

GAHC010043772023



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

Case No. : Crl.Pet./191/2023

RITESH DAS
S/O SRI SANJOY K DAS
CHANDRALOY APARTMENT,
FLAT NO. 1/D, FIRST FLOOR,
LAMB ROAD,
AMBARI, GUWAHATI-781001

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY THE PP, ASSAM

2:SRI DON AYENGIA
S/O BARMOTA AYENGIA

R/O HOUSE NO. 3
KUSHAL KONWAR PATH
NABAGRAHA KHARGHULI ROAD
GUWAHATI-781028
DIST. KAMRUP (M)
ASSA

Advocates for the petitioner : Mr. A. M. Bora, ld. Sr. Adv.

Assisted by Mr. B. Bhagawati, Adv.

Advocates for the respondent : Mr. B. Sharma, ld. Addl. P.P.
Mr. A. K. Bhuyan, ld. Adv.

:::BEFORE:::

HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 07.09.2023

Date of Judgment & Order : 29.09.2023

JUDGMENT & ORDER (CAV)

Heard Mr. A. M. Bora, learned Senior counsel assisted by Mr. B. Bhagawati, learned counsel for the petitioner. Also heard Mr. B. Sharma, learned Additional Public Prosecutor for the State respondent No.1 and Mr. A. K. Bhuyan, learned counsel for the private respondent No.2.

2. This is an application filed under Section 482 *read with* Section 401 of the Code of Criminal Procedure Code, 1973 challenging the impugned Order dated 04.02.2023 passed by the learned Judicial Magistrate, First Class, Kamrup (M) in C.R. Case No.3974/2019 instituted under Section 138 of the Negotiable Instruments Act, 1881 for dishonor of 8(eight) numbers of cheques before the learned Court of Chief Judicial Magistrate, Kamrup(M) on 04.10.2019.

3. The present petition is filed by the accused petitioner challenging the legality and validity of the impugned Order dated 04.02.2023 passed by the Court of learned JMFC, Kamrup (M) in C.R. Case No.3974/2019 instituted under Section 138 of N.I. Act, allowing the prayer of the respondent No.2/complainant to file additional evidence on affidavit when the case is pending at the state of cross-examination of the complainant as prosecution witness No.1/P.W.1 and accepting some doubtful electronic evidence tendered by the respondent No.2/complainant through the said additional evidence on affidavit which were not in the complaint petition.

4. It is alleged that the accused petitioner had received the demand notice on 24.08.2019, but, despite receipt of the said demand notice, he did not make payment of the cheques and as such, the respondent No.2/complainant had instituted a complaint case against the accused petitioner. On receipt of the aforesaid complaint petition, the learned CJM, Kamrup(M) had registered the same as C. R. Case No.3974/2019 and the said Court had transferred the same before the Court of learned JMFC, Kamrup(M) for disposal. Upon perusal of the complaint petition and the initial deposition of the complainant, the learned JMFC had taken cognizance of the offence under Section 138 of N.I Act and issued process to the accused petition. After receipt of the summons, the accused petitioner appeared before the learned Trial Court and on prayer being made by him, he was allowed to go on bail and at present he is facing the trial.

5. Further, it has been stated that the respondent No.2/complainant had filed the instant complaint in October, 2019. He also filed his evidence on affidavit as Prosecution Witness No.1 in November 2019. Thereafter, the learned JMFC had furnished the copies of the complaint petition, evidence on affidavit and relied upon the documents to the accused petitioner. On 17.03.2022, the learned Magistrate had explained the offence to the petitioner to which he pleaded not guilty and claimed to be tried. Then, the learned Magistrate had posted the case on 22.04.2022 for cross-examination of the P.W.-1. Since then, the case has been posted on various dates as reflected in the order sheets. As the complaint case was pending at the stage of cross-examination of the P.W.-1 since 22.04.2022, and at the very moment the respondent No.2/complainant had filed a petition being petition No.2617 dated 02.09.2022 with a prayer to allow him to file further evidence in the said complaint case stating that inspite of due diligence in filing the evidence on affidavit, some documents left out, which are

material and important in the said proceeding. It has also been stated that the respondent No.2/complainant had also filed some documents proposed to be exhibited in this case along with the petition dated 02.09.2022. The copies of the petition, additional evidence on affidavit and some documents were served upon the accused petitioner on 02.09.2022. After receipt of the copies, the accused petitioner had submitted before the trial Court that he will file written objection to the said petition on the next date and thereafter, the case was posted for objection/hearing on 06.01.2023. Accordingly vide order dated 04.02.2023 was passed by the learned JMFC by allowing the petition No.2617 dated 02.09.2022 of the respondent No.2/complainant and accepted his further evidence at the stage of cross-examination in gross violation of law.

6. On being highly aggrieved and dissatisfied with the order dated 04.02.2023 passed by the learned JMFC, Kamrup(M) in C.R. Case No.3974/2019, the accused petitioner has preferred this instant petition challenging the legality and validity of the Order dated 04.02.2023.

7. Mr. A. M. Bora, learned Senior counsel has submitted that the learned Trial Court had passed the impugned Order dated 04.02.2023 hypothetically without considering the material and documents available in the case record and as such the same is liable to be set aside and quashed. He further submitted that as per the provisions of the Indian Evidence Act 1872, the sequence of recording evidence is—examination in chief, cross examination and then re-examination. But, here in the instant case the complaint petition is pending at the stage of cross examination of the P.W.-1 and therefore, allowing the respondent No.2/complainant to give further evidence at this stage of his cross examination is bad in law and as such the same is liable to be set aside and

quashed. Further, the respondent No.2/complainant has intended to bring certain new facts and documents in his additional evidence, which will cause prejudice to the accused petitioner. The complaint and evidence on affidavit was filed in the month of November, 2019 and after about 3(three) years, the complainant has decided to bring such new facts and documents in his further evidence. It is mere an attempt to fill up lacuna of the complainant's case which is not permissible in law and the same will cause prejudice to the right of the accused petitioner and as such, the impugned Order dated 04.02.2023 is bad in law and is liable to be set aside and quashed.

8. More so, the respondent No.2/ complainant also intended to bring some electronic evidence which are more susceptible to tempering should be admitted in evidence only after thorough scrutiny about its admissibility. The learned Senior counsel, Mr. A. M. Bora has submitted that no FSL report is available in respect of those voices or chats and therefore, the same are not admissible in evidence. He further submitted that the Court has no power to recall the process issued and also, the learned Trial Court had not given any valid reason as to why the respondent No.2/complainant is allowed to give further evidence, when the case was posted for cross-examination of the respondent No.2/complainant.

9. In support of his submission, he relies upon the decision rendered by the Hon'ble Apex Court in the Case of ***Adalat Prasad vs. Rooplal Jindal & Others*** reported in ***2004 7 SCC 338*** wherein, he stressed mainly in paragraph Nos. 15 and 16, which read as under;

15. It is true that if a Magistrate takes cognizance of an offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of [Sections 200 & 202](#),

the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking [section 203](#) of the Code because [the Criminal Procedure Code](#) does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking [Section 482](#) of Code.

16. Therefore, in our opinion the observation of this Court in the case of Mathew (supra) that for recalling an order of issuance of process erroneously, no specific provision of law is required would run counter to the Scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in Mathew's case (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law.

10. He further submitted that the Court has no authority to alter or review its own order under Section 362 of Cr.P.C, which read as under;-

“362. Court not to alter judgement. Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error.”

11. In addition to his submission, he also relies upon the decision passed by the Hon'ble Apex Court in the case of **Atul Shukla vs. State of Madhya Pradesh & Anr.**, reported in **(2019) 17 SCC 299**, wherein, it has been held that recall/review and modification of earlier order passed under Section 482, held, impermissible in the light of Section 362 of Cr.P.C.

12. Accordingly, the learned Senior counsel, Mr. A. M. Bora has submitted that the learned trial Court had passed the impugned order dated 04.02.2023 without considering the entire fact of the case as well as without considering the proper provisions of law and allowed the respondent No.2/complainant to file the additional evidence on affidavit along with some documents which will cause

prejudice to the accused petitioner. Thus, he accordingly prays for setting aside the impugned order dated 04.02.2023 passed by the learned JMFC, Kamrup(M) in C.R. Case No.3974/2019 instituted under Section 138 of N.I. Act.

13. In this context, Mr. B. Sharma, learned Additional Public Prosecutor has submitted that the learned Trial Court had rightly passed the order by allowing the respondent No.2/complainant to file further evidence on affidavit along with some documents. He also submitted that no prejudice shall be caused to the accused petitioner, as the additional evidence is necessary for adjudicating the main dispute between the parties, and therefore, there is no reason for making any interference by this Court and thus, it is not liable to be set aside and quashed.

14. Mr. A. K. Bhuyan, learned counsel for the respondent No.2/complainant has submitted that the learned Trial Court has committed no error or mistake while allowing the prayer for filing additional evidence on affidavit along with some documents as per order dated 04.02.2023. He also submitted that the affidavit of the respondent No.2/complainant was filed in the year 2019 and he did not get any opportunity to file or pray for additional evidence before appearance of the accused/petitioner. More so, inspite of due diligence in filing the evidence on affidavit, some documents were left out, which are essential and important in further proceeding of the case. He also submitted that the accused petitioner will get the ample opportunity to cross examine the PW-1 and thus, the petitioner will not be prejudice, if, the petition for filing additional evidence of affidavit is allowed as per Order dated 04.02.2023.

15. He further submitted that Section 362 Cr.P.C has been wrongly interpreted by the accused petitioner as the aforementioned section is only

applicable at the time of final judgment and order, wherein, the Court finds the clerical error. But, here in the instant case, it is not a case of any review or alteration of judgment or final order, but, the petition was filed for additional affidavit of PW-1 after hearing the parties, the learned Trial Court passed the order by allowing the present respondent No.2/complainant to file additional evidence on affidavit along with some documents. He further submitted that the petition for additional affidavit was not filed in the midst of cross-examination of PW-1, but, the same was filed before initiation of cross evidence of PW-1 and the respondent got the opportunity to file the same as the order for cross evidence was passed only after appearance of the accused petitioner before the learned Trial Court.

16. In addition to his submission, he relies upon the decision passed by this ***Co-ordinate Bench in Crl. Rev. Pet. No.351 and 440 of 2018 decided on 24.10.2019***, wherein, he stressed mainly in paragraphs of 17 and 18 of the said judgment which read as under:-

”**17.** It is noticed that the learned Magistrate having found prima facie ground to proceed under Section 138 of the NI Act issued summons to the petitioner/accused and on his appearance explained the aforesaid offence to him and thereafter, the complainant/respondent filed his evidence-on-affidavit and further, before cross-examination was done by the petitioner/accused, the respondent/complainant filed petitions seeking permission to file the additional documentary evidence.

18. The impugned orders do not indicate compliance of second proviso of Section 143(1) of the NI Act. None of the parties raised this legal aspect before the learned trial Magistrate. The evidence of the respondent/complainant was filed in the form of evidence-on-affidavit as provided under Section 145 of the said Act. Therefore, as no substance of evidence of the respondent/complainant was recorded, after offence was explained to him, it is apparent that the learned trial Magistrate, in fact, decided to proceed the trial as a summons case and the petitioner/accused shall get ample opportunity to cross-examine him. Hence, the question of injustice or prejudice to the petitioner/accused does not arise and on the other hand, the omission to comply with Section 143(1) of the NI Act does not invalidate the proceedings.”

17. Accordingly, the learned counsel for the respondent No.2/complainant has submitted that the learned Trial Court had rightly passed the order by allowing the prayer of the respondent No.2/complainant for filing additional affidavit along with some documents. Hence, there is no reason to make any interference by this Court in the order passed by the learned Trial Court.

18. After considering the submission made by the learned counsels of both sides, I have perused the case record as well as the order dated 04.02.2023 passed in C.R. Case No. 3974/2019. It is seen that the learned Trial Court has allowed the respondent No.2/complainant to file his additional evidence on affidavit as per the impugned order dated 04.02.2023. Though, it is an admitted fact that the case was instituted in the year 2019 and the complainant/respondent No.2 had filed his evidence on affidavit in the year 2019 itself, but, the trial Court had allowed the petition of the respondent No.2/complainant and accepted his further evidence at the stage of his cross-examination as the petition was filed only after appearance of the accused/petitioner and after explanation of particulars of offence vide the said impugned Order the Court has not reviewed, altered or modified its order. But, the prayer for filing additional affidavit on evidence and document was allowed and thus, the impugned Order is not hit by Section 362 of Cr.P.C. The petitioner will get the opportunity to cross-examine the PW-1 as well as to challenge the legality and validity of documents to be relied on and thus, the petitioner will not be prejudiced. Accordingly, I find that there is no error or mistake committed by the learned Trial Court while passing the order dated 04.02.2023.

19. For the aforesaid reasons, I do not find any reasons to make any interference in the impugned Order dated 04.02.2023 passed by the learned

JMFC, Kamrup(M) in C.R. Case No.3974/2019 same is hereby upheld.

20. The criminal petition is, accordingly, stands dismissed.

JUDGE

Comparing Assistant