(2001) 08 KAR CK 0018

In the Karnataka High Court

Case No : Criminal Revision Petition No''s. 909 and 910 of 1998

Jimmy Jahangir Madan APPELLANT

Vs

Bolly Cariyappa Hindley by L.Rs RESPONDENT

Date of Decision : 10-08-2001

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 200
Negotiable Instruments Act, 1881 (NI) — Section 142

Citation : (2002) 1 CivCC 539 : (2003) 115 CompCas 770 : (2001) ILR (Kar) 5401 : (2002) 1 KarLJ 370 : (2001) 4 KCCR 2817

Hon'ble Judges : Manjula Chellur, J;H.N. Narayan, J

Bench : Division Bench

Advocate : Kumar and Kumar, for the Appellant; Cariappa and Company, for the Respondent

Judgement

This Judgment has been overruled by : Jimmy Jahangir Madan Vs. Bolly Cariyappa Hindley (Dead) by LRs., AIR 2005 SC 48 : (2005) 1 BC 16 : (2005) 126 CompCas 385 : (2005) CriLJ 112 : (2004) 5 CTC 420 : (2005) 141 PLR 209 : (2004) 9 SCALE 297 : (2004) 12 SCC 509 : (2004) AIRSCW 6248 : (2004) 8 Supreme 217

H.N. Narayan, J.—This reference is made u/s 8 of the Karnataka High Court Act by His Lordship Justice S.R. Bannurmath for deciding three questions formulated by him in view of the law of general importance involved in the reference. The Hon''ble Chief Justice has placed this matter before this Bench for appropriate orders.

2. The questions which are referred for our consideration are:

(1) In a proceeding, initiated u/s 142 of the Negotiable Instruments Act, on the death of the complainant, whether any other person could be permitted to prosecute the complaint and under what provisions of Criminal Procedure Code?

(2) If it is held that any person could be permitted to prosecute the complaint

who is the competent person who could be permitted to prosecute the complaint?

(3) Whether that person has to prosecute the complaint personally or whether he could be permitted to prosecute the complaint through a power of attorney holder?

3. These questions arise in the backdrop of certain facts which came up for consideration in the said revisions. One Mrs. Bolly Cariappa Hindley, an Indian Christian presented a complaint u/s 200 of the Criminal Procedure Code against the accused persons in the Court of VI Additional Chief Metropolitan Magistrate, Bangalore, initiating proceedings for an offence punishable u/s 138 of the Negotiable Instruments Act (the Act for short). The learned Magistrate has taken cognizance of the offence alleged in the complaint. The complainant died during the pendency of the proceedings. Her son and daughter viz., respondents herein who are presently staying in United States of America through their general power of attorney holder filed an application under the provisions of Section 302(1) of the Criminal Procedure Code seeking permission to conduct the prosecution initiated by the deceased complainant. This application was opposed by the petitioner-accused inter alia contending that the application is not maintainable; that the provisions of Section 302 deal with the prosecution to be conducted by any person other than the police officer and the present criminal proceeding not being of such nature, the application itself is not maintainable. This proceeding initiated by the complainant for the offence u/s 138 of the Act is the personal litigation and the present applicants cannot come on record as legal representatives, one like under Civil Procedure Code. The complainant being a Christian is governed by the Indian Succession Act and in the absence of probate in the matter, the respondents cannot come on record. At any rate the present application filed by the general power of attorney holder of the applicants itself is not maintainable even if it is held that the applicants are entitled to prosecute the case. The learned Magistrate has rejected all these contentions and allowed the application filed by the respondents, the legality of which is questioned before the learned Single Judge in these revisions.

4. Similar contentions were canvassed for consideration before the learned Single Judge. It is contended that the application is not filed u/s 302(2) of the Criminal Procedure Code, and the present application filed u/s 302(1) of the Criminal Procedure Code is not maintainable.

5. The respondents refuted these contentions contending that it was permissible for the respondents by virtue of Section 302(2) of the Criminal Procedure Code to seek permission of the Magistrate to prosecute the case further; moreover they are not strangers but the son and daughter of the complainant and they have subsisting interest in the property in respect of which the petitioner had issued cheque which came to be dishonoured. Learned Counsels on both sides relied upon a few decisions in support of their respective contentions. It is in this background the learned Single Judge expressed certain doubts which according to him are not answered in S. Reddappa v. M. Vijaya. It is held in Reddappa''s

case, supra, that in a proceeding u/s 138 of the Act, the death of the complainant does not ipso facto terminate the criminal proceedings. The questions posed by the learned Single Judge in this revision are, who is the fit and proper person to prosecute and what is the criteria for the same. The learned Judge has posed the questions specially in view of the fact that the respondents are Christians who are basing their legacy on the basis of a Will. The Will is not probated as required under Sections 213 and 214 of the Indian Success sion Act and they have come on record to prosecute the case not directly, but through their general power of attorney holder and therefore, whether it is proper for the general power of attorney holder to prosecute the case on behalf of the legal representatives of the respondents in a case of this nature.

6. We have heard the arguments of Sri Srinivas Raghavan for the petitioner and Sri A.H. Bhagawan and M/s. Cariappa and Associates for the respondents.

7. Section 142(a) of the N.I. Act provides that no Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the First Class shall try any offence punishable u/s 138, except on a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque. The first contention of the learned Counsel for the petitioner is based upon the fact that the complaint of this nature can only be initiated in writing, by the payee or, as the case may be, the holder in due course of the cheque and it is a personal complaint. There is no provision in the N.I. Act, 1988 to bring on record any person after the death of the complainant to prosecute the complaint. There is also no such provision in the Code of Criminal Procedure.

7-A. Similar provision is noticed in the Criminal Procedure Code u/s 198. The proviso to Section 198 of the Criminal Procedure Code suggests certain exceptions as Section 198 of the Code prohibits the concerned Magistrate to take cognizance of an offence punishable under Chapter XX of the Indian Penal Code except upon a complaint made by some person aggrieved by the offence. Hence, Section 198 imposes a prohibition on the cognizance with an exception and places a limitation on general rule that any person can set the criminal law in motion. However, it is observed by the Supreme Court in Abdul Rehman Mahomed Yusuf v. Mahomed Haji Ahmad Agbotwala and Anr., that it is limited only to offences under Chapter XX of the Indian Penal Code, i.e., offences relating to marriage. But no such exceptions are found in Section 142 of the N.I. Act. It is in the absence of such proviso or exceptions to the Statute which has give rise to certain contentions. The question of this nature arising under the Code came up for consideration before the Apex Court in Ashwin Nanubhai Vyas v. State of Maharashtra and Anr. In that case a private complaint was filed by the wife of the accused alleging offences punishable u/s 493 and 496 of the Indian Penal Code which were exclusively triable by the Court of Sessions. The accused entered appearance and disputed the marriage. During the pendency of the proceedings, the complainant died of heart attack. Her mother applied to the

Court for substitution as a fit and proper complainant and expressed her willingness to act as a complainant and to continue the proceedings. That application was strongly resisted by the accused on the ground that only the aggrieved person could be the complainant and on the death of the complainant, the complaint must be treated as abated. The Presidency Magistrate who heard the arguments, rejected the said application and permitted the complainant''s mother to continue the prosecution. An application for revision was filed in the High Court of Bombay which was also rejected. The Supreme Court in the appeal disagreeing with the contentions, that the section insists on a complaint of a person aggrieved, that continued presence of the person aggrieved throughout the trial is also necessary to keep the Court invested with the jurisdiction except in the circumstances mentioned in the proviso, held as under:

"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 complaint".

While rebutting the further contention of the Counsel for the accused that the Presidency Magistrate has erroneously permitted a substitution of a new complainant which is not provided in the Code which warrants the substitution of one complainant for another, the Apex Court held as under:

"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 Section 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".

Hence, there is further contention 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. Elaborating the discussion on this question, the Apex Court observed as under:

"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) u/s 495 of the Code of Criminal Procedure is always available".

8. Having considered the catena of decisions on this question, the Apex Court further held as under:

"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 u/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 lacuna 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 Section 198 requires is the removal of the bar".

Though in use Section 142 of the N.I. Act is not the same as Section 198 of the Criminal Procedure Code the judgment refers to this very contention viz., whether the appropriate substitute can continue and prosecute the complaint after the death of the complainant.

9. Reliance is placed by the learned Counsel for the petitioners to a judgment of the Madras High Court in A. Sambandam and Anr. v. G. Natesan by power agent S. Kuppuswami Padayachi. That was a case where a complaint was instituted by the power of attorney holder as agent of the husband alleging offences punishable under Sections 497 and 498 of the IPC and requested the Magistrate to take cognizance which was refused. The Madras High Court upheld the order of the Magistrate.

10. In Associated Cement Company Limited v. Keshvanand, this question is not strongly raised in that case before the Supreme Court and therefore, the decision has no bearing on the facts of this case. The Supreme Court held in that case that provisions of Section 256 of the Criminal Procedure Code is applicable even where complainant is Company or any other juristic person and the discretion as to whether personal attendance of complaint should be dispensed with or not has to be exercised judicially. The decision rendered by the Supreme Court in T.C. Mathai and Anr. v. District and Sessions Judge, Thiruvananthapuram, relied on by the learned Counsel for the petitioners has also no bearing on this question. It is a case where an agent who is power of attorney holder cannot become a "pleader" for the party in criminal proceedings unless the party secures permission from the Court to appoint him to act in such proceedings.

11. In Maddipatta Govindaiah Naidu v. Galakaluri Kamalamma and Anr., the learned Single Judge of Andhra Pradesh held that criminal proceedings legally instituted do not terminate or abate merely on the death of the complainant, the

cause of action for civil action bears no analogy to complaints of crime. Similar is the opinion expressed by the Calcutta High Court in Goutam Ranjan Basu v. Shanta Mukherjee. In T.N. Jayarajan v. Jayarajan, the Kerala High Court considered the scope and purport of Section 256 of the Code in a case arising out of the complaint for an offence u/s 138 of the Act. It held that Sub-section (2) of Section 302 is intended to achieve this objective, it cannot be held that the Magistrate has no option but to acquit the accused when the complainant is dead. In other words, in appropriate cases, the Magistrate can grant permission to the son of the deceased complainant to proceed with the complaint.

12. The Madras High Court in Ruby Leather Exports v. K. Venue, Rep. by Vandana Chemicals, not only considered some of the contentions which have academic interest but also answers certain questions raised in this case. Questions which came up for consideration before the Madras High Court in that case were whether the power of attorney agent of the payee or the holder in the due course of the cheque will be competent to make a complaint in writing u/s 142(a) of the Negotiable Instruments Act, to facilitate valid cognizance being taken by the Magistrate and whether power of attorney executed by the wife, payee or holder in due course in favour of her husband to file the complaint is maintainable. The other questions which are canvassed and decided are not relevant for our purpose. The first question is answered at para 30 of the judgment which reads as under:

"The answer to the question posed, is that a power of Attorney Agent of the payee or the holder in due course of the cheque, will be competent to make a complaint in writing u/s 142(a) of the Negotiable Instruments Act, to facilitate valid cognizance being taken by the Magistrate. It makes no difference, if the power of attorney is executed by one individual in favour of another or executed by a company in favour of a particular person. This verdict, of competency of a power of attorney, to prefer a complaint on behalf of the payee or holder in due course of the cheque, to be taken cognizance of, will not preclude the accused from raising any valid defence open to them under law, including the validity of the power of attorney. I am not in these batch of cases, deciding whether a person authorised in writing by a payee or the holder in due course (individual or a company would suffice to take cognizance, for that issue does not arise directly in these petitions".

The second question is answered at para 38 of the judgment homing that the power of attorney agent can competently prosecute u/s 142(a) of the Act.

His Lordship Justice K.T. Thomas in Hamsa v. Ibrahim, in fact answered all the doubts raised in this reference. The case before the Kerala High Court in Hamsa''s case, supra, was also a complaint regarding bouncing of cheque and the question whether the power of attorney holder of the payee of cheque in question can file and prosecute the complaint has been considered. It is held at para 10 as under:

"If a construction is made to the effect that no such complaint as envisaged in Section 142 of the N.I. Act can be made by a power of attorney holder on behalf of the payee or holder in due course, its consequence is the following: Under Clause (b) of the proviso to Section 138 demand for payment should be made in writing within 15 days of receipt of information regarding dishonour of cheque. u/s 142 the complaint should be made within one month of the date on which the cause of action arose. If the payee or holder in due course falls ill before the expiry of the said period or if he has to leave the station due to unavoidable reasons the cause of action would die out as the complaint cannot be filed by an agent or a power of attorney holder. It would not be in the interest of justice to construe the provision as containing a restriction that the complaint should be made by the payee or the holder in due course (as the case may be) "personally" ".

Thus the Madras High Court in M/s. Ruby Leather Exports case, supra, and Kerala High Court in Hamsa''s case, supra, have in fact permitted even a power of attorney or his agent to file the complaint u/s 142(a) of the N.I. Act and there is no restriction or bar for the Magistrate to take cognizance upon such presentation. This is insofar as taking cognizance of an offence on presentation not necessarily by the person named therein in the Act.

13. The precise question which needs consideration is after the cognizance of the offence is taken by the Magistrate, whether the complaint abates on the death of the complainant. It is true that there is no specific provision in the N.I. Act. We have to fall back upon the Code of Criminal Procedure. The general provision covering this circumstance is provided u/s 302(2) of the Criminal Procedure Code which empowers any person taking prosecution. Section 302(2) permits any person taking prosecution, may do so personally or by a pleader. However, it is only a procedural provision which enables a person to seek relief in the hands of the Magistrate though it has no reference to the prosecution of the complaint after the death of the complainant.

14. This very question came up for consideration before the learned Single Judge of this Court in S. Reddappa''s case, supra. That was a case whereupon the death of the complainant, the son was permitted to prosecute the complaint. Contentions of similar nature were also urged before the learned Single Judge for consideration. The learned Single Judge upon reference to three earlier decisions of this Court and also the rulings of Andhra Pradesh, Kerala and Calcutta High Courts held that the death of a complainant in a case of non-cognizable offence does not abate the prosecution and it is within the discretion of the trying Magistrate in a proper case to allow the complainant to continue by a proper and fit complainant, if the latter is willing. It pointed out in that decision that the decision rendered in Subbanna Hegde and Ors. v. Dyavappa Gowda, the three decisions of the Court have not been brought to the notice of the Court and therefore the object and purport of proviso of Sub-section (1) of Section 302 has not been considered. The learned Single Judge has not specifically answered the

question as to who is competent to prosecute the complaint after the death of the complainant and what is the consideration and who is that competent person who could be permitted to prosecute the complaint and whether such person can prosecute the complaint personally or through power of attorney. It is true that in S. Reddappa''s case, supra, there is no ready made answer to these questions. But the learned Single Judge in the said case proceeded to accept the law laid down in A. Sambandam''s case, supra and Raxaben and Ors. v. State of Gujarat and Ors. The reference Court has also referred to the rights of the parties under Indian Succession Act as they are Indian Christians who claimed rights under the Will which was not probated and they have also not prosecuted the case directly but through general power of attorney holder.

15. In our opinion, a probate is not necessary to prosecute a criminal complaint as L.Rs of the complainant. The question is who is competent to prosecute the complaint after the death of the complainant and whether the L.Rs are entitled to prosecute the complaint. In these cases, applications were made by the power of attorney u/s 302(1) of the Criminal Procedure Code only and the main objection was that the application was not filed u/s 302(2) of the Criminal Procedure Code. After perusal of various provisions of the Code and Section 142 of the N.I. Act, we answer the points referred to us as follows:

(1) The complaint filed u/s 200 of the Criminal Procedure Code or u/s 142 of the N.I. Act would not ipso facto terminate or abate upon the death of the complainant.

(2) In a proceeding initiated u/s 142 of the N.I. Act, on the death of the complainant, his L.Rs, their agents or power of attorney holder could be permitted to prosecute the complaint u/s 302(2) of the Criminal Procedure Code or u/s 142 of the N.I. Act.

(3) An agent or a power of attorney holder of payee of cheque or holder in due course may be permitted to prosecute the com- plaint unless there is a specific bar in the Code for such persons to lodge the complaint. But once the complaint is filed by the aggrieved persons, the prosecution can be continued by the interested persons or persons named above.

16. Before parting with this case, we may add that no provision of law should be construed so as to defeat the purpose of the Act on technicalities. It is desirable in a case of this nature for L.Rs of the deceased to come on record and prosecute the complaint in person, if possible. In the event of any disability, they may seek the permission of the Court to prosecute such complaint through their agent or power of attorney. If such applications are made, the Criminal Courts shall consider it on merits and pass appropriate orders as required u/s 302(2) of the Criminal Procedure Code or u/s 142 of the N.I. Act.

17. These revisions stand disposed of accordingly. The learned Trial Judge is directed to dispose of these matters as expeditiously as possible, but not later than six months from the date of receipt of a copy of this order.