

CRR-2793 of 2022

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

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Date of decision: 20.01.2023

Mahender and another

.....Petitioners

Versus

Mukesh (since deceased) through Gokul

.....Respondent

CORAM: HON'BLE MR. JUSTICE NAMIT KUMAR

Present: - Mr. Lakshman Sharma, Advocate,
for the petitioners.

Mr. Vikrant Pamboo, DAG, Haryana.

NAMIT KUMAR, J. (ORAL)

Instant revision petition has been filed under Section 401 Cr.P.C. by the petitioners impugning the order dated 22.09.2022 passed by learned Judicial Magistrate Ist Class, Bhiwani, whereby application moved by respondent-Gokul for permission/leave to prosecute and continue criminal complaint against the petitioners (accused) upon the death of complainant, has been allowed.

Brief facts of the case are that on 01-05-2016 at about 08:00 a.m. accused Shyam (petitioner No.2) with Tractor had come to plow complainant's fields. Thereupon the complainant and his brother Kapil and Gokal asked him not to do so and called Mahender (petitioner No.1) at the spot. Thereafter, it was agreed to settle the

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matter regarding land dispute at their house in the village, therefore, complainant and his brothers went to the hotel built in their fields. In the meanwhile petitioner No.2-Shyam called his son Dashrath alias Monu, Sumer alias Sonu son of Prakash and Bhupender son of petitioner No.1-Mahender Singh via phone. After some time they all came in an Alto vehicle with *lathis* and *gandasi*, entered in to the hotel, surrounded complainant's brother Kapil and Gokal and started causing injuries upon them. Accused Dashrath inflicted *gandasi* blow on the head, petitioner No.1-Mahender inflicted *lathi* blow on back side of head, Sumer alias Sonu inflicted *lathi* blow on chest of Kapil, petitioner No.2-Shyam inflicted *lathi* blows on hands and legs and Bhupender caused injuries to Gokal after his felling down. When complainant tried to rescue his brothers, petitioners caught hold of him, laid him down and accused Bhupender beaten him up by kick and punches blows coupled with threats to kill him. While in defence of complainant party, accused party also sustained injuries. Upon raising hue and cry for help, many passersby gathered there and on seeing them, accused persons led away by their Alto Car coupled with threats to kill the complainant party. Thereafter, complainant shifted his both injured brothers to the Civil Hospital, Bhiwani for treatment, where doctor treated them, prepared MLR No. RY/BWN/286/2016 of Kapil and RY/BWN/287/2016 of Gokal and sent Medical Rucca to the Police. On next day police recorded his statement but in collusion with accused party registered a false case FIR No. 270 dated 03-05-2016 against complainant and his brothers. The motive behind the occurrence

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remained the litigation between parties qua land since many years. Requests were made times and again to the Police but of no avail. Hence, the complainant filed present complaint before the trial Court, Bhiwani.

Learned Judicial Magistrate Ist Class, Bhiwani, after hearing the complainant and considering the preliminary evidence on record, summoned petitioners along with Dashrath, Bhupender and Sumer alias Sonu for offences under Section 323, 452 and 506 IPC read with Section 34 IPC vide order dated 22.07.2021.

During the pendency of the complaint, complainant Mukesh expired on 28.05.2022 and respondent-Gokul filed an application for permission/leave to prosecute and continue the criminal complaint against the accused persons, which has been allowed by learned Judicial Magistrate Ist Class, Bhiwani, vide impugned order dated 22.09.2022, challenged in present revision.

The order impugned reads as under: -

“Heard on the application moved on behalf of applicant Gokal seeking permission to prosecute and continue the criminal complaint against the accused.

2. It has been submitted by the applicant that complainant Mukesh expired on 28.05.2022 during the pendency of criminal complaint. The applicant is brother of the complainant Mukesh and is also injured/aggrieved in the present complaint. Hence, applicant be permitted to continue and prosecute with the present complaint against the accused.

3. Per contra, it is submitted by the accused Sumer that the applicant has no right to continue with the present

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complaint. Rests of the averments have been denied and dismissal of the present application.

4. Per contra, it is submitted by accused Mahender, Shyam, Dashrath and Bhupender that the present application is not maintainable and the same has been filed by the applicant with an intention to cause harassment to the accused. Applicant has no right to continue with the complaint as per provisions of Section 256 Cr.P.C. Rests of the averments have been denied and dismissal of the present application was prayed for.

4. Having heard the respective contentions of the learned counsel for applicant as well as learned counsel for accused and having perused the case file very carefully, the court is of considered view that from the perusal of the contents of complaint as well as perusal of the testimony of applicant already examined as CW3, it is evident that name of applicant has been mentioned as victim in the present complaint and applicant is equally interested in the complaint after the death of the complainant. Therefore, he can be permitted to pursue the proceedings after the death of complainant. Hence, the application at hand stands allowed.

Learned counsel for the petitioners contends that since the complainant has expired on 28.05.2022 during the pendency of the criminal complaint, the proceedings cannot continue and application filed on behalf of the applicant-Gokal, brother of the complainant-Mukesh, was liable to be rejected.

Per contra, learned State counsel submits that the impugned order passed by the trial Court is fully justifiable and also valid in the eyes of law.

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I have heard learned counsel for the parties and perused the record.

A perusal of the impugned order, as has been reproduced above, would show that complainant-Mukesh unfortunately expired on 28.05.2022 and his brother Gokal, who is injured/aggrieved, filed application for continuation of proceedings.

The Hon'ble Supreme Court in ***Chand Devi Daga and others v. Manju K. Humatani and others, 2017(4) R.C.R.(Criminal) 741*** had occasion to consider the same issue and it has been held as under: -

*13. This Court had occasion to consider Sections 256 and 302 in **Balasaheb K. Thackeray & Anr. v. Venkat @ Babru, 2006(3) RCR (Criminal) 631 : (2006) 5 SCC 530.** In the above case complaint was filed under Section 500 read with section 34 IPC. A petition was filed under section 482 of the Code 1973 against the order of issue of process in the High Court which was dismissed. SLP was filed in this Court in which notice was issued and during the pendency of the appeal it was noted that complainant had died. It was contended that the complaint be dismissed on the ground that complainant is dead. This Court in the above context referred to Sections 256 and 302. This Court repelled the argument of the appellant that complaint be dismissed on the ground that complainant had died. Following was held in paragraphs 3 to 6:*

"3. Learned counsel for the appellants with reference to Section 256 of the Code submitted that the complaint was to be dismissed on the ground of the death of the complainant. As noted above learned counsel for Respondent 1's legal heirs submitted that the legal heirs of

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the complainant shall file an application for permission to prosecute and, therefore, the complaint still survives consideration.

4. At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In Ashwin Nanubhai Vyas v. State of Maharashtra with reference to section 495 of the Code of Criminal Procedure, 1973 1898 (hereinafter referred to as "the old Code") it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution. In Jimmy Jahangir Madan v. Bolly Cariyappa Hindley after referring to Ashwin case it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution.

5. Section 302 of the Code reads as under:

"302. Permission to conduct prosecution.-(1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person, other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission: Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

6. To bring in application of Section 302 of the Code, permission to conduct the prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below

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the rank of Inspector; but no person other than the Advocate General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission."

14. Two Judge Bench **in Jimmy Jahangir Madan v. Bolly Caiyappa Hindley (dead) By Lrs., (2004) 12 SCC 509** referring to this Court's judgment in *Ashwin Nanubhai Vyas (supra)* had held that heirs of complainant can continue the prosecution. Following was held in paragraph 5:

*"5. The question as to whether the heirs of the complainant can be allowed to file an application under Section 302 of the Code to continue the prosecution is no longer res integra as the same has been concluded by a decision of this Court in the case of **Ashwin Nanubhai Vyas v. State of Maharashtra** in which case the Court was dealing with a case under section 495 of the Code of Criminal Procedure, 1973 1898, which is corresponding to Section 302 of the Code. In that case, it was laid down that upon the death of the complainant, under the provisions of Section 495 of the said Code, mother of the complainant could be allowed to continue the prosecution. It was further laid down that she could make the application either herself or through a pleader. Undisputedly, in the present case, the heirs themselves have not filed the applications to continue the prosecution, rather the same have been filed by their power-of-attorney holders...."*

15. In view of what has been discussed above, we are of the view that High Court did not commit any error in allowing the legal heirs of the complainant to prosecute the Criminal Misc. Petition before the High Court. We do

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not find any error in the order of the High Court. The appeal is dismissed.”

In view of the peculiar facts and circumstances of the case and settled proposition of law, no illegality or perversity is found in the order passed by the trial Court. Therefore, the present revision petition lacks merit and is accordingly dismissed with no order as to costs.

20.01.2023
R.S.

(NAMIT KUMAR)
JUDGE

Whether speaking/reasoned : Yes/No
Whether Reportable : Yes/No