

GAHC010155082024



2024:GAU-AS:12382

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

Case No. : Crl.Pet./905/2024

RANJIT KUMAR DEKA @ RANJIT DEKA
S/O LATE PANKAJ DEKA,
RESIDENT OF AMBARIHATI, SHIVBARI ROAD, PO AND PS BARPETA,
ASSAM 781301

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP ASSAM

2:SRI MANOJ KR. DAS

S/O LATE CHANDRA KANTA DAS

RESIDENT OF VILLAGE FATAHATI
BARPETA WARD NO. 2
PO
PS AND DIST BARPETA
ASSAM 78130

Advocate for the Petitioner : MR. K R PATGIRI, MS. D. DEVI, MS CHITRALEKHA DAS

Advocate for the Respondent : PP, ASSAM, MR. DILIP DEY (R-2)

**BEFORE
HONOURABLE MRS. JUSTICE MITALI THAKURIA
ORDER**

06.12.2024

Heard Mr. K. R. Patgiri, learned counsel for the petitioner. Also heard Mr. K. K. Das, learned Additional Public Prosecutor for the State respondent No.1 and Mr. D. Dey, learned counsel for the respondent No.2.

2. This application is filed under Section 528 of the Bharatiya Nagarik Suraksha Sanhita, 2023, praying for the quashing of the impugned Order dated 29.05.2024 passed by the learned Additional Chief Judicial Magistrate, Barpeta in N. I. Case No.13/2021 whereby the petition filed by the petitioner under Section 311 of Cr. P.C. for issuing summon to the complainant (P.W.1)/respondent No.2 for reexamining was rejected.

3. It is submitted by the learned counsel for the petitioner, Mr. Patgiri, that after the completion of the prosecution witnesses' testimony, the learned Trial Court fixed the matter for recording the statement of the present petitioner under Section 313 of the Cr.P.C. However, upon reviewing the evidence adduced by the complainant/respondent No.2, the petitioner became aware that his engaged counsel had inadvertently failed to ask certain questions regarding the cheque in question, as well as other material facts of the complaint, which may result in a lacuna in the proper adjudication of the case. Accordingly, the petitioner filed a petition under Section 311 of the Cr.P.C. before the Court of the learned Additional Chief Judicial Magistrate, Barpeta. However, the said Trial Court rejected the petition by impugned Order dated 29.05.2024, with the observation that P.W.1 had been cross-examined in detail and that the petition was filed merely to fill the lacuna.

4. Thus, being highly aggrieved, the petitioner has filed the present criminal

petition, praying for setting aside and quashing of the impugned Order dated 29.05.2024, and requesting the Court to grant the petitioner an opportunity to recall P.W.1 and cross-examine him on vital points that were inadvertently omitted by the engaged counsel during the cross-examination.

5. On the other hand, Mr. Dey, learned counsel for respondent No. 2, has submitted that the accused/petitioner, being a practicing advocate and currently working as a Special Public Prosecutor in Barpeta, possesses sufficient knowledge and experience in how to cross-examine a witness. Furthermore, he pointed out that when the petition for recalling the witness was filed, it did not mention that P.W.1 was to be cross-examined. He further submitted that P.W.1 had been cross-examined in detail, and after the detailed examination of P.W.1 and other witnesses, the evidence was closed. The subsequent petition, filed under the guise of Section 528 of the BNSS, is not maintainable.

6. He further submits that the though Court is empowered to summon or re-examine witnesses at any stage before the pronouncement of judgment, if it appears to the Court to be essential for a just decision of the case by getting at the truth through all lawful means. However, the present petition has been filed to fill the lacuna after recording the statement of the accused/petitioner under Section 313 of the Cr.P.C. He further submitted that the case is at the stage of argument, and that the present petition has been filed only to delay the proceedings by recalling P.W.1 for further examination. Accordingly, he submits that the learned Trial Court had rightly passed the order dated 29.05.2024 whereby rejecting the prayer made under Section 311 of the Cr.P.C..

7. After hearing the submissions made by the learned counsels for both sides, I have perused the case record and the order passed by the learned Trial Court. It is an admitted fact that the petition for re-examining P.W.1 was filed by the present petitioner when the case was at the stage of recording the statement of the

accused/petitioner under Section 313 of the Cr.P.C., after the closure of the prosecution witnesses (P.Ws.). The petitioner's case is that the petition under Section 311 of the Cr.P.C. was filed to re-examine P.W.1 and to cross-examine him on vital points that were inadvertently omitted by the engaged counsel during cross-examination. However, the same was rejected by the Trial Court by order dated 29.05.2024. On the other hand, respondent No. 2's case is that P.W.1 had been cross-examined in detail, and after the detailed examination of P.W.1 and other witnesses, the evidence was closed. Furthermore, it is evident that the learned Trial Court did not allow the recall of all the complainant's witnesses. Thus, while passing the order, the learned Trial Court considered all the pros and cons of the case and passed a detailed order rejecting the petition to recall P.W.1.

8. It is a settled position of law that under Section 311 of the Cr.P.C., the Court has the power to allow the prosecution/complainant to produce documents after the examination of witnesses and to re-examine the witnesses at any stage before the pronouncement of the judgment, if it appears essential for the just decision of the case. It is also settled law that re-examination of prosecution witnesses cannot be permitted under Section 311 of the Cr.P.C. merely to fill a lacuna in the prosecution evidence; the court must determine whether recalling witnesses or producing records will cause prejudice to the opposing side, and whether the petition is merely an attempt to fill a lacuna.

9. In the case of **Rajendra Prasad vs. Narcotic Cell**, reported in **(1999) 6 SCC 110**, the Hon'ble Supreme Court referred to paragraphs 8 and 9 of the said judgment, which read as follows:

"8. Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trail of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna. No parry in a trial can before-closed from correcting errors. If proper evidence was not adduced or a relevant material was not brought on record due to any

inadvertence, the court should be magnanimous in permitting such mistakes to be rectified. After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better.

9. The very same decision **Mohanlal Shamiji Soni v. Union of India**, (supra) which cautioned against filling up lacuna has also laid down the ratio thus :

"It is therefore clear that the Criminal Court has ample power to summon any person as a witness or recall and re-examined any such person even if the evidence on both sides is closed and the jurisdiction of the Court must obviously be dictated by exigency of the situation, and fair play and good sense appear to be the only safe guides and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."

10. In the instant case also, it is seen that some vital questions were left to be cross examined by the petitioner in respect of the cheque in question which is also a subject matter of the case. Accordingly, prayer of the petitioner cannot be stated only to fill up the lacuna.

11. In view of the above discussion, I find sufficient merit in this petition requiring interference of his Court in the impugned Order dated 29.05.2024, passed by the learned Additional Chief Judicial Magistrate, Barpeta in N. I. Case No.13/2021 and accordingly, the same is hereby set aside. Consequently the petitioner is hereby directed to appear before the learned Court below along with a petition for re-examining the P.W.1 and the learned Trial Court shall give an opportunity to the petitioner for re-examining the P.W.1.

12. With above observation this petition stands disposed of.

JUDGE

Comparing Assistant