

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 601 of 2021

Apu Kundu

-Vs-

State of West Bengal

For the Petitioner: Mr. Phiroze Edulji,
Mr. Jagadish Chandra Majumdar,
Mr. Shibji Kr. Das,
Mr. Soumajit Das Mahapatra,
Mr. Rupsa Sreemani,
Ms. Aishwarya Chatterjee.

For the O.P No. 2: Mr. Ayan Bhattacharyya,
Mr. Avik Ghattak,
Mr. S.De Dhara.

Heard on: 9 March, 2021.

Judgment on: 16 March, 2021.

BIBEK CHAUDHURI, J. : –

1. “No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, law will imply no more than that the substantial requirements of justice shall not be violated. He is not a Judge in the proper sense of the word : but he must give the parties an opportunity of being heard before him and stating their case and their

view. He must give notice when he will proceed with the matter and he must honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice". [Spackman vs. Plumstead District Board of Works : 1985 (10) AC 229:54 LJMC 81.]

2. In the instant criminal revision only question for adjudication is as to whether one of the essential principles of natural justice, viz audi alteram partem was violated by the learned trial court and if so, whether the impugned order suffers from patent illegality or material irregularity.

3. It is not in dispute that the petitioner is the husband of the opposite party No.2. Admittedly also in the wedlock between the petitioner and the opposite party No.2, a child was born and he is maintained by the opposite party No.2.

4. After the birth of the child, relation between the parties started to deteriorate which compelled the opposite party No.2 to file a complaint before the Officer-in-Charge Jagaddal P.S. A case bearing No.47 of 2018 under Sections 498A/494/420/406/120B/34 of the Indian Penal Code was registered against the petitioner. The opposite party No.2 has also instituted a proceeding under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereafter describe as the said Act) which was registered as Misc Case No.12 of 2018 and is presently pending before the learned Judicial Magistrate, 1st Court at Barrackpore. In the

said proceeding, opposite party No.2's prayer for interim monetary relief for maintenance of the son of the parties was allowed under the provision of Section 23 of the said Act and the opposite party was directed to pay a sum of Rs.3000/- per month for the maintenance of their child in favour of the opposite party No.2.

5. The opposite party No.2 assailed the said order passed by the learned Judicial Magistrate, 1st Court at Barrackpore in Misc Case No.12 of 2018 by filing Criminal Appeal No.14 of 2019 before the learned Additional Sessions Judge, Fast Track, 4th Court at Barrackpore.

6. In course of hearing of the aforesaid Criminal Appeal No.14 of 2019, an adjournment was sought for on behalf of the respondent/petitioner herein on 19th January, 2021 on the ground of personal inconvenience of the learned Advocate who represents the respondent/petitioner herein. It was stated that he was busy in a sessions trial under the direction of this Court. Prayer for adjournment was allowed by the learned Judge in Appeal subject to payment of cost of Rs.10,000/- and the next date fixed on 2nd February, 2021. On 2nd February, 2021 the learned Court below closed the argument and fixed 23rd February, 2021 for delivery of judgment. The respondent/petitioner herein filed CRR No.232 of 2021 challenging legality, validity and propriety of the said order dated 2nd February, 2021 on the ground that the petitioner was not given the opportunity of being heard.

7. Coordinate Bench of this Court observed as hereunder :-

“A right of hearing is too precious a right that is required to be scrupulously respected. It is a fundamental right of a litigant guaranteed by our Constitution”.

8. In the said order the Coordinate Bench observed that the petitioner took adjournment of hearing of the appeal on several occasions. However for the interest of justice the revision court granted another opportunity of hearing as a last chance.

9. Accordingly CRR No.232 of 2021 was disposed of directing the learned Appellate Court to fix a date for hearing the present petitioner and thereafter conclude the proceeding at the earliest.

10. The petitioner has filed series of orders passed in Criminal Appeal No.14 of 2019.

11. Vide order dated 9th January, 2021 the learned Court of Appeal below allowed the prayer of the respondent for adjournment with a cost of Rs.10,000/- and fixed 2nd February, 2021 for hearing. In the said order it was directed that if the respondent are not ready for hearing of the appeal on 2nd February, 2021, the matter will be heard exparte. Vide order No.15 dated 2nd February, 2021 the respondent petitioner herein failed to take any step accordingly the learned Trial Judge closed the hearing of the appeal and fixed 23rd February, 2021 for judgment.

12. In the mean time on 20th February, 2021 the record of criminal appeal No.14 of 2019 was put up on the basis of a petition filed by the opposite party No.2/appellant. Learned Advocate for the appellant filed a

copy of the order passed by this Court in CRR No.232 of 2021. The learned Judge in Lower Appellate Court directed the order of the Hon'ble Court to be kept with the record and the same to be put up on the date fixed, i.e on 23rd February, 2021.

13. In the mean time on 20th February, 2021 the record was again put up before the judge in Lower Appellate Court. The order passed in CRR No.232 of 2021 was placed before the learned Judge. He recorded the entire order passed in CRR No.232 of 2021 in the order-sheet and finally passed an order directing the order of Hon'ble High Court to be kept with the record and put up on the date fixed.

14. The date was fixed for delivery of judgment on 23rd February, 2021. The learned Judge passed the following order on 23rd February, 2021:-

Order No.17 dated 23.02.2021

Today is fixed for judgment of this case.

During this period one order has been communicated to me by the appellant which has been passed by the Hon'ble High Court, Calcutta in CRR No.232/2021 (Apu Kundu Vs. The State of West Bengal and another) and the said order has been communicated to this court on 20.02.2021.

In the said order the Hon'ble Court has been specifically observed that – “A right of hearing is too precious a right that is required to be scrupulously respected. It is a fundamental right of a litigant guaranteed by our Constitution.

However, it appears from the order sheet that the petitioner had prayed for adjournment on several occasions. As such, the learned appellate court was justified in imposing a cost of Rs.10,000/- on 19.01.2021.

In view of the above and in the interest of justice, this Court is of the view that another opportunity of hearing may be granted to the present petitioner as a last one.

Accordingly, the learned appellate court is requested to fix a date for hearing the present petitioner and thereafter, to conclude the proceeding at the earliest.

However, I have no reason to interfere with the impugned order so far as the imposition of cost is concerned.

The petitioner is directed to pay the costs imposed by the learned appellate court by the next date of hearing.

With these observations, the revisional application is disposed of.”

It is now 12:45 hours.

The appellant/petitioner Smt. Kakali Ghosh @ Kundu is present before the court along with her ld. lawyer Sri. Soumyadeep Banerjee but till time no step has been taken by the respondent No.2 Apu Kundu in compliance of the order of the Hon’ble High Court, Calcutta.

For the ends of justice, the matter is fixed at 14:30 hours today.

Order No.18 dated 23.02.2021

It is now 15:05 hours.

The petitioner/appellant Kakali Ghosh @ Kundu is present before the court along with his ld. lawyer.

On repeated calls, none present before the court for the respondent No.2 Apu Kundu.

At about 12:45 hours this record was called for hearing as there is a specific direction given by the Hon'ble High Court, Calcutta in CRR No.232/2021 (Apu Kundu vs. The State of West Bengal and another) and this order has been communicated to this court on 20.02.2021.

Though the judgment is almost ready in this case but as there is a specific direction by the Hon'ble High Court, Calcutta as such, judgment is not delivered today and it is also the direction to the Respondent No. 2 to pay the cost as imposed upon said Apu Kundu on 19.01.2021.

No cost has been paid.

The Respondent No. 2 has no intention to comply the order of the Hon'ble High Court, Calcutta or the order passed by this court.

I will again take the matter for hearing at about 16:15 hours today.

Order No.19 dated 23.02.2021

“It is now 16:50 hours.

As there is a specific direction of the Hon’ble High Court, Calcutta passed in CRR No. 232/2021 (Appu Kundu Vs. The State of West Bengal and another) the Court is waiting for the Respondent and his ld lawyer but in compliance of the Hon’ble Court’s order, none is present before the Court nor comply the direction of the Hon’ble High Court, Calcutta.

The Appellant Smt. Kakali Ghosh @ Kundu is present before the Court along with her ld lawyer since 10:30 a.m in the morning.

One petition has been filed on behalf of Respondent Apu Kundu without serving any copy to the Appellant who is all along present before the Court along with her ld lawyer.

A computer Generated copy has also been filed regarding the order passed by the Hon’ble High Court, Calcutta in CRR No. 232/2021 which order has been passed on 19.02.2021.

The copy of the order of the Hon’ble High Court, Calcutta has already been communicated to this court.

None moved the said petition filed by the Respondent no. 2.

I have perused the said petition.

As it appears from the said petition that the Respondent has prayed before the Court for moderate date for payment of cost and also for hearing in view of the order of the Hon'ble Court.

This Court has no jurisdiction to allow the said prayer as the order of the Hon'ble Court has not been complied by the Respondent in whose instance the said order has been passed by the Hon'ble High Court, Calcutta.

So, the petition has no merit and as such, it is considered and rejected.

The copies which are filed by the Appellant on 02.02.2021, a true copy of the same has submitted before the Court for the Respondent No. 2 but none appeared before the Court on behalf of the Respondent No. 2 nor received the said copies.

Kept it in the record.

Fix 25.02.2021 for Judgment."

15. Subsequently on 25th February, 2021 the learned Judge disposed of the criminal appeal exparte by delivering his judgment. Learned Advocate for the petitioner submits before me that when this Court in CRR No.232 of 2021 directed the Lower Appellate Court to fix a specific date for hearing the learned Counsel for the opposite party, he did not fix any date after receiving the copy of the order passed in the aforesaid criminal revision. On the other hand the learned Judge in the court below directed

the copy of the order passed by this Court in the aforesaid revision be kept with the record. According to the learned Advocate for the petitioner it was the bounden duty of the learned trial judge to fix a date for hearing of the appeal and communicate the same to the learned Advocate for the opposite party if on that date the learned Advocate for the opposite party failed to appear and take part in the hearing of the appeal, he could have passed the judgment *ex parte*. It is contended by the learned Counsel for the petitioner that learned Judge in the Lower Appellate Court did not give an opportunity of hearing to the opposite party and accordingly the order of closure of hearing of the appeal and subsequent delivery of judgment is illegal and suffers from material irregularity.

16. Learned Advocate for the opposite party No.2, on the other hand has placed the certified copies of the order passed by the learned Judge in the Lower Appellate Court and submits that the learned Advocate for the petitioner purposefully did not cooperate with the learned Judge in the Lower Appellate Court and took several adjournments only to drag the hearing of the appeal. This was the precise reason for which a Coordinate Bench of this Court refused to interfere with the order passed by the learned Judge in the Lower Appellate Court imposing hefty caused for adjournment. I have also perused the entire record and the order passed by the learned Judge in the Lower Appellate Court. It appears to me that the learned Advocate for the petitioner for some reason or other does not extent cooperation to the learned Judge in Lower Appellate Court.

17. In adversarial justice delivery system cooperation of both Bar and Bench is absolutely necessary. Such cooperation does not of course mean undue cooperation but the learned Advocates can cooperate with the Court by remaining present on the date and time of hearing of a proceeding. From series of orders since 19th January, 2021, it is found that the learned Advocate for the petitioner/respondent was not present to argue the appeal on behalf of his client. Considering such aspect of the matter I must observe that the conduct of the learned Advocate for the petitioner/respondent in dealing with Criminal Appeal No.14 of 2019 was not satisfactory.

18. However for the act of his Advocate, a litigant would not suffer. In my considered view, the learned Judge in Lower Appellate Court ought to have fixed a date for hearing of the appeal after receiving the copy of the order of CRR No.232 of 2021 without directing the same to be kept with the record and be put up on 23rd February, 2021. The learned Judge practically did not fix any date for hearing of the appeal by giving opportunity to the learned Advocate for the petitioner to submit his case. For the reasons stated above I am inclined to allow the instant revision on following conditions.

19. The instant revision is therefore allowed on contest, however, without cost.

20. The judgment and order dated 25th February, 2021 is set aside.

21. The learned Judge in the Lower Appellate Court is directed to fix the appeal for hearing on a suitable date as per his diary during the week

starting from 22nd March, 2021 and forward the date in the Court's cause list so that the opposite party/respondent can have the opportunity to know the date of hearing.

22. If the learned Advocate for the opposite party fails to advance argument on the date fix, he is at liberty to deliver the judgment in criminal appeal No.14 on 2019 exparte.

23. Ld. Advocate for the petitioner is at liberty to communicate a server copy of this judgment forthwith to the learned Court of Appeal for information and compliance.

(Bibek Chaudhuri, J.)