

GAHC010146212024



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

Case No. : Crl.Pet./865/2024

ASHRAFUL ALOM
S/O DARAG ALI SK
R/O SATER ALGA,
P.S. GAURIPUR
DIST. DHUBRI, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED BY THE PP, ASSAM

Advocate for the Petitioner : M. HOSSAIN, MS. A SULTANA

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

ORDER

Date : 11-09-2024

Heard Mr. MH Laskar, learned counsel for the petitioner, Ashraful Alom, who has filed this application under Section 528 of Bharatiya Nagarik Suraksha Sanhita, 2023/Section 482 read with Sections 397/401 Code of Criminal Procedure, 1973 and read with Article 227 of the Constitution of India

challenging the order dated 24.06.2024, passed by the learned Addl. Chief Judicial Magistrate, Kokrajhar rejecting the prayer of zimma of 2 (Two) cows to the petitioner in connection with Kazigaon Police Station Case No. 19/2024 under Sections 379/411/34 of the Indian Penal Code, 1860, read with Section 13(1) of the Assam Cattle Preservation Act, 2021.

2. Also heard Mr. D. Das, learned Addl. Public Prosecutor for the State respondent.

3. The order dated 24.6.2024 reflects that a petition seeking zimma of cattle was filed by the petitioner being Petition No. 406/2024. This petition was rejected by the learned Additional CJM, Kokrajhar observing that as per Section 11 (5), when the Magistrate is satisfied that there is enough materials to presume that the prima facie case under this Act has been committed or intention to commit such an offence etc. vehicle / conveyance etc. can be released except cattle. The petition was thereby rejected quoting the bar under Section 11(5) of the Assam Cattle Preservation Act.

4. Learned counsel for the petitioner has relied on the decision of this Court in *Abdul Kadir vs. The State of Assam* wherein vide order dated 18.06.2024 in Criminal Petition No. 619/2023, it has been observed that : -

“27) In the instant case, the petitioner Abdul Kadir has not been facing any accusation in the pending criminal proceeding in which the cattle have been seized. He has claimed himself to be the owner of the seized cattle and have produced certain documentary evidence in support of his claim. However, the learned Additional Chief Judicial Magistrate, Karimganj, instead of examining the said

documents and coming to prima-facie finding regarding the claim of the petitioner, had directed the Investigating Officer to ascertain the ownership of seized cattle. On failure of the Investigating Officer to ascertain the ownership of the seized cattle, the learned Additional Chief Judicial Magistrate, Karimganj has rejected the prayer for custody to the petitioner, citing absolute embargo, in giving such custody to the owner, under Section 11(5) of the aforesaid Act.”

“30) Accordingly, it is hereby held that, in an appropriate case, there is no embargo under Assam Cattle Preservation Act, 2021 in giving zimma of the seized cattle to the owner of the said cattle during the pendency of a criminal proceeding instituted in respect of the alleged offence under the said Act. It is also clarified that the Section 11(5) and Section 11(7) of the Assam Cattle Preservation Act, 2021 puts no such absolute embargo on the Court to give zimma of the seized cattle to its owner.”

5. On the contrary, learned Additional Public Prosecutor has raised objection stating that no documents ascertaining the ownership of cattle has been submitted by the petitioner. The Gaonburah certificate is not reliable. It is not discernible from the certificate as to from what source the Gaonburah had issued the certificate that the petitioner is the owner of the cattle. It is submitted that during the course of trial, the ownership of cattle can be ascertained, but at this juncture this petition is liable to be dismissed.

6. In reply, the learned counsel for the petitioner has relied on the decision of

this Court in *Mujibur Rahman vs. The State of Assam* wherein vide order dated 22.05.2024 in Crl.Rev.P./143/2024, it has been observed that : -

“24. Accordingly, the following determinations are recorded in terms of the discussion and reasons given hereinabove above.

- I. The prescription made under sub section 5 of Section 11 of the Act, 2021 is relatable only to a situation/stage when the authorised officer(s) exercises its power under sub sections 3 of Section 11 of the Act, 2021 or under sub section 14 of Section 7 of the Act, 2021 and reports the same to the Judicial Magistrate First Class in terms of sub section 4 of Section 11 of the Act, 2021.*
- II. Chapter XXXIV shall be applicable to a proceeding under the Act'2021. Therefore, when an application under Section 451 or 457 of Cr.P.C. is made, such application(s) is to be determined in terms of the law laid down by the Hon'ble Apex Court in the case of Sundarbhai Ambala (supra).*
- II. A revision either under Section 401, 397 or 482 of Cr.PC. Shall not be maintainable against an order passed in exercise of power under sub section 5 of Section 11 of the Act, 2021 and appropriate remedy shall be an appeal under Section 12 of the Act, 2021.*
- IV. No appeal shall be maintainable under section 12 of the Act, 2021 when a determination is made in an application filed under Section 451 or Section 457 of the Cr.P.C. as the case may be.*

V. *A Magistrate in exercise of power under Sub Section 5 of Section 11 of the Act'2021 is empowered to hand over custody of the seized materials (except cattle), even when, the Magistrate is satisfied that a prima facie case is made out."*

7. I have considered the submissions at the bar with circumspection. I find force in the argument of the learned counsel for the petitioner. I have also relied on the decision of this Court in Abdul Kadir's case (supra) as well as the decision of this Court in Mujibur Rahman's case (supra).

8. The impugned order dated 24.06.2024 passed by the Additional Chief Judicial Magistrate, Kokrajhar is hereby set aside. The learned Additional Chief Judicial Magistrate is hereby directed to decide the prayer of the petitioner for interim custody of seized cattle on the basis of the claim of his ownership of the seized cattle in connection with Kazigaon Police Station Case No. 19/2024, G.R. Case No. 273/2024.

9. In terms of the above observation, this Criminal Petition stands disposed of.

JUDGE

Comparing Assistant