



THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Petition No.925/2019

DINDAYAL AGARWALA
S/O LATE SHYAM SUNDAR AGARWALA,
R/O 3-D KAMALA RESIDENCY,
3/2 VENKAT RAMAN ROAD, R.S. PURAM,
COIMBATORE, P.S.-B.2, R.S. PURAM,
DIST-COIMBATORE, TAMIL NADU,
PIN-641002, P/A C/O AMARCHAND INDERCHAND,
OPPOSITE TO BAZORIA MARKET,
S.R.C.B. ROAD, FANCY BAZAR,
DIST-KAMRUP(M), ASSAM, GUWAHATI-781001

..... Petitioner.

-Versus-

1. THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM.
2. RAMAWATAR AGARWALA
S/O LATE SHYAM SUNDAR AGARWALA
R/O FLAT NO. 3081 (8TH FLOOR)
BLOCK NO. 3, TVH LUMBANI SQUARE
127 A BRIKLIN ROAD
PURSWAKAM, NEAR MEGHALA THEATRE BUS STAND
P.S.-VEPPER, DIST-CHENNAI (TAMIL NADU)
PIN-600007.
3. SRI SHIW KUMAR AGARWALA
S/O LATE SHYAM SUNDAR AGARWALA
R/O SADGURU SADAN
PLOT NO 344 16-11-511 D-344
MOOSARAM BAG SHALIVANA NAGAR
DILSUKHNAGAR (NEAR TV TOWER)
HYDERABAD

PS - MALAKPET
DIST- HYDERABAD (TELANGANA)
PIN CODE 50003.

..... Respondents.

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

Advocates for the petitioner : Mr. H. Baruah,
Advocate for the respondent s : Mr. P. Borthakur, Addl. PP,
Assam.

Date of Hearing :- 11.10.2023

Date of Order :- 07.11.2023.

**ORDER
CAV**

Heard Mr. H. Baruah, learned counsel for the petitioner. Also heard Mr. P. Borthakur, the learned Addl. P.P. Assam.

2. In this petition, under section 482 Cr.P.C. the petitioner, namely, Shri Dindayal Agarwal, has put to challenge the order, dated 12.03.2019, passed by the learned Sessions Judge, Kamrup (M), Guwahati in Criminal Revision No.88/2019 and also the order dated 20.09.2018, in petition No.1293, dated 20.06.2018, arising out of C.R. Case No. 1699/2017, passed by the learned Judicial Magistrate 1st Class, Kamrup (M) Guwahati.

3. The background facts leading to filing this petition is briefly stated as under:-

"The petitioner, as complainant, had filed one complaint case, being C.R. Case No.1699/2017, under sections 120B/418/420/34 IPC, before the learned Judicial Magistrate 1st Class, Kamrup (M), Guwahati. In the said complaint, the petitioner had examined as many as three witnesses, including himself, before charge. Thereafter, the petitioner had filed one petition, being petition No. 1293, dated 20.06.2018, under sections 244/311 Cr.P.C. read with section 165 of the Evidence Act, for calling additional three witnesses, namely, Shri Kishor Kamti, Mahesh Agarwal, Ramesh Agarwal @ Tony, for evidence before charge, before the learned Judicial Magistrate 1st Class. Then hearing both the parties, the learned Magistrate, vide order dated, 20.09.2019, dismissed the same on the ground that in the petition, dated 20.06.2018, the petitioner had mentioned that the accused of the complaint, with the aid and assistance of the witnesses mentioned herein above, committed criminal conspiracy under section 120B IPC and also committed the offence of cheating with knowledge that they would cause wrongful loss to the complainant and that under the criminal law a person is not allowed to make a choice to examine an accused by violating the established rules of procedure and that the power under section 311 Cr.P.C. cannot be exercised to defeat the cause of justice.

Thereafter, the petitioner had unsuccessfully challenged the said order before the learned Sessions Judge, Kamrup (M) in

Criminal Revision petition No. 88/2019. The learned Sessions Judge also, in the impugned order, dated 12.03.2019, held that the impugned order dated 20.09.2018, passed by the learned Magistrate, suffers from no infirmity, irregularity or illegality as the petitioner had alleged that the said witnesses have aided and abetted the opposite parties in committing the alleged crime and that the petitioner ought to have arrayed them as an accused since they have aided and abetted the opposite parties in committing the alleged offences and therefore, if the witnesses are allowed to be examined by the petitioner, that will amount to directing the witnesses to adduce evidence against themselves and the same is impermissible under the law."

4. Being aggrieved the petitioner has approached this court by filing the present petition on the following grounds:-

- (i) That, the learned court below has failed to appreciate the provision of section 244(1) and the first part of section 311 Cr.P.C.;
- (ii) That, the learned courts below had acted arbitrarily and mechanically considered the objection petition of the respondent and dismissed the petition and that the respondents have no right to raise the defence plea before framing of charge and the learned revisional court had failed to consider this aspect;
- (iii) That, the petitioner had specifically mentioned the names of three additional witnesses in paragraph No. 15 of the

complaint petition and for a just decision of the case the petitioner had filed the petition to summon those witnesses and during examination P.W.3 had categorically stated their names and instead of suo-moto exercising the power under section 244 and 311 Cr.P.C. the learned courts below had rejected the petition filed by the petitioner arbitrarily.

- (iv) That, denial to summon material witnesses amounts to denial of fair trial of the petitioner and therefore, the impugned orders, so passed by the learned courts below had failed to withstand the legal scrutiny.
- (v) That, the learned court below had unreasonably held that the petitioner should have arraigned the said witnesses as accused in the case and the observation are not tenable in the eye of law. Therefore, it is contended to allow the petition.

5. Mr. H. Baruah, the learned counsel for the petitioner, submits that both the impugned orders suffers from manifest illegalities and as such, the same are liable to be set aside. Mr. Baruah, submits that in order to arrive at a just decision of the case, examination of the three witnesses are very much necessary, and therefore, the petitioner had preferred the petition to summon the additional witnesses, by exercising the power under section 244 and 311 Cr.P.C., but the learned court below had failed to consider the same. Mr. Baruah further submits that the P.W.3 had categorically mentioned in the petition the names of the said three witnesses and despite such evidence, the learned court below had

failed to appreciate the same. Therefore, Mr. Baruah has contended to allow this petition.

6. Per contra, Mr. S. Agarwal, learned counsel for the respondents has supported both the impugned orders. Mr. Agarwal, referring to paragraph No. 2 of the petition, submits that the petitioner had made specific allegations against all the three additional witnesses and as such there is no scope for summoning them as witness and the learned courts below had rightly rejected the petition. Mr. Agarwal, therefore, contended to dismiss the petition.

7. On the other hand, Mr. Borthakur, learned Addl. P.P. also, referring to the paragraph No.2 of the petition, submits that in view of specific allegation against the additional witnesses, there is no scope for summoning them as witness and in fact they should have been made accused in the complaint and having summoned them as witness, they cannot be asked to depose against themselves. Mr. Borthakur, therefore, contended to dismiss the petition.

8. 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 gone through the relevant provisions of law.

9. It is not in dispute that the Complaint Case is pending before the learned Judicial Magistrate 1st Class, Kamrup (M) Guwahati in the stage of evidence before the charge. It is also not in dispute that the petitioner had examined three witnesses, including himself, in the said case before charge. It is also not in dispute that after the list of witnesses exhausted, the petitioner had filed the petition to summon

the additional witnesses, who have been named by P.W.3 in his evidence, as per the provision of section 244 and 311 Cr.P.C. and 165 of the Evidence Act. Section 244 Cr.P.C. provides for taking of all such evidence as may be produced in support of the prosecution. Though the section does not provide for additional list of witnesses, yet, discretion is vested upon the Magistrate to entertain supplementary list of witnesses. And while exercising the discretion the Magistrate must be judicious for the advancement of cause of justice. (See- **Sayeeda Farhana Shamin vs. State of Bihar** reported in **(2008) 8 SCC 218.**)

10. In the case in hand the petitioner had, after the list of witnesses in the complaint petition exhausted, furnishing the supplementary list of three witnesses, prayed for calling them along with some documents. The names of these three witnesses find mention in the paragraph No. 15 and 16 of the complaint. Merely because of some averments are made here and there in the petition No. 1293, dated 20.06.2018, for calling them as witness, to the considered opinion of this court, cannot be a disqualification for them, from being a competent witness, while there is no intention on the part of the petitioner /complainant to make them an accused and on such count the bar of Article 20(3) of the Constitution of India, to the considered opinion of this court, cannot apply in this case, though the learned courts below have, however, rejected the petition on account of the allegations made in the petition against the said witnesses. The ground so assigned for rejection of the petition by the learned trial court and also the ground so assigned by the learned Sessions Judge, while upholding the impugned order of the

trial court, to the considered opinion of this court, failed to withstand the legal scrutiny in as much as the same appears to be too technical and contrary to the right to fair trial of the petitioner.

11. It is to be mentioned here that 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. Thus, under no circumstances can a person's right to fair trial be jeopardized.

12. Adducing evidence in support of the prosecution is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. In the case of **Zahira Habibullah Sheikh & Anr. vs. State of Gujarat & Ors., AIR 2006 SC 1367**; Hon'ble Supreme Court had held that

"Failure to accord fair hearing, either to the accused or the prosecution, violates even minimum standards of due process of law....."

13. Again in the case of **Himanshu Singh Sabharwa Vs. State of M.P. & Ors**, reported in **MANU/SC/1193/2008**, Hon'ble Supreme Court observed that if fair trial envisaged under the Code is not imparted to the parties and the court has reasons to believe that prosecuting agency or prosecutor is not acting in the requisite manner

the court exercise its power under Section 311 of the Criminal Procedure Code or under Section 165 of the Indian Evidence Act, 1872 to call in for the material witness and procure the relevant documents so sub serve the cause of justice.

14. Since in the case in hand the petitioner had been denied to examine additional three witnesses, his right to fair trial stands violated and on such count, both the impugned orders, so passed by the learned courts below, failed withstand the legal scrutiny. And therefore, the same are liable to be set aside. Accordingly, the same stands set aside and quashed. The learned Judicial Magistrate 1st Class, Kamrup(M), Guwahati is directed to hear both the parties a fresh upon the Petition No. 1293, dated 20.06.2018, and thereafter to pass a reasoned order, keeping in mind the right to fair trial of the petitioner and the mandate of section 244/311 Cr.P.C. and of section 165 Evidence Act.

15. In terms of above this Criminal Petition stands disposed of leaving the parties to bear their own costs. Interim order passed on 14.08.2019, stands vacated.

JUDGE

Comparing Assistant