

**(2009) 07 CAL CK 0086**

**Calcutta High Court**

**Case No:** C.R.R. No"s. 1303 and 1307 of 2009

East India Produce Ltd.

APPELLANT

Vs

Nirmal Khandelwal

RESPONDENT

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**Date of Decision:** July 20, 2009

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 205
- Negotiable Instruments Act, 1881 (NI) - Section 138

**Citation:** (2010) 2 BC 253

**Hon'ble Judges:** P.S. Datta, J

**Bench:** Single Bench

**Advocate:** Amit Bhattacharjee and Ayan Bhattacharjee, for the Appellant;None, for the Respondent

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**Judgement**

@JUDGMENTTAG-ORDER

P.S. Datta, J.

Case Nos. CRR 1303 of 2009, CRR 1304 of 2009, CRR 1305 of 2009, CRR 1306 of 2009 & CRR 1307 of 2009 are being taken up together as the subject matter is one and the same and the accused person is common to all the cases.

2. Notice has been returned with the remark "not claimed" and "refused". Accordingly, presumption of service is drawn.

3. The complainant filed five cases against the opposite party Nirmal Khandelwal, Proprietor of Tirupati Balaji Blessing Co. alleging offences u/s 138 of the N.I. Act. The amounts involved in cheques bounced are Rs. 7,39,734/-, Rs. 1,57,248/-, Rs. 21,78,829/-, Rs. 2,91,897/- and Rs. 27,06,886/-respectively. All the cases are now pending before the learned Metropolitan Magistrate, 17th Court, Calcutta as case No. C-18808/07, C-18811/07, C-18810/ 07, C-18809/07 and C-20445/07 respectively. The accused did not appear before the learned Magistrate after issuance of

summons and made applications in all the cases u/s 205 of Cr.P.C. praying for dispensing with personal appearance of the accused. The learned Metropolitan Magistrate, 17th Court, Calcutta by his order dated 3rd June, 2008 observed as follows:

It appears from the petition that the accused person is residing at 17, Lower Range, Kolkata and he is running business at a place 50 Chowringhee Road, Kolkata which one is in Kolkata and very near to this Court. The accused does not reside or run business far away from Kolkata or far away from this Court. Therefore, it is not difficult for the accused to appear before this Court for his first appearance. I think that the accused is reluctant to appear personally first time denying general rule of law on the flimsy grounds.

In my opinion, it is not a fit case, where personal appearance may be exempted without first appearance in Court.

The aforesaid order was challenged in revision and the learned Additional Sessions Judge, 7th Fast Track Court, Bichar Bhavan, Calcutta. By an order dated 27.2.2009, the learned Judge set aside the order of the learned Magistrate and allowed all the petitions and directed that the personal appearance of the accused person may be dispensed with. The orders dated 27.2.2009 of the learned Additional Sessions Judge in Criminal Revision Nos. 114/08, 94/08, 95/08, 115/08 and 96/08 are now challenged in all the applications, by the complainant on the ground that the order of the learned Sessions Judge is illegal and without jurisdiction. It is submitted by Mr. Ayan Bhattacharjee that it is within the power of a Magistrate and in his judicial discretion to dispense with the personal appearance of the accused either throughout or at any particular stage of a proceeding, if the Magistrate finds that insistence of the personal appearance of the accused would inflict enormous suffering or tribulation to him and the comparative advantage would be less. It is further submitted by Mr. Ayan Bhattacharjee that such exemption must not be allowed in a very casual manner. And it is only in rarest of the rare cases where due to the far distance at which the accused resides or carries on business or on account of any physical reasons the Court feels that dispensing with the personal attendance of the accused would only be in the interest of justice. Learned Additional Sessions Judge referred to the judgment in *Bhaskar Industries Ltd. v. Bhiwani Denim & Apparels Ltd.* III (2001) CCR 208 (SC) : 2001(3) CHN (SC Suppl) 63 and observed that in terms of the said decision even first appearance of the accused can be dispensed with.

4. Now, the question is whether the learned Additional Sessions Judge should have really interfered with the order of the learned Magistrate. If we go to *V.K. Jain v. Union of India and Ors.* III (2000) CCR 65 (SC) : 2000 SCC (Cri) 302, we find a categorical observation that "This can be done only after making the first appearance in the Court concerned". Now, one of the Hon"ble Judges who was a party to *V.K. Jain* (supra) was also a party in *Bhaskar Industries Ltd.* (supra). In *Bhaskar Industries Ltd.* it was held that for the purpose of hearing of an application

u/s 205 of Cr. P.C., it is not necessary that the accused has to appear as to enter first appearance or that without first appearance such an application cannot be heard or considered.

5. In Bhaskar Industries Ltd. though the Hon"ble Court held that personal appearance at the first instance can be dispensed with gives a rider as follows:

It is within the powers of a Magistrate and in his judicial discretion to dispense with the personal appearance of an accused either throughout or at any particular stage of such proceedings in a summons case, if the Magistrate finds that insistence of his personal appearance would itself inflict enormous suffering or tribulations to him, and the comparative advantage would be less. Such discretion need be exercised only in rare instances where due to the far distance at which the accused resides or carries on business or on account of any physical or other good reasons the learned Magistrate feels that dispensing with the personal attendance of the accused would only be in the interest of justice. However, the Magistrate who grants such benefit to the accused must take the precautions enumerated above, as a matter of course.

6. Learned Sessions Judge is right in observing that in view of Bhaskar Industries application u/s 205, Cr.P.C. may be considered and/or allowed without insisting on appearance of the accused persons but he has not considered as to whether on the factual of the case representation should be allowed or not. Similarly, learned Magistrate is also wrong in holding that he was not inclined to grant personal exemption u/s 205, Cr.P.C. without first appearance. As laid down in Bhaskar Industries itself power has to be exercised in rare instances but the power can be exercised even without first appearance, therefore, as the factualities of the case were not considered by the learned Magistrate was not justified in keeping the application in abeyance or rejecting the same until first appearance was made. Whether it will be difficult for the accused persons to appear before the learned Magistrate or his appearance will cause hardship and it is a case of rare instance is a fact to be examined meticulously.

7. In the circumstances matter is remanded back to the learned Magistrate who will dispose of the application without insisting on appearance of the accused and the order of the learned Sessions Judge and that of the learned Magistrate are set aside.

The applications are disposed of.

8. Criminal Section is directed to supply certified copy of this order, if applied for, to the learned Advocate for the petitioner expeditiously.