

CHAND DEVI DAGA & ORS.

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v.

MANJU K. HUMATANI & ORS.

(Criminal Appeal No. 1860 of 2017)

NOVEMBER 03, 2017

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[A. K. SIKRI AND ASHOK BHUSHAN, JJ.]

Code of Criminal Procedure, 1973 – Chapter XIX and XX – Death of complainant – Substitution of legal representatives of the complainant for prosecuting the complaint – Propriety of – Held: There is no provision in Chapter XIX “Trial of warrant cases by Magistrates” that in the event of death of complainant, the complaint is to be rejected – The Magistrate u/s.249 has the power to discharge a case where the complainant is absent, however, discharge is hedged with a condition that “the offence may be lawfully compounded or is not a cognizable offence” – Had the Code of 1973 intended that in case of death of complainant in a warrant case the complaint is to be rejected, the provision would have indicated any such intention which is clearly absent – No error committed by High Court in allowing the legal heirs of the complainant to prosecute in Criminal Misc. Petition.

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Dismissing the appeal, the Court

HELD: Section 256 of Code of Criminal Procedure, 1973 is contained in Chapter XX with the heading ‘Trial of summons-cases by Magistrates’. Analogous provision to Section 256 of Code 1973 was contained in Section 247 of Criminal Procedure Code, 1898. In Section 247 the proviso was added in 1955 saying that “where the Magistrate is of the opinion that personal attendance is not necessary, he may dispense with such attendance”. The said proviso took out the rigour of the original rule and whole thing was left to the discretion of the Court. Sub-section (1) of Section 256 contains the above proviso in the similar manner. Thus, even in case of trial of summons-case it is not necessary or mandatory that after death of complainant the complaint is to be rejected, in exercise of the power under proviso to Section 256(1), the Magistrate can

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A proceed with the complaint. More so, the present is a case where
 offence was alleged under Sections 420, 467, 468, 471, 120B and
 201 read with 34 IPC for which procedure for trial of summons-
 case was not applicable and there is no provision in Chapter XIX
 B “Trial of warrant- cases by Magistrates” containing a provision
 that in the event of death of complainant the complaint is to be
 rejected. The Magistrate under Section 249 has power to
 discharge a case where the complainant is absent. The
 discharge under Section 249, however, is hedged with condition
 “the offence may be lawfully compounded or is not a cognizable
 C offence”. Had the Code 1973 intended that in case of death of
 complainant in a warrant case the complaint is to be rejected, the
 provision would have indicated any such intention which is clearly
 absent. [Para 9] [927-C-F]

D *Ashwin Nanubhai Vyas v. State of Maharashtra*
 AIR 1967 SCC 983 : [1967] SCR 807 ; *BalasahebK.*
Thackeray & Anr. v. Venkat @ Babru (2006) 5 SCC
 530 : [2006] 3 Suppl. SCR 301 ; *Jimmy Jahangir Madan*
v. Bolly Caiyappa Hindley (dead) By Lrs. (2004) 12
 SCC 509 : [2004] Suppl. SCR 955 – referred to.

Case Law Reference

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| E | [1967] SCR 807 | referred to | Para 10 |
| | [2006] 3 Suppl. SCR 301 | referred to | Para 13 |
| | [2004] 5 Suppl. SCR 955 | referred to | Para 14 |

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
 No.1860 of 2017.

From the Judgment and Order dated 02.02.2017 of the High Court
 of Chhattisgarh at Bilaspur in I.A. No.1 of 2016 in Cr. M.P. No.216 of
 2016.

G Garvesh Kabra, Mrs.Pooja Kabra, Ms.Nikita Kabra, Advs for
 the Appellants.

Kaustubh Shukla, Rahul Shyam Bhandari, Deepayan Mandal,
 Konark Tyagi, Advs for the Respondents.

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The Judgment of the Court was delivered by

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ASHOK BHUSHAN, J. 1. This appeal has been filed against the judgment of the High Court of Chhatisgarh allowing an IA filed by the legal representatives of the petitioner in Criminal Misc. Petition. The respondents aggrieved by the order of the High Court dated 02.02.2017 has filed this appeal.

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2. The brief facts necessary for deciding this appeal are:

Smt. Chandra Narayan Das whose legal representatives are the respondent Nos.1 to 7 had filed a complaint against the appellants alleging offence under Sections 420, 467, 468, 471, 120B, 201 and 34 IPC. The husband of Smt. Chandra Narayan Das was a lease holder of a shop situated in the Civic Centre, Bhilai Steel Plant, Chhatisgarh. Shop No.12 was allowed in the name of the husband of appellant No.1 in the year 1959. Although, husband of the appellant No.1, a Member of Parliament had died in 1952 itself, it was alleged by the complainant that certain agreements were got executed by legal heirs of Member of Parliament which constituted commission of offence. The complaint was dismissed by the Magistrate vide order dated 26.02.2015 holding that *prima facie* case under Sections 420, 467, 468, 120B and 201/34 IPC is not made out against the accused.

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3. Smt. Chandra Narayan Das filed a criminal revision before the Additional Sessions Judge, Durg which was dismissed by VIIIth Additional Sessions Judge, Durg vide judgment dated 20.11.2015. Criminal Misc. Petition against the said order dated 20.11.2015 was filed in the High Court of Chhatisgarh by Smt. Chandra Narayan Das. The High Court on 18.02.2016 issued notice in the Criminal Misc. Petition. After issuance of notice the petitioner, Smt. Chandra Narayan Das died on 02.04.2016. An application was filed by the legal heirs of Smt. Chandra Narayan Das praying them to be substituted in place of the petitioner. The application was opposed by the appellants. The High Court vide its order dated 02.02.2017 allowed the said application and permitted the legal representatives of Smt. Chandra Narayan Das to come on record for prosecuting the Criminal Misc. Petition. Aggrieved by the said judgment, the appellants have come up in this appeal.

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4. Learned counsel for the appellants submits that in the Code of Criminal Procedure, 1973 (hereinafter referred to as "Code 1973") there is no provision which permits legal representatives of the complainant to

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A be substituted for prosecuting the complaint. It is submitted that the present
is a case where no summons were issued to the appellants since the
complaint was rejected by the Magistrate and a criminal revision
challenging the said order has also been dismissed. It is submitted that
the High Court committed error in permitting the legal representatives
of complainant to be brought on record for prosecuting the case.

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D 5. Learned counsel for the respondents refuting the submission of
the learned counsel for the appellants contends that rejection of complaint
and order of the Sessions Judge dismissing the criminal revision were
under challenge before the High Court on the ground that *prima facie*
offence was disclosed in the complaint and courts below committed
error in rejecting the complaint. The offence having been committed by
the appellants, the High Court has every jurisdiction to permit the legal
representatives to prosecute the matter in the event of death of original
complainant. It is submitted that Code 1973 does not contain any provision
that on death of complainant, the complaint cannot be allowed to be
prosecuted by any other person including the legal representatives.

6. We have considered the submissions of the learned counsel for
the parties and perused the records.

E 7. There is no dispute regarding facts and events in the present
case. The original complainant died during the pendency of the Criminal
Misc. Petition before the High Court which was filed challenging the
order of the Sessions Judge rejecting the criminal revision against the
order of Magistrate dismissing the complaint.

F 8. Section 256 of Code of Criminal Procedure, 1973 is contained
in Chapter XX with the heading "Trial of summons-cases by
Magistrates". Section 256 on which reliance has been placed provides
as follows:

G *"Section 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
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:

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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. A

(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." B

9. Analogous provision to Section 256 of Code 1973 was contained in Section 247 of Criminal Procedure Code, 1898. In Section 247 the proviso was added in 1955 saying that "where the Magistrate is of the opinion that personal attendance is not necessary, he may dispense with such attendance". The said proviso took out the rigour of the original rule and whole thing was left to the discretion of the Court. Sub-section (1) of Section 256 contains the above proviso in the similar manner. Thus, even in case of trial of summons-case it is not necessary or mandatory that after death of complainant the complaint is to be rejected, in exercise of the power under proviso to Section 256(1), the Magistrate can proceed with the complaint. More so, the present is a case where offence was alleged under Sections 420, 467, 468, 471, 120B and 201 read with 34 IPC for which procedure for trial of summons-case was not applicable and there is no provision in Chapter XIX "Trial of warrant-cases by Magistrates" containing a provision that in the event of death of complainant the complaint is to be rejected. The Magistrate under Section 249 has power to discharge a case where the complainant is absent. The discharge under Section 249, however, is hedged with condition "the offence may be lawfully compounded or is not a cognizable offence". Had the Code 1973 intended that in case of death of complainant in a warrant case the complaint is to be rejected, the provision would have indicated any such intention which is clearly absent. C
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10. In this context a reference is made to judgment of this Court in *Ashwin Nanubhai Vyas Vs. State of Maharashtra, AIR 1967 SCC 983*. In the said case this Court had occasion to consider the provisions of Criminal Procedure Code, 1898. The complainant had filed a complaint against the appellants. The complaint was filed under Sections 498 and 496 IPC. Accused was summoned. However, during the pendency of the complaint, the complainant died. The complainant's mother applied G

A for substituting her to act as complainant and continue the proceedings. Magistrate permitted the mother of complainant to pursue the complaint against which revision was filed before the High Court which was dismissed. Aggrieved by the order of the High Court the appellant had come up before this Court. In the above context this Court considered the *pari materia* provisions of the Criminal Procedure Code, 1898 with regard to Section 247 (now Section 256) it was specifically held that said provision does not furnish any valid analogy. In paragraph 4 of the judgment following was observed:

C “4 Mr. Keswani for Vyas, in support of the abatement of the case, relied upon the analogy of Section 431 under which appeals abate and Sections 247 and 259 under which on the complainant remaining absent, the court can acquit or discharge the accused. These analogies do not avail him because they provide for special situations. Inquiries and trials before the court are of several kinds. Section 247 occurs in Chapter XX which deals with the trial of summons cases by a Magistrate and Section 259 in Chapter XXI which deals with trial of warrant cases before Magistrates. Under the former, if summons is issued on a complaint and the complainant on any day remains absent from the court, unless it decides to proceed with the trial, must acquit the accused. This can only happen in the trial of cases, which are punishable with imprisonment of less than one year. This not being the trial of a summons case but a committal inquiry, Section 247 neither applies nor can it furnish any valid analogy. Similarly, Section 259, which occurs in the Chapter on the trial of warrant cases, that is to say cases triable by a Magistrate and punishable with imprisonment exceeding one year can furnish no analogy. Under Section 259, if the offence being tried as a warrant case is compoundable or is not cognizable the Magistrate may discharge the accused before the charge is framed if the complainant remains absent. Once again this section cannot apply because the Presidency Magistrate was not trying the case under Chapter XXI.”

11. This Court further had occasion to consider Section 495 of Code 1898 (now Section 302 of Criminal Procedure Code) and this Court laid down in paragraph 7 as follows:

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“7 Mr. Keswani contends that the Presidency Magistrate has made a “substitution” of a new complainant and there is nothing in the Code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word “substitute” but that is not the effect of the order. What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power was undoubtedly possessed by the Presidency Magistrate because of Section 495 of the Code by which Courts are empowered (with some exceptions) to authorise the conduct of prosecution by any person. The words ‘any person’ would indubitably include the mother of the complainant in a case such as this. Section 198 itself contemplates that a complaint may be made by a person other than the person aggrieved and there seems to us no valid reason why in such a serious case we should hold that the death of the complainant puts an end to the prosecution.”

12. At this stage reference to Section 302 of the Criminal Procedure Code is necessary. Section 302 of the Criminal Procedure Code is contained in Chapter XXIV with the heading “General provisions as to inquiries and trials”. Section 302 relates to permission to conduct prosecution which is to the following effect:

“ Section 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.”

13. This Court had occasion to consider Sections 256 and 302 in *Balasaheb K. Thackeray & Anr. Vs. Venkat @ Babru, (2006) 5 SCC*

A **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
 B 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:

C *“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 the complainant shall file an
 application for permission to prosecute and, therefore, the
 D 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, 1898
 E (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
 F 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
 G 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:*

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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 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 Vs. 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, 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...."

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

Ankit Gyan

Appeal dismissed.