
(2024) 04 GAU CK 0038
In the Gauhati High Court
Case No : Criminal Petition No. 1035 Of 2018

M/S Magus Construction Private Limited	APPELLANT
Vs	
State Of Assam	RESPONDENT

Date of Decision : 19-04-2024

Acts Referred:

Constitution Of India, 1950 — Article 21, 227
Code Of Criminal Procedure, 1973 — Section 91, 311, 362, 397(2), 482
Indian Penal Code, 1860 — Section 406, 468, 474

Citation : (2024) 04 GAU CK 0038

Hon'ble Judges : Robin Phukan, J

Bench : Single Bench

Advocate : A. Das, R.J. Baruah, A.K. Bhuyan

Final Decision : Dismissed

Judgement

1. Heard Mr. A. Das, learned counsel for the petitioner. Also heard Mr. R.J. Baruah, learned Addl. P.P. for the respondent No.1 and Mr. A.K. Bhuyan, learned counsel for the respondent No.2.

2. In this petition, under Section 482 of the Cr.P.C., read with Article 227 of the Constitution of India, two petitioners namely, M/S Magus Construction Private Limited and Shri Anup Kumar Nath, have challenged the correctness or otherwise of the order, dated 16.07.2018, passed by the learned Judicial Magistrate 1st Class, Kamrup (M) at Guwahati, in Complaint Case No. 1729C/2012. It is to be mentioned here that vide impugned order, the learned Court below had allowed the petition No. 6384, dated 06.04.2018, filed by the respondent under Section 91 of the Cr.P.C.

3. The factual background, leading to filing of the present petition, is briefly stated as under:

"The respondent No. 2, Mrs. Banita B. Dutta, has instituted a complaint case being C.R. Case No. 1729c/2012, under Sections 406/468/474 of the IPC against

the present petitioners alleging inter-alia amongst others that she had purchased one Flat from the respondent No. 1 vide Sale Deed No. 10208/2007. Thereafter, the petitioners again sold the said Flat to other persons vide Sale Deed No. 14330/2008. Upon the said complaint C.R. Case No. 1729c/2012 has been registered and the same is pending before the court of learned Judicial Magistrate 1st Class, Kamrup (M) at Guwahati. Upon the said complainant under Sections 406/468/474 of the IPC, the learned court below had taken cognizance of the offences under section 406/468/474 IPC. Thereafter, in due course, the learned court below had framed charge against the petitioners under section 406 IPC only and on being read and explained over the petitioners have pleaded not guilty and claimed to be tried.

Then after examination of one witness, the respondent No. 2 had filed two petitions one being petition No. 1817 dated 01.06.2014 for calling Deed No. 4870/2004 and 10208/07 and 14330/08 and another being petition No. 2838 dated 13.08.2014, for calling for Deed Nos. 310/09 and 5356/2009, respectively. Then after hearing both the parties the learned court below had allowed the petition No. 1817 dated 01.06.2014, but dismissed the petition No. 2828 dated 13.08.2014, which was in respect of the Deed Nos. 310/09 and 5356/2009, vide order dated 23.09.2014.

Thereafter, again the respondent No. 2 had filed similar petition, being petition No. 6384, on 06.04.2018 under Section 91 of the Cr.P.C. praying for calling the Deed No. 5356/2009 from the Office of the Sub-Registrar, Guwahati. But, this time the learned court below had allowed the petition No. 6384, vide order dated 16.07.2018, ignoring the previous order dated 23.09.2014 by which earlier prayer was rejected."

4. Being highly aggrieved, the petitioner approached this court for quashing the proceeding, mainly on the following grounds, that:-

(i) The learned court below has erred in law and in facts while passing the impugned order, resulting abuse of the law and miscarriage of justice;

(ii) The learned court below, without considering the provisions in Cr.P.C. had allowed the petition though it cannot review its earlier order;

(iii) For that the learned court below, while passing the impugned order dated 16.07.2018, has absolutely ignored the previous order dated 23.09.2014 by virtue of which the prayer for calling for Deed No. 5356/2009 was rejected by the same court on 23.09.2014 and as such impugned order dated 16.07.2018 is liable to be set aside and quashed;

(iv) The impugned order was passed in most perfunctory and mechanical manner and without application of mind; and

(v) For that the learned trial court has failed to appreciate that the respondent No. 2/complainant has suppressed the order dated 23.09.2014 by virtue of which the prayer for calling for Deed No. 5356/09 has already been rejected without

any liberty or leave which has attained its finality and as such, impugned order dated 16.07.2018 allowing respondent No. 2/complainant to call for Deed No. 5356 is absolutely illegal and as such the same is liable to be set aside and quashed.

5. The respondents have not filed any objection/affidavit in opposition, here in this case.

6. Mr. A. Das, the learned counsel for the petitioners, has reiterated the grounds mentioned herein above and submits that the learned court below, having rejected such a prayer made by the respondent No. 2 cannot review its own order and allow the petition, because of the bar under Section 362 of the Cr.P.C. Therefore, Mr. Das contended to allow the petition by setting aside the impugned order. Mr. Das has referred following decision in support of his submission:-

(i) Adalat Prasad vs. Rooplal Jindal & Others, reported in (2004) 7 SCC 338 and

(ii) Devendra Kishanlal Dagalia vs. Dwarkesh Diamonds Private Limited and Ors., reported in (2014) 2 SCC 246.

7. Whereas, Mr. A.K. Bhuyan, the learned counsel for the respondent No. 2, submits that the bar of Section 362 of the Cr.P.C. does not come into play here in this case and that the learned court below has rightly allowed the petition and as such the impugned order suffers from no infirmity and it requires no interference of this court. Mr. Bhuyan also referred following case laws in support of his submissions:-

(i) Sabjudoin Ahmed vs. Banamali Das, reported in MANU/ GH/0151/1982;

(ii) Thomas Nongtdu vs. State of Meghalaya, reported in (2009) 6 GLR 590; and

(iii) Murti Dhar Singh &Ors. vs. Vijendra Singh Jafa, reported in MANU/ GH/0091/2002.

8. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on the record and also gone through the case laws referred by Mr. A. Das, learned counsel for the petitioners and also the case law referred by Mr. A.K. Bhuyan, learned counsel for the respondent.

9. What is transpired from the submissions advanced at the Bar is that the petitioner has mainly challenged the order dated 16.07.2018, because of the bar of Section of the 362 Cr.P.C. as the similar petition filed by respondent No. 2 was dismissed earlier on 23.09.2014. In order to appreciate the submissions of learned Advocates of both side it would be necessary to understand the provision of Section 362 of the Cr.P.C. is read as under:-

362. Court not to alter judgment.

"Save as otherwise provided by this Code or by any other law for the time being in force, no Court, when it has signed its judgment or final order disposing of a

case, shall alter or review the same except to correct a clerical or arithmetical error."

10. Thus, a cursory perusal of the provision indicates that the bar is applicable when the court signs its judgment or final order disposing of a case. Indisputably the order dated 23.09.2014 is neither a final order disposing of a case nor a judgment. The learned court below, vide its impugned order, has dismissed the petition No. 2838 dated 13.08.2014, filed by the respondent No. 2 for calling the Deed No. 5356/2009 from the Office of Sub-Registrar, Guwahati by invoking Section 91 of the Cr.P.C. Now, what left to be seen is whether an order passed under Section 91 of the Cr.P.C. is an interlocutory order or final order so as to attract the bar under Section 362 of the Cr.P.C.

11. This issue has already been settled by the Hon'ble Supreme Court in the case of Setthuraman vs. Rajamanickam, reported in (2009) 5 SCC 153. In Para No. 4 of the said judgment the Hon'ble Supreme Court has held as under:-

"4. Secondly, what was not realized was that the order passed by the Trial Court refusing to call the documents and rejecting the application under Section 311 Cr.P.C., were interlocutory orders and as such, the revision against those orders was clearly barred under Section 397(2) Cr.P.C. The Trial Court, in its common order, had clearly mentioned that the cheque was admittedly signed by the respondents/accused and the only defence that was raised, what that his signed cheques were lost and that the appellant/complainant had falsely used one such cheque. The Trial Court also recorded a finding that the documents were not necessary. This order did not, in any manner, decide anything finally. Therefore, both the orders, i.e. one on the application under Section 91 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for production of documents and other on the application under Section 311 Cr.P.C. for recalling the witness, were the orders of interlocutory nature, in which case, under Section 397(2), revision was clearly not maintainable. Under such circumstances, the learned Judge could not have interfered in his revisional jurisdiction. The impugned judgment is clearly incorrect in law and would have to be set aside. It is accordingly set aside. The appeals are allowed."

12. What is transpired from the aforementioned decision is that an order passed on an application under Section 91 of the Cr.P.C. is an order of interlocutory nature. That being so, this court is of the considered opinion that the bar of Section 362 of the Cr.P.C. is not applicable in the case in hand. And as such this court is unable to record concurrence to the submission advanced by A. Das, learned counsel for the petitioner.

13. Moreover, the first order, dealing with the application under Section 91 of the Cr.P.C. was passed on 23.09.2014. Thereafter, the impugned order was passed on 16.07.2018. In between several witnesses, including PW2, have been examined by the learned court below and there is indication that the petitioners had sold the Flat of the respondent No. 2 to several other persons after selling

the same to the respondent No. 2. And as such, no fault can be found with the impugned order, so passed by the learned court below.

14. Another aspect of the matter, which cannot lose sight of is that every litigant, be it informant/complainant/victim or accused has the right to fair trial, which is recognised as a fundamental right under Article 21 of the Constitution of India. In a fair trial the informant/complainant/victim is also entitled to get a fair opportunity to prove his or her case. Reference in this context can be made to a decision of Honble Supreme Court in the case of *Zahira Habibullah Sheikh vs. State of Gujarat*, reported in (2006) 3 SCC 374, wherein the concept of fair trial was explained as under:-

“36. The principles of rule of law and due process are closely linked with human rights protection. Such rights can be protected effectively when a citizen has recourse to the courts of law. It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical, all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz. whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted. It will not be correct to say that it is only the accused who must be fairly dealt with. That would be turning a Nelson eye to the needs of society at large and the victims or their family members and relatives. Each one has an inbuilt right to be dealt with fairly in a criminal trial. Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial.”

15. Thus, on this count also the order impugned, cannot be said to have suffered from any infirmity or impropriety requiring any interference of this court.

16. I have considered the submission of learned Advocates of both side in the light of fact and circumstances on the record and I am in respectful disagreement with the submission of Mr. A. Das, the learned counsel for the petitioner. I have carefully gone through the case laws, i.e. *Adalat Prasad (Supra)* and *Devendra Kishanlal Dagali (Supra)*, referred by him. The proposition of law, so laid down in the said cases, is that the Code of Criminal Procedure does not contemplate a review of an order. There is no quarrel at the Bar in respect of the said proposition of law. But, in the given facts and circumstances on the record and in view of the order dated 23.09.2014 being interlocutory in nature and also in view of the discussion and finding of this court in Para Nos. 12, 13 & 14 of this judgment, this court is of the view that the ratio laid down in the said cases would not be applicable in all force to the facts and circumstances herein this

case.

17. Under the facts and circumstances discussed herein above, I find no merit in this petition, and accordingly, the same stands dismissed. Stay, if any, granted earlier stands vacated. The parties have to bear their own cost.