

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO
Criminal Revision Case No.2864 OF 2016

ORDER:

The revision petitioner is the accused in C.C.No.93 of 2015 on the file of the XXIII Metropolitan Magistrate, Hyderabad which is on a private complaint of the defacto-complainant taken cognizance by the learned Magistrate for the offence u/ sec.138 of the Negotiable Instruments Act (*for short, the N.I.Act'*) and after appearance of the accused for the complainant remained absent on 09.09.2015, it was ended in dismissal. It is against said dismissal of the C.C.No.93 of 2015 which resulted in acquittal, CrI.A.No.834 of 2015 is filed before the learned Sessions Judge and the learned Sessions Judge by judgment dated 28.09.2016 allowed the appeal setting aside the dismissal order supra subject to payment of costs of Rs.500/- within two weeks therefrom and to complete the evidence on the side of the complainant in three sittings by directing both the parties to appear before the learned Magistrate on 24.10.2016 to take up further proceedings in the matter.

2. Impugning the same, the revision is filed on 03.11.2016 and pending disposal of the revision, there is interim stay granted on 19.01.2017 by permitting the Chief examination affidavit of the complainant if not taken, to take up for further chief to record if not also by postponing of the cross-examination of P.W.1 and other witnesses' evidence as sought by the accused/ revision petitioner and the interim order is in force even now extended pending disposal of the matter reserved for judgment after elaborate hearing of both sides.

3. The contentions in the grounds of revisions vis-à-vis oral submissions of the learned counsel for the revision petitioner are that the complainant in the C.C.93 of 2015 was not interested in diligently

prosecuting the matter and without considering the same, lower appellate Court erroneously allowed the appeal and failed to say that the medical certificate dated 05.09.2015 not produced on 09.09.2015 the day when it was dismissed for complainant's non-appearance if at all he really could not appear due to alleged back pain and head ache etc., and the same is introduced as a ground to cause restore, dismiss the appeal for non-diligence in prosecution and thereby the impugned order is liable to be set aside by allowing the revision.

4. In the course of hearing the revision, one of the points raised is even the lower appellate Court to entertain the appeal against the acquittal is not having jurisdiction.

5. Whereas, it is the submission of the learned counsel for the complainant-revision respondent No.2 that the maintainability of the appeal before the lower Court now cannot be raised in the revision for not even taken a ground in the revision apart from not raised any objection before the lower appellate Court in deciding the same on merits. It is also the submission that against the dismissal order of the C.C.No.93 of 2015 for the absence of the complainant for default on 09.09.2015 when otherwise revision lies before the Court of Sessions u/ sec.397CrPC, the very reading of Section 399 with Section 401 CrPC, the revision is maintainable where no appeal lies and even otherwise the revision can be converted as an appeal to decide thereby.

6. Once such is the power apart from no objection raised in the course of hearing, it is not left open. It is also the submission that this Court by judgment in CrI.A.No.1043 of 2015 dated 26.02.2014 in Petta Satya Govinda Ramachandra Rao @ Babji V/S Yarlagaadda Vijaya Kumar with reference to Section 372CrPC proviso read with Section 2(w)(a) of

the amended CrPC, 2009 read with Section 378(1)(2) CrPC, amended under the Act 2005 and with reference to Section 378(4) held after considering the law on the scope of amendment with legislative intention and Law Commission recommendation and the object in bringing the amendment to protect the interest of the victim and by referring to the Apex Court's expression in *Goa Plast Pvt. Ltd. vs. Chico Ursula D'Souza*¹ holding the complainant of a cheque bouncing case for the offence u/sec. 138 of the NI Act, of the accused is within the meaning of victim, suited to the definition u/sec. 2(w)(a) read with 372 proviso of the Amended CrPC supra, held even against acquittal judgment of Magistrate, appeal before the Court of Sessions is maintainable without need of approaching the High Court and for that leave under Section 378(4) of CrPC, not even necessary. Thereby once an appeal lies and once submitted to the jurisdiction of the Court it is not open to raise for not even raised in the grounds of appeal any objection on that aspect by oral submissions in the revision and otherwise nothing shown of such an irregularity if not vitiates the said proceedings covered by the lower appellate Court judgment on that technicality, once submitted to the jurisdiction.

6. No doubt, it is one of the submissions further by the revision petitioner that there is a recent judgment of the Apex Court in saying even to maintain the appeal against the acquittal judgment by a victim, leave of the High Court under Section 378(4) of the CrPC is required. It is not the case that the said judgment was brought to the notice of the learned Sessions Judge during the hearing and disposal of the appeal much less showing the same was even in existence by then though otherwise, the judgment of this Court in *Petta supra* is binding on the

¹ 2003 (2). RCR. (CR.) 131. SC

lower appellate Court and as such said contention is not available even orally raised in the course of hearing by the learned counsel for the revision petitioner/ Accused.

7. Coming to the other merits, once medical certificate is filed that proves inability to attend. There is nothing to suspect the genuineness of the medical certificate issued by the doctor on the inability of the complainant to attend the Court for undergoing treatment for the back pain with inability and the contentions contra in the revision of lower appellate Court should not have believed the said certificate is thereby untenable and no way requires to interfere with the impugned order of the lower appellate Court.

8. Coming to the other contention of with regard to the complainant was not interested in prosecuting and was not diligent is also baseless from the above and also from the fact that but for interested he could not maintain the revision impugning the default dismissal and acquittal judgment of the lower appellate Court.

9. Having regard to the above, the impugned order of the lower appellate Court no way requires interference but for to say if at all the lower appellate Court ought to have allowed the appeal subject to costs.

10. No doubt, this Court while sitting in the revision having inherent power u/ sec.482 CrPC and apart from under Section 483CrPC, to sit against the impugned default dismissal order of the learned Magistrate for which there is no limitation apart from the power under Article 227 of the Constitution of India and therefrom once the order of the Magistrate in dismissing the complaint for non-appearance requires no interference to subserve the ends of justice within the four corners of the provisions supra, to rectify the same, the revision by converting as

appeal under Section 482 CrPC from the settled expressions is to be allowed setting aside the impugned order of the learned Magistrate however, subject to costs.

11. Having regard to the above and in the result, the petition is allowed in part by setting aside the impugned dismissal order of the learned Magistrate of the private complaint in C.C.No.93 of 2015 dated 09.09.2015 and by restoring the complaint to file and by practically upholding the order of the lower appellate Court to that extent and with the following direction.

It is subject to payment of costs of Rs.5,000/- (Rupees five thousand only) by the complainant to the accused before the lower Court if taken, else to deposit before the Superintendent/ Head Clerk of the Court for the Court to remit the amount to any government running mentally challenged institution anywhere within the state of Telangana since the complaint is restored, the complainant/ P.W.1's evidence affidavit taken in chief as referred in the interim order of this Court during hearing of the revision referred supra to proceed further in disposal of the C.C.No.93 of 2015 after affording an opportunity to both sides and on merits.

Pending miscellaneous petitions in this revision, shall stand closed.

Date: 13.02.2017
Vvr.

Dr. B.SIVA SANKARA RAO J,