Rashida Kamaluddin Syed & Anr vs Shaikh Saheblal Mardan (Dead)Through ... on 2 March, 2007

Author: C.K. Thakker

Bench: C.K. Thakker

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           CASE NO.:
Appeal (crl.)  283 of 2007

PETITIONER:
RASHIDA KAMALUDDIN SYED & ANR

RESPONDENT:
SHAIKH SAHEBLAL MARDAN (DEAD)THROUGH LRs. & Anr

DATE OF JUDGMENT: 02/03/2007

BENCH:
C.K. THAKKER & LOKESHWAR SINGH PANT

JUDGMENT:
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J U D G M E N T (arising out of S.L.P. (Criminal) No. 474 of 2006) C.K. THAKKER, J.

Leave granted.

The present appeal is filed by the appellants- original accused against the order passed by the Judicial Magistrate, First Class (Court No. 7), Pune on August 25, 2004, confirmed by 5th Additional Sessions Judge, Pune on July 1, 2005 and also confirmed by the High Court of Bombay on December 15, 2005.

To understand the controversy raised in the appeal, relevant facts may be stated in brief.

One Shaikh Saheblal Mardan (hereinafter referred to as 'the complainant') was resident of Pune. Appellant- accused No. 1 Smt. Rashida Kamaluddin Syed is his daughter, and appellant accused-No.2 Kamaluddin K. Syed is husband of accused No. 1 and son-in-law of the complainant. It was the case of the complainant that he was the owner of a bungalow which he sold in May, 1992 through accused No. 2 and deposited the amount of consideration in Bank. The accused No. 2 dishonestly represented to the complainant that he was having some proposals of land for sale and he would get it at a cheaper rate if the complainant was interested in such investment. It would earn more profit to the complainant and he would also get exemption from payment of capital gains. But the complainant wanted to go on Haj (Saudi Arabia) for a month on June 1, 1992. The accused No. 2 again dishonestly represented to the complainant that he could very well go to tour and the accused No. 2 would invest the money in suitable and beneficial proposals. Relying on such dishonest

representations by accused No. 2, the complainant gave him five blank signed cheques as also withdrawal slips so as to enable appellant No. 2 to invest amount in purchase of property and to pay such amount to vendors. It was the case of the complainant that when he returned from Haj, he found that an amount of Rs. 5,15,000/- had already been withdrawn by appellant No. 2 but no property was purchased in the name of the complainant. On further inquiry, he found that accused Nos. 1 and 2 had joined hands and their common intention was to grab money of the complainant. He made inquiry to appellant No. 2 but the latter gave evasive reply. Moreover, the accused purchased an open plot in the joint name of accused No. 1 and complainant for Rs.2,70,000/-. Accused No. 1 also sent a notice through her advocate stating therein that the plot was purchased by her with her own money. She also filed a false complaint on August 28, 1992 against the complainant and his sons for offences punishable under Sections 384, 511, 504, 506 read with 34 of Indian Penal Code (IPC) alleging criminal intimidation and extortion. The complainant was thus convinced that his daughter and son-in-law (accused Nos. 1 and 2) had cheated him and committed criminal breach of trust. He, therefore, filed Criminal Complaint No. 605 of 1993 in the Court of Judicial Magistrate, First Class (A.C. Court), Pune on March 15, 1993 for offences punishable under Sections 406 and 420 read with 34 IPC. The Judicial Magistrate, First Class after recording statement of complainant issued process under Section 204 of Code of Criminal Procedure, 1974 (hereinafter referred to as "the Code"). During the pendency of the proceedings, however, complainant died in November, 1996.

Three sons of deceased-complainant [(i) Shaikh Shaiuddin, (ii) Shaikh Nuruddin; and (iii) Shaikh Nizamuddin] made an application (Ex. 21) on January 17, 1997 for permitting them to continue prosecution against the accused persons. The learned Magistrate by an order below Ex. 21 dated May 23, 1999 granted the application relying upon a decision of this Court in Ashwin Nanubhai Vyas v. State of Maharashtra, 1967 (1) SCR 807 : AIR 1967 SC 983 and allowed Shaikh Sahabuddin respondent No. 1 herein to continue the prosecution against the accused persons. It appears that the said order had not been challenged by the accused and it had attained finality. Name of respondent No. 1 was accordingly, entered on May 14, 2000. Prosecution witnesses were also examined thereafter. On March 3, 2004, written arguments were submitted by the appellants-accused praying for their discharge. On August 4, 2004, an application was made by the appellants-accused under Section 239 of the Code for their discharge (Ex.1) contending that no case was made out against them. The said application, however, was rejected by the Trial Court on August 25, 2004 holding that there was a prima facie case against the accused. Being aggrieved by the said order, the accused preferred revision which was also dismissed by the Sessions Court observing that there was a prima facie case against the accused for offences punishable under Sections 406, 420 read with 34 IPC. A Writ Petition against the said order met with the same fate, which has been challenged in the present appeal.

On February 6, 2006, when the matter was placed for admission hearing, the following order was passed by this Court;

> "Issue notice returnable within four weeks confined to the question whether the legal heirs could have continued with the complaint."

Thereafter, on December 4, 2006, the matter was ordered to be placed for final disposal on a non-miscellaneous day in February, 2007. That is how the matter has been placed before us.

Reading of the order dated February 6, 2006, extracted hereinabove clearly shows that notice was confined to the question whether the legal heirs could have continued with the complaint.

The learned counsel for the appellants submitted that on the death of complainant on November 19, 1996, the proceedings came to be abated. In the circumstances, the Court should not have granted prayer of the respondent No. 1 permitting him to continue the prosecution. Such an order is illegal and unlawful. He also submitted that the application filed by the accused under Section 239 read with Section 245 of the Code ought to have been allowed and they ought to have been discharged. Unfortunately, however, the Court committed an error and the application was rejected. The said order was confirmed by the revisional Court as well as by the High Court and all the orders, therefore, deserve to be set aside.

Learned counsel for the respondents, on the other hand, supported the order submitting that an order permitting the first respondent-son to continue prosecution could not be said to be illegal or contrary to law. Since the action was in accordance with law, no fault can be found against it and the appeal deserves to be dismissed. It was further submitted by the learned counsel for the first respondent that an application was made by sons of deceased Shaikh Saheblal in January, 1997 which was allowed by the Trial Court in May, 1997 and the first respondent was permitted to continue the case against the accused. The said order was never challenged by the accused and it has become final. The name of the first respondent was entered in May, 2000 and even thereafter nothing was done by the appellants. Witnesses were then examined and an application for discharge was made as late as in August, 2004 which was rightly rejected. Since the application filed by sons of deceased Shaikh Saheblal was allowed in May, 1997, there is gross delay and laches on the part of the appellants in approaching the Court. Even on that ground, rejection of application of the appellants could not be said to be improper. It was further stated that in application for discharge what was contended by the accused was that no prima facie case had been made out against them for offences punishable under Sections 406 and 420 read with 34 IPC. All the Courts held that prima facie case had been made out. No grievance was made against permitting sons to continue the prosecution nor anything was stated regarding death of original complainant and the appellants cannot now be allowed to raise such contention. On all these grounds, a prayer was made to dismiss the appeal.

In our opinion, the orders passed by the courts below cannot be said to be illegal, unlawful or contrary to law. It is submitted by the learned counsel for the appellants that the Trial Court was wrong in relying upon Ashwin Nanubhai. In peculiar facts and circumstances of the case and keeping in view the scheme and relevant provisions of the Code of Criminal Procedure, 1898 ('old Code'), this Court granted such permission, but the ratio laid down in that case would not apply to the case on hand. In Ashwin Nanubhai, a complaint was filed under Section 198 of the old Code by one Kusum for offences punishable under Sections 417, 493 and 496 of IPC. It was the case of Kusum that Vyas went through a sham marriage with her, before a person who posed as an Officer from the office of the Registrar for Marriages. Subsequently, however, he abandoned her and

married another. On being questioned, Vyas told her that he had never married her. According to Kusum, she became pregnant as a result of cohabitation, but in view of her serious ailment, Vyas took her to a clinic where under medical advice and on certificate granted by Vyas, an abortion was carried out. She, therefore, filed a complaint on November 1, 1963. Cognizance was taken by the Court. During the pendency of the case, however, on November 29, 1963, Kusum died of a heart-attack. Her mother, therefore, applied to the Court for substitution as a fit and proper complainant in the case. She wanted to continue criminal prosecution. The application was strongly objected to by Vyas contending that the trial of offences under Sections 493 and 496 IPC was governed by Section 198 of the Code and on Kusum's death, the complaint should be treated as abated. The Presidency Magistrate, however, turned down the objection and decided to proceed with the case with Kusum's mother as the complainant. Revision filed by Vyas was dimissed by the High Court of Bombay. Aggrieved accused approached this Court. Considering the scheme of the Code (old Code) in the light of allegations levelled against the accused, this Court held that proceedings initiated by Kusum could be continued at the instance of her mother. The Court stated;

> "The Code of Criminal Procedure provides only for the death of an accused or an appellant but does not expressly provide for the death of a complaint. The Code also does not provide for the abatement of inquiries and trials although it provides for the abatement of appeals on the death of the accused, in respect of appeals under Sections 411A(2) and 417 and on the death of an appellant in all appeals except an appeal from a sentence of fine. Therefore, what happens on the death of a complainant in a case started on a complaint has to be inferred generally from the provisions of the Code".

Dealing with Section 198 of the old Code, this Court said; "The complaint of Kusum was filed to remove the bar contained in this section although for the offence under s. 417 no such bar existed. The offences under ss. 493 (a man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to cohabit with him in that belief) and 496 (a person with fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married) are non-cognizable, not compoundable and exclusively triable by Court of Session. They are serious offences, being punishable with imprisonment extending to 10 and 7 years respectively. The Presidency Magistrate, was not trying the case but only inquiring into it with a view to its committal to the Court of Session if the facts justified a committal. During this inquiry Kusum died. We have to determine what is the effect of the death of a complainant on an inquiry under Chapter XVIII in respect of offences requiring a complaint by the person aggrieved, after the complaint has been filed". It was further stated; "Mr. Keshwani for Vyas, in support of the abatement of the case, relied upon the analogy of s. 431 under which appeals abate and ss. 247 and 259 under which on the complainant remaining absent, the court can acquit or discharge the accused. These analogies do not avail him because they provide for special situations. Inquiries and trials before the court are of several kinds. Section 247 occurs in Chapter XX which deals with the trial of summons cases by a Magistrate and s. 259 in Chapter XXI which deals with trial of warrant cases before Magistrates. Under the former, if summons is issued on a complaint and the complainant on any day remains absent from the court, unless it decides to proceed with the trial, must acquit the accused. This can only happen in the trial of cases, which are punishable with

imprisonment of less than one year. This not being the trial of a summons case but a committal inquiry, s. 247 neither applies nor can it furnish any valid analogy. Similarly, s. 259, which occurs in the Chapter on the trial of warrant cases, that is to say, cases triable by a Magistrate and punishable with imprisonment exceeding one year can furnish no analogy. Under s. 259, if the offence being tried as a warrant case is compoundable or is not cognizable the Magistrate may discharge the accused before the charge is framed if the complainant remains absent. Once again this section cannot apply because the Presidency Magistrate was not trying the case under Chapter XXI". The Court proceeded to state;

> "This case was being heard under Chapter XVIII which divides committal cases into two classes (a) those commenced on a police report and (b) other cases. The first kind is tried under the procedure laid down in s. 207A. With that procedure we are not concerned. The other cases are tried under the procedure as laid down in the other provisions of Chapter XVIII. Section 208 of this Chapter provides that in any proceeding instituted otherwise than on police report the Magistrate shall 'when the accused appears or is brought before him, proceed to hear the complainant (if any) and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or on behalf of the accused, or as may be called for by the Magistrate.' The Magistrate then hears evidence for the prosecution unless he makes an order of commitment and after recording the evidence and examining the accused (if necessary) frames a charge. He may, after hearing further evidence, which the accused may wish to produce (unless for reasons to be recorded, the Magistrate deems it unnecessary to do so) either discharge the accused cancelling the charge or commit him to stand his trial before the Court of Session. There is no provision about the acquittal or discharge of the accused on the failure of the complainant to attend the court. This is not an omission but a deliberate departure from the Chapters on the trial of summons and warrant cases. In such trials, on the absence of the complainant, the accused is either acquitted or discharged. The intention appears to be that the Magistrate should proceed with the inquiry because had it not been so intended, the Code would have said what would happen if the complainant remains absent".

The Court also considered the provisions of Section 495 of the Code (similar to Section 302 of the present Code) and observed that though Presidency Magistrate used the word 'substitute', it was in effect continuation of prosecution by the mother. The power was undoubtedly possessed by Presidency Magistrate under Section 495 of the Code and the Court was empowered to authorize conduct of prosecution by any person. The Court stated;

> " .The words 'any person' would indubitably 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 we should hold that the death of the complainant puts an end to the prosecution".

The learned counsel for the appellants submitted that the ratio laid down in Ashwin Nanubhai would not apply inasmuch as in that case the Court was concerned with offences punishable under Sections 493 and 496 of IPC. They were then triable by a Court of Session. In the instant case, we are concerned with the case punishable under Sections 406 and 420 of IPC, triable by a Magistrate of First Class. It was also stated that the Court had observed that the offences punishable under Sections 493 and 496 were serious being punishable with imprisonment which may extend to ten and seven years respectively.

In our opinion, the submission has no force and cannot be accepted. What was considered by this Court in Ashwin Nanubhai was whether prosecution could be continued by any person other than the complainant in view of bar of taking of cognizance under Section 198 of the Code. Considering the scheme and Sections 198 and 495 of the Code, this Court held that such permission could be granted and a person other than the complainant could be allowed to prosecute the complainant. In the instance case, there is no such bar. Moreover, necessary permission was granted in the year 1997 and we find no infirmity therein. So far as offences under Sections 406 and 420 are concerned, they are also serious in nature and are punishable with imprisonment for three years and seven years respectively. Our attention has also been invited by the learned counsel for the respondents to a recent case in Jimmy Jahangir Madan v. Bolly Cariyapa HIndley (dead) by Lrs., (2004) 12 SCC 509 : JT 2004 (9) SC 558. In Jimmy Jahangir, a complaint was filed by one B against the accused under Section 138 of the Negotiable Instruments Act in which cognizance had been taken. During trial, however, the complainant died leaving behind her son and daughter who executed General Power of Attorney in favour of two persons. The Power- of-Attorney holders filed applications under Section 302 of the Code permitting them to continue the prosecution. The prayer was contested, but the Magistrate allowed the application granting permission to continue prosecution. The High Court confirmed the order of the Trial Court which was challenged by the accused in this Court. Though this Court allowed the appeal holding that the courts below were not justified in granting such permission since it was made by the Power of Attorney, it was held that a person other than a complainant could continue prosecution. The Court, therefore, while setting aside the orders granted liberty to the heirs of the complainant to file fresh application under Section 302 of the Code.

Section 302 of the present Code reads thus;

302. Permission to conduct prosecution. (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, 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.

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

The Court also considered Ashwin Nanubhai and observed;

> "The question as to whether heirs of the complainant can be allowed to file an application under Section 302 of the Code to continue the prosecution is no longer res integra as the same has been concluded by a decision of this Court in the case of Ashwin Nanubhai Vyas v. State of Maharashtra and Anr., (1967) 1 SCR 807 in which case the Court was dealing with a case under Section 495 of the Code of Criminal Procedure, 1898, which is corresponding to Section 302 of the Code. In that case, it was laid down that upon the death of the complainant, under the provisions of Section 495 of the said Code, mother of the complainant could be allowed to continue the prosecution. It was further laid down that she could make the application either herself or through a pleader".

Reference was also made to Balasaheb K. Thackeray & Anr. v. Venkat @ Babru & Another, (2006) 5 SCC 530 : JT 2006 (7) SC 44, to which one of us (C.K. Thakker, J.) was a party. In that case, V filed a complaint against the accused in the Court of Judicial Magistrate, First Class for commission of offence punishable under Section 500 read with 34 IPC. The complainant, however, died in 2005 during the pendency of the proceedings in this Court. The accused, therefore, made an application under Section 256 of the Code for dismissal of the complaint on the ground of death of complainant. Legal heirs of the complainant submitted that they would make an application before the Trial Court where the case was pending as the accused had approached this Court against an interim order and the proceedings were pending in the Trial Court. This Court considered the provisions of Section 495 of the old Code and Section 302 of the present Code as also Ashwin Nanubhai and Jimmy Jahangir and observed that since the proceedings were pending before the Trial Court, it was not necessary to express any opinion one way or the other. It was observed that if any permission would be sought to continue prosecution by the legal heirs of the deceased, the Court would consider the same in its proper perspective and take an appropriate decision in accordance with law.

From the above case law, in our opinion, it is clear that on the death of Shaikh Saheblal, the case did not abate. It was, therefore, open to the sons of complainant to apply for continuation of proceedings against accused persons. By granting such prayer, no illegality has been committed by the courts.

There is an additional reason as to why the order should not be interfered with at this stage. As we have already noted, the complainant died in November, 1996. Immediately thereafter, sons applied for impleadment allowing them to continue prosecution against the accused persons by the application dated January 17, 1997. The said application was allowed and permission was granted by an order dated May 23, 1997. The said order was never challenged by the appellants and it had become final. Name of the first respondent was entered on May 14, 2000. Thereafter witnesses were also examined. In so far as application dated August 4, 2004 of the accused is concerned, it was under Section 239 of the Code which provides for discharge of accused. The only ground put forward by the accused was that no prima facie case had been made out against them. In the light of above facts also, in our opinion, this is not a fit case to exercise discretionary power under Article 136 of the Constitution.

Finally, the contention that a civil suit is filed by the complainant and is pending has also not impressed us. If a civil suit is pending, an appropriate order will be passed by the competent Court. That, however, does not mean that if the accused have committed any offence, jurisdiction of criminal court would be ousted. Both the proceedings are separate, independent and one cannot abate or defeat the other.

For the foregoing reasons, we are of the view that the courts below were right in permitting respondent No.1 to continue the prosecution by proceeding with the complaint filed by Shaikh Saheblal. In taking such decision, the courts had not committed any error of law which deserves interference by this Court under Article 136 of the Constitution.

The appeal is, accordingly, dismissed.