

HON'BLE SRI JUSTICE P. KESHA RAO

CRIMINAL REVISION CASE No.708 of 2018

ORDER:

Heard the learned counsel for the petitioner and the learned Public Prosecutor appearing for the 1st respondent State.

Though notice is served on the 2nd respondent, she has not chosen to appear either in-person or by engaging any counsel.

Questioning the orders passed in CrI.R.P.No.49 of 2017 dated 06.02.2018 on the file of the Court of the Principal District and Sessions Judge, Srikakulam, directing the learned Special Judicial Magistrate of First Class, Prohibition and Excise, Srikakulam, to restore the complaint in C.C.No.113 of 2011, which was dismissed for default on 17.08.2017, and to proceed with the trial after issuance of notice to both the parties, the present revision case is filed.

The facts of the case are that the 2nd respondent herein filed a complaint vide C.C.No.113 of 2011 against the petitioner for commission of offence under Section 138 of the Negotiable Instruments Act on the file of the Court of Special Judicial Magistrate of First Class, Prohibition and Excise, Srikakulam. During the course of hearing, on 17.08.2017, the 2nd respondent was called absent and there was no representation. Even though after repeated directions given to the 2nd respondent to attend before the Court and proceed

with the case, the 2nd respondent did not show any interest and made the Court to wait till 05.30 p.m. Therefore, the said complaint was dismissed for default. Aggrieved by the said orders, the 2nd respondent filed criminal revision petition being CrI.R.P.No.49 of 2017 in the Court of the Principal District and Sessions Judge, Srikakulam. The said revision petition was allowed by orders dated 06.02.2018, directing the trial Court to restore the complaint and proceed with its trial after issuing notice to both the parties. Aggrieved by the said orders, the present revision case is filed.

Learned counsel appearing for the petitioner would contend that dismissal of the complaint under Section 251 amounts to acquittal of the accused. Therefore, the 2nd respondent ought to have filed an appeal under Section 378 (4) Cr.P.C. after obtaining leave. The criminal revision case filed under Section 397 Cr.P.C. against dismissal of a calendar case is not maintainable. In fact, the said issue has already been decided by this Court in **P. Vijaya Laxmi vs. S.P. Sravana and another**¹. Therefore, he sought to allow the revision case.

Learned Public Prosecutor appearing for the 1st respondent supported the arguments of the petitioner's counsel and informed the Court that against acquittal of the accused, an appeal lies to this Court under Section 378(4) Cr.P.C. after obtaining leave.

¹ CrI.P.No.16742 of 2016 dated 27.10.2016

To appreciate the issue involved in the present revision case, the provisions of Sections 378 and 397 Cr.P.C., are relevant, which are as under:

“378. Appeal in case of acquittal: (1) Save as otherwise provided in sub-section (2) and subject to the provisions of sub-sections (3) and (5):

- (a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;
- (b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court not being an order under clause (a) or an order of acquittal passed by the Court of Session in revision

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal –

- (a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of cognizable and non-bailable offence; subject to the provisions of sub-section (3),
- (b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court.

(3) No appeal 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.

(5) No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub-section (4) for the grant of special leave to appeal from an order of acquittal is

refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub-section (2).”

“397. Calling for records to exercise powers of revision: (1)

The High Court or any Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within its or his local jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence or order be suspended, and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation: All magistrates, whether Executive or Judicial and whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of Section 398.

(2) The powers of revision conferred by sub-section (1) shall not be exercised in relation to any interlocutory order passed in any appeal, inquiry, trial or other proceeding.

(3) If an application under this section has been made by any person either to the High Court or to the Sessions Judge, no further application by the same person shall be entertained by the other of them.”

Basing on the above said two provisions, if a case is instituted on a complaint and the dismissal of the said complaint has an effect of acquittal, in view of the provisions of sub-section (4) of Section 378 Cr.P.C., the remedy available to the complainant is to make an application to the High Court seeking special leave to appeal against the impugned order.

As far as Section 397 Cr.P.C. is concerned, this Court and the Sessions Court may call for and examine the record of any proceeding before any inferior Court/criminal Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding arrived in the said order, after calling for such record. However, sub-section (4) of Section

401 Cr.P.C. contemplates 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.

Basing on the submissions made by both the parties and also looking into the provisions as stated supra, in the case on hand, the 2nd respondent ought to have filed an appeal under Section 378(4) Cr.P.C. to this Court against acquittal of the petitioner herein, but not the revision under Section 397 Cr.P.C. before the Principal District and Sessions Judge, Srikakulam. Therefore, CrI.R.P.No.49 of 2017 before the Court of the Principal District and Sessions Judge, Srikakulam, is not tenable.

In these circumstances, the present criminal revision case is allowed setting aside the orders passed in CrI.R.P.No.49 of 2017 dated 06.02.2018 on the file of the Principal District and Sessions Judge, Srikakulam.

Miscellaneous petitions, if any, shall stand closed.

P. KESHA RAO, J

Date: 22.06.2018.
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