

CRR 4707 of 2022

**Pratima Bagchi
Vs.
Moni Shankar Guha**

For the Petitioner : Mr. Amarta Ghosh.

- 1.** The present revisional application has been preferred against an order dated 27.06.2022 passed by the learned 2nd Additional District and Sessions Judge, Kakdwip, 24 Parganas (South), in connection with Criminal Appeal No. 01 of 2018, CNR No. WBSP 15000118-2018, Regd. 01/2018 under Section 138 of the Negotiable Instruments Act, thereby allowing the application for substitution preferred by the opposite party.
- 2.** It is the case of the petitioner that the opposite party is not the sole legal heir of deceased Swapam Guha, the original complainant in the present case. In support of the said contention, a copy of an application filed in CAN 03 of 2022 has been annexed to the revisional application (page 23) wherein it appears that it is an application for substitution on the death of the sole appellant Swapam Guha. The said application shows that the legal heirs of deceased Swapam Guha, other than the opposite party herein include his wife and three other children (in all five legal heirs).

3. The Supreme Court in *Ashwin Nanubhai Vyas v. State of Maharashtra*, on 10 October, 1996, (AIR 1967 SC 983), held that:—

“The Code of Criminal Procedure provides only for the death of an accused or an appellant but does not expressly provide for the death of a complainant. The Code also does not provide for the abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused, in respect of appeals under ss. 411 A(2) and 417 and on the death of an appellant in all appeals except an appeal from a sentence of fine. Therefore, what happens on the death of a complainant in a case started on a complaint has to be inferred generally from the provisions of the Code.

The Code by Chapter XV, which is to be found in Part VI (Proceedings in Prosecutions), provides for the jurisdiction of a criminal court in inquiries and trials. This Chapter is divided into two Parts-A (Place of Inquiry of Trial) and B (Conditions requisite for initiation of Proceedings). Part B consists of ss. 190 to 199B. Section 190 lays down, inter alia, that any Presidency Magistrate may take cognizance of any offence upon receiving a complaint ‘of fact which constitutes such offence. Sections 195 to 199B, however, place certain restrictions upon the power of the Chief Presidency Magistrate and other courts to take cognizance of cases. One such restriction is to be found in s. 198. It provides:

“198. Prosecution for breach of contract, defamation and offences against marriage.

No Court shall take cognizance of an offence falling under Chapter XIX or Chapter XXI of the Penal Code, 1860 or under sections 493 to 496 (both inclusive) of the same Code, except upon a complaint made by some person aggrieved by such offence:

Provided that, where the person so aggrieved is a woman who, according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his or her behalf : Provided further that The complaint of Kusum was filed to remove the bar

contained in this section although for the offence under s. 417 no such bar existed. The offences under ss. 493 (a man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief) and 496 (a person with fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married) are non-cognizable, not compoundable and exclusively triable by Court of Session. They are serious offences, being punishable with imprisonment extending to 10 and 7 years respectively. The Presidency Magistrate, was not trying the case but only inquiring into it with a view to its committal to the Court of Session if the facts justified a committal. During this inquiry Kusum died. We have to determine what is the effect of the death of a complainant on an inquiry under Chapter XVIII in respect of offences requiring a complaint by the person aggrieved, after the complaint has been filed. Mr. Keswani for Vyas, in support of the abatement of the case, relied upon the analogy of s. 431 under which appeals abate and ss. 247 and 259 under which on the complainant remaining M17Sup.C.I./66-7 absent, the court can acquit or discharge the accused. These analogies do not avail him because they provide for special situations. Inquiries and trials before the court are of several kinds. Section 247 occurs in Chapter XX which deals with the trial of summons cases by a Magistrate and s. 259 in Chapter XXI which deals with trial of warrant cases before Magistrates. Under the former, if summon is issued on a complaint and the complainant on any day remains absent from the court, unless it decides to proceed with the trial, must acquit the accused. This can only happen in the trial of cases, which are punishable with imprisonment of less than one year. This not being the trial of a summons case but a committal inquiry, s. 247 neither applies nor can it furnish any valid analogy. Similarly, s. 259, which occurs in the Chapter on the trial of warrant cases, that is to say, cases triable by a Magistrate and punishable with imprisonment exceeding one year can furnish no analogy. Under s. 259, if the offence being tried as a warrant case is compoundable or is not cognizable the Magistrate may discharge the accused before the charge is framed if the complainant remains absent. Once again this section cannot apply because the Presidency Magistrate was not trying the case under Chapter XXI.

This case was being heard under Chapter XVIII which divides committal cases into two

classes (a) those commenced on a police report and (b) other cases. The first kind is tried under the procedure laid down in s. 207A. With that procedure we are not concerned. The other cases are tried under the procedure as laid down in the other provisions of Chapter XVIII. Section 208 of this Chapter provides that in any proceeding instituted otherwise than on police report the Magistrate shall "when the accused appears or is brought before him, proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate." The Magistrate then hears evidence for the prosecution unless he makes an order of commitment and after recording the evidence and examining the accused (if necessary) frames a charge. He may, after hearing further evidence, which the accused may wish to produce (unless for reasons to be recorded, the Magistrate deems it unnecessary to do so) either discharge the accused cancelling the charge or commit him to stand his trial before the Court of Session. There is no provision about the acquittal or discharge of the accused on the failure of the complainant to attend the court. This is not an omission but a deliberate departure from the Chapters on the trial of summons and warrant cases. In such trials, on the absence of the complainant, the accused is either acquitted or discharged. The intention appears to be that the Magistrate should proceed with the inquiry because had it not been so intended, the Code would have said what would happen if the complainant remains absent.

Mr. Keswani, however, contends that S. 198 provides that the cognizance of the case can only be taken on the complaint of a person aggrieved and the only exception to this general rule is where the complainant is a woman, who according to the customs and manners of the country, ought not to be compelled to appear in public, or where such person is under the age of eighteen years or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint. He contends that what applies to the initiation of the proceeding must also apply to the continuance of the proceeding. He submits that if cognizance could not be taken unless a complaint was made in the manner provided in the section, the court cannot proceed with the inquiry unless the same condition continues to exist. In other words, because the section insists on a complaint of a person aggrieved, Mr. Keswani contends that continued presence of the person aggrieved throughout the

trial is also necessary to keep the court invested with its jurisdiction except in the circumstances mentioned in the proviso and summarised above. We do not agree. The section creates a bar which has to be removed before cognizance is taken. Once the bar is removed, because the proper person has filed a complaint, the section works itself out. If any other restriction was also there the Code would have said so. Not having said so, one must treat the section as fulfilled and worked out. There is nothing in the Code or in Chapter XVIII which says what, if any, consequence would follow if the complainant remains absent at any subsequent hearing after filing the complaint. In this respect Chapter XVIII is distinctly dissimilar to the Chapters dealing with the trial of summons and warrant cases where it is specifically provided what consequence follows on the absence of the complainant.

Mr. Keswani contends that the Presidency Magistrate has made a “substitution” of a new complainant and there is nothing in the Code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word “substitute” but that is not the effect of the order. What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power was undoubtedly possessed by the Presidency Magistrate because of s. 495 of the Code by which courts are empowered (with some exceptions) to authorise the conduct of prosecution by any person. The words ‘any person’ would indubitably include the mother of the complainant in a case such as this. Section 198 itself contemplates that a complaint may be made by a person other than the person aggrieved and there seems to us no valid reason why in such a serious case we should hold that the death of the complainant puts an end to the prosecution.

In support of his contention Mr. Keswani has cited some cases of the High Courts in which on the death of the complainant the prosecution was held to have abated. Chief among them are Ishwardas v. Emperor, (1) Ramanand v. Crown (2) and Labhu v. Crown (3). The first of these cases was a prosecution for defamation and the second a trial for an offence under s. 323, Penal Code, 1860. The third followed the second. The first two cases here mentioned were overruled by the Lahore High Court in Hazara Singh v. Crown(4) wherein it was laid down that such cases do not necessarily abate. Mr. Keswani also relied upon several cases which arose under s. 417(3) and 476 B of the Code

of Criminal Procedure in which appeals were held to have abated. We need not refer to these cases because they arose under different circumstances and were certainly not inquiries with a view to committal under Chapter XVIII of the Code. Mr. Hathi, who appeared on behalf of the State of Maharashtra, drew our attention to many later cases in which it has been held (dissenting from the cases relied upon by Mr. Keswani) that a criminal complaint does not necessarily abate on the death of the complainant even in those cases where the making of the complaint by the person aggrieved is made a condition precedent by the Code. We need not analyse those cases because, in our opinion, unless the Code itself says what is to happen, the power of the court to substitute another prosecution agency (subject to such restrictions as may be found) under s. 495 of the Code of Criminal Procedure is always available. Reference may, however, be made to the following: *Emperor v. Nurmohammed*, (5) *Emperor v. Mauj Din*, (6) *U Tin Maung v. King*, (7) *Mohammed Azam v. Emperor* (8) and *In re Ramasamier*(9). None of the cases cited either for the one side or the other directly arose under s. 198 first part in a committal proceeding. The later view is distinctly in favour of allowing the prosecution to continue except in those cases where the Code itself says that on the absence of the complainant the accused must be either acquitted or discharged. The present is not one of those cases and in our judgment the Presidency Magistrate was right in proceeding with the inquiry by allowing the mother to carry on the prosecution, and under s. 495 the mother may continue the prosecution herself or through a pleader. We see no reason why we should be astute to find a lacunas in the procedural law by which the trial of such important cases would be stultified by the death of a complainant when all that the s. 198 requires is the removal of the bar.....”

4. In ***Shri Balasaheb K. Thackeray & Anr. v. Shri Venkat @ Babru S/O. Wamanrao Deshpande Charthankar & Anr.***, (2006 ALL MR (Cri) 2624 (SC)), decided on 5th July, 2006 the Supreme Court considering the case ***Ashwin Nanubhai Vyas (Supra)*** and ***Jimmy Jahangir Madan v. Bolly Cariyappa Hindley (Dead)*** (2005 ALL MR (Cri) 259 (SC) held:—

“4. At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In *Ashwin Nanubhai Vyas v. State of Maharashtra* (AIR 1967 SC 983) with reference to Section 495 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the ‘Old Code’) it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution. In *Jimmy Jahangir Madan v. Bolly Cariyappa Hindley (dead) by Lrs.* ((2004) 12 SCC 509 : 2005 ALL MR (Cri) 259 (S.C.)) after referring to Ashwin's case (*supra*) it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution.

5. Section 302 of the Code 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.”

6. To bring in application of Section 302 of the Code, permission to conduct prosecution has to be obtained from the Magistrate inquiring into or trying a case. The Magistrate is empowered to permit 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.

7. Above being the position, if any permission is sought for by the legal heirs of the deceased complainant to continue prosecution, the same shall be considered in its perspective by the Court dealing with the matter. It is brought to the notice that by order dated 13.10.2003 further proceedings before the Magistrate are stayed. In that background, Mr. Adsure submitted that the application shall be filed before this Court. If and when any application is filed the same shall be dealt with appropriately. Ordered accordingly.”

5. The Supreme Court in **Rashida Kamaluddin Syed & Anr. v. Shaikh Saheblal Mardan (Dead) through LRs. & Anr., Appeal (Crl.) 283 of 2007, on 2nd March, 2007**, held that:—

“In our opinion, the submission has no force and cannot be accepted. What was considered by this Court in *Ashwin Nanubhai* was whether prosecution could be continued by any person other than the **complainant** in view of bar of taking of cognizance under Section 198 of the Code. Considering the scheme and Sections 198 and 495 of the Code, this Court held that such permission could be granted and a person other than the complainant could be allowed to prosecute the complainant. In the instance case, there is no such bar. Moreover, necessary permission was granted in the year 1997 and we find no infirmity therein. So far as offences under Sections 406 and 420 are concerned, they are also serious in nature and are punishable with imprisonment for three years and seven years respectively. Our attention has also been invited by the learned counsel for the respondents to a recent case in *Jimmy Jahangir Madan v. Bolly Cariyapa Hindley (dead) by Lrs.*, (2004) 12 SCC 509 : JT (2004) 9 SC 558. In *Jimmy Jahangir*, 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.

Reference was also made to *Balasaheb K. Thackeray v. Venkat @ Babru*, (2006) 5 SCC 530 : JT (2006) 7 SC 44, to which one of us (C.K.

Thakker, J.) was a party. In that case, V filed a complaint against the accused in the Court of Judicial Magistrate, First Class for commission of offence punishable under Section 500 read with 34 IPC. The complainant, however, died in 2005 during the pendency of the proceedings in this Court. The accused, therefore, made an application under Section 256 of the Code for dismissal of the complaint on the ground of death of complainant. Legal heirs of the complainant submitted that they would make an application before the Trial Court where the case was pending as the accused had approached this Court against an interim order and the proceedings were pending in the Trial Court. This Court considered the provisions of Section 495 of the old Code and Section 302 of the present Code as also Ashwin Nanubhai and Jimmy Jahangir and observed that since the proceedings were pending before the Trial Court, it was not necessary to express any opinion one way or the other. It was observed that if any permission would be sought to continue prosecution by the legal heirs of the deceased, the Court would consider the same in its proper perspective and take an appropriate decision in accordance with law.

*From the above case law, in our opinion, it is clear that on the death of Shaikh Saheblal, the case did not abate. It was, therefore, open to the sons of **complainant** to apply for continuation of proceedings against accused persons. By granting such prayer, no illegality has been committed by the courts.”*

6. The learned Sessions Judge has allowed the application for substitution of the opposite party herein as one of the legal heirs of deceased Swapan Guha. The learned Judge had rightly held that it is for the legal heirs who intend to continue the prosecution on the original complainant's death, who is to be permitted to prosecute the accused persons.
7. Considering the said order under revision, this Court finds no irregularity in the said order, the same being

in accordance with law thus requires no interference by this Court.

8. This Court has observed that there are other legal heirs of deceased Swapn Guha. The learned Sessions Judge has also clearly held in his order under revision that there are other legal heirs. But as the opposite party being one of the legal heirs wishes to proceed with the case, the learned Trial Court has rightly allowed the same.

9. The present revisional application is, thus, disposed of.

10. All connected applications, if any, stand disposed of.

11. Interim order, if any, stands vacated.

12. Let a copy of the order be sent to the learned trial court for compliance.

13. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(Shampa Dutt (Paul), J.)