

Bejoy Bhusan Sen Alias B.B. Sen Vs. Deputy Chief Controller of Imports and Exports

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Court : Kolkata

Decided On : Oct-07-1993

Reported in : (1994)2CALLT12(HC),98CWN701

Judge : Arun Kumar Dutta, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Section 482; ;Import and Export (Control) Act, 1947 - Sections 5 and 120B; ;[Indian Penal Code \(IPC\), 1860](#) - Section 120B

Appeal No. : Crl. Rev. No. 1782 of 1992

Appellant : Bejoy Bhusan Sen Alias B.B. Sen

Respondent : Deputy Chief Controller of Imports and Exports

Advocate for Def. : Priyanath Ghosh, Adv.

Advocate for Pet/Ap. : Dilip Kumar Dutta and ;Arup Chandra Chatterjee, Adv.

Judgement :

Arun Kumar Dutta, J.

1. The petitioner-accused (hereinafter referred to as accused) by his instant Revisional Application under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter shortened into Code), has prayed the Court for quashing the relevant proceedings, being Complaint Case No. C/2493/72, pending before the Metropolitan Magistrate, 12th Court, Calcutta, mainly on the grounds that the evidence of the 23 witnesses examined so far, taken on their face value, do not make out even a prima facie case against him and that in view of the long pendency of the said proceedings, he has suffered great mental agony and hardship during the last 22 years and in the interest of justice such a lame prosecution should not be allowed to continue and should be quashed in the background and facts and circumstances indicated therein.

2. The facts giving rise to the aforesaid relevant proceedings may shortly be stated as follows :-

On or about 22.5.1970 a report, being Crime No. 10/E/70 dated 22.5.70, was drawn up against Lankupara Tea Co. Ltd., Jalpaiguri, and two others for alleged commission of offence punishable under Section 120B, read with Section 5 of the Import and Export (Control) Act, 1947. Since the aforesaid alleged offence was a non-cognizable offence, the concerned C.B.I. Inspector had filed the said report before the learned Magistrate on 23.5.1970 praying for permission to investigate the matter under Section 155(2) of the Code, which was allowed by the learned Magistrate fixing 25.8.1970 for report. On prayer by petition by the Investigating Officer on 16.6.70, the then Chief Presidency Magistrate, Calcutta, had issued four search warrants under Section 96 of the Code whereupon the former had returned the search warrants, along with seizure lists showing seizure of documents, before the learned Magistrate on 26.6.70. But despite a number of opportunities granted to the Investigating Officer no report had been submitted by him in the matter for quite sometime. On his prayer for extension of time on 17.8.71, he was allowed time till 16.11.71 for submitting report in the matter. But no report was submitted by him on that date. He had again prayed for extension of time on 15.12.71 which was extended by the learned Magistrate till 16.2.72 clearly indicating that no further time would be allowed. The I.O. had thereafter filed a petition before the learned Magistrate on 24.1.72 praying for issue of summons under Section 94 of

the Code upon M/s. Meleod & Co. Ltd. for production of certain documents which was allowed by the learned Magistrate fixing 16.2.72 for return and orders. After a number of adjournments, in the meantime, the Investigating Officer had filed a complaint against the accused on 17.8.1972, after a lapse of more than two years, for alleged commission of offence punishable under Section 5 of the Import and Export (Control) Act, 1947 (hereinafter shortened into Act), whereupon the learned Magistrate had taken cognizance of the offence and had directed issue of process against the accused fixing 14.9.72 for his appearance. The prosecution case, inter alia, is that M/s. Martin Burn Ltd., Calcutta, as agent of M/s. Ruston Hornby Ltd. imported certain spare parts under Import licences on actual users quota which were ultimately transferred to M/s. Greaves Cotton & Co. Ltd. It is alleged that the accused had sold the imported parts in violation of the conditions of licence.

3. It is contended by the petitioner-accused that since he was out of the town, the summons could not be served upon him and when he came to know about the issue of summons against him he had surrendered before the Court by petition on 11.10.72 and was released on bail. On his prayer by petition he was further allowed by the learned Magistrate to be represented by his learned Lawyer.

4. The case had thereafter been transferred to the Trial Court on 13.10.72 and copies having been supplied to the accused between 4.11.72 and 1.2.73, the learned Magistrate had fixed the case for evidence on 12.3.1973.

5. From 12.3.73 till 18.4.75, 14 prosecution witnesses had been examined by the learned Magistrate, some of them in part. On 16.6.75 the accused had filed a petition before the learned Magistrate challenging the cognizance taken by him for non-compliance with the provisions of Section 200 of the Code, whereupon the latter had dropped the case by his order of that date. The prosecution had thereupon moved this Court and had obtained a Rule, being Criminal Revision No. 1172 of 1975, which had remained pending before this Court till 1978. The records of the case having been received back by the learned Magistrate on 20.1.79, he had directed issue of notices upon the parties fixing 7.2.79 for their appearance.

6. The accused had appeared before the learned Magistrate on 7.2.79 and was released on fresh bail and the case was fixed for evidence on 12.4.79. The

hearing of the case had thereafter been adjourned from time to time on various grounds, as stated in the petition. And, till the date of filing of this Revisional Application before this Court on 5.8.1992, 23 witnesses have only been examined before charge, out of 155 charge-sheet witnesses. The learned Magistrate by his order dated 4.6.92 had held that a prima facie case under Section 5 of the Import and Export (Control) Act, 1947 has been made out against the accused directing framing of a charge against him thereunder, though no formal charge has yet been framed.

7. It is contended by the petitioner-accused that even though the relevant case is pending since 1972, he had sought for adjournment on seven occasions only on the ground of his illness or absence, and it is the prosecution who is responsible for the prolongation of the proceedings for such a long period. He has accordingly reasonable apprehension that the prosecution would take another 15/20 years to produce the witnesses for cross-examination after charge. He was 56 when the report was lodged in 1970, and now aged 78 years and it is not unlikely that he would be forced to escape human justice if the case is allowed to continue in the manner it is proceeding. It is, accordingly contended that he has been denied the constitutional guarantee under Article 21 of the Constitution of India and has been subjected to persecution instead of prosecution. It is further contended by the petitioner-accused that the evidence of the 23 witnesses so far examined by the prosecution, taken on their face value, do not even make out a prima facie case against him to justify continuance of the relevant proceedings. It has further been contended that the evidence of the P.W. 14, D. Mukherjee, in particular, demolishes the prosecution case against him. Hence the instant Revisional Application for quashing the proceedings against him.

8. To the ground of delay and the alleged infringement of the right of the accused to speedy trial first.

9. As already indicated above, the formal complaint under Section 5 of the Act had been filed against the accused before the learned Magistrate on 17.8.1972, The accused had surrendered before the Court on 11.10.72 and was released on bail by the learned Magistrate. He was also allowed exemption from personal

appearance under Section 205 of the Code, From the date of his surrender before the Court on 11.10.72 till the date of his filing the instant Revisional Application before this Court on 5.8.92, in about 20 years, 23 prosecution witnesses only, out of 155 charge-sheet witnesses, have been examined by the prosecution before charge. From the materials on record it would clearly appear that the relevant case had not been proceeded with in the absence of the accused on 9 occasions only during this long 20 years. Since his personal appearance was exempted under Section 205 of the Code, there was little reason for not proceeding with the case in his absence during the aforesaid 9 occasions. The relevant case could very well have been proceeded with in his absence as well. His absence during the aforesaid 9 days could not, therefore, conceivably have contributed to the delay in the relevant proceedings, in the aforesaid circumstances. As against that, the hearing of the case appears to have been adjourned at the instance of the prosecution and/or in the absence of their witnesses on 39 occasions. There was, of course, some delay due to court. The case, however, could not be proceeded with from 16.6.75 to 20.11.79 (for about three years seven months) due to a Revisional Application pending before this Court at the instance of the prosecution. Even if the said period of three years seven months is left aside, the certified copies of the order sheets on record would at once make clear that the prosecution was mainly responsible for such long delay of about 16 years in the trial of the relevant case. And, as already noted above, during this long period, out of 155 charge-sheet witnesses, 23 prosecution witnesses only have been examined so far before charge. The learned Advocate for the Opposite-Party-State could not account for and justify such inordinate delay in the relevant proceedings.

10. It is about fourteen years that the Hon'ble Supreme Court had declared in *Hussainmara Khatoon*, : 1979 CriLJ1036 that right to speedy trial is implicit in the broad sweep and content of Article 21 of the Constitution of India. A series of decisions had since thereafter reaffirmed the said principle and there seems to have never been a dissenting note therefrom. A division Bench of this Court in *Ranjit Kumar Pal v. The State*, 1990 Cr LJ 643 had held about eleven years thereafter that the broad interpretation of the fundamental rights guaranteed under Article 21 of the Constitution includes the right of an accused to have speedy trial,

further observing therein that the prosecution cannot have the luxury of dragging a case in a court of law for years together. It had further been held therein that long delay in the disposal of criminal proceeding prejudicially affects the defence of an accused. Administration of justice requires that the accused is entitled to have as much protection as the prosecution is entitled to. A Single Bench the Bombay High Court in *Shyam Lachmandas Ajmani v. The State of Maharashtra*, 1991 Cr. L.J. 970, had as well held that inordinate delay and laches in the prosecution without any progress of a criminal proceedings amounts to harassment of the accused warranting interference under inherent powers of the Court. In another Single Bench decision of the Bombay High Court in *R. Mahadevan Iyer v. State of Maharashtra and Anr.*, 1992 Cr. L.J. 1388, it had been held that Criminal proceedings not completed even after a lapse of 12; years heavily prejudiced the accused in his defence in respect of the incidents extremely old in point of time. It had been held therein that the High Court is justified in quashing prosecution exercising its powers under Section 482 of the Code if the right to speedy trial is violated. The Orissa High Court in the decision in *Rabindranath Rout v. The State of Orissa*, 1992 Cr.L.J. 2309, had also quashed a criminal proceedings on the ground of delayed trial holding that the same constitutes denial of justice. In a Writ Petition, being No. 268 of 1987, and a few other Criminal Appeals, before a Division Bench of the Supreme Court, it was further urged on behalf of the accused that a time limit should be fixed for concluding all criminal proceedings as without such a time limit, the guarantee of right to speedy trial would remain a mere platitude. The Division Bench was of the opinion that the said contention raised a very important constitutional question which is likely to arise more often in many cases and that the decision on the question would have far-reaching consequences in a large number of criminal cases pending in Courts all over the country. The Bench had accordingly directed the cases to be placed before a Constitution Bench. Before the Constitution Bench of the Supreme Court in *Abdul Rehman Antulay etc. etc. v. R.S. Nayak and Anr. etc. etc.*, 1992 Cr. L.J, 2717 it was contended that no fundamental right flows from Article 21. It was argued, it was only a facet of a fair and reasonable procedure guaranteed by Article 21 and nothing more. It was also argued that violation of this right does not result in quashing of the charge and/or conviction. It was submitted that the right, if at all

there is one, is an. amorphous one, a right which is something less than other fundamental rights guaranteed by our Constitution. On the other hand, proponents of the right wanted the Court to go a step forward and prescribe a time limit beyond which no criminal proceeding should be allowed to go on. Without such a limit, they submitted the right remains a mere illusion and a platitude. The Hon'ble Supreme Court in the aforesaid decision had held 'Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is also in public interest or that it serves the societal interest also, does not make it any-the-less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances'. The Court had further observed that 'the provisions of the Code of Criminal Procedure provide for an early investigation and for a speedy and fair trial. If only the provisions of the Code are followed in their letter and spirit, there would be little room for any grievance. The fact, however, remains unpleasant, as it is, that in many cases, these provisions are honoured more in breach. Be that as it may, it is sufficient to say that the Constitutional Guarantee of speedy trial emanating from Article 21 is properly reflected in the provisions of the Code'. Their Lordships in the aforesaid decision had issued certain guidelines in regard to speedy trial in terms thereof, some of which are set out below :-

(1) One cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, 'delay is a known defence tactic'. Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there must be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the Right to speedy trial is alleged to have been infringed, the first question to be put and answered is-who is responsible for the delay?

(2) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact of incarceration

of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(3) It is neither advisable nor practicable to fix any time-limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of Right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the Court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of U.S.A. too has repeatedly refused to fix any such outer time limit in spite of the Sixth Amendment. Nor it can be said that non-fixing any such outer limit ineffectuates the guarantee of Right to speedy trial.

(4) Ordinarily speaking, where the Court comes to the conclusion that Right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the Court to make such other appropriate order-including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded-as may be deemed just and equitable in the circumstances of the case.

11. It has already been noted above that the prosecution is mainly responsible for inordinate delay of about 20 years in the relevant proceedings before us. And, this inordinately long delay could be taken as presumptive proof of prejudice to the accused. In the facts and circumstances indicated above, the prosecution seems to have become a persecution for the petitioner-accused. Even though in the case of a complaint of denial of right to speedy trial it is primarily for the prosecution to justify and explain the delay, the prosecution appears to have pointedly failed to justify and explain such long delay in the relevant proceedings. And, having regard to the facts and circumstances of the relevant proceedings there could be no

mistaking that the right of the accused to speedy trial has clearly been infringed in view of such long and inordinate delay. It should seem worth bearing in mind that the prosecution case, inter alia, is that M/s. Martin Burn Ltd., Calcutta, as Agent of Ruston Hornby Ltd., had imported certain spare parts under Import Licences on actual users quota which was ultimately transferred to M/s. Greaves Cotton and Co. Ltd., and the accused had allegedly sold out/disposed of the imported parts in violation of the conditions of licence for which he is prosecuted for having committed an offence punishable under Section 5 of the Import and Export (Control) Act, 1947. The nature of the alleged offence, as it is, to my judgment, does neither justify continuation of further proceedings after such long and inordinate delay of about 20 years. The relevant proceedings is accordingly liable to be quashed on the ground of delay, infringing the right of the accused to speedy trial.

12. The relevant proceedings is as well liable to be quashed on another, the second ground taken by the petitioner-accused, that the evidence of the 23 witnesses so far examined by the prosecution, taken on their face value, do not make out even a prima facie case against him for the alleged offence for which he is being prosecuted, even though the learned Magistrate in his relevant order dated 4.6.92 has held that a prima facie case under Section 5 of the Act has been made out against the accused concerned. It may be recalled that the accused has been prosecuted for the aforesaid offence on the allegation that he had sold out/disposed of the imported parts in question in violation of the conditions of licence. But on my scanning the evidence of the prosecution witnesses so far examined, such as they are, it appears to me that there is nothing therein to prima facie indicate that the accused had taken any part, or had any hand in the sale/disposal of the imported parts, as alleged. The learned Advocate for the Opposite-Party-State, Mr. Ghosh, had taken me, in particular, through the evidence of the P.W.s 5, 6, 10, 17 and 21 had to contend that their evidence would make out a prima facie case against the accused for the alleged offence. But on my scanning their evidence, as they are, it does not seem to me that the evidence of any of them makes out a prima facie case against the accused in respect of the aforesaid alleged offence. Let me shortly set out their evidence on the point in support of the said conclusion.

13. The P.W. 5, B. C. Bhandary, has stated that at the time of transfer of Agency from Martin Burn Ltd. to Greaves Cotton Ltd., Martin Burn had many spare parts with them which were imported earlier on behalf of the various Tea Gardens. Since the Agency was transferred, Martin Burn was interested to keep the spare parts with them. The matter was discussed with the accused of Greaves Cotton and an agreement was reached, presumably regarding transfer/shifting of spare parts on transfer of Agency, as stated. There is not the slightest whisper in his evidence that the accused had any hand in the alleged disposal of the imported parts, in or about 1968, as alleged.

14. The P.W. 6, W.J.A.M. Lith had neither stated so. On the contrary, he has clearly stated in his evidence that it was discussed between himself and the accused B. B. Sen that the spare parts were not to be sold or disposed of to any other party excepting the actual users. The accused B. B. Sen had agreed to it. His evidence, as it is, *prima facie* seems to demolish the case against the accused.

15. The P.W. 10, Ajit Kumar Dutta, does not also state that the accused had taken any part in the matter of alleged disposal of the imported parts in question. He has stated that during the transfer of Agency from Martin Burn to Greaves Cotton there was a meeting of top officers for arranging the actual transfer of stock etc. He (witness) had received a letter, Ext. 15, in course of his office duty which he had handed over to the Engine Division for taking action as it was marked for Mr. B. B. Sen. During this cross-examination: he has clearly stated that the accused B. B. Sen was the Manager, Engine Division, from 1966 to 1968. In 1969 he became the Manager of Calcutta Division. There was separate Division, namely, viz. Spares and Service Division. During the years 1966 to 1969 Mr. P. K. Sen was In-charge of the Spares and Service Division. Sale or disposal of spare parts, including Ruston, was the responsibility of Spares and Service Division. The accused B. B. Sen normally, as Manager, had nothing to do with the disposal of spares. Engine Division and Spares Division are two separate Divisions. His evidence as well instead of making out a *prima facie* case against the accused, would seem to disprove it.

16. The P.W. 17, Kanak Kumar Mukherjee, also an employee of Greaves Cotton & Co., does not appear to have stated in his evidence that the accused had any hand in the alleged disposal of the imported parts in question. He has only stated that Duncan Brothers were their Customers. Previously, Duncan Brothers was customers of Martin Burn Ltd. Martin Burn Ltd. used to import spare machinaries etc. from Duncan Brothers for its Tea Gardens. The goods used to be kept in the godown of Martin Burn Ltd. Thereafter, the same used to be supplied to the Tea Gardens. Subsequently, Ruston & Hornby, England, had given the Agency to Greaves Cotton Ltd. The goods kept in the godown of Martin Burn Ltd. were thus shifted to the godown of Greaves Cotton. The accused B. B. Sen and the Director, Mr. A. K. Dutta, made arrangements for shifting of the goods. He clearly appears to have stated about the shifting of goods during the transfer of Agency, in the manner stated by him, which could not conceivably be related to the alleged disposal of the imported parts by the accused.

17. The P.W. 21, Ganga Prasad Burman, does neither appear to have stated that the accused B. B. Sen had any hand in the alleged disposal of the imported parts. He has stated that in 1967 the accused was Incharge of the Engine Division. He used to look after the handing over of Ruston spares in the account of Duncan Brothers, presumably during the transfer of Agency, as stated above, which has nothing to do with the alleged disposal of the imported parts. No other witness has stated about the complicity of the accused in the alleged offence.

18. In view of the evidence of the witnesses so far examined by the prosecution, as discussed above, there could be no mistaking that there is no evidence whatsoever on record to make out a prima facie case against the accused in respect of the alleged offence. The evidence of the witnesses would, per contra, prima facie, seem to suggest that the accused had nothing to do with the alleged disposal of the imported parts, as alleged by the prosecution. Let alone the evidence of the aforesaid P.W.s, the evidence of the P.W. 14, D. Mukherjee, would seem to lend additional point to the said conclusion and confirm the said conviction. Evidently, the accused was the Manager of the Engine Division from 1965 to 1968. The P.W. 14 has stated that Sri G. S. Nawlakha was the Officer-in-Charge of Warehousing Department in 1966. Mr. S. C. Ghosh had thereafter taken

over the said Department. After Mr. Ghosh left the job, Mr. G. P. Burman became the in-charge of the Department. At the material time the accused was the Manager of the Engine Division. He (witness) has further added that spare parts, including those manufactured by M/s. Ruston & Hornby Ltd., used to be dealt with by the spare parts section of the Company. During the period from 1966 to 1969 Mr. P. K. Sen was the Chief Executive of the Spare Parts Division. He has stated with more than usual clarity that Mr. Sen was the only authority according to whose direction he (witness), as the Store-Keeper, was to release goods, namely, the spare parts from the stores ; and he could act only upon the written order or written challan of Mr. P. K. Sen. The aforesaid evidence of the P.W. 14 would clearly indicate that the accused had no authority to sell any spare part stocked in the godown of the Company, including Engine Spares. It is also in evidence that Mr. P. K. Sen or some other subordinate officer of the Warehousing Department had signed a challan when the alleged transactions had allegedly taken place in or about 1968.

In view of the discussions above, there could clearly be no running; away from the inescapable conclusion that the evidence presented by the prosecution, instead of making out a prima facie case against the accused, would prima facie seem to suggest that he had nothing to do with the alleged offence. The relevant proceedings is, accordingly, liable to be quashed on this ground as well. This is also a strong circumstances justifying the quashing of the proceedings on the ground of delay as well.

In the premises above, the Revisional Application succeeds. The relevant proceedings before the Court below be accordingly hereby quashed. The petitioner-accused be discharged from his bail Bond, if on bail.