

SHRI BALASAHEB K. THACKERAY AND ANR .

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V.

SHRI VENKAT @ BABRU AND ANR .

JULY 5 , 2006

[ARIJIT PASAYAT AND C.K. THAKKER , JJ .]

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Code of Criminal Procedure , 1973 - Section 302 - Private complaint
Death of complainant during pendency of the case - Effect of on the
prosecution - Permissibility to continue prosecution by legal heirs - Held : Heirs^C
of the complainant can continue the prosecution , after obtaining permission
for the same from the Court dealing with the matter .

Respondent - complainant had filed a private complaint against the
appellants - accused and others . Trial Court issued process . Appellant filed
petition u / s 482 Cr.P.C. which was dismissed by High Court . During
pendency of appeal to this Court , complainant died . Appellants contended
that complaint was liable to be dismissed on the ground of death of the
complainant . Legal heirs of the complainant contended that they would
file an application for permission to prosecute and therefore the complaint
still survived .

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Permitting the legal heirs to file the application for permission to
prosecute , the Court

HELD : 1. Heir of the complainant can be allowed to file a petition
under Section 302 Cr.P.C. to continue the prosecution . To bring in
application of Section 302 , permission to conduct prosecution has to be F
obtained from the Magistrate inquiring into or trying a case . The
Magistrate is empowered to permit prosecution to be conducted by any
person other than the Advocate - General or the Government Advocate or .
a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do
so without such permission . Hence if any permission is sought for by^G the
legal heirs of the deceased complainant to continue prosecution , the same
shall be considered in its perspective by the Court dealing with the matter .

(303 - D - E ; 303 - G - H ; 304 - A

2. As the further proceedings before the Magistrate are stayed , if

A and when any application is filed before this Court the same shall be dealt with appropriately . [304 - C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 236 of 2005 .

B From the Judgment and Order dated 2.7.2003 of the High Court of Judicature at Bombay in CrI . Appln . No. 442/1995 .

Jaideep Gupta and Shivaji M. Jadhav for the Appellants .

Kailash Chand , Mukesh K. Giri , S.S. Shinde and Ravindra Keshavrao C Adsure for the Respondents .

The Judgment of the Court was delivered by

ARIJIT PASAYAT , J. An interesting question as to what is the effect of the death of the complainant arises for consideration in this case . When the D matter was listed for hearing , learned counsel for the appellants submitted that the respondent no.1 , who was the complainant has died and , therefore , the proceedings initiated on the basis of said complainant do not survive . Learned counsel for the legal heirs of the complainant submitted that they propose to continue the proceedings and file an appropriate application thereof .

E A brief reference to the factual aspects would suffice :

Shri Venkat @ Babru (hereinafter referred to as the ' complainant ') filed a private complaint bearing No.R.CrI.C No. 107 of 1994 on 7.9.1994 against the appellant and four others in the Court of Judicial Magistrate , 1st Class , Sailu , District Parbhani alleging commission of offence punishable under F Section 500 read with Section 34 of the Indian Penal Code , 1860 (in short ' IPC ') . Subsequently , the complaint against the three reporters was withdrawn and proceedings are continuing against the appellants i.e. the Editor , Printer and Publisher of a newspaper " Dainik Samna " . The allegation in the complaint was that the accused persons in furtherance of their common intention had G published news in respect of the complainant in their newspaper published from Aurangabad on various dates . It was alleged in the complaint that due to the report , the reputation of the complainant was tarnished and he was defamed . After hearing arguments learned Magistrate issued process by order dated 15.9.1994 . A petition under Section 482 of the Code of Criminal Procedure , 1973 (in short the ' Code ') was filed before the Bombay High H Court , Aurangabad Bench which was dismissed by the judgment impugned in

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the appeal . The appellants filed Special Leave Petition (SLP (Cri .) No.4367 of 2003) . After notice , the appeal was admitted on 3.2.2005 . When the matter was taken for hearing on 31.5.2006 it was pointed out that the respondent no.1 - complainant had died on 3.8.2005 .

Learned counsel for the appellants with reference to Section 256 of the Code submitted that the complaint was to be dismissed on the ground^B of the death of the complainant . As noted above learned counsel for the respondent no.1's legal heirs submitted that the legal heirs of the complainant shall file an application for permission to prosecute and , therefore , the complaint still survives consideration .

At this juncture it is relevant to take note of what has been stated^C by this Court earlier on the principles applicable . In Ashwin Nanubhai Vyas v . The State of Maharashtra and Anr . , AIR (1967) SC 983 with reference to Section 495 of the Code of Criminal Procedure , 1898 (hereinafter referred to as the ' Old Code ') it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution . In Jimmy D Jahangir Madan v . Bolly Cariyappa Hindley (dead) by Lrs . , [2004] 12 SC 509 after referring to Ashwin's case (supra) it was held that heir of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution .

Section 302 of the Code reads as under :

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" 302. Permission to conduct prosecution - (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector ; but no person , other than the Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor ,^F shall be entitled to do so without such permission :

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted .

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(2) Any person conducting the prosecution may do so personally or by a pleader . "

To bring in application of Section 302 of the Code , permission to conduct prosecution has to be obtained from the Magistrate inquiring into or trying a case . The Magistrate is empowered to permit prosecution to be H

A conducted by any person other than a police officer below the rank of Inspector ; but no person other than the Advocate - General or the Government Advocate or a Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission .

Above being the position , if any permission is sought for by the legal heirs of the deceased complainant to continue prosecution , the same shall be considered in its perspective by the Court dealing with the matter . It is brought to the notice that by order dated 13.10.2003 further proceedings before the Magistrate are stayed . In that background , Mr. Adsure submitted that the application shall be filed before this Court . If and when any application is filed the same shall be dealt with appropriately . Ordered accordingly .

K.K.T.

Appeal pending .