



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

RESERVED ON : 22nd JANUARY, 2014
DECIDED ON : 3rd SEPTEMBER, 2014

+ **CRL.A.972/2012**

THE BHAJANPURA COOPERATIVE URBAN THRIFT &
CREDIT SOCIETY LTD. Appellant

Through : Mr.Rajeshwar Kr.Gupta, Advocate
with Ms.Sumati Sharma, Advocate.

versus

SUSHIL KUMAR Respondent

Through : Ms.Nandita Rao, Advocate.

AND

+ **CRL.A.1163/2012**

THE BHAJANPURA COOPERATIVE URBAN THRIFT &
CREDIT SOCIETY LTD. Appellant

Through : Mr.Rajeshwar Kr.Gupta, Advocate
with Ms.Sumati Sharma, Advocate.

versus

PRABHU DAYAL Respondent

Through : Ms.Nandita Rao, Advocate.

CORAM:
HON'BLE MR. JUSTICE S.P.GARG



S.P.GARG, J.

1. The challenge in these appeals is to judgments dated 02.03.2012 in CC No.4625/10 and dated 22.05.2012 in CC No.20806/10 by which the complaint cases under Section 138 of the Negotiable Instruments Act, 1881 (in short 'N.I. Act') filed by the appellant against the respondents resulted in their acquittal.
2. The appeals have been preferred under Section 372 of the Code of Criminal Procedure (in short 'Cr.P.C.'). By an order dated 21.01.2013, learned counsel for the appellant was asked to satisfy if against an acquittal order in a complaint case, appeal would lie under Section 372 Cr.P.C. or special leave to appeal would have to be sought under Section 378 Cr.P.C.
3. I have heard the learned counsel for the parties on this limited legal question and have examined the record. Appellant's counsel urged that after the Amendment Act 5 of 2009, amending Section 372 Cr.P.C. incorporating a right of appeal to the victims and also introducing definition of 'victim', as per Section 2(wa) of Cr.P.C., the appellant being the complainant-cum-victim was entitled to prefer appeals against orders of acquittal under Section 138 N.I. Act under Section 372 Cr.P.C. Learned



counsel for the respondents challenging the maintainability of appeals under Section 372 Cr.P.C. urged that proper remedy to impugn acquittal orders was to file Special Leave Petition under Section 378 (4) Cr.P.C. Section 372 Cr.P.C. was not intended to cover the complainants, who already had statutory remedies to file appeals.

4. Admitted position is that the appellant is aggrieved by the orders of acquittal in complaint cases under Section 138 N.I. Act. Moot question is whether an acquittal order can be challenged under Section 372 Cr.P.C. or special leave is required to prefer an appeal under Section 378 (4) Cr.P.C. Various High Courts have taken different views and are at variance on this issue. The decisions are not uniform.

5. Single Bench of Kerela High Court in '*Sree Gokulam Chit and Finance Co.(P) Ltd. and another vs. T.Krishnakumar and others*', (Crl.L.P.No.620/2013 and connected cases, decided on 30.10.2013) was of the view that 'victim' under Section 2 (wa) would include 'complainant' in a complaint case filed under Section 138 N.I. Act and therefore, as a matter of right, would be entitled to prefer appeal as provided under Section 372 Cr.P.C. Similar is the view taken by the High Court of Calcutta in '*National Plywood Industries vs. State of West Bengal*', CRR No.2816/2012 and CRAN No.3690/2012, decided on Crl.A.Nos.972/2012 & 1163/2012



12.03.2013. Giving liberal interpretation to the definition of the ‘victim’ under Section 2 (wa) read with Section 2(y) of Cr.P.C. along with definition of ‘injury’ under Section 44 IPC and Section 22 IPC, it held that non-encashment of the cheque causes ‘injury’ to the person in whose favour cheque has been issued. The holder of the cheque is to be determined both complainant and victim. High Court of Jharkhand in ‘*Mahesh Kumar Sinha vs. The State of Jharkhand & anr.*’, Acquittal Appeal (DB) No.4 of 2013, decided on 15.04.2013, in a detailed judgment observed that when the victim and the complainant are the same person(s), then the complainants have a right to prefer statutory appeal under Section 372 Cr.P.C. The appellant therein had sought leave to prefer appeal under Section 378 (4) Cr.P.C. to impugn acquittal order in the proceedings instituted under Section 138 N.I. Act.

6. In ‘*Ashok Kumar Srivastava and others vs. State of UP and another*’, 2012 LawSuit (All) 415, decided by High Court of Allahabad on 30.03.2012, a complaint case was filed by the victim under Section 200 Cr.P.C. The accused persons were acquitted of the charges under Sections 498A/323/504/506 IPC and 3/4 Dowry Prohibition Act. The Allahabad High Court held that under Section 372 Cr.P.C. the complainant who was a ‘victim’ was entitled to prefer an appeal under Section 372 Cr.P.C.



7. High Court of Bombay has been consistent in its approach and in various decisions have taken the view that complainant in a private complaint which ends up in acquittal is not entitled to take the benefit of the proviso of Section 372 Cr.P.C. In '*Ganesh Bandu Badgujar vs. Mangalabai Ashokbhai Patel and The State of Maharashtra*', Crl.Revision Application No.100/2013, decided on 09.12.2013 against acquittal order in the proceedings under Section 138 N.I. Act, it held that the appeal under Section 372 IPC was not maintainable. The proviso to Section 372 Cr.P.C. was inserted by Section 29 Cr.P.C. [Amendment Act, 2008 (5 of 2009)] with the object of giving an opportunity to the persons who were affected by the decision of the Court, but who had not been given right to file any appeal under the provisions of the Code, to challenge such decision by filing an appeal.

8. Decisions of the Rajasthan High Court are conflicting. In '*Laxmilal Menariya & ors. vs. Rajendra Kumar & ors.*' S.B.Criminal Leave to Appeal No.193/2011; '*Ram Avtar Gupta vs. Ravindra Kumar*', S.B.Criminal Leave to Appeal No.230/2011 and '*Ashok Kumar vs. State of Rajasthan*', S.B.Criminal Leave to Appeal No.6/2012 decided on 01.05.2012, it was held that the remedy to challenge the acquittal under Section 138 N.I. Act was under Section 372 Cr.P.C. However, in '*Nathu*



Ram Bansal vs. State of Rajasthan & anr.’, S.B.Criminal Leave to Appeal No.74/2012 decided on 28.02.2013, a contrary view was taken and it was held that against an order on acquittal under Section 138 N.I. Act the appeal would lie under Section 378 (4) Cr.P.C. only by way of filing an application for special leave to appeal. The view taken by the learned Single Judge in ‘*Laxmilal Menariya & ors. vs. Rajendra Kumar & ors.*’ (supra) was considered not a good law. Again in ‘*Porwal Trading Corporation (M/s) vs. M/s.Global Syntex (BHL) Ltd. & anr.*’, S.B.Criminal Leave to Appeal No.100/2012 decided on 22.03.2013, the said High Court taking support from ‘*Laxmilal Menariya & ors. vs. Rajendra Kumar & ors.*’ (supra) held that the appeal was to lie under Section 372 Cr.P.C. observing that the judgment in ‘*Nathu Ram Bansal vs. State of Rajasthan & anr.*’ (supra) was of no help as the impact of amended proviso to Section 372 Cr.P.C. was not considered in proper perspective therein.

9. Punjab and Haryana High Court has taken still another view in ‘*M/s.Tata Steel Ltd. vs. M/s. Atma Tube Products Ltd. & ors.*’, in CRM.No. 790-MA of 2010 decided on 18.03.2013 by Full Bench. The relevant findings on the issue are :



(83) “ *The above discussion thus can be summed up to say that –*

(i) the ‘complainant’ in a complaint-case who is a ‘victim’ also, shall continue to avail remedy of appeal against acquittal under Section 378(4) only except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an adequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372;

(ii) the ‘victim’, who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the unamended provisions read with Section 378(4) of the Code;

(iii) the Legislature has given no separate entity to a ‘victim’ in the complaint-case filed by a public servant under a special Statute and the appeal against acquittal in such a case can also be availed by the ‘complainant’ of that case under Section 378(4) of the Code only.

(iv) those ‘victims’ of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek ‘leave’ and ‘special leave’ to appeal from the High Court in the manner contemplated under Section 378(3)& (4), for the Legislature while enacting proviso to Section 372 has prescribed no such fetter nor has it applied the same language used for appeals against acquittals while enacting sub-Section (3) & (4) of Section 378 of the Code.”



10. At the outset, it may be mentioned that discussion would be restricted only to the remedy available in complaint cases instituted under Section 138 N.I. Act, in case they end up in acquittal i.e. whether to prefer appeal under Section 372 or 378(4) Cr.P.C.

11. Chapter XVII comprising Section 138 to Section 142 N.I. Act was introduced in the Statue by Act of 66 of 1988. The object underlying the provision contained in the said chapter was aimed at inculcating faith in the efficacy of banking operations and giving credibility to the negotiable instruments as a trustworthy substitute for cash payment in business and day to day transactions by making dishonour of the such instruments an offence. The said provisions were intended to discourage people from not honouring their commitments by way of payments through cheques. On a mere perusal thereof, it is clear that civil liability of a person has been converted into a criminal offence. Prior to 01.04.1989, in case of dishonour of a cheque, the remedy was to institute civil proceedings for the recovery of the disputed amount. Enforcement of a liability in Civil Court does not debar an aggrieved person from prosecuting the offender for an offence under Section 138 N.I. Act. The filing of civil suit and criminal proceedings are alternate remedies available to the complainant and they create different types of



rights in the complainant which he can legally proceed in the Court. Both the proceedings are not only different but are also independent from each other and can be pursued simultaneously. Section 138 N.I. Act primarily is of a quasi civil and criminal nature. Under Section 138, the offence is not committed on the date of issuing of the cheque. It happens after it is dishonoured by the bank for specified reasons and thereafter, even after demand the person concerned fails to pay the amount covered by the cheque. The offences are bailable, compoundable and non-cognizable. The proceedings can be instituted only by filing a complaint case under Section 200 before the Court of a competent jurisdiction. No Court is to take cognizance of said offence except upon a complaint in writing made by the payee or the holder in due course of the cheque. No Court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any such offence. Needless to say that State / Police has no role to regulate the proceedings / transactions. The proceedings under N.I.Act can well be differentiated from other penal statutes.

12. Prior to the amendments in Cr.P.C. before 31.12.2009, a complainant in a complaint case initiated under Section 138 N.I. Act could challenge an acquittal order only in an appeal before the High Court under Section 378 (4) Cr.P.C. Such appeal would be maintainable only if



the appellant / complainant was granted Special Leave to prefer appeal. In my view, amendments w.e.f. 31.12.2009 introducing Section 2 (wa) and Section 372 Cr.P.C. did not bring any change in this regard. The purpose and object of the amendment was to provide relief to the 'victims' of offence who hitherto had practically no role to play in the criminal proceedings and who were to remain as mute spectators even though they were the really affected parties. It was with that object that the amendment to Section 372 Cr.P.C. was made and the definition of 'victim' was incorporated. It was not to cover a situation where the complainant in a private complaint under Section 138 N.I.Act, already had a remedy by way of appeal for redressal of his grievances. The 'complainant' in 138 proceedings cannot be equated or treated at par with 'victims' for whose benefit the amendments have been brought into existence. This was meant for those 'victims' on whose behalf primarily State used to prosecute the offender(s). In case of acquittal, it was left to the State to challenge the order in appeal and the victim had no say. The amendments in question gave a voice to the victims to challenge the acquittal by filing an appeal under Section 372 Cr.P.C. It was a right conferred upon the victims to prefer an appeal on limited grounds enumerated in the proviso to Section 372 of the Code. It is a separate and independent statutory right and is not



dependent either upon or is subservient to the right of appeal of the State. Both the victim and State can file appeals independently without being dependent on the exercise of the right by the other. Under Section 372 Cr.P.C., the victim was given substantive right to file appeal not only against acquittal but also if the conviction was for a lesser offence or there was inadequate compensation. State does not have any right to appeal in case of inadequacy of compensation.

13. In my considered view, the ‘complainant’ in the proceedings under Section 138 N.I.Act cannot be considered ‘victim’ in the letter and spirit of the definition of Section 2 (wa) of the Code and definition of ‘injury’ under Section 44 IPC cannot be imported into Section 138 N.I.Act. In every such proceedings at first instance, every complainant considers / claims himself / herself a ‘victim’. The complainants in these proceedings cannot be taken at par with those who put criminal law into motion to bring the offenders to book at whose hands, they have sustained ‘injury’ as defined in Section 44 IPC. The changes in Cr.P.C. were for ‘victims’ who were the worst sufferers in a crime and did not have much role in the Court proceedings. To avoid distortion of the Criminal Judicial System, they were given certain rights.



14. The controversy now is no longer res integra in view of the pronouncement of law by Supreme Court in '*Subhash Chand vs. State (Delhi Administration)*', (2013) 2 SCC 17. It was a complaint case under Section 7 of Prevention of Food Adulteration Act, in which Subhash Chand was tried and he was acquitted by the learned Metropolitan Magistrate. The State filed criminal appeal before the Sessions Court under Section 378 (1)(a) Cr.P.C. Preliminary objection regarding maintainability of the appeal before the Sessions Court was rejected. That order was challenged before this Court (Delhi High Court) and it was held that Sessions Court had no jurisdiction to entertain the appeal. The order of the High Court was challenged before the Supreme Court who remanded the case to this Court for fresh decision after taking into consideration the provisions of Sections 378(1) and 378(4) of Cr.P.C. and the relevant provisions of the Prevention of Food Adulteration Act. After remand, this Court held that the appeal filed by the State against an order of acquittal would lie to the Sessions Court under Section 378 (1) of the Cr.P.C. Again, this order was challenged by the accused before the Supreme Court and Supreme Court held :

'...we conclude that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court.'



He cannot file such appeal in the Sessions Court. The complainant can challenge the order of acquittal by filing an application for special leave to appeal in the Delhi High Court and not in the Sessions Court....'

15. Of course, the scope of Section 372 Cr.P.C. and subsequent amendments in Cr.P.C. (Code of Criminal Procedure (Amendment) Act, 2008 (Act 5 of 2009) did not come for consideration before the Supreme Court in this case. But it cannot be assumed that the Supreme Court was not aware of the existence of the provisions of Section 372. The Supreme Court further observed :

“Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence is bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378 (4) for special leave to appeal against it in the High Court. Section 378 (4) places no restriction on the complainant....”

No distinction was made if the complainant was a private person or a public servant.

16. In a recent case ‘*Bhavuben Dineshbhai Makwana vs. State of Gujarat & ors.*’, 2013 Cr.L.J. 4225, Full Bench of Gujarat High Court answering the reference on question number (3) ‘*If the victim prefers an*



appeal before this Court, challenging the acquittal, invoking his right under proviso to section 372 of Cr.P.C., whether that appellant is required to first seek leave of the Court, as is required in case of appeal being preferred by the State?’, held :- ‘If the victim also happens to be the complainant and the appeal is against acquittal, he is required to take leave as provided in Section 378 of the Criminal Procedure Code but if he is not the complainant, he is not required to apply for or obtain any leave. For the appeal against inadequacy of compensation or punishment on a lesser offence, no leave is necessary at the instance of a victim, whether he is the complainant or not.’

17. Kerala High Court has also in a latest Division Bench judgment in ‘*Omana Jose vs. State of Kerala*’, ILR 2014 (2) Kerala 669 decided on 11.04.2014 on reference of Criminal Revision Petitions in the light of conflicting decisions in ‘*Sree Gokulam Chit and Finance Co.(P) Ltd. and another vs. T.Krishnakumar and others*’, 2013 (4) KLT 547 (supra) and ‘*Shibu Joseph & ors. vs. Tomy K.J. & ors.*’, ILR 2013 (4) Ker.866, concluded :

“For the aforesaid reasons, we hold that the complainant in a case under Section 138 of the Negotiable Instruments Act cannot challenge the order of acquittal before the Sessions Court under the proviso to Section 372 of the Cr.P.C. and his remedy is



only to file an appeal to the High Court with special leave under Section 378 (4) Cr.P.C.”

18. Considering all the relevant provisions, I am of the considered view that the remedy available to the complainants under Section 138 N.I.Act against order of acquittal is only to seek special leave before filing an appeal under Section 378 (4) Cr.P.C. before the High Court. In the instant case, the appellant has not sought any such leave. Consequentially the appeals filed by the appellant are dismissed as not maintainable. The appellant will, however, be at liberty to file special leave petitions to challenge acquittal orders before this Court and the period spent by him in contesting the present proceedings would be excluded in considering the delay.

(S.P.GARG)
JUDGE

SEPTEMBER 03, 2014 / tr