

IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

CRR 3051 of 2022

Shiv Siddhant Narayan Kaul

-Vs-

Insolvency and Bankruptcy Board of India

For the Petitioner: Mr. Sandipan Ganguly, Sr. Adv.,
 Mr. Tamal Mukherjee, Adv.,
 Mr. Rupraj Banerjee, Adv.,
 Mr. Rahul Auddy, Adv.,
 Mr. Aditya Gupta, Adv.

For the Opposite Party:
 Mr. A.K.Tiwary, Adv.,
 Mr. P.N.Mishra, Adv.,
 Mr. K.K.Tiwary, Adv.,
 Mr. Kushal Mukherjee, Adv.,
 Mr. A.P. Tiwary, Adv.

Heard on: 16 November, 2022.

Judgment on: 05 December, 2022.

BIBEK CHAUDHURI, J. : –

1. The petitioner is impleaded as an accused in complaint Case No.INS 01 of 2020 under Section 236 of the Insolvency and Bankruptcy Code (IBC) alleging commission of offence by him and other accused persons punishable under Section 70(1)(b) read with Sections 19(1) and 34(3) of the IBC. The said complaint is pending before the Trial Judge, 2nd Special Court, Calcutta for trial and disposal.

2. In the said proceeding filed by the Deputy General Manager, Insolvency and Bankruptcy Board of India, the petitioner filed an application under Section 205 of the Code of Criminal Procedure for exempting him from personally appearing before the trial court on each and every date of the said criminal proceeding on 9th March, 2021. Subsequently, on 31st March, 2022 he filed a supplemental application to the original application under Section 205 of the Cr.P.C annexing certain documents in support of his prayer.

3. It would not be out of place to mention that the aforesaid complaint was filed against three other accused persons. Remaining accused persons also prayed for exemption of personal appearance during trial on various grounds stated in their respective applications.

4. Briefly it is stated by the petitioner that the petitioner lives with his wife and three minor daughters and old, ailing parents. In order to protect the old parents and minor children the petitioner avoids exposure and crowded place in the light of the current pandemic. If the petitioner is compelled to regularly attend the court he may be exposed to dreaded virus which may in turn affect the health of his parents and children. Secondly, the petitioner is extensively involved in philanthropic activities. Thirdly, the petitioner is working as a Managing Director of a company which deals with industrial boilers. Very often defects are located in such industrial boilers in the form of developing cracks perforation etc. In order to repair the boilers conventionally, those are to be cooled down. Then after repairing the boilers are needed to be ignited and then after a

considerable time the boilers attain their requisite temporary for their functioning. The petitioner's company as the scientific and technological no how for repairing of boilers without turning them off for this specialized job and he requires to visit almost regularly to the factories and industries not only inside the country but also abroad. If he be not personally exempted, there would be huge loss in industrial sector. Fourthly, he is honourary office bearer and member of various business organizations, like CII, AIMA, FICCI etc. He also attends meetings and programmes of the said organizations. The petitioner also undertook that he would not challenge his identity in any stage of trial: an Advocate on his behalf would be present before the trial on each and every occasion whenever the case is taken up in his absence: the petitioner would not dispute any evidence recorded in his absence by the trial court in presence of his learned Advocate and he would be present on any day when his presence is required by the trial court.

5. By an order dated 19th May, 2022 the learned trial judge came to a finding that during the span of December, 2021 to August, 2022, the petitioner attended four meetings of various business organizations and two of such meetings were conducted through virtual mode. The learned trial judge also noticed that the office of the petitioner is situated at Kolkata therefore, he was pleased to reject petitioner's application for dispensing with personal appearance and directed him to remain present personally during trial of the case.

6. Mr. Sandipan Ganguly, learned Senior Counsel on behalf of the petitioner submits that Section 205 of the Cr.P.C makes it clear that in appropriate cases the Magistrate can allow an accused to make even the first appearance through a counsel. It is the foremost duty of the trial court to try a criminal case at the earliest, examine the witnesses and come to a reasoned finding as to whether charge against the accused is established beyond reasonable doubt or not. Presence of the accused in the court is not for marking his attendance just for the sake of seeing him in the court. It is to enable the court to proceed with the trial. If the progress of the trial can be achieved even in the absence of the accused, the court can certainly take into account the magnitude of the sufferings which a particular accused person may have to bear with in order to make himself present in the court during trial. In support of his submission learned Senior Counsel refers to a decision of the Hon'ble Supreme Court in the case of **Bhaskar Industries Ltd. vs. Bhiwani Denim & Apparels Ltd. & Ors.** reported in **(2001) 7 SCC 401**.

7. It is further submitted by the learned Senior Counsel that the petitioner is the Managing Director of NICCO Industries Pvt. Ltd. In his application under Section 205 of the Cr.P.C he stated the grounds for which it would be highly difficult for him to appear before the trial court on each and every date of trial. Therefore, he made an application under Section 205 praying for exemption of his personal appearance. The learned trial judge only considered the issue as to whether petitioner's commitment in other business organizations would be hampered if he is

directed to appear in court during trial or not. However, the learned trial judge failed to consider his professional commitment. It is also submitted that when the petitioner undertook that he would not challenge his identity, he would not raise any objection with regard to the evidence recorded on behalf of the complainant during trial. An Advocate duly appointed by him would represent him on each and every date of trial and he would be personally present on any day when his presence would be required by the trial court, learned trial judge acted illegally and material irregularity in rejecting the application under Section 205 of the Cr.P.C.

8. On this score the learned Senior Counsel relies on **Puneet Dalmia vs. Central Bureau of Investigation, Hyderabad** reported in **(2020) 12 SCC 695**. It is pointed out by the learned Senior Counsel referring to the aforementioned decision that the appellant was summoned by the trial court for the offences punishable under Section 120B read with Sections 420 and 409 of the IPC and Sections 9, 12 and 13(2) read with Sections 13(1)(c) and (d) of the Prevention of Corruption Act. In the said case the appellant filed an application under Section 205 of the Cr.P.C praying for exemption from personal appearance on the ground that he is the Director of the boards of several companies and preoccupied with the management and attending day to day affairs of account of business exigencies of the companies. He also requires to travel from Delhi to Hyderabad on a weekly basis. Under such factual background it was held by the Hon'ble Supreme Court that personal appearance of the accused ought to be dispensed with under certain terms and conditions. The

Hon'ble Supreme Court, therefore, passed an order exempting personal appearance of the accused on certain terms and conditions. The learned Senior Counsel submits that the learned trial judge ought to have exempted the petitioner from appearing personally during trial on certain conditions as he might deem fit and proper.

9. It is also pointed out by the learned Senior Counsel on behalf of the petitioner that Section 205 is applicable not only in Magistrate triable cases and the cases triable by the Special Judge.

10. Mr. P.N Mishra, learned Counsel on behalf of the opposite party/complainant on the other hand submits that the learned trial judge by a composite order dated 19th May, 2022 disposed of four separate applications under Section 205 of the Cr.P.C filed by four accused persons. In case of two accused persons prayer was allowed, but in case of the present petitioner the same prayer was rejected. Indisputably, petitioner resides in Kolkata. Officer of the petitioner is situated in close proximity of the trial court. There cannot be any impediment for the petitioner in attending the court of trial in order to take part in the proceeding.

11. It is further submitted by the learned Counsel for the opposite party that the ratio of Bhaskar Industries (supra) is not applicable under the facts and circumstances of the case. In the said report a complaint under Section 138 of the Negotiable Instruments Act was pending against the appellants. The appellants used to live at far distance places from the place of trial. Therefore, considering the practical inconvenience of the

accused person/appellant, the Hon'ble Supreme Court allowed exemption from personal appearance. Thus, the principal laid down in Bhaskar Industries is not applicable under the facts and circumstances of this case. The learned Counsel for the opposite party next refers to a decision in the case of **T.G.N Kumar vs. State of Kerala & Ors** reported in **AIR 2011 SC 708** and submits that it is within the powers of a Magistrate and in his judicial discretion but dispense with the personal appearance of an accused either through out or at any particular stage of a criminal proceeding. If the Magistrate finds that personal presence of an accused is required for the purpose of conducting fair and effective trial, he may very well within his discretion reject an application under Section 205 of the Cr.P.C. The revisional court should not interfere with the order the learned trial judge as he exercised his discretion in accordance with law assigning cogent and acceptable reasons. Thus, it is urged by the learned Advocate for the opposite party that in appropriate cases where the accused faces acute difficulty due to distance between his place of residence and the place of trial or where the accused suffers from physical ailment that may put him in a troublesome position to appear in the trial court or any other similar reason, the trial court can exempt personal appearance of an accused. It is also submitted by him that in a criminal case it is the rule that the accused would appear before the trial court during trial and exemption as an exception such exception is to be used sparingly with great caution and circumspection.

12. On the same point the learned Advocate for the opposite party refers to a decision of the Orissa High Court in the case of **Kamaljeet Singh Ahluwalia vs. State of Orissa** reported in **1998 CRI L.J 2191**. In the said report a Bench of Orissa High Court upon due consideration of various precedents on this point curled out the following grounds where it should be considered at the time of granting or rejecting an application under Section 205 of Cr.P.C. The grounds are:

“205. Magistrate may dispense with personal attendance of accused.-

(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.”

13. Thus, it is submitted by the learned Counsel for the opposite party that the petitioner being a resident of the city of Kolkata having his office at Kolkata who remain present during trial of the case. It is not appropriate that the trial of the case would commence and continue without physical presence of any of the accused persons.

14. Thus, it is urged by the learned Counsel for the opposite party that there is no reason to interfere with the order passed by the trial court while rejecting an application under Section 205 of the Cr.P.C filed by the petitioner.

15. Having heard the learned Counsel for the parties and on careful perusal of the impugned order as well as the precedents on the issue in hand, I like to record at the outset that Section 205 confers a discretion on the court to exempt an accused from personal appearance till such time his appearance is considered by the court to be not necessary during trial.

16. It is manifest from a complaint reading of the provision that while considering an application under Section 205 of the Code, the Magistrate has to bear in mind the nature of the case as well as the conduct of the person summoned. It is the foremost duty of the trial court to examine whether any useful purpose would be served by requiring the personal attendance of the accused or whether the progress of the trial is likely to be hampered on account of his absence.

17. Needless to say that the petitioner along with other accused persons are facing trial for committing offence punishable under Section 70(1)(b) and Sections 19(1) and 34(3) of the Insolvency and Bankruptcy Court. Section 70(1)(b) is a penal provision for misconduct in course of corporate insolvency resolution process (CIR). It is also alleged that the petitioner committed offence under Sections 19(1) and 34(3) of the IBC by not extending, assistance and cooperation to the official liquidator.

18. It is obvious that no useful purpose would be served by requiring personal attendance of the petitioner because the fate of the trial would depend on complainant's success in establishing the charge against the accused persons beyond any shadow of doubt. Allegation made against

the accused is not of such nature where personal attendance of the accused and his identification is absolutely necessary. Moreover, when the petitioner undertakes that he would not dispute his identity, this Court fails to understand as to why his application under Section 205 of the Cr.P.C was rejected.

19. The learned trial judge failed to consider that as the Managing Director of NICCO Engineering Pvt. Ltd., the petitioner discharges very responsible duty and for his professional commitment he requires to visit other places immediately. The learned trial judge has also failed to consider that the petitioner is Honourary Consul General of the Republic of South Korea.

20. The learned trial judge failed to consider that the nature of offences attributed to the petitioner was not of such nature that the petitioner should be present before the court throughout the trial preferable on each and every date. In the impugned order, the learned trial judge observed that the nature of job of the petitioner is not that all monumental importance. The petitioner is a Managing Director of a company engaged in specialized technical job and the petitioner knows the scientific and technical no how of the job and he requires to travel very often but different parts on this country and also abroad. The said fact regarding the nature of job of the petitioner was not disputed by the complainant. The learned trial judge disbelieved the petitioner's plea that he requires to attend various meetings of different business organizations of which he is either a office bearer or the member. On the ground that in some of the

meetings the petitioner attended virtually and he did not require to leave the city. He however, failed to consider that even if he attends any such meetings in virtual mode he would not be able to appear before the trial court if the date of meeting or date of his travelling on official purpose clashes with a date of trial. The learned trial judge also failed to appreciate that no useful purpose would be served by requiring personal attendance of the petitioner and also the course of trial of the case would not hamper on account of his absence.

21. Dr. Mishra, the learned Counsel for the complainant/opposite party strenuously urged that the petitioner may absent himself in case of exigencies during trial adopting the provision under Section 317 of the Cr.P.C.

22. Section 317 of Cr.P.C is extracted below:-

“317. Provision for inquiries and trial being held in the absence of accused in certain cases.- (1) At any stage of an inquiry or trial under this Code, if the Judge or Magistrate is satisfied, for reasons to be recorded, that the personal attendance of the accused before the Court is not necessary in the interests of justice, or that the accused persistently disturbs the proceedings in Court, the Judge or Magistrate may, if the accused is represented by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct the personal attendance of such accused.

(2) If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.”

Plain reading of Section 317 shows that inquiry and trial of a criminal case may be held in absence of an accused in certain cases where the learned trial judge is satisfied with personal attendance of the accused before the court is not necessary in the interest of justice or that the accused persistently disturbed the proceedings in the court.

23. Section 317 operates in completely different circumstances in comparison to Section 205. While Section 205 is a general provision empowering a Magistrate or a trial judge, as the case may be to exempt personal appearance of the accused, Section 317 operates only when the judge or Magistrate is satisfied that personal attendance of the accused is not necessary in the interest of justice or the accused persistently disturbed the proceedings. An application under Section 205 of the Cr.P.C cannot be rejected on the plea that the accused has alternative remedy Section 317 of the Cr.P.C. The learned trial court also failed to consider that provision under Section 205 of the Cr.P.C is to be liberally construed.

24. In view of the above discussion the impugned order dated 19th May, 2022 passed by the learned Judge-in-Charge, 2nd Special Court, Calcutta is liable to be set aside.

25. In the result the revision is allowed, the order dated 19th May, 2022 passed by the learned Judge-in-Charge, 2nd Special Court, Calcutta in INS Case No.INS 01 of 2020 is set aside.

26. The application filed by the petitioner under Section 205 of the Cr.P.C is allowed.

27. The personal appearance of the petitioner is exempted on the following conditions:- i) The petitioner No.1 shall be represented by an Advocate appointed by him on each and every date of trial. (ii) The petitioner shall not leave the country without prior permission of the court. (iii) The petitioner shall not challenge his identity in course of trial. (iv) The petitioner shall not dispute evidence of the witnesses on behalf of the complainant, if recorded in presence of his learned Advocate.

28. The above order, however would not preclude the Magistrate to pass appropriate orders, if and when personal appearance of the petitioner is required.

29. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Bibek Chaudhuri, J.)