

IN THE HIGH COURT AT CALCUTTA**Criminal Revisional Jurisdiction****Present: - Hon'ble Mr. Justice Subhendu Samanta.****C.R.R. No. - 3587 of 2018****With****IA NO. CRAN 1 of 2021****IN THE MATTER OF****Ms. Todi Investors****Vs.****Ashis Kr. Dutta & Anr.**

**For the petitioner : Mr. Prabhat Kumar Srivastawa, Adv.,
Mr. Subhamoy Patra, Adv.**

Judgment on : 03.11.2022

Subhendu Samanta, J.

The opposite party herein, initiated a petition of complaint U/s 138 of Negotiable Instrument Act against the present petitioner before the Learned Chief Judicial Magistrate Barrackpore vide Case No. 1966 of 2010. Subsequently, the case was transferred to the Court of Learned Judicial Magistrate 5th Court of Barrackpore. After conclusion of the trial Learned CJM found the present petitioner to be not guilty for the offence punishable U/s 138 of NI Act and thereby acquitted the present petitioner under section 255(1) of the Code of Criminal Procedure.

Against such order of acquittal an appeal has been preferred before the Learned Sessions Judge, North 24 Parganas vide a Criminal Appeal No.

101 of 2015 thereafter it was heard by Learned Additional Sessions Judge, Fast Track 3rd Court Barrackpore, North 24 Parganas, wherein Learned Additional Sessions Judge, set aside the order of acquittal passed by the Leaned Judicial Magistrate and found the present petitioner to be guilty of the offence punishable U/s 138 of Negotiable Instrument Act and convict the present petitioner U/s 255(2) of Cr.P.C.

Hence, this appeal.

Only two points of law are involved in the appeal.

Point No. 1:- whether a complainant in a case U/s 138 of N.I Act is a victim as defined U/s -2(wa) of Cr.P.C. ?

Point No. 2:- If the complainant is a victim within the definition of Section- 2(wa) of Cr.P.C., is he entitled to file an appeal invoking the provision to Section – 372 of Cr.P.C. before the court to which an appeal lies against the conviction?

Learned Advocate appearing on behalf of the petitioner cited a decision reported in **(2013)(2) Supreme Court Cases 2017**. He pointed out that the principle of law has settled in the Judgment of **SUBHAS CHAND** (supra). It has clearly held that in a case instituted on a complaint and an order of acquittal is passed, whether offence be bailable or nonbailable, or cognizable or noncognizable, complainant can only file application U/s 378(4) Cr.P.C. for special leave to appeal against it in High Court but the, complainant cannot file such appeal in Sessions Court.

It is the fact that a complaint case arising out on the basis of a petition of complaint U/s 138 of N.I. Act is a private complaint. Let me consider whether the complainant of a complaint case filed U/s 138 of N.I Act can be treated as 'victim' as defined U/s 372 of the Code of Criminal Procedure. Section 372 of the Code of Criminal Procedure after its amendment allowed a victim to prefer an appeal against an order of acquittal before a court of appeal where ordinarily appeal lies against the order of conviction of such court.

Section 372 of the Cr.P.C. read as follows.

372. No appeal to lie unless otherwise provided. – No appeal shall lie from any judgment or order of a Criminal Court Except as provided for by this Code or by any other law for the time being in force:

[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]

The term victim has been defined U/s 2(wa) of the Code of Criminal Procedure as follows

(wa) “victim” means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression “victim” includes his or her guardian or legal heir;]

If a complainant of 138 of N.I Act comes under the purview of the definition of victim enumerated U/s 2(wa) of the Cr.P.C he must have a right to appeal before the Court of Sessions against the order of acquittal.

The question has arisen before the different authorities and the principle is now well settled by a decision of Andhra Pradesh High Court in **Smt P. Vijaya Laxmi Vs. Smt. S.P. Sravana And Another.**

It has been categorically decided by the Hon’ble Andhra Pradesh High Court that a complainant of a case U/s 138 of N.I Act can not be categorised as ‘victim’ in terms of the definition U/s 2(wa) of the Code and stand excluded therefrom, by virtue of the fact that the accused in such a case is

not subjected to a charge. Thus he is not entitled to prefer an appeal under the provisions U/s 372 of the Code; his only remedy is to prefer an appeal U/s 378(4) of the Code, with special leave against the order of acquittal.

Hon'ble Supreme Court in **SUBHAS CHAND** Case as also made it clear that the complainant of such case can challenge the order the acquittal by filing an application for special leave to appeal in the High court and not in the Sessions Court.

Before amendment of the Code in 2009, the remedy available to a complainant against an order of acquittal in a case instituted on a complaint was to file an appeal under Section 378(4) of the Code before the High Court with special leave. This provision remained intact even after the amendment. Though drastic changes were made to the said provision in the year 2005, Section 378(4) was not amended. It could not be assumed that the Parliament was not aware of the remedy provided under section 378(4). Adverting to the fact that before this amendment, in a case instituted on a police report, the victim could only challenge the order of acquittal by way of a revision Under Section 397 of the Code and after the amendment and introduction of Section 2(wa) defining a victim, such a victim was conferred with the right of preferring an appeal to the Sessions Court against an order passed by the trial Court acquitting the accused or convicting him of a lesser offence or awarding inadequate compensation.

It is pointed out that if it is to be construed that a complainant could also file an appeal to the Sessions Court under Section 372 proviso or to the High Court under Section 378(4) of the Code, it would mean that a complainant in a complaint case would have two remedies and if he chooses the remedy under Section 372 proviso, he could file an appeal as of right to the Sessions Court without leave and if he files an appeal under Section 378(4) of the Code, special leave is required. The law makers would not have wanted to provide two remedies to a complainant in a complaint case. The amendment of the Code in 2009 was not with the intention of providing multiple remedies to a complainant. Law makers did not confer concurrent

jurisdiction on the Sessions Court and the High Court to entertain an appeal by the complainant against acquittal in a complaint case.

Thus, a complainant in a case U/s 138 of the Act of 1881 could not challenge the order of acquittal before the Sessions Court under the proviso to Section 372 of the Code and his only remedy is to file an appeal to the High Court with special leave under Section 378(4) of the Code.

Section 372 of the Code provides a victim the right of preferring an appeal only in cases arising out of a Police Report, the limited remedy available to such a victim when the trial court acquitted the accused, was to prefer a revision U/s 397 of the Code which, at best, would only result in the setting aside the acquittal a consequential remand but not a conviction. The legislature, in its wisdom, therefore, wished to provide a separate recourse to such an aggrieved victim by allowing an appeal at his behest. Therefore, a complainant in a case arising out of private complaint, who has already provide the right of appeal U/s 378(4) of the Code, can not be permitted to take recourse to Section 372 of the Code.

Thus both the above points are answered in negative.

Answered to point No. 1:- A complainant in a case U/s 138 of Negotiable Instrument Act is not a victim as defined U/s 2(wa) of Cr.P.C.

Answered to point No. 2:- A complainant in a case U/s 138 of NI Act is not entitled to file an appeal against acquittal according to the provision of Section 372 of Cr.P.C rather he may prefer an appeal before the Hon'ble High Court invoking the provision of Section 378(4) of the Cr.P.C.

After going through the authorities and after going through materials on record it appears to me that the appeal preferred by the present O.P. before the Learned Sessions Judge, vide Criminal appeal No. 101 of 2015 is beyond principle of law. Thus the impugned order of judgment passed by the Learned Additional Sessions Judge, in Criminal Appeal No. 101 of 2015 is devoid of merit and it is liable to be set aside.

In result thereof the instant appeal has got merit and it is allowed.

The impugned judgment passed in Criminal Appeal No. 101 of 2015 by the Learned Additional Sessions Judge, FTC 3rd Court Barrackpore is hereby set aside.

The instant CRR along with interim applications if any is disposed of. Order of stay if any, passed by this court is also vacated.

Let a copy of this order be sent down to the learned Court below for his information.

Urgent Photostat certified copy of this order, if applied for, be given to the parties, upon compliance of all formalities, on priority basis. All parties shall act in terms of copy of this order downloaded from the official website of this Court.

(Subhendu Samanta, J.)