

(2009) 02 DEL CK 0287

Delhi High Court

Case No: Criminal L.P. No. 236 of 2008

BSES Rajdhani Power Ltd.

APPELLANT

Vs

State NCT Delhi and Another

RESPONDENT

Date of Decision: Feb. 2, 2009

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 247, 250, 256, 256(1), 344
- Electricity Act, 2003 - Section 135, 151
- Negotiable Instruments Act, 1881 (NI) - Section 138
- Penal Code, 1860 (IPC) - Section 224

Citation: (2009) 5 RCR(Criminal) 374

Hon'ble Judges: Kailash Gambhir, J

Bench: Single Bench

Advocate: Sunil Fernandes, for the Appellant; U.L. Watwani, APP, for the Respondent

Final Decision: Allowed

Judgement

Kailash Gambhir, J.

Leave to appeal granted.

2. This common order shall dispose of CrI. L.P. Nos. 237/08, 238/08, 239/08, 241/08, 243/08, 244/08, 245/08, 350/08, 252/08, 253/08, 265/08 and 266/08 and consequent appeals filed by the BSES Rajdhani Power Ltd. challenging the order dated 3.10.2008 passed by the court of Sh. D.C. Anand, Additional Sessions Judge, Delhi while exercising powers of Special Court constituted under the Indian Electricity Act 2003.

3. On 3.10.2008 29 complaint cases filed by the petitioner u/s 135 r/w Section 151 of the Electricity Act, 2003 against various accused persons were dismissed with a single stroke of pen on the ground that no authorized person was present in court from the side of the complainant. The absence of authorized representative became a matter of grave concern for the court as despite a detailed order passed in one of

the complaint cases i.e. case No. 815/2007 granting sufficient time to the complainant to bring an authorized representative by 12.00 noon on the said date after the court had declined exemption to Mr. Binay Kumar, who was earlier representing the complainant, in all the complaint cases being filed by the appellant BSES. In fact, Mr. Binay Kumar was declared as an absconder after order of conviction and registration of FIR against him directed by the court vide separate order passed by the said court two days ago i.e. on dated 1.10.2008 in CC No. 1127/2007, holding him guilty for filing false affidavit before the court. Since the appellants failed to produce any authorized representative despite grant of opportunity on 3.10.2008 the Court perhaps loss the judicial equilibrium and dismissed all the complaint cases fixed on that day. Aggrieved with the said order, the appellant has preferred the present appeals.

4. Counsel appearing for the appellant submits that the order passed by the Id. Special Court is unprecedented, unwarranted and judiciously precipitated step in belated disregard to the law of the land but without giving any weight to the loss of public exchequer to be resulted by passing such order of dismissal. Counsel for the appellant further submitted that the order dated 1.10.2008 passed by the Id. Special Court in Complaint case No. 1127/2007 whereby directions were given by the court for the registration of a case against Binay Kumar u/s 224 IPC was already under challenge and operation of the same was stayed by this Court vide orders dated 3.10.2008 in Crl. A. No. 850/2008. The Counsel further submitted that even after disclosing the said fact of stay order, the Id. Special court not only declined exemption to Mr. Binay Kumar on 3.10.2008 on medical grounds but dismissed all the 29 complaints filed by the appellant on the ground as to how the exemption to a person who was an absconder could be granted by the court. The contention of the Counsel for the appellant is that the complainant was duly represented before the Special Court through an Advocate and even if the court felt not inclined to grant exemption, the matter could have easily been adjourned to some other date instead of dismissing all the complaints after the ritualistic exercise of granting opportunity of about one hour to produce some authorized representative. In support of his arguments Counsel for the appellant placed reliance on the judgments of the Apex Court reported in

[S. Anand Vs. Vasumathi Chandrasekar,](#)

[Associated Cement Co. Ltd. Vs. Keshvanand,](#)

[Yoginder Kapil Vs. Sanjay Gupta,](#)

[Lachhman Singh Vs. Mahinder Singh and Others, .](#)

[Kalpana Tyagi Vs. Sneha Lata Sharma,](#)

5. Counsel appearing for the respondent, on the other hand, strongly refuted the submissions made by the Counsel for the appellant. Counsel for the respondent

submitted that the appellant was well aware of the order dated 1.10.2008 passed by the Ld. Special Court in complaint case No. 1127/2007 whereby directions were given for the registration of an FIR against Mr. Binay Kumar, authorized representative of the appellant. The contention of the Counsel on behalf of the respondent is that there was sufficient time available with the appellant to appoint some alternate person as an authorized representative and such a newly appointed authorized representative could have appeared in all these cases to avoid the order of dismissal from the Court. Even before finally passing an order of dismissal, the court afforded sufficient time to produce some other authorized representative to represent the appellant/complainant but having failed to do so there was no other option for the special court but to pass an order of dismissal, the Counsel for the respondent submitted. Counsel thus contended that there is no illegality, infirmity or incorrectness in the order of the Special Court warranting any interference by this Court.

6. I have heard learned Counsel for the parties at considerable length and perused the record.

7. Chapter XXII of the Code of Criminal Procedure deals with the trial of summons cases by the Magistrates/Special Magistrates and Section 256 of the Code deals with a situation where the complainant does not appear or death of the complainant takes place. Section 256 Cr.P.C. is reproduced as under:

256. Non-appearance or death of complainant.

(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of Sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

8. As would be seen from the above provision the mandate of law is that before dismissing a complaint in the absence of a complainant or his authorized representative, the Magistrate must form an opinion that the personal attendance of the complainant is necessary otherwise in all other cases where the complainant is duly represented by an advocate and the personal attendance of the complainant on that particular date is not necessary, then, the Magistrate may dispense with the

attendance of the complainant so as to proceed with the case. In the present case, the appellant had moved an application seeking exemption of Mr. Binay Kumar from his personal appearance on 3.10.2007. Against this very person, the said court had given direction for registration of an FIR on the alleged ground of filing of a false affidavit by him. The court had granted an opportunity to file a reply to the show cause notice issued u/s 250 Cr.P.C. r/w Section 344 Cr.P.C. on 1.10.2008 and on the same very day itself at around 3.30 p.m. he was sentenced for 15 days simple imprisonment with fine of Rs. 500/-. The application moved by the appellant u/s 389 Cr.P.C. for suspension of sentence was also dismissed by the trial court. After passing of the said order the Id. Trial court also gave direction to the State for registration of an FIR against said Mr. Binay Kumar u/s 224 IPC.

9. The said order dated 1.10.2008 was challenged by the appellant before this Court and vide order dated 3.10.2008 the operation of the said order was stayed till the next date. The said stay order is still in force as per the Counsel for the appellant. The appellant on 3.10.2008 sought an exemption of the said very officer Mr. Binay Kumar on medical grounds which made the court intemperate on the premise that as to how the appellant could seek exemption of an officer who was an absconder and against whom directions were given for the registration of an FIR. One is totally at a loss of words and flabbergasted to go through the two orders passed by the learned Special Court i.e. one on 1.10.2008 in CC No. 1127/2007 and then on 3.10.2008 in various complaint cases filed by the appellant.

10. On 1.10.2008, the Special Court in CC No. 1127/2007 found that the accused who was in jail on the relevant date of inspection by the raiding team of the appellant could not have been found indulging in direct theft of electricity and therefore took a view that the complaint filed by the appellant against such a respondent who was in jail was apparently false and fabricated which led the court to issue show cause notice to the complainant u/s 250/344 Cr.P.C. for filing a false complaint with false affidavit and false deposition on oath. To this extent the action of the court does not appear to be unreasonable but when the complainant sought time to file reply to the show cause notice, the Special Court gave time to file reply on the same day at 2.00 p.m. and at 2.00 p.m. the court in utter haste convicted the complainant Mr. Binay Kumar for the offence of perjury after feeling not satisfied with the explanation given by the complainant through his counsel. Under these circumstances, Mr. Binay Kumar was convicted and sentenced for a simple imprisonment for 15 days with fine of Rs. 500/- and in default of which to suffer five days imprisonment with further directions to SHO P.S. Malviya Nagar to register a case against him for committing an offence u/s 224 IPC. Warrants of arrest were directed against the Binay Kumar since he was not found present at 2.00 p.m. and left the court on the alleged ground of suffering from some medical problem requiring immediate admission in the hospital. The application moved by the complainant u/s 389 Cr.P.C. seeking suspension of his sentence was also dismissed. All these punitive actions initiated by the court on one single day clearly

demonstrates that court had acted more with prejudice and anger and less with rationale, sobriety and endurance which are the virtues of any officer engaged in the task of dispensing justice. The Apex Court in plethora of judgments including in [P.N. Dua Vs. P. Shiv Shanker and Others](#), has observed that:

21. Justice Benjamin N. Cardozo says that he remembers when the statement made aroused a storm of criticism. (Cardozo: The Nature of the Judicial Process, pp. 171-173). It betrayed ignorance, he said, of the nature of the judicial process. Justice Benjamin N. Cardozo tells us that the business of the judge, was to discover objective truth. His own little individuality, his tiny stock of scattered and uncoordinated philosophies, these, with all his weaknesses and unconscious prejudices, were to be laid aside and forgotten. According to Cardozo the truth is, however, that all these inward questionings are born of the hope and desire to transcend the limitations which hedge our human nature....

...The training of the judge, if coupled with what is styled the judicial temperament, will help in some degree to emancipate him from the suggestive power of individual dislikes and prepossessions. It will help to broaden the group to which his subconscious loyalties are due.

11. This court at present would not make any observation regarding the merits of order dated 1.10.2008 as the same is already under challenge in CrI. Appeal No. 850/2008 preferred by the appellant. But since the exemption application of the appellant was dismissed by the special court based on the order dated 1.10.2008 whereby the said officer Mr. Binay Kumar was declared as absconder, therefore, it became imperative to deal with the said order dated 1.10.2008 to a short extent of deciding the present case.

12. Although the appellant could have appointed some other authorized representative in place of Mr. Binay Kumar for his appearance on 3.10.2008 instead of seeking an exemption of the same officer against whom the conviction and sentence order was passed by the court, yet, once the complainant was duly being represented by its Counsel the court could have either adjourned the matter to some future date if there was any necessity for the presence of the complainant for the progress of the complainant case and if there was no such necessity then the court could have gone ahead with the matter even in the absence of a complainant as per the mandate of proviso of Section 256 of the Cr.P.C. The Apex Court in the judgment of Associated Cement Co. Ltd. (Supra) while dealing with the scope of Section 256 Cr.P.C. held as under:

16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when

his presence is necessary. The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum.

17. Reading the Section in its entirety would reveal that two constraints are imposed on the court for exercising the power under the section. The first is, if the court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. The second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day the Magistrate has the power to dispense with his attendance and proceed with the case. When the court notices that the complainant is absent on a particular day the court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned the court is free to dismiss the complaint and acquit the accused. But if the presence of the complainant on that day was quite unnecessary then resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must therefore be exercised judicially and fairly without impairing the cause of administration of criminal justice.

13. This Court also while dealing with such a similar situation in *Crl. A. No. 131/2008 in Citi Financial Consumer Finance India Ltd. v. Mr. Jasbir Singh* Decided on 5th September 2008 held as under:

Mere absence of a complainant on the date of hearing cannot be a ground to dismiss the case in a routine manner. Absence on a solitary occasion or on an occasion when presence of complainant was not necessary does not call for dismissal of a complaint case and dismissal on such occasions is not in the interest of substantial criminal justice, unless the court is of the opinion that the complainant has been trying to protract the matter or adopting dilatory tactics to harass the accused. If the presence of the complainant is not necessary on the date of hearing then it would be proper for the magistrate to adjourn the case to some other date rather than dismiss of the case u/s 256 Cr.P.C.

In the recent past there has been a spurt of litigation u/s 138 of the Negotiable Instruments Act and every endeavour is being made at the level of the administration to ensure expeditious disposal of these cases. Steps have also been initiated to settle these cases by organizing Lok Adalats, Special Adalats and through other alternative dispute resolution mechanism of mediation and conciliation, but still the disposal of such cases is no where near in comparison to the inflow of litigation in this field. The Magistrates by dismissing these complaints due to the absence of the complainant are not increasing their own load of work but increasing the docket of the High Court as well. Every case which is dismissed in default by the Magistrate, the remedy against such an order is taken by the complainant by filing an appeal u/s 378(4) of the Cr.P.C. It is a settled position that there is no provision in

the Cr.P.C. empowering the Magistrate to restore or revive such case as Magistrate has no inherent powers to review his own order of dismissal or to restore the case unlike the provision existing in C.P.C. In a summon case u/s 138 of the Negotiable Instruments Act three courses are open to the Magistrate when the complainant is absent on the date of hearing: (1) acquit the accused; (2) to adjourn the case for a future date; and (3) to dispense with the attendance of the complainant and proceed with the case. Reading of Section 256 in its entirety would clearly reveal that whenever the Court finds the complainant is absent on a particular date the Court must consider that the personal attendance of the complainant is essential on that date for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other sufficient reason, if the situation on a particular date does not justify the case being adjourned the Court has ample powers to dismiss the complaint and to acquit the accused, but if the presence of the complainant on that particular day is quite unnecessary or not essential in any manner then to dismiss such a complaint would be nothing but would amount to arbitrary and illegal exercise of the power quite contrary to the one envisaged in the said Section. The discretion by the Court must be exercised judicially and fairly without impairing the cause of administration of criminal justice. It is no doubt true that the complainant has a duty to be present on all dates of hearing, but it is equally true that for his non-appearance on a date when his presence is not necessary the same should not result in passing an order of acquittal or in the dismissal of a complaint case. The Court must realize that after summoning of the accused if the complaint results into his acquittal then the entire cumbersome process would start again to bring back the accused before the Court and, therefore, unless there are sufficient reasons warranting dismissal of a complaint case the Courts may not act in haste in dismissing the complaints filed u/s 138 of the Negotiable Instruments Act, just on account of absence of the complainant on one or two occasions when the presence of the complainant is not necessary on such dates. I am, therefore, of the considered view that in all such cases where complaint cases are being dismissed in default on account of the absence of the complainant or his authorized representative the Magistrate shall give reasons for the dismissal of the complaint case by specifically stating that on such date the presence of the complainant was necessary. In the light of the above discussion, it would be apparent that the concerned Magistrate has clearly acted in defiance of the said mandate of law and resultantly the impugned order dated 4.12.2007 is set aside.

14. All 29 complaint cases filed by the appellant and fixed before the Special Court were dismissed by the said court on account of absence of the authorized representative and refusal to grant exemption to Mr. Binay Kumar, authorized representative as sought by the appellant. All these cases relate to theft of electricity which offence has been made punishable u/s 135 of the Electricity Act 2003. This new legislation was enacted by the parliament to streamline the transmission and

distribution of the electricity and for bringing some strict measures against all those who indulge into theft of electricity at a large scale. Such, thefts whereas, on the one hand, are responsible to result in major loss of public exchequer to the State while, on the other hand, such thefts are committed at the cost of honest consumers who gets deprived to get uninterrupted electricity supply.

15. No order of the judicial officer should give a slightest reflection of anger, insensitivity, unfairness and hastiness. Besides the above hallmarks, the most important personal qualifications required are moral vigour, ethical firmness and imperviousness to corrupting or venal influences, humility and lack of affiliations, judicial temperament, zeal and capacity to work. Judicial temperament of a judge besides possessing qualities of honesty, integrity besides adequate knowledge of law, skill and legal soundness must also possess the qualities of compassion, fairness, diligence, decisiveness, high order of emotional stability, firmness, serenity, ability, endurance and open-mindedness. Totally free from any biasness, perversity and arbitrariness with the overt commitment to the sense of justice. Our system of justice depends on the faith of the citizens. Out of respect for the justice delivery system and the position of a judge in this system, judges have been accorded respect traditionally by our citizens. The Citizens in return expect their judges to decide their cases fairly and impartially with no anger or sense of any biasness or arbitrariness. I feel that the Special Judge has not done his job till the parties and Counsel get a feeling of satisfaction that they have had a fair hearing of the dispute regardless of the ultimate decision of the case.

16. The courts are temple of justice where there is no room to radiate vengeance. In the instant case, the Learned Special Judge unmindful of the basic philosophy of Justice Delivery System and in a spree of fury dismissed 29 cases. It is only where the complainant tries to protract the matter or adopts dilatory tactics to harass the accused the power u/s 256 Cr.P.C. should be exercised by a Judge and not out of ferocity and anger.

17. In view of the above discussion, the appeals are allowed and the impugned order dated 3/10/2008 passed by the Ld. Trial Court in CC Nos. 941/2007, 568/2007, 571/2007, 1256/2007, 824/2007, 815/2007, 1287/2007, 388/2008, 1024/2007, 572/2007, 386/2008, 936/2007 and 945/2007 are set aside and the same are restored to their original CC Numbers and stage. A copy of this order be placed by the Registry before the Inspecting Judge of this judicial officer.

18. With above directions, the appeals are allowed.