



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-30002-2016
DECIDED ON: 04.11.2024

AMARJIT SINGH

.....PETITIONER

VERSUS

M/S EKAM FABRICS

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE SANDEEP MOUDGIL

Present: Mr. Bhupinder Gupta, Advocate for
Mr. G.S. Madaan, Advocate
for the petitioner.

Mr. Divyanshu Shukla, Advocate for
Mr. Hitesh Pandit, Advocate
for the respondent.

SANDEEP MOUDGIL, J (ORAL)

Relief sought

1. The jurisdiction of this Court has been invoked under Section 482 Cr.P.C. seeking setting aside order dated 21.04.2016 (Annexure P-4) passed in Criminal Revision No.11 of 18.02.2015 titled as M/s Ekam Fabrics versus Amarjit Singh, whereby the Addl. Sessions Judge, Ludhiana has wrongly restored the complaint dated 26.11.2014 of the respondent registered as COMA-8287 of 2014, under Section 138 of Negotiable Instruments Act, which was dismissed in default vide order dated 30.01.2015.

Brief facts

2. Shorn of unnecessary detail, the facts giving rise to this petition under Section 482 of the Code folds as under:-

The complainant/respondent filed Complaint No. 8287 dated 26.11.2014 under Section 138 of the Negotiable Instruments Act against the petitioner/accused. Based on preliminary evidence, the trial court issued summons to the petitioner/accused on 10.12.2014. During the notice process, the trial court dismissed the complaint in default on 30.01.2015 due to non-appearance of the respondent/complainant, despite multiple calls and thereafter respondent/complainant preferred revision against the said order before the Sessions Court and the Court was pleased to restore the same to its original number and directed to proceed with the case.

Argument**On behalf of the petitioner**

3. Learned counsel for the petitioner at the very outset submits that the impugned order dated 21.04.2016 passed in Criminal Revision by the trial Court wherein the complaint was ordered to be restored which was dismissed in default by it, suffers from material illegality and impropriety as the adjudicating authority had no jurisdiction authority to pass the same.

4. He further submits that if any complaint is dismissed in default under the provisions of Section 256 Cr.P.C., the same amounts to order of acquittal and, therefore, can only be challenged by way of Section 378(4) Cr.P.C. i.e. by way of filing appeal against acquittal.

On behalf of the respondent

5. Controverting the submissions made by the petitioner, learned counsel for the respondent/complainant submits that it was only on one

occasion that the complainant/respondent failed to appear before the trial Court otherwise he was regularly appearing on each and every date, however, could not rebut the submissions on the ground of maintainability.

6. Heard learned counsel for the parties.

Analysis

7. This Court is conscious of the fact that once a complaint under Section 138 of Negotiable Instruments Act, 1881 has been dismissed for non-appearance of the complainant in exercise of powers under Section 256(1) of Cr.P.C. and the manner of exercise of the power to dismiss under Section 256 Cr.P.C. amounts to acquittal of the accused/petitioner.

8. The same issue involved in the present lis has garnered the attention of Bombay High Court in “***Om Gayatri & Co. & others v. State of Maharashtra & another***”, 2005 SCC OnLine Bom 1622, where it was observed:

“11. Section 256(1) mandates that if the absence of the complainant is not justified, the Magistrate shall acquit the accused. In a summons case, instituted on a complaint, if the complainant is absent on the date of hearing, the Magistrate has to follow either of the three courses, namely. 1) Acquit the accused; 2) to adjourn the case and 3) to dispense with the attendance of the complainant and to proceed with the case. In the present case, the Magistrate found that the complainant was avoiding to lead evidence, therefore, relying on the ruling of this Court reported in 1998 Mah LJ 576 : (1998 Cri LJ 3754) the Magistrate proceeded to pass an order acquitting the accused. Once this order has been passed, the remedy of the complainant is to prefer an appeal under Section 378 of the Code of Criminal Procedure after obtaining leave of the Court as required by Section

378(4) of Cr. P.C. This view is consistently taken by this Court. The earliest decision is that of Justice Vaidya, reported in AIR 1959 Bombay 94. This point then, arose in the matter of Dharamaji Gangaram Gholam v. Vithoba Soma Khade, reported in 1992 Mah LJ 118 : (1992 Cri LJ 870). In that case, the accused came to be acquitted in a complaint case by the learned Magistrate for the offences punishable under Sections 417 and 420 read with 34 of the Penal Code, 1860, The point whether an appeal lies against the order of acquittal or whether a revision can be maintained arose for the consideration of the Court. Referring to earlier decision of this Court and to the provisions of Section 401(4) which provides that where an appeal lies under the provisions of the Code of Criminal Procedure, and no appeal is brought, no proceeding by way of a revision shall be entertained at the instance of the party who could have appealed. Daud, J. came to the conclusion that only an appeal can be preferred against the order of acquittal in consonance with provisions of Section 378, Cr. P.C. In this behalf, reference can also be made to another judgment of this Court, reported in 1999 (3) Mah LJ 397 in the matter of Raja s/o Dr. S.P. Upadhyay v. State of Maharashtra. In that case also prosecution was for offence punishable under Section. 138 of N.I. Act. In the absence of complainant, the learned Magistrate passed an order of discharge. A revision was filed against that order. It was entertained by the Sessions Judge. The order of Sessions Judge was appealed against. In this context, Patel, J. observed in para 9 of the report that: "It can not be gainsaid that merely because the Magistrate committed an error in recording the order of discharge, that would invest the complainant with a right to prefer a revision and he was justified in doing so. As the order itself is very

clear that it has been passed under Section 256(1) of Cr. P.C., 1973, it will necessarily have to be construed an order of acquittal under section 256(1) and not that of discharge. There is one more distinction which will have to be kept in mind and that is, that once an order of acquittal under section 256(1) of the Criminal Procedure Code, 1973 is passed, then the complainant is debarred from filing a second complaint on the same facts so long as the order of acquittal is not set aside. Therefore, the only course open to the complainant was to prefer an appeal in the High Court against the said order of the learned Magistrate by special leave of the Court under section 378(5) of the Criminal Procedure Code, 1973.”

12. It may also be worthwhile to refer to the views of other High Courts on the point. In the matter of Krishna Kumar Gupta v. Mohammed Jaros, reported in 2003 Cri LJ 149, while dealing with this point, Mahmood Ali, J. referred to the submissions made on behalf of appellant in para 4 of the report. Its observed : “He had cited Guest Kleen Williams Ltd. v. Murarilal, 1984 Rajdhani LR 32 (1983 Cri LJ 554), where a Division Bench of this Court held that against an order of dismissal of a complaint under section 256 of the Cr. P.C. only an appeal lies. He also referred to the judgment of Shri M.M.S. Bedi v. Union Territory of Chandigarh, (1986) 89 Pun LR 687; Vinod Kumar v. State of Punjab, (1999) 4 Rec Cri Refers 469 and a judgment of Himachal High Court in H.P. Agro Industries Corporation Ltd. v. M.P.S. Chawla, (1997) 2 Crimes 591 in support of his argument that the dismissal of the complaint under section 256 of the Cr. P.C. resulted in acquittal of the accused and an appeal and not the revision will be the remedy to challenge it.” This submissions were accepted by the learned Judge. Dealing with these arguments, the learned

Judge observed in para 5: “Counsel for respondent initially justified the order of the Additional Sessions Judge impugned in this petition on the ground that it was not in accordance with the law laid down by the Supreme Court in Associated Cement Co. Ltd. v. Keshavanand, (1998) 1 SCC 687 : AIR 1998 SC 596 : (1998 Cr LJ 856) and a judgment of the Division Bench of this Court in Shiv Kumar v. Mond, Saghir, 1997 JCC 149 : (1997 Cri LJ 1264) but finally conceded that technically speaking revision did not lie against the order of dismissal of a complaint under Section 256, Cr. P.C. in view of the consistence view held by the courts that dismissal resulted in acquittal of the accused and against the acquittal only an appeal would be the appropriate legal remedy to challenge it, “In H.P. Agro Industries Corporation Ltd. v. M.P.S. Chawla, reported in 1997 (2) Crimes 591, petition under Section 482 of Cr. P.C. was filed challenging the order of dismissal passed under section 256 of Cr. P.C. After referring to the decisions of the Supreme Court in Bindeshwari Prasad Singh v. Kali Singh, and Maj. Genl. A.S. Gauraya v. S.N. Thakur. Learned Judge observed in para 12 of the report: “There is no denying that the dismissal of the complaint in default under Section 256 of the Code of Criminal Procedure entails the acquittal of the accused. Once an accused has been acquitted of the offence, the law provides a remedy by way of an appeal against the order of acquittal. Once a remedy by way of appeal is available to the petitioner under Section 378(4) of the Code of Criminal Procedure, on the failure of the petitioner to avail such a remedy, this Court is not to exercise the inherent powers for interfering with the impugned order.

13. It can be seen that earlier decisions of this Court and other High Courts have consistently laid down law that

only an appeal lies against order of dismissal of the complaint which amounts to acquittal of the accused and in case of acquittal remedy of revision is not available to the aggrieved party. Not only that under Section 401 of Cr. P.C. there is express bar for entertaining a revision at the instance of the party who could have appealed.

14.The point whether an appeal or revision lies against the order of acquittal passed under Section 256(1) Cr. P.C. was not before the Court and was not decided by the Court in this ruling. This judgment therefore is not an authority on the point whether a revision or appeal lies against an order of acquittal passed under Section 256(1) of the Code of Criminal Procedure. Be that, as it may, similar situation arose in the past before this Court in the matter of Dharamji Gangaram v. Vithoba Khade, where, Baud, J. was faced similar dilemma. In that case also, reference was made to the judgment of Sharad Manohar J. in Kokilabai Ramchandre Mahajan v. Gangadhar Shivram Mahajan, reported in 1986 (2) Bom CR 289, wherein it was held that the revision against the order of acquittal is maintainable. After referring to the relevant observations and the legal provisions, Daud J., distinguished the judgment on facts and observed in para 5 page 1217 that: "Had his attention been drawn to Badakas is decision, perhaps learned Judge may not have chosen to express himself in the broad terms he has done. In the present case we are also faced with the similar situation. However, in view of the judgments of the Apex Court that the long standing precedents are to be followed, and in view of the fact that while deciding the controversy in the matter of Mahendra Indermal Borana v. Anil Shankar Joshi, (supra) the attention of the, Court was not drawn to the earlier decisions of this Court as well as of other

High Courts holding that in case of order being passed under Section 256(1), Cr. P.C. acquitting the accused, the only remedy is to file an appeal and not a revision.....”

9. Coming back to the present case in hand wherein once a specific remedy of appeal under Section 378(4) of the Code is explicitly provided for a particular type of order, it would be highly irregular and inconsistent to allow a litigant to abandon their statutory right provided under the law and instead resort to wrong forum is not appreciable by this Court.

Decision

10. Keeping in view the dictum laid down in Om Gayatri & Co.’s case (supra) and the statutory provisions of the law, this Court is of the view that the order dated 21.04.2016 passed by the Addl. Sessions Judge, Ludhiana in a revision petition is not tenable as the same is not legally sustainable as the Court acted out of jurisdiction.

11. Hence, the order dated 21.04.2016 is quashed and the petition is allowed.

(SANDEEP MOUDGIL)
JUDGE

04.11.2024

Poonam Negi

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No