

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL WRIT PETITION NO.347 OF 2019

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Shri Baban s/o Ravji Chaudhary,
Age 53 years, Occupation Business,
R/o : 8 – Wasudeobaba Nagar,
Shirpur Tq. Shirpur Dist. Dhule.

...Petitioner.

VERSUS

- 1) Karan Chandrakant Agrawal,
Age 30 years, Occupation Business,
- 2) Keval Chandrakant Agrawal,
Age 28 years, Occupation Service,
Both R/o : 21/B, Mangal Nagar,
Annex Sukliya, Indore (Madhya
Pradesh) (Legal Heirs of original
Complainant Smt.Ashabai Chandrakant
Agrawal).

- 3) The State of Maharashtra.

...Respondents.

.....

Advocate for Petitioner : Mr. N. N. Desale

Advocate for Respondents No.1 & 2 : Mr. P. S. Paranjape
& Josleyn A. Menzes.

APP for Respondent No.3-State : Mr. B. V. Virdhe.

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CORAM : SMT.VIBHA KANKANWADI, J.
DATE : 08-01-2020.

JUDGMENT :

1. Since issue raised is common in all the writ petitions, they are decided by this common Judgment.
2. Rule. Rule made returnable forthwith. By consent heard both sides for final disposal.
3. Present writ petitions have been filed invoking constitutional powers of this Court under Article 227 of the Constitution of India challenging the order below Exhibit 50, passed by learned Judicial Magistrate, First Class (Court No.2), Shirpur Dist. Dhule, on 18-06-2018, in Summary Trial Case No.48 of 2008, which has been then confirmed by the learned Sessions Judge, Dhule in Criminal Revision Application No.66 of 2018 on 23-11-2018.
4. The factual matrix leading to the present petitions are that, the petitioner is the original accused who is facing the said trial in Summary Trial Case No.48 of 2008. The mother of the present respondents No.1 and 2 viz. Ashabai Chandrakant Agrawal had lodged the said complaint contending that, the present petitioner / accused has committed offence punishable under Section 138 of the Negotiable Instruments Act. It was contended that, the husband of

original complainant was having friendly relations with the accused. Accused as well as the complainant was on visiting terms with each other. Accused used to take hand loan from the husband of the complainant. Husband of the complainant died on 25-11-2006. Even after death of her husband, accused continued the friendly relations with the family of the complainant and requested to extend hand loan of Rs.4,00,000/-. Accordingly she had given the said hand loan and in discharge of his said debt and liability, accused issued four cheques for Rs.1,00,000/- each dated 10-08-2007, 10-09-2007, 10-10-2007 and 10-11-2007 drawn on The Shirpur Merchants Co-Op. Bank Ltd. Shirpur Branch. When she had deposited cheque dated 10-11-2007, which was one amongst those four, for encashment, it was dishonoured. The accused in order to avoid payment of the said amount, lodged false case bearing No.155 of 2007 in the Court of Judicial Magistrate, First Class, Shirpur. When the said case went to police for investigation, in presence of the panchas all the four cheques have been handed over to police for which a panchanama was drawn on 29-07-2007. In the said case, the accused has admitted that the said cheque bears his signature. After the investigation, the police have filed charge-sheet and the said case Regular Criminal Case No.183 of 2007 has been

filed against the complainant. Those four cheques were deposited by the police with the Court along with the said charge-sheet. The complainant had taken the possession of one cheque dated 19-10-2007 by making Criminal Miscellaneous Application No.141 of 2007 on bond. As regards rest of the three cheques, she had filed Criminal Revision Application No.137 of 2007 before the Sessions Court, Dhule and her revision was allowed. Accordingly the rest of the three cheques were also handed over to her. She had presented the cheque dated 10-11-2007 for encashment on 30-11-2007 but it was dishonoured on the ground that the signature defers. Therefore, she issued notice on 15-12-2007 to the accused. Accused did not claim the notice, and therefore, the notice was returned. Accused did not comply with the notice and has not given the amount under the cheque to her, hence she filed complaint.

5. After the complaint was filed, verification was recorded and then the process has been issued against the accused.

6. During the pendency of the said criminal case, an application came to be filed at Exhibit 50 stating that the original complainant has expired and she is survived by two sons, the applicants. They have intention to continue the prosecution, therefore, they prayed

for adding them as complainant.

7. Accused raised objection on the ground that, the complainant has filed a false case. The cheques were misused by the accused. The date of death of complainant has not been mentioned. There is also no document on record to prove that the applicants are the legal heirs of complainant. She was accused in Regular Criminal Case No.183 of 2007, however since she has expired, the case has abated. There is no provision under Section 256 of Code of Criminal Procedure to bring the legal representatives of the complainant on record, and therefore, the application deserves to be rejected.

8. After hearing both sides, the learned Magistrate has allowed the application and permitted the legal heirs of deceased complainant on record.

9. The said order was challenged by the present petitioner in Criminal Revision Application No.66 of 2018, and after hearing both sides, the learned Sessions Judge, Dhule has rejected the said application. Hence, present petition has been filed to challenge both these orders.

10. Heard learned advocate Mr. N. N. Desale for petitioner, learned

advocate Mr. P. S. Paranjape for respondents No.1 and 2, and learned Additional Public Prosecutor Mr. B. V. Virdhe for State - respondent No.3.

11. It has been submitted on behalf of the petitioner that, the Trial Court as well as Revisional Court erred in holding that the present respondents No.1 and 2 can continue the prosecution. There was absolutely no documentary evidence to support that, present respondents No.1 and 2 are the legal representatives of deceased Ashabai. It was specifically contended by the accused that, there was no legal marriage between Ashabai and Chandrakant, and therefore, it cannot be said that the applicants in application Exhibit 50 were the legitimate sons. They had not produced birth certificate or had not obtained heirship certificate. Merely on the basis of Aadhar Card and affidavits, the learned Magistrate has allowed the application. Something more ought to have been demanded which will establish the right to continue the prosecution.

12. Per contra, the learned advocate appearing for respondents No.1 and 2 relied on the decision of the Hon'ble Apex Court in *Chand Devi Daga and Ors. v. Manju K. Humatani and Ors.*, reported in *AIR 2017 SC 5126*, wherein it has been held that,

“Upon the death of the complainant in a private case, the case does not automatically abate.”

The decision in *Ashwin Nanubhai Vyas v. State of Maharashtra and Ors.*, reported in *AIR 1967 SC 983* was considered, wherein the complainant had filed the complaint against the appellants therein contending that the offence under Sections 493 and 496 of Indian Penal Code has been committed. During the pendency of the complaint, after the accused was summoned, the complainant died. Mother of the complainant had then applied for the substituting her to act as complainant and continue the proceedings, it was permitted. Then the Hon'ble Supreme Court held that, the Court had the powers to substitute the prosecution agency under Section 495 of the Code, and therefore, the complaint could not be treated as abated.

13. Further in *Chand Devi Daga and Ors. (Supra)*, provisions under Section 302 of the Code of Criminal procedure which deal with permission to conduct prosecution were considered and taking into consideration the provisions under Section 256 and 302 of Code of Criminal Procedure, note of the decision in *Balasaheb K. Thackeray and Anr. v. Venkat @ Babru*, reported in *(2006) 5 SCC 530* was taken. It was held that,

“In view of what has been discussed above where, 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 miscellaneous petition before the High Court. We do not find any error in the order of High Court, the appeal is dismissed.”

14. Further reliance has been placed by the learned advocate for respondents No.1 and 2 on the decision by the Kerala High Court in, *T. N. Jayarajan v. Jayarajan*, reported in 1993 (1) ALT Cri 147, wherein when the appellants father who had filed the complaint under Section 138 of the Negotiable Instruments Act died during the pendency of the complaint, complaint was substituted by the appellant.

15. Now the point that, in private complaint after death of the complainant, the prosecution can be continued by the legal representative is the law laid down by the Apex Court and that point is not *res integra*. In *Rashida Kamaluddin Syed & Anr vs Shaikh Saheblal Mardan* [(2007)2 Supreme Court Cases (Cri.) 63: (2007) 3 Supreme Court Cases 548] note of the decision in *Jimmy Jahangir Madan v/s. Bolly Cariyapa Hindley (dead) by Lrs.*, (2004) 12 SCC 509 : JT 2004 (9) SC has been taken and it has been observed that

“In Jimmy's case, a complaint was filed by one B against the accused under Section 138 of the Negotiable Instruments Act in which cognizance had been taken. During trial, however, the complainant died

leaving behind her son and daughter who executed General Power of Attorney in favour of two persons. The Power- of-Attorney holders filed applications under Section 302 of the Code permitting them to continue the prosecution. The prayer was contested, but the Magistrate allowed the application granting permission to continue prosecution. The High Court confirmed the order of the Trial Court which was challenged by the accused in this Court. Though this Court allowed the appeal holding that the courts below were not justified in granting such permission since it was made by the Power of Attorney, it was held that a person other than a complainant could continue prosecution. The Court, therefore, while setting aside the orders granted liberty to the heirs of the complainant to file fresh application under Section 302 of the Code”.

After taking these decisions into consideration, this Court is not required to now discuss that point again and definitely when the proceedings under Section 138 of the Negotiable Instruments Act are basically based on the civil transaction and many times it is held that it is quasi civil in nature, then definitely the Magistrate has power to allow the complaint to be prosecuted by any other person.

16. The objection that has been raised by the accused is that the learned Magistrate did not consider documents which would show that the applicants to application Exhibit 50 are the legal representatives of Ashabai. First and the foremost fact to be noted is that, in a criminal matter when the point comes under Section 256

read with Section 302 of the Code of Criminal procedure, then the Court need not go into the aspect as to whether the applicant who intends to continue the prosecution can be said to be the legal representative as defined in Code of Civil Procedure. It is a well settled law that, a criminal law can be set in motion by anybody. Both the applicants had come with a case that, they are the sons and they had produced Aadhar Cards to support their contention. The learned Magistrate was satisfied with those documents and the satisfaction of the Magistrate was important. Even as aforesaid, Section 302 of the Code empowers Magistrate to permit the prosecution to be conducted by any person, therefore very strict proof about heirship is not required. Here 'any person' means that person having 'interest' in prosecuting the accused as well as having nexus with deceased. There may be some cases in which strict proof may be called upon by the Magistrate taking into consideration the facts and the circumstances of the case. However, no such circumstance was shown by the present petitioner before the learned Magistrate. Mere denial by the accused was not sufficient. When he had contended that there was no legal marriage between deceased and Chandrankant, then he ought to have supported it by affidavit or otherwise; when applicants had produced certain

documents in their favour. Therefore, no fault can be found in the order passed by learned Magistrate to the extent that the application to continue the prosecution was allowed.

17. It is to be noted that, application Exhibit 50 has been filed by two persons and the said has been allowed by the learned Magistrate, that means there would be two complainants contemplating that it would be then a joint complaint. As regards maintainability of joint complaint is concerned, there is divergence of opinion. The oldest pronouncement which could be found on this point is, *Sashadhar Acharjya And Anr. v. Sir Charles Tegart And Ors.*, reported in *AIR 1931 Calcutta 646*, wherein it was held that, “*A joint complaint by two persons is not contemplated by the Code.*” Thereafter in *Narayanaswami and others v. Egappa Reddi and Others*, reported in *AIR 1962 Madras 443*, it was held that,

“There should be a separate charge for each distinct offence of which any person is accused and that two or more complainants cannot file a single complaint.”

That was a case of two complainants joining together to file a single complaint for different offences for which separate charges were required to be framed. In that case further it is held that,

“The Magistrate can treat the complaint filed in that case as a

complaint by one of the complainant at their option and permit to other complainant to file a separate complaint, if they desire so.”

But then recently the Madras High Court again in, *Ritesh Bawri and Oth. v. M/s Dalmia Bharat (Ltd.) and Ano., Crl. O. P. (MD) No.11759 of 2017 and the group*, decided on 14-06-2018 (Single Judge), observed that,

“The law settled appears to be that a joint complaint in respect of different cause of action and different offences by two or more persons is not maintainable.....”

“.....Even if a complaint is filed by two, the Court can treat the complaint as one by the first respondent at a later stage and the complaint need not be quashed at this stage for that reason.”

It will not be out of place to mention here that, a contrary view was taken by the Chief Court of Oudh in *Abdul Karim and another v. Nangoo and Another*, reported in *A.I.R. (29) 1942 Oudh 407 : 43 Cri. L.J. 731*, wherein it was held that,

“There is no legal objection to such a joint complaint and upon a such joint complaint it is incumbent upon the Magistrate to examine both complainants.”

18. It is to be noted here in this case the question is, as to who should be permitted to continue the prosecution. Prosecution can be continued by one person and when it comes to examination, both the complainants are not going to depose same facts. Therefore, it would be appropriate that in such cases either the legal

representatives to decide who amongst them would continue the prosecution or the Magistrate can give them option and allow the complaint to proceed and be prosecuted by only one person. Necessary directions to that effect are required to be given in this case. There is no merit in the writ petitions, they deserves to be dismissed. Hence, following order.

ORDER

- (1) Writ Petition is hereby dismissed.
- (2) The respondents No.1 and 2 either to take a decision and inform to the Magistrate, as to amongst them who would continue the prosecution or the Magistrate to give them option, and continue the prosecution/ complaint in any ones name.
- (3) With these directions all the writ petitions are dismissed of accordingly.
- (4) Rule is discharged.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-.