Benny Daniel vs M/S. Gold Galaxy on 9 February, 2007

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS

TUESDAY, THE 4TH DAY OF JULY 2017/13TH ASHADHA, 1939

Crl.Rev.Pet.No. 1956 of 2007 ( )

AGAINST THE JUDGMENT IN CRL.A. NO.367/2004 OF ADDITIONAL DISTRICT COURT, PATHANAMTHITTA DATED 09-02-2007.
AGAINST THE JUDGMENT IN CC. NO.162/2003 OF JUDICIAL FIRST CLASS MAGISTRATE COURT-II, PATHANAMTHITTA DATED 30-10-2004.

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REVISION PETITIONER: (APPELLANT/ACCUSED):

BENNY DANIEL, S/O. DANIAL,
ELLIRICKAL HOUSE, MANGARAM P.O.,
KONNI.

BY ADVS.SRI.T.M.ABDUL LATHEEF,
SMT.P.VIJAYALAKSHMI.

RESPONDENTS: (RESPONDENTS/COMPLAINANTS):

1. M/S. GOLD GALAXY,
1ST FLOOR, VIJAYAPURAM BUILDINGS,
GOOD SHAPHARED STREET, KOTTAYAM,
REPRESENTED BY ITS WORKING PARTNER,
SUN GEORGE ABRAHAM, S/O G.U. ABRAHAM,
CHALLIYIL HOUSE, CHALLIYIL ROAD, KOTTAYAM-686 001.

2. SUN GEORGE ABRAHAM, S/O G.U. ABRAHAM,
WORKING PARTNER, M/S GOLD GALAXY,
KOTTAYAM-686 001.

3. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

R2 BY ADV. SRI.ABRAHAM GEORGE JACOB.
R3 BY PUBLIC PROSECUTOR SRI.SAIGI JACOB PALATTY.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04-07-2017, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

rs.

"C.R"

ALEXANDER THOMAS, J.

Crl.R.P.No.1956 of 2007,
unnumbered in Crl.M.A. in Crl.R.P.1956/2007 (ZCRLMA 1956/2017)
&
unnumbered in Crl.M.A. in Crl.R.P.1956/2007 (ZCRLMA 1957/2017)

Dated this the 4th day of July, 2017.

O R D E R

The petitioner herein is the complainant in S.T.No.162/2003 on the file of the Judicial First Class Magistrate's Court-II, Pathanamthitta, in which respondents 1 and 2 herein, are arrayed as accused 1 and 2, alleging offence punishable under Sec.138 of the Negotiable Instruments Act. The cheque amount covered by the dishonoured Ext.P-1 cheque dated 28.2.2003 is for Rs.2.5 lakhs, which is said to have been drawn by the 1st accused partnership firm, etc. The trial court as per the judgment rendered on 30.10.2004 has convicted both the accused for the abovesaid offence and has sentenced A-2 (managing partner of the partnership firm) to undergo simple imprisonment for one year and further that A-1 and A-2 shall pay Rs. 2.5 lakhs as compensation to the complainant in terms of Sec. 357(3) of the Cr.P.C. and in default thereof, A-2 shall undergo simple imprisonment for six ::2::

> months. Aggrieved thereby, respondents 1 and 2 herein had filed Crl.Appeal No.367/2004 before the Court of Addl. Sessions Judge, Pathanamthitta. The appellate sessions court as per the impugned judgment rendered on 9.2.2007 has allowed the appeal by ordering the acquittal of both accused 1 and 2.

2. The complainant has filed the present Criminal Revision Petition by taking recourse to the remedies under Secs. 397 and 401 of the Cr.P.C. so as to impugn the abovesaid judgment dated 9.2.2007 of the appellate court, which led to the acquittal of accused 1 and 2. The learned counsel appearing for respondents 1 and 2 (A-1 and A-3) raised a contention that the remedy of a complainant, who is aggrieved by the judgment of acquittal in private complaint like the present one is to seek special leave of this Court under Sec.378(4) of the Cr.P.C. for prosecuting a criminal appeal before this Court so as to impugn the said judgment of acquittal. It is contended that since such an explicit remedy has been conferred on the complainant like the present petitioner, in terms of Sec.378(4) of the Cr.P.C., the bar under Sec. 401 (4) for entertaining a revision would lie and revision is not maintainable.

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3. Sri.T.M.Abdul Latiff, learned counsel appearing for revision petitioner has resisted the said plea of the accused and has also raised an alternate plea, that in case this Court holds that revision is not maintainable in view of the aforesaid aspects, this Court has the power to convert the revision petition, as an appeal in terms of the provisions contained in sub section (5) of Sec. 401. This submission was opposed by Sri.Abraham George Jacob, the learned counsel appearing for respondents 1 and 2 by stating that in the very scheme of things in Sec. 378(4), a special leave has to be obtained from this Court before the institution of a criminal appeal and what is conceived of in sub section (5) of Sec.401 of the Cr.P.C. is conversion of a revision petition to an appeal, provided the appeal is directly maintainable and in case where appeal can be instituted only after securing special leave of this Court, then the enabling provisions under sub section (5) of Sec.401 cannot be pressed into service. Presumably, in order to overcome this objection, the revision petitioner has filed the two aforecaptioned criminal miscellaneous applications and the prayer in one such application is to grant special leave to the petitioner to institute criminal appeal and prayer in the latter criminal miscellaneous application is to convert present revision petition to an appeal in terms of Sec. 401(5) of the Cr.P.C.

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4. Heard Sri.T.M.Abdul Latiff, learned counsel appearing for the revision petitioner (complainant), Sri.Abraham George Jacob, learned counsel appearing for R-1 & R-2 and Sri.Saigi Jacob Palatty, learned Prosecutor appearing for R-3 State.

5. There is no serious dispute regarding the basic factual aspects. The trial court had convicted accused 1 and 2, which has been reversed by the appellate sessions court. The said judgment of acquittal rendered by the appellate sessions court has been sought to be impugned by filing the present revision petition in terms of Sec.397 read with Sec.401 of the Cr.P.C.

6. The revision petition was filed on 23.5.2007 and was admitted on 24.5.2007, on which day the P.P. had taken notice for R-3 State and notice was ordered to issue to R-1 and R-2 (A-1 and A-2). Respondents 1 and 2 have entered appearance through counsel.

7. It will be pertinent to refer to the provisions contained in Sec. 378(4) of the Cr.P.C., which reads as follows:

> "Sec.378: Appeal in case of acquittal.- (1) Save as otherwise provided in sub- sec. (2), and subject to the provisions of sub-secs. (3) and (5),
>
> (a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal ::5::

passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.";

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code the "the Central Government may, subject to the provisions of ck472sub-sec.

(3), also direct the Public Prosecutor to present an appeal-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision";

(3) "No appeal to the High Court" under sub-section (1) or sub-section (2) shall be entertained except with the leave of the High Court.

(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.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant and sixty days in every other case, computed from the date of that order of acquittal.

(6) If, in any case, the application under sub-section (4) 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) or under sub-section (2)."

Sec. 397 and Sec. 401 of the Cr.P.C. provide 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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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 purposes 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 Sessions Judge, no further application by the same person shall be entertained by the other of them."

xxx xxx xxx

"Sec.401: High Court's powers of revision. (1) In the ca

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 authorise 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.

(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."

8. One of the contentions raised by the petitioner is that the bar under sub section (4) of Sec.401 for entertaining a revision petition ::7::

> would arise only if an appeal lies and where a revision petition is preferred without instituting an appeal, etc. Further that in the instant case involving a private complaint, it is well settled that by virtue of the provisions contained in Sec.378(4) of the Cr.P.C., the complainant aggrieved by the judgment of acquittal, is only given the right to file an application seeking special leave for permission of this Court to prosecute a criminal appeal and that therefore appeal does not directly lie through this process and that it is only after the filtration of securing special leave is secured, that thereafter the question of "arising of appeal" would come into play and that therefore the bar under sub section (4) of Sec.401 of the Cr.P.C. will not lie in a case relating to acquittal in a private complaint. Per contra, it is pointed out by Sri.Abraham George Jacob, learned counsel appearing for R-1 and R-2 that Sec.378 deals with appeals against acquittal and sub section (3) mandates that such appeal against acquittal as envisaged in sub sections (1) and (2) could also be instituted only after getting "leave" of the High Court, whereas in the case of private complaint, institution of a criminal appeal can be set in motion only after getting special leave as envisaged in sub section (4) of Sec.378. Accordingly, it is argued by respondents 1 and 2 that if the abovesaid hyper technical interpretation put forward ::8::
>
> by the petitioner regarding the applicability of the bar in sub section (4) of Sec. 401 is accepted, then the said bar will not apply in the case of any appeals against acquittal, as in all such cases, appeal does not directly lie as a matter of right, but could be instituted only after securing leave or special leave as the case may be, as envisaged in Sec. 378(3) or Sec. 378(4) as the case may be. Further that this Court while interpreting such a provision should make a wholesome appreciation of the entire scheme of appeals provided in the Cr.P.C. and it should be evaluated in the context of the basic principle in criminal jurisprudence that a judgment of acquittal would bolster the innocence of the accused, etc.

9. Sri.T.M.Abdul Latiff, learned counsel appearing for the revision petitioner (complainant) would also argue that the language employed in the beginning portions of sub section (4) and sub section (5) of Sec. 401 are identical words "where under this Code an appeal lies" and that if this Court holds the bar under sub-sec.(4) of Sec.401 would apply so long as the remedy by way of special leave is conferred by the statute as per Sec.378(4) of the Cr.P.C., then the same interpretation would also apply for construing the scope and ambit of the very same expression, "where under this Code an appeal lies", ::9::

> appearing in sub section (5) of Sec. 401. On this basis, it is contended by Sri.T.M.Abdul Latiff, learned counsel appearing for the revision petitioner that this Court should render a proactive interpretation of sub section of (5) of Sec. 401 so that technicalities should not further delay the challenges made against the judgment of acquittal, by dismissing a revision petition like the present one, which would have the result of compelling the petitioner to denovo start the process of filing special leave to challenge the impugned judgment of acquittal. In this regard it is pointed out that the appeal was admitted more than 10 years back and that the respondents have not raised any such objections as the present one and therefore the compelling interest of justice would require that this Court may take a proactive approach in granting special leave to the petitioner and then convert the revision as a criminal appeal having regard to the very long pendency of this revision. Per contra, Sri.Abraham George Jacob, learned counsel appearing for the accused would submit that he had raised this objection immediately after entering appearance, but that due to paucity of time and adjournments, the said objection could not be taken up for due consideration by this Court.

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10. The first issue to be decided is as to whether the bar under sub section (4) of Sec.401 would apply to the facts of this case. The contention raised by the petitioner is that in a case involving an acquittal in a private complaint, no appeal directly lies as of right and the aggrieved complainant can only prefer a special leave petition and only if special leave is granted by this Court, can he prefer an appeal as of right and that therefore the bar under sub section (4) of Sec. 401 will not apply, as appeal does not lies directly as of right, etc. The issue in that regard is no longer res intergra and is covered by the judgment of this Court (rendered by P.Subramonian Poti, J., as His Lordship then was) in the case in Krishanlal Oberoi v. Corpn. of Cochin , reported in 1979 KLT 75. That was a case relating to order/judgment of acquittal in a case instituted upon a complaint and the complainant without filing special leave application under Sec. 378(4) of the Cr.P.C., had preferred a revision to impugn the order of acquittal. The issue was as to the maintainability of such a revision. This Court held that by virtue of the provisions contained in Sec. 378(4) of the Cr.P.C. an appeal does lie against an order of acquittal in any case instituted upon a complaint and of course, an appeal lies only when special leave is obtained. The requirement that the complainant has to seek special leave and only if

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> it is granted, he can present the appeal, does not mean that no appeal lies against the order of acquittal. It was held that appeal does lie but subject to special leave. The contention that appeal must lie as a matter of right in order to attract the bar of Sec. 401(4) of the Code was overruled by this Court by holding that the said contention if so accepted, then in the 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", should be substituted. That it was held that such an interpretation is against the scheme of the provisions regulating the appeal against acquittal and held that even in such a case, the bar against revision as engrafted in Sec. 401(4) would apply. It will be pertinent

to refer to para 2 of the judgment of this Court in Krishanlal Oberoi's case supra, which reads 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 ::12::

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 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. 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."

11. A similar view was taken by this Court (rendered by Chief Justice K.Sankaran) in an earlier judgment in K.M.Antony v. V.K. Ibrahimkutty reported in 1960 KLT 481. It was held by this Court therein that the aggrieved complainant therein could have invoked the aid of Sec.417 (3) of the Cr.P.C. 1898 [corresponding to Sec. 378(4) of the Cr.P.C. 1973] and having not invoked that remedy, the revision against the acquittal was held to be barred in view of the provisions contained in Sec.439(5) of the Cr.P.C. 1898 [corresponding to Sec. 401 (4) of the Cr.P.C.].

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12. This Court has also held in the judgment in Thambi v. Sadanandan reported in 1998 (1) KLT 39, that for impugning an order of acquittal rendered by the magistrate under Sec.256(1) of the Cr.P.C., no revision would lie and the remedy is to file appeal under Sec.378(4) after obtaining special leave of this Court. It was held that if the said remedy under Sec.378(4) of the Cr.P.C. is not invoked, then the aggrieved complainant is barred from instituting a revision in view of the prohibition contained in Sec. 401(4) of the Cr.P.C. The position in this regard has been reiterated by this Court recently in the judgment in Shaji Jacob v. Shaji P. & Anr. reported in 2014 (4) KHC 98. So in view of the this well settled position, it is no longer in doubt that in the facts of this case, the aggrieved complainant's remedy against the acquittal is to invoke the provisions contained in Sec.378(4) of the Cr.P.C. and since such a remedy has been conferred by the Code, the remedy by way of revision is barred as mandated in Sec.401(4) of the Cr.P.C. So it is only to be held that the present revision petition instituted to impugn the judgment of acquittal in this case, is not maintainable before this Court.

13. The next issue is as to whether this Court could invoke the special provisions contained in sub section (5) of Sec.401 so as to grant special leave under Sec.378 to the petitioner and then to convert the ::14::

> present revision as an appeal. True that the beginning portions of both the provisions contained in sub section (4) and sub section of (5) of Sec. 401 have employed the same words, "Where under this Code an appeal lies". But it is to be borne in mind that these provisions contained in sub section (4) and sub section (5) will have to be construed taking into account the context in which those respective provisions operate and also taking into account the wholesome scheme envisaged by the Cr.P.C.

in the institution of appeals. For a meaningful interpretation of those words appearing in the sub section (5) of Sec. 401 in contradistinction to that in sub section (4) thereof, it may be pertinent to take into account the brief overview of the historical origins of criminal jurisprudence. This Court in the judgment rendered by Chettur Sankaran Nair, J., in the case Aboobaker v. M. Ratna Singh reported in 1992 (1) KLT 41, has referred to the historical origin in that regard in the Anglo Saxon Criminal Legal system as can be seen from a reference to paras 15 to 17 thereof, which read as follows:

> "15. In the early days, the Public Prosecutor was like any other counsel who would press for a verdict for his client. Over the years, the office was chiselled into a public

> office. J.L1.J. Edwards in 'Law Officers of the Crown', has traced the growth of the office of the Public Prosecutor in England. Prosecution of offences was left in the hands of private persons in that country, as noticed by Sir Fitz James Stephen in 'History of Criminal Law'. According to Sir Theobald Mathew, there was no public prosecutor in England, in the true sense of the term. About the manner in which prosecutions were conducted, Lord Chief Justice Campbell observed:
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> ::15::
>
> The Criminal Law is most shamefully perverted to serve private purposes".
>
> "

However, in Scotland prosecutions were under the supervision of the Lord Advocate. Ireland followed suit with its indigenous machinery of Crown Solicitors. The United States and many Common Wealth Countries adopted the principle that enforcement of criminal law is a federal or State function, thus eschewing the inquisitorial features in European system of criminal prosecutions. The winds of change swept the landscape. Change was heralded with the introduction of the Public Prosecution Bill in 1873. In 1879, a new approach was tried by Sir John Holkers, the Attorney General. A full-fledged office of the Solicitor of Public Prosecution emerged, and this later became the office of the Director of Public Prosecutions. Prosecution of Offenders Act, 1884 and the appointment of Sir Augustus Stephenson as Director of Public Prosecutions, mark the beginning of modern era. With the succession of Sir Hamilton Cuffe, "the most thankless office under the Crown" became an institution and the office of the Public Prosecutor became a public office in its true sense. The English pattern came to stay in India. Today, it is beyond doubt that Public Prosecutor represents public interest, and that he acts as the Minister of Justice of the Court.

16. Kenny's 'Outline of Criminal Law' gives a vivid picture of the office and its duties:

> ".....A prosecuting counsel stands in a position quite different from that of an advocate who represents the person accused or represents a plaintiff or defendant in a civil litigation. For this tatter advocate has a private duty - that of doing everything that he honourably can, to protect the interests of his client He is entitled to 'fight for a verdict'. But the Crown counsel is a representative of the State, "aminister of justice'; his function is to assist the jury in arriving at the truth. He ant oat urge any argument that does not carry weight in his own mind, or try to shut out any legal evidence that would be important to the interests of the person accused .....But there is no rule or principle of practice that the prosecution must call witnesses irrespective of considerations of number and of reliability, or that the prosecution should discharge the functions of both prosecution and defence. It is regarded as proper, and enough, for the prosecution to : the defence with any relevant information which has come into their hands so that the have the opportunity to use it if they desire....."

17. Judicial pronouncements dealing with the functions of the Public Prosecutor also may be noticed. In Seneviratne v. R. (1936(3) All England Reports

36), the Judicial Committee of Privy Council, outlined the functions and responsibilities of the Public Prosecutor. In that case, two of the fifty four prosecution witnesses were not called, and dealing with a contention similar to the one raised by petitioner, the Judicial Committee stated:

> Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this, which is so dependent on the particular ::16::
>
> circumstances of each case. Still less, do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence."
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> (emphasis supplied) In Dallison v. Caffery (1965) l Q.B. 348 (CA)), Lord Denning M.R. dealing with a charge of withholding evidence, observed:
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> This contention seems to me to be based on the erroneous proposition that "
>
> it is the duty of a prosecutor to place before the court all the evidence known to him, whether or not it is probative of the guilt the accused person. A prosecutor is under no such duty. His duty is to prosecute, not to defend. If he happens to have information from a credible witness which is inconsistent with the guilt of the accused, or helpful to the accused, the prosecutor should make such witness available to the defence. But, it is not the prosecutor's duty to resolve a conflict of evidence from apparently credible sources. The prosecutor's knowledge that there is such a conflict, does not itself constitute lack of reasonable and probable cause for the prosecution, nor is it inconsistent with the prosecutor's honest belief that there is a case against the accused (emphasis supplied)"
>
> 14. In para 15 of the above judgment, this Court has referred to the earlier days when the public prosecutor was like any other counsel, who would press for a verdict for his client and over the years, the office was chiseled into a public office. Earlier, prosecution of offence was left in the hands of private persons in England, as noticed by Sir Fitz James Stephen in 'History of Criminal Law'. etc. and that Lord Chief Justice Campbell lamented that "The Criminal Law is most shamefully perverted to serve private purposes". , etc. It is from such a position that the prosecutoral system was slowly and gradually built up to become an independent institution so that the repository of the power of ::17::
>
> prosecution is predominantly vested with the State so that it is not left to be handled by private individual, which may give rise to perpetuation of private vendettas etc.,

> Therefore, when provisions are engrafted by the Parliament in a law like the Code of Criminal Procedure to regulate the procedure, the same have to be strictly and faithfully followed. That apart, it will also be relevant to refer to Sec.4 of the Cr.P.C which reads as follows:
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> "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.
>
> (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."

No doubt, Sec.4(1) will have no application in the special law like the Negotiable Instruments Act. But the provisions contained in Sec.4(2) would apply so long as there are no provisions to the contrary in the special statute dealing with the offence concerned. Therefore, going by the wholesome principles envisaged by the Parliament and as reflected in sub-sec.(2) of Sec.4, that offence under any special law should be inquired into or tried and otherwise dealt with according to the same provisions of the Code, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, ::18::

> trying or otherwise dealing with such offences. 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 savings 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]. 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 ::19::

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 will apply to offence created under Sec.138 of the N.I. Act, not only in respect of inquiry and trial, but also in respect of appeals, revisions, etc., as contained in the Cr.P.C, so long as there are no special provisions in that regard 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. Hence, the provisions contained in the Cr.P.C to the extent it covers matters relating to inquiry, trial and even aspects thereafter like appeals, revisions, etc., would also be covered by the specific provisions in the Code in the absence of any special provisions in the special law concerned. Therefore, when the Code has made a specific and explicit remedy as the one under Sec.378(4) of the Cr.P.C, then recourse of the ::20::

same has to be faithfully followed and the same cannot be whittled down.

15. There is yet another aspect of the matter. It has been held by the Apex Court in Pudhu Raja and another Vs. State reported in (2012) 11 SCC 196 = (2013) 1 SCC (Cri) 430, that, the elementary principle of criminal jurisprudence in commonwealth jurisdictions is that the accused is presumed to be innocent until he is found guilty in the trial and over and above that, the acquittal rendered by the trial court would bolster the innocence of the accused. When that be the position, the Parliament has felt it necessary that stringent provisions as in Sec.378 (4) of the Cr.P.C should be engrafted so as to strictly fetter and regulate the appellate process to impugn involving acquittal of the accused. It may also be noted that for the cases covered by sub-secs.(1) & (2) of Sec.378, the Parliament has envisaged that appeals in such cases would be instituted only with "leave of the High Court". Whereas in the case of acquittal in private complaints, Parliament has more emphatically mandated in Sec.378(4) that special leave of the High Court has to be obtained before the institution of Criminal Appeal to impugn the judgment of acquittal. So compared to the provisions in Sub-secs.(1) and (2) of Sec.378 or other provisions facilitating appellate remedy, the ::21::

Parliament has certainly envisaged a more strict and rigorous filtering process before a Criminal Appeal could be instituted in acquittal matters and such criminals appeals could be filed only after securing special leave of the High Court in terms of Sec.378(4) of the Cr.P.C. These aspects should be viewed from the backdrop of the principles in criminal jurisprudence that criminal legal system should not be

permitted to be shamefully perverted to serve private purposes and also taking into account the crucial principles that the acquittal of an accused would bolster his innocence. It is to be seen that these provisions as in Sec.378(4) of the Cr.P.C should be strictly construed for its effective enforcement as otherwise it would lead to upsetting the whole scheme laid down by the Parliament for regulating the appeals against acquittal which should be appreciated in the backdrop of the above said crucial principles of criminal jurisprudence as mentioned hereinabove. Moreover, the beginning portion of Sec.401(5) containing the words "where under this Code, an appeals lies....." should be understood in the context of the requirement in that provision, that the revision petition should be capable of being directly converted as an appeal. Where the applicant is compelled at the threshold to seek special leave for getting permission to file appeal, there is no question of ::22::

directly converting the wrongly filed revision as an appeal, as institution of appeal at that stage cannot even be contemplated. So the inevitable consequence flowing from these aspects in that conversion of such a wrongly filed revision shall have the drastic effect of overriding the provisions in sub-secs.(4) & (5) of Sec.401 as well as that in sub- secs.(4), (5) & (6) of Sec.378. An accused in a complaint who has lawfully secured acquittal can be subjected to an appellate process only after strict compliance of those provisions, as otherwise it will amount to violating the "due process clause" of just, fair and reasonable procedure engrafted in Article 21 of the Constitution of India. In the light of these aspects, this Court is constrained to take the view that without securing special leave, there is no question of institution of Criminal Appeal and therefore, there is no question of converting a revision into an appeal in a case like this by invoking the provisions in sub-sec.(5) of Sec.401. It is primarily because, as of now without securing special leave there is no question of institution of a criminal appeal for challenging the judgment of acquittal in a private complaint. In case an accused is convicted and he wrongly files a revision without invoking the appellate remedy against conviction as envisaged in Sec.374 of the Cr.P.C, then certainly the accused could seek conversion of his wrongly ::23::

filing Criminal Revision Petition as a Criminal Appeal as he has the right to file an appeal against conviction in terms of Sec.374 of the Cr.P.C, which is not hedged with any conditions requiring special leave or leave, etc.

16. A learned Single Judge of this Court in the decision in Raveendran v. State of Kerala, reported in 2008 (3) KLT 650 = 2008 (3) KLJ 476, has held that a separate application seeking special leave under Sec.378(4) is mandatory when it comes with the prayer for grant of leave under that provision. But that in the absence of any contra stipulation in the Code of Criminal Procedure, it can be insisted that an application for special leave under Sec.378 (4) of the Cr.P.C, can be accompanied by a copy of the proposed appeal. Further that an application seeking special leave under Sec.378(4) must be accompanied by a copy of the proposed appeal thereof and once leave is granted, appeal should be numbered and notice could be ordered without the

> requirement of such appeal being called before the Bench for admission, etc. It was held that filing of an application for special leave and then filing of the appeal memorandum results in unnecessary repetition of work. A Division Bench of this Court in Johnson v.

Sebastian, reported in 2010 (1) KLT 498, has overruled the said decision ::24::

> of the learned Single Judge in Raveendran's case (supra) and that sub- Sec.(4) of Sec.378 Cr.P.C, postulates filing a separate application seeking special leave to appeal whereas sub-sec.(3) of Sec.378 only provides that no appeal to the High Court at the instance of the State or the agencies under it shall be entertained except with the leave of the court whereas a complainant other than a public officer cannot do so without obtaining special leave by filing an application for this purpose and that the judicial practice and process will have to be given due weight and consideration and that the Registrar whose powers and duties have been clearly delineated in the Rules, cannot be assigned additional judicial functions by the Court unless it is permissible under law or procedure prescribed. Thus it was held that direction issued by the learned Single Judge in Raveendran 's case (supra) to present the memorandum of appeal along with application for special leave filed under Sec.378(4) of the Cr.P.C cannot be sustained and it is only the applicant, who has obtained special leave, who is entitled to present the appeal separately within the period of limitation prescribed under Limitation Act, 1963. So the said decision of the Division Bench in Johnson v. Sebastian, reported in 2010 (1) KLT 498 (supra), would clearly show that the procedure under Sec.378(4) of the Cr.P.C is quite distinct and rigorous ::25::

> compared to the procedure seeking "leave" of the High Court in cases covered by Sec.378(4), which is applicable to the situation mentioned in sub-secs.(1) & (2) of Sec.378. This is because for appeal against acquittal in complaint cases aggrieved complainant has to secure special leave of the court as mandated in Sec.378(4) whereas Sec.378(3) only envisages obtaining a "leave" of the High Court. So once the statute has prescribed the rigorous procedure for seeking special leave under Sec.378(4) and that the appeal could be preferred by the aggrieved complainant against judgment of acquittal only after securing special leave from the High Court, then the said rigorous procedure has to be necessarily complied with and the same cannot be made a dead letter or whittled down.
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> 17. If a victim who is aggrieved by the judgment of acquittal, has wrongly filed a revision, then probably, the same could be considered for conversion as an appeal in terms of Sec.401(5) of the Cr.P.C so long as the victim could competently exercise the right to file appeal against conviction in terms of proviso to Sec.372 of the Cr.P.C.

In such cases, it may be prima facie observed that since such an appeal is maintainable in terms of proviso to Sec.372 of the Cr.P.C, without any special leave, etc., then the above said facility under Sec.401(5) could be ::26::

> appropriately pursued. However, this Court would make it clear that this Court is confining its consideration of the issues only in case the complainant is conferred with the right to file an application for special leave under Sec.378(4) of the Cr.P.C. and who wrongly files a revision as in the instant case. The issue as to whether or not the bar contained in Sec.401(5) of the Cr.P.C is applicable in the cases of situation covered by sub-secs.(1) & (2) of Sec.378, which insist to seek only leave in terms of Sec.378 (3) [in contradictions to special leave in terms of Sec.378(4) of the Cr.P.C] is not the subject matter of the consideration in this case and needless to say those issues are left open to be considered in appropriate cases, when such an issue actually arises for consideration. It is relevant to note that a Division Bench of this Court in Omana Jose v. State of Kerala reported in 2014 (2) KLT 504 = 2014 (2) KHC 277 has categorically held that complainant in offence involving Sec.138 of the N.I.Act, who is aggrieved by the acquittal of the accused, is not entitled to pursue the appeal remedy under the proviso to Sec.372 and in such cases the remedy of the aggrieved complainant is only to seek the special leave of this Court seeking permission to file criminal appeal to impugn such judgment of acquittal as envisaged in Sec.378(4) of the Cr.P.C. The contra position laid down by a learned ::27::
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> Single Judge of this Court in Shibu Joseph & others v. Tomy K.J. & others reported in 2013 (4) KHC 629 was thus overruled by the Division Bench in Omana's case (supra)

18. The Apex Court in the judgment in The Assistant Registrar of Companies, West Bengal, Culcutta v. Standard Paint Works (Pvt) Ltd. & ors. reported in AIR 1971 SC 1115, dealt with a case where an appeal filed under Sec.417(3) of the Cr.P.C [corresponding to Sec.378(4) of the Cr.P.C, 1973] against an acquittal of a complaint by the Assistant Registrar of Companies was held to be incompetent as it was so done without obtaining a special leave within the time prescribed by Sec.417 (4) of the Cr.P.C, 1898 [corresponding to Sec.378(5) of the Cr.P.C1973], etc. The Apex Court held in para 11 of that judgment that Article 114 of the Limitation Act, 1963, requires appeal under sub-sec.(3) of Sec.417 of the Cr.P.C to be filed within 30 days from the date of the grant of special leave. It was noted that no application for the grant of special leave was made from that order of acquittal and orders of acquittal were passed on 4.4.1968 and the memorandum of appeals were presented on 1.7.1968 and the appeals were rightly not entertained by the High Court because first there was no application for grant of special leave under Sec.417 (3) of the Cr.P.C and secondly, the ::28::

> appeals were incompetent as the same same was preferred without obtaining special leave and thus they are barred by limitation. More crucially, it was held in para 11 thereof that an appeal under Sec.417 (3) of the old Code against acquittal is competent only when there is special leave granted by the High Court and on obtaining special leave an appeal is thereafter filed within 30 days of the grant of leave.

Therefore, the Apex Court has also emphasised the significance and importance of compliance of the statutory and rigorous procedure for obtaining prior special leave for the aggrieved complainant before he/she could competently present appeal against such a judgment of acquittal in complaint

proceedings. Thus the judgment of the Division Bench of this Court in Johnson v. Sebastian, reported in 2010 (1) KLT 498 and The Assistant Registrar of Companies, West Bengal, Culcutta v. Standard Paint Works (Pvt) Ltd. & ors. reported in AIR 1971 SC 1115, would clearly show that the complainant, aggrieved by the judgment of acquittal, is to strictly comply with the rigorous procedure of special leave before he is permitted to competently file an appeal. Therefore, without obtaining special leave, there is no question of institution of any appeal. These aspects would also reinforce the conclusion of this court that it is statutorily impermissible to bye-pass this procedure so as to ::29::

> convert a wrongly filed revision of the aggrieved complainant directly as an appeal in terms of Sec.401(5) of the Cr.P.C.
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> 19. Faced with the situation, Sri.T.M.Abdul Latiff, learned counsel for the petitioner, has placed reliance on an unreported judgment of the Madras High Court in Crl.R.C(MD).No.43/2008, wherein it has been held in para 15 thereof as follows:
>
> '15. of course, it is true that when a revision is filed by a person with a belief that no appeal lies, the High Court under Section 401(5) Cr.P.C can treat the revision as an appeal petition and dispose of the same. The above said general provisions shall be applicable in all cases wherein there is no condition precedent is prescribed for preferring the appeal. Moreover, sub-section 5 of Section 401 does not make it mandatory on the High Court to treat the revision as an appeal and it gives a discretion (of course, a judicial discretion) to the High Court to treat the revision as an appeal petition. In a case wherein the presentation of the appeal itself is made contingent on the grant of "special leave", an application seeking special leave for filing appeal is to be preferred within the time stipulated under sub-section (50 of Section 378 Cr.P.C converting a revision when no "special leave" was obtained, that too after the period stipulated in Sub-section (5) of Section 378 Cr.P.C. will amount to improper exercise of the discretion. Conversion of such revision into appeal which shall have a drastic effect of making the provisions found in Sub-sections (4) and (5) of Section 378 Cr.P.C. a dead letter in statute book so far as that particular case is concerned. The proper exercise of such discretion shall be to reject the prayer for conversion of the revision into al appeal, if such a request is not made within the time prescribed under sub-section 5 of Section 378 Cr.P.C. and no such application seeking special leave contemplated under Section 4 of Section 378 is filed within that time. If that time stipulated in sub-section (5) of 378 Cr.P.C. is allowed to expire, thereafter, the prayer for conversion of the revision into an appeal cannot be entertained and the exercise of the discretion in favour of such conversion shall be an improper exercise of the judicial discretion. Hence, this Court comes to the conclusion that the submission made by the learned counsel for the petitioner that the revision can be treated as an appeal petition and the same can be heard and disposed of as an appeal, is bound to be rejected.' Based on the observations in Madras High Court in para 15 (supra), Sri.T.M.Abdul Latiff, learned counsel for the petitioner, would urge that ::30::

in the present case, the limitation period for filing special leave is 60 days as prescribed in sub-sec (5) of Sec.378 and that in the instant case, the petitioner has filed Revision Petition on 23.5.2007, which is within the said period. It is pointed out that Madras High Court in para 15 of the said judgment has held that conversion of such a revision into appeal will have the drastic effect of making sub-secs.(4) and (5) of Sec.378, a dead letter so far as the particular case is concerned and proper exercise is to reject the request for conversion of revision into appeal if such a request is not made within the time prescribed in Sec.378(5) and that if the time stipulated in Sec.378(5) is allowed to expire, thereafter, the prayer for conversion of the revision into an appeal cannot be entertained and the exercise of discretion in favour of such conversion will be improper exercise of the judicial discretion, etc. On a consideration of these issues, this court is in agreement with the above said view rendered by the Madras High Court that converting a revision with special leave will amount to improper exercise of the judicial discretion and such conversion of revision into appeal will have the drastic effect of making the provisions of sub-secs.(4) & (5) of Sec.378, a dead letter in the statute book, etc. However, this Court is not in agreement with the other observations in the said judgment of the ::31::

Madras High Court, which proceed on the premise that if the request for conversion is made within the time prescribed in Sec.378(5), then revision could be converted into an appeal, etc. In the considered opinion of this Court it makes no difference whether the request for conversion is made within the time limit prescribed in Sec.378(5) or beyond that. The heart and soul of the matter is as to the strict adherence to the procedure established by law, in the matter of deprivation of the personal liberty of an accused and not merely placing hyper technical hurdles before an aggrieved complainant like the present one. The above said principles flowing from Sec.4(2) of the Cr.P.C when interpreted in the backdrop of aforementioned well established principles of criminal jurisprudence would persuade this Court to reach the considered conclusion that where the remedy is to seek special leave and the party wrongly files a revision, then there is no power vested with the court to convert such a revision into an appeal and the position is not different irrespective as to whether the request for such conversion has been filed within the period of limitation prescribed for filing such leave application as envisaged in Sec.378(5) of the Cr.P.C. Moreover, in the instant case, though the present revision petition filed on 23.5.2007 may be within the time prescribed in ::32::

Sec.378(5), but the request for conversion of revision into appeal has been made by the present Crl.M.A only on 8.3.2017, which is far beyond that prescribed time limit. So if the present plea of the petitioner is to be considered, then grant of special leave, should necessarily be proceeded by condoning delay beyond the time limit prescribed in Sec.378(5). Any such consideration of delay condonation in the present revision proceedings will be, as overriding the scheme of the statute as envisaged in sub-secs.(4) & (5) of Sec.378. In the light of these aspects, it is only to be held that the

revision petition as well as the two Criminal Miscellaneous Applications filed subsequently by the petitioner are not maintainable.

20. Faced with the situation, Sri.T.M.Abdul Latiff, learned counsel for the petitioner, would submit that in case this Court is so inclined to take the above view, then it may be without prejudice to the right of the petitioner to invoke his appropriate remedy by way of institution of special leave and this Court may further clarify that the period of pendency of the revision petition from 23.5.2007 (date of filing of the revision) up to now, should be excluded for the purpose of computing the period of limitation in terms of Sec.378(5) of the Cr.P.C. by invoking the provisions of time exclusion as contained in Sec.470 of the Cr.P.C and Sec.14 of the ::33::

Limitation Act. Sri.Abraham George Jacob, learned counsel for the respondent-accused, would point out that the provisions contained in Sec.14 of the Limitation Act may not aptly apply in criminal proceedings inasmuch as the said provisions explicitly speaks about its applicability in "civil proceedings". He would further point out that the said plea of time exclusion is the one which has to be considered when such an application is filed before the appropriate forum and not at the present stage. Sri.T.M.Abdul Latiff, learned counsel for the revision petitioner would also point out that in view of the judgment of the Apex Court in Mangu Ram & anr. v. Municipal Corporation of Delhi, reported in (1976) 1 SCC 392, the provisions contained in the Limitation Act, 1963, will apply in the matter of delay condonation applications which may be filed even in respect of criminal proceedings, etc., and further that time exclusion is explicitly permitted Sec.470 of the Cr.P.C.

21. Having considered these aspects of the matter dealt with hereinabove, this Court would certainly hold that dismissal of the revision petition and the criminal miscellaneous applications shall be without any prejudice whatsoever to the rights of the revision petitioner-complainant to invoke his appropriate remedy in accordance with law. As regards the plea for time exclusion, this court would only observe that it is not proper for this Court to consider those aspects in the present proceedings and it is ::34::

for the petitioner to raise the said aspect of time exclusion as and when he invokes the appropriate remedy.

22. At this juncture, Sri.T.M.Abdul Latiff, learned counsel for the petitioner, would submit that this Court may direct the Registry to return back the certified copies of the judgment of both the courts below so that the petitioner can forthwith prosecute his proper remedy to file application for special leave under Sec.378(4) of the Cr.P.C. In this regard, it is ordered that the Registry will forthwith return back the certified copies of the impugned judgment to the petitioner's counsel if a request in that regard is made by him.

23. Before parting with this case this Court would place on record the appreciation of the able and competent assistance rendered by the learned Advocates on both sides for resolving the subtle and intricate issues issues in the matter.

With these observations and directions, the Crl.R.P and the two Criminal Miscellaneous Applications will stand dismissed as not maintainable and with the above said liberty to the petitioner.

ALEXANDER THOMAS, Judge.

Sdk/bkn