
(2015) 08 JH CK 0011
In the Jharkhand High Court
Case No : Criminal M.P. No. 458 of 2003

Kavita Devi and Others

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 18-08-2015

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 145, 256, 256(1), 256(2), 302

Citation : (2016) 1 AJR 811 : (2015) 3 JLJR 556

Hon'ble Judges : Harish Chandra Mishra, J.

Bench : Single Bench

Advocate : Sanjay Piprawall, for the Appellant

Final Decision : Allowed

Judgement

Harish Chandra Mishra, J.—Heard learned counsel for the petitioners, learned counsel for the State as also learned counsel for the O.P. No. 2. The petitioners are aggrieved by the order dated 5.2.2003 passed by Smt. S. Kumari, learned Judicial Magistrate, Jamshedpur, in C-1 Case No. 108 of 1997, whereby the Court below has allowed the O.P. No. 2 to make the pairvi on behalf of the complainant in the said complaint case.

2. The facts of this case lie in a short compass. The complainant Siroman Singh had filed a complaint case against the petitioners, which was registered as C-1 Case No. 108 of 1997, alleging that there was a dispute between the parties for a -land, for which, there was a proceeding under Section 145 of the Cr.P.C. It is alleged that there was a meeting between the parties, in which, it was decided that the accused persons shall not pursue the said case under Section 145 of the Cr.P.C. and accordingly, the co-cordial relation was developed between them. It is further alleged that the accused persons demanded a loan of Rs. 80,000/- from the complainant, but at the relevant point of time, the complainant had only Rs. 71,000/-, which he gave to the accused persons and in lieu thereof, the accused persons also issued two cheques to the complainant for the amount of Rs. 21,000/- and another cheque of Rs. 50,000/-. However, before the cheques

could be produced for encashment, the complainant received a legal notice from the accused persons, in which, it was stated that the cheques were given for the sale of disputed plot of land to the accused persons. Alleging that the accused persons had deceived the complainant, the present complaint was filed.

3. It appears from the impugned order that prima facie offence was found against the accused persons and upon summons, the accused persons appeared in the case. In the meantime, the original complainant died and the O.P. No. 2, claiming himself to be the grandson of the complainant, filed an application for being substituted at the place of the complainant, but the said application was objected to by the petitioners, stating that due to death of the complainant, the case was fit, to be dismissed. It was also stated that the son of the deceased complainant was alive and accordingly, the O.P. No. 2 (the grandson of the deceased) was not empowered to pursue the case. However, another application was filed by the O.P. No. 2, praying to allow him to pursue the case and ultimately by the impugned order dated 5.2.2003, the Court below allowed the O.P. No. 2, to make pairvi on behalf of the deceased-complainant.

4. Learned counsel for the petitioners has submitted that the impugned order, passed by the Court below is absolutely illegal and is in teeth of Section 256 of the Code of Criminal Procedure. Learned counsel has submitted that under the provisions of Section 256(2) of the Code, the Court below had no other alternative than to acquit the accused in the event of death of the complainant. In support of his contention, learned counsel for the petitioners has placed reliance upon the decision of Delhi High Court in Om Saran etc. Vs. Satya Dhawan, , as also of the Karnataka High Court in Subbanna Hegde and Others Vs. Dyavappa Gowda, and of Ratan Singh and Others Vs. Chain Singh, , taking the view that in the case of death of the complainant, the Magistrate would have no discretion but to acquit the accused in view of Section 256(2) of the Cr.P.C.

5. Learned counsel has also placed reliance upon a decision of the Hon"ble Supreme Court of India in S. Rama Krishna Vs. S. Rami Reddy (D) by his LRs. and Others, , wherein the law has been laid down as follows:--

"7. Section 256 of the Code of Criminal Procedure empowers a Magistrate to pass an order of acquittal on nonappearance or death of the complainant.

The complaint petition was filed in the year 2001. Rami Reddy died in 2001.--

It is not a case where the proviso appended to sub-section (1) of Section 256 of the Code was applicable.

(Emphasis supplied)

6. It is also submitted by learned counsel for the petitioner that if two decisions of the Supreme Court on a similar question of law cannot be reconciled and if both Benches of the Supreme Court consist of equal numbers of Judges, the later of the two decisions should be followed. In this connection learned counsel has also placed reliance upon a Full Bench decision of the Karnataka High Court in

Govindanaik G. Kalaghatigi v. West Patent Press Co. Ltd. & Ors., reported in AIR 1980 Karnataka 92. Placing reliance on these decisions, learned counsel has submitted that the impugned order cannot be sustained in the eyes of law.

7. Learned counsel for the State as also learned counsel for the O.P. No. 2 have opposed the prayer and it is submitted by learned counsel for the O.P. No. 2 that O.P. No. 2 being the legal heir of the deceased, he is fully entitled to pursue the case. Learned counsel for the O.P. No. 2 has placed reliance upon a decision of the Hon'ble Supreme Court of India in Shri Balasaheb K. Thackeray and Another Vs. Shri Venkat @ Babru and Another, , wherein in the similar matter, where the complainant had died after the issuance of summons to the accused, the Apex Court, interpreting Section 302 of the Cr.P.C. held that the Magistrate is empowered to permit the prosecution to be continued by the legal heir.

8. Learned counsel for the O.P. No. 2 has also placed reliance upon a decision of the Apex Court in Rashida Kamaluddin Syed and Another Vs. Shaikh Saheblal Mardan (Dead) through Lrs. and Another, , wherein where after the death of the complainant, the sons of the deceased complainant immediately applied for their impleadment allowing them to continue the prosecution against the accused persons, which was allowed and the said order was not challenged by the accused persons and thereafter the witnesses were also examined, it was held that the Court below was right in permitting the sons of the deceased-complainant to continue the prosecution. Placing reliance on these decisions, learned counsel for the O.P. No. 2 has submitted that there is no illegality in the impugned order, whereby the O.P. No. 2 has been allowed to make pairvi on behalf of the deceased complainant, being his grandson. Learned counsel has accordingly, submitted that there can be no interference in the impugned order dated 5.2.2003.

9. Section 256 of the Cr.P.C. reads as follows:--

"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."

Similarly, Section 302 of the Cr.P.C. reads as follows:--

"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."

10. Both these provisions clearly show that Section 302 of the Cr.P.C. is a general provision, whereas Section 256(2) of the Cr.P.C. deals with the specific case of non-appearance of the complainant due to his death. Section 256(2) of the Cr.P.C. clearly provides that in case of non-appearance of the complainant due to his death, the provisions of Section 256(1) shall, so far as may be, apply. Section 256(1) of the Cr.P.C. clearly states that for non-appearance of the complainant, the accused is to be acquitted. However, there is a proviso to sub-section (1) of Section 256 of the Cr.P.C. but the said proviso is not at all applicable in case of death of the complainant. The same view has been taken by the Apex Court in *S. Rama Krishna's case* (supra), and the Apex Court has clearly laid down the law that in case of death of the complainant, the proviso appended to sub-section (1) of Section 256 of Cr.P.C. is not applicable. Though the contrary view has been taken by the Supreme Court in *Balasaheb K. Thackeray's case* (supra) as also in *Rashida Kamaluddin Syed's case* (supra), but the facts remain that in *S. Rama Krishna's case* (supra), the Co-ordinate Bench in the later decision has taken the view that Section 256 of the Cr.P.C. empowers a Magistrate to pass an order of acquittal on non-appearance or death of the complainant and in case of death of the complainant, the proviso to sub-section (1) of Section 256 of the Cr.P.C. is not applicable.

11. From the record, I find that the facts of the present case is fully covered by the later decision of the Co-ordinate Bench of the Apex Court in the case of *S. Rama Krishna's case* (supra), and accordingly the petitioners were entitled to be acquitted upon the death of the complainant. As such, the impugned order passed by the Court below, permitting the O.P. No. 2 to make the pairvi on behalf of the complainant after the death of the complainant, cannot be sustained in the eyes of law. In view of the aforementioned discussions, the impugned order dated 5.2.2003, passed by Smt. S. Kumari, learned Judicial Magistrate, Jamshedpur, in C-1 Case No. 108 of 1997, is hereby, set aside. As the complainant has already died, there is no need to remit the matter back to the Court below for passing the order afresh. Accordingly, the petitioners stand acquitted. This Criminal Miscellaneous Petition is accordingly, allowed.