

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No. 41386 of 2017

Arising Out of PS. Case No.-47 Year-2016 Thana- Sahjahanpur District- Patna

- =====
1. Mridula Singh, W/o Chandra Prasad
 2. Vivek Kumar, S/o Late Dr. V.K. Singh,
Both residents of Flat No. 43, Prakash Kunj Apartment, West Nageshwar Colony, Boring Road,
P.S.- Buddha Colony, District- Patna.

... ... Petitioners

Versus

1. The State of Bihar
2. Shivshankar Prasad, S/o Late Kailash Prasad, R/o Village- Nizamat, P.O. & P.S.- Dhanrua,
District- Patna.

... ... Opposite Parties

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Code of Criminal Procedure, 1973-Section 482

Indian Penal code, 1860- Sections 323, 504, 406, 420, 506, 424 and 384

Arms Act, 1959-Section 27

The issues for adjudication in the present case is whether substitution is permissible with regard to complaint case, police case, summons case, warrant case, sessions case and any other case pending before the court of law.

Chand Devi Daga and Ors. v. Manju K. Humatany reported in A.I.R. 2017 SC 5126 was relied on to hold that in complaint case, after death of complainant, substitution petition is not permissible but the learned Magistrate can proceed with the complaint case in terms of Section 256 of Cr.P.C.

With regard to police case, it was held that there is no reason for entertaining any substitution petition in view of Section 302 of Cr.P.C in as much as the case can proceed even in absence of informant/complainant even after his death.

With regard to the question whether substitution is permissible in summons case, warrant case, sessions case the division bench found that the question lost its significance in view of above answer. The last question whether application for substitution is pending in any other proceedings pending in the court, the division bench did not answer because it was not specifically asked for.

[Para 9,10 and11]

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Appearance :

For the Petitioner/s	:	Mr. Ramakant Sharma, Sr. Advocate
		Mr. Nikhil Kumar Agrawal, Advocate
For the Opposite Party/s	:	Mr. Narendra Kumar Singh, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL

C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

- | | |
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| 12. 28-03-2019 | <p>(1) whether substitution is permissible with regard to complaint case as well as police case,</p> <p>(2) if so, with regard to summons triable, warrant triable as well as sessions triable, and</p> <p>(3) with regard to any other petition pending before the court of justice at the end of the party.</p> |
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2. Aforesaid three questions are required to be answered by this Division Bench, since those questions have



been referred to by the Hon'ble Single Bench for its adjudication by the Division Bench. Before proceeding to answer aforesaid questions, it would be apt to briefly state some fact of the case.

3. We have heard Sri Ramakant Sharma, learned senior counsel assisted by Sri Nikhil Kumar Agrawal, learned counsel for the petitioners and Sri Narendra Kumar Singh, learned Addl. Public Prosecutor.

4. Aforesaid two petitioners have approached this Court invoking its inherent jurisdiction under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') against an order dated 07-07-2017 passed by the learned Additional Chief Judicial Magistrate, Patna City (hereinafter referred to as the 'A.C.J.M.') in Shahjahapur P.S. Case No. 47 of 2016. By the said order, the learned A.C.J.M. has taken cognizance of offence under Sections 323, 504, 406, 420, 506, 424 & 384 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and Section 27 of the Arms Act, 1959 (hereinafter referred to as 'Arms Act') and directed for issuance of summons against accused persons. The said order was passed on the basis of supplementary chargesheet. Shahjahapur P.S. Case No. 47 of 2016 was emanated by a complaint case, vide



Complaint Case No. 702 of 2016, which was filed by one Shivshankar Prasad in the court of learned A.C.J.M., Patna City, arraying four persons as accused, which includes aforesaid two petitioners namely Mridula Singh and Vivek Kumar. The complainant alleged in the complaint petition that he had purchased a plot of agricultural land from one Meenakshi Singh on 18-05-2010 and thereafter, he was continuing in peaceful possession over the said land since then. The said plot of land was ancestral property of Meenakshi Singh and she had procured the said plot of land by means of partition. It was alleged in the complaint petition that on 27-05-2016, one Rohan Yadav (co-accused) fraudulently shown to purchase the said land from petitioners and one Yogendra Mahto (co-accused) signed as a witness on the sale-deed. It was alleged that on 01-08-2016, when the complainant was ploughing his land, co-accused Rohan Yadav came there and started to abuse the complainant claiming that he had purchased the said land. In complaint petition, it was further alleged that Rohan Yadav (co-accused) fired from his pistol, however; complainant somehow managed to save his life. The complaint petition was numbered as Complaint Case No. 702 of 2016. The learned A.C.J.M., in view of provisions contained in Section 156(3) of the Cr.P.C.,



directed the officer incharge of Shahjahapur Police Station to institute a case and investigate the same and as such, a formal F.I.R., vide Shahjahapur P.S. Case No. 47 of 2016, was registered on 07-09-2016 for offence under Sections 323, 504, 406, 420, 506, 424 & 384 of the I.P.C. and Section 27 of the Arms Act. During investigation, accusation was found true and chargesheet & supplementary chargesheet were submitted and thereafter, the learned A.C.J.M. took cognizance of offence by order dated 07-07-2017, which has been assailed in the present application, filed under Section 482 of the Cr.P.C.

5. In the present case, subsequently a supplementary affidavit was also filed on behalf of the petitioners. By order dated 14-08-2018, after hearing learned counsel for the petitioners, the Hon'ble Single Bench had directed for issuance of notice to opposite party no. 2 as well as directed for staying further proceeding in the case, with respect to petitioners, before the court below. The notice, earlier issued to opposite party no. 2, returned back with endorsement that "opposite party no. 2 had already died on 18-09-2016". Thereafter, on 03-10-2018, on the prayer made by learned counsel for the petitioners, four weeks' time was granted for taking step for filing substitution petition. It appears from the ordersheet that the matter was listed



under the heading “To Be Mentioned” for modification of order dated 03-10-2018. Thereafter, by order dated 25-10-2018, the Hon’ble Single Bench called for a report from the court of learned A.C.J.M., Patnacity in Shahjahapur P.S. Case No. 47 of 2016 as to whether after the death of original complainant, any petition, seeking leave of the court to continue the prosecution of the accused, has been filed by any person to be a legal heir or representative and also directed the learned Addl. Public Prosecutor to obtain case diary, which was subsequently received. In the meanwhile, on 15-01-2019, petitioners filed an interlocutory application, vide I.A. No. 01 of 2019, under Section 482 of the Cr.P.C. for substituting legal heir of opposite party no. 2, who died on 18-09-2016. Finally, after hearing learned counsel for the petitioners as well as learned Addl. Public Prosecutor, by order dated 25-01-2019, the Hon’ble Single Bench has referred the matter to Division Bench for answering the questions, which have already been quoted hereinabove.

6. So far as question no. 1 “as to whether substitution is permissible with regard to complaint case as well as police case” is concerned, we are of the opinion that no substitution petition is permissible either in complaint case or in police case.



So far as complaint case is concerned, there are some provisions in the Cr.P.C., which are required to be recapitulated.

7. Section 256 of the Cr.P.C., which speaks 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.”

8. Similarly, Section 302 of the Cr.P.C. reads as follows:-

“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, 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.”

9. On perusal of Section 256 of the Cr.P.C., it is evident that even in case of death of a complainant, the learned Magistrate may proceed with the case provided the complainant is represented by a pleader or by an officer conducting the prosecution. Even, the learned Magistrate, if he is of the opinion that personal attendance of the complainant is not necessary, may proceed with the case. Likewise, Section 302 of the Cr.P.C. authorizes a Magistrate inquiring into or trying a case 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 a Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission. Meaning thereby that if the case is being represented by Advocate General, Government Advocate or Public Prosecutor or Assistant Public Prosecutor, there is no requirement for even permission of the learned Magistrate trying the case, even in case of death of informant. The case in hand was registered by the police, in view of direction given by the learned A.C.J.M. under Section 156(3) of the Cr.P.C. On



receipt of the complaint petition, Shahjahapur P.S. Case No. 47 of 2016 was instituted and police investigated the case. During investigation, accusation was found true, thereafter chargesheet was submitted forwarding the accused persons to face trial. Since the case was investigated by the police and report was submitted by the police, it was a case in between State and accused. Meaning thereby that the present case was prosecuted by the Public Prosecutor/Additional Public Prosecutor/Assistant Public Prosecutor and as such, death of complainant/opposite party no. 2 is having no effect with the case. Even in a case, proceeded on the basis of complaint case, there is specific provision under Section 256 of the Cr.P.C., which has recently been examined by the Hon'ble Apex Court, in a case reported in **AIR 2017 SC 5126 (Chand Devi Daga & Ors. v. Manju K. Humatany)**. The Hon'ble Supreme Court in Chand Devi Daga's case (*supra*) has also examined number of its earlier judgment, particularly **AIR 1967 SC 983 (Ashwin Nanubhai Vyas v. State of Maharashtra)** and **(2006) 5 SCC 530 (Balasaheb K. Thackeray & Anr. Vs. Venkat @ Babru)**. In Ashwin Nanubhai Vyas's case (*supra*), *pari materia* provision to Section 256 of the new Code was Section 247 in the old Code. Section 247 of the old Code was dealt with and it was held that there was no



provision for substitution, but to allow legal representative in case after death of complainant, legal heir wanted to pursue the case. In other words, it has been held by Hon'ble Supreme Court that even in complaint case, after death of complainant, substitution petition is not permissible, but the learned Magistrate can proceed with the complaint case in terms of Section 256 of the Cr.P.C.

10. Since the first question i.e. as to whether substitution is permissible with regard to complaint case has already been decided by the Hon'ble Apex Court that no substitution is permissible, the first question is answered that in a complaint case, after death of complainant, substitution petition is not permissible. However, if any legal heir of the complainant intends to pursue the case, he/she can file a petition before the learned Magistrate for allowing him/her to pursue the case. So far as police case is concerned, in view of Section 302 of the Cr.P.C., there is no reason for entertaining any substitution petition and case can proceed even in absence of informant/complainant or even after his death. Since the first question i.e. question no. (1) has been answered that no substitution petition is maintainable, question no. (2) automatically loses its significance and need not to be answered.



11. So far as question no. (3) i.e. with regard to any other petition pending before the court of justice at the end of any of the party is concerned, such question may not be answered, unless specifically asked for. Moreover, in the Cr.P.C., there are several provisions, which emanate filing of substitution petition, such as; proceeding under Section 145 of the Cr.P.C. as well as a proceeding under Chapter XXXIV of the Cr.P.C., which deals with disposal of property and right of appeal, however since the case in hand is in relation to police case, question no. (3) can be dealt with in detail in appropriate case.

12. In view of aforesaid discussion, the main question i.e. question no. (1) is answered, as indicated hereinabove, and the matter is remitted back to the Hon’ble Single Judge for final adjudication on the subject in question.

(Rakesh Kumar, J.)

(P.C.Jaiswal, J.): I agree.

(Prakash Chandra Jaiswal, J.)

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