Sivadasan vs Harish on 28 October, 2016

Author: Alexander Thomas

Bench: Alexander Thomas

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

TUESDAY, THE 20TH DAY OF JUNE 2017/30TH JYAISHTA, 1939

Crl.MC.No. 2496 of 2017 ()

CRRP 59/2016 OF SESSIONS COURT, PALAKKAD
ST 1244/2015 OF CHIEF JUDICIAL MAGISTRATE COURT, PALAKKAD

PETITIONER/ACCUSED:

SIVADASAN, AGED 35
S/O.MARIMUTHU,
A-32, INSTRUMENTATION TOWNSHIP,
KANJIKKODE WEST, PALAKKAD.

BY ADVS.SRI.K.ABDUL JAWAD
SRI.U.MUHAMMED MUSTHAFA
SRI.MATHEW A KUZHALANADAN
SMT.A.GRANCY JOSE
SRI.M.K.PRASANTH KUMAR

RESPONDENT(S)/COMPLAINANT & STATE:

1. HARISH,AGED 35 YEARS,
S/O.RAMAKRISHNAN,
POKKATHU VEEDU, THANIYAMKAVU,
KONNADI, PALAKKAD.

2. STATE OF KERALA,
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM 682 031.

R1 BY ADVS. SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P
R2 BY PUBLIC PROSECUTOR SRI SAIGI JACOB PALATTY
BY ADV.SRI SOJAN MICHEAL (AMICUS CURIAE)

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 20-06-2017, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.V.

Crl.MC.No. 2496 of 2017 ()

APPENDIX

PETITIONER(S)' ANNEXURES

ANNEXURE A TRUE COPY OF THE ORDER DATED 28/10/2016 IN S.T.CASE NO.1244/2015 ON THE FILE OF CHIEF JUDICIAL MAGISTRATE COURT, PALAKKAD

ANNEXURE B CERTIFIED COPY OF THE ORDER DATED 15/3/2017 IN CRL.REVISION PETITION NO.59/2016, ON THE FILE OF THE SESSIONS COURT, PALAKKAD

RESPONDENT(S)' EXHIBITS NIL

/TRUE COPY/

P.S.TO JUDGE

K.V.

"C.R"

ALEXANDER THOMAS, J.

Crl.M.C.No.2496 Of 2017

Dated this the 20th day of June, 2017.

O R D E R

The petitioner is the accused for the offence punishable under Sec.138 of the Negotiable Instruments Act, in S.T.No.1224/2015 on the file of the Chief Judicial Magistrate Court, Palakkad, instituted on the basis of a complaint instituted by the 1st respondent herein. The trial court had taken cognizance of the offence and thereafter issued summons to the accused who had entered appearance and thereafter the matter was posted for tendering of evidence of the complainant. The matter come up before the trial court on various occasions to tender evidence on 27.7.2016, 2.9.2016

and on 28.10.2016 and on these days the trial court found that the complainant was continuously absent, but there was application filed for adjournment. But the trial court adjudged that the said request for adjournment lacks bonafides and the same was rejected as the personal appearance of the complainant is required for evidence. Since the complainant continuously failed to ::2::

> Crl.M.C.No.2496 Of 2017 appear to give evidence, no purpose will be served in continuing the proceedings and the learned Magistrate held that the accused will stand acquitted of the offence by virtue of the enabling provisions under Sec.256(1) of the Cr.P.C. That the order passed by the trial court under Sec.256(1) of the Cr.P.C is the one acquitting the accused and therefore the remedy is to file a special leave. Aggrieved by the said Anx-A order, the 1st respondent-complainant had preferred Crl.R.P.No.59/2016 before the Sessions Court, Palakkad, by taking recourse to the remedy conferred under Sec.397 of the Cr.P.C. The Sessions Court, Palakkad, had issued notice to the respondent therein (accused). The respondent therein (accused) took up the contention that revision under Sec.397 is not maintainable in view of the bar engrafted under Sec.401(4) r/w Sec.399(1) of the Cr.P.C inasmuch as to the extent it has provided that where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed. It was also contended that the remedy of the complainant to challenge the impugned judgment of acquittal rendered by the trial court in a private complaint is to prefer special leave under Sec.378(4) of the Cr.P.C., so as to secure special leave of the High Court to file Criminal Appeal to impugn such judgment of ::3::
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> Crl.M.C.No.2496 Of 2017 acquittal rendered by the trial court. Since such an appellate process is conferred by the Cr.P.C, though hedged with a condition for special leave, the bar as stated above would apply and therefore the Sessions Court does not have the jurisdiction to entertain the above said revision. The Sessions Court overruled the said contention of the respondent therein (accused) on the basis of the judgment of the Apex Court in Maj. Genl. A.S.Gaauraya & anr. v. S.N.Thakur & anr. reported in AIR 1986 SC 1440, which in turn had relied on another judgment on the Apex Court in Bindeshwari Prasad Singh v. Kali Singh reported in AIR 1977 C 2432. On the basis of the said rulings, the Sessions Court observed that the remedy of a complainant to challenge an order of acquittal under Sec.256(1) of the Cr.P.C is to move the Sessions Court or High Court in revision and accordingly held that the Sessions Court has jurisdiction to entertain the revision on merits and on the merits of the matter, the Sessions Court has held that the lapse of the complainant in not appearing before the trial court could be condoned subject to payment of cost and subject to such condition the complaint was remitted to the trial court for further proceedings in the trial. A copy of the said revisional order passed by the Sessions Court on 15.3.2017 in S.T.No.59/2016 has been produced as Anx-B. The accused has now ::4::

Crl.M.C.No.2496 Of 2017 challenged the legality and correctness of the impugned Anx-B order by filing the present petition by invoking the inherent powers conferred under Sec.482 of the Cr.P.C.

2. Sri.Sojan Micheal, learned Advocate, was appointed as Amicus Curiae in this case to assist this Court in the matter. Heard Sri.K.Abdul Jawad, learned counsel appearing for the petitioner-accused, Sri.M.P.Liju, learned counsel appearing for the 1st respondent- complainant, Sri.Saigi Jacob Palatty, learned Prosecutor appearing for R-2 State and Sri.Sojan Micheal, learned Amicus Curiae.

3. The short point that arises for consideration in this case is as to whether an order of acquittal rendered by the trial court under Sec.256(1) of the Cr.P.C in a private complaint proceedings could be challenged in revision either before the Sessions Court or before the High Court in terms of Sec.397 of the Cr.P.C and other allied provisions.

4. It is not in dispute that the order rendered by the trial court by virtue of the enabling powers conferred under Sec.256(1) of the Cr.P.C is after due service of summons on the accused and after the appearance of the accused and at a stage when the matter was posted for evidence of the complainant. Sec.256(1) of the Cr.P.C reads as follows:

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Crl.M.C.No.2496 Of 2017 "Sec.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."

The impugned Anx-A order dated 28.10.2016 rendered by the trial court reads as follows:

"This is a complaint filed u/s 138 of the Negotiable Instruments Act.

2. Complainant absent. Application filed for adjournment. Case was posted for evidence to 27-07-2016, 02-9-16 and finally to 28-10-2016.

Complainant is continuously absent. Application for adjournment lacks bonafides, hence rejected. Personal appearance of complainant is required for evidence. Since complainant continuously failed

to appear to give evidence, no purpose will be served in continuing the proceedings. Hence, accused is acquitted u/s 256(1) of Cr.P.C." The Sessions Court has opined as per Anx-B revisional order that on the basis of the dictum laid down by the Apex Court in the case in Maj. Genl. A.S.Gaauraya & anr. v. S.N.Thakur & anr. reported in AIR 1986 SC 1440 = (1986) 2 SCC 709 = 1986 KHC 790, the order of acquittal as the one rendered in impugned Anx-A, being a final order is amenable for a challenge through institution of Criminal Revision Petition either before the Sessions Court or before the High Court in terms of Sec.397 of the Cr.P.C, etc. The question is whether the said view rendered by the ::6::

> Crl.M.C.No.2496 Of 2017 Sessions Court in the impugned Anx-B revisional order is legally correct and tenable.

5. In the case in Maj. Genl. A.S.Gaauraya & anr. v. S.N.Thakur & anr. reported in AIR 1986 SC 1440, the appellants therein were 2 accused in a complaint filed by the respondent-complainant therein before the Judicial Magistrate, First Class, New Delhi, alleging offence punishable under Secs.67 & 72C(1)(a) of the Mines Act, 1952 r/w Regulation 106 of the Metalliferous Mines Regulation, 1961. The maximum punishment imposed for these offences is the one for Sec.72C (1)(a) of the Mines Act, 1952, wherein the substantive sentence would extent up to 2 years. The learned Magistrate therein had taken the case on file and issued summons to the accused to appear on 6.1.1972 and on 6.1.1972 neither the complainant nor his counsel was present and therefore the learned Magistrate was constrained to pass the present order which reads as follows:

> "Accused not present. None present for the complainant also. The complaint is hereby dismissed in default and for want of prosecution."

These details are available from a mere perusal of para 2 of the decision in Maj. Genl. A.S.Gaauraya's case (supra) reported in AIR 1986 SC 1440. Therefore, at the time when the impugned order was passed on 6.1.1972, the provisions contained in the Code of Criminal Procedure, ::7::

> Crl.M.C.No.2496 Of 2017 1973, were in vogue and the provisions contained in the Code of Criminal Procedure, 1898 governed the field. As per the provisions contained in Sec.4(1)(w) of the Cr.P.C, 1898, "warrant case" means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding not exceeding 6 months. Therefore, the trial court in that case could have been dealt with as per the governing procedure for trial of warrant cases contained in Chapter XXI of the Cr.P.C, 1898, which contained Sections 251 to 259. Sec.252 of the old Code reads as follows:
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> "Sec.252: Evidence for prosecution.-(1) ln any case instituted otherwise on a police report, when the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution:

> Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.
>
> (2) The Magistrate shall ascertain, from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary."

Sec.252 of the old Code casts a duty on the complainant to adduce evidence in such trial of warrant cases before the Magistrate. Sec.253 thereof provides as follows:

> "Sec.253: Discharge of accused.-(1) If, upon taking all the evidence referred to in Section 252, and making such examination (if any) of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction, the Magistrate shall discharge him.
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> ::8::
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> Crl.M.C.No.2496 Of 2017 (2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless."

Sec.259 thereof deals with the absence of the complainant, which reads as follows:

> "Sec.259: Absence of complainant.- When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded 9[or is not a cognizable offence,] the Magistrate may, in his discretion, notwithstanding anything hereinbefore, contained at any time before the charge has been framed) discharge the accused."

Sec.256 under Chapter XX of the Cr.P.C, 1973, is corresponding to the provisions contained in Sec.247 under Chapter XX of the Cr.P.C, 1898, (it may be relevant to note that Chapter XX of both the Cr.P.C, 1973 as well as the old Cr.P.C, 1898, deals with the trial of summons cases by Magistrates). Sec.247 under Chapter XX of the old Cr.P.C, 1898 provided as follows:

> "Sec.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 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 Magistrate is of opinion that the personal attendance of the complaint is not necessary, the Magistrate may dispense with his attendance, and proceed with the case."

Therefore the acquittal of the accused as envisaged in Sec.256 of the Cr.P.C, 1973, as well as the provisions contained in Sec.247 of the ::9::

> Crl.M.C.No.2496 Of 2017 Cr.P.C, 1898 (which deal with the trial of summons cases), was not applicable to the facts of the case dealt with by the Apex Court in Maj. Genl. A.S.Gaauraya's case (supra), inasmuch as the case dealt with therein was a matter of trial of a complaint of a warrant case. So the impugned order passed by the learned Magistrate on 6.1.1972 (referred to hereinabove), which is the genesis of the impugned proceedings in the decision in Maj. Genl. A.S.Gaauraya's case reported in AIR 1986 SC 1440) dealt with an entirely different factual issue and the impugned order did have any legal implication of acquittal of the accused. But at the same time, such a dismissal of the complaint in that case amounted to a final order inasmuch as it led to the very termination and culmination of the impugned proceedings and therefore such a final order was held to be amenable for revisional challenge.

6. On that aspect of the matter, their Lordships of the Apex Court in the case Maj. Genl. A.S.Gaauraya's case (supra), reported in AIR 1986 SC 1440, while dealing with that case, have placed on a previous judgment of the Apex Court in Bindeshwari Prasad Singh v. Kali Singh reported in AIR 1977 SC 2432 = (1977) 1 SCC 57. On a perusal of the facts of the case dealt with in Bindeshwari Prasad Singh's case (supra) reported in AIR 1977 SC 2432, would clearly disclose from a mere ::10::

> Crl.M.C.No.2496 Of 2017 reading of para 1 thereof that the complaint therein was dismissed on 23.11.1968 by virtue of the enabling provisions contained in Sec.203 of the Cr.P.C on the ground that the complainant was absent and did not show any interest in the inquiry ordered by the trial court therein inasmuch as the impugned order therein was passed on 23.11.1968.

The facts of that case were also governed by the old provisions contained in the Cr.P.C, 1898. Sec.203 of the old Cr.P.C, 1898, which appears in Chapter XVI provides as follows:

> "Sec.203: The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the witnesses and the result of the investigation or inquiry (if any) under Section 202; there is in his judgment no sufficient ground for proceeding. In such cases he shall briefly record his reasons for so doing."

The provisions contained in Sec.203 of the old Code are broadly in correspondence with the provisions, contained in Sec.203, which appears in Chapter XV of the present Cr.P.C, 1973, which reads as follows:

"Sec.203. Dismissal of complaint.- If, after considering the statements on oath (if any) of the complainant and of the witnesses and the result of the inquiry or investigation (if any) under Section 202 , The Magistrate is of opinion that there is no sufficient ground for proceeding, he shall dismiss the complaint, and in every such case he shall briefly record his reasons for so doing."

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Crl.M.C.No.2496 Of 2017 Therefore, the facts of that case also had not dealt with a case relating to acquittal of the accused as envisaged in Sec.256(1) of the Cr.P.C, 1973, or its corresponding Sec.247 of the Cr.P.C, 1898. Their Lordships of the Supreme Court held in para 4 of the case in Bindeshwari Prasad Singh's case (supra) reported in AIR 1977 SC 2432, that the remedy of a person concerned, who is aggrieved by such an order of dismissal of a complaint, is to prefer a revision. It is by placing reliance on those observations made in para 4 of Bindeshwari Prasad Singh's case (supra), that the decision in Maj. Genl. A.S.Gaauraya's case (supra), reported in AIR 1986 SC 1440 was rendered. Therefore, the facts of both these cases in Bindeshwari Prasad Singh's case (supra) as well as in Maj. Genl. A.S.Gaauraya's case (supra), dealt with matters relating to dismissal of the complaint and did not deal with contingency of acquittal of the accused as envisaged in Sec.256(1) of the Cr.P.C or Sec.247 of the old Cr.P.C, 1898. Some of the main issues dealt with in Maj. Genl. A.S.Gaauraya's case (supra) and Bindeshwari Prasad Singh's case (supra) were as to the competence and jurisdiction of the Magistrate in restoring the complaint which was dismissed for non-prosecution. Their Lordships of the Apex Court have reiterated in both the aforesaid rulings that so long as the Magistrate is not empowered to restore such

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Crl.M.C.No.2496 Of 2017 complaint, he does not have any implicit and inherent power to restore such a complaint and that the only remedy of a person, who is aggrieved by such a dismissal of the complaint, is to file a revision in terms of the provision of the Code. It is placing reliance on the above said judgments of the Apex Court in Maj. Genl. A.S.Gaauraya's case (supra), reported in AIR 1986 SC 1440, which in turn was based on Bindeshwari Prasad Singh's case (supra), reported in AIR 1977 SC 2432, that the learned Sessions Judge has passed the impugned Anx-B order herein holding that the impugned order of acquittal passed by the learned Magistrate in this case is also amenable for revision. The said view taken by the Sessions Court in the revisional jurisdiction is patently untenable and unsustainable. The dictum laid down by the Apex Court that the revision is the remedy in a case where the complaint is dismissed for default as held in the aforecited judgments does not have a bearing in the present case as the present case is one, which exclusively comes within the matters relating to acquittal of an accused under Sec.256(1) of the Cr.P.C.

7. So, the next issue to be considered is as to what is the remedy that is available for such a complainant, who has faced with an order, wherein the learned Magistrate has directed acquittal of

the ::13::

Crl.M.C.No.2496 Of 2017 accused under Sec.256(1) of the Cr.P.C. Sec.378(4) of the Cr.P.C reads as follows:

"Sec.378: Appeal in case of acquittal:

xxx xxx xxx (4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

xxx xxx xxx"

Sub-sec.(4) of Sec.378 provides that in the case of the order of acquittal, which is passed in any case instituted upon a complaint and the High Court, on an application made by the complainant, granted special leave to appeal against the very order of acquittal, the complainant may file such an appeal to the High Court.

8. Another issue that will arise in this connection is as to whether such complainants, who are aggrieved by a judgment of acquittal, are entitled to seek revisional remedy as per Sec.397 of the Cr.P.C before the Sessions Court or High Court. Secs.397, 399 and 401 of the Cr.P.C read as follows:

"Sec.397: Calling for records to exercise powers of revision.-(1) The High Court or any Sessions judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

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Crl.M.C.No.2496 Of 2017 Explanation.- All Magistrates, whether Executive or Judicial, and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purpose of this sub-section and of section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application, under this section has been made by any person either to the High Court or to the Session Judge, no further application by the same person shall be entertained by the other of them.

xxx xxx xxx Sec.399: Sessions Judge's powers of revision.-(1) In the case of any proceeding the record of which has been called for by himself, the Sessions judge may exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of Section 401.

(2) Where any proceeding by way of revision is commenced before a Sessions judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of Section 401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge.

(3) Where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision of the Sessions Judge thereon in relation to such person shall be final and no further proceeding by way of revision at the instance of such person shall be entertained by the High Court or any other Court.

xxx xxx xxx Sec.401: High Court's powers of revision.-(1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Sections 386, 389, 390 and 391 or on a Court of Session by Section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by Section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorize a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

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Crl.M.C.No.2496 Of 2017 (5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court

> may treat the application for revision as a petition of appeal and deal with the same accordingly."

9. A Division Bench of this Court in the judgment in State of Kerala v. Neelakandan Damodaran & anr. reported in 1974 Cri.L.J 1107 has held that where there is a remedy by way of right to appeal provided under Sec.11(2) of the Probation of Offenders Act to impugn an order passed under Secs.3 or 4 of that Act, the revision remedy under Sec.439(1) of the old Code (Cr.P.C, 1898) does not lie. Their Lordships of the Division Bench of this Court in Neelakandan Damodaran's case (supra), have placed reliance on an earlier ruling of the Orissa High Court in The State v. Lachman Murty, reported in AIR 1958 Ori. 204 = 1958 Cri.L.J 1074, for arriving at this conclusion. It will be profitable to refer to paras 5 & 6 of the above said Division Bench judgment in State of Kerala v. Neelakandan Damodaran & anr. reported in 1974 Cri.L.J 1107, which read as follows:

> '5. There is no difficulty in finding an answer to this question as S.11(2) of the Probation of Offenders Act itself provides for a right of appeal. It reads:
>
> "Notwithstanding anything contained in the Code, where an order under S.3 or S.4 is made by any court trying the offender (other than a High Court), an appeal shall lie to the court to which appeals ordinarily lie from the sentence of the former court."

This provision does not run counter to the provisions of the Code of Criminal procedure, as S.404 Cr. P. C. provides:

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>
> Crl.M.C.No.2496 Of 2017 No appeal shall lie from any judgment or order of a Criminal "
>
> Court except as provided for by this Code or by any other law for the time being in force."
>
> Where there is provision to file an appeal under a special statute as required in S.404 Cr. P. C., and if no appeal is filed under that statute, it is not open to a party to that proceeding to question the order, judgment or conviction in a revision under S.439 Cr. P.C. Sub-s.(5) of S.439 Cr. P. C. itself prohibits the filing of a revision under S.439 (1) if the party has a right of appeal. Sub-s.(5). reads:
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> Where under this Code an appeal lies and no appeal is brought, no "
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> proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

Sub-s.(2) of S.11 of the Probation of Offenders Act applies to all parties in a proceeding pending before a criminal court. The expression "party" occurring in sub-s.(5) of S.439 Cr. P.C. includes not

only private parties, but also the State if it happens to be the party as in a police case. S.11(2) of the Probation of Offenders Act, read with S.459(5) Cr. P. C. is clear that the State is bound to file an appeal against the order made either under S.3 or under S.4 of the Probation of Offenders Act, and that the remedy of the State, or for that matter, every person who is affected by the order, is to file an appeal against that order and not to file a revision against the order under S.439(1) Cr. P. C. The revision petition therefore is not maintainable. That was also the view expressed in a decision in Rajkishore Jena v. Raja alias Kalasi Sahu (AIR 1971 Orissa 193). The opinion expressed in that decision reads:

> "Inany view of the matter, in my opinion, the petitioner in this case who was the complainant being entitled to prefer an appeal under S.11(2) and not having done so, the revision is not maintainable."

6. In an earlier ruling of the Orissa High Court in The State v. K. Lachman Murty (AIR 1958 Orissa 204), where in a police case ending in acquittal by the trying Magistrate, the State omitted to file a regular appeal under S.417 Cr. P. C., it was held that the State cannot move the High Court through the Sessions Judge to reverse the order of acquittal in exercise of its revisional jurisdiction under S.439 Cr. P.C. It is because the State being a party for the purpose of S.439(5) Cr. P. C., that sub-section would operate as a bar against the High Court's interference in revision. It is apparent from the trend of this decision that the language of S.439(5), Cr. P. C., does not warrant the inference that the bar of that Section applies only if the court is directly approached by the party concerned and not when it is moved through the Sessions Judge or the District Magistrate, as the case may be, even though the latter officer was requested to exercise his revisional jurisdiction at the instance of the party concerned.' ::17::

> Crl.M.C.No.2496 Of 2017 In the judgment in K.M.Antony v. V.K. Ibrahimkutty reported in 1960 KLT 481, it was held that that where a complainant, who is aggrieved by a judgment of acquittal, who had applied for special leave under Sec.373 of the Cr.P.C, 1898, to prefer appeal against the judgment of acquittal, [which is para materia to Sec.378(4) of Cr.P.C, 1973], the bar under Sec.439(5) of the old Code, 1898, would stand against such a petitioner in preferring a revision petition and accordingly held that the revision petition cannot be entertained at the instance of such a petitioner, who could have sought special leave to appeal, etc. The said judgment in K.M. antony v. V.K. Ibrahimkutty reported in 1960 KLT 481 was rendered by his Lordship Chief Justice K.Sankaran. It will be profitable to refer to paras 2 & 3 of the said judgment which read as follows:
>
> "This is a petition by the Executive Authority of the Muhamma Panchayat to revise the order passed by the First Class Magistrate at Sherthallai acquitting the accused in C. C. 1464 of 1958. It was a prosecution initiated on a complaint filed by the Executive Authority alleging that the accused who was conducting a fish market without taking a license, is guilty of the offence under S. 71 [1] of the Panchayat Act [Act II of 1950] and rule 39 of the market rules.

> 2. Before proceeding to consider the question whether the order of acquittal calls for any interference, it has to be examined whether this petition for revision is maintainable. Cl. (5] of S. 439 of the Code of Criminal Procedure states that "when under this Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed".

Admittedly no appeal has been preferred against the order of acquittal in this case. The next aspect for consideration is whether an appeal could have been preferred by the Executive Authority who had preferred the complaint. I think that he could have invoked sub-section [1] or sub-section [3] of S. 417 of the Code of Criminal Procedure for preferring an appeal. The prosecution was obviously initiated by the Executive ::18::

> Crl.M.C.No.2496 Of 2017 authority in his official capacity and as such it has to be deemed to be a prosecution on behalf of the State. In that capacity he could have reported the matter to the State Government with a request that under sub-section [1) of S. 417 the State Government may direct the Public Prosecutor to present an appeal to the High Court against the order of acquittal. The executive authority could as well have invoked the aid of sub- section [3] of S. 417 because the order of acquittal was passed in a case instituted upon a complaint filed by him. The learned counsel for the petitioner argues that the word "complaint" as used in subsection [3] contemplates complaints filed by private parties only. I am unable to accept this argument as sound. The word "complaint" has been defined in clause [h] of S. 4 of the Code of Criminal Procedure. That definition is as follows: "complaint" means the allegation made orally or in writing to a magistrate, with a view to his taking action, under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police officer". When the word complaint has thus been defined in the Code, there is no justification or warrant for supposing that in sub-section (3) of S. 417 of the same Code, that word has been used in a different sense or with only a restricted meaning so as to refer to complaints by private individuals only. A complaint by a public officer will also come within the definition and hence the executive officer could have applied under sub-section [3] of S. 417 of the Code for Special Leave to prefer an appeal against the order of acquittal. This view regarding the scope of sub-section [3] gains strength from a reading of sub-section [5] of S. 417. The provision in sub-section [5] is as follows: "If in any case the application under sub-section [3] for the grant of Special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub-section [1] which relates to appeals to be preferred by the Public Prosecutor under directions from the State Government. If sub-section [1] is made use of in the first instance, it is well and good. But if sub-section [3] is invoked in the first instance, then the person who is the complainant cannot again go back and seek the aid of sub-section [1]."
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> This Court in the judgment in Krishanlal Oberoi v. Corporation of Cochin, reported in 1979 KLT 75 has held that requirement in Sec.378(4) of the Cr.P.C to secure special

leave for instituting Criminal Appeal against judgment of acquittal does not mean that no appeal lies against an order of acquittal but the appeal itself lies but subject to special leave and the contention that the appeal will lie as a matter of right in order to ::19::

Crl.M.C.No.2496 Of 2017 attract the bar under Sec.401(4) of the Code is, to read in the place of words "where under this Code of appeal lies" appearing in Sec.401(4) of the Cr.P.C, with the words "where under the Code an appeal lies as a matter of right", etc., and that where the aggrieved complainant has the right to seek special leave to prefer Criminal Appeal against judgment of acquittal no revision will lie at the instance of the party who could have appealed. The said judgment in Krishanlal Oberoi v. Corporation of Cochin, reported in 1979 KLT 75, was rendered by his Lordship Justice Subromonian Poti. It will be profitable to refer to paras 2 & 3 of the said judgment which read as follows:

'2. Without the aid of any precedents and on the plain language of sub- section (4) of S.401, I am inclined to say that an appeal does lie against an order of acquittal in any case instituted upon complaint. Of course an appeal lies only when special leave is obtained. The requirement that the complainant has to seek special leave and only if it is granted he can present the appeal, does not, according to me, mean that no appeal lies against the order of acquittal. Appeal does lie, but subject to special leave. The contention of the complainant that appeal must lie as a matter of right in order to attract the bar of S.401 (4) of the Code is, as observed by the High Court of Allahabad in City Board Mussorie v. Sri. Kishun Lal (AIR. 1959 Allahabad

413), to read in place of the words, "where under this Code an appeal lies" the words 'where under the Code an appeal lies as a matter of right'. The High Court of Madras has in the decision reported in Municipal Commr. Nagercoil v. Annapakkiyam (1967 Crl. L. J. 898) expressed the same view. That leave has to be obtained before an appeal is filed does not amount to saying that there is no right of appeal is the view expressed by many of the High Courts of India. The High Court of Allahabad in the decisions in Ram Narain v. Mool Chand (AlR. 1960 Allahabad 296) has expressed this view. The same view has been expressed by the High Court of Assam in Abdul Majid v. Adai (1970 Crl. L. J. 950), the High Court of Bombay in the decision reported in State of Bombay v. Tayawade (AIR. 1959 Bombay 94), the Gujarat High Court in the decision in Sankalchand v. Khengaram (AIR. 1969 Gujarat 342) and the High Court of Madras ::20::

Crl.M.C.No.2496 Of 2017 in In re Seeni Ammal (AIR. 1960 Mad. 573), Municipal Commissioner, Nagercoil v. Chinnammal (1966 Crl. L. J. 1461), and in the later decision in Municipal Commissioner, Nagercoil v. Annapappiyam (1967 Crl. L. J. 898), already adverted to. The mere fact that right of appeal is made subject to obtaining leave makes no difference is the view expressed by the decision of the Orissa High Court in Dukhishyam Sahu v. Bidyadhar Sahu (AIR. 1966 Orissa 45).

> Relying on the decision of the Allahabad High Court in City Board Mussorie v. Sri. Kishan Lal (AIR. 1959 All.
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> 413), that of the Bombay High Court in State of Bombay v. Tayawade (AIR. 1959 Bombay 94) and that of the Punjab High Court in Shiv Prashad v. Bhagwan Das (AIR.

1958 Punjab 228) the same view was expressed in Chairman, Village-Panchayath Nagathihalli v. N. Thimmasetty (AIR. 1956 Mysore 62). This Court had in the decision in Antony v. Ibrahimkutty (I960 KLT. 481) expressed the same view and Chief Justice Sankaran expressed the view where an appeal could be filed by a complainant in a private complaint and he has not sought to file an appeal, a revision at his instance would not be entertainable.

3. I may notice the contrary view of the Judicial Commissioner of Tripura in the decision in Raj Kumar v. Amar Chand (1962 (1) Crl. L. J. 677). The view expressed therein is that it cannot be said that the complainant has a right of appeal against an acquittal within the meaning of S.439 (5) and that is because it is subject to obtaining special leave and therefore the right is only to file an application for leave. The learned Judicial Commissioner has noticed the contrary view expressed by many of the High Courts in India and I do not think that the reasoning in those decisions has been properly met by the learned Judicial Commissioner in the Tripura case. In fact it is evident from the judgment that the view expressed by the learned Judicial Commissioner is merely obiter. Though the Judicial Commissioner, Manipur in the decision in Raringsui Thagkhul v. Yangmaso (AIR. 1963 Manipur 17) has expressed the view that a revision could be entertained by the Sessions Judge in a case where an appeal lies at the instance of the party who could have applied for special leave to appeal, the judgment is not supported by any reasoning, and the learned Judicial Commissioner merely follows his earlier decisions. Though the contrary view of the Bombay and Allahabad High Courts is noticed the learned Judicial Commissioner observes that he sees no reason to change his view. I may notice here that the said view has not been followed by the same Court later in S. Laingam Singh v. Amuyama Singh (1971 Crl. L. J. 404). It has been noticed by the Judicial Commissioner, Manipur that the earlier decision does not discuss the question and the Commissioner prefers to follow the preponderance of the authorities to the contra.' Further this Court in Muhammad v. State of Kerala reported in 1993(2) KLT 46 has held that by virtue of the provisions contained in Sec.399 of ::21::

> Crl.M.C.No.2496 Of 2017 the Cr.P.C, Sessions Court is entitled to exercise all or any other powers available under Sec.401(1) and that the provisions of sub-secs.2, 3 and

4 of Sec.401 would also apply when the Sessions Judge is exercising powers under Sec.397 by virtue of the provisions in Sec.399 and that the bar engrafted in Sec.401(3) that a High Court sitting in revision shall not convert an order of acquittal to an order of conviction is equally applicable to a Sessions Judge while exercising the power of revision in view of Sec.397 r/w Sec.399 of the Cr.PC. It will be profitable to refer to para 3 of the Muhammad v. State of Kerala reported in 1993(2) KLT 46 which reads as follows:

"3. By virtue of S.399 Cr.P.C. Sessions Judge is entitled to exercise all or any of the powers which may be exercised by the High Court under sub-section (1) of S.401. S.401(l) provides that in the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by Ss. 386, 389, 390 and 391 or on a Court of Sessions by S.307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by S.392. Section 399(2) makes the position clear that where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of S.401 shall so far as may be, apply to such preceding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge. Thus, it can be seen that S.401 (3) equally applies so far as a Sessions Judge is concerned. The above sub-section makes it clear that the revisional court whether the High Court or Sessions Court cannot convert a finding of acquittal into one of conviction. It is pertinent to note that the State has not filed any appeal against the acquittal of the revision petitioner for the offence under Ss.l6(i)(a)(i) read with Ss.7(i) and (iii) and 2(l-a)(a) of the P.F.A. Act. In the suo motu revision taken by the Sessions Judge he cannot obviously convert a finding of acquittal into one of conviction in view of the specific interdict in S.401(3) Cr.P.C. That being the position, the order of the Sessions Judge cannot be sustained."

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Crl.M.C.No.2496 Of 2017 This Court in Thampi v. Sadanandan reported in 1998 KLJ 810 = 1998 (1) KLT 39 has held that there is no doubt that with the special leave of the High Court, an appeal can be preferred before it against an order of acquittal passed by a subordinate criminal court in a case instituted upon a complaint and Sec.401(4) lays down that where under this Code an appeal lies and no appeal is brought no proceeding by way of revision shall be entertained at the instance of the party who could have appealed and that where no application for special leave has been filed before the High Court against the judgment of acquittal rendered by the trial court, then revision filed before the Sessions Court is not maintainable and that the impugned order passed by the Sessions Judge in that case is without jurisdiction. This Court in the judgment in Shaji Jacob v. Shaji P.V & anr. reported in 2014 (4) KHC 98 has again reiterated the above said legal position that the bar engrafted in Sec.401(4) that where an appeal lies and no appeal is brought about, then revision is not maintainable before the High Court, etc., would be equally applicable to a Sessions Court while exercising revisional powers by virtue of the provisions contained in Sec.399(2) of the Cr.P.C., and accordingly, it was held that where the complainant, who has filed special leave to institute a criminal appeal, has not availed that ::23::

Crl.M.C.No.2496 Of 2017 remedy, then he cannot maintain a revision in terms of the provisions contained in Secs.397 & 401 of the Cr.P.C. The above said view has been reiterated in Vinay Kumar v. State of U.P & anr. reported in 2007 Cri.L.J 3161, by holding that where an order of acquittal has been rendered under Sec.256(1) of the Cr.P.C, then the complainant has a remedy to file special leave to appeal to High Court under Sec.378(4) and if no such proceedings are initiated, then revision would not be maintainable at the behest of such complainant before the Sessions Judge in view of the prohibitions contained in Sec.401(4) of the Cr.P.C. The same view has been reiterated by the Bombay High Court in State of Bombay v. N.G.Tayawade, reported in AIR 1959 Bombay 94 as well as the decision in Dharamaji Gangaram Gholem & ors. v. Vithoba Soma Khade & anr. reported in 1992 Cri.L.J 870 by holding that in view of the provisions for special leave under Sec.378(4), the aggrieved complainant cannot impugn the judgment of acquittal by revision.

10. Sec.401(2) of the Cr.P.C explicitly deals with the restrictions imposed on the High Court while exercising powers of revision. It is contended by the respondent complainant that the said restriction imposed in Sec.401 of the Cr.P.C would apply in case of suo motu revisions entertained by the Sessions Judge and not in cases, ::24::

Crl.M.C.No.2496 Of 2017 where the revision petitioner is moved by the aggrieved party.

11. It has also been inter alia held by the Division Bench of the Gujarat High Court in Kershi Pirozsha Bhagvagar v. State of Gujarat, reported in 2007 Crl.L.J.3958, pp.3962, 3963, that the expression, "any other law" appearing in Sec.4(2) of the Cr.P.C. would encompass within its broad sweep Negotiable Instruments Act also. However, the applicability of Cr.P.C. to a special enactment like the N.I. Act would be subject to the special provisions that may be contained in such special enactment to regulate a particular contingency or scenario.

12. An argument was addressed before this Court that the restrictions on the High Court's power on revision conceived in Sec.401(4) of the Cr.P.C would be applicable to a Sessions Judge only if he is exercising suo motu revisional powers and not otherwise in view of the provisions contained in Sec.399(1) of the Cr.P.C and that in the instant case, the revisional remedy was exercised by the Sessions Judge on a petition filed by the aggrieved complainant and not in a suo motu case. This argument is made by the 1st respondent-complainant. The said argument made by the 1st respondent is on the basis of the wordings in sub-sec.(1) of Sec.399 and it has been argued that the expression "in the case of any proceeding the record of which has been ::25::

Crl.M.C.No.2496 Of 2017 called for by himself ....." appearing in sub-sec.(1) of Sec.399 should be seen in contradiction to the expression "where any application for revision is made by or on behalf of any person before the Sessions Judge, the decision

of the Sessions Judge thereon in relation to such person shall be final ....." appearing in sub-sec.(3) of Sec.399 and that the limitations and powers engrafted in Sec.401 on the powers of the High Court in exercising powers of revision will apply only in a case of suo motu revision entertained by a Sessions Judge and not in an application made by the aggrieved party, etc. Though the said argument appears to be attractive at first blush, it is unsound and untenable. In a substantial manner such an argument has been repelled by this Court in Muhammad v. State of Kerala reported in 1993(2) KLT 46, para 3, though that is in relation to bar engrafted in Sec.401(3) of the Cr.P.C. The ratio decidendi laid down by this Court in Muhammad 's case (supra) in relation to the bar engrafted in Sec.401(3) would apply with equal force and vigour in view of the provisions contained in Sec.401(4) of the Cr.P.C as well. Moreover, the Bombay High Court in the aforecited judgment in Dharamaji Gangaram Gholem & ors. v. Vithoba Soma Khade & anr. reported in 1992 Cri.L.J 870 has held that the argument, that the limitation to be found in Sec.401(4) is a fetter upon the powers of the High Court sitting ::26::

Crl.M.C.No.2496 Of 2017 in revision and the same fetter should not be foisted upon a Sessions Court while entertaining a revision, would fly in the face of sub-sec.(2) of Sec.399 and has accordingly overruled the said position. It would be profitable to refer to the relevant observations of the judgment of the Bombay High Court in para 3 thereof which reads as follows:

'3.....Learned Counsel refers to sub-section (4) of S.401 which lays down: -

Where under this Code an appeal lies and no appeal is brought, no "

proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

Mr. Rege for the complainant submits that the limitation to be found in sub-section (4) of S.401 is a fetter upon the powers of the High Court sitting in revision, the same fetter should not be foisted upon a Sessions Court entertaining revision. This argument flies in the face of sub-section (2) of S.399 which says -

Where any proceeding by way of revision is commenced before a "

Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of S.401, shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge."

Mr. Rege submits that an appeal assailing an acquittal does not lie to a Sessions Judge, and therefore, sub-section (4) of S.401 has no application to a Sessions Court hearing a revision under

S.399. It is not possible to agree with this submission. Sub-section (2) of S.399 does speak of provisions of different sub-sections of S.401 being applicable "so far as may be",. But sub- section (4) of S.401 speaks, of the remedy of appeal provided by the Code and not any particular provision thereof. Sub- section (4) of S.378 permits a complainant in a private case to assail a verdict of acquittal by an appeal to the High Court which appeal can be preferred only after grant of special leave to appeal. Therefore this fetter would come in the way of a revision entertainable by the Sessions Judge also. The facts of the case before Sharad Manohar J. were different, and there the Sessions Judge did have jurisdiction to entertain an appeal against a verdict of acquittal. The reason for that was the disability of the said revision petitioner to prefer an appeal whether under sub-section(l) or sub-section (4) of Section 78. To the facts of this case the judgment of Badkas J. in AIR 1959 Bom 94 (1959 Cri.LJ 170) applies. Significantly, this judgment was not brought to the notice of the learned Judge hearing Kokilabai's case. Had his attention been drawn to Badkas J.'s decision perhaps the learned Judge may not have chosen to express himself in the broad terms he has done.' ::27::

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13. The expression "in the case of any proceeding the record of which has been called for by himself" appearing in Sec.399(1) should be read in the overall context of the scheme in respect of the revisory powers conferred on the High Courts and the Sessions Courts as envisaged in the basic provision in Sec.397 of the Cr.P.C, which empowers the High Court or any Sessions Judge, to call for and examine the records of any proceeding before any inferior Criminal Court situates within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety, etc. So the said expression appearing in Sec.399(1) is in the context of calling for the records by the High Court or by the Sessions Court and it is not merely in the narrow context of suo motu powers of revision conferred on the Sessions Court. Otherwise, the interpretation now canvassed by the 1st respondent would be totally against the scheme provided in Secs.397, 399 and 401 on the High Court and if the said argument is accepted, then some of the substantial restrictions imposed on the High Court's powers of revision as in sub-secs.(2), (3) and (4) of Sec.401 would apply to a High Court and to a Sessions Court only if the latter is exercising the suo motu revision and not by an application made by the aggrieved person. Can it be imagined for a moment that a Sessions ::28::

Crl.M.C.No.2496 Of 2017 Judge sitting in revisional jurisdiction on an application made by an aggrieved party will not be fettered with sub-secs.(2), (3) and (4), of Sec.401? Can it be countenanced that a Sessions Court considering the revision petition of an aggrieved party is not subjected to the restrictions that no order shall be made to the prejudice of the accused or other person, unless he is afforded due opportunity of being heard or that acquittal shall not be converted to conviction, etc? If such a situation is permitted, it would result in situation whereby the High Court which is otherwise conferred with the status of a Constitutional Court as per the provisions contained in the Constitution of India is fettered with a certain restrictions

as in sub-secs.(2), (3) and (4) of Sec.401 while acting in suo motu revisions or otherwise. Whereas the Sessions Judge sitting in revision on an application made by the aggrieved party is not fettered by any of those restrictions and it will be so fettered only if it is exercising suo motu powers. Therefore, the said argument flies in the face of the composite provisions made by the Parliament under Secs.397, 399 and 401 of the Cr.P.C. The Apex Court in the judgment in Gurdev Singh v.

Surinder Singh & ors. reported in (2015) 3 SCC 773 has dealt with a case wherein the trial court had dismissed the complaint under Sec.203 of the Cr.P.C and the matter was taken in revision before the Sessions Court and the ::29::

Crl.M.C.No.2496 Of 2017 Sessions Court remitted the matter to the Magistrate Court without affording opportunity to the affected accused and the accused challenged the said revisional order passed by the Sessions Judge before the High Court in revision and the High Court had also dismissed the revision and then Special Leave Petition was filed before the Apex Court. In that case, the Apex Court has held that it was obligatory on the part of the Sessions Judge to have heard the accused by virtue of the restrictions imposed in Sec.401(2) of the Cr.P.C and had accordingly, set aside the impugned orders and had remanded the matter to the Sessions Court to dispose of the matter after hearing the accused. It will be relevant to refer to paras 8 to 11 of the said judgment in Gurdev Singh v. Surinder Singh & ors. reported in (2015) 3 SCC 773 pp.776-778, which read as follows:

'8.Mr Luthra, learned Senior Counsel for the petitioner raised only one contention before us. He submitted that the Additional CJM dismissed the complaint on 19-1-2009. The complainants carried a revision to the Additional Sessions Judge. By order dated 6-7-2010, the Additional Sessions Judge set aside the order dated 19-1-2009 and remanded the complaint to the Additional CJM with a direction to hold further enquiry. The counsel submitted that the petitioner - accused was, however, not given a hearing at that stage, which was a must. In this connection, he relied on Manharibhai Muljibhai Kakadia v. Shaileshbhai Mohanbhai Patel, 2012 (10) SCC 517 : 2013 (1) SCC (Cri) 218. The counsel submitted that it is therefore necessary to quash the proceedings as they are vitiated on account of failure to give a hearing to the petitioner - accused by the Revisional Court while setting aside the dismissal of the complaint.

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9. We find substance in this submission. Dismissal of the complaint terminates criminal proceedings against the accused. If the complainant carries the matter further by filing a revision and the Sessions Court sets aside the dismissal order and remands the matter to the Additional CJM for fresh enquiry, the complaint is revived.

> In this connection, it is necessary to refer to S.401 of the Code which lays down the High Court's powers of revision. Sub-section (2) thereof states that:
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> "401.(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence. "

S.399 of the Code refers to the Sessions Judge's powers of revision. Sub-section (2) thereof states that:

> "399. (2) Where any proceeding by way of revision is commenced before a Sessions Judge under sub-section (1), the provisions of sub-sections (2), (3), (4) and (5) of S.401 shall, so far as may be, apply to such proceeding and references in the said sub-sections to the High Court shall be construed as references to the Sessions Judge."

10. Thus, it was obligatory on the Additional Sessions Judge to hear the accused before setting aside the order of dismissal of the complaint in his revisional jurisdiction. Of course, once the matter is remanded to the Additional CJM, the accused will have no right of hearing because at pre - process stage, the law does not give him any such right. It is only in the aforementioned situation that the accused is entitled to a hearing.

11. In Manharibhai Muljibhai Kakadia, 2012 (10) SCC 517 : 2013 (1) SCC (Cri) 218, this Court considered the question whether a suspect is entitled to hearing by the Revisional Court in a revision filed by the complainant challenging an order of the Magistrate dismissing the complaint under S.203 of the Code. This Court considered the relevant provisions of the Code and observed as under: (SCC pp. 528, 540-41 & 544, paras 20, 46, 48 and 53) "20.S.202 of the Code has twin objects; one, to enable the Magistrate to scrutinise carefully the allegations made in the complaint with a view to prevent a person named therein as accused from being called upon to face an unnecessary, frivolous or meritless complaint and the other, to find out whether there is some material to support the allegations made in the complaint. The Magistrate has a duty to elicit all facts having regard to the interest of an absent accused person and also to bring to book a person or persons against whom the allegations have been made. To find out the above, the Magistrate himself may hold an inquiry under S.202 of the Code or direct an investigation to be made by a police officer. The dismissal of the complaint under S.203 is without doubt a pre - issuance of process stage. The Code does not permit an accused person to intervene in the course of inquiry by the Magistrate under S.202.

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46. The legal position is fairly well settled that in the proceedings under S.202 of the Code the accused / suspect is not entitled to be heard on the question whether the process should be issued against him or not. As a matter of law, up to the stage of issuance of process, the accused cannot claim any right of hearing. S.202 contemplates postponement of issue of process where the Magistrate is of an opinion that further inquiry into the complaint either by himself is required and

he proceeds with the further ::31::

> Crl.M.C.No.2496 Of 2017 inquiry or directs an investigation to be made by a police officer or by such other person as he thinks fit for the purpose of deciding whether or not there is sufficient ground for proceeding. If the Magistrate finds that there is no sufficient ground for proceeding with the complaint and dismisses the complaint under S.203 of the Code, the question is whether a person accused of crime in the complaint can claim right of hearing in a revision application preferred by the complainant against the order of the dismissal of the complaint. Parliament being alive to the legal position that the accused / suspects are not entitled to be heard at any stage of the proceedings until issuance of process under S.204, yet in S.401(2) of the Code provided that no order in exercise of the power of the revision shall be made by the Sessions Judge or the High Court, as the case may be, to the prejudice of the accused or the other person unless he had an opportunity of being heard either personally or by pleader in his own defence.
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> xxxx xxxx
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> 48.... The dismissal of complaint by the Magistrate under S.203 - although it is at preliminary stage - nevertheless results in termination of proceedings in a complaint against the persons who are alleged to have committed the crime. Once a challenge is laid to such order at the instance of the complainant in a revision petition before the High Court or the Sessions Judge, by virtue of S.401(2) of the Code, the suspects get the right of hearing before the Revisional Court although such order was passed without their participation. The right give n to 'accused' or 'the other person' under S.401 (2) of being heard before the Revisional Court to defend an order which operates in his favour should not be confused with the proceedings before a Magistrate under S.200, S.202, S.203 and S.204. In the revision petition before the High Court or the Sessions Judge at the instance of the complainant challenging the order of dismissal of complaint, one of the things that could happen is reversal of the order of the Magistrate and revival of the complaint. It is in this view of the matter that the accused or other person cannot be deprived of hearing on the face of the express provision contained in S.401(2) of the Code. The stage is not important whether it is pre - process stage or post - process stage.
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> xxxx xxxx
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> 53.... If the Revisional Court overturns the order of the Magistrate dismissing the complaint and the complaint is restored to the file of the Magistrate and it is sent back for fresh consideration, the persons who are alleged in the complaint to have committed the crime have, however, no right to participate in the proceedings nor are they entitled to any hearing of any sort whatsoever by the Magistrate until the consideration of the matter by the Magistrate for issuance of process."

There is yet another aspect of the matter. The operative portion of proviso to Sec.372 and the provision under Sec.4 of the Cr.P.C read as follows:

> Sec.372: No appeal to lie unless otherwise provided:
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> xxxx xxxx xxxx Provided that the victim shall have a right to prefer an appeal against any order passed by the Court acquitting the accused or convicting for a lesser offence or ::32::
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> Crl.M.C.No.2496 Of 2017 imposing inadequate compensation, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court.] *** *** *** "Sec.4: Trial of offences under the Indian Penal Code and other laws .-(1) All offences under the Indian Penal Code (45 of 1860) shall be investigated, inquired into, tried, and otherwise dealt with according to the provisions hereinafter contained.
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> (2) All offences under any other law shall be investigated, inquired into, tried, and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences."

However, no doubt, the provisions conceived in Sec.4(1) will not apply in the instant case as it is a complaint in respect of Sec.138 of the N.I.Act. But the provisions contained in Sec.4(2) would certainly apply for offence under Sec.138 of the N.I.Act and subject to condition that if there are any specific and special provisions in special enactments like Negotiable Instrument Act governing a particular scenario compared to the provisions of the Cr.P.C, then the provisions in the special law should be effectuated in view of the special clause in Sec.5 incorporated in the Cr.P.C, which reads as follows:

> Sec.5: Saving .- Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force. [See also State (Union of India) v. Ram Saran, reported in (2003) 12 SCC 578 = AIR 2004 SC 481].

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> Crl.M.C.No.2496 Of 2017
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> 14. It has been held by the Apex Court in State of Punjab v.

Balbir Singh reported AIR 1994 SC 1872 = 1994 3 SCC Cri. 634 p.643 that the expression "otherwise dealt with" appearing in sub-sec.(2) of Sec.4 of the Cr.P.C, does not necessarily mean something which is not included in the investigation, inquiry or trial and the word "otherwise" points out to the

fact that the expression "dealt with" is all comprehensive and that investigation, inquiry and trial are some aspects dealing with the offence. It has been also held in Delhi Administration v. Ram Singh reported in AIR 1962 SC 63 = (1962) 1 Cri.L.J 106 that the word "otherwise" appearing in that provision of the Cr.P.C points to the fact that the expression "dealt with" is all comprehensive and that investigation, inquiry and trial are some aspects "dealing" with offence and that the words "otherwise dealt with"

> refer to such dealing with offences as is provided in the Cr.P.C apart from the provisions for inquiry or trial. Therefore, in view of the wholesome principles contained in Sec.4(2) of the Cr.P.C, the provisions contained in the Cr.P.C not only in respect of inquiry and trial, but also in respect of appeals, revisions, etc., as contained in the Cr.P.C, would also be applicable in respect of a trial involving offence under Sec.138 of the N.I. Act, so long as there are no special provisions in that regard ::34::
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> Crl.M.C.No.2496 Of 2017 in the special statute. Since that is the position flowing from Sec.4(2) of the Cr.P.C, if the statute provides for a specific remedy by way of appeal or revision, then the aggrieved party is ordinarily bound to avail of such specific remedy. Of course, the inherent extra ordinary powers under Sec.482 of the Cr.P.C stand on a different footing. But this case is not in any manner concerned with the facts under Sec.482 of the Cr.P.C. The operative portion of Sec.372 of the Cr.P.C would stipulate that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code or by any other law for the time being in force. Secs.373, 374, 377, 378, 379, 380, etc., explicitly provide for invocation of the appellate remedy and the manner and method of seeking such appellate remedy. Secs.375 and 376 deal with the power of appeal in certain contingencies. In the instant case, it is not in doubt that the judgment/order of acquittal rendered by the trial court under the enabling powers under Sec.256(1) of the Cr.P.C could be challenged by firstly seeking special leave from the High Court for filing Criminal Appeal and after obtaining such special leave, to institute Criminal Appeal in that regard. When such remedy is so provided, then such aggrieved party has to necessarily recourse to that remedy and therefore it would be improper to hold that such aggrieved complainant will also ::35::
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> Crl.M.C.No.2496 Of 2017 have concurrent remedy of revision before the Sessions Court. In the light of these aspects, this Court is constrained to hold that the view taken by the Sessions Court that revision is maintainable as against the judgment/order of acquittal rendered under Sec.256(1) of the Cr.P.C is illegal and improper. For these reasons the impugned Anx-B order passed by the Sessions Judge, Palakkad, allowing Crl.R.P.No.59/2016 is set aside as the Sessions Judge did not have jurisdiction to entertain revision. The proper remedy for the aggrieved 1st respondent-complainant to challenge Anx.-A order of acquittal was to seek special leave before this Court for instituting Criminal Appeal as envisaged in Sec.378(4) of the Cr.P.C. Therefore, it is also held that it will be certainly open to the 1st respondent-complainant to work out his remedies as against Anx-A order of acquittal

strictly in accordance with law.

14. Before parting with these cases, this Court would place its deep appreciation for the effective assistance rendered by Sri.Sojan Micheal, learned Amicus Curiae and Sri.Saigi Jacob Palatty, learned Prosecutor, who has also assisted this Court, even though the State was only a formal respondent in the matter.

With these observations and directions, the Crl.M.C stands finally disposed of.

ALEXANDER THOMAS, Judge.

bkn/-