(2009) 05 CAL CK 0015

Calcutta High Court

Case No: C.R.R. No. 530 of 2009

Anil Credit Commercial (P) Ltd. and Another		APPELLANT
	Vs	
State of West Bengal and Others		RESPONDENT

Date of Decision: May 14, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 254, 313, 482
- Evidence Act, 1872 - Section 114, 114(f)
- Negotiable Instruments Act, 1881 (NI) - Section 138, 141

Hon'ble Judges: Partha Sakha Datta, J

Bench: Single Bench

Advocate: Amit Bhattacharjee, Sandipan Ganguly and Ayan Bhattacharjee, for the Appellant;

Judgement

Partha Sakha Datta, J.

Order dated 21st of January, 2009 passed by the learned Chief Judge, City Sessions'' Court Calcutta in connection with Criminal Revision No. 181 of 2008 setting aside the order dated 19th of November, 2008 passed by the learned Metropolitan Magistrate, 6th Court, Calcutta in connection with C-5024 of 2000 is under challenge in this application u/s 482 Cr. P.C. at the instance of the petitioners who are accused before the learned Magistrate in case No. C-5024 of 2000 u/s 138/141 of the N.I. Act.

2. As per postman''s report notice issued upon the O.P. No. 2 in the address as 52/3 Ballygunj Circular Road, Calcutta-19 remains ''not claimed''. Since the impugned order has not been challenged by the complainant, O.P. No. 3 its presence so far as this revisional application is concerned is hot necessary. It is the O.P. No. 2 who challenged the order of the learned Magistrate before the learned Chief Judge; City Sessions Court and it is the order of the learned Chief Judge, City Sessions Court in relation to the O.P. No. 2 which is the subject-matter of challenge in this application.

3. O.P. No. 3 as complainant, filed the complaint being No. C-5024 of 2000 u/s 138/141 of the N.J. Act before the learned Magistrate who took cognizance of the offence and issued process against the petitioners and upon appearance of the petitioners trial commenced. By order dated 18th June, 2007 the Learned Magistrate closed the cross-examination of the prosecution witness No. 1 (complainant) and then fixed a date for examination of the accused persons u/s 313 Cr. P.C. The petitioners being aggrieved with the order moved an application before this Court being CRR No. 3280 of 2007 and the Court set aside the order of the learned Magistrate and directed expeditious disposal of the trial. After cross-examination of the prosecution witness the learned Magistrate examined the petitioners u/s 313 Cr. PC. on 23rd of March, 2008 and then adjourned the trial to 6th of June, 2008 for examination of the defence witness. On the prayer of the petitioner summons were issued upon the O.P. No. 2 for his examination as a defence witness. There was no service return of the said O.P. No. 2 and but the learned Magistrate drawing presumption u/s 114(f) of the Evidence Act directed issuance of bailable warrant of arrest upon the said O.P. No. 2 who was at the material time allegedly a Director of the complainant, O.P. No. 3. The O.P. No. 2 filed an application on 15th of September, 2008 before the learned Magistrate against the order of issuance of bailable warrant of arrest. The learned Magistrate by order dated 19th of November, 2008 turned down the objection and reaffirmed his earlier order and fixed 17th of January, 2009 for execution and report. Then the O.P. No. 2 filed a revisional application before the learned Chief Judge, City Sessions Court which was registered as Criminal Revision No. 181 of 2008. In the said revisional application the O.P. No. 2 claimed himself to be a non-resident Indian, as well as a Member of Parliament. However, the learned Chief Judge, City Sessions Court while setting aside the order of the learned Magistrate is alleged to have traveled much beyond the subject-matter of revision and closed the right of the petitioners to examine the O.P. No. 2 which was totally unjustified.

4. It is the submission of Mr. Bhattacharya, learned advocate appearing for the petitioners that when the cheque was issued and the complaint was filed the O.P. No. 2 was a Director of the company of the O.P. No. 3. The alleged retirement of the O.P. No. 2 from the company in March, 2001 does not alter the situation. According to the petitioners, the O.P. No. 2 made transactions with the accused and communicated to P.W.1 about the transactions but P.W.1 failed to depose whether there was any document of the alleged transactions, nor did he file any document regarding the alleged supply of machinery to the accused.

5. Before the learned Magistrate prayer was made for issuance of summons upon the O.P. No. 2. Learned Magistrate allowed the prayer and summons was issued upon the said O.P. No. 2. Since the O.P. No. 2 did not appear the learned Magistrate finding that the letter was properly addressed and posted presumed service and directed issuance of bailable warrant of arrest upon the said O.P. No. 2 for his examination as a defence witness. The O.P. No. 2 appeared before the learned

Magistrate through his lawyer and filed a petition for recalling of the warrant of arrest on the ground that he retired from the company in March 2001. The learned Magistrate observed that from cross-examination of P.W.1 it appeared that in April, 2000 the said O.P. No. 2 was Director of the company of the complainant and his retirement on 29th of March, 2001 is of no effect. Accordingly, prayer for recalling of the warrant of arrest was rejected. The learned Chief Judge, City Sessions Court before whom the order of the learned Magistrate dated 19th of November, 2008 was challenged allowed the revision on the ground that presumption u/s 114 of the Evidence Act cannot be taken on the ground that it is admitted position that on the date of issuance of summons that petitioner ceased to be a Director of the company as he left the company in March, 2001 and without ascertaining the present address of the said O.P. No. 2 summons was sent to the address of the company showing the petitioner as Director of the company. Learned Judge observed that before issuance of warrant of arrest against the O.P. No. 2 as a witness the Court should have been satisfied that summons was duly served upon the said witness. Since summons was not duly served upon the O.P. No. 2 as a witness learned Court was not justified in issuance of warrant of arrest against the petitioner. Then the learned Judge observed that there was a direction of this Court in CRR No. 3280 of 2007 on 28th of November, 2007 for expeditious disposal of the criminal case and that order was violated and the learned Judge wondered as to why the learned Metropolitan Magistrate failed to comply with the direction of the Hon''ble Court. Accordingly, on these two grounds the Criminal Revision No. 181 of 2008 was allowed and the order of the learned Magistrate dated 19th of November, 2008 was set aside. Then the learned Judge directed the learned Magistrate to comply with the order passed by the Hon''ble Court in CRR No. 3280 of 2007 dated 28th of November, 2007 and to proceed with the trial of the case on day to day basis and conclude the trial as expeditiously as possible within the period of one month from the date of communication of the order. Accordingly, warrant of arrest issued against the O.P. No. 2 was recalled. It is submitted by the learned advocate for the petitioner that a Magistrate is not obliged to terminate trial merely on account of elapse of time and on that ground the procedure established by law cannot be relinquished. In a criminal trial the accused has right to examine a witness as a defence witness and that right cannot be curtailed merely on the ground that the trial could not be concluded within the time fixed by the Hon''ble Court in CRR No. 3280 of 2007.

6. The observation of the learned Judge that summons sent to the address of the O.P. No. 2 showing him as a Director of the company when he ceased to be Director of the company may be a good point but the right of the petitioners to examine a person as a defence witness cannot be taken away simply on the ground that the observation of this Court in connection with an earlier revisional application that the trial should be concluded as expeditiously as possible preferably within a period of one month from the date of communication of the order could not be complied with. It is not necessary to launch an enquiry as to on whose fault the time schedule

could not be maintained. A criminal trial is delayed on a number of grounds and even though a Magistrate has good intention to conclude the trial of a case within a specific time frame. It may not be possible to do so for variety of reasons. As the complainant has right to prove his case through examination of the witnesses the accused also has right under the statute to examine his defence witnesses. Herein in the instant case the learned Magistrate upon petition of the petitioners-accused persons allowed issuance of summons upon the O.P. No. 2 and the complainant did not raise any objection whatsoever. It may be that the order issuing bailable warrant of arrest without being satisfied as to whether service has been effected or not was not proper, but for that reason the entire (right of the accused to examine a person as a defence witness cannot be curtailed by judicial order simply on the ground that summons was not taken out properly and that the time framed had elapsed).

7. Mr. Bhattacharya incidentally submitted that before the learned Chief Judge, City Sessions Court the opposite party in Criminal Revision No. 181 of 2008 contended that he is a non-resident Indian and also a Member of the Parliament, but a non-resident Indian cannot be a Member of the Parliament. This point nor relevant at all for the purpose of deciding the revisional application. Moreover, the learned Chief Judge, City Sessions Court also did not take into consideration this aspect of the matter. In this connection Mr. Bhattacharya referred to the decision in Ila Kayal vs. State of West Bengal & Ors., 2007(2) AICLR 267 in support of his submission that merely because the High Court directed the learned Trial Court to dispose of a case within a period of three months it does not necessarily follow that the learned Trial Court was free to violate the provisions of the Code to secure the attendance of the witnesses necessary for adjudication of the case thereby causing injustice to the complainant. In that case it was observed that the learned Magistrate on the application of the prosecution or the accused is to issue summons to any witness as required under sub-section (2) of Section 254 Cr. P.C. and in the event of summons being returned unserved the Court shall take all steps to secure the attendance of the witnesses instead of closing the prosecution case and proceeding to judgment. In State vs. Brishnupada Dutta & Ors.,1999 C. Cri. LR (Cal) 319 it was observed by this court that once the process has started it becomes the ultimate responsibility of the Court to procure the attendance of the witness by exhausting the process and it cannot stop midway. My attention has been drawn to the decision of the Supreme Court in Kalyani Baskar vs. M.S. Sampornam, 2007 Cri 278 where it was observed that adducing evidence in support of defence is a valuable right and denial of hat right means denial of fair trial. This Court in Deepak Bapna vs. State of West Bengal & Ors., 2007(2) Cri 604 (Cal) held that application for recalling a witness has to be considered judiciously and merely because High Court directed to dispose of a case in a particular date application cannot be rejected without assigning any reason. The learned Chief Judge, City Sessions Court did not say in the impugned order that examination of the O.P.No.2 as a defence witness was not necessary. Since the learned Magistrate has allowed the prayer for examination of the O.P. No. 2 as a

defence witness and the complainant-opposite party No. 3 did not raise any objection and the Court issued summons such examination has to be recorded. The O.P. No. 2 is said to have retired from the Directorship of the company only in March, 2001 but it is asserted that he was the Director when the occurrence took place. The learned Magistrate might have committed error in issuance bailable warrant of arrest against the O.P. No. 2 but taking away a right of examination of the defence witness simply on the ground that this Court''s earlier order for disposal of a case by a time frame was not adhered to cannot be supported.

8. Accordingly, the application is disposed of and the order dated 28th of January, 2009 passed by the learned Chief Judge, City Sessions Court is modified. A fresh summons shall be taken out for service upon the O.P. No. 2 for his examination as a defence witness and the learned Magistrate will proceed accordingly.

9. A Copy of this Judgment shall be sent to .the learned Chief Judge, City Sessions Court for information and necessary action.