

2004 SCC OnLine Gau 130 : (2005) 3 Gau LR 491 : (2005) 3 ICC 708 (Gau) :  
2005 Cri LJ 599 : (2005) 2 ALD (Cri) (NOC 23) 14

In the High Court of Gauhati  
(BEFORE I.A. ANSARI, J.)

Kushal Kumar Talukdar ... Petitioner;

*Versus*

Chandra Pd. Goenka ... Opposite Party.

Criminal Revision No. 130 of 2001

Decided on September 15, 2004

Criminal Procedure Code, 1973, S. 256(1) — Absence of the complainant on account of his death — Complaint disclosing commission of an offence triable as a summons case — Complaint whether shall abate on the death of the complainant — Held: Whether the case should be allowed to proceed or not depends on the facts and circumstances of a given case.

There may, of course, be cases, where, on the death of the complainant, the trial may not be allowed to proceed by the Magistrate if he finds that the personal appearance of the complainant is necessary. For example, if a complaint is lodged by a complainant alleging that the accused has assaulted him, then, if the sole witness is the complainant himself and he dies, not because of the assault but for some other reason, no purpose would be served in continuing with such a complaint, for, the trial would eventually end with the acquittal of the accused on account of complete absence of evidence. But supposing that the complainant dies after his evidence has been recorded and he has been put to cross-examination too, then, the trial can still proceed, for, the personal appearance of the complainant would no longer be necessary. Let us, now, take yet another case. Supposing a complaint is lodged by a person alleging that his son had been assaulted by the accused. In course of time, the Magistrate issued summons in such a case and the accused appeared, but the complainant did not appear due to his death. The Magistrate should, in such a case, proceed with the trial, for, even in the absence of the complainant, the evidence of the complainant's son may result into conviction of the accused. It will, therefore, depend on the facts of a given case as to whether the case shall be allowed to proceed even after the death of the complainant or not. No inflexible rule, in this regard, can be laid down. In other words, whether a complain in a summons case be allowed to continue even after the death of the complainant is a question, which has to be answered on the basis of the facts of the given case and no invariable or inflexible rule of law can be laid down in this regard. The discretion to be exercised in such cases shall, however, be judicious and not arbitrary.

[Para 48]

Criminal Procedure Code, 1973, Ss. 256(1) and 302 — Death of the complainant in summons case — Case whether can be allowed to be proceeded with on the ground that the pleader of the deceased



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complainant is present to represent the deceased — Held: No — A pleader appointed by a complainant ceases to be the complainant's pleader on the death of the complainant and can not represent the deceased — Magistrate may however allow such a pleader to represent the deceased complainant by virtue of the provisions of S. 302.

[Para 47]

Negotiable Instruments Act, 1881, S. 138 — Criminal Procedure Code, 1973, S. 256(1) — Complaint disclosing commission of an offence under section 138 triable as summons case — Death of the complainant — Trial whether shall abate — Legal heirs of the deceased complainant held to be entitled to represent the deceased complainant and to proceed further with the trial.

It has been laid down that in a case under Section 138 of the Negotiable Instruments Act, 1881, the complainant dies after taking of cognizance, the proceedings do not abate and trial has to be taken to its logical end following due process and the procedure laid down in Criminal Procedure Code. It has also been held that there is no provision in the Code of Criminal Procedure or the Negotiable Instruments Act laying down that on account of death of payee, the trial must abate and as such, the proceedings cannot abate on the death of the complainant payee. Therefore, the legal heirs of the original complainant are entitled to come forward and ask for allowing them to represent the complainant so as to enable the Court to proceed further with the trial.

[Para 52]

Criminal Procedure Code, 1973, S. 302 — Death of the complainant during the course of trial — Prayer for substitution of legal heirs in place of the deceased complainant made — Prayer allowed — Revision petition challenging the order filed — Magistrate whether has the power to allow substitution of a deceased complainant under the Code — Held: No.

There is no provision for substitution of a deceased complainant under the Cr. P.C. but a Magistrate has the power under Section 302 Cr. P.C., to permit any one to conduct prosecution. Hence, when the opposite party herein, as a son of the deceased complainant, came forward to continue to proceed with the complain, there was no impediment, on the part of the Court, in allowing the son of the deceased complainant to represent the complainant. Though the Magistrate has substituted the accused-opposite party herein in place of the deceased complainant, the impugned order has the effect of allowing the opposite party therein to represent the deceased complainant in terms of Section 302 Cr. P.C.

[Para 53]

Advocates who appeared in this case:

None appeared for the petitioner.

Mr. Z. Kamar and Mr. F.H. Laskar for the opposite party.

*Cases referred: Chronological*



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*Ajay Kumar Agarwala v. State of Jharkhand*, 2003 Cri. LJ 3088 (Jhar).  
*Helen C. Pinheiro v. Kamani Steel Products*, 2000 Cri. LJ 1622 (Bom.).  
*Raviselvam v. Nilini Vijaya Kumar*, 1999 (4) Crimes 209.  
*Associated Cement Co. Ltd. v. Keshvanand*, 1998 Cri. LJ 856 (SC).  
*Anil G. Shah v. J. Chattaranjan Co.*, 1998 GLJ 3870 (Guj.).  
*S. Reddappa v. Vijaya M.*, 1997 Cri. LJ 98 (Kant).  
*Samuel Thomas v. Unnikrishnan*, Cri. A. 269, 1991 (Ker.)  
*Om Saran v. Mrs. Satva Dhawan*, 1990 Cri. LJ 1619.  
*Ashok Kumar v. Abdul Latif*, 1989 Cri. LJ 1856 (J & K).  
*Maddipatta Govindiah Naidu v. Yelaklauri Kamalamma*, 1984 Cri. LJ 1326 (AP).  
*Subbanna Hegde v. Dyavappa Gowda*, 1980 Cri. LJ (Kant).  
*Ashwin Nanu Bhai Vyas v. State of Maharashtra*, 1967 Cri. LJ 943 (SC).  
*Ramdeo Trilokchand Agarwal v. Lalu Natha*, AIR 1937 Nagpur 65.  
*Bidhu Bhusan Sen v. Mofizuddin Ahmed*, 42 CWN 1263

#### JUDGMENT AND ORDER

1. Based on a complaint lodged by Shri Inder Chand Goenka (since deceased) for

prosecution of the present petitioner, namely, Shri Kushal Kumar Talukdar as accused under Section 138 read with Section 142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the N.I. Act"), C.R. Case No. 30020/2000 was registered in the Court of the Chief Judicial Magistrate, Kamrup, Guwahati.

2. In course of time, in pursuance of the summons issued, the accused-petitioner appeared, through his counsel, in the said Complaint Case. While the Complaint Case No. 3002(c)/2000 aforementioned was pending in the Court of the Chief Judicial Magistrate, Kamrup, Guwahati, the complainant, Shri Inder Chand Goenka, died on 18.7.2000 and his only son, namely, Shri Chandra Prasad Goenka filed a petition, on 18.9.2000, for substituting him as a complainant in place of his deceased father. This prayer was allowed by the learned Court below by its order, dated 18.9.2000, whereupon the accused-petitioner filed an application on 8.11.2000, for his discharge or acquittal in terms of the provisions of Section 256 Cr. P.C. This application was fixed for hearing on 13.11.2000 but on that day, the accused-petitioner was absent. As the accused-petitioner remained repeatedly absent, the learned Court below passed an order on 22.2.2001, directing issuance of warrant of arrest against him.

3. Thereafter, the accused-petitioner made this application under Section 401/397 read with Section 482 of the Cr. P.C. impugning the order, dated 18.9.2000, aforementioned, whereby, the prayer of the opposite party herein, namely, Shri Chandra Prasad Goenka, (i.e. the son of the said deceased), to be substituted, in place of his father, as complainant, in the case at hand, had been allowed, and also the order,



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dated 22.2.2001, aforementioned, whereby direction for issuance of warrant of arrest against the accused-petitioner was given.

4. None has appeared on behalf of the parties. However, Mr. Z Kamar, learned counsel, was appointed and heard as amicus curiae. Also heard Mr. F.H. Laskar, learned Additional Public Prosecutor, for the State of Assam.

5. The question, which has been raised by the accused-petitioner is, this: Whether the impugned order substituting the opposite party herein, who is the son of the said deceased, as complainant, in the complaint case aforementioned, which arose out of a complaint lodged for prosecution of the accused-petitioner under Section 138, read with Section 142 of the N.I. Act, is legally sustainable under Section 256 of the Code of Criminal Procedure?

6. The above question, in turn, brings us to a more fundamental question and the question is this: Whether a complaint lodged with a Magistrate, which discloses commission of an offence triable as a summons case, shall abate on the death of the complainant and if not, when and in what circumstances, such a complaint, even on the death of the complainant, be allowed to proceed?

7. In view of the fact that divergent views have been expressed on the above aspects of law by different High Courts and in view also of the fact that no reported decision of this Court, on the above aspect of law, could be brought to the notice of this Court, it is desirable that the correct position of law governing the question posed above is ascertained. In this regard, it is important to bear in mind that in a trial of summons procedure case, it is Section 256 Cr. P.C. which comes into play in the case of death of the complainant during trial.

8. While answering the above question, it is important to bear in mind that the law aims at rendering substantive justice. Hence, its interpretation too shall be aimed at

advancing the course of justice and not scuttling the legal proceedings on technicalities unless the clear legislative intendment is otherwise.

9. Before entering into the discussion of the scope of Section 256 Cr. P.C. it is pertinent to note that Section 256, as it exists today, is an outcome of several material changes introduced into Section 247 of the Code of Criminal Procedure, 1809. Section 247, as it, originally, appeared in the old Code i.e., in the Code of Criminal Procedure, 1809, read as follows:

*"Section 247. Non-appearance of complainant. — If the Summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may*



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be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the, accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day:

Provided that, where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance and proceed with the case."

10. By the Amendment Act of 26 of 1955, the above proviso to Section 247 was amended as follows:

"Provided that, where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case."

11. From a bare reading of the provisions of Section 247 Cr. P.C. and as it stood after the Amendment Act 26 of 1955, it is clear that it is only the proviso to Section 247, which underwent some change.

12. A careful reading of Section 247 reveals that this Section, as it stood in the Code of Criminal-Procedure, 1809, spoke; only of the consequences of the non-appearance of the complainant and not specifically as regards the death of the complainant and laid down that if the summons had been issued on a complaint, and upon the day appointed for the appearance of the accused, or any day subsequent, thereto to which the hearing might have been adjourned, the complainant did not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused unless, for some reason, he found it proper to adjourn the hearing of the case to some other day.

13. It also follows from the above reading of Section 247 that it envisaged the cases of non-appearance of the complainant after the summons had been issued for appearance of the accused. That is to say, Section 247 dealt with a stage, when cognizance of the offences had already been taken by the Magistrate and the process had been issued for appearance of the accused and/or at any stage subsequent thereto, and laid down that if the complainant did not appear, the Magistrate was bound to acquit the accused unless, for some reason to be recorded, he thought it proper to adjourn the hearing of the case to some other day.

14. The proviso to Section 247 as it originally, stood i.e. before it underwent change by virtue of the Amendment Act 26 of 1955, shows that if the complainant was a public servant and his personal attendance was not required, the Magistrate was given the discretion to dispense with his attendance and proceed with the case. The scope



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of this proviso was widened with the amendment introduced thereto, by the Amendment Act of 1955 inasmuch as, while the Magistrate could have, under the old proviso, dispensed with the attendance of the complainant and proceeded with the case only if the complainant was a public servant and his personal attendance was not required, the amendment to the proviso vested in the Magistrate the discretion to dispense with the attendance of the complainant not only when the complainant was a public servant, but also when the complainant was not a public servant, the condition precedent for the exercise of such discretion, however, being the formation of an opinion by the Magistrate that the presence of the complainant was not necessary.

15. What emerges from the above discussion is that if the proviso was kept excluded then. Section 247, in the Code of Criminal Procedure, 1809, empowered the Magistrate, if he thought proper, to merely adjourn the hearing of the case to some other day if the summons had been issued for the appearance of the accused or on any day subsequent thereto. The proviso, however, introduced an exception to the power of merely adjourning the hearing of the case and gave the Magistrate the discretion, to dispense with the presence of the complainant altogether and proceed with the case if the complainant was a public servant and his personal attendance was, in the opinion of the Magistrate, not required. By the Amendment Act 26 of 1955, the proviso widened the discretion of the Magistrate and laid down that if, in the opinion of the Magistrate, the personal attendance of the complainant was not necessary, the Magistrate could dispense with the attendance of such a complainant and proceed with the case irrespective of the fact whether the complainant was a public servant or not.

16. As divergent views were being expressed by the High Courts on the question as to whether a complainant's death brings a complete end to the proceedings in a summons procedure case, the Law Commission, in its 41st report, observed and recommended as follows:

"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 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. The trust this will in practice work satisfactorily."

17. The above observations and recommendations of the Law



Commission clearly indicate that the Law Commission, on being confronted with a situation, where the High Courts were expressing conflicting views on the question as to whether the complainant's death ends the proceeding in a summons case, realised that the answer to this question would really depend on the nature of the case and also the stage of the proceeding and since it was not possible to catalogue various situations in which the question as to whether the complaint lease shall proceed or not may arise, the Law Commission recommended that the provisions be made in the law to give an indication that the absence of the complainant, on account of his death and

or on account of any other reason, stands on the same footing. In short, the Law Commission's view was that there is no difference in the absence of a complainant on account of his death and in the absence of the complainant for reasons other than his death.

18. However, notwithstanding the above recommendations, Section 256, which finally emerged under the Code of Criminal Procedure, 1973, 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 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 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."*

19. From a bare reading of Section 256, it clearly transpires that Section 256, same as Section 247, comes into play after cognizance has been taken by the Magistrate and summons has already been issued to the accused. Hence, Section 256 does not apply to a case in which the complainant dies before cognizance is taken and the summons is issued.

20. A careful reading of Section 256, as it stands in the Code of Criminal Procedure, 1973, makes it clear that this Section deals with the consequences of the absence of the complainant on account of his death as well as on account of any other reason. However, before answering the question as to whether the death of the complainant will bring a



complete end to the trial of an accused in a summons case and force the Magistrate to acquit; him and/or the question as to whether the Magistrate has the power to allow the deceased complainant to be substituted or represented by any one it is of immense importance to not that it is sub-section (2) of Section 256, which makes provisions for application of the provisions of sub-section (1) of Section 256 to the cases of non-appearance of the complainant on account of his death. Hence, before entering into the discussion of the scope of sub-section (2) of Section 256 and as to what it really lays down it is imperative, for the purpose of better appreciation of the scope and ambit of Section 256, to consider as to what sub-section (1) of Section 256 and the proviso that Sub-section (1) of Section 256 has undergone in the Code of Criminal Procedure, 1973, from what Section 247 of the Code of Criminal Procedure, 1809 had envisaged.

21. From a comparative leading of the provisions of Section 247 vis-a-vis Section 247, that if the summons had been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing might have been adjourned, anything herein before contained, acquit the accused unless, for some reason, he thought proper to adjourn the hearing of the case some other day.

22. However, while the provision to Section 247, as the same stood after the Amendment Act 26 of 1955, vested a discretion in the Magistrate to dispense with personal attendance of the complainant and proceed with the case if the Magistrate was of the opinion that the personal attendance of the complainant was not necessary the proviso to Section 250(1) has further widened the scope of the exercise of the proviso to Section 256(1) has now made possible for the Magistrate to dispense with the personal attendance of the complainant and proceed with the trial not only when, in the opinion of the Magistrate, the personal attendance of the complainant is not necessary, but also when the complainant is represented by a pleader or by an officer conducting the prosecution.

23. What emerges from the discussion held above, as a whole, is that initially, the proviso to Section 247, as it stood in Code of Criminal Procedure, 1809, vested in the Magistrate the discretion to dispense with the personal attendance of the complainant only when the complainant was a public servant and the Magistrate was of the opinion



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that the personal attendance of the public servant was not required. The proviso to Section 247, as amended in the year 1955, widened the, scope of this discretion of the Magistrate to dispense with the personal attendance of the complainant by laying down to the effect that the Magistrate can dispense with the personal attendance of the complainant irrespective of the fact as to whether the complainant was a public servant or not, the only limitation, however, being that the Magistrate had to form an opinion, before exercising such discretion, that in the facts and circumstances of the case, personal attendance of the complainant was not necessary. The proviso to Section 256(1) has further widened the discretion so vested in the Magistrate by making it clear that the Magistrate can dispense with the personal attendance of the complainant and proceed with the trial not only when the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, but also when the complainant is represented by a pleader or by an officer conducting the prosecution.

24. The question; therefore, which, naturally, arises is this: Is there any difference between the summons triable case, wherein the complainant is represented by a pleader, and a summons triable case, wherein the complainant is represented by an officer conducting the prosecution?

25. My quest for an answer to the above question brings me to Section 2(q) Cr. P.C. which defines the word "pleader" thus, "pleader" when used with reference to any proceeding in any Court, means a person authorised by or under any law, for the time being in force, to practise in such Court, and includes, any other person appointed with the permission of the Court to act in such proceeding.

26. From a close reading of Section 2(q) Cr. P.C., it clearly transpires that the pleader means a person, who is authorised, by or under any law, to practise as an advocate and includes a person appointed with the permission of the Court to act in such proceeding. Section 24 read with Section 25 Cr. P.C. relates to appointment of Public Prosecutors, Addl. Public Prosecutors and Asstt. Public Prosecutors. Section 24 (1) makes it clear that the appointment of Public Prosecutors and Addl. Public Prosecutors is for conducting prosecution, appeal, etc. Section 25(1) makes it clear that the appointment of Assistant Public Prosecutors is "for conducting prosecution in the Court of Magistrates". This apart, Section 301 Cr. P.C. shows that though any private person may instruct a pleader to prosecute any person in any Court, yet it is the Public Prosecutor or Assistant Public Prosecutor, who remains in charge of the case and responsible for conducting the prosecution, and the pleader, so instructed, by a

private person, acts under the directions of the

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Prosecutor. Coupled with this, Section 301 Cr. P.C. shows that the Public Prosecutor or Assistant Public Prosecutor, in charge of a case, may appear and plead without any authority before the Court in which the trial or appeal is pending. I may, however, hasten to add there that though Section 302 Cr. P.C. empowers Magistrates to permit any person to conduct prosecution, the fact remains that if a person comes forward to conduct prosecution as a pleader appointed by the complainant, his appointment as a pleader must subsist on the day, when he is to be permitted to appear as a pleader of the complainant.

27. Thus, the scheme of the Code of Criminal Procedure shows that there is a difference between a pleader, appointed by a private person, and a person, who is appointed, in terms of Section 24 and/or 25 Cr. P.C., as a Prosecutor by the State or the Central Government for conducting the prosecution in a given case.

28. Bearing in mind the above aspects of the matter, when I revert to the proviso to Section 256(1), it becomes abundantly clear that this proviso relates to both the contingencies, namely, when a complainant is represented by a pleader and also when a complainant is represented by an officer conducting the prosecution. While the former indicate that the complainant, who lodged the complaint, is a private individual and is represented by his own advocate, the latter shows that the complaint has been lodged in terms of Section 190(1)(a) read with Clause (a) of the first proviso, to Section 200 of the Cr. P.C. and is conducted by an officer conducting prosecution.

29. One may also note that under Section 190 Cr. P.C. a Magistrate may take cognizance of any offence - (a) upon receiving a complaint of facts, which constitute such offence, (b) upon a police report of such facts, (c) upon information received from any person other than a police officer or, upon his own knowledge, that such offence has been committed. However, when the complaint has been lodged by a public servant acting or purporting to act in the discharge of his official duty, the Magistrate, taking cognizance of the offence on such a complaint, need not, in terms of Clause (a) of the first proviso to Section 200 Cr. P.C., examine the complainant and the witnesses, nor is there any necessity of holding, in terms of Section 202 Cr. P.C., an enquiry for the purpose of taking a decision as to whether process can be issued to the accused, provided, of course, that the Magistrate is, otherwise, satisfied that the contents of the complaint disclose commission of offence.

30. Turning to Sub-section (2) of Section 256, it needs to be noted that sub-section (2) merely states that the provisions of sub-section (1) of Section 256 shall, so far as may be, apply also to the case, where the non-appearance of the complainant is due to his death.

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31. The question, therefore, is as to how far the provisions of sub-section (1) of Section 256 and the proviso thereto can be applied to a case, where the complainant is absent on account of his death and how far sub-section (2) of Section 256 differ, in this regard from sub-section (1) of Section 256?



32. While considering the above aspect of the matter, it is worth noticing that the expression "so far as may be", occurring in sub-section (2) of Section 256, is of considerable importance, for, the expression, so used, makes it clear that the provisions of sub-section (1) of Section 256 including the proviso thereto, which lay down the various conditions in which the absence of the complainant, on account of reasons other than his death, may not ipso facto result into acquittal of the accused, shall be applied, to the extent possible, even when the complainant's absence is on account of his death. In other words, the provisions of Section 256(1) and the proviso thereto do not apply, in their entirety, to a case, where the complainant, in a summons case, dies after the summons has been issued to the accused.

33. While considering the question as to how far sub-section (2) of Section 256 differs from Sub-section (1) of section 256, it is of utmost importance to note that one of the powers, which the proviso to sub-section (1) of Section 256 gives to the Magistrate is the power to dispense with the personal attendance of the complainant and proceed with the case if the complainant is represented by a pleader or by an officer conducting the prosecution?

34. The question, therefore, which, now, arises is this: If the absence of the complainant is on account of his death, can the Magistrate allow the summons case to proceed merely on the ground that the deceased complainant is represented by his pleader or by an officer conducting the prosecution? In order to correctly appreciate the question as to whether a pleader appointed by a complainant, in a summons triable case, can continue to represent the deceased complainant as the deceased complainant's pleader, one has to understand the nature of the relationship between a party and his pleader.

35. While considering the above aspect of the matter, it is of paramount importance to note that the appointment of a pleader by a person is contractual in nature. The appointment of a pleader by a party is essentially appointment of an attorney and the vakalatnama is nothing, but a power of attorney or an authority to represent the party concerned, who may even be a complainant in a criminal case whether the appointment of the pleader is in a criminal case or in a civil case is immaterial. I derive support for the inference, so drawn, from the decision in *Ramdeo Trilokchand Agarwal v. Lalu Natha*, reported in



AIR 1937 Nagpur 65, wherein Mysore High Court, while dealing with vakalatnama, observed and held as follows:

"In *Stroud's Judicial Dictionary*, "power of attorney" is defined as: An authority, whereby one "is set in: the tune, stead or place of another" to act for him.

In India, under the Stamp Act S. 2(21), a power of attorney, for the purposes of the Stamp Act, is defined in a way that excludes a vakalatnama, because it excludes a document, which carries a court-fee stamp, but that definition, for the purposes of the Stamp Act, in my opinion, makes it quite clear that if it were not for that definition, a vakalatnama being a power of attorney, would require not only a court fee stamp under the Court fees Act, but also a stamp under the Stamp Act and to avoid that double stamp, it was necessary in the Stamp Act to exclude the vakalatnama."

36. Without entering into the discussion of the question as to whether a pleader is essentially, within the meaning of Section 182 of the Contract Act, an agent of the person, who appoints him as laid down in *Bidhu Bhusan Sen v. Mofizuddin Ahmed*,

reported in 42 CWN 1263, or not, the fact remains that the appointment of a pleader by a person is contractual in nature, and the fact that it is so recognised by Legislature is evident from a bare reading of Order 22, Rule 10A of the CPC, which lays down as follows:

"10A. *Duty of a pleader to communicate to Court death of a party.* — Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and for this purpose, the contract between a pleader and the deceased party shall be deemed to subsist."

37. Thus, in a civil case, a pleader's appointment ends on the death of the person, who appointed him except to the extent as Order 22, Rule 10A of the CPC specifically permits. No wonder, therefore, that when the appellant dies during pendency of even a civil appeal, the power given by him to his pleader comes to an end and ceases to be in force. [See (1931) 32 Pun LR 389 (DB)]. The only exception, however, is what Order 22, Rule 10A of the CPC provides for, namely, that the contract between the pleader and the deceased party "shall be deemed to subsist" only for the purpose of informing the Court that the party represented by him has died. Thus, the appointment of a pleader by a private person is nothing, but a kind of contract and this contract ends with the death of the 'person', who had appointed the pleader.

38. In criminal cases too, same as in the civil cases, the relationship of the complainant with his pleader as the client of the latter comes to an



end on the death of the complainant. Hence, when the complainant dies, his pleader retains no authority and cannot, therefore, be allowed to continue to proceed with the complaint in the capacity of the pleader of the deceased complainant.

39. What logically follows from the above discussion is that when a complainant dies, the Magistrate cannot proceed with the case merely on the ground that the pleader, appointed by the deceased complainant; is present; but even in such a case, the Magistrate may, for the ends of justice, allow a pleader, if the pleader is so willing, to represent the deceased complainant in terms of Section 302 Cr. P.C. for, Section 302 Cr. P.C. empowers the Magistrate to permit any person to conduct the prosecution and the words "any person" would obviously include even a pleader [See *Ashwin Nanu Bhai Vyas v. The State of Maharashtra*, reported in 1967 Cri LJ 943 (SC)]. However, the appearance of such a pleader; in the complaint case, would, not be as a pleader of the deceased complainant, but as a person, who is permitted by the Magistrate to conduct the prosecution. In other words, when the pleader conducts such a prosecution, he does so on the basis of the permission given to him by the Magistrate in terms of Section 302 Cr. P.C. and not by virtue of his original appointment as pleader of the complainant, for, his appointment as a pleader of the complainant, as indicated hereinabove, ceases on the death of the complainant. In this regard, there is, as already mentioned above, no difference between the appointment of a pleader in a criminal case and civil case. However, when the prosecution is conducted by a prosecutor appointed by the Government, State or Central, the death of the complainant is immaterial and the complaint can still be proceeded with. Thus, while in the case of the former, i.e., when the complainant is represented by a pleader, the appointment of the pleader ends with the death of the complainant, no such result ensues, when the complainant, in the latter case, dies and is represented by an officer conducting the prosecution. I may, of course, point out and reiterate that notwithstanding the fact that in a case, where the complainant is represented by a

pleader and the complainant has died, the Magistrate may still proceed with the case by dispensing the presence of the complainant if, in the opinion of the Magistrate, personal attendance of the complainant is not necessary and may even allow the complainant's pleader to continue with the prosecution in terms of Section 302 Cr. P.C. not as a pleader of the complainant, but as an officer of the Court.

40. In short, a careful reading of sub-section (2) of Section 256 shows that when the complainant dies, the pleader, appointed by the complainant, ceases to be pleader of the complainant and cannot be

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allowed to represent the complainant, whereas an officer conducting the prosecution of the case based on the complaint lodged by a public servant, continues as an officer conducting the prosecution, notwithstanding the death of the public servant as complainant can, therefore, be allowed to continue to conduct the prosecution.

41. In other words, after the summons in a complaint case has been issued, then, on the day appointed for the appearance of the accused or on any day subsequent thereto to which hearing may be adjourned, the complainant does not appear, on account of his death, the Magistrate cannot proceed with the case merely on the ground that the pleader appointed by the complainant is present to represent the complainant. However, if the complainant is represented by an officer conducting the prosecution or if the nature of the complaint is such that the personal appearance of the complainant is not necessary, the Magistrate may proceed with the case subject to what have been mentioned hereinabove.

42. Hence, when sub-section (2) of Section 256 is read, in the light of the proviso to Section 256(1), it becomes abundantly clear that even when the absence of the complainant is due to his death, the Magistrate may still proceed with the case if the Magistrate is of the opinion that the personal attendance of the complainant is not necessary or when the complainant is represented by an officer conducting the prosecution. If the Magistrate dispenses with personal attendance of the deceased complainant on the ground that his presence is not necessary, the Magistrate may permit 'any person' to conduct the prosecution. I am guided to adopt this view from the decision in *Ashwin Nanu Bhai Vyas* (supra).

43. Though the case of *Ashwin Nanu Bhai Vyas* (supra) is with regard to session's case, the interpretation of Section 495 Cr. P.C. (old), which is, now Section 302 Cr. P.C., still holds good inasmuch as in this case, interpreting the words "any person", occurring in Section 495 Cr. P.C., the Apex Court observed and held as follows:—

"7. Mr. Keswani contends that the Presidency Magistrate has made a "substitution" of a new complainant and there is nothing in the Code which warrants the substitution of one complainant for another. It is true that the Presidency Magistrate has used the word "substitute" but that is not the effect of the order. 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 authorise the conduct of prosecution by any person. The words 'any person' would indubitably

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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."

44. From what has been pointed out by the Apex Court in *Ashwin Nanu Bhai Vyas* (supra), it is clear that though there is no provision for substitution, Section 302(1), which has, now, replaced Section 495 Cr. P.C., empowers the Court to authorise the conduct of prosecution by any person and the word "any person" would include the son of the complainant in a case of present nature. The accused-opposite party herein, being the son of the complainant stands on the footing of "any person" as envisaged by Section 302(1) Cr. P.C. As correctly observed in *Raviselvam v. Nilini Vijaya Kumar*, reported in 1999 (4) Crimes 209, the endeavour must be to do justice and not to take advantage or technicalities. The urge to resort to easy way out must give way to judicial justness.

45. On an examination of all the relevant provisions of the Criminal Procedure Code, the proposition that criminal proceedings abate on the death of the complainant appears to be legally unfounded and unacceptable. Criminal proceedings, legally instituted, do not terminate or abate merely on the death of the complainant. The cause of action for civil action bears no analogy to complaints of crime. The object of Section 256 Cr. P.C. is succinctly explained by the Apex Court in *Associated Cement Co. Ltd. v. Keshvanand*, reported in 1998 Cri. LJ 856 (SC), in the following words:

"17. What was the purpose of including a provision like Section 247 in the old Code (or S. 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the Court on all posting days can be put to much harassment by a complainant if he does not turn up to the Court on occasions when his presence is necessary. The Section, therefore, affords a protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent. Court has a duty to acquit the accused in invitum.

18. Reading the Section in its entirety would reveal that two constraints are imposed on the Court for exercising the power under the Section. First is, if the Court thinks that in a situation it is proper to adjourn the hearing then the Magistrate shall not acquit the accused. Second is, when the Magistrate considers that personal attendance of the complainant is not necessary on that day, the Magistrate has the power to dispense with his attendance and proceed with the case. When the Court notices that the complainant is absent on a particular day, the



Court must consider whether personal attendance of the complainant is essential on that day for the progress of the case and also whether the situation does not justify the case being adjourned to another date due to any other reason. If the situation does not justify the case being adjourned, the Court is free to dismiss the complaint and acquit, the accused. But if the presence of the complainant on that day was quite unnecessary, then, resorting to the step of axing down the complaint may not be a proper exercise of the power envisaged in the section. The discretion must, therefore, be exercised judicially and fairly without impairing the cause of administration of criminal justice."

46. One also cannot lose sight of the fact that the concept of locus standi has undergone considerable change and the well-settled principle in criminal law is that unless, otherwise, barred by law, any person can set the law in motion. Moreover, sub-section (2) of Section 256 Criminal Procedure Code was obviously introduced with the object of ensuring that in an appropriate case, on account of death of a complainant, the proceedings do not come to an end automatically and a discretion has been vested in the Magistrate to continue with the proceeding of the case if the complainant's presence is not necessary and/or where the complaint is represented by an officer conducting the prosecution.

47. In the case of *Subbanna Hegde v. Dyauappa Gowda*, reported in 1980 Cri. LJ (Kant), Karnataka High Court has expressed the view that on the death of the complainant in a summons triable case, the complaint abates and the Magistrate must acquit the accused. For the reasons stated hereinabove, I find myself unable to agree with the view so expressed. For coming to the conclusions, which I have reached, I am fortified by the decisions in *Maddipatta Govindiah Naidu v. Yelakaluri Kamamma*, reported in 1984 Cri. LJ 1326 (AP), *S. Reddappa v. Vijaya M.*, reported in 1997 Cri. LJ 98 (Kant), *Ajay Kumar Agarwala v. State of Jharkhand*, reported in 2003 Cri. LJ 3088 (Jhar), *Samuel Thomas v. Unnikrishnan*, reported in Cri. A 269, 1991 (Ker.), *Ashok Kumar v. Abdul Latif*, reported in 1989 Cri. LJ 1856 (J&K), *Helen C. Pinheiro v. Kamani Steel Products*, reported in 2000 Cri. LJ 1622 (Bom.), *Associated Cement Co. Ltd.* (supra), *Anil G. Shah v. J Chattaranjan Co.* reported in 1998 GLJ 3870 (Guj) and *Ashwin Nanu Bhai Vyas* (supra). I may, however, hasten to add here that though some of the cases referred to hereinbefore reflect that a summons case can be allowed to proceed merely on the ground that the appointed pleader of the deceased complainant is present to represent the deceased complainant, I may, for the reasons, which I have already indicated hereinabove, find it impossible to agree to such a proposition. I, therefore, lay down that a pleader appointed by a complainant ceases to be the complainant's pleader on the death of the former and cannot



represent the complainant as his appointed pleader. In a case, however, in which the complainant is absent on account of his death, the Magistrate may still allow the case to proceed by allowing 'any person' including a pleader to represent the complainant by, invoking the provisions of Section 302 Cr. P.C.

48. There; may, of course, be cases where, on the death of the complainant, the trial may not be allowed to proceed by the Magistrate if he finds that the personal appearance of the complainant is necessary. For example, if a complaint is lodged by a complainant alleging that the accused has assaulted him, then, if the sole witness is the complainant himself and he dies, not because of the assault but for some other reason, no purpose would be served in continuing with such a complaint, for, the trial would eventually end with the acquittal of the accused on account of complete absence of evidence. But supposing that the complainant dies after his evidence has been recorded and he has been put to cross-examination too, then, the trial can still proceed, for, the personal appearance of the complainant would no longer be necessary. Let us, now, take yet another case. Supposing a complaint is lodged by a person alleging that his son had been assaulted by the accused. In course of time, the Magistrate issued summons in such a case and the accused appeared, but the complainant did not appear due to his death. The Magistrate should, in such a case, proceed with the trial, for, even in the absence of the complainant, the evidence of the complainant's son may result into conviction of the accused. It will, therefore, depend

on the facts of a given case as to whether the case, shall be allowed to proceed even after the death of the complainant or not. No inflexible rule, in this regard, can be laid down. In other words, whether a complaint in a summons case be allowed to continue even after the death of the complainant is a question, which has to be answered on the basis of the facts of the given case and no invariable or inflexible rule of law can be laid down in this regard. The discretion to be exercised in such cases shall, I however, be judicious and not arbitrary.

49. In *Om Saran v. Mrs. Satya Dhawan*, reported in 1990 Cri. L.J. 1619, Delhi High Court has laid down that the Legislature has vested a discretion in the Magistrate to decide, keeping in view the facts of each case, as to whether, on non-appearance of the complainant or on the death of the complainant in a summons case, the accused, should be acquitted or not and if he, for good reasons, thinks it proper, the Magistrate can proceed with the complaint, and adjourn the matter in the absence of the complainant or when the complainant has died. I find myself in complete agreement with the observations so made.

50. Keeping in mind what have been concluded above, when I revert

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to the case at hand, what becomes glaring to the eyes is that in the present case, the complaint relates to the prosecution of the accused-petitioner for the offence allegedly committed by the accused-petitioner under Section 138 read with Section 142 of the N.I. Act.

51. In the present case, the allegation is that the cheque issued by the accused, when presented for encashment, was returned with an endorsement "Payment stopped by the drawer". The complainant, then, sent a notice to the accused-petitioner demanding payment of the amount for which the cheque in question, was drawn but despite receiving the notice/no payment was made by the accused-petitioner. The allegations so made, which may or may not be true, disclose commission of offence by the accused-petitioner under Section 138 read with Section 142 of the N.I. Act. In fact, the fact that the contents of the complaint disclose commission of the offence aforementioned is not, at this stage, in dispute. The important and necessary ingredients to be proved are the issuance of cheque, dishonour of the cheque, issuance of legal notice by the complainant demanding payment to the accused after the cheques had bounced. These are facts, which can be considered and proved in the absence of the complainant. Whether stopping of payment of cheque by a drawer amounts to dishonour of cheque or not within the meaning of Section 138 of the N.I. Act is a question which I am not dealing with in the present revision, for, the question as to whether the contents of the complaint, in question, when, read as a whole, amount to commission of offences under Section 138 of the NI Act, has not been raised in the present revision. The complainant, who was dead, is, now, represented by the applicant and the applicant is the son of the deceased. In such a situation, there is no reason why the complaint case, in question, can not be allowed to proceed. Viewed from this angle, the exercise of the discretion by the learned Magistrate to allow the opposite party therein (who is the son of the deceased complainant) to represent the complainant is based on sound judicial principles and is unimpeachable in law.

52. I may also refer to a case under Section 138 of the N.I. Act, which has dealt with the issue relating to the death of the complainant and this judgment is of the Gujarat High Court in *Anil G. Shah* (supra). In this case too, it has been laid down that in a case under Section 138 of the N.I. Act, where the complainant dies after taking of

cognizance, the proceedings do not abate and trial has to be taken to its logical end following due process and the procedure laid down in Criminal Procedure Code. It has also been held that there is no provision in the Code of Criminal Procedure or the N.I. Act laying down that on account of death of payee, the trial must abate and as such, the proceedings

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cannot abate on the death of the complainant payee. Therefore, the legal heirs of the original complainant are entitled to come forward and ask for allowing them to represent the complainant so as to enable the Court to proceed further with the trial. In this case, reliance has been placed on the decisions of Kerala High Court in *T.N. Jayarajan* (supra), Jammu and Kashmir High Court in *Ashok Kumar* (supra) and Andhra Pradesh High Court in *Maddipatta Govinidaiah Naidu* (supra).

53. While dealing with the present, case, it is necessary to bear in mind that there is no provision for substitution of a deceased complainant under the Cr. P.C., but a Magistrate has the power under Section 302 Cr. P.C. to permit any one to conduct prosecution. Hence, when the opposite party herein, as a son of the deceased complainant, came forward to continue to proceed with the complaint, there was no impediment, on the part of the Court, in allowing the son of the deceased complainant to represent the complainant. Though the Magistrate has substituted the accused-opposite party herein in place of the deceased complainant, the impugned order has the effect of allowing the opposite party therein to represent, the deceased complainant in terms of Section 302 Cr. P.C. [See also *Ashwin Nanu Bhai* (supra)].

54. What crystallises from the above discussion is that in the case at hand, for proving the ingredients of the offence allegedly committed by the accused-petitioner, presence of the complainant was not necessary. In such a situation, when the son of the complainant, i.e., the opposite party herein came forward to conduct the prosecution, there was no impediment under the law, in the light of the provisions of Section 256 Cr. P.C. read with Section 302 Cr. P.C. to permit the opposite party herein, as son of the deceased complainant, to represent the complainant and to allow him to appoint a pleader of his choice to represent him in the case. There was, thus, no legal impediment, on the part of the learned Court below, to allow the proceedings of the complaint case aforementioned to continue. For the conclusions so reached, I find no merit in the present revision and the revision cannot succeed.

55. In the result and for the reasons discussed above, this revision fails and the same shall accordingly stand dismissed.

56. Send back the LCRs.