

(2011) 12 AP CK 0011

In the Andhra Pradesh High Court

Case No : Criminal Appeal No : 818 of 2006, Criminal A.M.P. No. 1431 of 2011
and Criminal A.M.P. No. 63 of 2012

Smt. Gadale Vasantha, died per LR.s. and Others APPELLANT

Vs

M/s Cybermate Infotek Ltd. and The State of Andhra Pradesh RESPONDENT

Date of Decision : 27-12-2011

Acts Referred:

Companies Act, 1956 — Section 434
Criminal Procedure Code, 1973 (CrPC) — Section 198, 302, 377, 378, 378(4)
Negotiable Instruments Act, 1881 (NI) — Section 138
Transfer of Property Act, 1882 — Section 106

Citation : (2012) 1 ALD(Cri) 865 : (2012) 1 ALT(Cri) 254

Hon'ble Judges : Samudrala Govindarajulu, J

Bench : Single Bench

Advocate : T.S. Praveen Kumar, for the Appellant; Venkat Reddy Donthureddy,
for the Respondents 1 to 3, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Honourable Sri Justice Samudrala Govindarajulu

1. This criminal appeal is filed by the Complainants 1 and 2 as Appellants 1 and 2 against order of acquittal of the Respondents 1 to 3/A-1 to A-3 recorded by XVII Metropolitan Magistrate, Hyderabad in C.C. No.732 of 2003 vide judgement dated 26-04-2005. When this Appeal has been pending in this Court, the first complainant/first appellant died on 19-12-2007; therefore, CrI.A.M.P. (S.R.) No.28256 of 2011 is filed for impleading the Petitioners 3 to 6 therein who are her husband and children, as her legal representatives (L.Rs). CrI.A.M.P. No.1431 of 2011 is filed by them for condoning the delay of 1318 days in filing the L.R. Petition. These petitions are opposed by the respondents/accused.

2. L.Rs of the deceased first appellant were sought to be brought on record u/s 394(2) Cr.P.C. Section 394 reads as follows :

394. Abatement of appeals - (1) Every appeal u/s 377 or section 378 shall finally

abate on the death of the accused. (2) Every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Provided that where the appeal is against a conviction and sentence of death or of imprisonment, and the appellant dies during the pendency of the appeal, any of his near relatives may, within thirty days of the death of the appellant, apply to the Appellate Court for leave to continue the appeal; and if leave is granted, the appeal shall not abate.

Sub-section (1) deals with effect of death of an accused in an appeal filed by the State or by the complainant. Sub-section (2) relates to effect of death of an appellant in any other appeal. This appeal is filed by the appellants 1 and 2 u/s 378(4) Cr.P.C. In this appeal, there is no abatement as such due to death of the first appellant since the second appellant/second complainant can effectively prosecute the appeal before this Court even in the absence of the first appellant. But husband and children of the deceased first appellant intend to come on record in the place of the deceased first appellant.

3. Placing reliance on *Thothan and Another Vs. Murugan and Others*, of the Madras High Court, it is contended by the appellants' counsel that since there is no provision in the Code providing for the legal representatives of the deceased appellant/complainant to continue the proceedings in the appeal, the petition for bringing husband and children of the deceased first appellant on record is not maintainable. While considering similar provision under the old Code of Criminal Procedure, 1898 the Madras High held as follows :

This is an appeal u/s 417 Cr.P.C under the terms of S. 431 Cr.P.C. this can abate only on the death of the accused. The other appeals, i.e., appeals which are filed Under Sections other than Section 417 Cr.P.C. abate only on the death of the appellant. The right of appeal which is given to the complainant was introduced by the Amending Act of 1955. Parliament is supposed to have taken notice of Section 431 Cr.P.C. also when the amendment was passed. But there is this lacuna in the section, namely, as to what is to happen in Case where the accused does not die and the appeal is not by the accused but by the complainant and he dies pending disposal.

I should think that in the absence of a specific provision for the legal representative to be brought on the record, the appellant having died, the question of prosecuting the appeal further does not arise.

5. In the circumstances, the only order that could be passed is the dismissal of the application to bring on record the legal representative.

The above situation u/s 431 of the old Code of 1898 continues even after replacing the old Code with the new Code of the year 1973 by Section 394.

4. On the other hand, reliance is placed by the appellants' counsel on *Jimmy Jahangir Madan Vs. Bolly Cariyappa Hindley (Dead) by LRs.*, of the Supreme

Court wherein the Supreme Court while holding that power of attorney holder of the legal representatives of a deceased complainant in a Criminal Case cannot come on record to continue the prosecution, held that it is only the legal heirs of the deceased complainant who can come on record to continue the prosecution in the place of the deceased complainant. The Supreme Court observed as follows:

5. The question as to whether heirs of the complainant can be allowed to file an application u/s 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 the case of Ashwin Nanubhai Vyas V. State of Maharashtra 1967 (1) SCSR 807, in which case the Court was dealing with a case u/s 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.

5. The Jharkhand High Court in Ajay Kumar Agarwala V. State of Jharkhand 2003 Criminal Law Journal 3088 permitted impleading of legal representatives of the deceased-complainant in the light of the language employed in Section 495 Cr.P.C. to the effect that the Court may empower with some exceptions to authorize conduct of prosecution by any person. It is observed therein:

What the Presidency Magistrate has done is to allow the mother to act as the complainant to continue the prosecution. This power has undoubtedly possessed by the Presidency Magistrate because of Section 495 of the Code by which Courts are empowered (with some exceptions) to authorize 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 was should hold that the death of the complainant puts an end to the prosecution. Drawing the same analogy, this Court is also satisfied that the Opposite Party No.2 had all the necessary jurisdiction to continue with the case and holds that the death of the Complainant could not have terminated the prosecution and that too, in such a serious case.

In view of the above pronouncement of the Supreme Court in Jimmy Jahangir Madan (2 supra), decision of the Madras High Court in Thothan (1 supra) no longer holds the field. The lis does not die with death of the complainant in criminal law. Any person, whether legal representatives of the deceased-complainant or any other interested person can continue the proceedings by coming on record in the place of the deceased -complainant with permission of the Court and can continue the prosecution either u/s 302 or u/s 495 Cr.P.C.

There is no time limit prescribed for the legal representatives or any other person

to come on record in the place of the deceased-complainant. When there is no time limit therefor, the question of delay in filing such a petition would not arise at all. The petition filed by the petitioners herein for condoning the alleged delay of 1318 days is wholly unnecessary. The petitioners 3 to 6 being husband and children of the deceased 1st appellant, are entitled to come on record to participate in further proceedings in the appeal in the place of the deceased-1st appellant. In any event, even if the petitioners 3 to 6 did not come forward with a petition to bring them on record, the appeal can be proceeded with even in the absence of the deceased-1st appellant, since the 2nd appellant namely Sri Gadale Laxmibai and Kishan Rao Charitable Trust is there and the Trust is represented by Trustee G.Pavankumar (who is the 4th petitioner herein) and he can proceed with the appeal.

6. Coming to merits of the appeal, the lower Court dismissed the complaint on two grounds, viz., that there is no valid statutory notice u/s 138(b) of the Negotiable Instruments Act (in short, the Act) prior to institution of the complaint, and that the dishonoured cheques were replaced by demand draft. It is contended by the appellants' counsel that Ex.P.11 legal notice got issued by the complainants though contained several demands in respect of several claims, it is in accordance with K.R. Indira Vs. Dr. G. Adinarayana, of the Supreme Court inasmuch as in Ex.P. 11 notice there is specific demand for the amount covered by the dishonoured cheques, which part is separable from other parts of the notice. On the other hand, the respondents' counsel also placed reliance on K.R. Indira (4 supra) in support of the contention that Ex.P. 11 notice is not in accordance with law. Observations and ratio of the Supreme Court therein are as follows:

In a given case if the consolidated notice is found to provide sufficient information envisaged by the statutory provision and there was a specific demand for the payment of the sum covered by the cheque dishonoured, mere fact that it was a consolidated notice, and/or that further demands in addition to the statutorily envisaged demand was also found to have been made may not invalidate the same. We have perused the contents of the notice. Significantly, not only the cheque amounts were different from the alleged loan amounts but the demand was made out of the cheque amounts but only the loan amount as though it is a demand for the loan amount and not the demand for payment of the cheque amount; nor could it be said that it was a demand for payment of the cheque amount and in addition thereto made further demands as well. What is necessary is making of a demand for the amount covered by the bounced cheque which is conspicuously absent in the notice issued in this case. The notice in question is imperfect in this case not because it had any further or additional claims as well but it did not specifically contain any demand for the payment of the cheque amount, the non-compliance with such a demand only being the incriminating circumstance which expose the drawer for being proceeded against u/s 138 of the Act.

7. The respondents' counsel also placed reliance on *Suman Sethi Vs. Ajay K. Churiwal and Another*, of the Supreme Court and the following observation made therein:

If in a notice while giving up break up of the claim the cheque amount, interest damages etc. are separately specified, other such claims for interest, cost etc. would be superfluous and these additional claims would be severable and will not invalidate the notice. If, however, in the notice an omnibus demand is made without specifying what was due under the dishonoured cheque, notice might well fail to meet the legal requirement and may be regarded as bad.

8. In the light of the above pronouncements of the Supreme Court, facts of this case and contents of Ex.P. 11 notice have to be examined. The complainants filed the complaint in the lower Court against the accused for dishonour of two cheques Exs.P.5 and P.6 drawn by the 1st accused/1st respondent in favour of the appellants 1 and 2 respectively for Rs. 1,65,904/- and Rs.60,000/- respectively. Exs.P.7 and P.8 are dishonour memos dated 10.01.2003. Exs.P.9 and P.11 are debit advices issued by the banker on 11.01.2002. Ex.P.11 notice is dated 23.01.2003. It is the complainants' case that the respondents 2 and 3/A.2 and A.3 are Managing Director and Director of A.1 company. In that capacity A.2 and A.3 were impleaded in the case. According to the complainants, A.1 company became liable to pay arrears of rent amounting to Rs.6,38,000/- upto 30.05.2002 and the accused also had to pay tax to the Department deducted at source, and towards the said arrears, the two dishonoured cheques in this case were drawn by A.1. Though debt or liability in partial discharge of which the cheques were issued was one and the same, the cheques Exs.P.5 and P.6 were drawn by A.1 in favour of the 1st complainant and the 2nd complainant separately. When those two cheques were dishonoured, the complainants 1 and 2 should have issued two separate notices to the accused u/s 138(b) of the Act and should have instituted two separate complaints for prosecuting the accused u/s 138 of the Act. Consolidated complaint and consolidated notice Ex.P.11 for dishonour of those two cheques drawn separately and individually in favour of the complaints 1 and 2, are not maintainable and not tenable in law. In any event, it was not the ground on which the lower Court dismissed the complaint.

9. Concluding portion of Ex.P.11 notice reads that it is a comprehensive notice which may be treated as notice u/s 434 of the Companies Act, u/s 138 of the Act and u/s 106 of the Transfer of Property Act. Finally, the notice reads that A.1 to A.3 are called upon to comply with that notice in accordance with law, failing which they will be held responsible for the costs and consequences and legal action which the complainants would be constrained to take against them including the notice charges of Rs.10,000/-. It is pointed out by the appellants' counsel that in paras 2 and 4 of the notice, details of demand as contemplated u/s 138(b) of the Act are mentioned. The said portions of the notice read that the accused had also issued two post-dated cheques drawn on ICICI Bank in favour of both the complainants respectively for Rs. 1,65,904/- and Rs.60,000/- dated

31.12.2002 and that the cheques issued by the accused earlier towards rent arrears have similarly been dishonoured and the complainants did not take any action in lieu of promises made by the accused to pay the amount due. It is further stated therein that the accused are called upon to forthwith make good the said entire payment of arrears together with interest at 24% per annum to both the complainants within 21 days of receipt of that notice, failing which the complainants would be constrained to take appropriate action permissible in law and that on their failure to make good the arrears of rent including the amount covered by the bounced cheques aforesaid within the time stipulated as above, the complainants shall also be entitled to take appropriate proceedings against the accused u/s 138 of the Act. The lower Court considered these allegations in the light of K.R.Indira (4 supra) and came to the conclusion that the said allegations are not in accordance with the requirements of the Act. Main thrust of demand by the complainants in Ex.P.11 notice is payment of entire arrears of rent together with interest at 24% per annum. According to the complainants, the said arrears of rent include the amounts covered by two dishonoured cheques herein. Even though the demanded amount covered by dishonoured cheque (s) is liable to be paid within 15 days as per Section 138(c) of the Act, in Ex. P. 11 notice, the demand was to the effect that the accused were called upon to pay the entire arrears of rent including dishonoured cheque amounts within 21 days of receipt of the notice. Not only the specific amount covered by the two dishonoured cheques was demanded but also the time limit for payment is beyond 15 days in Ex.P.11 notice; and therefore viewed from any angle, Ex.P.11 notice is not in accordance with legal requirements u/s 138 of the Act. The lower Court is correct in finding that Ex.P.11 notice is invalid u/s 138 of the Act.

10. Further, the lower Court came to the conclusion that Exs.P.5 and P.6 cheques were replaced by the accused by demand draft dated 31.12.2002. The said conclusion was arrived at by the lower Court on the basis of observations of this Court in the order dated 23.03.2005 in Company Petition No.69 of 2003. When the amounts covered by post-dated cheques were paid subsequently, the complainants should not have presented the cheques for payment. The respondents' counsel placing reliance on English Prasad Vs. N. Shravan Kumar, of the Delhi High Court contended that when the cheques were replaced -by demand drafts for the equal amount, then there was no cause of action for the complainants to present the cheques for payment. There is substance in both the contentions put forward by the respondents' counsel and accepted by the lower Court. There are no valid grounds in this appeal to come to a different conclusion from that of the lower Court.

11. CrI.A.M.P.No.1431 of 2011: In the result, the petition is dismissed as unnecessary.

12. CrI.A.M.P.(SR) No.28256 of 2011: In the result, the petition is allowed.

13. CrI.A.No.818 of 2006: In the result, the appeal is dismissed.