

GAHC010137972022



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

Case No. : Crl.Pet./713/2022

CHAKRADHAR MEDHI
S/O LATE PHANIDHAR MEDHI
R/O VILL- SANTIPUR, P.O. SIRAJULI, P.S. DHEKIAJULI, DIST. SONITPUR,
ASSAM, PIN-784117

VERSUS

SIMA RANI DEKA
W/O LATE BIREN SAIKIA
R/O VILL- KUSUMTOLA
P.O. KARCHANTOLA, P.S. JAMAGURI, DIST. SONITPUR, ASSAM, PIN-784189

Advocate for the Petitioner : MR. B CHAKRAVARTY

Advocate for the Respondent : MR. S K SINGH

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 16-06-2023

1. Heard Mr. B. Chakravarty, learned counsel for the petitioner. Also heard Mr. S.K. Singh and Mr. B. Pushilal, learned counsel for the respondent.

2. The petitioner has filed this application u/s 482 of the Code of Criminal Procedure, 1973 (Cr.PC for short) with prayer for quashing and setting aside the order dated 08.04.2021 passed by the learned Chief Judicial Magistrate, Sonitpur, Tezpur in N.I. Case No. 81/2017 which was upheld by the learned Sessions Judge, Sonitpur, Tezpur in Criminal Revision No. 12(S-4)/2021 upholding the impugned order dated 08.04.2021. The learned Sessions Judge also passed a direction allowing to recall/re-examine the complainant in N.I. Case No. 81/2017 pending in the Court of the learned Additional Chief Judicial Magistrate, Sonitpur at Tezpur.

3. The respondent instituted a proceeding u/s 138/142 of the Negotiable Instruments Act, 1881 (the N.I. Act for short). It was alleged by the respondent that after acquisition of her land, she received a huge amount of money and was looking for some alternative parcel of land. The petitioner then advised her to purchase a plot of land at Dhekiajuli for 20 lacs and the respondent paid an amount of Rs. 17.50 lacs to the petitioner during the period between 2015-2016. On 06.11.2015 the respondent's husband passed away, but the petitioner failed to provide her with the land as promised and the respondent demanded that the petitioner should return the money which was paid to him. Then the petitioner issued three cheques of denomination of Rs. 2.5 lacs each. The cheques were dated 27.03.2017, 28.03.2017 and 02.04.2017. The cheques were deposited in the Bank but were dishonoured. The petitioner vide Memo dated 27.07.2017 intimated the respondents about the dishonoured cheques due to "insufficiency of funds". Legal notice was issued against the petitioner on 10.07.2017 but as the petitioner failed to pay the money as demanded by the respondent, the respondent instituted proceeding which was registered as N.I. Case No. 81/2017. At the same time, the respondent also instituted a money suit against the petitioner being M.S. No. 7/2019 which

was finally registered as M.S. No. 16/2019. The cause of action of the money suit, M.S. No. 16/2019 is similar to the present complaint Case No. 81/2017. The petitioner contested the money suit and filed written statements.

4. It is contended by the petitioner that the respondent's husband during his life time procured some signatures of the petitioner on some blank papers, which is now being used by the respondent to assert her claim. It is also averred that the petitioner issued two blank cheques without date and without mentioning any amount and these cheques were issued as security. It is also averred that both the parties decided to settle their dispute amicably and they filed a joint petition on 05.07.2019 with prayer to refer the matter to the Lok Adalat to be held on 13.07.2019. In pursuance of their amicable settlement the petitioner also paid a substantial amount on different occasions to the respondent, who did not issue any acknowledgment of receipt but assured the petitioner not to worry as their dispute has been resolved. But the process of settlement failed due to the adamant attitude of the respondent. It is submitted that the petitioner has paid Rs. 2.5 lacs in pursuance of their settlement. A petition was also filed by the petitioner in the month of February, 2020 praying for re-examination of the respondent, on the ground of the amount already paid by him to be brought on record during the cross-examination of the respondent. This petition was dismissed by the learned trial Court vide order dated 09.02.2021. The petitioner then filed a petition u/s 311 Cr.PC praying for further cross-examination of the complainant and the respondent filed an objection and the learned trial Court after hearing both the parties passed the order dated 08.04.2021 rejecting the prayer to recall the respondent. The petitioner then filed a revision petition u/s 397/399 Cr.PC before the learned Sessions Judge, Sonitpur at Tezpur challenging the legality and propriety of the order dated 08.04.2021 and the revision

petition was registered as Criminal Revision No. 12(S-4)/2021. The learned Sessions Judge after hearing both the parties passed the judgment & order dated 28.04.2022 rejecting the prayer for recalling the respondent and upholding the order dated 08.04.2021 passed by the learned trial Court. It is contended that through the concurrent orders both the Courts below failed to appreciate the fact that it is the primary duty to search the truth, and truth being primary concern, every endeavour has to be made to unearth the truth so that the Court could come to a logical decision. This aspect was overlooked by both the Courts below.

5. It is further contended that the provisions of Section 311 Cr.PC is unambiguous and clear in its terms mandating obligations to the Court to call any witness at any stage of trial/enquiry/proceeding. The Court below dismissed the prayer in a mechanical manner with a hyper- technical approach. It was erroneously held that the petitioner has not stated on which point the re-examination was required while dismissing the petition u/s 311 Cr.PC.

6. The learned counsel for the petitioner has relied on the decision of the Hon'ble Supreme Court in:-

- i. *Swapan Kumar Chatterjee v. Central Bureau of Investigation*, reported in (2019) 14 SCC 328;
- ii. *V.N. Patil v. K. Niranjan Kumar & Others*, reported in (2021) 3 SCC 361; and

7. The learned counsel for the respondent laid stress in his argument that the petitioner has not clearly mentioned in the petition, relating to which aspect the cross-examination was to be carried out. The learned counsel for the respondent has also relied on the decision of the Hon'ble Supreme Court in *Swapan Kumar Chatterjee v. CBI* reported in (2019) 14 SCC 328.

8. The impugned order dated 08.04.2021 was passed by the learned Additional CJM, Sonitpur, Tezpur in N.I. Case No. 81/2017 rejecting the Petition No. 1533/2021 u/s 311 Cr.PC. This petition No. 1533/2021 is similar to an earlier petition filed by the petitioner being Petition No. 472/2020. Through both the petitions, the petitioner had prayed to recall the complainant as witness and further cross-examine her on the point of payment of Rs. 2,50,000/- to the respondent by the petitioner. Earlier this plea was not incorporated and the petition was rejected and immediately after two months a petition u/s 311 Cr.PC was filed incorporating the point on which the respondent has to be cross-examined by the petitioner. It was also observed that the petitioner has not mentioned about how the facts of the money suit (M.S. No. 16/2019) filed by the respondent against him is relevant to this case. Relying on the decision of the Hon'ble Supreme Court in *Swapan Kumar Chatterjee v. CBI (supra)*, the learned trial Court rejected the petition u/s 311 Cr.PC holding that it has been held by the Hon'ble Apex Court that filing of such applications for recall of witness u/s 311 Cr.PC should not be encouraged. The learned trial Court also referred to the decision of this Court in *Dibakar Das v. State of Assam in Criminal Petition No. 433/2015* decided on 21.02.2018 wherein it was observed that the Courts should exercise the power u/s 311 Cr.PC sparingly and with circumspection.

9. As the subsequent petition u/s 311 Cr.PC was rejected, the petitioner preferred a revision and vide order dated 27.01.2022 in Criminal Revision Petition No. 12(S-4)/2021, the learned Sessions Judge upheld the impugned order dated 08.04.2021 passed by the Additional Chief Judicial Magistrate, Sonitpur at Tezpur. It was held by the learned Sessions Judge that the petitioner was well aware of the money suit which was filed for recovery of Rs. 17,50,000/- and the respondent could have been cross-examined on the point of receipt of

Rs. 2,50,000/- which was paid by the petitioner, but not having done so, the petitioner preferred this petition u/s 311 Cr.PC. It was held that the petition was filed at the fag end of trial, when his statement was to be recorded u/s 313 Cr.PC. Allowing the petition at this stage may also tantamount to filing up of lacuna. By his own admission, the petitioner has stated that there is no document to prove payment of Rs. 2,50,000/-. So stating it was held by the Sessions Judge that mere oral statement of payment of money without any supporting document, re-examination of the respondent on the point of payment of money and recalling the respondent for further cross-examination does not appear to be necessary for deciding the real issue. It was held by the learned Sessions Judge that the failure of the engaged counsel to examine the respondent concerning payment of money by the petitioner cannot be considered to be a good ground to exercise the power u/s 311 Cr.PC.

10. I would like to reiterate that vide order dated 08.04.2021 Petition No. 1533/2021 u/s 311 Cr.PC was rejected by the learned trial court holding that nothing has been stated in the petition as to “*on what points/issues the defence side want to further cross-examine the complainant.*”

11. It has been held by the Hon’ble Supreme Court in *Swapan Kumar Chatterjee’s* case (*supra*) that:-

“It is well settled that the power conferred under [Section 311](#) should be invoked by the court only to meet the ends of justice. The power is to be exercised only for strong and valid reasons and it should be exercised with great caution and circumspection. The court has wide power under this Section to even recall witnesses for re-examination or further examination, necessary in the interest of justice, but the same has to be exercised after taking into consideration the facts and circumstances of each case. The power under this provision shall not be exercised if the court is of the view that the application has been filed as an abuse of the process of law.

Where the prosecution evidence has been closed long back and the reasons for non-examination of the witness earlier is not satisfactory, the summoning of the witness at belated stage would cause great prejudice to the accused and should not be allowed.

Similarly, the court should not encourage the filing of successive applications for recall of a witness under this provision."

12. It is true that the successive petitions were filed u/s 311 Cr.PC by the petitioner to recall witness after this case was fixed for recording the statement of the petitioner u/s 313 Cr.PC. The petitioner has filed an application at the fag end of the trial. A petition numbered as 472/2020 was also preferred by the petitioner earlier under the same provision of Section 311 Cr.PC which was also rejected. The petition numbered as 1533/2021 is marked as Annexure-F1 and the petitioner has prayed for cross-examination of the respondent, about the dues in the money suit which is very much relevant to the petitioner's case under the N.I. Act. The written objection marked as Annexure-F1 against the petitioner has clearly reflected the denial of the respondent receiving Rs. 2,50,000/- from the petitioner out of Rs. 17,50,000/-. In this case, it is not the accused who will be prejudiced, as the petitioner is the accused in this case.

13. It has been held by the Hon'ble Supreme Court in *V.N. Patil v. K. Niranjan Kumar & Others*, reported in (2021) 3 SCC 361 that:-

"The object underlying [Section 311](#) CrPC 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 significant expression that occurs is "at any stage of any inquiry or trial or other proceeding under this Code". It is, however, to be borne in mind that the discretionary power conferred under [Section 311](#) CrPC has to be exercised judiciously, as it is always said "wider the power, greater is the necessity of caution while exercise of judicious discretion."

14. Although, the case is at the fag end of trial, the petitioner has prayed for re-examination of the witness on a point which according to the petitioner is inevitable and necessary for his defence. The petitioner appears to be aggrieved as his prayer to re-examine

the witness has been rejected. He has ceaselessly prayed for examination of the witness even at the fag end of the trial. At this juncture it cannot be decided conclusively if the cross-examination of the respondent on the point of receipt of Rs. 2,50,000/- from the petitioner may not be a deciding factor of this case.

15. Thus in order to secure the ends of justice the impugned order dated 28.04.2022 passed by the learned Sessions Judge, Sonitpur in connection with Criminal Revision No. 12(S-4)/2021 upholding the order dated 08.04.2021 passed by the learned Additional CJM, Tezpur is hereby set aside with a direction to recall and allow cross-examination of respondent Smt. Sima Rani Deka, in connection with the Money Suit No. 16/2019 only on the point of lending Rs. 17,50,000/- by the respondent to the petitioner, and payment of Rs. 2,50,000/- to the respondent by the petitioner, and the cross-examination has to be limited to this point alone. Every endeavour should be made by the trial Court thereafter to dispose of the original case being N.I. Case No. 81/2017 registered u/s 138/142 of the N.I. Act expeditiously within 1 (one) month.

JUDGE

Comparing Assistant