

GAHC010185522020



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

Case No. : Crl.Pet./609/2020

ANJUMA BEGUM
W/O ABDUL RAHIM @ RAHIMUDDIN SHEIKH, R/O VILL-FOLIMARI PART-I,
P.S.-DHUBRI, DIST-DHUBRI, ASSAM, PIN-783325

VERSUS

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

2:ABDUL HAMID AHMED
S/O KUDDUS ALI AHMED
R/O VILL-I.G. ROAD
DHUBRI
P.S.-DHUBRI
DIST-DHUBRI
ASSAM
PIN-78332

Advocate for the Petitioner : MR. J KALITA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

20.01.2023

Heard Mr. Jitumoni Kalita, learned counsel for the petitioner and also heard Mr. R.K. Jain, learned counsel for the respondent No.2 and Ms. S.H. Borah, learned Addl. P.P. for the respondent No.1.

2. In this petition, under Sections 482 of the Code of Criminal Procedure, the petitioner, Smti. Anjuma Begum has put to challenge the judgment and order, dated 02.07.2020 passed by the learned Addl. Sessions Judge, Dhubri, in Criminal Revision Petition No. 03/2020, and the orders dated 01.08.2019 and 07.12.2019, passed by the learned Addl. Chief Judicial Magistrate, Dhubri, in C. R. Case No. 2712/2018, under section 138 N.I. Act. It is to be mentioned here that the learned Addl. Chief Judicial Magistrate, Dhubri, vide impugned order, dated 01.08.2019, has dispensed with the cross-examination of complainant's witness and vide impugned order dated 07.12.2019, the learned Addl. Chief Judicial Magistrate dismissed the petition No.6052/2019, filed by the petitioner to for giving an opportunity to cross-examine the witnesses of the complainant and vide impugned judgment and order dated 02.12.2020, the learned Addl. Sessions Judge, Dhubri has dismissed the revision petition preferred by the petitioner for setting aside the impugned order dated 07.12.2019.

3. The factual background, leading to filing of the present petition, is briefly stated as under:

“The respondent No. 2 -Md. Abdul Hamid, as complainant had instituted a C.R. Case, No.2712/2018, under section 138 N.I. Act read with section 420/406 IPC against the petitioner- Smti. Anjuma Begum as an accused, in the court of learned Addl. Chief Judicial Magistrate, Dhubri for dishonour of a cheque which has allegedly been issued by the petitioner for a sum of Rs.3,18,119/ (Rupees-three lakhs eighteen

thousand one hundred nineteen rupees) in favour of the respondent No.2. Upon the said complaint the learned Addl. Chief Judicial Magistrate, Dhubri has taken cognizance and issued process to the petitioner. Accordingly, the petitioner has entered appearance before the learned court below and contested the complaint and pleaded not guilty to the offence. During the course of hearing petitioner could not appear before the learned court below on 01.08.2019, account of illness of her mother, and her engaged counsel has filed a petition before the learned court below, but, the learned court below has dispensed with the cross-examination of complainant's witnesses and posted the case for examination of the petitioner under section 313 Cr.P.C. and defence evidence. Thereafter, the petitioner has preferred an application, No.6052, dated 07.12.2019, before the learned court below and the learned court below was pleased to dismiss the same. Thereafter, the petitioner has preferred a criminal revision petition No. 03/2019, before the court of learned Addl. Sessions Judge, Dhubri, but after hearing both sides, vide impugned judgment and order dated 02.07.2020, the learned Addl. Sessions Judge, Dhubri has dismissed the revision petition."

4. Being highly aggrieved, the petitioners have preferred this present petition, under section 482 Cr.P.C. and contended to set aside the impugned judgments and orders on the following grounds:-

- (i) That, the impugned order dated 02.07.2020, passed by the learned Addl. Sessions Judge, Dhubri in Criminal Revision Petition No.03/2020 is not maintainable in law as well as on facts;
- (ii) That, the learned Addl. Sessions Judge, has failed to consider the

fact that on the relevant date, i.e. 01.08.2019, the mother of the petitioner was suffering from illness and on account of the same she could not appear before the learned court below and her engaged counsel had file a petition to that effect, and without application of mind, whimsically and mechanically dismissed the revision petition.

- (iii) That, the learned Add. Sessions Judge, Dhubri has misconceived the revision petition as the second revision petition without going through the petition dated 07.12.2019, filed by the petitioner, where not a single word was used to review or recall the order dated 01.08.2019. But, the learned court below has failed to apply its judicial mind.
- (iv) That, the learned trial court as well revisional court has failed to consider the fact that the respondent No.2 has no cause of action to file C.R. Case No. 2712/2018, as there was no legally enforceable debt against the petitioner, which is crystal clear from the from the complaint petition itself, but the learned courts below has failed to consider this aspect and mechanically passed the impugned order dated 02.07.2020.

5. Mr. Jitumoni Kalita, the learned counsel for the petitioner, besides reiterating the points raised in the petition, also submits that the learned court below had ignored the provision of section 313 Cr.P.C. and though in the petition dated 01.08.2019, no such section is mentioned yet, mere quoting or mis quoting of such provision does not invalidate an order in the event it is found that a power therefore, exist. Mr. Kalita has referred one case law **M.T. Khan and Others vs. Govt of A.P. and Others**, reported

in **(2004) 2 SCC 267**. Mr. Kalita further submits that the court has ample power under section 311 Cr.P.C. to permit the petitioner to cross-examine the witness of the respondent after recalling it, for a just decision of the case, while the petitioner has challenged the very existence of a legally enforceable debt between her and the respondent, but, the learned court below has failed to exercise its power which caused prejudice to the petitioner and that her right to fair trial is thereby violated. Mr. Kalita has referred one case law **Rajaram Prasad Yadav vs. State of Bihar and Another** reported in **(2013) 14 SCC 461**, in support of his above submission. Mr. Kalita further submits that the petitioner's counsel has filed a petition before the learned court below showing the cause of absence of the petitioner on date fixed and her counsel also could not cross-examine the witnesses in absence of instruction of the petitioner and the same eschewed consideration of both the learned court below and as such the impugned judgment and order of the learned Addl. Sessions Judge, Dhubri dated 02.07.2020, and the impugned orders dated 01.08.2019, and 07.12.2019, passed by the learned Addl. Chief Judicial Magistrate, Dhubri, in C. R. Case No. 2712/2018, under section 138 N.I. Act, failed to withstand the legal scrutiny and therefore it is contended to allow this petition.

6. On the other hand, Mr. R.K. Jain, learned counsel for the respondent No.2 submits that the impugned order dated 02.07.2020, so passed by the learned Addl. Sessions Judge, Dhubri in Criminal Revision Petition No.03/2020, and also the impugned orders dated 01.08.2019, and 07.12.2019, passed by the learned Addl. Chief Judicial Magistrate, Dhubri suffer from no infirmity or illegality, as several dates have been given to the petitioner to cross-examine the witnesses and she has failed to avail her

right and as such there is no merit in this petition, and therefore, it is contended to dismiss the same. Mr. Jain further submits that the power under section 482 Cr.P.C. can be invoked sparingly and only in exceptional circumstances and as such exceptional circumstances shown to have been existed here in this case the petition is not maintainable. Mr. Jain has referred one case law **Ratish Babu Unnikrishnan vs. The State Govt. of NCT Delhi, Criminal Appeal No. 694-695 of 2022**, arising out of **SLP(Crl.) Nos. 5781-5782 of 2022**, in support of his submission.

7. Having heard the submissions of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record. Also, I have carefully gone through the impugned judgment and order dated 02.07.2020, so passed by the learned Addl. Sessions Judge, Dhubri in Criminal Revision Petition No.03/2020, and also the impugned orders dated 01.08.2019, and 07.12.2019, passed by the learned Addl. Chief Judicial Magistrate, Dhubri in C.R. Case No. 2712/2018, and the case laws referred by the learned Advocates for both the parties.

8. Before delving a discussion into the controversy at hand, it would be beneficial to reproduce the impugned order dated 01.08.2019, so passed by the learned Addl. Chief Judicial Magistrate in C.R. Case No. 2712/2018. The said order read as under:-

01.08.2019:-

“Complainant is present. Accused is absent and her engaged advocate has filed a petition and stated that accused could not remain present in the court today due to illness of her mother.

Heard. Perused the record.

From record, it appears that accused is remaining absent in the court on this or that grounds and delayed cross-examination seeking adjournment through her advocate.

It is seen that defence advocate is not ready to cross-examine witness.

Hence cross-examination of witness by defence side is dispensed with. Complainants evidence is closed.

Fix- 16.08.2019 for S.D.

Sd./
Addl. Chief Judicial, Magistrate,
Dhubri,

9. A careful perusal of the aforesaid order reveals that on the date fixed for cross-examination of the witnesses the petitioner remained absent and a petition was filed by the learned counsel for the petitioner showing the cause of absence of the petitioner on that day on account of illness of her mother. But, despite the learned court below has dispensed with the cross-examination of the witnesses of the complainant, without considering the genuineness of the ground of her absence. The petitioner in her petition has categorically stated that due to her absence and due to lack of instruction her counsel could not cross-examine the witnesses. Despite, the learned court below has dispensed with the cross-examination of the witnesses of the respondent. The learned court below also failed to exercise the power under section 311 Cr.P.C., while the petitioner on 07.12.2019, has filed a petition for giving her an opportunity to cross-examine P.W.1. And the learned Addl. Sessions Judge has also failed to consider the

aforementioned aspect instead branded the petition as second revision petition.

10. In the matter of **Natasha Singh V. CBI (State) reported in 2013 AIR SCW 3554, Hon'ble** Supreme Court has held in paragraph No. 9 as under:-

“Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right.”

11. In the case of **Dharam Pal vs. State of Haryana**, reported in **(2016) 4 SCC 160**, Hon'ble Supreme Court has held that accused has a fundamental right to fair trial for which there is a pre-condition of fair investigation, which is denied in a given case as a chance to cross-examination of prosecution witnesses are not provided to the accused.

12. The High Court of Chhattisgarh in **Manish Sonkar, vs. State of Chhattisgarh CRMP No. 74 of 2022**, dated 25/02/2022, also held that right to cross-examination is a part of right to fair trial which every person has in the spirit of right to life and personal liberty.

13. The legal proposition that can be crystallised from the aforesaid discussion is that right to cross-examination is a part of right to fair trial which every person is entitled to in the spirit of right to life and personal liberty under Article 21 of the constitution of India.

14. If the impugned judgment and orders of the learned courts below are

examined on the touchstone of the principles laid down in the case of **Dharam Pal** (supra), this court afraid the same withstand the test of legal scrutiny. The right of the petitioner to fair trial stands violated here in this case, on account of denial of her right to cross-examination of the respondent's witness. This being the factual and legal position, it is the duty of this court to uphold such right by interfering with the same.

15. I have carefully considered the submission of learned counsel for the respondent and also gone through the case law **Ratish Babu Unnikrishnan** (supra) referred by him at the time of hearing. But, in view of above discussion and findings I am unable to record concurrence to the same. While right to fair trial of the petitioner stands violated, this court is duty bound to interfere with the impugned orders by invoking the power conferred under section 482 Cr.P.C.

16. On the other hand, I find sufficient force in the submission of learned counsel for the petitioner and the case law referred by him also strengthened his submission. Accordingly, I record concurrence with the same. The learned Addl. Chief Judicial Magistrate ought to have allowed the petition No.6052/2019, dated 07.12.2019, filed by the petitioner for giving an opportunity to cross-examine the witnesses of the complainant by recalling them, instead of dismissing the same, invoking the provision of section 311 Cr.P.C., the scope and object of which is discussed by Hon'ble Supreme Court in the case of **Manju Devi v. State of Rajasthan** reported in **AIR 2019 SC 1976** as under:-

“15. The scope and object of the provision is to enable the court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised

judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as "any Court", "at any stage", or "or any enquiry, trial or other proceedings", "any person" and "any such person" clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is, thus, no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case."

17. In the result, I find sufficient merit in the present Criminal Petition, and accordingly, the same stands allowed. The impugned judgment and order, dated 02.07.2020, passed by the learned Addl. Sessions Judge, Dhubri, in Criminal Revision Petition No. 03/2020, and the orders dated 01.08.2019 and 07.12.2019, passed by the learned Addl. Chief Judicial Magistrate, Dhubri, in C. R. Case No. 2712/2018 stands set aside and quashed. The learned Addl. Chief Judicial Magistrate, Dhubri is directed to allow the petitioner to cross-examine the witness of the respondent and thereafter, proceed to disposing of the case. The parties have to bear their

own costs.

JUDGE

Comparing Assistant