

Sebastian Vs. State of Kerala

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Court : Kerala

Decided On : Nov-21-2003

Reported in : II(2004)BC483; 2004(1)KLT457

Judge : R. Basant, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 256(1) and 256(2)

Appeal No. : C.R.M.C. No. 5861 of 1999

Appellant : Sebastian

Respondent : State of Kerala

Advocate for Def. : M.A. Khadir Kunju, Public Prosecutor,; K.A. Jaleel,; C.

Advocate for Pet/Ap. : S. Sreekumar and; P.K. Suyuz, Advs.

Disposition : Complaint dismissed

Judgement :

ORDER

R. Basant, J.

1. The petitioner is the accused in C.C. 197 of 1996. That is a complaint under Section 138 of the Negotiable Instruments Act. The complainant expired during the

pendency of the proceedings. Her legal heirs have not sought permission of the court to prosecute the complaint. The second respondent herein is the sister of the deceased. She filed an application before the learned Magistrate seeking permission to continue to prosecute the complaint. She claimed that she is a legatee and that under the will executed by the deceased she is a beneficiary. Her application for such impleadment was resisted by the petitioner-accused. Inter alia he took up a contention that the will is not genuine. He filed an application to send the will to the handwriting expert for examination. The learned Magistrate took up the petition for impleadment as well as the petition to forward the will to a handwriting expert together for consideration. The application for impleadment was allowed and the other application was dismissed. The petitioner challenges the impugned common order.

2. The question whether the death of a complainant would ipso facto bring the criminal prosecution initiated by him to termination was considered in detail by this Court in *Santhi Balagopal v. Benilde* (1995 (2) KLT 488). A fairly exhaustive discussion of the law is available in the said decision. The court took note of the contradictory stand taken by different High Courts. Paragraph 12 of the said judgment gives the manner in which the controversy was resolved.

3. Under Section 256(1) of the Code of Criminal Procedure a complainant's absence can lead to three different consequences. They are:

(1) the learned Magistrate may acquit the accused.

(2) the learned Magistrate may adjourn the case.

(3) the learned Magistrate may proceed with the trial if personal attendance of the complainant is not necessary.

4. Sub-section 2 of Section 256 stipulates that even if the non-appearance of the complainant is because of his/her death, the consequences enumerated under Section 256(1) would follow. Though there is no specific provision in that regard available in the Code of Criminal Procedure, relying on precedents and principles the court held that adjourning the case consequent to the death of the complainant

is therefore within the powers of the Magistrate. This Court further proceeded to observe that if in the meanwhile one of the legal representatives of the deceased complainant or a fit person comes forward and seeks permission to continue the proceedings, it is perfectly within the powers of the Magistrate to permit him to do so.

5. It is hence very evident that it is not even necessary that such person who seeks permission of the learned Magistrate to continue with the prosecution must be a legal heir or even a legal representative of the deceased complainant. It is enough if he is a fit and proper person. I would go one step further and observe that it is not at all necessary that any person should apply to come on record to continue the proceedings. Even without that if the learned Magistrate chooses to follow the third of the three options available (referred to earlier) there is no impropriety or illegality. The learned Magistrate can certainly proceed with the matter without impleading anyone.

6. Coming back to the facts of this case it is very evident that the complainant's evidence were over. Examination of the accused under Section 313 is also over. The case was posted for examination of defence witnesses. One of the defence witnesses has already been examined as DW. 1. The matter stood posted for further evidence on the side of the accused when the death of the complainant was reported to court. To me it does not appear that this is a fit case where the learned Magistrate must wait for anyone to come on record to continue the proceedings. Even without such application, the third alternative referred above could certainly have been pursued by the learned Magistrate.

7. As already adverted to it is evidenced that the legal heirs of the deceased under the personal law are not choosing to continue to prosecute the complaint. The short question hence is whether her sister would be a fit and proper person to come on record to continue the proceedings. Even without the will - ignoring the controversy about the genuineness of the will - I am of the opinion that in these circumstance where the legal heirs have not chosen to come on record to prosecute the petition, sister of the deceased can certainly be permitted by the court to continue the proceedings. My attention has been drawn to one decision of

this Court in C.M. Stephne v. John Manjooran (1970 KLT 545) where this Court had approved the conduct of a Magistrate permitting the brother of the deceased to continue with the prosecution. I repeat that it is not hence essential that the person who seeks to continue the proceedings must be one of the legal heirs or even the legal representative. A fit and proper person can be permitted to continue and I find no reason to come to a conclusion that the second respondent herein-sister of the deceased is not a fit and proper person to continue the proceedings.

8. I must alertly note and perceive the contours of the jurisdiction of this Court under Section 482 of the Code of Criminal Procedure. I am satisfied that this is not a fit case where the extra-ordinary powers available to this Court under Section 482 CrI.P.C. can or ought to be invoked to interfere with the impugned order. The challenge fails.

9. In the result, this CrI.M.C. is dismissed.

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