

GAHC010072322024



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

Case No. : Crl.Pet./437/2024

DEEP MONI MAZUMDAR
S/O LATE DEBA KANTA MAZUMDAR, HOUSE NO. 31, DOVE VILLA, FIRST
FLOOR, B-2, BANIPPUR PATH, KAILASH NAGAR, BELTOLA TINIALI, P.S.-
BASISTHA, GUWAHATI-28, DIST-KAMRUP (M), ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

Advocate for the Petitioner : MR. R DE

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA

ORDER

Date : 03.05.2024

Heard Mr. R. De, learned counsel for the petitioner. Also heard Mr. D. Das,
learned Additional Public Prosecutor for the State respondent.

2. This is an application filed under Section 482 of the Code of Criminal Procedure, 1973 challenging the impugned order dated 21.09.2022 passed by the learned Court of Munsiff No.4 cum Judicial Magistrate First Class, Kamrup (M), Guwahati in Complaint Case No.2044^C of 2021, whereby, dismissing the complaint filed under Section 138 *read with* Section 142 of N.I. Act, 1881.

3. The brief facts of the case is that; the petitioner as a complainant had filed a Complaint Case under Section 138 *read with* Section 142 of N.I. Act, 1881 against one Sri Sarat Baishya who is a Government employee having his residence at Rudreswar, P.O.- Rangmahal, North Guwahati. It is stated that Sri Sarat Baishya is the owner of some plots of land at North Guwahati and the petitioner had advanced an amount of Rs.4,50,000/- (Rupees four lakhs fifty thousand) only for purchasing land from him. However, the sale did not materialize, and the said vendor had issued a cheque amounting to Rs.4,50,000/- (Rupees four lakhs fifty thousand) only towards refund of the amount which was dishonored on presentation and hence, the proceeding under Section 138 *read with* Section 142 of N.I. Act was initiated before the Court of learned Chief Judicial Magistrate, Kamrup (M), Guwahati. Later the Complaint Case No.2044^C/2021 was transferred for disposal to the Court of learned Munsiff No.4 cum Judicial Magistrate First Class, Kamrup (M), Guwahati. On the day of receipt of the case i.e on 06.08.2021, the learned Magistrate was on leave and the next date was fixed on 16.08.2021 for necessary orders.

4. During that relevant period, due to outbreak of Covid-19 pandemic, the functioning of the Courts was affected. On 16.08.2021, the case was deferred on account of Covid-19 and the next date was fixed on 01.11.2021. However, from 01.11.2021 onwards, again the Court work was adjourned due to surge of

Covid-19 and accordingly, the next date was fixed on 18.11.2021. On 18.11.2021, the petitioner had appeared and a petition No.2919/21 was filed seeking amendment of the complaint petition. However, on the next date i.e on 01.02.2022, the matter was adjourned due to outbreak of Covid-19.

5. It is further stated that since the Court was functioning in a restricted manner and there was a communication gap with the counsel. Subsequently, normal functioning of the Courts were restored, but, the petitioner was unaware of the same and his engaged counsel did not represent him on three consecutive dates i.e. 28.03.2022, 24.05.2022 and 19.07.2022. More so, the petitioner being the kidney patient suffered from Right Renal Cell Carcinoma and Right Lower Ureteric Calculus and he had undergone Nephrectomy i.e. surgery for removal of a part of his kidney in the year 2013, for which his entire family was very traumatic for him. Also, the petitioner was infected with covid-19 twice and he was kept quarantine at Sonapur Covid Centre. Further, the petitioner was advised with restricted movement during the pandemic period and thus, in such a situation he could not make any contact with his engaged counsel and as a result, he was completely unaware about the initiation of the proceeding. It has been also stated that, the mother of the petitioner was also suffering from Dementia since long and was also hospitalized in Psychiatric Ward. Apart from that she is also suffering from old age ailments.

6. The petitioner was totally unaware about the status of the case and only in the first week of February, 2024, he approached his engaged counsel to make an enquiry about the case, wherein, he was informed that since there was no correspondence with the petitioner during Covid-19, he had not taken any steps in the case. Thereafter, checking on the official website, it came to the

knowledge of the petitioner that the case was dismissed for non-prosecution on 21.09.2022. Then, he obtained the certified copy of the order-sheet on 28.02.2024 and after collecting the relevant files and after consultation with his engaged counsel, the present petition has been preferred praying for setting aside and quashing of the order dated 21.09.2022 passed by the learned Court of Munsiff No.4 cum JMFC, Kamrup (M), Guwahati.

7. It is submitted by the learned counsel for the petitioner, Mr. De, that there was no intentional, negligence, and laches on the part of the petitioner. The petitioner could not appear before the learned Trial Court only due to the reasons beyond his control, particularly, because of his medical ailments and that of his mother; the unforeseen Covid-19 pandemic and due to loss of communication with his Advocate. But, the learned Trial Court dismissed the petition for non-prosecution considering the ground of absence of the petitioner on three consecutive dates i.e. 28.03.2022, 24.05.2022 and 19.07.2022. He also submits that in the case under Section 138 *read with* Section 142 of N.I. Act, 1881, where, the Magistrate has no power to restore the complaint once it is dismissed on default. And, because of the limitation prescribed, the petitioner is unable to re-file the case and having no other alternative, he was compelled to approach before this Court and accordingly, he prays for setting aside and quashing of the impugned order dated 21.09.2022 passed by the learned Trial Court.

8. He further submitted that before passing order of dismissal for non-prosecution, the learned Trial Court ought to have considered the nature of the offence and the materials produced by the complainant and ought not to have presumed that the petitioner was not interested in proceeding with the case.

Hence, the impugned order dated 21.09.2022 passed by the Trial Court is liable to be set aside and quashed and the complaint should be restored for the interest of justice.

9. In addition to his submission, Mr. De, the learned counsel for the petitioner relied on the following Judgments:-

- i). **2011 (1) Bankmann 193 (Del) [Ms. Number One Advertisement & Marketing Co Vs. State of Delhi & Anr.];**
- ii). **2002 Crl.L.J 2601 (AP) [J.K. International vs. State of Delhi];**
- iii). **2000 Supreme (Del) 599 [Galaxie Plywood Industries Pvt. Ltd. vs. Vijay Kumar];**
- iv). **2003 Crl.L.J 1410 (AP) [Continental Papers Ltd. Vs. Darshan Print Pack Pvt. Ltd.];**
- v). **2018 Supreme (P & H) 2405 [Smti Meera Rani vs. M/s. Surya Industries & Anr.];**
- vi). **2003 Crl.L.J 3395 (Del) [Kalpana Tyagi vs. Sneh Lata Sharrna];**
- vii). **2001 Crl.L.J 2801 (Kar) [Mohammad Ikyas Ahmed vs. Abdul Subhan];**

10. Relying on the above judgments, it is submitted by the learned counsel for the petitioner that if the complaint under Section 138 is dismissed for default, the Magistrate becomes *functus officio* and he has no inherent power to restore the complaint. However, under Section 482 of Cr.P.C., the High Court being not guided by mere technicalities, can grant relief in order to achieve the ends of justice since there is no remedy available for the complainant to file a second complaint when dismissed for default in view of the limitations prescribed.

11. In this context, Mr. Das, learned Additional Public Prosecutor has submitted that the learned Trial Court had rightly passed the order of dismissal after considering the absence of the petitioner for three consecutive dates. He further submitted that it was within the knowledge of the complainant/petitioner regarding the pendency of the case and also it was the duty of the complainant to enquire about the status of the case and should have appeared before the Court through his engaged counsel after coming to know about the normal functioning of the Court proceeding.

12. After hearing the submissions made by the learned counsels for both sides, I have perused the case record and it is seen that till 18.11.2021, the complainant was present through his engaged counsel and on the next date fixed i.e. 01.02.2022, the Court work was suspended due to surge of Covid-19 pandemic. Further, the case was again listed on 28.03.2022 when the complainant remained absent and he also remained absent on other two consecutive dates i.e. on 24.05.2022 and 19.07.2022 and finally on 21.09.2022, the case was dismissed by the learned Trial Court on the ground that the complainant was absent without any steps since 28.03.2022, and came to a conclusion that it was safe to presume that the complainant had lost interest to proceed further in the case and accordingly, dismissed the case for non-prosecution. However, from the annexure appended in the petition, it is seen that the petitioner has undergone operation of kidney in the year 2013. Thus, it cannot be denied that a kidney patient had to follow some restriction as well as his movement was restricted due to outburst of covid-19 and also from the other annexed document, it is seen that his mother was suffering from Dementia and was also hospitalized in Psychiatric Ward and apart from that she was also suffering from old ailment diseases.

13. Further, from the submissions made by the learned counsel for the petitioner, it is seen that the petitioner was not aware about the restoration of the Courts functioning after the Covid-19 and plea cannot be outrightly rejected as the entire Courts works were hampered due to surge of Covid-19. It is also seen that the complaint was filed for dishonor of cheque amounting to Rs.4,50,000/- (Rupees four lakhs fifty thousand) only which was claimed to be given as an advance amount to one Sri Sarat Baishya for purchasing the land. But, the learned Court below had dismissed the complaint petition for non-prosecution. And, having no alternative remedy the petitioner filed this petition for restoration of the complaint which was dismissed for default. Further, from the order sheet annexed along with the petition, it is seen that, the summon was not send against the alleged accused, as cognizance was not even taken by the learned Court below and thus, the question of acquittal of the accused does not arise in which event, the petitioner would have the option for filing an appeal.

14. Considering all the facts and circumstances of the case as well as interest of justice, I find that one more chance may be given to the present petitioner/complainant to continue the proceeding which has been filed by him under Section 138 *read with* Section 142 of N.I. Act, 1881. Accordingly, the impugned order dated 21.09.2022 passed by the learned Court of Munsiff No.4 cum Judicial Magistrate First Class, Kamrup (M), Guwahati in Complaint Case No.2044^c of 2021 is hereby set aside and quashed and the Complaint Case No.2044^c/2021 is hereby restored with a direction to the petitioner to appear before the learned Trial Court on or before **18.05.2024** and also directed to remain present in the proceeding.

15. In terms of above, this criminal petition stands disposed of.

16. Let a copy of this order be served to the Court of learned Court of Munsiff No.4-cum-Judicial Magistrate First Class, Kamrup (M), Guwahati.

JUDGE

Comparing Assistant