

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 287 of 2019

M/s. Kabra Brothers & Anr.

Vs.

Piyush Binakiya

For the Petitioner

: Mr. Ayan Bhattacharjee,
Mr. Aditya Tiwary,
Mr. Prattay Khan,
Mr. Suman Majumder.

Heard on

: 07.06.2023

Judgment on

: 23.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred against the Judgment and Order dated December 17, 2018 passed by the learned Chief Judge, City Sessions Court at Calcutta in Criminal Appeal No.90 of 2018 thereby setting aside the Order dated February 5, 2018 passed by the learned Metropolitan Magistrate, 18th Court at Calcutta in CN/399393 of 2014 under Section 138 of the Negotiable Instruments Act, 1881.

2. The petitioner's case is that the petitioner no.1 is a partnership firm.

3. That sometime in 2014, the opposite party herein filed a complaint under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter

referred to as 'NI Act') before the Court of the learned Chief Metropolitan Magistrate at Calcutta against the persons herein on the allegations as canvassed therein which was registered as case no.CN/399393 of 2014.

4. The petitioners were examined under Section 251 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') when they pleaded 'not guilty' and claimed to be tried. During trial, PW1 was examined in chief and date was fixed for cross-examination.

5. On January 18, 2018, the date fixed for cross-examination, neither the opposite party herein/complainant nor his lawyer entered appearance for which, vide Order dated January 18, 2018, the learned Trial Magistrate was pleased to issue show cause notice upon the opposite party herein fixing the next date on February 5, 2018. On February 5, 2018, since nobody appeared on behalf of the opposite party/complainant, vide Order dated February 5, 2018, the learned **Trial Magistrate was pleased to dismiss the complaint, thereby acquitting the petitioner under Section 256 of Cr.P.C.**

6. Being aggrieved by and dissatisfied with the order dated February 5, 2018 passed by the learned Trial Magistrate in case No.CN/399393 of 2014, the opposite party/complainant filed an appeal before the Court of the learned Chief Judge, City Sessions Court at Calcutta under Section 372 (Proviso) of Cr.P.C. which was registered as Criminal Appeal No.90 of 2018.

7. During hearing, the petitioners herein objected to the said appeal and pointed out the non-maintainability of the same in view of the specific provision under Section 378 of Cr.P.C. The petitioners herein relied upon the judgment passed by the Hon'ble Supreme Court of India in Subhash

Chand Vs. State (Delhi Administration) reported in 2013(1) Crimes 135(SC). However, after hearing, vide Judgment and Order dated December 17, 2018, the learned Chief Judge was pleased to allow the appeal preferred by the opposite party thereby setting aside the order dated February 5, 2018 passed by the learned Trial Magistrate.

8. The petitioners state that the learned Chief Judge has failed to appreciate that in view of Section 378 of Cr.P.C., the opposite party herein ought to have filed an appeal before this Hon'ble Court. Therefore, the judgment and order so passed by the learned Chief Judge suffers from quorum nonjudice.

9. **Mr. Ayan Bhattacharjee, learned counsel for the petitioners** has submitted that the judgment and order so passed by the learned Chief Judge is factually incorrect, procedurally untenable and legally unsustainable.

10. That the learned Chief Judge has failed to appreciate that in view of Section 378 of Cr.P.C., the opposite party herein ought to have filed an appeal before this Hon'ble Court. Therefore, the judgment and order so passed by the learned Chief Judge suffers from quorum nonjudice.

11. The learned Chief Judge has failed to appreciate that Section 378 of Cr.P.C. provides for appeal in cases of acquittal. According to Section 378 of Cr.P.C., in case of a complaint, the appeal will lie only to the High Court and that too only after grant of special leave under sub-section (5) of Section 378 of Cr.P.C. Section 378 of Cr.P.C. further provides that in case of an order of acquittal on a complaint where the High Court grants special leave to appeal

from the order of acquittal, the complainant may present an appeal to the High Court.

12. Thus, the impugned judgment and order so passed by the learned Chief Judge suffers from quoram nonjuidice and therefore, the same being nonest in the eye of law, requires to be set at naught.

13. **In spite of due service there is no representation on behalf of the opposite party.**

14. Vide order dated 05.02.2018, the learned Magistrate dismissed the complainant's case for non prosecution and acquitted the accused. In appeal under Section 372 of Cr.P.C. before the learned Sessions Court, the said order was set aside and the trial court was directed to give an opportunity to the complainant.

15. Hence, the revision.

16. Written notes of argument has been filed by the petitioner along with the judgments relied upon.

17. **It is argued by Mr. Bhattacharjee that:-**

A. After issuance of summons, in case the complainant does not turn up, the Magistrate is empowered to dismiss the complaint under Section 256 of Cr.P.C. The result of such dismissal is acquittal of the accused (vide Section 256 of Cr.P.C.).

B. An order of acquittal passed on a complaint case can only be interfered with by the High Court under Section 378 of the Cr.P.C. Such an appeal under Section 378 of Cr.P.C can only be entertained by High Court that too after grant of special leave under Section 378(4) of Cr.P.C. (vide Section 378(4) of Cr.P.C.).

C. It is trenchant from Section 378 of Cr.P.C. that an appeal against an order of acquittal passed in complaint case lies only before High Court and not before Court of Sessions. Furthermore, such appeal is pre-conditioned by grant of special leave.

18. **The following judgments have been relied upon:-**

- i) V. K. Bhat vs. G. Ravi Kishore & Anr. reported in (2016) 13 SCC 243.
- ii) Sri Chandan Mukherjee vs. Pankaj Kumar Behera reported in 2017(1) CLJ(Cal).

19. The Supreme Court in ***M/S. Bls Infrastructure Ltd. vs. M/S. Rajwant Singh, Criminal Appeal Nos.657-664 of 2023 (arising out of SLP (Criminal) Nos.867-874 of 2020) on 1 March, 2023***, held:-

“10. Having noticed the rival submissions, before we proceed further, it would be useful to notice the provisions of Section 256 of the Code, which are reproduced below:

“256. Non-appearance or death of complainant.—(1) If the summons has been issued on complaint, and on the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear, the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks it proper to adjourn the hearing of the case to some other day.

Provided that where the complainant is represented by a pleader or by the officer conducting the prosecution or where the Magistrate is of opinion that the personal attendance of the complainant is not necessary, the Magistrate may dispense with his attendance and proceed with the case.

(2) The provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant is due to his death.” A plain reading of the proviso to sub-section (1) of Section 256 would indicate that where the Magistrate is satisfied that the personal attendance of the complainant is not necessary, he can dispense with the attendance of the complainant and

proceed with the case. Such a situation may arise where complainant's/prosecution's evidence has been recorded and to decide the case on merits, complainant's presence is not necessary.

11. *In the case of S. Anand (supra), addressing a situation where the complainant was absent but had already examined his witnesses, this Court observed as follows:*

"12. Section 256 of the Code provides for disposal of a complaint in default. It entails in acquittal. But, the question which arises for consideration is as to whether the said provision could have been resorted to in the facts of the case as the witnesses on behalf of the complainant have already been examined.

13. The date was fixed for examining the defence witnesses. The appellant could have examined witnesses, if he wanted to do the same. In that case, the appearance of the complainant was not necessary. It was for her to cross-examine the witnesses examined on behalf of the defence." After observing as above, in paragraph 15, it was held thus:

"15. ... when the prosecution has closed its case and the accused has been examined under Section 311 of the Code of Criminal Procedure, the Court was required to pass a judgment on merit of the matter."

12. *In Associated Cement Co. Ltd. (supra), the purpose of inserting a provision like Section 256 of the Code was discussed and in light thereof, in paragraph 16, it was observed as under:*

"16. What was the purpose of including a provision like Section 247 in the old Code (or Section 256 in the new Code). It affords some deterrence against dilatory tactics on the part of a complainant who set the law in motion through his complaint. An accused who is per force to attend the court on all posting days can be put to much harassment by a complainant if he does not turn up to the court on occasions when his presence is necessary.

The section, therefore, affords protection to an accused against such tactics of the complainant. But that does not mean if the complainant is absent, the court has a duty to acquit the accused in invitum." After observing as above, it was held that where the complainant had already been examined as a witness in the case, it would not be appropriate for the Court to pass an order of acquittal merely on non-appearance of the complainant. Thus, the order of

acquittal was set-aside and it was directed that the prosecution would proceed from the stage where it reached before the order of acquittal was passed.”

20. **Section 2(wa) lays down:-**

“2. Definitions.—*In this Code, unless the context otherwise requires,—*

.....2 [(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;].....”

The legislature introduced certain amendments in the Code of Criminal Procedure on the recommendations of the Committee on Reforms of the Criminal Justice System (Justice Malimath Committee) through the Code of Criminal Procedure (Amendment) Act, 2008. Some of the salient provisions of the Act that creates room for victim rights in the Indian criminal framework are:-

- 1. Section 2(wa) defines a victim and extends the definition to include the victim’s legal heirs and guardians.*
- 2. Proviso to Section 24(8) allows the victim to appoint a legal practitioner to aid the public prosecutor with the permission of the Court.*
- 3. Proviso to Section 26(a) mandates the offences covered under Section 376(A) to 376(D) of the Indian Penal Code, 1860 would be subjected to trial in a court of law usually presided by a woman judge.*
- 4. Proviso to Section 157(1) provides that the statement of a rape victim be recorded at the place of residence of the victim or a place of her choice, by a woman police officer, in the presence of any parent, guardian or social worker of the area.*
- 5. Section 173(1-A) mandates that investigation must be completed with three months from the date of receipt of information in a case involving child rape.*
- 6. Section 357-A establishes a victim compensation scheme for compensation to the victim or his dependents.*
- 7. Section 372 allows the victim to appeal against an acquittal order, a conviction for a lesser offence or inadequate compensation given by the court.*

“.....The parliament enacted the Code of Criminal Procedure, 1973, and implemented the recommendations of the Law Committee’s reports. The insertion of Section 378(3) restricted the right to appeal against an acquittal order without the permission of the High Court. Section 378(4) allowed the State Government to file an appeal with the consent of the complainant only if the special leave to appeal was granted by the High Court. Section 372 of the Code of Criminal Procedure mandated that no appeals against the decision of a Criminal Court could be maintained without the consent of the High Court. Therefore, the Indian legislature failed to acknowledge the diminished rights and options available to a victim after a criminal proceeding.

The Code of Criminal Procedure (Amendment) Act 2005, introduced various changes in the legislation. However, despite the Supreme Court’s recognition of victim’s rights as well as the evolution of international jurisprudence regarding the rights of the victims of crimes, the legislature failed to introduce provisions permitting the victim to appeal against the acquittal of an accused. The Amendment allowed appeals against acquittals in the Court of Session without any leave to appeal. Section 377 of the CrPC was also amended to allow an appeal on the ground of inadequacy of sentence. All these amendments were intended to check the abuse of power and restrain frivolous acquittals.”

21. Thus, the learned Sessions Court did not have the jurisdiction to entertain the appeal preferred under Section 372 of Cr.P.C.

22. The complainant's/opposite party’s relief lies before the High Court under Section 378(4) Cr.P.C. The complainant is at liberty to avail of the said provision of law.

23. As the complainant has pursued his relief before the wrong forum, the question of limitation shall be decided accordingly.

24. **The revisional application being CRR 287 of 2019 is thus, allowed.**

25. The Judgment and Order dated December 17, 2018 passed by the court of the learned Chief Judge, City Sessions Court at Calcutta in Criminal Appeal No.90 of 2018 is hereby set aside.

26. No order as to costs.

27. All connected applications stand disposed of.

28. Interim order, if any, stands vacated.

29. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

30. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)