

* **HIGH COURT OF DELHI : NEW DELHI**

+ **CRL.L.P. 450 OF 2010**

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Decided on: August 04, 2011

GHISA RAM DECD. THR. HIS ATTORNEY
MADAN LAL

..... Petitioner

Through: Mr. Ravinder Narayan and Mr.
Ashwani, Advocates.

versus

NCT OF DELHI & ORS

..... Respondents

Through: Mr. C.L. Gupta, APP for the State.
Mr. K.K. Datta, Advocate for
Respondent Nos. 2 to 4.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Whether the Reporters of local papers may
be allowed to see the judgment? Not necessary
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

MUKTA GUPTA, J. (ORAL)

Crl. M.A. No. 18232/2010 (Delay)

By this application the Petitioner seeks condonation of delay of nine days in filing the leave to appeal petition.

For the reasons stated in the application, the delay of 9 days in filing

the leave to appeal petition is condoned.

Application is disposed of.

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I have heard learned counsel for the parties.

Leave to appeal is granted.

Petition is disposed of.

Crl. Appeal No. 1011 /2011

1. Registry to number the appeal.
2. The Appellant's father filed a complaint through the Appellant as his attorney before the learned Metropolitan Magistrate against Respondent Nos. 2 to 4 for offences punishable under Sections 419/420/468/471/457/379/506/120B/34 IPC. Along with the complaint no list of witnesses was filed. At the stage of pre summoning and pre charge evidence only one witness Ghisa Ram that is the father of the Appellant was examined. However, at the post charge stage before he could be cross examined Ghisa Ram expired. After the death of the Complainant his attorney, that is, the present Appellant Madan Lal filed an application stating that he wishes to prosecute the present case. This application of the Appellant was dismissed on the ground that the applicant was neither cited as a witness nor he has ever appeared as the witness at the pre-summoning or pre charge stage. It

was further held that in the absence of the complainant Ghisa Ram no other person can appear in the witness box to prove the alleged offence against the accused persons. Thus while dismissing the application of Madan Lal, the Appellant herein the application of Respondent Nos. 2 to 4 to close the complaint was allowed and Respondent Nos. 2 to 4 were acquitted.

3. The short issue which arises for consideration is that after the demise of the Complainant whether his attorney/legal heir could enter into the witness box and prove the charge against the Respondents.

4. Learned counsel for the Appellant contends that the learned Trial Court ignored Sections 249 and 256 Cr.P.C which clearly permit that even in the absence of the complainant, the Court can proceed with the trial. It is contended that the learned Trial Court failed to appreciate that the allegations as set out in the complaint were such which were in the knowledge of the present Appellant and thus he could have also deposed about the same. Reliance is placed on *Devender Kumar Jain and other vs. State*, 38 (1989) DLT 213 wherein it was held that unless a prejudice is shown to have been caused to the accused persons because of the failure of the complainant to have filed the list of witnesses with the complaint, the proceedings shall not be vitiated. Relying upon *K.S. Juneja and another vs. Embassy of Uruguay in India and others*, 2003 (2) CC cases (HC) 177 it is

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contended that non-filing of the list of witnesses is at best an irregularity which can be cured during trial.

5. Learned counsel for Respondent Nos. 2 to 4 on the other hand contends that the learned Trial Court has rightly acquitted the Respondent Nos. 2 to 4 since the complainant was the only witness who was in the knowledge of facts and in his absence the charges against the Respondents could not have been proved. Continuing the trial further would have been an exercise in futility and thus the learned Trial Court had rightly acquitted them. In the absence of Appellant herein being examined as a witness and also not having been cited as a witness it cannot be said that he was a witness and the proceedings cannot be continued against the Respondents.

6. I have heard learned counsel for the parties.

7. Briefly the allegations as set out in the complaint and in the statement of the complainant Ghisa Ram are that in the year 1977 he was allotted shop No. 24 at Babu Market, Sarojini Nagar and he was in possession of the shop till 1999. In the year 1999 his wife fell ill and he went to his village in Kothputli. When he returned back after one month after performing the last rites of his wife, he found Respondent Nos. 3 and 4 were present in the shop and stated that the complainant should leave or otherwise he would be killed.

He exhibited his complaint lodged at PS Ambedkar Nagar in this regard.

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8. Respondent No. 2 Om Prakash is the son of the Complainant whom he had disowned by a publication in the newspaper.

9. The complainant has further stated that Respondent No. 2 put his signatures on the documents without his knowledge and executed a forged GPA dated 28th December, 2008 in his favour. It is alleged that when he went to his native place he had left behind the articles of barber in his shop as he was running a barber shop and when he came back all those articles had been removed. It may be noted that this complaint by Ghisa Ram was filed through his attorney Madan Lal, the Appellant herein.

10. On the said complaint the Respondent Nos. 2 to 4 were charged for offences punishable under Section 120B read with Sections 467/468/471/506/380/490 and 420 IPC. However, since CW1 could not be cross-examined the impugned order acquitting the Respondent Nos. 2 to 4 was passed. Sections 249 and 256 of the Cr.P.C. provide as under:

“249. Absence of complainant-When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

256. Non-appearance or death of complainant.-(1) If the summons has been issued on complaint and on the day appointed for the appearance of the accused, or any day

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subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall notwithstanding anything hereinbefore contained, acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other day:

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

11. A perusal of Section 256 Cr.P.C. shows that in the absence of the Complainant also the complaint case can proceed. Hon'ble Supreme Court in *Rashida Kamaluddin Syed and another vs. Shaikh Saheblal Mardan (Dead) through Lrs. And another*, 2007 (3) SCC 548 observed:

"21. From the above case law, in our opinion, it is clear that on the death of Shaikh Saheblal, the case did not abate. It was, therefore, open to the sons of complainant to apply for continuation of proceedings against accused persons. By granting such prayer, no illegality has been committed by the courts. There is an additional reason as to why the order should not be interfered with at this stage. As we have already noted, the complainant died in November, 1996. Immediately thereafter, sons applied for impleadment allowing them to continue prosecution against the accused persons by the application dated January 17, 1997. The said application was allowed and permission was granted by an order dated May 23, 1997. The said order was never challenged by the appellants and it had become final. Name of the first respondent was

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entered on May 14, 2000. Thereafter witnesses were also examined. In so far as application dated August 4, 2004 of the accused is concerned, it was under Section 239 of the Code which provides for discharge of accused. The only ground put forward by the accused was that no prima facie case had been made out against them. In the light of above facts also, in our opinion, this is not a fit case to exercise discretionary power under Article 136 of the Constitution."

12. It is the quality of the evidence which has to be tested. In a given case of injury where only the Complainant was the eye witness, the strict parameter that since there is no other witness is applicable but in a case of this nature that is of cheating and forgery which is largely based on the documents the complainant's case can be proved and the allegations of the learned counsel for the Respondent that no list of witnesses was submitted is of no consequence. Hon'ble Supreme Court in *Sayeeda Farhana Shamim vs. State of Bihar and another*, 2008 (8) SCC 218 held that:-

8. In view of the consensus of the opinion which has emerged from various decisions of the High Courts appears to be that the power of the Magistrate should not be fettered either under Section 244 or under sub-section (6) of Section 246 of the Cr.P.C. and full latitude should be given to the Magistrate to exercise the discretion to entertain a supplementary list. But as we have already added a word of caution that while accepting the supplementary list the Magistrate shall exercise its discretion judiciously for the advancement of the cause of justice and not to give a handle to the complainant to harass the accused."

13. Thus, in view of the law laid down by the Hon'ble Supreme Court and the facts of the present case, I do not find that it was appropriate for the learned Trial Court to have acquitted the Respondent Nos. 2 to 4. Hence, the Appellant is permitted to be substituted as complainant and allowed to continue with the complaint case.

14. The appeal is disposed of accordingly.


(MUKTA GUPTA)
JUDGE

AUGUST 04, 2011/'vn'