

GAHC010051892024



2024:GAU-AS:11902

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

Case No. : Crl.Pet./276/2024

AYNUL HAQUE LASKAR AND 2 ORS
S/O LATE ABDUL SARKAR LASKAR, R/O VILL- BHATISANGJURAI, P.S.-
ALGAPUR, DIST- HAILAKANDI, ASSAM

2: NAZRUL ISLAM LASKAR @ NAJRUL HAQUE LASKAR
S/O LATE ABDUL SARKAR LASKAR
R/O VILL- BHATISANGJURAI
P.S.-ALGAPUR
DIST- HAILAKANDI
ASSAM

3: ABDUS SUFFAN LASKAR
S/O LATE HARI MIA LASKAR
R/O VILL- NABINSANANPUR
P.S.-ALGAPUR
DIST- HAILAKANDI
ASSA

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PUBLIC PROSECUTOR, ASSAM

2:FORIZ UDDIN LASKAR
S/O LATE NIMAR ALI LASKAR
R/O VILL- BHATISANGJURAI
P.S.-ALGAPUR
DIST- HAILAKANDI
ASSAM
PIN-78815

Advocate for the Petitioner : MR. M KHAN, MR. N J DUTTA, MS J AKTAR

Advocate for the Respondent : PP, ASSAM, MR. M PHUKAN, LD, PP, ASSAM, S. M. ZINNA (R-

2),MS. S R MAZARBHUIYA (R-2),MS. A BEGUM (R-2),MR. A M BARBHUIYA (R-2)

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Petitioner : MR N. J. Dutta, Advocate.
For the Respondents : Mr. B. Sarma, Addl.PP.
Mr. A. M. Barbhuiya, Advocate.
Date of Hearing : 01.10.2024
Date of Judgement : 29.11.2024

JUDGMENT & ORDER (CAV)

1. Heard Mr. N. J. Dutta, learned counsel for the petitioners. Also heard Mr. B. Sarma, learned Additional Public Prosecutor for the State respondent and Mr. A. M. Barbhuiya, learned counsel for the respondent No. 2.
2. The present application is filed under Section 482 Cr.P.C. for quashing of proceeding in CR case No. 604/2023 pending in the court of learned Judicial Magistrate 1st Class, Hailakandi.
3. Before dealing in details, the argument of the learned counsel for the parties, let this Court first record the facts of the present case which are necessary for proper determination of the case in hand.
 - I. On 28.05.2016, an FIR was lodged by one Fariz Uddin Laskar against one Selim Uddin Laskar, one Kutub Uddin Laskar, one Aynul Hauque Laskar (petitioner No. 1) one Narzul Haque Laskar (Petitioner No. 2) and one Abdus Suffan Laskar (Petitioner No. 3) with an allegation that the informant and the accused No. 1 and 2 are the

brothers and there has been a long standing land dispute relating to their inherited property and to resolve the said dispute several village meetings were held, however, it remain unsettled. Thereafter, 25.05.2016, at around 10:00 AM, a last meeting was held in the residence of the accused No. 1, however, the accused persons attacked the informant with fist blow and accused No. 1 and 2 sat on the body of the informant and assaulted with brick with an intention to kill him etc. It is also alleged that when the wife of the informant came to his rescue, then accused No. 1 and 2 started beating her and pulled out her saree. It is further alleged that when his wife ran away, the accused No. 3 attempted to beat her in a naked condition but somehow she could protect herself.

- II. Accordingly, Algapur PS Case No. 75/2016 under Section 120B/143/354(B)/323 IPC was registered.
- III. After completion of the investigation, charge sheet was filed on 20.06.2016 and accused Selim Uddin Laskar and accused Kutub Uddin Laskar i.e. accused No. 1 and 2 were sent for trial, however, the present petitioners who were arrayed as accused No. 3, 4 and 5 in the FIR were not sent for trial.
- IV. Thereafter, the learned Magistrate 1st Class, Hailakandi, after perusal of the case diary was satisfied that the prima facie case is made out against the accused under Section 448/323/34 of the IPC and accordingly, summons were issued to the accused Nos. 1 and 2, and the matter was fixed for appearance on 30.01.2017.

- V. The trial proceeded and as many as 7 (seven) witnesses were examined till 17.11.2022.
- VI. At that stage, a petition was filed under Section 321 of Cr.P.C. by the learned Additional Public Prosecutor for withdrawal of the prosecution on the strength of a direction of the Government of Assam issued vide Notification E-217405/52 dated 21.10.2022. Taking note of the guidelines/notification dated 21.10.2022 (supra), the learned Additional Public Prosecutor was allowed to withdraw the prosecution and accordingly GR Case No. 929/2016 arising out of Algapur P.S. Case No. 75/2016 was closed on withdrawal.
- VII. Subsequent to such withdrawal, the informant, on the same fact filed a complaint case being C.R. Case No. 604/2023 under Section 120(B)/354(B)/323/34 of IPC before the Chief Judicial Magistrate, Hailakandi arraying all the accused named in the FIR as accused in the complaint case including the present petitioners, who were not charge sheeted/not sent for trial.
- VIII. Amongst other, a stand was taken that the case was wrongly withdrawn without verifying facts and the evidence that has already been recorded inasmuch as there were allegation of molestation and by virtue of Notification dated 21.10.2022, case involving molestation cannot be withdrawn.
- IX. Accordingly, C.R. Case No. C.R. Case No. 604/2023 under Section 120(B)/354(B)/323/34 of IPC was registered. Statement under Section 200/202 of Cr.P.C. was recorded and the learned magistrate

under its order dated 19.08.2023 took cognizance of offences under Section 120B/354(B)/323/34 of IPC against all the accused persons including the petitioners herein and summons were issued to them.

X. As recorded herein above assailing such action, the present petition is filed.

4. In the aforesaid undisputed factual background, Mr. N. J. Dutta, learned counsel for the petitioners argues that by virtue of withdrawal of the case by State in terms of Section 321 of the Cr.P.C., more particularly, after cognizance were taken, even the accused sent for trial were acquitted and not to say about the petitioners, who were not even sent for trial for want of any material by the Investigating Authority. Therefore, on the same set of fact, cognizance of offences under Section 120B/354/323/34 of IPC could not have been taken by the Magistrate and by doing so the learned Magistrate had exceeded in his jurisdiction resulting in miscarriage of justice.

5. Mr. Dutta, learned counsel further contends that withdrawal of a case by State under Section 321 of Cr.P.C., shall not give any right to the victim to file a complaint on the same set of fact inasmuch as such course of action is not prescribed and permissible under the scheme of Code of Criminal Procedure. Therefore, the State in exercise of its executive power cannot create a right to file a complaint on the same facts after the prosecution is withdrawn by the State in exercise of its power under Section 321 of Cr.P.C.

6. Per contra, Mr. A. M. Barbhuiya, learned counsel for the respondent No. 2 argues that the State has no absolute power to withdraw all kind of cases

to bypass legal procedure of pending G.R. cases inasmuch as the Public Prosecutor is to apply its mind on instruction received from the State, then only he can press for withdrawal before the Court, if the same is having legally valid and acceptable reason. Therefore, according to Mr. Barbhuiya, learned counsel, the withdrawal of the G.R. case in question itself is bad in law. While concluding Mr. Barbhuiya, learned counsel submits that he will have no objection if the complaint case is set aside against the present petitioners for the reason that they were not charge sheeted/sent for trial.

7. This Court has given anxious consideration to the argument advanced by the learned counsel for the parties. Also perused the materials available on record.
8. Before dealing with the mandate of Section 321 of Cr.P.C. and the effect of withdrawal of a prosecution by State, let this Court first record the decision of the State Government to withdraw certain criminal prosecution:-
 - I. It is on record that the State Cabinet, in its meeting held on 11.09.2022, took a decision to go for withdrawal of cases by invoking Section 321 of Cr.P.C., 1973, where punishment is upto 3 years or fine or both under IPC or under any other special Act/Regulation, which were registered upto 14.08.2022, except those cases registered and/or involves Molestation/ Sexual Assault/ POCSO Act/ Corruption/Embezzlement of Public Fund, under NDPS Act, under Arms Act/Explosive Substance Act, cases registered under Section 498(A) IPC and other cases relating to dowry, offences under Section 304A of IPC/Vehicle theft cases under Section 379 of IPC, offences relating to coins/government stamp/currency, under Unlawful

Activities (P) Act, Organized crimes like Cattle smuggling/supari smuggling/coal smuggling/oil theft etc, and cases against MPs/MLAs.

II. It is also on record that pursuant to such Cabinet decision, a detailed Standard Operating Procedure (SOP) was notified Vide Notification No. E-217405/52 dated 21.10.2022 prescribing guidelines for this purpose.

III. The important clause under the said SOP, relevant for determination of this case is quoted herein below:-

“If any of the victim is aggrieved with the proposed withdrawal, he/she shall be at liberty to file complaint case on their own, to proceed with their grievance and in appropriate cases, such eligible victim may approach for legal aid before District Legal Services Authority”.

IV. With the aforesaid background, it was urged by the petitioners that by way of a SOP, no substantive right can be created for filing a complaint in absence of any specific provision in the Cr.P.C. and/ or without amendment of the Cr.P.C.

V. This point was deliberated during the course of hearing and at that stage, Mr. M. Phukan, learned Public Prosecutor sought some time on the ground that the highest authority in the State is considering this aspect of the matter and accordingly on 02.08.2024, during the course of deliberation, it was submitted that the State is proposing to amend certain provision of SOP so that SOP conforms with the provision of Code of Criminal Procedure as well as the new Procedure Code, i.e. BNSS, 2023.

VI. Subsequently, a fresh Cabinet decision was taken 13.09.2024 and the aforesaid provision of earlier SOP dated 21.10.2022 was modified and the prescription "***if any of the victim is aggrieved with the proposed withdrawal, he/she will be at liberty to file complaint case on their own***" was replaced to the effect that "***he/she will be at liberty to approach the appropriate forum as per law***".

VII. Thus, the right / prescription to file complaint case on their own was deleted.

9. Section 321 of Code of Criminal Procedure, 1973 authorizes the Public Prosecutor or Assistant Public Prosecutor in charge of a case to withdraw from the prosecution of any person at any time before the judgment is pronounced, however, with consent of the Court. The effect of such withdrawal is also enumerated under the provision of Section 321 of Cr.P.C and according to such prescription, if prosecution is withdrawn before framing of charge, the accused shall be discharged in respect of the offence or offences and if it is withdrawn after a charge has been framed or when under this Code no charge is required, he shall be acquitted in respect of the offence or offences.

10. That being the position, in the case in hand, the accused in G.R. Case No. 929/2016 arising out of Algapur P.S. Case No. 75/2016, for all meaning and purport were acquitted by virtue of such provision on withdrawal of prosecution as recorded hereinabove. This Court is of the unhesitant opinion that the State will be within its right to withdraw by following the mandate and prescription of Section 321 of Cr.P.C., however, the State will

not be within its executive power to prescribe a mode of prosecution in the shape of a complaint case for prosecution of offence(s) from which the accused has already been acquitted/discharged by virtue of withdrawal of the case by State under Section 321 Cr.P.C.

11. Therefore, in view of the aforesaid determination and in the given facts of the present case by virtue of acquittal of the co-accused, the present petitioners, who were not even accused in the said case and were not sent for trial, in absence of material against them by the investigating authority, cannot be prosecuted once again by virtue of a right created by the State in exercise of its executive power and by way of a fresh complaint.
12. Therefore, in view of the aforesaid, the complaint case cannot sustain against the present petitioners. Accordingly, the proceeding in CR case No. 604/2023 pending in the court of learned Judicial Magistrate 1st Class, Hailakandi stands set aside and quashed so far the same relates to the present petitioners.
13. This Court cannot be oblivious of the right of a victim, though no opportunity is provided to a victim to object such withdrawal of prosecution by State under the scheme of Section 321 of Cr.P.C. In the considered opinion of this Court, the victim shall always have a right not only to participate in a criminal prosecution but to object withdrawal of a prosecution by the State. However, such right is not recognized under Section 321 of Cr.P.C. Therefore, an aggrieved victim cannot be made remediless inasmuch as in such a situation, an aggrieved can very well approach the superior Court, may be under Section 482 of Cr.P.C or in a given case under provision of Articles 226/227 of Constitution of India.

However, this Court records herein that there is a positive change in this regard by virtue of enactment of Section 360 of BNSS, 2023, which prohibits withdrawal of prosecution by the State without giving notice to the victim. Be that as it may, while parting with the record, it is made clear that the respondent shall still be at liberty to approach higher forum assailing the withdrawal of the prosecution by the State even at this stage.

14. With the aforesaid reason, decision and observation, the criminal petition stands allowed.

JUDGE

Comparing Assistant