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

% *Date of Decision : 17th May, 2016*

+ **CRL.REV.P. 147/2012**

J B GUPTA & ORS.

..... Petitioners

Through: Ms.Rebecca M.John, Senior Advocate
with Mr.Gagan Minocha, Advocate.

versus

STATE

..... Respondent

Through Mr.Kewal Singh Ahuja, APP for the
State.
Mr.Jugal Wadhwa, Advocate for R-2.

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

Crl.M.A. No.7641/2014

1. Exemption allowed, subject to all just exceptions.
2. Application stands disposed of.

CRL.REV.P. 147/2012

1. The present revision petition has been filed by the petitioners impugning the order dated 28.01.2012 passed by learned ASJ allowed the appeal preferred by the respondent No.2 herein against the order of acquittal passed by learned MM in case FIR No. 449/1997 under Section 325/34 IPC PS Saraswati Vihar.
2. The issue arising for consideration in this revision petition is whether against the order of acquittal, the victim can file an appeal before the Court of Sessions.

3. The petitioners before this Court were facing trial in case FIR No. 449/1997 under Section 325/34 IPC registered at PS Saraswati Vihar. The said FIR was registered on the complaint made by Jai Prakash Gupta and Nirmala Devi, Jai Bhagwan, Aman Gupta and Shivank Gupta were facing trial as accused.
4. The prosecution evidence was closed by the learned Trial Court on 05.02.2011. On finding no incriminating material against the accused persons, the statement of the accused persons under Section 313 Cr.P.C. was dispensed with and all the accused persons were acquitted.
5. Aggrieved by the said order of acquittal, respondent No.2 herein preferred Criminal Appeal No.7/11 wherein apart from State, all the accused persons were impleaded as respondents No.2 to 5.
6. Vide impugned order dated 28.01.2012, the learned ASJ allowed the appeal. While setting aside the judgment of acquittal dated 05.02.2011, learned ASJ remanded the case with the direction to allow examination of Vaibhav Gupta and Sarla Gupta before learned Trial Court.
7. The grievance of the petitioners herein in this revision petition is that the order passed by learned ASJ being illegal and without jurisdiction needs to be set aside.
8. Mr.Jugal Wadhwa, learned counsel for the respondent No.2 submits that Section 378 Cr.P.C. deals with appeal in case of acquittal. However, the respondent No.2 herein falls in the category of victim as defined under Section 2(wa) and under proviso to Section 372 Cr.P.C. which has been inserted w.e.f. 31.12.2009.
9. Mr.Jugal Wadhwa, learned counsel for the respondent No.2 has referred to proviso to Section 372 Cr.P.C. contending that victim has been

put on the same footing as a convict and the appeal shall lie to the Court where it ordinarily lies against the order of conviction of such Court. Learned counsel for the respondent No.2 further submits that since the offence under Section 325/34 IPC is triable by a Magistrate and in case of order of conviction, the appeal lies to the Court of Session, the appeal against the order of acquittal preferred by the victim also lies before the Court of Session. Hence impugned order cannot be interfered with by this Court in revisional jurisdiction.

10. I have considered the submissions made on behalf of the parties and carefully gone through the record.

11. Proviso to Section 372 of Code of Criminal Procedure, 1973 inserted by the amendment Act of 2009 w.e.f. 31st December, 2009, reads as under: -

"Section 372. No appeals to lie unless otherwise provided.-

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[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. Sub-sections 3 and 4 of Section 378 of Code of Criminal Procedure, 1973, provide:

"Section 378 .Appeal in case of acquittal.-

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(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."

13. In the case ***Subhash Chand v. State (Delhi Admn.)***, (2013) 2 SCC 17 this question has been considered by the Supreme Court wherein it was held as under:

*"In view of the above, 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. In the instant case the complaint alleging offences punishable under Sections 16(1) & (1-A) read with Section 7 of the PFA Act and the Rules is filed by complainant Shri Jaiswal, Local Health Authority through Delhi Administration. **The appellant was acquitted by the Metropolitan Magistrate, Patiala House Courts, New Delhi. 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. Therefore, the impugned order [Criminal Misc. Case No. 427 of 2009, decided on 7-1-2011 (Del)] holding that this case is not governed by Section 378(4) of the Code is quashed and set aside. In the circumstances the appeal is allowed."***

14. In the decision reported as *Satya Pal Singh vs. State of M.P. and Ors.* 2015 (10) SCALE 444, the right of victim to file appeal against an order of acquittal has been examined by the Supreme Court. The conclusion on this legal issue arrived at is as under:-

*“11. The Full Bench of the High Court of Delhi after examining the relevant provisions Under Section 2(wa) and proviso to Section 372 of Code of Criminal Procedure, in the light of their legislative history has held that the right to prefer an appeal conferred upon the victim or relatives of the victim by virtue of proviso to Section 372 is an independent statutory right. Therefore, it has held that there is no need for the victim in terms of definition Under Section 2(wa) of Code of Criminal Procedure to seek the leave of the High Court as required Under Sub-section (3) of Section 378 of Code of Criminal Procedure to prefer an appeal under proviso to Section 372 of Code of Criminal Procedure. The said view of the High Court is not legally correct for the reason that the substantive provision of Section 372 of Code of Criminal Procedure clearly provides that no appeal shall lie from any judgment and order of a Criminal Court except as provided for by Code of Criminal Procedure. Further, Sub-section (3) to Section 378 of Code of Criminal Procedure provides that for preferring an appeal to the High Court against an order of acquittal it is necessary to obtain its leave. We have to refer to the rules of interpretation of statutes to find out what is the effect of the proviso to Section 372 of Code of Criminal Procedure, it is well established that the proviso of a statute must be given an interpretation limited to the subject-matter of the enacting provision. Reliance is placed on the decision of this Court rendered by four Judge Bench in *Dwarka Prasad v. Dwarka Das Saraf* MANU/SC/0505/1975 : (1976) 1 SCC 128, the relevant para 18 of which reads thus:*

18. ... A proviso must be limited to the subject-matter of the enacting clause. It is a settled rule of construction that a proviso must prima facie be read and considered in relation to the principal

matter to which it is a proviso. It is not a separate or independent enactment. "Words are dependent on the principal enacting words to which they are tacked as a proviso. They cannot be read as divorced from their context" (Thompson v. Dibdin 1912 AC 533). If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.

(Emphasis laid by this Court)

12. Further, a three Judge Bench of this Court by majority of 2:1 in the case of **S. Sundaram Pillai v. V.R. Pattabiraman** MANU/SC/0387/1985 : (1985) 1 SCC 591 has elaborately examined the scope of proviso to the substantive provision of the Section and rules of its interpretation. The relevant paras are reproduced hereunder:

30. Sarathi in *Interpretation of Statutes* at pages 294-295 has collected the following principles in regard to a proviso:

(a) When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso.

(b) A proviso must be construed with reference to the preceding parts of the clause to which it is appended.

(c) Where the proviso is directly repugnant to a section, the proviso shall stand and be held a

repeal of the section as the proviso speaks the latter intention of the makers.

(d) Where the section is doubtful, a proviso may be used as a guide to its interpretation: but when it is clear, a proviso cannot imply the existence of words of which there is no trace in the section.

(e) The proviso is subordinate to the main section.

(f) A proviso does not enlarge an enactment except for compelling reasons.

(g) Sometimes an unnecessary proviso is inserted by way of abundant caution.

(h) A construction placed upon a proviso which brings it into general harmony with the terms of section should prevail.

(i) When a proviso is repugnant to the enacting part, the proviso will not prevail over the absolute terms of a later Act directed to be read as supplemental to the earlier one.

(j) A proviso may sometimes contain a substantive provision.

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32. In Ishverlal Thakorelal Almaula v. Motibhai Nagjibhai it was held that the main object of a proviso is merely to qualify the main enactment. In Madras and Southern Mahrata Railway Co. Ltd. v. Bezwada Municipality Lord Macmillan observed thus:

The proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case.

33. The above case was approved by this Court in CIT v. Indo Mercantile Bank Ltd. where Kapur, J. held that the proper function of a proviso was merely to qualify the generality of the main enactment by providing an exception and taking out, as it were, from the main enactment a portion which, but for the proviso, would fall within the

main enactment. In Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subbash Chandra Yograj Sinha Hidayatullah, J., as he then was, very aptly and succinctly indicated the parameters of a proviso thus:

As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as stating a general rule.

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36. While interpreting a proviso care must be taken that it is used to remove special cases from the general enactment and provide for them separately.

37. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself.

(Emphasis supplied)

Thus, from a reading of the abovesaid legal position laid down by this Court in the cases referred to supra, it is abundantly clear that the proviso to Section 372 of Code of Criminal Procedure must be read along with its main enactment i.e., Section 372 itself and together with Sub-section (3) to Section 378 of Code of Criminal Procedure otherwise the substantive provision of Section 372 of Code of Criminal Procedure will be rendered nugatory, as it clearly states that no appeal shall lie from any judgment or order of a Criminal Court except as provided by Code of Criminal Procedure.

13. Thus, to conclude on the legal issue:

whether the Appellant herein, being the father of the deceased, has statutory right to prefer an appeal to the High Court against the order of acquittal under proviso to Section 372 of Code of Criminal Procedure without obtaining the leave of the High

Court as required Under Sub-section (3) to Section 378 of Code of Criminal Procedure", this Court is of the view that the right of questioning the correctness of the judgment and order of acquittal by preferring an appeal to the High Court is conferred upon the victim including the legal heir and others as defined Under Section 2(wa) of Code of Criminal Procedure, under proviso to Section 372, but only after obtaining the leave of the High Court as required Under Sub-section (3) to Section 378 of Code of Criminal Procedure. The High Court of M.P. has failed to deal with this important legal aspect of the matter while passing the impugned judgment and order."

15. In view of the above legal position, the order of acquittal could not have been challenged by the victim before the Court of Sessions as the only remedy available against the order of acquittal is to obtain leave to appeal from the High Court. Thus, the order dated 28.01.2012 passed by learned ASJ in CrI.A.7/2011 being passed without jurisdiction is set aside.

16. The revision petition is allowed.

17. A copy of this order be sent to the concerned Court for information and compliance.

As prayed, copy of the order be given dasti to learned counsel for the parties.

PRATIBHA RANI, J.

MAY 17, 2016

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