

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

CRM-26603-2014
CRM-25619-2014
CRM-A-1316-MA-2014
Date of Decision: 23.01.2023

NAHAR SINGH

...Applicant

Versus

STATE OF PUNJAB AND OTHERS

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSH BUNGER

Present : Mr. Tejinder Pal Singh, Advocate
for the applicant.

Mr. Subhash Godara, Additional A.G. Punjab.

Mr. H.S. Randhawa, Advocate (Legal aid counsel)
for respondent No. 2

Mr. J.S. Brar, Advocate
for respondent No. 3.

HARSH BUNGER, J.

CRM-25619-2014

This is an application for exemption from filing certified copy of judgment dated 03.11.2009 passed by learned Judicial Magistrate Ist Class, Dhuri.

For the reasons recorded in the application, the same is allowed, as prayed for.

CRM-26603-2014 and CRM-A-1316-MA-2014

The instant application (***CRM-A-1316-MA-2014***) has been filed under Section 378(4) of the Code of Criminal Procedure, 1973 (for

short 'the Cr.P.C.') for grant of leave to appeal against impugned judgment of acquittal dated 03.11.2009 passed by learned Judicial Magistrate Ist Class, Dhuri and judgment dated 26.05.2011 passed by learned Additional Sessions Judge, Sangrur, vide which, the appeal filed by the petitioner against said judgment dated 03.11.2009, has been dismissed.

Brief facts of the case are that the applicant-complainant submitted a complaint against Baghera Singh and Sukhpal Singh by stating that in the year 2003-2004, he gave his 43 *bighas* of land on *theka* basis @ Rs.2,800/- per *bigha* to Baghera Singh for which a writing was executed and Baghera Singh, agreed to pay Rs.1,18,000/- before 06.11.2002, at the time of harvesting season of paddy crop. It was stated in the complaint that Baghera Singh, did not keep his words and then the complainant stopped him from harvesting the paddy crop, whereupon, the respectables and Sarpanch Sukhpal Singh intervened and Baghera Singh agreed to pay the whole amount after selling the paddy crop. It is stated in the complaint that said Sarpanch Sukhpal Singh took the guarantee regarding the payment and said that upto 15.11.2003, he would take the amount from Baghera Singh along with Rs.5,000/- and would hand over the same to complainant-Nahar Singh and thereafter, the complainant would not ask for money from said Baghera Singh. A writing was again said to have been executed, which was signed by Sarpanch Sukhpal Singh and also the witnesses. It was stated that upon expiry of the time limit, the applicant-complainant requested Baghera Singh and Sukhpal Singh to pay Rs.1,23,000/-; however, they put off the matter on one pretext or the other and said that they would pay the whole amount along with interest and again executed another writing in this regard. It was stated that subsequently, when applicant-complainant inquired about payment from

Baghera Singh and Sarpanch Sukhpal Singh, they became arrogant and refused to make any payment and rather extended threats to the applicant-complainant, whereupon, a complaint was submitted to the police, alleging that Baghera Singh and Sukhpal Singh, both had connived with each other and cheated the applicant-complainant and had mis-appropriated the amount of *Theka* (lease). Another complaint was submitted to the Senior Superintendent of Police, Sangrur on 18.05.2006. It appears that on the basis of the complaint submitted by the applicant-complainant, case FIR No.12 dated 20.02.2006 at Police Station Sherupur under Sections 420 and 120-B of the Indian Penal Code, was registered and accordingly, the charges were also framed under the said sections.

In order to prove his case, the prosecution had examined PW-1 Inspector Dalip Singh, PW-2 Nahar Singh (applicant-complainant), PW-3 Bhajan Singh, PW-4 ASI Gurdial Singh, PW5 Jaswant Singh, PW-6 ASI Sant Singh and various documents were submitted. Thereafter, statement of the accused under Section 313 of the Code of Criminal Procedure, was recorded and all the incriminating circumstances/evidence was put to the accused, which were denied by them. Baghera Singh took a plea that he had taken the land of the applicant-complainant on *theka* basis for one year and he was stopped by the complainant himself from harvesting the crop. It was his stand that Sarpanch Sukhpal Singh, had received the amount from him and thereafter, the complainant had taken the possession of the land. Sukhpal Singh took the plea that he had got the compromise effected between the parties and he has no personal relation or interest in the compromise and he merely participated in the compromise being a co-villager.

After appreciating the entire evidence available on the record, the learned trial Court, vide its judgment dated 03.11.2009, acquitted the respondents-accused of the charges framed against them by giving them the benefit of doubt and held as under :-

“13. In the present case, when the parties entered into an agreement of Theka, it was agreed between the parties that the accused Baghera Singh would pay the amount of Theka before 06.11.2002 at the time of harvesting the paddy crop. Meaning thereby at the time of transaction, there was no dishonest intention of the accused. It is well settled law that to constitute the offence under Section 420 IPC the dishonest intention of the party must be there from the very beginning of the transaction, but in the present case, the accused could not keep his words. There is no evidence on record, from which it could be inferred or proved by the prosecution that accused had dishonest intention at the time of execution of agreement of theka to cheat the complainant. The liability of the accused is of civil nature. The complainant could have filed a civil suit against the accused to recover the amount. So, I am of the considered view that no offence under Section 420 IPC or 120-B IPC is made out against the accused persons. So, both the accused are acquitted of the charge framed against them given them the benefit of doubt as the prosecution has miserably failed to prove the case against the accused beyond reasonable shadow of doubt. Case property be disposed of as per rules, after the expiry of period of appeal or revision, if any. File be consigned to the record room.”

The above-said judgment dated 03.11.2009 passed by learned Judicial Magistrate Ist Class, Dhuri, was impugned by the applicant-complainant by filing an appeal before the Sessions Judge, Sangrur; however, the same was dismissed, being not maintainable vide judgment

dated 26.05.2011 passed by Sessions Judge, Sangrur, by observing as under :-

“12. It comes out from the above said observations of the Hon’ble Supreme Court that incorporation of the Proviso to Section 372 of the Code has to take effect from the date of its incorporation and it has no application to the cases decided prior to such incorporation. The Proviso to Section 372 of the Code was incorporated vide Section 29 of the Code of Criminal Procedure (Amendment) Act, 2008 (5 of 2009) with effect from 31.12.2009. The judgment under appeal was passed prior to that day i.e. on 03.11.2009 and, as such the appeal before this Court against that judgment is not competent. The appeal, therefore, is not maintainable before this Court and is, accordingly, dismissed.”

Thereafter, the present application under Section 378(4) of the Code of Criminal Procedure, seeking leave to appeal against the above-said judgment dated 03.11.2009 passed by the learned Judicial Magistrate Ist Class, Dhuri as well as judgment dated 26.05.2011 passed by learned Sessions Judge, Sangrur, along with the appeal, has been filed by the applicant-complainant.

It is apposite to note that the above-said application (**CRM-A-1316-MA-2014**) under Section 378(4) of the Code of Criminal Procedure, has been filed after the delay of 1734 days; accordingly, an application (**CRM-26603-2014**) under Section 5 of the Limitation Act, has also been filed, seeking condonation of delay.

At the very outset, learned counsel appearing for respondents No.2 and 3 have raised a preliminary objection before this Court that the impugned judgment of acquittal has been passed by the learned trial Court on 03.11.2009; consequently, the complainant had no right to file an appeal

against the judgment of acquittal passed by the learned Judicial Magistrate 1st Class, Dhuri; however still the applicant-complainant filed an appeal before the Court of Sessions Judge, Sangrur; which was dismissed as not maintainable vide judgment dated 26.05.2011. Thereafter, the applicant-complainant slept over the matter and the present application under Section 378(4) Cr.P.C. for leave to appeal alongwith appeal has been filed accompanied by an application under section 5 of Limitation Act, seeking condonation of unexplained delay of 1734 days. Learned counsel for respondents No. 2 and 3 have also submitted that the proviso to Section 372 Cr.P.C., whereby the victim has been granted the right to file an appeal against the acquittal was inserted w.e.f. 31.12.2009 and the same is prospective in nature. Consequently, the appeal is not maintainable before this Court. Learned counsel for the respondents also placed reliance on the law laid down by Full Bench of this Court in "***M/s Tata Steel Ltd. v. M/s Atma Tube Products Ltd. and others***" 2013(2) RCR (Criminal) 1005, the judgment of Hon'ble the Supreme Court in "***Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and other***", 2018 (4) RCR (Criminal) 781 and also the judgment rendered by a Co-ordinate Bench of this Court in the case of "***Jai Lal vs Rajender and others***", 2023(1) RCR (Criminal) 387.

The submissions made by learned counsel for respondents no. 2 and 3 have been opposed by learned counsel for the applicant and he contended that in view of the provisions contained in Section 378(4) Cr.P.C., the appeal was maintainable before this Court. Chapter XXIX of Code of Criminal Procedure 1973, deals with the appeal. Section

378 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 cognisable 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 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.]

(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 cognisable 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).

I have heard learned counsels for the parties and have gone through the paper book as well as impugned judgments and also the judgments relied upon by counsel for the respondent.

Before considering the objection raised by learned counsel for respondent no. 2 and 3, it would be apposite to refer to the provisions contained in Section 372 of Cr.P.C., as it stood prior to 31.12.2009, which read as follows:-

"S. 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."

A bare perusal of aforesaid provision contained in Section 372 Cr.P.C. (as it stood prior to 31.12.2009) would manifest that the victim did not have the right to file an appeal. There has always been a consistent view that the State represents the victims of the crime. Every

criminal offence was treated to be an offence against the State and the State alone had the power to investigate and prosecute such case. Thus, the victim/complainant in a State case had no right to file appeal against the judgment of acquittal.

The right to appeal was vested for the first time in a 'victim' under the proviso to Section 372 of the Code inserted by the Code of Criminal Procedure (Amendment Act) 2008. Section 1(ii) of the Amendment Act clearly stated that ***"it shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint; and different dates may be appointed for different provisions of this Act"***. Still further Section 29 of the Amendment Act, 2008 pertaining to amendment of Section 372 of the Code states that ***"in Section 372 of the Principal Act, the following proviso shall be inserted, namely:- 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 Central Government, by Notification No.S.O.3313(E), dated 30.12.2009, appointed 31.12.2009, as the date for the Act No.5 of 2009 to come into force, which was published in the Gazette of India, extraordinary, Part 2(ii) Section 3(ii), dated 30.12.2009. Thus, the right of the victim, to prefer an appeal in terms of the said proviso to Section 372 Cr.P.C., became available to the victim(s) of all cases in which orders were passed by any criminal Court acquitting the accused or convicting him for a lesser offence or imposing inadequate compensation, on or after 31.12.2009.

The amended provision of Section 372 Cr.P.C. reads thus:-

"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 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.]

Further, the appeal against judgments of acquittal are governed by the provisions of Section 378 of Cr.P.C. As per sub section (1) of 378 Cr.P.C., only the District Magistrate or the State, as the case may be, is entitled to direct the Public Prosecutor to file an appeal. Sub section (2) of Section 378 of Cr.P.C. deals with the cases investigated under the Delhi Special Police Establishment Act, 1946 and in those cases, the Central Government may also direct the public prosecutor to file an appeal. As per Sub section (3) of Section 378 Cr.P.C., no appeal to the High Court either under Sub section (1) or Sub section (2) shall be entertained except with the leave of the Court. Sub section (4) deals with the appeals filed by the complainant in case the order of acquittal is passed in any case instituted upon a 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. Still further, Subsection (5) provides for the limitation for filing the petition for grant of special leave to appeal in terms of Subsection (4). Subsection (6) provides that in case the application for special leave to appeal filed by a complainant under subsection (4) is refused then no appeal

from that order of acquittal shall lie under Subsection (1) or under Subsection (2). It is thus apparent that so far as the appeals against acquittal are concerned, code of criminal procedure ascribes a predominant role to the State, who alone was entitled to file an appeal in cases, which were launched on the basis of a FIR. The only exception to this rule appears to be in a complaint case, where the complainant could file an appeal under Section 378(4) of Cr.P.C. after seeking special leave to appeal, in case the appeal lay to the High Court.

It is well settled that a right to appeal is a substantive right and it cannot be inferred by implication unless the statute expressly provides so. Thus, the right to appeal given to a victim under the proviso to Section 372 of the Code has been made enforceable w.e.f. 31.12.2009 and the same is prospective in nature.

Hon'ble Supreme Court of India in ***"Mallikarjun K Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and other"***, 2018 (4) RCR (Criminal) 781 has held as follows:-

"74. What is significant is that several High Courts have taken a consistent view to the effect that the victim of an offence has a right of appeal under the proviso to section 372 of the Cr.P.C., 1973. This view is in consonance with the plain language of the proviso. But what is more important is that several High Courts have also taken the view that the date of the alleged offence has no relevance to the right of appeal. It has been held, and we have referred to those decisions above, that the significant date is the date of the order of acquittal passed by the Trial Court. In a sense, the cause of action arises in favour of the victim of an offence only when an order of acquittal is passed and if that happens after 31st December, 2009 the victim has a right to challenge the acquittal, through an appeal. Indeed, the right not only extends to challenging the order of acquittal but also challenging the conviction of the accused for a lesser offence or imposing inadequate compensation. The language of the proviso is quite explicit, and we should not read nuances that do not exist in the proviso."

When the facts of this case are considered in the light of the legal position as indicated in foregoing paras; the complainant in the instant case was not entitled to file the accompanying appeal because the impugned judgment of acquittal has been passed by the learned trial Court on 03.11.2009 which is much prior to 31.12.2009 when the proviso to Section 372 Cr.P.C. was enforced under the provisions of Section 378 (4) Cr.P.C.

In view of the above discussion, I am of the considered view that since accompanying appeal under Section 378(4) Cr.P.C. filed by the applicant-complainant against judgment and order of acquittal dated 03.11.2009 passed by the learned Judicial Magistrate 1st Class, Dhuri in case FIR No. 12 dated 20.02.2006, under Sections 420, and 120-B of IPC, is not maintainable before this Court; accordingly, I do not find any justification to allow the application under Section 378(4) of Cr.P.C. which in any case has been filed after delay of 1734 days. I also do not find any plausible ground for condoning the delay in filing the application under Section 378(4) of Cr.P.C. alongwith the appeal.

Consequently, the application (*CRM-26603-2014*) under Section 5 of the Limitation Act seeking condonation of delay in filing the application under Section 378(4) of Cr.P.C. is dismissed.

Pending application/s, if any, shall stand closed.

January 23, 2023
gurpreet

(HARSH BUNGER)
JUDGE

Whether speaking/reasoned:

Yes/No

Whether reportable:

Yes/No