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Dukhishyam Benupani Vs State of West Bengal and Another

Court: Calcutta High Court

Date of Decision: May 18, 2000

Acts Referred: Criminal Procedure Code, 1973 (CrPC) â€" Section 205, 244, 245, 245(1), 245(2)
Foreign Exchange Regulation Act, 1973 â€" Section 56, 9(1)
Limitation Act, 1963 â€" Section 5

Citation: (2000) CriLJ 4086 : (2000) 1 ILR (Cal) 520

Hon'ble Judges: Malay Kumar Basu, J

Bench: Single Bench

Advocate: D.C. Thakur, for the Appellant;T. Ghosh and S.N.S. Alquadri, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Malay Kumar Basu, J.
This revisional application u/s 397 read with Section 401 and Section 482 of the Code of Criminal Procedure is

directed against the order dated 9-10-96 passed by the Metropolitan Magistrate, 4th Court, Calcutta in complaint case No. C/298 of 95. The

relevant facts leading to the filing of this application may be summarised as follows :-

According to the petitioner, the O.P. Nos. 1 and 2 M. P. Agarwala and Umethmal Dugar contravened the provisions of Cl. (b & d) of Sub-

section (1) of Section 9 of the Foreign Exchange Regulations Act, 1973 during the financial year, 1993 and thereby allegedly committed an offence

punishable u/s 56 of the said Act. Accordingly, the petitioner being competent officer of the Enforcement Directorate, Foreign Exchange

Regulations Act filed a complaint in 1995 before the Court of Chief Metropolitan Magistrate, Calcutta and the complaint was numbered as C-

298/95. In the body of that complaint names of 8 prosecution witnesses including that of the complainant were given. The learned Metropolitan

Magistrate took cognizance of the offence against the two accused and issued summons upon them and in response thereto they appeared before

that Court and on their application u/s 205, Cr.P.C. their personal attendance in the Court was dispensed with and they were allowed to be

represented by their respective lawyers until further orders; On 9th October, 1996 when the case was fixed for taking steps by the complainant,

the complainant was found absent on repeated calls during 10.15 a.m. to 11.15a.m. while both the accused persons were found represented by

their Advocates. The learned Magistrate took the evidence of the complainant as closed passing the impugned order thereby fixing 5th December,

1996 as the date for framing charge. Then the date was shifted to 9th January, 1997 when the complainant (the present petitioner) filed a petition

for fixing a date for evidence stating therein that evidence in the case had not been started and as such it was not possible for the Court to frame

charges against the accused in the absence of oral or documentary evidence, but that petition was rejected by the Court with the observation that

on 9th October, 1996 in spite of repeated calls none on behalf of the prosecution had turned up and hence the evidence for the prosecution was

taken as closed and the date for framing of charge was fixed, but even then the prosecution did not care to move before the higher Court against

that order, and had come with the said petition without assigning any reason why the prosecution did not adduce evidence or why none on behalf

of them turned upon that date to represent the prosecution, nor there was any prayer for recalling the order of closure of evidence and hence the

petition of the prosecution for fixing the date for evidence was rejected and a date for framing of charge was again fixed, namely, 30-1-97. On that

date the complainant again filed an application praying for an order recalling the order dated 9th October, 1996 on the ground that otherwise the

complainant would suffer irreparable prejudice for laches on the part of its Advocate but the learned Metropolitan Magistrate rejected that petition

also. Hence the complainant decided to move this Hon''ble Court by filing this application in its revisional jurisdiction challenging the order dated

9th October, 1996 as illegal and unsustainable. 2. In this connection, the petitioner has, made in the revision-petition a prayer for condonation of

delay in the filing of this revisional application and by way of explanation of the delay he has stated that while the period of limitation of 90 (ninety)

days was to expire on January 7, 1997, he on that day filed an application before the Court below for obtaining the certified copy of the impugned

order and he could obtain this certified copy as late as on 8th April, 1997. He then handed over these certified copies along with other relevant

documents to his Advocate Mr. D. Chakraborty Thakur for moving this revisional application before this High Court against the impugned order

but the learned Advocate advised him that such a time barred revisional application should not be admitted unless the delay of 228 days was

condoned on the basis of a separate application for condonation of delay accompanying the revisional application and in the process further delay

of about a month took place and ultimately he filed the revisional application on 14th May, 1997 challenging the legality and propriety of the

impugned order of the learned Metropolitan Magistrate dated 9th October, 1996 passed in Case No. 298/95. The grounds on which he has

challenged the order of the learned Magistrate are that the Court below ought to have deferred the date for examination of prosecution witnesses

suo motu when the complainant was found absent and that the impugned order became defective and it could not be cured even applying Section

465 of the Code. His further contention is that unless the delay of 228 days in filing of this application is condoned and the revisional application is

admitted, heard and decided in favour of the petitioner, it would suffer irreparable prejudice.

3. Two issues in the main have been raised in this hearing. First, whether the delay in filing of this application can be condoned and if not whether

the application being barred by limitation and being incapable of admission is liable to be dismissed in limine. The second point is whether the

revisional application if not found time barred can succeed on merits.

4. So far as the question of limitation is concerned, the admitted position is that the petition has been filed after the expiry of 228 days from the

date of the impugned order while the prescribed period within which it is to be filed as per law of limitation is 90 days. It is to be noted that

although there has been a delay in filing the revisional application, the applicant has not filed any separate petition u/s 5 of the Limitation Act for

condonation of the delay giving any explanation of the delay that occurred in respect of 228 days though, however, this has been given in a

paragraph in the revisional application itself. It is the contention of Mr. Thakur, learned Advocate for the revisional applicant, that since this

application has been admitted it has to be presumed that this Court has already condoned the delay and therefore, any further hearing on this point

is unnecessary and uncalled for and this Court now should proceed on giving a verdict on the merits of the application. But since I do not find in the

earlier relevant orders of this Court any observation touching the question of limitation, this contention cannot be acceptable. Simply because a

date was fixed for hearing of this application in the presence of both the sides it cannot be presumed that the Court impliedly disposed of any

question regarding limitation. That omission cannot be exploited by the petitioner by advancing an argument like this. Question of limitation is to be

governed by the relevant provisions of law on limitation and there must be a full-, fledged hearing on it, if the opposite party after entering its

appearance before the Court raises any question taking the plea that the application has not been filed within the prescribed period of limitation.

Otherwise the provisions of the Limitation Act would have been a total farce.

5. The impugned order was passed on 9-10-96 when the learned Metropolitan Magistrate finding the complainant absent on repeated calls

without taking any steps took the prosecution evidence before charge as closed and fixed a date, namely, 5-12-96 for consideration of charge. On

9-1-97 the complainant filed a petition for fixing a date for prosecution evidence, but it was rejected by the Court. Thereafter on 31-1-97 again the

complainant filed another petition before that Court of Magistrate for an order recalling the said order dated 9-10-96. But the learned Magistrate

after considering that petition found it unjustified and rejected it. Then the aggrieved complainant has filed the present revisional application for

setting aside that order on the ground that it is illegal and improper. This revisional application appears to have been filed on 14-5-97 whereas the

date of the impugned order is 9-10-96. The learned Advocate for the O.P. has raised the plea that in such circumstances the revisional application

is time barred, and no satisfactory explanation regarding the delay of 228 days having been offered, the application is liable to be dismissed on that

ground and there is no necessity for the Court to enter into the merits of the matter.

6. Let us see the nature of the impugned order. In view of the absence of the complainant on repeated calls the learned Magistrate took the

prosecution evidence as closed and fixed a date for consideration of charge. Thereafter on 9th January, 1997 the complainant filed a petition

before the learned Magistrate for fixing a date for evidence of the witnesses afresh to enable him to examine his witnesses on the ground that in

view of the seriousness of the offence alleged and in view of the fact that no iota of evidence had been adduced and in the face of such nil evidence

it was not possible for the Court to consider the question of framing of charge against the accused. The learned Magistrate after hearing both the

sides rejected this petition on the reasoning, inter alia, that the prosecution had not made any prayer for recalling his order dated 9-10-96 under

which the prosecution evidence had been taken as closed. This observation of the learned Magistrate does not appear to be justified. The above

petition of the complainant dated 9-1 -97 was in reality and essence a petition praying for reconsideration of the order dated 9-10-96, although no

word like ""reconsider"" or ""review"" etc., was used anywhere or no prayer like ""prayer for recalling that order"" was incorporated therein. The

learned Magistrate was well within his competence to fix another date for evidence even though once he had passed an order taking the evidence

of the prosecution as closed. Here the complainant had not examined a single witness and on the very first date fixed for evidence, that is, 9th

October, 1996, the complainant being found absent on repeated calls, his evidence was taken as closed. This order was not in the nature of a final

order and there was no bar under the law for the learned Magistrate to reconsider the same in view of the subsequent developments and allow the

prayer of the prosecution for fixing a date for evidence to make the provisions of Section 244 or 245 of the Cr. P.C. meaningful and effective.

Section 244 provides that the Magistrate shall take such evidence as may be produced in support of the prosecution and Section 245 lays down

that if upon taking the evidence referred to u/s 244 the Magistrate considers for reasons to be recorded that no case against the accused has been

made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him. Thus it is quite clear that the Magistrate can

proceed u/s 245(1) only when he has taken the evidence as provided u/s 244. But if the Magistrate does not take any evidence at all, or for that

matter, the prosecution can be said to have not adduced any evidence at all, then the Magistrate has to proceed u/s 245(2) of the Code under

which it has been enjoined that nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any stage of the

case if; for reasons to be recorded by such Magistrate, he considers the charge to be groundless. That is to say, when there was no evidence

adduced from the side of the complainant at all, the Magistrate had nothing to fix a date for consideration of charge, because question of

consideration of charge can arise if there is any evidence adduced from the side of the prosecution. In this case it was very clear before the learned

Magistrate that there was absolutely no materials on record for the purpose of considering the question whether charge should be framed against

the accused persons or not. To meet such a situation the legislature has enacted the Sub-section (2) of Section 245 enabling the Magistrate to pass

an order discharging the accused on the ground that charge was found to be groundless. So the order of the Magistrate in question was clearly a

contradiction in terms and totally inconsistent.

7. If due to the fact that the complainant was absent and no witness on his behalf was present, the learned Magistrate fixed a date for consideration

of charge, the question is if such an order is to be treated as final in the sense that the Magistrate had no power to pass any further order for taking

evidence either on the prayer of the prosecution or of his own accord to serve the interest of justice. In my view there is no bar against such an

order being passed by the Magistrate. Since the learned Magistrate did not choose to pass any order u/s 245(2) of Cr. P.C. although there was

absolutely no evidence on record from the side of the prosecution, but he proposed to proceed u/s 245(1) Cr.P.C. by fixing a date for

consideration of charge against the accused persons, obviously he kept alive the scope for taking evidence, if necessary, before passing an order

on that point and all doors had not been shut. Such an intention of the legislature is manifest from the enactment of the provisions of Section 311 of

the Code. Under this section any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a

witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the

Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the

case. This Section thus confers a wide discretion on the Court to act as the exigencies of justice require and such a power is exercisable at any

stage of inquiry or trial even after the entire case is over, what to speak of closure of evidence. It was therefore, the bounden duty of the

Magistrate, when the prosecution filed a petition before him on 9th January, 1977, to allow this petition and fix a date for prosecution evidence,

inasmuch as, his hands had not been tied in the matter of passing such an order for the mere reason that he had already passed an order taking the

prosecution evidence as closed. The language of the Section 311 suggests that a Criminal Court has always this discretion to examine any witness

at any stage even after evidence has been closed. From this it follows that for the purpose of passing an order for fixing a date for examination of

witness a criminal Court is not helpless simply because it has already closed the evidence or it has taken the evidence as closed. The petition filed

by the prosecution before the learned Magistrate praying for such an order may not be u/s 311 of the Code, but the principle that an order of

closure of evidence will not stand in the way of the Court''s fixing a date for further evidence, if necessary, will continue to govern such petitions

and it cannot be said that it is in the nature of final order which is incapable of being reconsidered by that Court. From this what is intended to be

driven at is that the order passed by the learned Magistrate dated 9-1-97 was not an order characterised by propriety or legality and that petition

of the prosecution being a legally valid one the learned Magistrate''s observation that the complainant having not moved against his earlier order

dated 9-10-96 before a higher Court had forfeited the benefit of getting it reconsidered by him was not sustainable under the law. The complainant

rightly approached the learned Magistrate for reconsideration of the order of closure of evidence fixing a date for evidence afresh, but the learned

Magistrate committed a wrong by rejecting that petition. Had the petition been allowed by the learned Magistrate no question of prejudice to the

other side would have arisen at all, inasmuch as, the defence would have got the opportunity to cross-examine them and at the same time the spirit

behind the provisions of Sections 244 and 245(1) would have been fully regarded and served.

8. So far as the question of limitation is concerned, learned advocate for the prosecution has referred to a Division Bench decision of this High

Court reported in State of West Bengal and others Vs. Nripendra NathBanerjee and others, . In this case their Lordships have held that where the

State Govt. filed an appeal 80 (eighty) days beyond limitation and application for consideration of delay was filed six years thereafter, but there

was good and sufficient cause showing for the delay in preferring the appeal, delay can be condoned and appeal can be admitted considering that

the appellant is a Government whose immobility is well known. It has been further observed that the present law overwhelmingly favours

condonation of delay in preferment of appeals especially by the State since the mere admission of an appeal without stay is not likely to cause

much prejudice to the respondents. There is also a decision of the Apex Court in favour of adopting a liberal approach in respect of condonation

of delay in order to enable the Courts to do substantial justice to the parties by disposing of matters on merits. This is to be found in Collector,

Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, Their Lordships in this judgment were of the view that the expression

sufficient cause"" is adequately elastic to enable the Courts to apply the law in a meaningful way which subserves the ends of justice. There

Lordships further expressed their concern over the possibility of adopting a rigid and pedantic approach in this regard by enunciating the following

principles. According to their Lordships, refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and

cause of justice being defeated, whereas when delay is condoned the highest that can happen is that a cause would be decided on merits after

hearing the parties. Secondly, ""every day"s delay must be explained"" does not mean that a pedantic approach should be made and here the

doctrine must be applied in a rational, commonsense, pragmatic manner. It has been further pointed out in this Division Bench decision of the Apex

Court that when State is the applicant praying for condonation of delay it is to be considered that on account of impersonal machinery and the

inherited bureaucratic methodology imbued with the note-making, file-pushing and passing on the buck ethos, delay on the part of the State is less

difficult to understand and the Courts, therefore, have to remain conscious of the true spirit and philosophy of a provision of Section 5 Limitation

Act while interpreting the expression ""sufficient cause"".

9. In the present case, as have already been pointed out above, although there has been no separate petition u/s 5 of the Limitation Act, it cannot

be said that the petitioner has not made any prayer for condonation of delay in the matter of filing of this revisional application, inasmuch as, in

paragraphs 10 & 11 of this revisional application he has given an explanation as to how the delay for 228 days cropped up. In this connection the

Division Bench judgment of this Court already cited above State of West Bengal and others Vs. Nripendra NathBanerjee and others, will come to

the aid of the applicant, since herein their Lordships have held that it is not required that there should be always a Section 5 application in separate

form and even a verbal prayer for condonation of delay at a late stage also may be taken as enough for this purpose. Keeping in view the

principles enunciated in the aforementioned judgements of the Apex Court and this High Court, I am inclined to hold that the delay that took place

on the part of the complainant which is a Government department for two hundred and odd days in filing the revisional application should be

condoned since the explanation which has been given in paragraphs 10 & 11 of the revisional application appears to be satisfactory and sufficient,

regard being had to the fact that in case of a Government department the factor of impersonal machinery assumes considerable proportions

inasmuch as, the awareness works at the back of the mind of the people that no one in charge of the matter is directly hit or hurt by the impugned

order which is to be the subject matter of revision or appeal and also the peculiar bureaucratic methodology. The words ""sufficient cause"" should

get a liberal construction so as to advance substantial justice when there is no want of bona fide imputable to the applicant. In view of the entire

discussion made above I am of the view that the delay in filing of the revisional application is condonable and so far as the merits of the application

are concerned, the impugned order of the learned Magistrate was not legal or proper.

10. In the result the revisional application be allowed and the impugned order be set aside. The Court below shall proceed with the trial of the case

according to law after giving an opportunity to the complainant to adduce his evidence before charge. The trial do proceed expeditiously. Interim

order, if any, stands vacated.