

JIMMY JAHANGIR MADAN
v.
BOLLY CARIYAPPA HINDLEY (D) BY LRS.

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NOVEMBER 4, 2004

[B.N. AGRAWAL AND H.K. SEMA, JJ.]

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Code of Criminal Procedure, 1973:

s.302 read with s.2(q)—Permission to continue prosecution—Death of complainant during trial—Power of attorney holders of the heirs filing applications u/s 302 for permission to continue prosecution—Held, permission can be granted only if it is sought by the person who is entitled to continue the prosecution and not by the power of attorney holders—Applications dismissed with liberty to the heirs to make applications themselves as indicated in the order—Advocates Act, 1961—s.32—Negotiable Instruments Act, 1881—s.138.

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In a complaint case under s.138 of the Negotiable Instruments Act, 1881, on the death of the complainant during trial the power of attorney holders of the legal heirs of the deceased complainant filed petitions under s.302 of the Code of Criminal Procedure, 1973 for allowing them to continue the prosecution. The trial court allowed the petitions, and the High Court upheld the order.

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In the appeals filed by the accused it was contended that power of attorney holders had no right to file the applications under s.302 of the Code, and as such the applications were not maintainable.

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Allowing the appeals, the Court

HELD: 1.1. In view of section 302 read with Section 2(q) of the Code of Criminal Procedure, 1973, the prayer to continue the prosecution can be made either by a legally qualified person, who is authorized to practice in the court under the Advocates Act, or by any other person, including a power of attorney holder, in which eventuality such permission can be granted by the court only if it is sought by the person who is entitled to

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A continue the prosecution and not by the power of attorney holder. Under s.302 of the Code, a person who is entitled to continue the prosecution, is required to make an application himself, but, instead of taking steps personally, a party can be represented through a pleader. Power of attorney holder can represent the party concerned in case permission for such representation is sought from the court by the person concerned and granted by it. But where no such permission is sought by a party who has right to continue the prosecution, power of attorney holder cannot be allowed to represent the party concerned. [961-E-H; 962-A]

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C *T.C. Mathai and Anr. v. District and Sessions Judge, Thiruvananthapuram, Kerala, [1999] 3 SCC 614 and Ashwin Nanubhai Vyas v. State of Maharashtra and Anr., [1967] 1 SCR 807, relied on.*

D 1.2. In the instant case, neither heirs of the complainant filed petition under s.302 of the Code to continue the prosecution nor any permission was sought by them from the competent court that they should be allowed to continue the prosecution through their power of attorney holders; rather the prayer was made by the power of attorney holders, which is not permissible under law. Therefore, the trial court was not justified in allowing the petitions under s.302 of the Code filed by the power of attorney holders. The orders of the trial court and the High Court are set aside. However, the heirs would be at liberty either to make application themselves before the court concerned to continue the prosecution or apply to the court to grant permission to them to authorize the power of attorney holders to continue the prosecution on their behalf. [962-B-D]

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F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1222-1223 of 2002.

From the Judgment and Order dated 10.8.2001 of the Karnataka High Court in Crl. R.P. Nos. 909 and 910 of 1998.

G Dhruv Mehta, Ms. Shalini Gupta and Mohit Chaudhry for M/s K.L. Mehta & Co. for the Appellant.

K.R. Chaudhury, Sr. Joshua H. Samueh and Rakesh K. Sharma with him for the Respondents.

H The Judgment of the Court was delivered by

B.N. AGRAWAL, J. These appeals by special leave have been filed against judgment rendered by Karnataka High Court in revision applications upholding order passed by the Additional Chief Metropolitan Magistrate, Bangalore, in two complaint cases whereby petitions filed under Section 302 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') for allowing power of attorney holders of heirs of the original complainant to continue the prosecution were allowed.

The short facts are that one Mrs. Bolly Cariyappa Hindley filed two complaints for prosecution of the appellant under Section 138 of the Negotiable Instruments Act (hereinafter referred to as 'the Act') in which cognizance was taken and the accused was summoned. During trial, the complainant died leaving behind her son Peter Baldwin Jr. and daughter Mrs. Nina Baldwin Eddy who were staying in United States of America, as such they executed a general power of attorney in favour of Mr. John Curtis and Mrs. Annie Cariyappa respectively. The two general power of attorney holders of the aforesaid heirs filed applications under Section 302 of the Code in the aforesaid cases before the trial court for permitting them to continue the prosecution therein. which prayer was contested by the accused, but the learned magistrate allowed the applications and permission was granted to continue the prosecution. Challenging the aforesaid order, two revision applications were filed before the High Court of Karnataka by the accused which having been dismissed, the same necessitated filing of these appeals by special leave.

Shri Dhruv Mehta, learned advocate appearing on behalf of the appellant, submitted that the power of attorney holders had no right to file an application under Section 302 of the Code to continue the prosecution which could have been filed by heirs of the complainant, as such, the petitions under Section 302 of the Code were not maintainable and liable to be dismissed on this count alone. Shri K.R. Chaudhary, learned Senior advocate appearing on behalf of the respondents, on the other hand, submitted that the petitions under Section 302 of the Code by the power of attorney holders were maintainable and the trial court was justified in allowing the same.

The question that arises for consideration is as to whether application under Section 302 of the Code to continue the prosecution could be filed by power of attorney holders of heirs of the complainant? In order to appreciate the point, it would be useful to refer to Section 302 of the Code which runs thus:-"

"Permission to conduct prosecution.—(1) Any Magistrate inquiring

A 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;

B 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.”

C The question as to whether 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 and Anr.*, [1967] 1 SCR 807, in which case the Court was dealing with a case under Section 495 of the Code of Criminal Procedure, 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. Thus, the question that arises would be as to whether power of attorney holder can be treated to be pleader of heirs of the complainant? ‘Pleader’ is defined in Section 2(q) of the Code which reads thus:-

F “2(q) ‘Pleader’, when used with reference to any proceeding in any Court, means a person authorized by or under any law for the time being in force, to practise in such Court, and includes any other appointed with the permission of the Court to act in such proceeding;”

G The definition envelopes two kinds of pleaders within its ambit. The first refers to legal practitioners who are authorized to practise law and the second refers to “any other person”. If it is the latter, its essential requisite is that such person should have been appointed with the permission of the court to act in such proceedings. This is in tune with Section 32 of the advocates Act, 1961 which empowers a court to permit any person, who is

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not enrolled as an advocate, to appear before it in any particular case. But if he is to represent another person in a criminal court, such permission should be sought for by that person. It is not necessary that the "pleader" so appointed should be the power of attorney holder of a party in the case. What seems to be a condition precedent is that his appointment should have been preceded by grant of permission of the court. It is for the court to consider whether such permission is necessary in the given case. Legally qualified persons who are authorized to practise in the courts by the authority prescribed under the Statute concerned can appear for parties in the proceedings pending against them. No party is required to obtain prior permission of the court to appoint such persons to represent him in court. Section 30 of the Advocates Act confers a right on every advocate, whose name is entered in the Roll of advocates maintained by a State Bar Council, to practise in all the courts in India. Section 33 of the Advocates Act lays down that no person shall be entitled to practise in any court unless he is enrolled as an advocate under the said Act. But if the person proposed to be appointed by a party is not such a qualified person, prior permission of the court must be secured before a non-Aavocate is appointed by a party to represent him in court.

The question as to under what circumstances a power of attorney holder can be brought within the ambit of the expression "pleader", as defined in Section 2(q) of the Code, was subject matter of consideration before this Court in the case of *T.C.Mathai and Anr. v. District and Sessions Judge, Thiruvananthapuram, Kerala*, [1999] 3 SCC 614. In that case, power of attorney holder filed a petition before the session court for permitting him to represent the accused persons but the prayer was declined and the same was confirmed by a Single Judge of the Kerala High Court as well as by Division Bench, on appeal being preferred. When the matter was brought to this Court, order of session court declining to grant permission was not interfered with, and this Court observed thus at pages 619 and 620:

"14. Under the English law, "every person who is *sui juris* has a right to appoint an agent for any purpose whatsoever, and he can do so when he is exercising statutory right no less than when he is exercising any other right", (vide *Jackson and Co. v. Napper Ch D*, (1886) 35 Ch D 162 at p. 172). But this Court has pointed out that the aforesaid common law principle does not apply where the act to be performed is personal in character, or when it is annexed to a public office or to an office involving any fiduciary obligation, (vide *Ravulu Subba Rao v. CIT AIR* (1956) SC 604).

A 15. Section 2 of the Power of Attorney Act cannot override the specific provision of a statute which requires that a particular act should be done by a party-in-person. When the Code requires the appearance of an accused in a court it is no compliance with it if a power-of-attorney holder appears for him. It is a different thing that a party can be permitted to appear through counsel. Chapter XVI of the Code empowers the Magistrate to issue summons or warrant for the appearance of the accused. Section 205 of the Code empowers the Magistrate to dispense with "the personal attendance of the accused, and permit him to appear by his pleader" if he sees reasons to do so. Section 273 of the Code speaks of the powers of the court to record evidence in the presence of the pleader of the accused, in cases when personal attendance of the accused is dispensed with. But in no case can the appearance of the accused be made through a power-of-attorney holder. So the contention of the appellant based on the instrument of power of attorney is of no avail in this case.

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D 16. In this context reference can be made to a decision rendered by a Full Bench of the Madras High Court in *M. Krishnammal v. T. Balasubramania Pillai* AIR (1937) Madras 937 when a person, who was the power-of-attorney holder of another, claimed right of audience in the High Court on behalf of his principal. A Single Judge referred three questions to be considered by the Full Bench, of which the one which is relevant here was whether an agent with the power of attorney to appear and conduct judicial proceedings has the right of audience in court. Beasley, C.J., who delivered the judgment on behalf of the Full Bench stated the legal position thus: (AIR Headnote)

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F "An agent with a power of attorney to appear and conduct judicial proceedings, but who has not been so authorised by the High Court, has no right of audience on behalf of the principal, either in the appellate or original side of the High Court.... There is no warrant whatever for putting a power of attorney given to a recognized agent to conduct proceedings in court in the same category as a vakalat given to a legal practitioner, though latter may be described as a power of attorney (which) is confined only to pleaders, i.e., those who have a right to plead in courts."

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H 17. The aforesaid observations, though stated sixty years ago, would represent the correct legal position even now. Be that as it may, an agent cannot become a "pleader" for the party in criminal proceedings,

unless the party secures permission from the court to appoint him to act in such proceedings. The respondent-couple have not even moved for such a permission and hence no occasion has arisen so far to consider that aspect.”

In the case of *T.C. Mathai* (supra), this Court was considering as to whether under Section 205 of the Code, personal attendance of accused could be dispensed with and permission could be granted to the power of attorney holder to represent the accused and it was laid down that after dispensing with personal attendance of an accused, he could be allowed to be represented only by a “pleader” within the meaning of Section 2(q) of the Code and “pleader” may be of two kinds. The first refers to legal practitioners who are authorised to practise law; and the second “any other person” appointed by a party with the permission of the court to represent him in the proceeding, permission for which must be sought by the party concerned meaning thereby that if an accused wants himself to be represented by a power of attorney holder in court, he should himself apply to the court seeking such a permission and no such permission can be granted where the same has been sought by the power of attorney holder.

The language of Sections 205 and 302 of the Code is similar. Under Section 302 of the Code, a party can make an application himself to continue the prosecution or the same can be made by a pleader. As provided under Section 2(q) of the Code, the prayer to continue the prosecution can be made either by a legally qualified person, who is authorised to practise in the court under the Advocates Act; or by any other person which would obviously include a power of attorney holder in which eventuality such permission can be granted by the court where the prosecution is pending only if it is sought by the person who is entitled to continue the prosecution and not by the power of attorney holder. Under Section 205 of the Code, an accused is required to appear in person but his personal appearance can be dispensed with and he can be allowed to be represented by a pleader. Likewise, under Section 302 of the Code, a person, who is entitled to continue the prosecution, is required to make an application himself but under both the provisions aforesaid, instead of taking steps personally, a party can be represented through a pleader. Power of attorney holder can represent the concerned party under both the provisions of the Code, in case permission for such representation is sought from the court by the concerned person and granted by it. But where no such permission is sought by the concerned person, meaning thereby, in the case of Section 205 of the - Code an accused and in the case of Section

- A 302 of the Code - a party who has right to continue the prosecution, power of attorney holder cannot be allowed to represent the concerned person in the proceeding.

- B In the present case, neither heirs of the complainant filed petition under Section 302 of the Code to continue the prosecution nor any permission was sought by them from the competent court that they should be allowed to continue the prosecution through their power of attorney holders, rather the prayer was made by the power of attorney holders, which is not permissible under law. This being the position, we are of the view that the trial court was not justified in allowing the petitions under Section 302 of the Code and the
- C High Court has committed an error in confirming the said order which is liable to be set aside and petitions under Section 302 of the Code are fit to be dismissed giving liberty to the heirs either to make application themselves before the court concerned to continue the prosecution or apply to the court to grant permission to them to authorize the power of attorney holders to continue the prosecution on their behalf.

- D In the result, the appeals are allowed, impugned orders are set aside and the petitions under Section 302 of the Code filed before the trial court are rejected giving liberty to the heirs of the complainant to file fresh applications under Section 302 of the Code as stated above.

R.P.

Appeals allowed.