(2012) 06 GAU CK 0019

Gauhati High Court

Case No: Criminal Petition 389 of 2012

Sri Pratap Sinha		APPELLANT
	Vs	
Sarma and Company		RESPONDENT

Date of Decision: June 27, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 311, 313, 482
- Evidence Act, 1872 - Section 165

Citation: (2013) 1 GLD 86

Hon'ble Judges: Iqbal Ahmed Ansari, J

Bench: Single Bench

Advocate: S. Banik, Mr. A.K. Talukdar and Mr. Ms. S. Parveen, for the Appellant; B.B. Gogoi, Assistant Public Prosecutor, for the Respondent

Final Decision: Dismissed

Judgement

I.A. Ansari

1. With the help of this application, made u/s 482 CrPC, the petitioner, who is accused in NI Case No. 1/2009, has put to challenge the order, dated 19.12.2012, passed by the learned Judicial Magistrate, 1st Class, Cachar, in the case aforementioned allowing the complainant''s prayer for re-examination of the prosecution witness No. 1. While considering the present application, made u/s 482 CrPC, it needs to be noted that the Complaint Case aforementioned arose out of a complaint, made by the opposite party herein, alleging to the effect, inter alia, that a Cheque, for a sum of Rs. 8,90,626/-, issued by the present petitioner, had been dishonoured by the bank concerned for insufficiency of fund and, despite notice having been issued to the accused-petitioner, in this regard, by the complainant-opposite party herein, demanding payment of the sum of money covered by the said Cheque, the payment had not been made within the period, prescribed by law, and, hence, the complaint case was instituted.

2. The present petitioner, as accused, appeared in the case and contested the same. On completion of the evidence, adduced by the complainant, the accused-petitioner was examined u/s 313 CrPC and the case was fixed for arguments. Oral arguments were accordingly addressed by the parties concerned and, thereafter, the learned Court below fixed the case, on 26.11.2010, for further arguments.

3. The case, then, came to be fixed, on 08.12.2010, for judgment. However, on 08.12.2010, the complainant filed a petition seeking time to advance further arguments, which was allowed by the learned Court below, and the matter came to be fixed, on 10.12.2010, for hearing and necessary order. Eventually, in its order, dated 10.12.2010, the learned Court below mentioned that, while going through the materials on record, it transpired that further hearing was necessary as regards admissibility of the power of attorney, available in the case record, without proof thereof.

4. Thereafter, the complainant made an application to the learned Court below for providing him with an opportunity to re-examine his witness No. 1 and the complainant''s prayer was allowed by order, dated 19.12.2011, which stands impugned in this application, made u/s 482 CrPC.

5. Heard Mr. S. Banik, learned counsel for the accused petitioner, and Mr. B. B. Gogoi, learned Addl. Public Prosecutor, Assam, appearing for the State of Assam.

6. The sole ground, on which rests the challenge to the impugned order by the accused-petitioner, is that, by allowing the complainant the liberty of re-examination of his witness No. 1, the Court has provided him with an opportunity to fill up the lacuna.

7. While considering the question of lacuna, it needs to be noted that any deficiency in the case of prosecution or defence is not lacuna. The lacuna, in the case of prosecution or defence means inherent defect(s) of the case, or else, one would be counting the errors of the counsel appearing for the parties concerned. Reference may be made, in this regard, to the case of Rajendra Prasad Vs. The Narcotic Cell Through its Officer in Charge, Delhi, , wherein the Supreme Court has clarified that the power to examine a witness can be exercised even if the evidence on both sides is closed. The only factor, which governs the exercise of such power, u/s 311 of the Code, shall be whether such examination is essential for a just decision of the case. In the case of Rajendra Prasad (supra), the Supreme Court has clarified that a lacuna, in the prosecution case, is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial either in producing relevant materials or in eliciting relevant answers from the witness. The maxim, '' To err is human'', is applicable to trials as much it is applicable to other facets of life. The result of any such laches or mistake, while conducting of a case, shall not be understood as a lacuna, which a Court cannot fill up. The relevant observations, made in Rajendra Prasad (supra), are reproduced below:

7. It is a common experience in criminal courts that defence counsel would raise objections whenever courts exercise powers u/s 311 of the Code of u/s 165 of the Evidence Act, 1872 by saying that the court could not "fill the lacuna in the prosecution case". A lacuna in the prosecution is not to be equated with the fallout of an oversight committed by a Public Prosecutor during trial, either in producing relevant materials or in eliciting relevant answers from witnesses. The adage "to err is human" is the recognition of the possibility of making mistakes to which humans are phone. A corollary of any such laches or mistakes during the conducting of a case cannot be understood as a lacuna which a court cannot fill up.

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 trial of the case, but an oversight in the management of the prosecution cannot be treated as irreparable lacuna. No party in a trial can be foreclosed 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 Shamji Soni Vs. Union of India, which cautioned against filling up lacuna has also laid down the ratio thus : (AIR Headnote) "it is therefore clear that the criminal court has ample power to summon any person as a witness or recall and re-examine 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.

(Emphasis added)

8. Reference may also be made, in this regard, to the case of Haren Ch. Sharma Vs. State of Assam, , wherein this Court held thus:

10. Dealing with the corresponding section in the old Code (Section 540) Hidayatullah, J. (as the learned Chief Justice then was) speaking for a three-Judge Bench of this Court had said, in Jamatraj Kewalji Govani Vs. State of Maharashtra as follows : "it would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, and makes this the duty and obligation of the court provided the just decision of the case demands it. In other words, where the court exercises the power under the second part, the enquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new

evidence is needed by it for a just decision of the case.

11. Chinnappa Reddy, J. has also observed in the same tone in Ram Chander Vs. State of Haryana.

12. We cannot therefore accept the contention of the appellant as a legal proposition that the court cannot exercise power of resummoning any witness if once that power was exercised, nor can the power be whittled down merely on the ground that the prosecution discovered laches only when the defence highlighted them during final arguments. The power of the court is plenary to summon or even recall any witness at any stage of the case if the court considers it necessary for a just decision. The steps which the trial court permitted in this case for resummoning certain witnesses cannot therefore be spurned down or frowned at.

(Emphasis is supplied)

9. From the observations made in Rajendra Prasad''s case (supra), it clearly transpires that lacuna, in a case of prosecution or defence, would mean an inherent and not accidental slip or omission nor does lacuna mean patent wedge, but a latent wedge. An oversight or inefficiency in the management of a case is not a lacuna. (See also Haren Ch. Sharma vs. State of Assam, 2008 (1) GIST 412)

10. In the light of the decision of the Supreme Court as well as this Court, referred to above, it becomes clear that even though the power of attorney, which had been produced in the case at hand, the same had not been proved in the manner as was required by law, and the failure to do the needful by the counsel of the complainant cannot be made a ground for disallowing the complainant''s prayer to re-examine his witness No. 1. Situated thus, it becomes clear that the order, dated 19.12.2011, which stands impugned in this application, made u/s 482 CrPC, does not suffer from any infirmity, legal or factual. This application, made u/s 482 CrPC, is, therefore, not admitted and the same shall accordingly stand dismissed.