

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**CRIMINAL PETITION No.9046 of 2018****ORDER:**

This Criminal Petition, under Section 482 Cr.P.C., is filed questioning the Order dt. 27.09.2017 in CrI.M.P.No.5727 of 2017 in C.C.No.330 of 2012 passed by III Additional Chief Metropolitan Magistrate, Vijayawada, Krishna District, permitting the respondent to continue the proceedings in C.C.No.330 of 2012 registered for the offence punishable under Section 504 IPC on account of death of original complainant i.e., father of the petitioner, on 11.01.2015, though the petitioner herein opposed the petition filed under Section 256 Cr.P.C. for continuation of the proceedings, but the trial Court passed an order permitting the petitioner herein to continue the proceedings.

Aggrieved by the Order dt. 27.09.2017, the petitioner filed the present petition on the ground that under Section 256 Cr.P.C., the petitioner is not competent to seek permission to continue the proceedings after death of his father and therefore the Order passed by the trial Court is illegal since the discretionary power of the Court under Section 256 Cr.P.C., is limited to the extent of dispensing with the presence of the complainant or continue the proceedings even in the case of his death.

During hearing, learned counsel for the petitioner reiterated the said contention, whereas the respondent opposed the petition on the ground that the petitioner can come on record and prosecute the proceedings, in view of the Judgment reported in *Balasaheb K.*

*Thackeray and another v Venkat @ Babru, S/o Wamanrao*¹ and requested to dismiss the petition.

It is an undisputed fact that the respondent filed petition before the trial Court under Section 256 Cr.P.C., which deals with the power of the Court to dispense with the appearance of the complainant during trial or enquiry and it reads as follows:

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 hereinabove 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 the case where the non appearance of the complainant is due to the death.

In view of Clause (2) of Section 256 Cr.P.C, the same procedure is applied for dispense with the appearance of the complainant and continuation of the proceedings can be followed in case of death also. But, it is the discretion of the Magistrate. However, Section 302 of Cr.P.C., deals with permission to conduct prosecution and in fact the petitioner should have filed application under Section 302 Cr.P.C. Instead of filing such application, a petition was filed under Section 256 Cr.P.C.,

In the judgment relied upon by the learned counsel for the petitioner in *Chand Devi Daga and Others v Manju K. Humatani and others*, the Apex Court adverted to both Sections 256 and 302 Cr.P.C. and based on the observations in Balasaheb's case, concluded that competent person can continue the proceedings.

¹ (2006) 5 SCC 530

A vague advertence is made to Section 256 Cr.P.C. in *Balasaheb's* case, but the Order in effect is under Section 302 Cr.P.C. In *Jimmy Jahangir Madan v Bolly Cariyappa Hindley*², which is referred in para No.4 of the judgment in *Balasaheb's* case, an identical question came up for consideration and the Apex Court based on *Ashwin Nanubhai Vyas v State of Maharashtra*³, concluded that proceedings can be continued by filing application under Section 302 Cr.P.C. Therefore, granting permission under Section 256 Cr.P.C. to the respondent to conduct prosecution is an illegality, but the petitioner is entitled to file appropriate application under Sections 302 and 256 Cr.P.C. if advised. Hence, the Order under challenge is liable to be set aside while granting liberty to the petitioner to file appropriate application before the Magistrate.

With the above observation, this Criminal Petition is allowed setting aside the Order dt. 27.09.2017 in CrI.M.P.No.5727 of 2017 in C.C.No.330 of 2012 on the file of III Additional Chief Metropolitan Magistrate, Vijayawada, Krishna District.

As a sequel, miscellaneous applications pending, if any, shall stand closed.

M. SATYANARAYANA MURTHY, J

Date: 03-10-2018
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² (2004) 12 SCC 509,

³ AIR 1967 Sc 983

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