GAHC010127082019

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

Case No. : Crl.Pet./659/2019

M/S. S.B. INDUSTRIES AND 2 ORS.
BORPUKHURI, R.N.P. ROAD, WARD NO. 14, P.O.-HOJAI, DIST-NAGAON (PRESENTLY HOJAI), ASSAM, PIN-782435

2: MD ZAKIR HUSSAIN
S/O JUMIL AKHTAR
BORPUKHURI
R.N.P. ROAD
WARD NO. 14
P.O.-HOJAI
DIST-NAGAON (PRESENTLY HOJAI)
ASSAM
PIN-782435

3: SAHNAZ BEGUM
W/O MD. ZAKIR HUSSAIN
C/O S.B. ELECTRONICS
R.N.P. ROAD
WARD NO. 14
P.O.-HOJAI
DIST-NAGAON (PRESENTLY HOJAI)
ASSAM
PIN-78243

VERSUS

M/S. EASTERN INFRATECH
GROUND FLOOR, SIOTA MARKET, S.R.C.B. ROAD, FANCY BAZAR, GUWAHATI-781001, REPRESENTED BY ONE OF ITS PARTNERS SRI PAWAN KUMAR SIOTIA

Advocate for the Petitioner : MR. N K MURRY

Advocate for the Respondent : MR J CHOPRA

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT

Date : 21-10-2021

1. This petition, under section 482 Cr.P.C., read with section 397/401 of the Cr.P.C., is preferred by M/S - S. B. Industries, (petitioner No.1) of Borpukhuri & Md. Zakir Hussain (petitioner No.2), S/o Jumil Akhtar, Borpukhuri and Smti. Sahnaz Begum(petitioner No.3), W/o Zakir Hussain, C/o S.B. Electronics, R.N.P. Road, Ward No.14, Hojai, Assam, challenging the legality, propriety and correctness of the orders dated 03.05.2018 and 06.04.2019, passed by Shri I.A. Hazarika, Judicial Magistrate 1st class, Kamrup (M) in case No. C. R. 3366/2016 (M/s S.B. Industries & 2 Others Vs. M/s Eastern Infratech). It is to be mentioned here that vide impugned order dated 03.05.2018, the ld. Court below has not only closed cross-examination of the P.W.1, but also issued NBWA against the petitioners No. 2 and 3, and vide impugned order dated 06.04.2019, the ld. Court below has rejected the petition filed by the petitioner u/s 311 Cr.P.C. for allowing them to cross-examine P.W.1.

2. Heard Mr. N. K. Murry, learned counsel for the petitioners and also heard Mr. J. Chopra, learned counsel for the respondent.

3. The factual background, leading to filing of the present petition is adumbrated herein below:-

"The petitioner No.2 - Md. Zakir Hussain and petitioner No.3-Smti. Sahnaz Begum is partners of a Firm, in the name & Style of M/S - S.B. Industries (petitioner No.1). The respondent,- M/S Eastern Infratech is also a partnership Firm, represented by one of its partner namely Shri Pawan Kr. Siotia. The petitioners used to purchase goods from the respondent's Firm on different dates since 22.07.2015 to 10.03.2016 and towards liquidation of liabilities, as on 10.03.2016, payable to the respondents the petitioners have issued one cheque bearing No. 859928, dated 03.08.2016, drawn on Punjab National Bank, Hojai Branch, Nagaon, for a sum of Rs. 4,05,269/ to the respondent. The respondent presented the Cheque to its banker, the State bank of India, Fancy Bazar Branch, Guwahati. But, the same returned dishonored vide Cheque returning memo, dated 30.08.2016, with the endorsement "*Fund Insufficient".* The respondent then issued demand Notice to the petitioners to pay the Cheque amount on 03.09.2016, through his Advocate, within 15 days from the date of receipt of notice. But, the petitioners failed to pay the amount in spite of receipt of notice. Then the respondent has lodged a complaint before the ld. court below under section 138 N.I. Act. The ld. Court below, then, issued process to the petitioners after taking cognizance of the offence. The petitioners have entered appearance before the ld. Court below and contested the case. The ld. Court below then explained the particulars of offence under section 138 N.I. Act to the petitioners to which the petitioners pleaded not guilty. During trial the respondent has submitted his evidence-in-affidavit. The ld. Court below then fixed the case for cross-examination of the respondent (P.W.1). But, vide

impugned order dated 03.05.2018, the ld. Court below has closed the cross-examination of (P.W.1). Thereafter, on 06.08.2018, the newly engaged lawyer of the petitioners filed a petition, being petition No. 4244/2018, before the ld. Court below under section 311 Cr.P.C. for allowing the petitioners to cross-examine the P.W.1. But the ld. Court below has rejected the petition No. 4244/2018, vide impugned order dated 06.08.2019."

4. Being highly aggrieved, the petitioners preferred this revision petition on the following grounds:-

(i) that the ld. Court below has failed to apply its judicial mind and rejected the petition No. 4244/2018 vide order dated 06.08.2019;

(ii) that without giving an opportunity to the petitioners the ld. Court below has closed the cross-examination the P.W.1, and thereby caused prejudice to the petitioners;

(iii) that the petitioners have no legally enforceable debt to the respondent and the cheque was misused by the respondent and to unfurl the truth cross-examination of the P.W.1 is very much necessary and by refusing to allow the petition, great injustice is caused to the petitioners;

(iv) that the power to recall the witnesses under section 311 Cr.P.C is discretionary and the ld. Court below has failed to exercise the discretion judiciously and by refusing to allow the prayer, ld. Court below caused miscarries of justice. Therefore, it is contended to allow the petition.

5. Mr. N.K. Murry, the ld. Counsel for the petitioners has submitted

that there was no legally enforceable debt between the parties and that the respondent has misused the cheque and to unfurl the truth, cross-examination of P.W.1 is very much necessary here in this case. Mr. Murry further submitted that the ld. Court below, by dismissing the petition to allow cross-examination of P.W. 1, failed to exercise its judicial discretion under section 311 Cr.P.C. It is further submitted that he has been newly engaged in this case and he is not aware of the conduct of earlier lawyer and that for conduct of lawyer, the petitioner should not suffer, and that only one chance may be afforded to the petitioners to prove their case by allowing them to cross-examine the P.W.1.

6. Per contra, Mr. J. Chopra, the learned counsel for the respondent, vehemently opposed the petition. Taking this Court through the impugned order dated 03.05.2016, the ld. Counsel has submitted that the ld. Court below has given sufficient opportunities to the petitioners to cross-examine the P.W.1, but, the petitioners have failed to avail the same and being left with no other option the ld. Court below has closed the evidence of P.W.1. It is further submitted that section 311 Cr.P.C. cannot be used as a delaying tactics. Mr. Chopra has referred one case law **Shivnarayan Shakya Vs. State of M.P. (M. Cr. C. No. 13215/2015),** and submitted that the petitioners have failed to furnish any reason as to why it has failed to cross-examine the witness. In support of his submission Mr. Chopra has submitted another case law Criminal Revision Case No. 206 of 2012 of Andhra Pradesh High Court. It is further submitted that the ld. Court below

has rightly rejected the petition No. 4244/2018, vide order dated 06.08.2019, and as such no interference of this court is warranted and therefore, it is contended to dismiss the petition.

7. Having heard the submission of the ld. Advocates of both side I have gone through the impugned orders and the documents placed on record and also gone through the case laws referred by the ld. Counsel for the respondent and I find sufficient force in his submission. The ld. Court below, in the impugned order dated 03.05.2018, has noted that the case was posted for cross-examination of P.W.1 on 30.05.2017, and since then ample opportunities were afforded to the petitioners to complete cross-examination of P.W.1. But, the accused persons could not avail the opportunity. And on that day, i.e. 03.05.2018, also the petitioners have failed to cross-examine the P.W.1. Instead, on that day neither the accused nor his counsel remained present in the court, though the ld. Counsel has filed hazira in the court. Then being left with no option the ld. Court below has closed the evidence of the P.W.1.

8. Now, it is to be seen how far the ld. Court below is justified in closing the evidence of P.W. 1, when the petitioner remained absent in the court and the counsel for the petitioner also remained absent in the court on that day, though he has filed hazira. In a similar fact situation, Hon'ble Supreme Court in **Mohd. Hussain Zulfikar Ali: (2012) 2 SCC 584,** his Lordship **Hon'ble Dattu, J** (as His Lordship then was) writing a separate, but concurring judgment on the issue of a right to a fair trial, particularly, in the context of cross-examination

(or the absence of it due to unavailability of counsel) held as under:-

> **13. It will, thus, be seen that the trial court did not think it proper to appoint any counsel to defend the appellant-accused, when the counsel engaged by him did not appear at the commencement of the trial nor at the time of recording of the evidence of the prosecution witnesses. The accused did not have the aid of the counsel in any real sense, although, he was as much entitled to such aid during the period of trial. The record indicates, as I have already noticed, that the appointment of the learned counsel and her appearance during the last stages of the trial was rather pro forma than active. It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case, to confront the witnesses against him not only on facts but also to discredit the witness by showing that his testimony-in-chief was untrue and unbiased.**
>
> **(Emphasis by us)**
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> **14. The purpose of cross-examination of a witness has been succinctly explained by the Constitution Bench of this Court in Kartar Singh v. State of Punjab : (1994) 3 SCC 569, (para 278)**
>
> **"278. Section 137 of the Evidence Act defines what cross-examination means and Sections 139 and 145 speak of the mode of cross-examination with reference to the documents as well as oral evidence. It is the jurisprudence of law that cross-examination is an acid-test of the truthfulness of the statement made by a witness on oath in examination-in-chief, the objects of which are:**

(1) to destroy or weaken the evidentiary value of the witness of his adversary;

(2) to elicit facts in favour of the cross-examining lawyer's client from the mouth of the witness of the adversary party;

(3) to show that the witness is unworthy of belief by impeaching the credit of the said witness;

and the questions to be addressed in the course of cross-examination are to test his veracity; to discover who he is and what is his position in life; and to shake his credit by injuring his character."

15. The aforesaid view is reiterated by this Court in Jayendra Vishnu Thakur v. State of Maharashtra (2009) 7 SCC 104, wherein it is observed: (para 24),

"24. A right to cross-examine a witness, apart from being a natural right is a statutory right. Section 137 of the Evidence Act provides for examination-in-chief, cross-examination and re-examination. Section 138 of the Evidence Act confers a right on the adverse party to cross-examine a witness who had been examined in chief, subject of course to expression of his desire to the said effect. But, indisputably such an opportunity is to be granted. An accused has not only a valuable right to represent himself, he has also the right to be informed thereabout. If an exception is to be carved out, the statute must say so expressly or the same must be capable of being inferred by necessary implication. There are statutes like the Extradition Act, 1962 which excludes taking of evidence vis-à-vis opinion."

16. In my view, every person, therefore, has a right to a fair trial by a competent court in the spirit of the right to life and

personal liberty. The object and purpose of providing competent legal aid to undefended and unrepresented accused persons are to see that the accused gets free and fair, just and reasonable trial of the charge in a criminal case.

17. This Court in Zahira Habibullah Sheikh (5) v. State of Gujarat : (2006) 3 SCC 374, has explained the concept of fair trial to an accused and it was central to the administration of justice and the cardinality of protection of human rights. It is stated: (SCC pp. 394-96, paras 35-37)

"35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the ''majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials

necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators."

9. What transpired from the above discussion is that right to cross-examination is a part of right to fair trial, which, every person has in the spirit of the right to life and personal liberty as enshrined in Article 21 of the Constitution of India. In the case in hand, on the relevant date i.e. on 03.05.2018, the petitioner remained absent in the court and his counsel also remained absent though he has filed hazira. Thus, the petitioner remained unrepresented on that day. Therefore, the impugned order, closing the evidence of P.W.1, behind the back of the petitioners and also his counsel, is denial of fair hearing, as it has infringed their right to fair trial.

10. It also appears from the documents placed on record that the petitioners have not at all cross-examined the P.W.1. And as such the very object of cross-examination as stated in **Karter Singh Vs. State of Punjab (supra)** stands frustrated here in this case and as such great injustice is caused to them. Had the impugned order dated 03.05.2018, been passed after hearing the petitioner or their counsel, then the situation would have been complete different. By the impugned order dated 06.04.2018, the ld. Court below has allowed to

continue the injustice that has perpetrated upon the petitioners by the impugned order dated 03.05.2018. Therefore, the ld. Court below has committed illegality by rejecting the petition No. 4244 by the impugned order dated 06.04.2018.

11. In view of above discussion and finding it cannot be said that impugned order dated 03.05.2018, passed by which the ld. Court below closing the evidence of P.W.1, behind the back of the petitioner and his counsel, and subsequent impugned order dated 06.04.2018, by which the ld. Court below, after hearing ld. Advocates of both sides declined to invoke its jurisdiction under section 311 Cr.P.C, to allow the petitioners to cross-examine P.W.1 and other listed witnesses of the complainant withstand the test of legality, propriety and correctness. It is worthwhile to mention here in this context that in **A.R. Antuley vs. R.S. Nayak : (1988)2 SCC 602,** a seven Judge Bench of Hon'ble Supreme Court has held that when an order has been passed in violation of a fundamental right or in breach of the principles of natural justice, the same would be nullity. Reference can also be made to two more decisions of Hon'ble Supreme Court in **State of Haryana Vs. State of Punjab: (2004)12 SCC 673,** and **Rajasthan SRTC Vs. Zakir Hussain: (2005) 7 SCC 447.**

12. While rejecting the petition No.4244, filed by the petitioner the ld. Court below has held that the order dated 03.05.2018, by which the evidence of the P.W.1 was closed, has not been challenged by the accused side and further held that it has no power to recall its own order. However, the ld. Court below has held that the accused persons

are at liberty to call any witness at the stage of D.W. It is well settled that criminal courts have no power to recall its own order. But, the reason, so assigned by the ld. Court below, for rejecting the prayer in the petition No. 4244 cannot be said to be based on sound principle of law, in view of discussion and finding in forgoing para.

13. Section 311 Cr.P.C. deals with power to summon material witness, or examined persons present. It provides that any court may, at any stage of enquiry, trial or other proceeding under this code, summon any person as a witness, or examine any persons in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

14. A bare perusal of the section reveals that when the conditions under the sections are satisfied the court can call a witness not only on the motion of either of the prosecution or the defence, but also it can do so on its own motion. In **Mohanlal Shyamji Soni Vs. Union of India, (1991) Crl. J.J. 152 (SC),** while dealing with the power to under section 311 Cr.P.C., Hon'ble Supreme Court has held that –

> "**the power of Court to re-call any witness or witnesses already examined or to summon any witness can be invoked even if the evidence in both sides is closes so long as the Court retain seisin of the criminal proceeding."**

15. Following the aforesaid principle, Hon'ble Supreme Court in

Mannan Sheikh Vs. State of West Bengal (2014) 13 SCC 59, held that –

> "**the aim of every Court has to discover the truth. Section 311 of the Code is one of many such provisions of the Code which strengthen the arms of a Court in its effort to ferret out the truth by procedure sanctioned by law. It is couched in very wide terms. It empowers the Court at any stage of any inquiry, trial, or other proceedings under the Code to summon any person as a witness or examine any person in attendance, though not summoned as witness or re-call and re-examine already examined witness. The Second part of the Section used the word "shall", it says that the Court shall summon and examine or re-call or re-examine any such person, if his evidence appears to it to be essential to the just decision of the case. The word "essential to the just decision of the case" are the key words. The Court must form an opinion that for the just decision of the case, re-call and re-examination of the witness is necessary. Since the power is wide, it exercise has to be done with circumspection. It is trite that wider the power greater is the responsibility on the Court who is exercised it. The exercise of the power cannot be untrammeled and arbitrary, but must be guided only by the object of arriving at a just decision of the case. It should not cause prejudice to the accused. It should not permit the prosecution to fill up the lacuna. Whether re-call of a witness is for filling up a lacuna, or it is for just decision of the case depends upon the facts and circumstances of the case. In all cases, it is likely to be argued that the prosecution is trying to fill up a**

lacuna because of the line of demarcation is thin. It is for the Court to consider all the circumstances and decide whether the prayer for re-call is a genuine."

16. Here in this case, it appears from the impugned order dated 03.05.2018, that in a span of almost one year, ample opportunities were afforded to the petitioners. But, the petitioners have failed to avail the same. They have failed to assign any reason, not to speak of a plausible one, as to why they could not cross-examine the P.W.1. The ld. Counsel for the respondent has rightly pointed this out during hearing, and the law laid down in the case of **Shivnarayan Shakya Vs. State of M.P. (supra)** referred by him also fortified his submission. But, since the impugned order dated 03.05.2018, has been passed behind the back of the petitioners and their counsel and there by infringed their right to fair trial, the ld. Court below ought to have allowed the petition by exercising the jurisdiction under section 311 Cr.P.C.

17. In the result, I find sufficient merit in this revision petition, and accordingly, the same stands allowed. The impugned orders, dated 03.05.2018, and 06.04.2018, stands set aside. The parties are directed appear before the ld. Court below on 12.11.2021 and on their appearance, the ld. Court below shall afford a chance to the petitioners to cross-examine the P.W.1. In the event of failing to cross-examine P.W.1, on that day by the petitioners, or on a subsequent date to be fixed by the ld. Court below, then the ld. Court below shall proceeds to next stage of the trial. Send down the record of ld. Court

below with a copy of this judgment and order. The parties have to bear their own cost.

JUDGE

Comparing Assistant