

For Respondent : Mr.P.Ganapathisubramanian
(in CrI.A(MD)No.20/2014 &
Petitioner in CrI.R.C(MD)No.237 of 2014)

JUDGMENT

Criminal Appeal No.20 of 2014 has been preferred against the judgment of the learned Additional District and Sessions Judge, Special Court for EC and NDPS Act Case, dated 26.12.2013 pronounced in CrI.A.No.13 of 2011 reversing the judgment of acquittal passed by the learned Judicial Magistrate, Pudukottai in S.T.C.No.124 of 2008. The said case in S.T.C.No.124 of 2008 came to be instituted on a complaint against the appellant for an alleged offence under Section 138 of the Negotiable Instruments Act, 1881. The trial Court acquitted the appellant herein/accused. As against the acquittal, the complainant preferred an appeal before the lower Appellate Court under Section 372 proviso Cr.P.C. The learned lower Appellate Judge allowed the appeal, set aside the order of acquittal passed by the trial Court, convicted the appellant herein/accused for the offence under Section 138 of the Negotiable Instruments Act, 1881 and sentenced him to undergo simple imprisonment for six months and to pay a fine of Rs.10,000/- with a further direction to undergo simple imprisonment for three months in case of default in payment of the fine. As against the above said judgment of the appellate Court, the appellant/accused has preferred Criminal Appeal (MD)No.20 of 2014.

2.The respondent in the said Criminal Appeal, namely, the complainant has chosen to file Criminal Revision Case (MD)No.237 of 2014 under Sections 397 read with 401 Cr.PC complaining that the sentence imposed is inadequate and praying for enhancement of punishment. Both the cases are taken up together and are being disposed of by this common judgment.

3.The arguments advanced by Mr.M.Karunanithi, learned counsel for the appellant in Criminal Appeal (MD)No.20 of 2014 who is the respondent in Criminal Revision Case (MD)No.234 of 2014 (accused) and Mr.P.Ganapathisubramanian, learned counsel for the respondent in the Criminal Appeal/Petitioner in the Criminal Revision Case (complainant) are heard. The materials available on record are also perused.

4.In this judgment, the appellant and the respondent in CrI.A(MD)No.20 of 2014 shall be referred to as ?appellant? and ?respondent? respectively.

5.Learned counsel for the appellant in Criminal Appeal/ respondent in Criminal Revision Case (accused) without adverting to the facts of the case confined his arguments with regard to the challenge made to the judgment of the lower appellate Court on a legal issue namely, jurisdiction of the lower appellate Court to entertain the appeal.

6.According to the submissions made by the learned counsel for the appellant, an appeal against an order of acquittal passed in a case instituted on complaint shall be governed by Section 378 (4) and (5) of Code of Criminal Procedure, 1973 and the right of appeal conferred on the victim under

Section 372 proviso shall not be available to a victim who is also the complainant when the criminal case was instituted based on his complaint. To strengthen his submission, learned counsel for the appellant (accused) took the Court through the relevant provisions cited above and argued that the proviso to Section 372 Cr.P.C should be understood in the light of the object sought to be achieved by the amending Act introducing the amendment and that if such an approach is made, this Court cannot come to any other conclusion than the one in support of his contention.

7.It is the contention of the learned counsel for the appellant that a proviso should not be read disjunctively or independent of the main provision and that it should be interpreted either as an explanation or as an exception to the main provision, as the case may be. According to the submissions made by the learned counsel for the appellant, Section 372 reiterates the point which has been incorporated in the Code that no appeal will lie against any order or judgment unless such an appeal is provided in any other provision of the Code and that the same is the reason why the Section itself has been couched in a negative language to the effect that no appeal will lie against any order or judgment unless such an appeal is provided under any other provision of the Code. According to the submissions of the learned counsel for the appellant, if such an approach is made, the proviso found in Section 372 should be confined to its applications to those cases which are not covered by any other provision found in the Code of Criminal Procedure providing for appeal.

8.It is also the contention of the learned counsel for the appellant that as per Section 372, if a victim figures as a complainant and he is given a right to challenge the order of acquittal in a case instituted on complaint, it would amount to conferring a double benefit on such a person who figures as victim as well as the complainant, besides making the appeal provisions provided in Section 378 (4) and (5) otiose, ineffective and a dead letter.

9.On the contrary, Mr.P.Ganapathisubramanian, learned counsel for the respondent (complainant) would submit that since the proviso to Section 372 Cr.P.C does not make any distinction between a victim-complainant and a victim in a case instituted on police report, the plain meaning of the term 'victim' should be applied in interpreting the proviso to Section 372 Cr.P.C and that if such a meaning is applied to the term 'victim' found in the proviso to Section 372, the complainant can be construed to be a person on whom such right of appeal has been conferred under the said proviso.

10.This Court paid its anxious considerations to the rival submissions made on both sides.

11.Section 372 of Code of Criminal Procedure, 1973, reads as follows:

§372.No appeal to lie unless otherwise provided:- 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:

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 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?.

12.It is pertinent to note that the proviso was inserted by Act 5 of 2009 and it came into effect from 31.12.2009.

13.Section 378 of the Code of Criminal Procedure dealing with appeals in case of acquittal reads as follows:

378.Appeal in case of acquittal.

(1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (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 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 Central Government may, subject to the provisions of sub-section (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).

14. A comparative study of Sections 372 and 378 will make it clear that the learned counsel for the appellant is right in raising a contention that the applicability of Section 372 proviso should be confined to cases not governed by Sections 373 to 383 Cr.P.C. The entire scheme of Code of Criminal Procedure dealing with criminal cases instituted on complaint and instituted on police report will make it clear that the Parliament by enacting the relevant provisions wanted to deal with the said cases as two different categories applying different procedures right from the stage of taking cognizance till pronouncement of judgment and also regarding appeals. So far as the cases instituted on police report are concerned, provisions are made for the State to prefer an appeal not only against the acquittal but also against the inadequacy of sentence.

15. So far as the cases instituted on complaint are concerned, irrespective of the fact whether the complainant is a private individual or a public servant, the Code prescribes a condition that an appeal against acquittal in such cases can be preferred with the Special Leave of the High Court. The same means that in cases of acquittal in complaint cases passed by the learned Judicial Magistrates or Courts subordinate to the Sessions Judges, no appeal shall lie to the Sessions Court and it shall lie only to the High Court, that too, with the Special Leave of the High Court under Section 378 (4) of Cr.P.C. Sub Section 5 of the said Section provides that such leave shall be applied for within sixty days, in case the complainant is any other person than a public servant and within six months, in case the complainant is a public servant. A consideration of Section 378 will make it clear that it provides a code within the Code namely, a special provision for dealing with the appeals against acquittal in complaint cases. When such a special provision is there, the general provision namely, Section 372 and the proviso attached to it shall stand excluded by the special provision namely Section 378 (4) and (5) of Cr.P.C. In this regard, there had been divergent views among the High Courts.

16. The Hon'ble Division Bench of the Kerala High Court, in Omanajose and another Vs. State of Kerala and others reported in 2014(2) MWN (Cr) DCC 22, after going through the relevant provisions, namely Sections 372 and 378 Cr.P.C has rendered a clear finding that the term 'victim' found in Section 2 (wa) of Cr.P.C needs a harmonious construction and if such a harmonious construction is made then the term 'victim' would not include a complainant even though he might have suffered injury or loss by the act complained of. In arriving at such a conclusion, the Hon'ble Division Bench of the Kerala High Court held that one Section should not be interpreted so as to defeat another provision found in the very same Code. The Hon'ble Division Bench of the Kerala High Court made a clear observation that if the term 'victim' found in Section 372 is given wider meaning to include the complainant also, then it will be destructive of the provision found in Section

378 (4) and (5). It was also commented upon by referring to the language of the main part of Section 372.

17. According to the Hon'ble Division Bench of the Kerala High Court, as contended by the learned counsel for the appellant in the present case, the proviso found in Section 372 should be made applicable only to those cases which are sought to be covered by the main Section of 372. Section 372 is general in its application and it has also been couched in a negative language that no appeal shall lie against any order or judgment unless otherwise provided somewhere else in the Code. Hence, as rightly contended by the learned counsel for the appellant, the scope of Section 372 Cr.P.C should be limited to the cases which are not governed by Sections 373 to 383 Cr.P.C. The proviso has been inserted subsequently only as an exception to the main provision and enlarging the application of the proviso beyond the scope of the main proviso shall not be in tune with the principles of interpretation of statutes. In addition, if at all the Legislature intended to do away with the requirement of seeking Special Leave against the orders of acquittal passed in complaint cases, provision could have been made in the very same amending Act for the deletion of sub-sections 4 and 5 of Section 378. As the Legislature was conscious of the relief available to a complainant who may be the victim of the crime, the amendment was intended to enable the other victims namely, victims of the crimes in cases instituted on police report to file an appeal against acquittal. There was no provision before the 2008 amendment enabling the victim to file an appeal against acquittal and hence, this proviso was introduced only to cover those persons who were left with no remedy of appeal.

18. When a similar question arose before the Hon'ble Supreme Court in Subhash Chand Vs. State (Delhi Administration) reported in (2013) 2 SCC 17, Their Lordships of the Hon'ble Supreme Court made it clear that a complainant cannot file an appeal against acquittal in the Court of Session. Though the scope of Section 372 proviso was not canvassed and considered by the Hon'ble Supreme Court in the said case, it will provide a necessary clue that complainants are treated differently than the State and the victims in cases instituted on police report.

19. In view of the discussions made above, I am of the considered view that the term 'victim' found in the proviso to Section 372 Cr.P.C shall not include a victim who is a complainant in a complaint case and that the term 'victim' used in the said proviso shall be confined to the victims in cases instituted otherwise than on a complaint. In the case on hand, the criminal case was instituted on the file of the trial Court on a complaint made by the respondent/ complainant. In fact, the offence is a non-cognizable offence and hence there can be no other mode of institution of the criminal case than by preferring a complaint to the Magistrate. The offence alleged is one punishable under Section 138 of the Negotiable Instruments Act, 1881. As the case ended in acquittal before the trial Court, the remedy available to the respondent herein (complainant) was to approach this Court (High Court) under Section 378 (4) within the period stipulated in Section 378 (5) seeking Special Leave to file an appeal against acquittal. Instead of adopting such a procedure, the respondent herein (complainant) chose to prefer an appeal under the Proviso to Section 372 Cr.P.C before the Sessions Court and the learned Appellate Judge either without considering the scope of the Proviso to Section 372 or in an erroneous interpretation of the said provision, assumed jurisdiction and decided the appeal which went against the appellant herein (accused). The appellant is right in

challenging the judgment of the learned lower Appellate Judge on the ground of absence of jurisdiction. On the other hand, the respondent (complainant) who has approached a wrong Court with an appeal under Section 372 has chosen to prefer a revision against the judgment of the appellate Court expressing grievance over the alleged inadequacy of punishment. The appeal is bound to succeed and the revision is bound to fail.

20. Accordingly, the Criminal Appeal is allowed, the judgment of the learned lower Appellate Judge, dated 26.12.2013 is set aside, the Criminal Revision Case filed by the respondent/complainant is dismissed and the order of acquittal pronounced by the learned Judicial Magistrate, Pudukkottai, dated 09.08.2010 shall stand restored.

To

1. The Judicial Magistrate, Pudukkottai

2. The Additional District and Sessions Judge, Special Court for EC and NDPS Act cases, Pudukkottai.