

T.N. Jayarajan Vs. Jayarajan

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Court : Kerala

Decided On : Sep-16-1992

Reported in : 1993(1)ALT(Cri)147; [1995]82CompCas629(Ker)

Judge : M.M. Pareed Pillay, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 256; [Negotiable Instruments Act, 1881](#) - Sections 138

Appeal No. : Criminal Appeal No. 269 of 1991

Appellant : T.N. Jayarajan

Respondent : Jayarajan

Advocate for Def. : A.K. Basheer, Adv.

Advocate for Pet/Ap. : M. Ramesh Chander, Adv.

Disposition : Appeal allowed

Judgement :

M.M. Pareed Pillay, J.

1. The appellant's father filed a complaint against the respondent alleging an offence under Section 138 of the [Negotiable Instruments Act, 1881](#). The complaint was filed on April 25, 1990. The Magistrate took cognizance of the offence. The

appellant's father died on August 11, 1990. The appellant filed an application for permission to prosecute the complaint. The Magistrate dismissed the application and acquitted the accused. The order of the Magistrate is challenged by the appellant.

2. The learned Magistrate held that in the absence of the complainant the only course open to the court is to dismiss the complaint and acquit the accused.

3. The question that arises for consideration is whether the complainant's son is entitled to prosecute the complaint after the complainant's death.

4. Under Section 256(1) of the Criminal Procedure Code, 1973, the Magistrate may adjourn the hearing of the case to some other day in the absence of the complainant. The section provides that in a case where summons had been issued on a complaint and on the day appointed for the appearance of the accused or on any day subsequent thereto to which the hearing has been adjourned the Magistrate can acquit the accused if the complainant is absent. It is not the invariable rule that he should acquit the accused the moment he finds the complainant absent in the court. For proper reasons he can adjourn the hearing of the case to some other day, The proviso to Sub-section (1) of Section 256 enables the Magistrate to excuse the personal attendance of the complainant in a case where he is represented by a pleader or by the officer conducting the prosecution or if he is of the opinion that the personal attendance of the complainant is not necessary. Sub-section (2) makes the position clear that Sub-section (1) shall apply to cases where non-appearance of the complainant is due to his death. Thus, in a case where the complainant could not appear before the court due to any reason or where the absence is on account of death the Magistrate is vested with power to postpone the hearing of the case. Section 256 does not postulate that whenever the complainant is absent and whatever be the cause for it the Magistrate has no option but to acquit the accused. Though the absence of the complainant on the day fixed for the hearing may entail the dismissal of the complaint and acquittal of the accused, wide discretion is there for the Magistrate to adjourn the case for hearing to some other day if he finds proper reasons to do so. Certainly that power is there in the case of the complainant's absence on

account of his death.

5. Section 256(1) of the present Code more or less corresponds to Section 247 of the old Code (Criminal Procedure Code, 1898). Sub-section (2) to Section 256 has been newly added. Even under the old Code, the Bombay High Court had occasion to hold that the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complainant. In *Mahomed Azam v. Emperor*, AIR 1926 Bom 178, the court held thus (headnote) :

' In a case of non-cognizable offence instituted upon a complaint, the axiom of *actio personalis moritur cum persona*, in civil law confined to torts, does not apply, and the trying Magistrate has discretion in proper cases to allow the complaint to continue by a proper and fit complainant, if the latter is willing.'

The above view has been adopted in *Subbamma v. Kannappachari*, AIR 1969 Mys 221, where the Mysore High Court held that the death of the 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 complaint to continue by a proper and fit complainant if the latter is willing. But some other High Courts have taken a contrary stand.

6. As to the question whether the complainant's death ends the proceedings in a summons case, the Law Commission in its 41st report observed :

' A question has arisen whether the complainant's death ends the proceedings in a summons case ; and we find that different views have been expressed on this question. As a matter of policy we think the answer should depend on the nature of the case and the stage of the proceedings at which death occurs, It is impracticable to detail with the various situations that may arise and the considerations that may have to be weighed. We think, in the circumstances, that the decision should be left to the judicial discretion of the court, and the legal provision need only be that death and absence stand on the same footing. We trust this will in practice work satisfactorily.'

As Sub-section (2) of the section 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,

7. The order of the Magistrate dismissing the complaint and acquitting the accused is set aside. The Magistrate is directed to grant permission to the appellant to proceed with the complaint. Criminal appeal is allowed.

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