

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLREV No. 579 of 2011

An application under Section 401 of the Code of Criminal Procedure, 1973.

AFR Sanjit Kumar Mishra & Others Petitioners

-Versus-

Ranjit Mishra Opp. Party

Advocate(s) appeared in this case:-

For Petitioner : M/s. D. Panda, A.K. Parida,
D.P. Dhal & C.R. Panda,
Advocates

For Opp. Party : Mr. B.K. Ragada, N. Das &
L.N. Patel, Advocates.

CORAM:

JUSTICE SASHIKANTA MISHRA

JUDGMENT

6th September, 2022

SASHIKANTA MISHRA, J.

Two interesting questions are involved in the present revision - whether a legal heir can be substituted upon death of the original complainant in a

complaint case and if so, whether one legal heir can continue such proceeding against other legal heir(s).

2. The facts of the case lie in a narrow compass.

3. One Baidyanath Mishra (since deceased) filed a complaint case bearing ICC No. 55 of 2000 before the JMFC(O), Bhubaneswar alleging commission of offence under sections 426/448/506/34 IPC and Section 24 of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007. It was alleged by the complainant that a house had been purchased in the name of his deceased wife at Sailashree Vihar, Bhubaneswar, who died intestate, whereupon the property devolved on her sons, Ranjit Kumar Mishra, Sanjit Kumar Mishra, Susanta Kumar Mishra and married daughter Sasmita Mishra. The complainant was residing in the said house with his three sons as all his children had executed a registered General Power of Attorney in his favour. The mother of his daughter-in-law, Snehapama Devi started interfering in the complainant's life and so also his sons, threatened him to send him to jail on the false allegation of dowry

demand. The complainant was forcibly evicted from his room on 19.03.2010 and was not permitted to enter the house and the room was given to the mother of his daughter-in-law. On such allegation, the complainant filed a complaint against his son, Sanjit Kumar Mishra, Snehapama Devi (mother of his daughter-in-law) and Padmini Priyadarshini Mishra (daughter-in-law). After conducting inquiry under Section 200 of Cr.P.C., learned trial court took cognizance of the offence under sections 426/506/34 IPC and summons was issued fixing 18.05.2010 for appearance of the accused persons. The eldest son of the complainant, namely, Ranjit Kumar Mishra was cited as a witness on 15.05.2010. The complainant died at Kalinga Hospital while under treatment. On 19.07. 2010, his eldest son, Ranjit Kumar Mishra filed a petition seeking to be substituted as a complainant expressing his desire to contest the case. The petition for substitution was opposed by the accused persons, who took the plea that the accused persons are liable to be discharged upon death of the complainant.

However learned Court below, by relying on the decision of the Apex Court in the case of **Ashwin Nanubhai Vyas v. State of Maharashtra**, (1967) 1 SCR 807 : AIR 1967 SC 983, allowed the petition for substitution by substituting the deceased complainant with Ranjit Kumar Mishra. The accused persons as named above being aggrieved have preferred the present revision with the present Ranjit Kumar Mishra being the sole opposite party.

4. Heard Mr. D. Panda, learned counsel for the petitioners and Ms. Agnisikha Ray, learned counsel for opposite party.

5. It is argued by Mr. D. Panda that unlike a civil proceeding, the Code of Criminal Procedure does not recognize substitution of a deceased complainant. Referring to the decision of **Ashwin Nanubhai Vyas** (supra), Mr. Panda contends that the Code provides only for dismissal of a complaint upon death of an accused but does not expressly provide for continuance of the complaint thereafter. Therefore, what happens on the death of the complainant, in a case started on a complaint

has to be inferred generally from the provisions of the Code. According to Mr. Panda since the Code provides that in the absence of the complainant, the accused must be either acquitted or discharged, the same principle must be applied in the case of death of a complainant. It is alternatively argued by Mr. Panda that even assuming for the sake of argument that a legal heir can be substituted as the complainant upon death of the original complainant, the same would be permissible only against person or persons other than the legal heirs. In the instant case, one of the accused persons, namely Sanjit Mishra (petitioner no1) is admittedly a legal heir being the son of the deceased-complainant. Therefore, Ranjit Mishra (opposite party) himself being a legal heir cannot continue the proceeding against another legal heir.

6. Per contra, Ms. Agnisikha Ray, referring to the decision of the Apex Court in the case of **Chand Devi Daga v. Manju K. Humatani**, reported in (2018) 1 SCC 71 has argued that the provision under Section 249 of Cr.P.C. which provides for discharge of the accused in the

absence of the complainant is applicable only when the offence can be lawfully compounded or is non-cognizable but not in respect of non-compoundable offences such as the ones Section 426/506 IPC. Since the Code is silent as to what would happen in case of death of a complainant in a warrant case, it means the provision under Section 249 Cr.P.C. cannot be made applicable to such cases. Since the original complainant had filed the complaint against the accused persons, the opposite party being the legal heir has got every right to seek continuance of the proceeding upon the death of his father as otherwise, the accused persons would be allowed to go scot-free.

7. Law is now fairly well settled that the legal heirs of the deceased complainant can be substituted in his place. The case laws in this regard shall be referred to a little later. It would be apposite at the outset to refer to the rival contentions put forth in this regard before this Court with reference to the relevant statutory provisions. Admittedly, the complaint was filed by one Baidyanath Mishra. During pendency of the complaint, he died. On an

application filed by the complainant's elder son, he was allowed to be substituted in his place. After recording the initial statement of the deceased complainant and conducting enquiry under section 202 of the IPC, learned court below has taken cognizance of the offences under section 426/506/34 IPC.

8. Mr. Debashis Panda has argued that as per section 256 of CrPC the Magistrate can acquit the accused on death of the complainant. There is no provision in the Code whereby the legal heirs of the deceased complainant can be substituted in his place to continue the proceeding. Mr. Panda has relied upon the decision of the Apex Court in the case of **Ashwin Nanubhai Vyas** (supra) in support of his contentions. Ms Ray on the other hand, has argued that since cognizance has been taken of the offences under section 426/506/34 IPC, the procedure prescribed for trial of warrant cases has to be adopted. She further argues that there is no provision akin to section 256 of CrPC for trial of warrant procedure cases. Section 256 applies in case of summons procedure cases

only. Ms Ray has relied upon the decision of **Chand Devi Daga** (supra) in support of her contentions.

9. Undisputedly, cognizance has been taken by learned court below of the offences under sections 426/506/34 IPC. In view of the involvement of section 506 of IPC, there is no doubt that the case is to be tried as per procedure laid down for warrant cases. Chapter XIX of the Code deals with trial of warrant cases by magistrates and contains the provisions from section 238 to 250. Section 249 provides as under:

“249. Absence of complainant.—When the proceedings have been instituted upon complaint, and on any day fixed for the hearing of the case, the complainant is absent, and the offence may be lawfully compounded or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

10. On the other hand, Chapter XX deals with trial of summons cases by magistrates and contains the provision under section 256, which reads as under:

“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:

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."

11. Obviously, the procedure prescribed under Chapter XIX would be applicable to the case at hand and therefore, there is considerable force in the submission of Ms Ray that there is no direct provision akin to the one under section 256 of CrPC. In the case of **Balasaheb K Thackeray and another vs. Venkat** reported in **(2006) 5 SCC 530**, it was held that section 302 of the code can be invoked 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 of the magistrate. Holding thus, the Apex Court allowed the prayer of the legal heirs of the deceased complainant in the said case to continue with the proceeding by seeking necessary permission from the magistrate. Following the ratio of **Balasaheb** (supra), the Apex Court in the case of **Chand Devi Daga** (supra) also held that taking assistance of Section 302 of the code, the legal heirs can continue the prosecution upon death of the original complainant. Referring to the earlier decisions the court held as under:

“14. Two-Judge Bench in Jimmy Jahangir Madan v. Bolly Cariyappa Hindley (dead) By Lrs., (2004) 12 SCC 509 : 2004 SCC (Cri) Supp 317 referring to this Court's judgment in Ashwin Nanubhai Vyas [Ashwin Nanubhai Vyas v. State of Maharashtra, AIR 1967 SC 983 : 1967 Cri LJ 943] had held that heirs of the complainant can continue the prosecution. Following was held in para 5: (SCC p. 512)

“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 Ashwin Nanubhai Vyas v. State of Maharashtra [Ashwin Nanubhai Vyas v. State of Maharashtra, AIR 1967 SC 983 : 1967 Cri LJ 943] 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. ...”

15. In view of what has been discussed above, we are of the view that the 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 the High Court. The appeal is dismissed.

12. Section 302 occurs in Chapter XXIV of the Code relating to General Provisions as to inquiries and trials, which reads as under;

“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. In the case of **J.K. International vs. State (Govt. of NCT of Delhi) and Others** reported in (2001) 3 SCC 462, the Apex Court while interpreting the scope of a

private person intending to participate in the conduct of prosecution, held as follows;

“12. The private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against anyone in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates' Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them.”

Of course, the said case was instituted on the basis of police report and not a private complaint as in the case at hand. However, the principle underlying the observations as quoted above can be adopted in the present case.

14. From a conspectus of the analysis made hereinbefore by relying upon the ratio decided in the cited cases, it would be evident that notwithstanding absence of a specific provision, the statutory intent of the provisions of the Code is not to foreclose the right of a person to continue with the prosecution upon death of the complainant. In other words, it is impliedly acknowledged that the victim of a crime may die but the crime committed against him does not. Nor does the guilt of the offender get washed away only because the victim is no more. On the contrary, the offender would still remain liable to be prosecuted for his deeds and punished, if found guilty.

15. Thus, there is no doubt that the legal heirs of a complainant can continue the proceeding after his death and to such extent therefore, the magistrate did not commit any error in allowing one of his legal heirs to prosecute the complaint originally filed by his father. However, the petition filed by the son of the deceased complainant to substitute him in place of his father must

be deemed to be an application for permission to conduct prosecution as per the provisions of Section 302 of the Code and consequently, the impugned order passed in allowing the application must be deemed to have been passed also as per the provision under Section 302 CrPC.

16. The other question that falls for consideration is, can one legal heir maintain the complaint against another legal heir. It must be kept in mind that the original complaint was filed by one Baidyanath Mishra against his son, daughter-in-law and the mother of his daughter in law. Undoubtedly, his son is a Class I legal heir. Of course, his daughter-in-law (during the life time of her husband) and her mother do not possess the same status as his son and therefore, ordinarily there can be no objection to the proceeding being continued against them. Taking the family as a whole, if the original complainant could maintain an action against his son, who is his legal heir, there is no reason as to why a person cannot maintain the complaint against his brother and other relations. From the ratio of the cases referred above it is

evident that any action which seeks to foreclose the right of a person to prosecute a legitimate complaint against his legal heirs and relations cannot be approved. Viewed differently, the spirit of the decisions referred above is to the effect that the right to prosecute subsists even after death of the original complainant.

17. For the forgoing reasons therefore, this Court finds no infirmity or illegality in the impugned order so as to be persuaded to interfere. Accordingly, the revision being devoid of merit is therefore, dismissed. Since, the complaint is of the year 2000, learned court below is directed to try and conclude the same as expeditiously as possible, preferably within a period of six months.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack,
The 6th September, 2022/ A.K. Rana, P.A.