
(2010) 12 KL CK 0017
In the High Court Of Kerala
Case No : Criminal A. No. 1851 of 2010

Laly Thomas

APPELLANT

Vs

State of Kerala

RESPONDENT

Date of Decision : 01-12-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 255, 256, 256(1), 302
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2011) 3 BC 521 : (2011) 2 ILR (Ker) 134 : (2011) 2 KLJ 302 :
(2011) 2 KLJ 299 : (2011) 2 KLT 41 : (2012) 1 RCR(Civil) 86 : (2011) 4
RCR(Criminal) 860

Hon'ble Judges : K. Hema, J

Bench : Single Bench

Advocate : P.V. Paulson, for the Appellant; K.A. Jaleel, C.Y. Vinod Kumar and
K.S. Sivakumar, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

K. Hema, J.—Can an accused be acquitted u/s 256(1) of the Code of Criminal Procedure ("the Code" for short), if legal heir of deceased complainant remains absent? Can legal heir of deceased complainant be treated as "complainant", for the purpose of Section 256(1) of the Code?

2. Appellant's husband filed a complaint against Respondents 2 to 4, before Magistrate Court, alleging offence u/s 138 of Negotiable Instruments Act. During pendency of trial, complainant died. The court did not acquit accused u/s 256(1) of the Code. But prosecution continued since his widow, who is his legal heir filed an application and prosecution continued. The case was posted for evidence. On 14.7.2010, deceased complainant's widow was absent and Trial Court acquitted accused, u/s 256(1) of Code, recording that "complainant was continuously absent".

3. Heard both sides. Perused the available records. It is seen from the impugned order u/s 256(1) of the Code that Trial Court acquitted accused since legal heir of

deceased complainant was absent, stating that "complainant" was continuously absent. Thus, acquittal order was passed, treating legal heir of deceased complainant, as "complainant".

4. Can the deceased complainant be treated as "complainant" for purpose of Section 256(1) of the Code? Can the Magistrate acquit an accused u/s 256(1) of the Code, if legal heir of deceased complainant is absent? Section 256 of the Code 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 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 the 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.

5. Section 256 of the Code lays down that if complainant does not appear, accused shall be acquitted on certain days, (whether such non-appearance is due to his death or some other reason), unless the court thinks it proper to adjourn the case. But, the said provision also reveals that notwithstanding absence of complainant, Magistrate may proceed with the case, by dispensing with attendance of complainant, if Magistrate is of opinion that personal attendance of complainant is not necessary.

6. Thus, it is clear that even in cases in which complainant dies, the court can still proceed with the case. But, how can this be done? There is no provision in the Code to implead legal heir of the complainant as a "complainant" on death of complainant. There is also no provision in the Code by which, complainant can be substituted on his death, by legal heir or any other person. This position is made clear in *Bhagheerathi Amma v. Jeevan Kumar* 1981 KLT 875 a decision of a Single Bench of this Court, it is held therein as follows:

There is however no provision in the Code for impleading or substituting a person in the place of the Appellant or the complainant.

7. A Division Bench of this Court also approved what is laid down in *Bhagheerathi Amma's* case and held in *Chathukutty v. Prasanna* in 2007 (1) KLT 584 thus: "There is no provision in the Code of Criminal Procedure to implead the legal representatives of a party to a criminal case pending before any criminal court. There is no provision for setting aside abatement or condoning the delay as there is no provision is made for filing a petition for impleading the legal

representatives or any period of limitation is prescribed".

8. There is no provision in the Code, which lays down that the complaint abates on death of complainant. The complaint also does not abate on the death of complainant. On the other hand, it is indicated in Section 256 of the Code that the court can still proceed with the case, even on death of complainant. Such continuation of proceedings will be possible by virtue of Section 302 of the Code. Section 302 is extracted as hereunder:

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 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.

9. Section 302 of the Code lays down that any Magistrate inquiring into or trying a case may permit prosecution to be conducted by any person other than police officer etc., and such person shall be entitled to conduct the prosecution. So, on the death of complainant, if a legal heir or any other person files an application u/s 302 of the Code, for permission to conduct prosecution, the court may permit such person to do so.

10. The legal heir or legal representative of deceased complainant or some other person who is permitted u/s 302 of the Code to conduct prosecution, after the death of complainant, cannot be treated as a "complainant" or a substitute for the complainant. A legal heir who comes on record on death of complainant is only a person who is permitted by court "to conduct prosecution", u/s 302 of the Code. He cannot be treated as "complainant".

11. Neither Section 302 nor any other provision in the Code lays down that a person who is permitted to conduct prosecution can be considered as "complainant". A legal heir of deceased complainant does not, therefore, gain status of a "complainant" and he cannot be treated as "complainant", only because he is permitted to conduct prosecution. A reading of Section 256 of the Code itself makes it clear that the case is proceeded with even after death of complainant, only because Magistrate forms an opinion that "complainant's" attendance is not necessary and attendance of complainant is dispensed with.

12. In such circumstances, having found that attendance of complainant is not necessary to proceed with the case, and his attendance is dispensed with, there will be no justification in acquitting accused u/s 256(1) of the Code, on the ground that "complainant" is absent. Therefore, in cases where legal heir of deceased complainant is absent, the court shall not acquit accused u/s 256(1) of

the Code, treating legal heir as "complainant".

13. The accused can be acquitted u/s 256(1) of the Code only if "complainant" is absent. Legal heir of deceased complainant cannot be treated as "complainant", for purpose of Section 256 of the Code. Section 256(1) of the Code does not permit the court to acquit an accused, if legal heir of deceased complainant or other person who conducts prosecution after death of complainant, is absent. No arguments were placed to substantiate that this view is not correct.

14. If the person who conducts prosecution on death of complainant does not appear, the Magistrate will have to dispose of the case on merit, u/s 255 of the Code, whether there is evidence on record or not. At any rate, an order of acquittal u/s 256(1) of the Code on the date to which case is posted for evidence is illegal. In such circumstances, impugned order is unsustainable and the following order is passed:

1. The order under challenge is set aside.
2. The Trial Court is directed to take the case on file and proceed in accordance with law.
3. The parties shall appear before the Magistrate Court on 15.3.2011.

This appeal is allowed.