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

+ CRL.A. 1209/2016 and Crl.M.B. 2249/2016

NAWAB SINGH Appellant

Through: Mr. Ram Lal, Advocate

Versus

URMILA RASTOGI Respondent

Through: Mr. A.K.Tiwari, Advocate

CORAM:

HON'BLE MR. JUSTICE R.K.GAUBA

ORDER

% **17.04.2017**

The appellant was prosecuted by the respondent by a criminal complaint alleging offence under Section 138 of the Negotiable Instruments Act, 1881. The said criminal complaint case no.376/2014 was decided by the Metropolitan Magistrate by judgment and order dated 12.01.2016 resulting in order of acquittal. The judgment of acquittal was challenged by the respondent by criminal appeal no.1155/2016 in the court of Additional Sessions Judge (ASJ), Shahdara at Karkardooma Court Complex, the opening paragraph of the judgment dated 26.10.2016 indicating the appeal having been treated as one under Section 372 of the Code of Criminal Procedure, 1973 (Cr.P.C.). By the said judgment dated 26.10.2016 the Sessions court allowed and appeal, upturned the decision of the magisterial Court and convicted the appellant for the offence under Section 138 of the Negotiable Instruments Act, 1881. By subsequent order dated 09.11.2016 sentence of imprisonment till rising of the court with fine of Rs.4 lacs was imposed.

It is the above-said judgment and order of sentence passed by the Sessions court which has been assailed by the criminal appeal at hand.

On 21.03.2017 the learned Single Judge in *seisin* of the matter brought to the notice of the counsel for the respondent decisions of the Supreme Court in *Subash Chand vs. State (Delhi Administration)*, (2013) 2 SCC 17 and of Kerala High Court in *KI.T. Omana Jose vs. State of Kerala*, 2015 Crl.LJ 2784; and a full Bench decision of the Gujarat High Court in *Bhavuben Dineshbhai Makwana vs. State of Gujarat & Ors.*, 2013 Crl.LJ 4225; also noting that a criminal appeal under Section 372 Cr.P.C. was not maintainable and the only remedy available was by way of special leave to appeal to be brought before this court under Section 378 (4) Cr.P.C.

The learned counsel for the respondent has submitted at the hearing today that he has no quarrel with the above noted proposition of law and since he now realises that an appeal could not have been preferred against an order of acquittal in a private complaint case, he would not resist the appeal of the convicted person to be allowed for the judgment and order impugned here being set aside they being without jurisdiction, though he presses for liberty to file special leave to appeal under Section 378 (4) Cr.P.C.

The counsel for the appellant submits he has nothing to say on the prayer for liberty to file petition for leave to appeal being granted.

Having regard to the settled law on the subject, as declared by the three judgments referred to above, since the proper remedy against the judgment of the Metropolitan Magistrate acquitting the appellant was by way of petition for leave to file the appeal under Section 378 (4) Cr.P.C. brought before this court, the judgment of the Sessions court which is impugned here being without jurisdiction, the appeal is allowed.

The judgment and order on sentence of the Sessions court are set aside. The respondent, however, is given liberty to move appropriate petition for leave to appeal under Section 378 (4) Cr.P.C. within 30 days of today.

R.K.GAUBA, J.

APRIL 17, 2017vk