

GAHC040005142023



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

Case No. : Crl.Petn. 66/2023

1:Lokam Talo
Son of Late Lokam Hangi,
Resident of Pappu Nallah, PO/PS Naharlagun, District Papumpare, Arunachal Pradesh.

VERSUS

1:THE STATE OF AP and Anr.
Through P.P (AP)

2:Bake Yama
Wife of Shri Dare Mada

Resident of Division IV
Itanagar
PO/PS Itanagar
Arunachal Pradesh

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : Mr. M. Biswas. Advocate.

For the Respondents : Mr. Gimi Tarak.Sr.Advocate
Assisted by Mr. T. Garam.
Advocate.

Date of Hearing : 26.06.2023

Date of Judgement : 26.06.2023

JUDGMENT & ORDER (ORAL)

1. Heard Mr. M. Biswas, learned counsel for the petitioner. Also heard Mr. Gimi Tarak, learned Senior Counsel assisted by Mr. T. Garam, learned counsel for the respondents.

2. The present application under Section 482 of the Code of Criminal Procedure, 1973 has been filed for quashing an order dated 27.03.2023 passed by the learned Sessions Judge, Yupia in I.A No. 02/2022 arising out of Criminal Appeal No. 1/2022, whereby the application of the petitioner filed under Section 391 of the Code of Criminal Procedure, 1973 (Code) seeking to adduce evidence at appellate stage was rejected.

3. **The brief facts of the case of the petitioner is as follows:-**

- I. The respondent No. 2 filed a complaint case under Section 138 of the Negotiable Instrument Act, 1881 arraying the present petitioner as an accused. The said case was registered as CR. Case No. 69/2018.
- II. The learned trial Court below by judgment dated 22.12.2021, convicted the petitioner for the offence punishable under Section 138 of the Negotiable Instrument Act, 1881 and also sentenced to undergo imprisonment or to pay fine and compensation.
- III. During the course of trial, the petitioner through suggestion made a defence case that cheque was missing from 16.04.2018. A suggestion was also given that an FIR was lodged on 16.04.2018.

Another suggestion was given that the accused used to keep his cheque with husband of the complainant.

- IV. During the examination of the accused under the provision of Section 313 of the Cr.P.C., the accused expressed his desire to adduce defence witnesses, however, subsequently even after being given opportunities, did not lead any evidence and when it was expressed that no evidence will be laid, the learned trial Court went to pronounce the judgment after hearing the learned counsel for the parties and accordingly, the petitioner was held guilty and was convicted as discussed hereinabove.
- V. Prior to passing of such judgment, the petitioner filed an I.A. before the learned trial Court below to allow him to adduce evidence, however, such application was rejected by the learned trial Court.
- VI. Being aggrieved, the petitioner preferred a petition under Section 482 of the Cr.P.C, which was registered as Criminal Petition No. 18/2021. Such petition was unrepresented in as many as 3 (three) dates consecutively and accordingly, this Court dismissed the said Criminal Petition by its order dated 17.09.2021 for non prosecution.
- VII. Thereafter, the petitioner preferred an appeal before the appellate Court against the judgment of the learned trial Court below. The petitioner also filed an application under Section 391 of the Cr.P.C. with a prayer to allow adduce evidence to exhibit and prove the FIR dated 16.04.2018. A communication dated 24.07.2018 purportedly issued by the Chief Manager, Itanagar Branch, whereby, according to the petitioner, it was intimated to the petitioner that the Cheque has

been returned with a wrong reason of “funds insufficient” whether such reason should have been “cheque stopped by the drawer”.

4. The basic ground of seeking such additional evidence was that though a suggestion was made that cheque was lost, accordingly FIR was lodged and bank was asked to stop the payment of the cheque, however, such evidence were not laid due to fault of the lawyer and the petitioner is not aware of such proceeding. However, the learned appellate Court by the impugned order dated 27.03.2023 rejected such prayer holding that such application was filed on malafide intent and after exhausting the provision of Section 313 Cr.P.C., the learned Court had given an ample opportunity to laid defence witness and on 11.02.2020, the learned counsel for the accused informed the Court that accused do not want to adduce evidence. Accordingly, the learned Appellate Court came to a conclusion that as the accused did not adduce evidence before the trial Court knowing fully well about his position and as nothing is discernable that the petitioner was misguided or ill advised by his conducting advocate, the petition was rejected. Accordingly, the present petition is filed.

5. The Hon'ble Apex Court in ***Rambhau and Another –Vs- State of Maharashtra*** reported in ***2001 4 SCC 759*** culled out the following principle in dealing with an application under Section 391 of the Cr.P.C.:-

- I. The exercise of power under Section 391 of the Cr.P.C. is depended upon the facts situation of each case having due regard to the concept of fair play and justice, well being of the society.
- II. The provision of Section 391 of the being an acceptance to the general rule, such powers is to be exercised with caution and circumspection so as to meet ends of justice.

III. It is not to fill up the lacuna but to subserve the ends of justice.

IV. Section 391 of the Cr.P.C. is akin to Order XLI Rule 27 of the Civil Procedure Code.

6. In the case of ***Zahira Habibullah Sheikh and Anr –Vs- State of Gujarat & Ors*** reported in ***2004 4 SCC 158***, the Hon'ble Apex Court reiterated the proposition of law that power under Section 391 cannot be filed to fill up lacunae and further laid down the following proposition:-

I. If the appellate court considers additional evidence to be necessary, the provision of Section 386 of the Cr.P.C. and Section 391 of the Cr.P.C. have to be harmoniously considered inasmuch as Section 386 of the Cr.P.C. envisages normal and ordinary manner and method of disposal of an appeal whereas Section 391 of the Cr.P.C. is an exception.

II. Where the Court through some carelessness or ignorance has omitted to record the circumstances essential to elucidation of truth, the exercise of power under Section 391 of the Cr.P.C. is desirable.

7. With the aforesaid settled proposition of law, let us now deal with the present case.

8. From the material available on record, it is clear that the case was initiated in the year 2018 and ended in conviction on 22.12.2021 i.e. after three years. The petitioner got sufficient opportunity to lead evidence, which he did not avail. Though the petitioner filed an application after closure of evidence to allow him to lead evidence, the same was rejected by the trial Court. Though such order was challenged before this Court, he did not prosecute such application. Ultimately the said criminal petition was dismissed by this Court

under its order dated 17.09.2021. Thereafter, he again filed the application under Section 391 of the Cr.P.C. before the appellate court. In the aforesaid backdrop, this Court cannot find fault with the conclusion of the learned appellate court that application was filed with malafide intention to delay the process.

9. The fact remains that the petitioner tried to make out a defence case that the cheque went on missing on 16.04.2008 and another defence that cheque was returned unpaid with reason (cheque stopped by drawer and not due to the reason "fund insufficient". The communication dated 24.07.2018 was issued after the issuance of return memo on 11.07.2018 and no suggestion was made that the bank was immediately intimated about the missing of the same. It is also seen that there is no mentioned or suggestion regarding lodging of the F.I.R. The learned appellate Court while dealing with the necessity of the adducing evidence at appellate stage took note of the fact that the cheque was issued on 28.02.2018 and the FIR was lodged on 16.04.2018. It is also concluded that any prudent men could not have delayed in reporting to police station or bank about missing of cheque of his business account.

10. In the aforesaid backdrop of fact, the learned appellate Court could not satisfy itself to allow the petitioner to adduce fresh evidence. This Court on the totality of the matter also of the view that the concept of fair play and justice would not require to allow the petitioner to adduce fresh evidence inasmuch as the petitioner failed to adduce evidence even after getting opportunity and the informant is still awaiting from the year 2018 to have the fruit of the judgment passed in a case under the provisions of Negotiable Instrument Act.

11. As discussed hereinabove, the petitioner failed to adduce evidence after getting ample opportunities and in the backdrop of the facts as discussed

hereinabove, this is not a case of adducing additional evidence rather a case to fill up the lacuna of the petitioner to adduce evidence.

12. Coming to the judgment of the Hon'ble Apex Court in the case of ***Sukhjeet Singh vs. The State of Uttar Pradesh*** reported in **2019 16 SCC 712**, upon which the learned counsel for the petitioner have placed heavy reliance to contend that lacuna on the part of a lawyer is required to be cured at the appellate stage for ends of justice, also do not find favour of this Court. In the case of ***Sukhjeet*** (supra) the fact under which the Hon'ble Apex Court allowed to lead evidence was that a vital document was exhibited and was part of record of the trial Court and the Trial court though made reference of the said document, however, did not rely on the same as the said document was not duly proved. Accordingly, at the appellate stage, the record/document which was already on record of the trial Court was allowed to be proved. In the present case, no documents were exhibited except making certain suggestions during cross-examination, nor the complainant was confronted with such documents during cross-examination. Even after such failure, the petitioner though was granted opportunity to lead defence witnesses, no evidence was laid. Therefore, this Court is of the view that the ratio laid down in ***Sukhjeet*** (supra) is not applicable in the given facts of the present case. Accordingly, this Court is not inclined to exercise its revisional power to interfere with the discretionary power exercised by the learned appellate Court under the provision of Section 391 of the Cr.P.C.

13. Accordingly, the present criminal petition stands dismissed.

14. While parting with the record, it is clarified that observation made by this Court in the present order and the observations made by the learned appellate Court in the impugned order are for the purpose of determining the

application filed under Section 391 of the Cr.P.C. and the same shall not influence the learned appellate Court in determining the appeal and the appeal be determined on its own merit and without being influenced by the present order.

JUDGE

Comparing Assistant