

35. In view of above discussions, we alter/modify the conviction of the appellants under Sections 302 read with Section 34 IPC to Section 304-II IPC. Further the conviction of the appellants under Section 323 read with Section 34 IPC is hereby affirmed.

36. Accordingly, the appeal is **partly allowed**. The conviction and sentence of the appellants is altered/modified from Section 302 read with Section 34 IPC to Section 304-II IPC. The appellants are hereby convicted under Section 304-II IPC and sentenced to undergo seven years imprisonment and with fine of Rs.10,000/- each. All the sentences shall run concurrently. The period already undergone by the appellants shall be adjusted. After completion of the sentence as has been modified/altered by this Court, the appellants shall be released, if they are not wanted in any other case.

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**(2025) 5 ILRA 1578**

**ORIGINAL JURISDICTION**

**CIVIL SIDE**

**DATED: LUCKNOW 09.05.2025**

**BEFORE**

**THE HON'BLE RAJNISH KUMAR, J.**

Criminal Misc. Writ Petition No. 2588 of 2023

**Kodai** **...Petitioner**  
**Versus**  
**State of U.P. & Anr.** **...Respondents**

**Counsel for the Petitioner:**  
 Durga Prasad

**Counsel for the Respondents:**  
 G.A., Alok Singh Chauhan, Anil Kumar, Dr. Surendra Singh Chauhan

**Criminal Procedure Code, 1973 — Sections 256 & 302 — Death of complainant during**

**pendency of complaint case — Whether complaint abates — Legal representative on basis of Will — Permissibility to continue prosecution — Held, death of complainant does not ipso facto terminate prosecution — Magistrate may, under Section 302 Cr.P.C., permit any person including legal heir or legatee to continue proceedings — No abatement of inquiry or trial on complainant's death — Heir by Will entitled to pursue complaint — Petition dismissed. (Paras 9, 11, 12, 13, 15 and 18)**

**HELD:**

Section 256(1) Cr.P.C. provides that if the summons have been issued on complaint, and on the day appointed for appearance of the accused, or any day subsequent thereto, the complainant does not appear, the Magistrate shall acquit the accused, unless for some reason, he thinks it proper to adjourn the hearing of the case to some other day; Provided that where the complainant is represented by a pleader, or by the Officer conducting the prosecution, or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. It has been provided in subsection (2) of Section 256 that the provisions of sub Section (1) of Section 256 shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death. (Para 9)

In view of above, on the death of the complainant, the criminal prosecution does not put to end and the prosecution can be permitted to be continued by the Magistrate, before whom the proceedings are pending and it may be permitted to be continued through Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor as there is no provision of abatement of inquiry and trial in absence of the complainant, whereas the provision has been made for abatement of appeal or trial on the death of the accused. It is for this reason, it does not provide abatement of the proceedings on death of the complainant, rather if the complainant does not appear, the Magistrate shall acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other date;

Provided that the Magistrate is of the opinion that personal attendance of the complainant is not necessary and may proceed with the case dispensing his attendance. It is also in the cases where the nonappearance of the complainant is due to his death. The prosecution may be permitted to be conducted by any person personally or by a pleader. Thus, on the death of complainant, his legal representative may move application for prosecuting the case, therefore, a legal representative cannot be debarred only because he is on the basis of a will in his favour. (Para 11)

Adverting to the facts of the present case, the complaint has been filed on the ground that the petitioner, showing himself to be the son after death of the husband of the complainant, got his name recorded in the revenue records as heir, whereas they had no issue and the accused/petitioner along with his two brothers is son of Bechai. It is not in dispute that the Will was executed by the complainant Atwari in favour of the respondent no.2 in regard to the property, on which the name had been got recorded by the petitioner fraudulently as alleged during pendency of the application of the complainant for mutation before the Consolidation Officer and after filing of the application by the complainant, the proceedings in consolidation are going on and the respondent no.2 is in possession of the property in dispute of the complainant on the basis of Will. Thus, he is her legal representative and entitled for the property-in-dispute on the basis of Will and entitled to continue with the proceedings on behalf of the complainant. (Para 18)

**Application allowed.** (E-14)

**List of Cases cited:**

1. Ashwin Nanubhai Vyas Vs St. of Maharashtra reported in AIR 1967 Supreme Court 983
2. Balasaheb K. Thackeray & anr. Vs Venkat @ Babru, s/o Wamanrao Deshpande Charthankar & anr. reported in (2006) 5 Supreme Court Cases 530
3. Jimmy Jahangir Madan vesus Bolly Cariyappa Hindley (dead) by Lrs. reported in (2004) 12 Supreme Court Cases 509

4. Smt. Saroj Gupta & anr. Vs St. of U.P. & anr. reported in 2006 ADJ 446 (All)

5. Habib Vs St. of U.P. & anr. reported in 2013 (8) ADJ 369

6. Laly Thomas Vs St. of Kerla & ors.; 2010 SCC Online KER 4988

(Delivered by Hon'ble Rajnish Kumar, J.)

1. Heard Sri Durga Prasad, learned counsel for the petitioner, learned AGA and Sri Anil Kumar, learned counsel for the respondent no.2.

2. This petition has been filed challenging the order dated 31.01.2023 passed in Criminal Revision No.24 of 2022 (Kodai versus State of U.P. and others) by Additional District & Sessions Judge, Court No.3, Ambedkar Nagar and the order dated 11.01.2022 passed in Complaint No.883 of 2018 (Atwari versus Kodai) by Civil Judge (Junior Division)/ Judicial Magistrate, Tanda, Ambedkar Nagar.

3. Learned counsel for the petitioner submits that the complaint can not be allowed to be prosecuted after death of the complainant by the person having a *Will* in his favour as he can not be said to be a legal heir of the complainant but without considering it, the learned trial court allowed the application of the respondent no.2 and permitted him to pursue the complaint. He further submits that the petitioner challenged the said order in the revision and the revisional court also without considering it and the grounds raised in the revision dismissed the revision upholding the order passed by the trial court. Thus, the impugned orders are not sustainable in the eyes of law and liable to be set aside.

4. Per contra, learned counsel for the respondent no.2 submits that the respondent no.2 is entitled for all the movable and immovable properties of the complainant on the basis of the Will executed by her. He further submits that the complaint was lodged on the ground that the petitioner has got his name recorded in the revenue records by playing fraud after death of her husband, showing him to be the son, whereas they had no issue. He further submits that the respondent no.2 has been substituted in the pending Consolidation proceedings in place of the complainant, which is pending. Thus, the submission is that respondent no.2 is entitled to prosecute the case after death of the complainant as he is the only person to inherit the properties of respondent no.2 on the basis of will. The learned trial court has rightly and in accordance with law permitted him to prosecute the case. The revisional court has also rightly dismissed the revision in accordance with law. This petition has been filed on misconceived and baseless grounds, which is liable to be dismissed.

5. Having considered the submissions of learned counsel for the parties, I have perused the records.

6. An application under Section 156(3) of Criminal Procedure Code (hereinafter referred as 'Cr.P.C.') was filed by Atwari wife of late Bahao alleging therein that there was no issue of herself and Bahao. After death of husband Bahao of the applicant, the accused/petitioner; Kodai showing himself to be son and with the forged statement and signatures of the then Gram Pradhan got his name recorded in the revenue records, while the Consolidation proceedings were going on. The applicant after death of her

husband, being the sole legal heir, had applied for mutation before the Consolidation Officer, Jalalpur. During pendency of her application, the accused/petitioner has been treated his legal heir, whereas he has two other brothers, namely, Ram Avatar and Ram Pratap and all the three are sons of Bechai, resident of Makarha, Police Station - Atrauliya, District - Azamgarh.

7. Admittedly, the application under Section 156(3) Cr.P.C., filed by Atwari, was registered as a complaint case and after recording her statement, summons were issued. The summoning order was challenged before this court in a petition under Section 482/378/407 No.453 of 2019 (Kodai versus State of U.P. and another). □ Initially, an interim order was passed in the said petition but subsequently, the said petition was disposed of by means of the order dated 24.08.2022 with direction to appear before the trial court. However, the petitioner moved an application for anticipatory bail before this Court and he has been granted anticipatory bail by means of the order dated 21.07.2023 passed in Criminal Misc. Anticipatory Bail Application U/S 438 Cr.P.C. No.1621 of 2023.

8. During pendency of the trial, the complainant Atwari had died on 12.03.2019, therefore, an application for continuing the prosecution was filed by the respondent no.2 on 16.05.2019, on which after inviting objections and considering, the application was allowed on the ground that after summoning of the accused. There is no need of appearance of the complainant for deciding the complaint on merit and the respondent no.2 was permitted to pursue the matter by means of the order dated 11.01.2022. The aforesaid

order was challenged by the petitioner in a revision before the Sessions Court. The revisional court, considering the pleadings and grounds taken by the petitioner, dismissed the revision by means of the order dated 31.01.2023. Hence, this petition has been filed.

9. Section 256(1) Cr.P.C. provides that if the summons have been issued on complaint, and on the day appointed for appearance of the accused, or any day subsequent thereto, the complainant does not appear, the Magistrate shall acquit the accused, unless for some reason, he thinks it proper to adjourn the hearing of the case to some other day; Provided that where the complainant is represented by a pleader, or by the Officer conducting the prosecution, or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case. It has been provided in sub-section (2) of Section 256 that the provisions of sub Section (1) of Section 256 shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death. Section 256 of the Code of Criminal Procedure is extracted hereunder:

**"256. Non-appearance or death of complaint-** (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."*

10. Section 302 Cr.P.C. provides that the Magistrate may permit the prosecution to be conducted by any person as provided and any person conducting the prosecution may do so personally or by a pleader. Section 302 is extracted hereunder:

**"302. Permit 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."*

11. In view of above, on the death of the complainant, the criminal prosecution does not put to end and the prosecution can be permitted to be continued by the Magistrate, before whom the proceedings are pending and it may be permitted to be

continued through Advocate General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor as there is no provision of abatement of inquiry and trial in absence of the complainant, whereas the provision has been made for abatement of appeal or trial on the death of the accused. It is for this reason, it does not provide abatement of the proceedings on death of the complainant, rather if the complainant does not appear, the Magistrate shall acquit the accused unless for some reason he thinks it proper to adjourn the hearing of the case to some other date; Provided that the Magistrate is of the opinion that personal attendance of the complainant is not necessary and may proceed with the case dispensing his attendance. It is also in the cases where the non-appearance of the complainant is due to his death. The prosecution may be permitted to be conducted by any person personally or by a pleader. Thus, on the death of complainant, his legal representative may move application for prosecuting the case, therefore, a legal representative can not be debarred only because he is on the basis of a will in his favour.

12. The Hon'ble Supreme Court, in the case of **Ashwin Nanubhai Vyas versus State of Maharashtra** reported in **AIR 1967 Supreme Court 983**, which is by a three Hon'ble Judges, bench, has held that there is no provision about the acquittal or discharge of the accused on the failure of the complainant to attend the court and in such trials, on the absence of the complainant, the accused is either acquitted or discharged. It has further been observed that the intention appears to be that the Magistrate should proceed with the inquiry because had it not been intended, the Code

would have said what would happen if the complainant remains absent.

13. The Hon'ble Supreme Court, in the case of **Balasaheb K. Thackeray and another versus Venkat Alias Babru, s/o Wamanrao Deshpande Charthankar and another** reported in (2006) 5 Supreme Court Cases 530, has held that heir of the complainant can file a petition under Section 302 of the Code to continue with the prosecution and the Magistrate is empowered to permit the prosecution to be conducted by any person other than a police officer below the rank of Inspector; but no person other than Advocate General or the Government Advocate or the Public Prosecutor or Assistant Public Prosecutor shall be entitled to do so without such permission. Thus, if any, permission is sought 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. The relevant paragraphs no.4, 6 and 7 are extracted hereunder:

*"4. At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In Ashwin Nanubhai Vyas v. The State of Maharashtra and another (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 Jahangir Madan v. Bolly Cariyappa Hindley (dead) by Lrs. (2004 (12) SCC 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.*

**5. Section 302 of the Code reads as under:**

.....  
 .....  
 6. *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 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.*

7. *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."*

14. The Hon'ble Supreme Court, in the case of **Jimmy Jahangir Madan vesus Bolly Cariyappa Hindley (dead) by Lrs.** reported in (2004) 12 **Supreme Court Cases 509**, in which the question for consideration was as to whether an application under Section 302 of the Code to continue the prosecution can be filed by Power-of-Attorney holders or heirs of the complainant, considering the relevant provisions and the law on the issue held that as provided under Section 2(q) of the Code, the application to continue the prosecution can be made by the party

himself or by a legally qualified person, who is authorized to practice in the court under Advocates Act; or by any other person which would obviously include a Power-of- Attorney holder in which eventuality such permission can be granted by the court where the prosecution is pending only if it is sought by the person who is entitled to continue the prosecution and not by the Power-of-Attorney holder.

15. This Court, in the case of **Smt. Saroj Gupta and another versus State of U.P. and another** reported in **2006 ADJ 446 (All)**, has held that there is no provision of abatement of inquiries and trials in absence of the complainant. Relevant paragraphs 6 and 7 are extracted hereunder:-

*"6. It is, thus, evident that the death of the complainant does not ipso facto put an end to a criminal prosecution.*

*"Actio personalis moritur cum persona:- Death of complainant does not terminate a criminal prosecution. The maxim actio personalis moritur cum persona of Section 306 of Succession Act, 1925 does not apply to criminal prosecutions."*

*7. There is no provisions of abatement of inquiries and trials in absence of the complainant although it provides abatement of appeal or trial on the death of the accused, therefore, what happens on the death of the complainant, in a case started on a complaint, has to be inferred generally from the provisions of the Code."*

16. This Court, in the case of **Habib versus State of U.P. and another** reported in **2013 (8) ADJ 369**, has taken the similar view as above. Relevant paragraph-23 is extracted hereinbelow:

*"23. From perusal of the aforesaid judgements of the Apex Court, it is now well settled that on the death of the complainant, under Section 256(2) Cr.P.C. cannot ipso facto bring about the termination of the criminal proceeding and in that case the learned Magistrate is authorised to exercise his power under Section 302 Cr.P.C by allowing any person or prosecution agency for conducting of the criminal case merely on the death of the complainant, the complaint filed by him cannot be dismissed nor the accused acquitted or discharged under Section 256 or 258 Cr.P.C."*

17. The Kerala High Court, in the case of **Laly Thomas versus State of Kerla and others; 2010 SCC Online KER 4988**, held that a reading of Section 256 of Code itself makes it clear that the case is proceeded with even after death of complainant, only because the Magistrate forms an opinion that complainant's attendance is not necessary and attendance of the complainant is dispensed with. Therefore, mere Will be no justification in acquitting accused under Section 256(1) of the Code on the ground that the complainant is absent.

18. Adverting to the facts of the present case, the complaint has been filed on the ground that the petitioner, showing himself to be the son after death of the husband of the complainant, got his name recorded in the revenue records as heir, whereas they had no issue and the accused/petitioner along with his two brothers is son of Bechai. It is not in dispute that the Will was executed by the complainant Atwari in favour of the respondent no.2 in regard to the property, on which the name had been got recorded by the petitioner fraudulently as alleged

during pendency of the application of the complainant for mutation before the Consolidation Officer and after filing of the application by the complainant, the proceedings in consolidation are going on and the respondent no.2 is in possession of the property in dispute of the complainant on the basis of Will. Thus, he is her legal representative and entitled for the property-in-dispute on the basis of Will and entitled to continue with the proceedings on behalf of the complainant.

19. In view of above, learned courts below have rightly and in accordance with law passed the impugned orders and permitted to the petitioner to pursue/ do pairvi of the proceedings of complaint case after death of complainant Atwari. The impugned orders have been passed in accordance with law by reasoned and speaking orders, which does not call for any interference by this Court. The petition is misconceived and lacks merit.

20. The petition is, accordingly, **dismissed.**

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**(2025) 5 ILRA 1584**

**ORIGINAL JURISDICTION**

**CIVIL SIDE**

**DATED: ALLAHABAD 30.05.2025**

**BEFORE**

**THE HON'BLE ROHIT RANJAN AGARWAL, J.**

Election Petition No. 11 of 2022

**Prem Pal Singh** ...Petitioner

**Versus**

**Prem Pal Singh Dhangar & Ors.**

...Respondents

**Counsel for the Petitioner:**

Sanjay Kumar Srivastava, Virendra Singh