

GAHC010046782023



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

Case No. : Tr.P.(Crl.)/5/2023

BIKASH BORGOHAIN
S/O- LATE ROMEN BORGOHAIN, R/O- MOTHACHIGA, P.O. MOTHACHIGA,
P.S. NAZIRA, DIST. SIVASAGAR, ASSAM, PIN- 785685.

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE P.P., ASSAM

2:KUKHESWAR BORAH
S/O- TANKESWAR BORUAH
VILL.- GUPALPUR
P.O. BUKANOLA
P.S. BOGIODI
DIST. NORTH LAKHIMPUR
ASSAM
PIN- 787060.

3:ABDUL MAJID
S/O- LATE AZZIJUR RAHMAN
R/O- PRABHATIPUR
NAMGHARIA PATH
SIMALIGURI WARD NO. 2
DIST. SIVASAGAR
ASSAM
PIN- 785686.

4:PURABI MAJUMDAR
ADDL. SP BI (EO)
SRIMANTAPUR
GUWAHATI-32
ASSA

Advocate for the Petitioner : MR P KATAKI, MRS R BEGUM,MR U S BORGOHAIN

Advocate for the Respondent : PP, ASSAM, MR. D BARUAH

**BEFORE
HON'BLE MR. JUSTICE ROBIN PHUKAN**

ORDER

03.10.2024

Heard Mr. P. Kataki, learned counsel for the petitioner. Also heard Mr. D. Baruah, learned counsel for the respondent Nos.2 and 3 and Mr. K.K. Parasar, learned Additional Public Prosecutor, Assam, appearing for the State respondent No.1.

2. This application under Section 407 of the Code of Criminal Procedure, 1973 is preferred by the petitioner, namely, Shri Bikash Borgohain for transferring the G.R. Case No.675/2014 arising out of North Lakhimpur P.S. Case No.349/2014 under Section 406/420 IPC, read with Section 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, pending before the Court of learned Chief Judicial Magistrate, Lakhimpur and G.R. Case No.706/2014 arising out of Jorhat P.S. Case No.468/2014 under Section 406/420/120B IPC, read with Section 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, pending before the Court of learned Chief Judicial Magistrate, Jorhat, to the Court of learned Sub-Divisional Judicial Magistrate No.1, Kamrup(M), Guwahati, for joint trial along with PRC No.3097/2022 arising out of BI(EO) P.S. Case No.19/2020.

3. Mr. Kataki, learned counsel for the petitioner submits that the petitioner is an accused in **PRC No.3097/2022**, pending before the Court of learned Sub-Divisional Judicial Magistrate No.1, Kamrup(M), Guwahati, registered under Section 120B/420/406 IPC, read with Section 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, read with Section 5 of APID Act, 2013 and the said case was

registered on the basis of one FIR lodged by Smt. Purabi Mazumdar of BI(EO) on 03.11.2020. Mr. Kataki also submits that the petitioner is also an accused in **Jorhat P.S. Case No.468/2014** under Section 406/420/120B IPC, read with Section 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978 and the said case is also charge-sheeted on 30.09.2016 and the said case was registered on the basis of one FIR lodged by one Abdul Mujid – President and Shri Bikash Bharali – Secretary of Response Real Estate & Constructions (P) Ltd. **on 28.03.2014** and he is also an accused in **North Lakhimpur P.S. Case No.349/2014** under Section 406/420 IPC, read with Section 4, 5 and 6 of the Prize Chits and Money Circulation Schemes (Banning) Act, 1978, which was also registered on the basis of one FIR lodged by one Kusheswar Baruah **on 17.04.2014** and all the three cases are relating to same kind of offences and the witnesses are also same and the documents relied upon by the prosecution side are also same and as such, there may be conflicting decisions in all the three cases unless the same are tried together in joint trial and therefore, Mr. Kataki contended to allow the petition.

4. Mr. Kataki, in support of his contention, has referred to a decision of Hon'ble Supreme Court in the case of **Nasib Singh v. State of Punjab & Anr.**, reported in **(2022) 2 SCC 89**.

5. On the other hand, Mr. Baruah, learned counsel for the respondent Nos.2 and 3 has opposed the petition. Mr. Baruah submits that though the offences are of similar in nature, yet, the place of occurrences, and the witnesses are different. Mr. Baruah submits that Jorhat P.S. Case No.468/2014, was registered on the basis of a complaint lodged by Abdul Mujid and in that case all the witnesses are from Jorhat., and the North Lakhimpur P.S. Case No.349/2014 was registered on the basis of one FIR lodged by one Kusheswar Baruah and in that case all the witnesses are from Jorhat. And if those two cases are transferred to Guwahati it would cause unnecessary harassment to them since they have to travel to Guwahati. And therefore, it is contended to dismiss the petition.

6. On the other hand, Mr. K.K. Parasar, learned Additional Public Prosecutor, Assam,

has subscribe the submission of Mr. Baruah, learned counsel for the respondent Nos.2 and 3.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record.

8. Section 407 of the Cr.P.C. deals with the power of the High Court to transfer cases and appeals. The section reads as under:-

“407: Power of High Court to transfer cases and appeals.—(1) Whenever it is made to appear to the High Court—

(a) that a fair and impartial inquiry or trial cannot be held in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that an order under this section is required by any provision of this Code, or will tend to the general convenience of the parties or witnesses, or is expedient for the ends of justice, it may order—

(i) that any offence be inquired into or tried by any Court not qualified under sections 177 to 185 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case be committed for trial to a Court of Session; or

(iv) that any particular case or appeal be transferred to and tried before itself.....”

9. Thus, a perusal of the section indicates that a case can be transferred on the

grounds:-

- (i) a fair and impartial inquiry or trial cannot be held in any Criminal Court subordinate thereto, or
- (ii) that some question of law of unusual difficulty is likely to arise, or
- (iii) that an order under this section is required by any provision of this Code, or
- (iv) will tend to the general convenience of the parties or witnesses, or
- (v) is expedient for the ends of justice,

10. It is to be noted here that the issue of transfer of a criminal case was dealt with by Hon'ble Supreme Court in the case of **Mrs. Maneka Sanjay Gandhi & Anr. v. Ms. Rani Jethmalani**, reported in (1979) 4 SCC 167, wherein the Hon'ble Supreme Court has emphasized the necessity to ensure fair trial by observing as hereunder:-

"Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperilling, from the point of view of public justice and its attendant environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the circumstances may be myriad and vary from case to case. We have to test the petitioners grounds on this touch-stone bearing in mind the rule that normally the complainant has the right to choose any court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the court may weight the circumstances."

11. The proposition of law, that can be crystallized from the aforesaid decision is that something more substantial, more compelling, more imperiling, from the point of view of public justice is necessary to exercise the power under Section 407 Cr.P.C. While assurance of a fair trial is the first imperative, relative convenience of a party may not be the consideration. Normally, the complainant as '*dominus litis*' has the right to choose any court having jurisdiction, and the accused cannot dictate where the case against him should be tried. Harassment to be caused to the party, in the event of exercising the power has also to be born in mind.

12. Adverting to the facts herein this case, I find from the record that North Lakhimpur P.S. Case No.349/2014 was registered on the basis of one FIR lodged on 17.04.2014, filed by Kusheswar Baruah and others against the present petitioner, along with one Jyotish Gogoi (Director) and Shri Rikumoni Bora. It also appears that Jorhat P.S. Case No.468/2014, has been registered on the basis of one FIR lodged by one Abdul Mujid and Bikash Bharali of Response Real Estate & Constructions (P) Ltd. on 28.03.2014. And the BI(EO) P.S. Case No.19/2020, is registered on 03.11.2020, on the basis of one FIR lodged by Smt. Purabi Mazumdar, Additional S.P., BI(EO). It is to be noted here that the aforesaid FIR was lodged on the basis of one news item published in Assamese daily and the said offences took place during the period 2009/10 to 2014 and in the said case the accused are one Jyoti Gogoi, Bikash Borgohain, Rinkumoni Borah, Rajani Gogoi, Dibakar Bora, Chandan Bora and others.

13. Further it appears that the witnesses in North Lakhimpur P.S. case, Jorhat P.S. Case are different. In North Lakhimpur P.S. case the witnesses are from Lakhimpur and Jorhat P.S. case the witnesses are from Jorhat. The complainants are also from Lakhimpur and Jorhat respectively, being '*dominus litis*' they have the right to choose any court having jurisdiction to initiate legal proceeding. This right of the complainants has to be respected. The petitioner, being an accused, cannot also dictate where the case against him should be tried. The apprehension of not getting fair trial is also not there. There is no doubt that in the event of exercise of the power and consequent transfer of the case to Guwahati, would undoubtedly cause harassment to the witnesses of both the cases.

14. Though the petitioner has expressed apprehension of conflicting of decision, unless the same are tried together in joint trial, yet having examined the said ground in the light of the proposition of law laid down in the case of **Maneka Sanjay Gandhi (supra)**, this Court is of the view that the petitioner has failed to make out a case for exercising the power under Section 407 IPC by this court. It is well settled that each case has to be decided on its own merit. Acquittal or conviction of the accused one case would have no bearing in the case of Jorhat. However, it may be in the case of BI(EO) P.S. Case No.19/2020, because the allegations against the accused persons in the said case is same with that of Lakhimpur and Jorhat. On that count the question arises about the very maintainability of the FIR of BI(EO) P.S. Case No.19/2020, being the second FIR, on the same allegations, which took place at Lakhimpur and Jorhat, in view of the decision of Hon'ble Supreme Court in the case of **T.T. Antony vs. State Of Kerala & Ors** reported in **2001 (6) SCC 181**.

15. I have carefully gone through the decision of Hon'ble Supreme Court in the case of **Nasib Singh (supra)** referred by Mr. Kataki, learned counsel for the petitioner. In the said case the principle of joint and separate trial has been dealt with in paragraph No. 51 as under:-

"51. From the decisions of this Court on joint trial and separate trials, the following principles can be formulated:

51.1 Section 218 provides that separate trials shall be conducted for distinct offences alleged to be committed by a person. Sections 219-221 provide exceptions to this general rule. If a person falls under these exceptions, then a joint trial for the offences which a person is charged with *may* be conducted. Similarly, under Section 223, a joint trial *may* be held for persons charged with different offences if any of the clauses in the provision are separately or on a combination satisfied.

51.2 While applying the principles enunciated in Sections 218-223 on conducting joint and separate trials, the trial court should apply a two-pronged test, namely:-

- (i) whether conducting a joint/separate trial will prejudice the defence of the accused; and/or
- (ii) whether conducting a joint/separate trial would cause judicial delay.

51.3 The possibility of conducting a joint trial will have to be determined at the beginning of the *trial* and not *after* the trial based on the result of the trial. The appellate court may determine the validity of the argument that there ought to have been a separate/joint trial only based on whether the trial had prejudiced the right of accused or the prosecutrix.

51.4 Since the provisions which engraft an exception use the phrase “may” with reference to conducting a joint trial, a separate trial is usually not contrary to law even if a joint trial could be conducted, unless proven to cause a miscarriage of justice.

51. A conviction or acquittal of the accused cannot be set aside on the mere ground that there was a possibility of a joint or a separate trial. To set aside the order of conviction or acquittal, it must be proved that the rights of the parties were prejudiced because of the joint or separate trial, as the case may be.”

16. In the given fact situation of the case in hand, this court afraid that the case of the petitioner could not be able to withstand the two prong test namely, (i) whether conducting a joint/separate trial will prejudice the defence of the accused and (ii) whether conducting a joint/separate trial would cause judicial delay. The petitioner has failed to show that any prejudice would be caused to him and that joint trial would cause delay.

17. Moreover, the right of the petitioner to joint trial has to be balance with the right of the complainant as '*dominus Litis*', and also on the touchstone of the proposition of law laid down in the case of *Mrs. Maneka Sanjay Gandhi & Anr.*, (supra). And having tested on the touchstone of the proposition of law laid down in the said case and balancing with the right of the complainant and the harassment to be caused to the witnesses in the case of North Lakhimpur and Jorhat, this Court is of the view that the decision referred by Mr. Kataki would not come into his assistance.

18. In the result, I find no merit in this petition and accordingly, the same stands dismissed. The parties have to bear their own cost.

Sd/- Robin Phuikan
JUDGE

Comparing Assistant