

**(2009) 04 CAL CK 0024****Calcutta High Court****Case No:** C.R.A. No. 469 of 2008

Assam Asbestors Ltd.

APPELLANT

Vs

State of West Bengal and  
Another

RESPONDENT

**Date of Decision:** April 3, 2009**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 256, 311, 313
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141

**Hon'ble Judges:** P.S. Datta, J**Bench:** Single Bench**Advocate:** Amit Bhattacharjee, Ayan Bhattacherjee, Indrajit Adhikari, for the Appellant;**Final Decision:** Allowed**Judgement**

P.S. Datta, J.

The appellant was the complainant before the learned Metropolitan Magistrate, 10th Court, Calcutta in case No. C/1576 of 1997 u/s 138/141 of the N.I. Act. The learned Magistrate was proceeding with the trial of the case. The prosecution evidence was closed and the accused was examined u/s 313 Cr.PC on 20.8.04. The stage was reached for examination of defence witness and indeed D.W.1 Sujit Kr. Ghosh was examined-in-chief on 17.1.05. The deposition sheet of the said defence witness does not show that examination-in-chief was completed because on 17.1.05 further examination-in-chief was deferred on the prayer of the defence. Be that as it may, no further development of the trial did take place and survey of the orders passed by the learned Magistrate from time to time would reveal that the next date was 30.3.05 when the accused filed a petition praying for admission in evidence of xerox copy of certain documents. The learned Magistrate then fixed 8.6.05 for hearing of the said petition. Then on 8.6.05 on the prayer of the defence adjournment was allowed for hearing of the said petition. The next date was fixed on 22.8.05. The order dated 22.8.05 does not reveal what happened to the fate of

that petition and the learned Magistrate adjourned the hearing to 11.11.05 for defence evidence. On 11.11.05, the complainant was absent on call and he was asked show cause by 12.11.05. On 3.3.06 show-cause accepted. Then, the next date fixed was 28.4.06. On that date, the learned Magistrate-in-charge adjourned the trial as the regular presiding officer was on leave. On 12.5.06 on the prayer of the defence, trial was adjourned to 19.6.06. On that date, the complainant was present but on the prayer of the defence trial was adjourned and furthermore the Court was suffering from load-shedding. Then on 17.7.06, the complainant was present but accused was absent by petition and time was prayed for the learned Magistrate adjourned till 8.8.06 for argument. There was no record as to whether D.W.1 would be further examined or his evidence stood closed. In this way time passed by. On 19.9.06 which was an adjourned date, no argument was heard and on the prayer of the defence, the matter was adjourned. Now it appears that on that date the defence filed a petition but what was that petition about is, not disclosed in the order dated 19.9.06. On 6.11.06 again the matter was adjourned only for the purpose of hearing of a defence petition. Now from the order dated 6.11.06 it came to be revealed that the said petition was a reproduction of an earlier petition whereby xerox copy of a certain document was prayed for being admitted in evidence. The said petition was not heard from day-to-day and it was heard only on 7.9.07 when the petitioner of the defence was rejected. Then the learned Magistrate fixed 14.11.07 for completion of evidence of D.W.1 but on 14.11.07 the matter was adjourned as no time was available with the learned Magistrate. On 30.1.08 the complainant was absent without steps and examination of D.W.1 was adjourned to 4.3.08. On 4.3.08, local Bar did not participate in the Court's business. Then on 16.4.08 as the complainant was absent, the learned Magistrate dismissed the complaint petition u/s 256 Cr.PC and acquitted the accused.

2. In the factual scenario as above, this appeal has been filed to challenge magisterial order of acquittal dated 16.4.08 on the ground that the learned Magistrate committed illegality in dismissing the complaint only for the non-appearance of the complainant on the day and the learned Magistrate ought not to have passed the order.

3. None appears for the respondent/accused No.2. Affidavit-of-service has been filed which shows that on 16.8.08 notice of appeal was served upon the respondent No.2 but he did not appear. A copy of the appeal has been served upon the State of West Bengal but State of West Bengal is not a necessary party in this appeal. Affidavit-of-service be kept with the record.

4. Mr. Ayan Bhattacharyya learned Advocate for the appellant submitted that absence of the complainant on 16.4.08 was purely unintentional and even if the complainant was absent, the learned Magistrate could have proceeded with the hearing of the case on merit but acquittal u/s 256 Cr.PC was unwarranted. It is further submitted that if the orders passed by the learned Magistrate from time to

time are examined it would reveal that the respondent also secured number of adjournment on different pretexts from time to time and long time was consumed by the learned Magistrate only for the purpose of disposal of a petition of the defence whereby the copy of certain document was prayed to be admitted in evidence. Therefore, it is submitted that the order impugned may be set aside.

5. In support of the appeal, my attention has been drawn to a decision of the Supreme Court in S. Anand Vs. Vasumathi Chandrasekar, wherein Their Lordships of the Supreme Court observed as follows:

"Presence of the complainant or her lawyer would have been necessary as indicated hereinbefore, only for the purpose of cross-examination of the witnesses examined on behalf of the defence. If she did not intend to do so, she would do so at her peril but it cannot be said that her presence was absolutely necessary. Furthermore, when the prosecution has closed its case and the accused has been examined u/s 311 of the Code of Criminal Procedure, the court was required to pass a judgment on merit of the matter".

6. Having heard the learned Advocate for the appellant and having perused the orders of the learned Magistrate including the impugned order, it appears to me that if the evidence of the prosecution was closed and accused was examined u/s 313 Cr.PC, the learned Magistrate would have proceeded with the disposal of the case on merit as has been observed in the decision cited or else the learned Magistrate could have directed the appellant to file a show cause as to why his case would not be dismissed. Since the respondent does not appear to contest the appeal and in view of the aforesaid facts and circumstances. I am of the judgment that the appellant/complainant may be given an opportunity to cross-examine the defence witnesses after his examination-in-chief is completed.

7. Accordingly, the appeal is allowed. The order dated 16.4.08 passed by the learned Magistrate is set aside. The learned Magistrate will fix a date for examination of D.W.1 and the complainant upon closure of examination-in-chief of the said D.W.1 will cross-examine the witness without seeking any adjournment from the learned Trial Judge and upon examination and cross-examination of the witness, the learned Magistrate will proceed with hearing of argument and pass judgment according to law. Since the case was instituted in the year 1977, it is desirable that the trial is concluded without granting any further adjournment to either of the sides as expeditiously as possible preferably within a period of 3 months from the date of communication of the order.

8. Let a copy of the order along with the L.C.R be sent down to the learned Trial Court as expeditiously as possible.