

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

213

**CRA-S-3280-SB-2012 (O&M)
Decided on : 26.05.2023**

Babu Khan

... Appellant(s)

Versus

M/s Hitesh Finance Company, Ambala City

... Respondent(s)

CORAM: HON'BLE MR. JUSTICE SANJAY VASHISTH

Present: Mr. Bhag Singh, Advocate
for the appellant(s).

None for the respondent(s).

SANJAY VASHISTH, J. (Oral)

1. Appellant – Babu Khan, has filed present appeal, challenging the judgment of conviction dated 18.10.2012, and order of sentence dated 19.10.2012, passed by the Court of Ld. Addl. Sessions Judge, Ambala (Appellate Court), whereby, the appellant has been convicted for committing an offence punishable under Section 138 of the Negotiable Instruments Act, 1881 (in short ‘NI Act’).

2. Cheque No. ‘630994, dated 18.05.2004, amounting to Rs.96,660/- was issued by the appellant (accused) payable at Punjab National Bank, Mullana, but the same got bounced and vide memos of the Bank (Ex.P2, P3 & P4), bouncing of the cheque was informed to the respondent. After issuance of legal notice (Ex.P5), respondent (complainant) filed Criminal Complaint No. 844/2, dated 17.07.2004/28.09.2008, before the Court of Judicial Magistrate Ist Class, Ambala Cantt. (in short ‘Ld. Trial Court’).

3. Ld. Trial Court acquitted the accused (appellant herein) by

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recording its findings in paragraphs Nos. 14, 16 & 17 of its judgment dated 24.09.2010. Para Nos. 14, 16 & 17 of the said judgment says as under:-

“14. Further, the loan was advanced on 24.4.2000 and at the time of advancement of loan, it was agreed that regular monthly installments of Rs.37001/- including interest shall be paid in 24 installments. As per the version of the complainant in Para 24 of the complaint, a payment of Rs.2000/- was received by him from the accused on 3.4.2001 and thereafter on 14.5.2004, the accused made a payment of Rs. 17,000/- as well as issued the cheque in question as final settlement of the loan. Admittedly, the last payment was made on 3.4.2001 and thereafter for a period of three years i.e. up to 3.4.2004 no payment was made by the accused and admittedly, a payment of Rs. 17,000/- was made to the complainant by the accused on 14.5.2004 i.e. after a period of three years. However, on the said date i.e. On 14.5.2004, the liability of discharging the debt had become time barred. As per the complainant, the amount of Rs.2000/- was also paid by the accused on 3.4.2001. Thus, the debt was payable up to 3.4.2004. As such, the payment of Rs. 17,000/- and the cheque in question dated 18.5.2004 was issued by the accused when the debt liability had become time barred. In these circumstances, after the expiry of three years the debt has become time barred. Further, there is no evidence on record to show that the accused ever acknowledged the existence of liability, thus extending the period of limitation. In these circumstances, the present complaint is barred by limitation.

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16. It is contended by the learned counsel for the complainant that the accused vide his separate statement dated 10.11.2008 has entered into a compromise and agreed to pay the cheque amount of Rs.96660/- by way of monthly installment of Rs. 1000/-. This, the accused has admitted his liability and now nothing remains to be proved against him for commission of offence under section 138 of Negotiable Instruments Act. The Statement dated

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10.11.2008 perused. The said statement is a joint statement of complainant and accused and vide said statement, the accused has nowhere admitted the existence of liability. Thus, the said statement can not be used against the accused. Moreover, the said statement was never put by the complainant to the accused in his evidence. Thus, the aforesaid contention of complainant is devoid of any merit.

17. In view of the above discussion, there is no merit in the case of the complainant. Thus, accused has rebutted the presumption available to the complainant under section 139 of Negotiable Instruments Act and therefore, the accused is hereby acquitted of the notice of accusation served upon him. His bail bonds and surety bonds also stands discharged.

File be consigned to the record room after due compliance.

Pronounced: 24.09.2010."

4. Judgment of acquittal dated 24.09.2010, was challenged by the respondent (complainant) by filing an appeal (appears to be inadvertently mentioned as Crl. Revision No. 19/25-10-10/30-1-12), before the next Court i.e. Court of Addl. Sessions Judge, Ambala, without realizing that as per law of Criminal Procedure Code, appeal would be maintainable or not before the Court of Sessions.

However, said appeal was allowed by the Court of Sh. Bimlesh Tanwar, Additional Sessions Judge, Ambala, by holding the appellant guilty for committing of offence punishable under Section 138 of NI Act. Accordingly, appellant was sentenced to undergo rigorous imprisonment for six months and to pay an amount of compensation of Rs.1,00,000/- (Rs. One Lac only) to the complainant vide its order of sentence dated 19.10.2012.

5. It is thereafter, that the appellant (accused) approached this Court by way of present appeal i.e. CRA-S-3280-SB-2012. Mr. Bhag Singh,

learned counsel for the appellant, submits that the impugned judgment of conviction, and order of sentence is null and void, because same has been passed by the Court, which was not competent to entertain the appeal against the judgment of acquittal passed by the Court of Magistrate. In fact, as per Section 378(4) of Cr.P.C., appeal in the complaint case is maintainable only before the High Court, and for the said purpose, in Cr.P.C., there is a specific provision for seeking '**Special Leave to Appeal**' under Section 378(4) Cr.P.C.

6. Mr. Bhag Singh, learned counsel for the appellant, refers to Chapter XXIX of Cr.P.C., which deals with the appeals against the judgments passed in criminal cases. Learned counsel refers to Section 378 of Cr.P.C., which says 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, 1 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).”*

Thus, learned counsel submits that in the absence of any provision of filing appeal before the Court of Sessions in a complaint case, the Court of Sessions could not have entertained the appeal, and thus, the impugned judgment is not sustainable, rather, same is without jurisdiction.

7. To strengthen his submissions, learned counsel for the appellant, relies upon the Full Bench judgment of this Court (Punjab and Haryana High Court) rendered in M/s Tata Steel Ltd. Vs. M/s Atma Tube Products Ltd. And others, 2013(2) R.C.R. (Crl.) 1005 (Law Finder Doc Id # 436468). He refers to para Nos. 71 & 139(a), which says as under:-

“71. Section 378 of the Code provides the remedy of appeal against acquittal of an accused. Its sub-Section (1) authorizes the District Magistrate or the State Government, as the case may be, to present an appeal to the Court of Session or the High Court against the order of acquittal passed by a Magistrate or the Court of Session, respectively. The Central Government can also present such appeal under sub-Section (2) in a case in which the offence has been investigated by CBI or any other central agency. Sub-section (3), however, puts a caveat that no appeal under sub-Sections (1) & (2) can be presented to the High Court without its 'leave'. Sub-Section (4) provides that if an order of acquittal is passed in a case instituted upon the complaint, the 'complainant' can present an appeal to the High Court against such acquittal only if the High Court grants 'special leave' to appeal. The Legislature has thus prescribed different conditions for the maintainability of appeal against order of acquittal passed in a 'police-case' vis-à-vis a 'complaint-case' i.e. a case instituted upon a private complaint. No appeal against acquittal in a complaint-case is maintainable to the Court of Session and for an appeal to High Court, the State or Central Government are required to obtain 'leave' of the High Court as mandated by Section 378(3) and if such an appeal is presented by the complainant, he/she is required to seek 'special leave' of the High Court under Section 378(4).

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139. For the reasons assigned above, we sum up our conclusions

and answer the questions as formulated in para 6 of this order, in the following terms:-

Question – (A) (i) *The expression "victim" as defined in Section 2(wa) includes all categories of his/her legal heirs for the purpose of engaging an advocate under Section 24(8) or to prefer an appeal under proviso to Section 372 of the Code.*

(ii) *However, legal heirs comprising only the wife, husband, parent and child of a deceased victim are entitled to payment of compensation under Section 357(1)(c) of the Code. Similarly, only those dependents of a deceased victim who have suffered loss or injury as a result of the crime and require rehabilitation, are eligible to seek compensation as per the Scheme formulated under Section 357-A of the Code.*

Question - (B) (iii) *The 'complainant' in a complaint-case who is also a 'victim' and the 'victim' other than a 'complainant' in such case, shall have remedy of appeal against acquittal under Section 378(4) only, except where he/she succeeds in establishing the guilt of an accused but is aggrieved at the conviction for a lesser offence or imposition of an inadequate compensation, for which he/she shall be entitled to avail the remedy of appeal under proviso to Section 372 of the Code.*

(iv) *The 'victim', who is not the complainant in a private complaint-case, is not entitled to prefer appeal against acquittal under proviso to Section 372 and his/her right to appeal, if any, continues to be governed by the unamended provisions read with Section 378 (4)Page 33 of 33.*

(v) *those 'victims' of complaint-cases whose right to appeal have been recognized under proviso to Section 372, are not required to seek leave or 'special leave' to appeal from the High Court in the manner contemplated under Section 378(3) & (4) of the Code.*

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8. Learned counsel further relies upon the judgment of the Hon’ble Apex Court rendered in **Subhash Chand Vs. Sttae (Delhi**

Administration), 2013 AIR (SC) 395 (Law Finder Doc ID # 413022), and refers to para Nos. 11, 14, 17 & 21 of the said judgment, which says as under:-

“11. Section 378 of the Code prior to its amendment by Act 25 of 2005 read as under:

“Appeal in case of acquittal.

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), 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 2*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 also direct the Public Prosecutor to present an appeal, subject to the provisions of sub-section (3), to the High Court from the order of acquittal.

(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).

Thus, under earlier Section 378(1) of the Code, the State Government could, 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 or

an order of acquittal passed by the Court of Session in revision. Section 378(2) covered cases where order of acquittal was passed in any case in which the offence had been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 or by any other agency empowered to make investigation into an offence under any Central Act other than the Code. In such cases, the Central Government could also direct the Public Prosecutor to present an appeal to the High Court from an order of acquittal. Section 378(3) stated that appeals under sub-sections (1) and (2) of Section 378 of the Code could not be entertained except with the leave of the High Court. Sub-section (4) of Section 378 of the Code provided for orders of acquittal passed in any case instituted upon complaint. According to this provision, if on an application made to it by the complainant, the High Court grants special leave to appeal from the order of acquittal, the complainant could present such an appeal to the High Court. Sub-section (5) of Section 378 of the Code provided for a period of limitation. Sub-section (6) of Section 378 of the Code stated that 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-sections (1) or (2). Thus, if the High Court refused to grant special leave to appeal to the complainant, no appeal from that order of acquittal could be filed by the State or the agency contemplated in Section 378(2). It is clear from these provisions that earlier an appeal against an order of acquittal could only lie to the High Court. Sub-section (4) was aimed at giving finality to the orders of acquittal.

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14. *Having analysed un-amended Section 378 it is necessary to have a look at Section 378 of the Code, as amended by Act 25 of 2005. It reads as under:*

“378. Appeal in case of acquittal.

- (1) *Save as otherwise provided in sub-section (2) and subject to the provisions of subsections (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 subsection (1) or subsection (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 subsection (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 subsection (2).*

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17. *Sub-Section (4) of Section 378 makes provision for appeal against an order of acquittal passed in case instituted upon complaint. It states that in such case if the complainant makes an*

application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It grants six months period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub- Section (6) is important. It states that if in any case complainant's application for 'special leave' under sub-Section (4) is refused no appeal from order of acquittal shall lie under sub-section (1) or under sub- section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation."

9. Arguments have been addressed on the point of law by learned counsel for the appellant, however, on this issue, there is no assistance from the side of respondent, as this Court has already noticed the absence of the respondent (complainant), almost through out the period of pendency of appeal before this Court.

10. After hearing learned counsel for the appellant, I have gone through the provision of law; and complete Chapter XXIX of Cr.P.C.; and the provision of appeal against acquittal i.e. Section 378 Cr.P.C. as well as the judgments (supra) cited by learned counsel for the appellant.

Therefore, with the reasons recorded in the judgment and in reference to the plain statutory language, this Court is fully satisfied that respondent could have filed his appeal with an application for seeking

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‘Special Leave to Appeal’ under Section 378(4) Cr.P.C., before this Court and thus, the appeal filed by appellant before the Court of Sessions, was incompetent and same could not be entertained.

Accordingly, judgment of conviction is held to be without jurisdiction, and thus, appeal is worth to be allowed by setting aside the judgment of conviction dated 18.10.2012, and order of sentence dated 19.10.2012, passed by Ld. Addl. Sessions Judge, Ambala. Accordingly, same are hereby *set aside*.

Appeal stands **allowed**.

(SANJAY VASHISTH)
JUDGE

May 26, 2023

J.Ram

Whether speaking/reasoned: *Yes/No*

Whether Reportable: *Yes/No*