GAHC010054802024

2024:GAU-AS:12450

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.Pet./290/2024

ASHISH DUTTA
S/O LATE ANNADA CHARAN DUTTA, P/R/O WARD NO. 12, THANA ROAD,
NEAR RED CROSS, P.S.-KARIMGANJ, DIST-KARIMGANJ, ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:M/S J.C. BUSINESS PVT. LTD.
CIRCUIT HOUSE ROAD
SILCHAR TOWN
SILCHAR
P.S.-SILCHAR SADAR
DIST- CACHAR
ASSAM
REPRESENTED BY ITS MANAGING DIRECTOR SRI GOPENDRA CHOUDHURY
S/O JNANENDRA CHOUDHURY
R/O LACHMIDHAR ROAD
TARAPUR
SILCHAR
P.S.-SILCHAR SADAR
DIST- CACHAR
ASSA

Advocate for the Petitioner : MR. B M CHOUDHURY, MR. U CHOUDHURY

Advocate for the Respondent : PP, ASSAM, MS. A K CHOPHI (R-2),MR. A GHOSAL (R-2),J SINGPHO (R-2),MR. M BISWAS (R-2)

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER

10.12.2024

Heard Mr. B. M. Choudhury, learned counsel for the petitioner. Also heard Mr. R. J. Baruah, learned Additional Public Prosecutor for the State respondent No.1 and Mr. M. Biswas, learned counsel for the respondent No.2.

2. This application is filed under Section 482 of the Code of Criminal Procedure, 1973, *read with* Section 397 of Cr.P.C., praying for the quashing of the impugned Order dated 16.12.2023 passed by the learned Sessions/Special Judge, Calchar, Silchar, in Criminal Revision No. 117/2023, affirming the impugned Order dated 20.06.2023, passed by the learned Additional Chief Judicial Magistrate, Cachar, Silchar, in N.I. Case No. 151/2020.

3. It is submitted by the learned counsel for the petitioner, Mr. Choudhury, that after the closure of evidence of the P.Ws, the learned Trial Court recorded the statement of the present petitioner under Section 313 of the Cr.P.C. After the recording of the petitioner's statement, a petition was filed by respondent No. 2/complainant under Section 311 of the Cr.P.C., seeking to recall the witnesses for the purpose of producing a document that came to light during the cross-examination of the complainant's evidence. He further submitted that while adducing evidence, the complainant had already exhibited Exhibits 6 and 6(1), i.e. the ledger account of goods supplied on credit to the petitioner by the complainant, i.e., M/s J.C. Business Pvt. Ltd. However, during his cross-examination, the complainant stated, "*Our ledger is maintained in a bound register. I have not yet submitted the original ledger register in this case*". Only

after the complainant made this statement, the petition under Section 311 of the Cr.P.C. has been filed, seeking the production of the document and to recall of the complainant's witnesses, when the case was at the stage of defence evidence.

4. Mr. Choudhury, learned counsel for the petitioner, has submitted that under Section 311 of the Cr.P.C., it is not provided that the Court has the power to allow the prosecution/complainant to produce a document after the witnesses have been examined. Although the Court is empowered to summon or re-examine witnesses at any stage before the pronouncement of the judgment, if it appears to the Court to be essential for a just decision of the case by getting at the truth through all lawful means. But, the petition in this case was filed under Section 311 of the Cr.P.C. solely to fill the lacuna and exhibit the ledger register. From the cross-examination of the P.Ws, it is clear that the register had not been furnished before the Court, nor it had exhibited. However, without considering this aspect, the learned Revisional Court dismissed the revision petition, affirming the order passed by the learned Trial Court, which suffers from inherent and fundamental defects.

5. In addition to his submission, he relies on the decision passed by this Court in the case of **Gopal Jhunjhunwala vs. Shuvrateja Chaudhury & Anr.**, reported in 2008 (1) GLT 1093, wherein, the prayer for the production of the document by complying with the provisions under Section 311 of the Cr.P.C. was rejected. In this regard, he relied on the paragraph 14 of the said judgment which read as under;

> "14. The Apex Court in the case of ***Rajendra Prasad v. Narcotic Cell***, as reported in AIR 1999 SC 2292 held that reexamination of prosecution witnesses cannot be permitted merely for filling up lacuna in

prosecution evidence and a lacuna in prosecution is not to be equated with the fall out of an oversight committed by a Public Prosecutor during trial, either in producing the relevant materials or in eliciting relevant answers from witnesses. It would be beneficial to quote Para-7 of the judgment of the Apex Court in the said case:

> 7. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."

6. He further relied on another decision passed by the Hon'ble Bombay High Court in Criminal Writ Petition No. 3369/2022, dated 29.11.2022 [**Niketan Delip Paldhe vs. The State of Maharashtra & Anr.**], wherein also same view has been expressed. Accordingly, he submits that this is a fit case where, by exercising the power under Section 482 of the Cr.P.C., the impugned Order dated 16.12.2023, passed by the learned Sessions/Special Judge, Cachar, Silchar, in Criminal Revision No. 117/2023, affirming the impugned order dated 20.06.2023, passed by the learned Additional Chief Judicial Magistrate, Cachar, Silchar, in N.I. Case No. 151/2020, may be set aside and quashed for the interest of justice.

7. On the other hand, Mr. Biswas, learned counsel for respondent No. 2/complainant, has submitted that after the dismissal of the first revision petition, the subsequent revision petition filed in the garb of Section 482 of the Cr.P.C. is not maintainable. He further submitted that, by impugned Order dated

20.06.2023, the learned Additional Chief Judicial Magistrate, Cachar, while allowing the petition under Section 311 of the Cr.P.C., had discussed in detail the lacuna in the prosecution case in light of the view expressed by the Hon'ble Apex Court in the case of **Rajendra Prasad** (supra). The learned Magistrate also rightly observed that the document which the complainant sought to produce may be necessary for the proper appreciation of the facts of the case and to arrive at a just and proper decision. Accordingly, the petition was allowed, and the learned Revisional Court also upheld the order passed by the learned Additional Chief Judicial Magistrate, Cachar, vide impugned Order dated 16.12.2023.

8. He further submitted that although the prayer for recalling other witnesses was also made before the trial court, only the recalling of P.W.1 was allowed, as P.W.1 was the one who required to produce the relevant document, specifically the ledger book, before the learned Trial Court. Thus, the Court did not allow the prayer for recalling all the witnesses. After considering all aspects of the case, only the prayer for recalling P.W.1 was allowed, and P.W.1 was directed to produce the document as prayed for. Therefore, the learned Revisional Court and the Trial Court committed no error or mistake in passing the orders that allowed respondent No. 2 to recall the evidence of P.W.1 and to produce the document, which are necessary for the proper appreciation of the facts and for the interest of justice.

9. In support of his submission, he further relies on the following decisions:

i). **U.T. of Dadra & Nagar Haveli & Anr. vs. Fatehsinh Mohansinh Chauhan**, reported in (2006) 7 SCC 529;

ii). **Rajendra Prasad vs. Narcotic Cell**, reported in (1999) 6 SCC 110;

iii). **Raj Deo Sharma vs. The State of Bihar**, reported in (1999) 7 SCC 604; and

iv). **Zahira Habibullah Sheikh & Anr. vs. The State of Gujrat & others**, reported in (2006) 3 SCC 374.

10. In the case of **U.T. of Dadra & Nagar Haveli** (supra), it has been held that the exercise of power under Section 311 of the Cr.P.C. should be resorted to only with the objective of finding out the truth or properly proving facts that lead to a just and correct decision of the case. Calling or re-examining witnesses who have already been examined, for the purpose of finding out the truth to enable the court to arrive at a just decision, cannot be termed as "filling in a lacuna in prosecution case" unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused resulting in miscarriage of justice. Paragraph 16 of the said judgment reads as follows:

> "Para-16; ..... Normally, the investigating agency cannot visualize at that stage what will be the nature of defence which an accused will take in his statement under Section 313 Cr.P.C. as the said stage comes after the entire prosecution evidence has been recorded. The prosecution is only required to establish its case by leading oral and documentary evidence in support thereof. While leading evidence the prosecution may not be in a position to anticipate or foresee the nature of defence which may be taken by the accused and evidence which he may lead to substantiate the same.

Therefore, it is neither expected to lead negative evidence nor it is possible for it to lead such evidence so as to demolish the plea which may possibly be taken by the accused in his defence. This being the normal situation, an application moved by the prosecution for summoning a witness under Section 311 Cr.P.C., after the defence evidence has been recorded, should not be branded as "an attempt by the prosecution to fill in a lacuna".

11. Relying on the case of **Rajendra Prasad** (supra), he refers to paragraphs 8 and 9 of the said judgment, which read as follows:

"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No parry in a trial can before-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. The very same decision **Mohanlal Shamiji Soni v. Union of India**, (supra) which cautioned against filling up lacuna has also laid down the ratio thus :

"It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examined any such person even if the evidence on both sides is closed and the jurisdiction of

the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

12. Further, in the case of **Zahira Habibullah Sheikh** (supra), the same view was also expressed, and he relies on paragraph 27 of the said decision, which reads as follows:

"Para-27; The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the Court to summon a witness under the Section merely because the evidence supports the case for the prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is "at any stage of inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that whereas the section confers a very wide power on the Court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind."

13. Citing the above-referred judgments, Mr. Biswas, learned counsel for

respondent No. 2 has submitted that the learned Trial Court as well as the learned Revisional Court rightly passed the orders by allowing the complainant/respondent No.2 to recall only P.W. No. 1, through whom some relevant documents were to be exhibited. The recalling of P.W. 1 and the exhibition of certain documents are necessary for the proper appreciation of the case and also to ascertain the actual facts of the case. He further submitted that the petitioner will get ample opportunity to cross-examine P.W. 1 and will also have the opportunity to rebut the evidence of P.Ws, either by cross-examining P.W. 1 or by adducing rebuttable evidence. No prejudice will be caused to the petitioner by allowing the complainant to recall P.W. 1 and to produce evidence that is highly relevant to the complainant's case. Thus, he submits that this is not a fit case to invoke the power under Section 482 of the Cr.P.C. to quash the impugned orders dated 16.12.2023 and 20.06.2023.

15. In this context, Mr. Choudhury, learned counsel for the petitioner, has submitted that in the case of **Prabhu Chawla vs. The State of Rajasthan and Anr.**, reported in 2016 (16) SCC 30, decided by a three-judge bench, it was expressed that Section 397 of the Cr.P.C. does not bar the exercise of inherent power under Section 482 of the Cr.P.C. Just because a revision petition is maintainable, this in itself would not constitute a bar to entertaining an application under Section 482 of the Cr.P.C. Despite the provisions of Section 397(2) of the Cr.P.C., the High Court can exercise its inherent power under Section 482 of the Cr.P.C. when there is an abuse of the process of the Court or when other extraordinary situations arise that warrant the Court's jurisdiction. He further relies on paragraph 6 of the said judgment, which reads as follows:

> "In our considered view any attempt to explain the law further as regards the issue relating to inherent power of High Court under Section

> 482 Cr.P.C. is unwarranted. We would simply reiterate that Section 482 begins with a non-obstante clause to state: "Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice." A fortiori, there can be no total ban on the exercise of such wholesome jurisdiction where, in the words of Krishna Iyer, J. "abuse of the process of the Court or other extraordinary situation excites the court's jurisdiction. The limitation is self-restraint, nothing more." We venture to add a further reason in support. Since Section 397 Cr.P.C. is attracted against all orders other than interlocutory, a contrary view would limit the availability of inherent powers under Section 482 Cr.P.C. only to petty interlocutory orders! A situation wholly unwarranted and undesirable."

16. After hearing the submissions made by the learned counsels for both sides, I have perused the case record and the order passed by the learned Trial Court. It is an admitted fact that the petition for recalling the P.Ws and for the production of documents was filed by the complainant/respondent No.2 when the case was at the stage of recording the statement of the accused/petitioner under Section 313 of the Cr.P.C., after the closure of the P.Ws. The petitioner's case is that the petition under Section 311 of the Cr.P.C. was filed by the respondent to fill up certain lacunae, following a disclosure made by P.W.1 during his cross-examination. It is also stated that P.W.1 had already exhibited Exhibits 6 and 6(1), which are the ledger accounts of goods supplied on credit to the petitioner by the complainant/respondent No.2. However, during cross-examination, P.W.1 stated that he maintained a bound ledger register, which had not yet been submitted to the Court. Consequently, after P.W.1's cross-examination, the petition under Section 311 of the Cr.P.C. was filed to recall all the witnesses and exhibit some relevant documents.

17. On the other hand, the respondent No.2's case is that the document

sought to be produced by P.W.1 is highly relevant and necessary for the proper appreciation of the facts of the case, and for arriving at a just and proper decision. The defence, however, submitted that the petition for recalling the P.W.s cannot be considered as an attempt to fill a lacuna, and that the witnesses should not be recalled for this purpose. In this regard, both parties have relied on aforementioned judgments. However, it is observed that although the complainant filed a petition to recall all the P.W.s and produce relevant documents, the learned Trial Court made a detailed discussion regarding the term "lacuna" and the view expressed by the Hon'ble Supreme Court in the aforementioned case. Furthermore, it is evident that the learned Trial Court did not allow to recall of all the complainant's witnesses; only P.W.1 was allowed to be recalled, and only the relevant documents to be produced/exhibited which the Trial Court deemed necessary for the just decision of the case. Thus, while passing the order, the learned Trial Court considered all the pros and cons of the case and passed a detailed order, allowing the petition to recall only P.W.1 and permitting the production of some relevant documents.

18. From the contents of the complaint and other relevant materials, it is clear that the document sought to be produced by the complainant may be considered one of the relevant documents which could not be exhibited during P.W.1's evidence, despite the fact that P.W.1 maintained the ledger book. It is a settled position of law that under Section 311 of the Cr.P.C., the Court has the power to allow the prosecution/complainant to produce documents after the examination of witnesses and to re-examine the witnesses at any stage before the pronouncement of the judgment, if it appears essential for the just decision of the case. It is also settled law that re-examination of prosecution witnesses cannot be permitted under Section 311 of the Cr.P.C. merely to fill a lacuna in

the prosecution evidence; the court must determine whether recalling witnesses or producing records will cause prejudice to the opposing side, and whether the petition is merely an attempt to fill a lacuna. The learned Additional Chief Judicial Magistrate, while dealing with the petition in the order dated 20.06.2023 passed in N.I. Case No. 15/2022, made a detailed discussion, especially regarding lacuna, and also considered the view of the Hon'ble Apex Court in the case of Rajendra Prasad (supra), where observations were made concerning lacuna, which read as follows:

> "In support of its contention the complainant has relied upon the judgment passed by the Hon'ble Apex Court in Rajendra Prasad vs. Narcotic Cell reported in (1999) 6 Supreme Court Cases 110. I have carefully gone through this judgment. In this case the Hon'ble Apex Court dealt with the question "What is meant by lacuna in a prosecution case" and laid down as follows-
>
> "Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who amoung the parties performed better".

19. Moreover, it is observed that this is a case involving the dishonor of a check for a substantial amount of Rs. 29,86,614/- (Rupees twenty-nine lakhs eighty-six thousand six hundred and fourteen only). There were several transactions between the petitioner and respondent No. 2, but inadvertently, those documents could not be exhibited or produced during the recording of the evidence of P.W.1. However, it is noted that those documents may be relevant

for a just and proper decision in this case and for the proper appreciation of the facts. Allowing the petition under Section 311 of Cr.P.C. will not cause any prejudice to the petitioner, as they will get ample opportunity to rebut the evidence of P.W.1 through cross-examination and will also be given the opportunity to present rebuttal evidence through the defence.

20. In view of the above discussion, I find that no error or mistake has been committed by the impugned order dated 16.12.2023, passed by the learned Sessions/Special Judge, Calchar, Silchar, in Criminal Revision No. 117/2023, upholding the impugned order dated 20.06.2023, passed by the learned Additional Chief Judicial Magistrate, Cachar, Silchar, in N.I. Case No. 151/2020. Accordingly, the interference of this court is not required, and the same stands dismissed.

21. With above observation this petition stands disposed of.

JUDGE

Comparing Assistant