

Gene Vs. Gabriel

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Court : Chennai

Decided On : Mar-13-2007

Reported in : I(2008)BC167

Judge : P. Murgesen, J.

Acts : [Negotiable Instruments Act, 1881](#) - Sections 138; [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 256, 256(1), 256(2) and 313

Appeal No. : Cri. Revn. Case No. 821 of 2002

Appellant : Gene

Respondent : Gabriel

Advocate for Def. : S. Velapandian, Adv. for A. Sasidaran, Adv.

Advocate for Pet/Ap. : V. Jayakumar, Adv.

Disposition : Revision allowed

Judgement :

ORDER

P. Murgesen, J.

1. This revision has been filed by the petitioner/third party against the judgment dated 4.1.2000 made in Cri. M.P. No. 7239 of 2001 in C.C. No. 240 of 1998 by the

learned Judicial Magistrate No. II, Kuzhithurai.

2. The petitioner's case briefly is as follows:

(i) One Thangaraj filed a petition so as to constitute a complaint under Section 138 of Negotiable Instruments Act against the respondent herein. The respondent herein borrowed a sum of Rs. 1,50,000/- from the complainant to be invested in his Prawn business, agreeing to repay the amount within one month and issued a cheque bearing No. 961549 dated 20.7.1998 drawn at State Bank of Travancore, Thengapattanam Branch.

(ii) The cheque was presented in the State Bank of India, Kuzhithurai Branch for collection and it was returned on 8.8.1998 as unpaid due to insufficiency of fund in the respondent's Bank account. The respondent has issued the cheque knowing fully well about the insufficiency of funds in his account, and consequences thereon.

(iii) So, the complainant, within fifteen days from the date of receipt of information from the Bank, sent a notice dated 19.8.1998 through his Advocate on 20.8.1998 calling upon the respondent accused to pay the amount within fifteen days from the date of receipt of the notice. But, the respondent accused did not pay the amount. Instead, he sent a reply notice with allegations against the complainant. So, the complainant filed a complaint within one month from the date of expiry of 15 days' grace time given under the notice for payment of the amount. So, the complaint was filed in time.

3. Before the Trial Court, on the side of the complainant, PWs. 1 to 3 were examined and Exs. P1 to P9 were marked. The accused neither examined any witness nor marked any document.

4. At the time of questioning under Section 313, Cr.P.C. the complainant was dead. So, the petitioner in this revision, namely, Gene, son of Thangaraj had filed a petition in Cri.M.P. No. 7239 of 2001 to implead himself as a party to prosecute the case. The respondent herein filed a counter stating that the son of the complainant has no right to implead himself as a party and to continue the

proceedings and he is not competent to conduct the case.

5. Learned Judicial Magistrate No. II, accepted the claim of the respondent herein and dismissed the petition in Cri.M.P. 240 of 1998.

5.1 Challenging the dismissal order of the learned Judicial Magistrate No. II, this revision has been filed by Gene, son of the complainant, Thangaraj.

6. The point for consideration is:

Whether the son of the complainant is competent to prosecute the complaint instituted by his father

The point:

7. No doubt, the revision petitioner is the son of the complainant, Thangaraj who filed a complaint against the respondent. In that case, witnesses were examined and at the time of questioning under Section 313, Cr.P.C., the complainant died. So, his son has come forward with a petition to implead himself as a party to the proceedings as person to prosecute the case instituted by his father against the respondent.

8. According to the learned Counsel for the petitioner, Gene, son of the complainant is a competent person to continue the case.

9. According to the respondent, Gene, son of the complainant is not competent to conduct the case. Learned Counsel for the respondent would submit that under Section 256, Cr.P.C., the Magistrate has no option but to dismiss the complaint and that there is no provision to allow the complaint to be prosecuted after the death of the complainant by permitting someone on behalf of the complaint to proceed with the same and the Trial Court has rightly dismissed the petition.

10. It is, therefore, necessary to refer to Section 256, Cr.P.C. which reads as follows:

Section 256(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 the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

Section 256(2): The provisions of sub-section shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.

Thus the section leaves three courses open to the Magistrate: (1) The first case open is that on the date fixed for hearing, if the complainant is absent, he may acquit the accused; (2) he can adjourn in the case to a future date; or (3) He can dispense with the attendance of the complainant and proceed with the case in his absence.

11. Section 256(2) makes it clear that 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.

12. In the case on hand, the complainant was dead and the case was posted for hearing. So, it is open to the Magistrate to follow any of the courses as indicated above. After taking into consideration of the facts and circumstances of the case, he can exercise his discretion by dismissing the complaint and acquitting the accused or he can adjourn the case to a future date. So Section 256(1) empowers the Magistrate to proceed with the case by adjourning to a future date and by empowering him to dispense with the attendance of the complainant and proceed with the case in his absence.

13. Learned Counsel for the petitioner in support of his contention, relied on the decision in *Raviselvam v. Nalini Vijayakumar* : 1998(2)CTC647 , and argued that the petitioner is competent to continue the proceedings instituted by his father. It has been held in the above said decision as follows:

In my opinion, there is nothing to bar the prosecution to be conducted by proper person in the place of deceased complainant in proper cases. From the working employed in the section, I will take the view that the death of a complainant ipso facto would not lead to termination of criminal proceedings. The Magistrate has power to allow the substitution if he is satisfied on the very materials on record and other surrounding circumstances that such permission should be given.

Sub-section 2 of Section 256, Cr.P.C. reads that the provisions of Sub-section (1) shall, so far as may be, apply to cases, where the non-appearance of the complainant is due to his death. Section 256 empowers the Magistrate to acquit the accused or to adjourn the case to a future date or to dispense with the attendance of the complainant and proceed with the case in his absence. Therefore, I am of the view, that the death of the complainant does not bring about an automatic termination of the criminal proceeding and that the Magistrate has got sufficient powers to allow the substitution on the death of the original complainant, if he is satisfied from the materials on record and from the circumstances to do so.

In the above case, the father filed a complaint under Section 138, N.I. Act against the accused and substitution was allowed by the Magistrate.

14. There is no bar for the son in the place of complainant to conduct the case. The Court is of the considered view that the death of the complainant does not bring about an automatic termination of the criminal proceeding and the Magistrate has got sufficient powers to allow the substitution on the death of the original complaint if he satisfied from the materials on record and from the circumstances to do so.

15. In this case, Gene, son of the complainant came forward to be substituted. The person applied to be substituted is none other than the son of the original complainant and he is a fit person to further prosecute the complaint. He is competent to conduct the proceedings initiated by the deceased father. It cannot also cause any injustice to the accused. The Magistrate has come to a wrong conclusion and dismissed the petition, which is, liable to be set aside.

16. For the foregoing reasons, the revision is allowed. The order dated 4.1.2002 made in Cri.M.P. No. 7239 of 2001 by the learned Judicial Magistrate No. II, Kuzhithurai is set aside.

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