

IN THE HIGH COURT OF ORISSA AT CUTTACK

CRLMC No.3973 of 2012

AFR

P. Ananda Rao @ Ananda Rao

....

Petitioner

Mr. Amitav Tripathy, Advocate

-Versus-

R. Krishore Patanaik

....

Opposite Party

Mr. Jugal Kishore Panda, Advocate

CORAM:

JUSTICE R.K. PATTANAIK

DATE OF JUDGMENT:01.11.2022

1. Instant petition under Section 482 Cr.P.C. is at the behest of the petitioner questioning the correctness and judicial propriety of the impugned order dated 24th November, 2012 passed in Criminal Revision Petition No.20 of 2012 by the learned 1st Additional Sessions Judge, Berhampur, Ganjam, whereby, order dated 9th August, 2010 in ICC Case No.132 of 2007 of the learned J.M.F.C., Berhampur was set aside and such challenge is on the grounds inter alia that the same is untenable in law and therefore, deserves to be interfered with and set aside.

2. The complaint in ICC Case No.132 of 2007 was filed by the opposite party under Section 138 NI Act, wherein, the petitioner entered appearance, however, when it was posted to 9th August, 2010 for hearing, the former did not turn up, as a result of which, the complaint was dismissed and the latter was acquitted under Section 256 Cr.P.C. and the case was closed by the learned J.M.F.C., Berhampur. Against the above order of acquittal, the opposite party preferred a revision which was allowed by the impugned order under Annexure-2 restoring the complaint to file.

The aforesaid decision of the learned 1st Additional Sessions Judge, Berhampur, Ganjam is under challenge which is primarily on the ground that the revision was not maintainable as the order of acquittal under Section 256 Cr.P.C. was to be appealed in terms of Section 378 Cr.P.C.

3. Heard Mr. Amitav Tripathy, learned counsel for the petitioner and Mr. Jugal Kishore Panda, learned counsel for the opposite party.

4. Mr. Tripathy, learned counsel for the petitioner submits that the learned Sessions court fell into error by entertaining the revision when the opposite party was required to challenge such an order of acquittal by filing an appeal under Section 378 Cr.P.C. It is contended that against the order of acquittal even under Section 256 Cr.P.C., an appeal was to be preferred by the opposite party but the learned court below without any jurisdiction not only entertained the revision but also allowed the same and resultantly reinstated the complaint. Mr. Panda, learned counsel for the opposite party, on the other hand, would submit that there has been no wrong or illegality committed as the learned court below in order to do proper justice entertained the revision and on just ground set aside the order of acquittal and restored the complaint to file for a decision on merit and therefore, the impugned order under Annexure-2 does not call for any interference.

5. Position of law is loud and clear which is to the effect that an order of acquittal under Section 256 Cr.P.C. has to be challenged by an appeal under Section 378 Cr.P.C. In **Subash Chand Vrs. State-Delhi Administration (2013)2 SCC 17**, the Supreme Court held and observed that an order of dismissal of a complaint in default would have the effect of acquittal and therefore, an application under Section 378(4) Cr.P.C. seeking leave to appeal against the decision

is maintainable, however, in that case, the appeal was rejected on merit. In **Ravi Sharma Vrs. State (NCT of Delhi) and Another 2009 Vol-IX AD (Delhi) 566**, it has been held that the only remedy available to the complainant against an order passed under Section 256 Cr.P.C. would be by way of an appeal under Section 378 Cr.P.C. Similarly, in **Yudhvir Singh Vrs. Nagmani Financial Services Private Limited 2003(108)DLT 142**, the Delhi High court concluded that when the complaint was dismissed as a consequence of failure on the part of the complainant, it results in an acquittal under Section 256 Cr.P.C. and therefore, an application for special leave to appeal under Section 378(4) Cr.P.C. would lie. The same view has been expressed by the Delhi High Court in **M/sLogix Corporate Solutions Private Limited Vrs. State of NCT of Delhi and Another** decided in **Criminal Leave Petition No.158 of 2017** and **CRLMA No.4579 of 2017** and disposed of on 3rd February, 2020. So, it cannot be gainsaid that an order of acquittal under Section 256 Cr.P.C. has to be appealed and can only be entertained provided the leave is granted by the Court as per and in accordance with Section 378(4) Cr.P.C.

6. In the instant case, after the order of acquittal by the learned J.M.F.C., a revision was carried to the Sessions court which resulted in the passing of the impugned order under Annexure-2. In fact, an objection had been raised by the petitioner before the court below vis-à-vis maintainability of revision. However, the Sessions court considered it appropriate to deal with the revision and even directed restoration of the complaint filed by the opposite party. The Sessions court relying upon a decision rendered in **Rabindra Behera Vrs. Sridhar Samantaray and others 1995 (II)OLR433** reached at a conclusion that a revision can be entertained in order to do proper justice.

7. In the decision of **Rabindra Behera** (supra), this Court, in the case of an acquittal under Section 256 Cr.P.C. though held that it is appealable in view of Section 378 Cr.P.C. yet treated it as a revision while exercising jurisdiction under Section 401 Cr.P.C. and remanded after restoring the case with an observation that even otherwise, the Court is not denuded of its power to suo motu revise an order of the inferior court where there is manifest error or illegality committed which resulted in miscarriage of justice. In fact, a Sessions court is having plenary powers to call for and examine records of any proceeding pending before a criminal court situate within its local jurisdiction for the purpose of satisfying itself as to the correctness of a finding recorded or returned which, however, shall not be exercised under Section 397 Cr.P.C. in relation to any interlocutory orders. Such power of a Sessions court shall have to be read with Section 399 Cr.P.C. The revisional power of this Court is specified in Section 401 Cr.P.C. In fact, where any proceeding by way of a revision is commenced in terms of Section 399(1) Cr.P.C., the provisions of sub-sections (2) to (5) of Section 401 Cr.P.C. shall apply to such proceedings and references so made therein to be construed as references to a Sessions court. However, as per Section 401(4) Cr.P.C., it is stipulated that where under the Code, an appeal lies but it has not been filed, no proceeding by way of revision shall be entertained at the instance of a party, who could have appealed. In other words, if an order is appealable but assailing it, a revision is filed, such revision cannot be entertained in view of Section 401(4) Cr.P.C. Furthermore, sub-section (5) of Section 401 Cr.P.C. specifies that where an appeal lies but an application for revision has been made by any person and the Court is satisfied that such move was under an erroneous belief that no appeal lies thereto and that it is necessary in the interest of justice so to do, the Court may treat the application as an appeal and dispose of the same accordingly. In the decision of **Rabindra**

Behera(supra), this Court treated the proceeding as a revision under Section 401 Cr.P.C. for doing justice yet with a conclusion that an order of acquittal under Section 256 Cr.P.C. has to be appealed in view of Section 378 Cr.P.C. While concluding so, this Court in the aforesaid case referred to Section 401(5) Cr.P.C. and also observed that suo motu powers can be exercised in case of glaring defect or error in the procedure or point of law.

8. To sum up, an order of acquittal under Section 256 Cr.P.C. shall have to be challenged in appeal under Section 378 Cr.P.C. subject to a leave granted by the Court. If a special leave is sought for by the complainant in terms of sub-section(4) of Section 378 Cr.P.C. and the same is allowed, then the appeal is admitted and decided according to law. A revision cannot lie if the order is appealable in nature in view of Section 401(4) Cr.P.C. If erroneously a revision is filed when the order is appealable, then in that case, such revision can be treated as an appeal and disposed of as stipulated in Section 401(5) Cr.P.C. Referring to the aforesaid decision in **Rabindra Behera** ibid, the learned court below entertained the revision and disposed it of on merit and restored the complaint to the file of the court of learned J.M.F.C., Berhampur. In the considered view of the Court, the court below fell into error by exercising the revisional power under Section 397 read with Section 399 Cr.P.C. notwithstanding the bar contained in Section 401(4) thereof. If at all a revision is to be treated as an appeal as per Section 401(5) Cr.P.C., it can only be by this Court in case of an order of acquittal under Section 256 Cr.P.C. since because a Sessions court cannot entertain an appeal under Section 378 Cr.P.C. In other words, in case of an order of acquittal in a proceeding instituted upon complaint, an application for special leave shall have to be moved before this Court by the complainant. Such an exercise can only be undertaken by approaching this Court and in case, special leave to

appeal is refused, no appeal from that order of acquittal shall lie under Section 378 (1) or (2) Cr.P.C. However, if the order is not appealable, a revisional court is having ample jurisdiction to rectify the mistake or error and even regularize a proceeding and not otherwise, when an appeal is to lie from such an order and furthermore, it cannot exercise jurisdiction under Section 401(5) Cr.P.C. to the extent and with reference to Section 378 Cr.P.C. where an occasion may arise for this Court alone to treat a revision as an appeal. Since this Court is possessed of the jurisdiction under Section 482 Cr.P.C., it has also the powers to pass appropriate orders and issue directions to do *ex debito justitia*, a jurisdiction which does not lie with a Sessions court. A Sessions court again does not have the suo motu power like this Court which is clearly evident from the expression 'the record of which has been called for by itself or *which otherwise comes to its knowledge*' (italicized to emphasize the existence of suo motu power of this Court which a Sessions court does not possess) employed in Section 401(1) Cr.P.C. Having discussed the relevant provisions, the Court reaches at a conclusion that the learned court below could not have entertained the revision for the following reasons, such as, the order under Section 256 Cr.P.C. is appealable in nature; a revision cannot lie when the order is to be appealed in terms of Section 378 Cr.P.C. with a special leave applied for by the complainant before this Court; when it cannot exercise powers under Sections 401(5) Cr.P.C. and treat a revision as an application for appeal in view of Section 378(4) Cr.P.C. and lastly, it does not have the inherent jurisdiction or for that matter, suo motu power under Section 401(1) Cr.P.C. In the ultimate analysis, it can be said that the Sessions court instead of restoring the complaint should have directed the opposite party to approach this Court in appeal as per and in accordance with Section 378(4) Cr.P.C.

9. Despite a conclusion, as above, the question is, whether, in the facts and circumstances of the case, restoration of the complaint as has been allowed by the Sessions court should still be disturbed? In fact, this Court is not inclined to interfere with the impugned order dated 24th November, 2012 despite its disagreement with the reasoning of the revisional court having regard to the background facts which are related to the circumstances preceding the dismissal of the complaint. That apart, reiterating the view of this Court expressed in **Rabindra Behera** (supra) which is to effect that the courts are not respected on account of its power to legalize prejudice on technical ground but because it is capable of removing injustice and cognizant of the fact that a disposal should normally be on merits instead of technicality, such restoration of complaint ought not to be tinkered with.

10. It is ordered accordingly.

11. In the result, the petition stands dismissed for the reasons discussed herein above.

(R.K. Pattanaik)
Judge

TUDU