

**IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH.**

CRM-M-5961-2022 (O &M)

Date of decision : 24 th Feburary, 2022

VIRENDER SINGH

.....Petitioner

Versus

M/S ELINA AUTOMOBILES PVT. LTD. AND ANR. ..Respondents

CORAM: HON'BLE MR. JUSTICE SANT PARKASH

Argued by : Mr. S.K.Bishnoi, Advocate
for the petitioner.

Mr. Amreek Singh Narwal, DAG, Haryana

SANT PARKASH, J.

(The case has been taken up for hearing through video conferencing.)

CRM-5772-2022

For the reasons mentioned in the application, the same is allowed and the copy of judgments as annexed with the application are taken on record as Annexures P-7 to P-9.

CRM-M-5961-2022

The petitioner has filed the present petition under Section 482 of the Code of Criminal Procedure for quashing of impugned order dated 18.01.2022 (Annexure P-6) passed by learned Sessions Judge, Sirsa whereby order of dismissal of complaint No. NACT-223/2018 under Section 138 of the Negotiable Instruments Act (for short 'the N.I. Act') has been set aside and the petitioner has been summoned to face

trial after his acquittal in the said complaint case.

The petition has been filed on the averments that the complainant firm filed complaint under Section 138 of the Negotiable Instruments Act alleging that the petitioner had taken loan of Rs.5,50,000/- in the year 2017 and the petitioner defaulted in payments of his installments and in order to discharge his legal/debt liability issued cheque amounting to Rs. 1,48,000/- in favour of the complainant but the cheque on presentation was received back unpaid with the remarks "Funds insufficient". The complainant Firm filed complaint under Section 138 of the N.I. Act and the petitioner was summoned to face trial and notice of accusation was served upon him to which he pleaded not guilty and claimed trial. Thereafter, on 22.02.2021, the matter was listed for CW's but despite repeated calls no one put in appearance on behalf of the complainant. Learned Judicial Magistrate First Class, Sirsa dismissed the complaint for want of prosecution. Relevant part of the said order is as under :-

"..... It is 3:30 pm. The entire cause list of the day has been exhausted. Case has been again called several times but no one has appeared on behalf of complainant. Accordingly, the present complaint is hereby dismissed for want of prosecution....."

Feeling aggrieved, the complainant filed application/revision for restoration of his complaint on the ground that due to some unavoidable circumstances he was unable to appear before the learned trial Court on 22.02.2021. Learned Sessions Judge, Sirsa vide impugned order dated 18.01.2022 (Annexure P-6) allowed the application and restored the complaint case to its original number and

directed the petitioner to appear before the learned trial Court in the said complaint case under Section 138 of the N.I. Act.

Learned Counsel for the petitioner has submitted that the case under Section 138 of the N.I. Act is a complaint case of summons trial and if the case is dismissed in default then it results into acquittal of the accused and the remedy to file an appeal for that lies before the High Court as enumerated in Section 378(4) Cr.P.C. The petitioner has been forced to re-tried for the offence in which he was legally acquitted and the impugned order dated 18.01.2022 (Annexure P-6) passed by learned Sessions Judge, Sirsa is a nullity and void ab initio. In support of his arguments, learned Counsel for the petitioner by way of **CRM-5772-2022** has placed on record judgments passed by Hon'ble Apex Court in '**Subhash Chand Vs. State (Delhi Administration)**' 2013(1) R.C.R. (Criminal) 1013; '**Damodar S. Prabhu Vs. Sayed Babalal H.**' 2010(2) R.C.R. (Criminal) 851 and judgment passed by Co-ordinate Bench of this Court in '**Ramanjit Singh Vs. Ramesh Kumar Naruala**' 2019(3) R.C.R. (Criminal) 363.

In **Subhash Chand (Supra)** it has been held that a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. He cannot file such appeal in the Sessions Court and quashed the impugned order holding that the case was not governed by Section 378(4) of the Cr.P.C.

In **Damodar S. Prabhu (Supra)**, it has been held as under :-

14. It may be noted here that Section 143 of the Act makes an offence under Section 138 triable by a Judicial

Magistrate First Class (JMFC). After trial, the progression of further legal proceedings would depend on whether there has been a conviction or an acquittal.

In the case of conviction, an appeal would lie to the Court of Sessions under Section 374(3)(a) of the CrPC; thereafter a Revision to the High Court under Section 397/401 of the CrPC and finally a petition before the Supreme Court, seeking special leave to appeal under 136 of the Constitution of India. Thus, in case of conviction there will be four levels of litigation.

In the case of acquittal by the JMFC, the complainant could appeal to the High Court under Section 378(4) of the CrPC, and thereafter for special leave to appeal to the Supreme Court under Article 136. In such an instance, therefore, there will be three levels of proceedings.

In case **Ramanjit Singh (Supra)**, it was held as under :-

10.....It is well settled principle of law that dismissal of a complaint in default of appearance of the complainant amounts to acquittal of the accused under Section 256 Cr.P.C. and, therefore, the revision before the Court of Sessions was not maintainable as the complainant had a right to file an appeal under Section 378(4) Cr.P.C., thus, the impugned order dated 13.08.2015 passed by the Additional Sessions Judge, Ludhiana is liable to be set-aside on the ground of non-maintainability of the revision petition.

Section 378 of the Cr.P.C., reads 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 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 a cognizable and non-bailable offence;

(b) 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.] (3)[No appeal to the High Court] 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).”

In view of the above referred judicial precedents and provisions of Section 378(4) Cr.P.C., it has become clear that in case of acquittal in a complaint case, the remedy before the complainant to file an appeal was only before the High Court. The said Section makes provision for appeal against an order of acquittal passed in case instituted upon complaint. Further, in view of Section 378(1)(a) and (b) of the Code, an appeal against an order of acquittal passed by the

Magistrate can only be filed before the Sessions Court in respect of cognizable and non-bailable offence and all other cases where orders of acquittal have been passed, appeal can only be filed to the High Court.

In the present case, the complaint case filed under Section 138 of the N.I. Act against the petitioner was dismissed in default on account of non appearance of the complainant. It is well settled principle of law that dismissal of a complaint in default of appearance of the complainant amounts to acquittal of the accused and the remedy to the complainant for filing an appeal against the said order of acquittal would lie before the High Court by filing leave to appeal and not before the Sessions Court.

In view of the above, the petition is allowed and the impugned order dated 18.01.2022 (Annexure P-6) passed by learned Sessions Judge, Sirsa is set aside.

24.02.2022
kavneet singh

(SANT PARKASH)
JUDGE

Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No