to an accused who is placed in a predicament deserving such a help?

Section 243(1) of the Code enables the accused, who is involved in the trial of warrant case instituted on police report, to put in any written statement. When any such statement is filed the Court is obliged to make it part of the record of the case. Even if such case is not instituted on police report the accused has the same right (vide Section 247). Even the accused involved in offences exclusively triable by the Court of Session can also exercise such a right to put in written statements (Section 233(2) of the Code). It is common knowledge that most of such written statements, if not all, are prepared by the counsel of the accused. If such written statements can be treated as statements directly emanating from the accused, hook, line and sinker, why not the answers given by him in the manner set out hereinafter, in special contingencies, be afforded the same worth.

We think that a pragmatic and humanistic approach is warranted in regard to such special exigencies. The word "shall" in Clause (b) to Section 313(1) of the Code is to

be interpreted as obligatory on the Court and it should be complied with when it is for the benefit of the accused. But if it works to his great prejudice and disadvantage the Court should, in appropriate cases, e.g., if the accused satisfies the Court that he is unable to reach the venue of the Court, except by bearing huge expenditure or that he is unable to travel the long journey due to physical incapacity or some such other hardship, relieve him of such hardship and at the same time adopt a measure to comply with the requirements in Section 313 of the Code in a substantial manner. How could this be achieved? [para 25]

If the accused (who is already exempted from personally appearing in the Court) makes an application to the Court praying that he may be allowed to answer the questions without making his physical presence in Court on account of justifying exigency the Court can pass appropriate orders thereon, provided such application is accompanied by an affidavit sworn to by the accused himself containing the following matters:

- (a) A narration of facts to satisfy the Court of his real difficulties to be physically present in Court for giving such answer.
- (b) An assurance that no prejudice would be caused to him, in any manner, by dispensing with his personal presence during such questioning.
- (c) An undertaking that he would not raise any grievance on that score at any stage of the case.

If the Court is satisfied of the genuineness of the statements made by the accused in the said application and affidavit it is open to the Court to supply the questionnaire to his advocate (containing the questions which the Court might put to him u/s 313 of the Code) and fix the time within which the same has to be returned duly answered by the accused together with a properly authenticated affidavit that those answers were given by the accused himself.

6. He should affix his signature on all the sheets of the answered questionnaire. However, if he does not wish to give any answer to any of the questions he is free to indicate that fact, that the appropriate place in the questionnaire (as a matter of precaution the Court may keep photocopy or carbon copy of the questionnaire before it is supplied to the accused for an answer). If the accused fails to return the questionnaire duly answered as aforesaid within the time or extended time granted by the Court, he shall forfeit his right to seek personal exemption from Court during such questioning. The Court has also to ensure that the imaginative response of the counsel is intended to be availed to be a substitute for taking statement of accused.

7. In view of the above, I dispose of both the aforesaid criminal revisions directing the Learned Magistrate, in the event the petitioners, who are already enjoying exemption u/s 205 of the Code of Criminal Procedure, make any application to the Court praying that they may be allowed to answer to the question to be put to them

u/s 313 of the Code without making their physical appearance in Court on justified exigency the Court shall pass necessary order thereon in the light of the observation made by the Apex Court in the aforesaid decisions.

8. The petitioners are given liberty to approach the learned Court below with such application within a period of two weeks from this date, if so advised. In the event the petitioners makes no such application within the aforesaid period the learned Magistrate shall proceed against them in accordance with law.

9. I make it clear, I have not gone into the merits of this case as regards to whether petitioners are entitled to any exemption from personal attendance for their examination u/s 313(b) of the Code of Criminal Procedure and it is for the trial Court below to consider the same independently and in accordance with the observations made by the Apex Court in the case of Keya Mukherjee v. Magma Leasing Limited and Anr.

This judgment and order shall govern the fate of the Criminal Revision No. 1148 of 2008 and the same shall accordingly stands disposed of.

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