

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.166 OF 2015

Mr. Tome Carvalho,
s/o Isidore Carvalho,
Aged 57 years,
r/o H.No.116/3, Nauta,
Cortalim, Goa. .. Petitioner

V/s

1. Comunidade of Cortalim,
Through its Attorney,
Shri Savio Misquita,
Major of age,
Having premises at chawder,
Cortalim, Goa.
2. State of Goa,
through the ld Public Prosecutor,
Panaji, Goa.
3. Smt. Maria Pia,
w/o Isidor Carvalho,
Aged 88 years,
r/o H.No.116, Nauta,
Cortalim, Goa.
4. Mr. Sagar Dessai,
Aged 51 years,
s/o Antu Dessai,
r/o H. No.1545/1,
Culwado, Cuncolim,
Salcete, Goa.
5. Mr. Ravindra Pandit
Aged 52 years,
s/o Krishnan Pandit,
c/o Gajanan Naik,
Near Rashtroli Temple,
n/o at Kas,
Post/ Madura, Bandha,
Sindhudurga, Maharashtra. .. Respondents

Mr. Valmiki Menezes and Mr. Akshay Shirodkar, Advocates

for the petitioner.

Mr. D. J. Pangam, Advocate for the respondent no.1.

Mr. S. R. Rivankar, Public Prosecutor for the respondent no.2.

CORAM :- C. V. BHADANG, J.

Reserved on : 24th June, 2016

Pronounced on : 27th June, 2016

ORDER :

By this petition, under Section 482 of the Code of Criminal Procedure (Code, for short), the petitioner is seeking modification/ recalling of the part of the order dated 07/08/2015 passed in Criminal Revision Application No.33/2015.

2. By the said order, the respondent no.1, Comunidade of Cortalim was allowed to withdraw the aforesaid Criminal Revision Application and while doing so, this Court had noted the submission on behalf of the respondent no.1 that the respondent no.1 in the capacity as a "victim" as defined under Section 2(wa) of the Code, would have a right to file an appeal against acquittal, before the learned Sessions Judge by virtue of proviso to Section 372 of the Code and that the respondent no.1 intends to take recourse to the said

remedy.

3. This Court in para 4 of the order, after noticing the definition of victim under Section 2(wa) of the Code, had observed that the respondent no.1 Comunidade would come within the ambit of definition of 'victim'.

4. The brief facts are that on the basis of a complaint filed by the respondent no.1 i.e. Comunidade of Cortalim Smt. Maria Pia and three others, (including the petitioner Tome Carvalho,) were tried for the offences punishable under Sections 465, 468, 471 and 420 read with Section 34 of I.P.C. in Criminal Case No.142/S/2003/A before the Judicial Magistrate First Class at Vasco-da-Gama. The Magistrate, by a judgment and order dated 30/07/2011, acquitted all the accused. The prosecution case was that the accused, in furtherance of common intention, used a forged certificate, issued by Escrivao of the Comunidade. The petitioner, who was accused no.2 in the said case and was then working as an Attorney of the Comunidade, had issued the certificate to the accused no.1, stating that

the Comunidade had no objection for deletion of the name of the said Comunidade from survey records and had managed to get the name of the accused no.1 Smt. Maria Pia mutated in the survey records.

5. Be that as it may, the respondent no.1 filed Criminal Revision Application No.33/2015 before this Court, challenging the acquittal. When the matter came up before this Court on 07/08/2015, the learned Counsel for the respondent no.1 Comunidade stated that as the respondent no.1 would come within the ambit of the 'victim' as defined under Section 2(wa) of the Code, the respondent no.1 intends to take recourse to the remedy of filing an appeal before the learned Sessions Judge and sought permission to withdraw the said Writ Petition, with liberty to approach the learned Sessions Judge. This Court allowed the Revision Application, to be withdrawn, with liberty as prayed.

6. Indisputably, this order was challenged by the petitioner (to the extent of grant of liberty) before the Hon'ble Apex Court in SLP No.8985 of 2015, which was dismissed as withdrawn on 30/10/2015. It is, thereafter,

that the petitioner has filed this petition, for recall of the part of the order granting liberty. It may be mentioned that in the meantime, the respondent no.1 has filed an application being Criminal Miscellaneous Application No.10/2016 for condonation of delay in filing Criminal Appeal against the order dated 30/07/2011 before the learned Sessions Judge on 07/12/2015.

7. The learned Counsel for the petitioner has placed reliance on the decision of the Apex Court in the case of **National Commission for Women Vs. State of Delhi**, reported in (2010)12 SCC 599 and in particular, para 8 of the judgment which reads thus :

"Chapter XXIX of the Code of Criminal Procedure deals with "Appeal"(s). Section 372 specifically provides that no appeal shall lie from a judgment or order of a Criminal Court except as provided by the Code or by any other law which authorises an appeal. The proviso inserted by Section 372 (Act 5 of 2009) w.e.f. 31-12-2009, gives a limited right to the victim to file an appeal in the High Court against any order of a Criminal Court acquitting the accused or convicting him for a lesser offence or the imposition of inadequate

compensation. The proviso may not thus be applicable as it came in the year 2009 (long after the present incident) and, in any case, would confer a right only on a victim and also does not envisage an appeal against an inadequate sentence. An appeal would thus be maintainable only under Section 377 to the High Court as it is effectively challenging the quantum of sentence."

8. It is thus, submitted that the proviso would have no application to cases instituted prior to the year 2009 as in the present case. He, therefore, states that no such liberty could have been granted. The learned Counsel points out that once this Court had granted liberty it would not be possible for the petitioner to point this aspect to the learned Sessions Judge, who would be bound by the order passed by this Court which may cause prejudice to the petitioner. The learned Counsel has placed reliance on the decision of the Hon'ble Supreme Court, in the case of **State represented by DSP, SB CID, Chennai Vs. K. V. Rajendran and others;** (2008)8 673, in order to submit that in a case whether there are subsequent developments which are required to be brought to the notice of this Court, a fresh petition under Section 482 of Cr.P.C. would be

maintainable.

9. The learned Counsel for the respondent no.1 has stated that in the event, this Court holds that the appeal before the learned Sessions Judge is not maintainable (as the proviso would have prospective application), it would be necessary to recall the entire order permitting withdrawal of Criminal Revision Application No.33/2015. He submits that if Criminal Revision Application No.33/2015 is restored back to file, the respondent no.1 will withdraw the Criminal Appeal pending before the learned Sessions Judge.

10. The learned Counsel for the petitioner has expressed no objection for recalling of the entire order permitting withdrawal of Criminal Revision Application No.33/2015, subject to condition that the respondent no.1 withdraws the Criminal Appeal pending before the learned Sessions Judge.

11. I have given my anxious consideration to the circumstances and the submissions made.

12. In **National Commission for women** (supra), it has been held that the proviso to Section 372 would not apply to cases arising prior to 31/12/2009. I find that although the petitioner is praying for recall of the part of the order granting liberty, in all fairness, the learned Counsel for the petitioner has expressed no objection, even if while doing so, the Criminal Revision Application is restored to file, by recalling the entire order permitting withdrawal. It is trite that the respondent no.1 cannot be placed in a situation where it would be remedyless against the order of acquittal. On one hand Criminal Revision Application filed before this Court stands withdrawn and on the other, it is claimed on behalf of the petitioner that the remedy of appeal may also not be available in view of the fact that the proviso to Section 372 of the Code would have prospective application. It is well settled that the act of the Court would cause prejudice to none. Considering the overall circumstances and the concession on behalf of the petitioner, the following order is passed :

(i) The petition is allowed.

(ii) The order dated 07/08/2015 is hereby recalled.

Criminal Revision Application No.33/2015 is restored back to file.

(iii) This will be subject to the respondent no.1 withdrawing Criminal Miscellaneous Application No.10/2016 pending before the learned Sessions Judge, within a period of two weeks from today.

(iv) The Criminal Revision Application shall be listed for admission on 25/07/2016.

(v) The petition is disposed of in the aforesaid terms, with no order as to costs.

C. V. BHADANG, J.

SMA