

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2017

CORAM:

THE HONOURABLE MR.JUSTICE R. SURESH KUMAR

Crl.R.C. No.1180 of 2016

M.P.Balasubramanian (died)

1. B. Kamalam
2. B. Sivakami
3. B. Kannan
4. B. Parimalavalli

... Petitioners/  
L.Rs. of the Complainant

Vs

Dr.C.Jayanthi

... Respondent

**Prayer:-** This Criminal revision is filed under Section 397 & 401 of Cr.P.C. praying to call for the records relating to the order dated 14.08.2015 made in C.C.No.37 of 2014 on the file of the learned Judicial Magistrate No.5, Salem and set aside the same by allowing this Criminal Revision Petition.

For petitioners : Mr.N.Manokaran

For Respondent : Mr.M.Devaraj

ORDER

This Revision Case has been filed against the order dated 14.08.2015 passed by the learned Judicial Magistrate No.5, Salem in C.C.No.37 of 2014.

complaint against the respondent/accused for the alleged offence under Section 138 of the Negotiable Instruments Act, which was taken on file and numbered as C.C.No.37 of 2014. During the pendency of the said C.C.No.37 of 2014, the complainant M.P.Balasubramaniam died on 14.12.2014.

3. This factor had been brought to the notice of the trial Court when the case was taken up for hearing on 14.08.2015 as, on that date, the learned counsel who appeared before the lower Court on behalf of the complainant seems to have filed a memo stating that the complainant had died. On receipt of the said memo filed by the learned counsel for the complainant, the learned Judge through the impugned order has stated that the complainant called absent, although the learned counsel for the complainant filed a memo stating that the complainant had died, memo was recorded, hence this complaint is dismissed. Against this order, the present revision had been filed.

4. I have heard Mr.N.Manokaran, learned counsel appearing for the petitioners as well as Mr.M.Devaraj, learned counsel appearing for the respondent.

5. In view of the death of the original complainant, his legal heirs i.e. wife, two daughters and one son being the legal heirs of the complainant

have filed this revision case before this Court against the said order dated 14.08.2015.

6. The learned counsel appearing for the petitioners would state that since the complainant was no more and the said information was made to the Court concerned, the Court must have explored the possibility as to whether the legal heirs are going to conduct the case in this regard and only after ascertaining the fact from the learned counsel appearing for the complainant, further proceeding should have been undertaken by the learned Magistrate. However, he simply dismissed the complaint by recording the absence of the complainant. Therefore, that order cannot be sustained and therefore the revision has to be allowed.

7. *Per contra*, Mr.M.Devaraj, learned counsel appearing for the respondent has invited the attention of this Court to Section 256 of the Code of Criminal Procedure, which reads thus:

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 herein before 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.

8. By relying upon the said provision, the learned counsel for the respondent would state that as per Section 256(1), if the complainant does not appear, the Magistrate shall pass orders dismissing the said complaint. He would further state that, the Magistrate can adopt the very same procedure under sub-section (2) of Section 256 in case the complainant was absent due to death. Therefore, what has been contemplated under Section 256 of the Code has been simply adopted by the learned Magistrate and accordingly he dismissed the complaint by recording the statement that the complainant had died. Therefore, the learned counsel for the respondent would state that absolutely there is no infirmity in the order which is impugned herein.

9. I have considered the said submissions made by both the learned counsel appearing for the parties and also perused the records filed before this Court.

10. If we take into account the arguments advanced by the learned counsel for the respondent, we must look into the language used by the legislature in Section 256 of the Code.

11. Sub-section (1) of Section 256 says “The Magistrate shall, notwithstanding anything herein before contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day”. Like that, the language used in sub-section (2) of Section 256 of the Code is “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”.

12. So, what is available in sub-section (1) would be equally applicable in case of absence of complainant due to his death as per sub-section (2). The Magistrate, in the absence of the complainant can either acquit the accused or can adjourn the case to some other day for the reason he thinks it proper. These two ways are possible before the Magistrate and no other third way is contemplated in the Section. Since the provision of sub-section (1) shall also apply in case of absence of complainant due to death as per sub-section (2), the very same two options alone are available to the Magistrate even in case of the complainant is absence because of death.

13. In the case in hand, it was reported before the learned Judge that the complainant died. If at all the Magistrate wants to exercise the power under Section 256(2) of the Code, he could have either acquitted the accused or could have adjourned the case for reasons to be recorded. In this regard, if the Magistrate thinks fit that since the complainant died, therefore, on behalf of the complainant, if any legal heirs come forward to implead themselves to get on with the case, for the said purpose, after recording the said reasons, the Magistrate can adjourn the matter to some other day.

14. Suppose, if the Magistrate does not want to adjourn the matter enabling the legal heir to come forward to conduct the case, he can simply take the first option under Section 256 i.e. to proceed with disposing the case by acquitting the accused. In the case on hand, if we peruse the order which is impugned herein, the learned Magistrate, though has recorded the death of the complainant, has passed the order stating “Hence this complaint is dismissed”.

15. The dismissal of the complaint for non-absence of the complainant because of his death is, in the opinion of this Court, has not been contemplated under Section 256(1) or 256(2) of the Code.

16. Therefore, the order impugned dismissing the complaint because of the absence due to death of the complainant cannot be considered to be or within the meaning of Section 256(2) of the code and therefore, the arguments advanced by the learned counsel for the respondent in this regard, in the opinion of this Court, are liable to be rejected, accordingly they are rejected.

17. Moreover, whenever an order is passed disposing the Criminal Case, Courts have repeatedly held that a reasoned order has to be passed and in this case, since the complainant himself died and the same has been reported, either the Magistrate could have adjourned the matter enabling the legal heirs to appear before the Court to proceed with the case or at least disposed the said case by acquitting the accused, as contemplated under Section 256 of the Code.

18. On perusal of the impugned order, this Court finds that the impugned order does not meet any of the two ways which is contemplated under the said Section 256 and therefore this order is liable to be set aside, accordingly, it is set aside.

19. In the result, this Criminal Revision Case is allowed. The matter is remanded to the learned Judge i.e. on the file of the Judicial Magistrate

**R. SURESH KUMAR, J.**

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No.5, Salem to take the case on file and proceed in accordance with the Code. It is made clear that if the petitioners want to pursue with the complaint made by the original complainant, they can do so by filing appropriate petition before the trial Court and if such petitions are filed by the legal heirs i.e. petitioners herein before the trial Court, it shall be considered and be decided in accordance with law. With these directions, this Criminal Revision Case is allowed.

07.09.2017

Internet:Yes

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To

The Judicial Magistrate No.5,  
Salem.

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