

\$~38 to 42

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

+ CRL.M.C. 490/2017

SANJEEV KAPOOR & ANRPetitioners

versus

L.G.POLYMERS INDIA P.LTD.Respondent

+ CRL.M.C. 492/2017

SANJEEV KAPOOR & ANR.Petitioners

versus

L G POLYMERS INDIA P.LTD. Respondent

+ CRL.M.C. 493/2017

SANJEEV KAPOOR & ANR.Petitioners

versus

L G POLYMERS INDIA P.LTD.Respondent

+ CRL.M.C. 494/2017

SANJEEV KAPOOR & ANR. Petitioners

versus

L G POLYMERS INDIA P.LTD. Respondent

+ CRL.M.C. 495/2017

SANJEEV KAPOOR & ANR. Petitioners

versus

LG POLYMERS INDIA P.LTD. Respondent

Present:

Mr. M. K. Gupta, Advocate for the petitioners.

Mr. Gurmehar S. Sistani, Advocate for the respondent.

CORAM:

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

ORDER
14.09.2017

%

1. The present petition has been filed under Section 482 of the Code of Criminal Procedure 1973, (hereinafter referred to as 'CrPC') for setting aside the order dated 30.11.2016 passed by learned Additional Session Judge (hereinafter referred as ASJ), Patiala House Courts, New Delhi in Criminal Revision No. 97/2016 wherein the order dated 12.07.2016 passed by learned Metropolitan Magistrate, Patiala House Courts has been set aside and Criminal Complaint No. 11/2014 under Section 138 of the Negotiable Instruments Act has been restored to its original number vide order dated 30.11.2016.
2. The brief facts of the case are as follows:
The Complaint was filed by M/s LG Polymers India Pvt. Ltd (Respondent herein) against Mr. Sanjiv Kapoor & Anr.(Petitioners) under Section 138 of The Negotiable Instruments Act, on account of dishonor of three postdated cheques issued by the petitioner/accused in favour of the complainant/respondent. Due to non appearance of the complainant, the complaint was dismissed by the trial court on 12.07.2016 in compliance with the Section 256 of CrPC. Aggrieved by the said order, the complainant filed the Criminal Revision petition before the learned ASJ on 1.10.2016, wherein the said petition was allowed by the court on the ground that the court in exercise of its discretionary power would treat the said revision petition as an appeal. Challenging the same, the

petitioner herein preferred this petition.

3. The counsel for the petitioner submits that the order of revision dated 12.07.2016 dismissing the complaint in the absence of complainant amounted to automatic acquittal of the petitioner and it is a well settled law that in case of acquittal under Section 256 CrPC, an appeal against the order of acquittal is to be filed under Section 375(4) CrPC and a criminal revision under section 397 is not maintainable.
4. Per contra, the learned counsel for the respondent contends that the impugned order dated 30.11.2016 allowing the revision petition is order on merits and calls for no interference. He further relied upon two judgments namely V.K Bhat v. G. Ravi Kishore and Anr.[(2006) 13 SCC 243] and Independent New Services Pvt Ltd. & Ors. v. State & Anr (Crl.M.C. 4260 & 4263 of 2011).
5. Keeping in mind the submissions made by the counsel for the parties, the material available on the record, at the outset it is relevant to peruse Section 256 of CrPC. It is incumbent to refer to Section 256(1) of CrPC, which states as under: -

256. Non- appearance or death of complainant.

*(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, **acquit the accused**, unless for some reason he thinks it proper **to adjourn the hearing** of the case to some other day: Provided*

*that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may **dispense with his attendance** and proceed with the case.*

6. On perusal of the above section it is clear that if the complainant is not present on the date of hearing, the concerned court can acquit the accused or adjourn the case or dispense with the attendance of the complainant.

In the present case in hand the Metropolitan Magistrate taking into account the conduct of the complainant dismissed the complaint in default of non- appearance of the complainant. There is no denying that the dismissal of the complaint in default under Section 256 entails the acquittal of the accused and the section clearly stipulates that once an accused has been acquitted of the offence, the law provides a remedy by way of an appeal against the order of acquittal under Section 378(4) of CrPC.

7. In Section 378 CrPC, the procedure to be followed for filing an appeal in cases of acquittal is provided. It is categorically stated that where an order of acquittal is passed in any case instituted upon compliant, the complainant after seeking special leave to appeal from an order of acquittal may present an appeal to the High Court/ Session Court. The procedure prescribed under Section 378(4) is to be followed when complaint has been dismissed under Section 256(1) CrPC.

8. The learned counsel for the petitioner vehemently argued that against an order of acquittal only an appeal lies and criminal revision under Section 397 is not maintainable and is barred by Section 401(4) of CrPC.
9. On bare reading of Section 401(4) of CrPC it is evident that “where under this code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.” On Conjoint reading of the Section 256 and Section 401(4) of CrPC, it is evident that the complainant/respondent cannot come in revision against the order of Metropolitan Magistrate acquitting the respondent herein rather an appeal under Section 378 of CrPC lies in this effect.
10. ***The Supreme Court in Kalpana Tyagi vs Sneh Lata Sharma*** reported in ***2003 CriLJ 3395*** has held as under:-

“However, once the accused has been summoned and the complainant does not appear on the date appointed for the appearance of the accused or any day subsequent thereto to which the hearing may be adjourned the Magistrate is under a duty to acquit the accused unless for some reason he does not dismiss the complaint and thinks it proper to adjourn the hearing of the case to some other day. The proviso to the Section 256 of the Code further says that where the complainant is represented by a pleader or by officer conducting the prosecution or where the Magistrate is of the opinion that the personal attendance of the complainant is not necessary the Magistrate may dispense with his attendance and proceed with the case. It is, therefore, manifest that this provision

gives a wide discretion to the Magistrate in the matter of dismissal of a complaint in default and empowers him to adjourn the hearing even in the absence of the complainant but once the Magistrate chooses to exercise his discretion in favor of dismissal of the complaint the consequence of acquittal of the accused follows against which no revision is maintainable and only an appeal can be filed in terms of Section 378 of the Code.

8. A distinction, therefore, has to be drawn in regard to the complaints dismissed prior to the summoning of an accused and those dismissed subsequent to the summoning of the accused if a complaint is dismissed prior to the summoning of an accused the order may be challenged by way of filing a revision but once Section 256 comes into play, the dismissal of a complaint has the effect of acquittal of an accused and only an appeal can be filed under Section 378 of the Code to challenge his acquittal.”

11. It is therefore clear that under Section 256 Cr.P.C, for non-appearance of the complainant, the Magistrate shall acquit the accused, and also revision is barred under Sub-Section 4 of Section 401 Cr.P.C. The only remedy available to the complainant is to seek the leave of the Court under Sub-Section 4 of Section 378 Cr.PC and to file an appeal under Section 378 Cr.PC.
12. Accordingly, the impugned order dated 30.11.2016 is set aside. The period spent by the complainant/ respondent in bonafidely pursuing the revision petition and time spent during its proceeding would be taken into account. The period of

limitation of filing of appeal against the impugned order dated 30.11.2016 shall be counted from the date of receipt of copy of this order.

13. Hence, the petition is allowed.

SANGITA DHINGRA SEHGAL, J

SEPTEMBER 14, 2017

gr//