

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 153 OF 2019

Prakash H. Kukreja

...Applicant

Versus

The State of Maharashtra and Ors

...Respondents

Mr. Mahendra Swar for Applicant.

Mr. S.R. Agarkar, APP for Respondent – State.

Mr. Subhash Dhadge for Respondent No. 2.

CORAM	:	S.S. SHINDE, J.
DATE	:	30th JULY 2019

P.C.:-

1. This petition takes an exception to the impugned order dated 03.01.2019 passed by the Hon'ble Sessions Court in Criminal Revision Application No. 581/2018 so also the order dated 06.04.2018 passed by the learned Metropolitan Magistrate, 11 Court at Kurla, Mumbai in Case No. 1774/SS/2004.

2. It is the case of the applicant that, the subject complaint is filed under Section 13 r/w. 4, 5 and 11 of the Maharashtra ownership of Flat Act against the applicant along with other brother and sisters of Applicant who are legal heir of the promoter of the subject building. After framing of charges the original complainant Shri. Narain D.

Jotwani entered in the witness box and partial examination in chief was recorded twice and on both the occasion at the request of Advocate for said complainant the examination in chief was deferred. Subsequently instead of proceeding with further examination of chief the Advocate for complainant preferred application for substitution and same was allowed by the learned Magistrate.

3. Applicant being aggrieved by the said order filed the Revision Application before the Hon'ble Sessions Court. The said Revisions application was allowed vide order dated 03.02.2011. Thereafter complainant either under one pretext or the other adjourned the matter before the learned Magistrate. On no occasion applicant have sought adjournment. On 13.10.2017 Advocate for Respondent filed the application for substitution upon which the applicant have filed reply. Learned Magistrate vide its impugned order dated 06.04.2018 allowed the application.

4. Being aggrieved by the said order applicant preferred Revision Application in the Hon'ble Sessions Court. Sessions Court vide its order dated 03.01.2019 dismissed the Revision Application of the applicant. Hence this Writ Petition.

5. Learned counsel appearing for the Petitioner submits that, learned Magistrate failed to appreciate that earlier application for substitution which was allowed by learned Predecessor of the said Court was set aside by Hon'ble Sessions Court. There is no provision under the Code of Criminal Procedure whereby complainant can be substitute in private complaint. The Learned Magistrate failed to appreciate that in the event of complainant dies during the pendency of complaint and there is no evidence against the accused and they are required to be acquitted. The Society is not the complainant as such have no right or locus standi to make any application in the said complaint for substituting the complainant. The substitution can be allowed in the matter where the complainant is either Society or Company, and that to for authorized representative in the complaint in the individual capacity, however, this fact has not been properly considered by the learned Magistrate. Learned counsel appearing for the petitioner further submits that, in spite of aforesaid contention raised and reliance of an placed on upon and law laid down by the Supreme Court in the case of *Shankar Finance and Investments Vs. State of Andhra Pradesh and Others (2008) 8 SCC 536.*, the learned Magistrate has not properly considered the contentions raised by the

petitioner.

6. On the other hand learned counsel appearing for the Second Respondent relying upon the reasons assigned by the Magistrate as well as Sessions Court submits that, since the original complainant died, keeping in view the provisions of Section 256 of Cr.P.C., the learned Magistrate has rightly allowed the application filed by the second Respondent, since the complainant died on 03.07.2017. Therefore, learned counsel submits that petition may be rejected.

7. Heard learned counsel appearing for the parties at length, with their able assistance perused the grounds taken in the application and annexures thereto. It appears that, the learned Addl. Chief Metropolitan Magistrate, 11th Court, Kurla allowed the application filed by the Respondent No. 2 herein. It appears that, the original complainant died on 03.07.2017 and therefore, the application as vide Exh. 85 was moved by the Respondent No. 2, inserting his name in place of Narayan Jotwani, Honorary Secretary of Shivpuri Krishnakunj Co-op. Housing Society Ltd., both the Courts below have taken the note of the fact that, the said application was moved due to death of Honorary Secretary Mr. Jotwani. In the aforesaid background, both the

Courts below have considered the rival contentions and after appreciating the provisions of Section 256 of the Cr.P.C. arrived at the conclusion that, the said application filed by the Respondent No. 2 was maintainable, and the order passed by the learned Magistrate is well within the four corners of provisions of Section 256 of the Cr.P.C. It is observed by the Sessions Court that in view of Section 256(2) of Cr.P.C. upon the death of the complainant, it would be deemed to be non-appearance on account of death. Therefore, the learned Magistrate has rightly allowed the application fled by the Second Respondent to prosecute pending complaint.

8. Upon appreciation of rival contention and keeping in view the provision of Section 256 of Cr.P.C., this Court is of the opinion that, view taken by the Courts below is in consonance with the scheme of provision of Section 256 of the Cr.P.C, the said findings and reasons assigned by the learned Magistrate are confirmed by the learned Sessions Judge, there is no perversity in the findings / reasons assigned by the Courts below. Hence no interference is called for, Criminal Application is devoid of any merits, hence same stands rejected.

(S.S. SHINDE, J.)