



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 795/2018.

Prakash Madhukarrao Desai

.vs.

Dattatraya Sheshrao Desai

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders

Shri D.R. Khapre, Advocate for the Appellant.

Shri R.S. Kurekar, Advocate for the Respondent.

CORAM : M.M. NERLIKAR, J.

DATE : SEPTEMBER 12, 2025.

Heard.

2. The principal challenge in this matter pertains to acquittal in cases under Section 138 of the Negotiable Instruments Act. This Appeal is filed under Section 378 of the Code of Criminal Procedure.

3. Vide order dated 25.01.2023, this Court has framed the following question for being referred to appropriate Bench.

“ Whether in case the transaction, is not reflected in the Books of account and/or the Income Tax Returns of the holder of the cheque in due course and thus is in violation to the provisions of Section 269 SS of the Income Tax Act, 1961, whether such a transaction, can be held to be “a

legally enforceable debt” and can be permitted to be enforced, by institution of proceedings under Section 138 of the Negotiable Instruments Act ?”

Division Bench of this Court on 19.08.2023 has answered the said question and relevant consideration is reflected in paragraph no.18 of the said judgment, which reads as under :

“18. In view of the aforesaid discussion, it is held that a transaction not reflected in the books of accounts and/or Income Tax returns of the holder of the cheque in due course can be permitted to be enforced by instituting proceedings under Section 138 of the Act of 1881 in view of the presumption under Section 139 of the Act of 1881 that such cheque was issued by the drawer for the discharge of any debt or other liability, execution of the cheque being admitted. Violation of Sections 269-SS and/or Section 271-AAD of the Act of 1961 would not render the transaction unenforceable under Section 138 of the Act of 1881. The decisions in Krishna P. Morajkar, Bipin Mathurdas Thakkar and Pushpa Sanchalal Kothari (supra) lay down the correct position and are thus affirmed. The decision in Sanjay Mishra (supra) with utmost respect stands overruled.”

4. Now so far as the issue in respect of preferring Appeal under Section 372 of the Code by the complainant/victim is concerned, the same was considered by the Hon’ble Supreme Court

in case of **Celestium Financial .vrs. A. Ganasekaran Etc (2025 SCC Online SC 1320)**, wherein the Supreme Court has held as under :

“7.7 In the context of offences under the Act, particularly under Section 138 of the said Act, the complainant is clearly the aggrieved party who has suffered economic loss and injury due to the default in payment by the accused owing to the dishonour of the cheque which is deemed to be an offence under that provision. In such circumstances, it would be just, reasonable and in consonance with the spirit of the CrPC to hold that the complainant under the Act also qualifies as a victim within the meaning of Section 2(wa) of the CrPC. Consequently, such a complainant ought to be extended the benefit of the proviso to Section 372, thereby enabling him to maintain an appeal against an order of acquittal in his own right without having to seek special leave under Section 378(4) of the CrPC.

7.8 In the case of an offence alleged against an accused under Section 138 of the Act, we are of the view that the complainant is indeed the victim owing to the alleged dishonour of a cheque. In the circumstances, the complainant can proceed as per the proviso to Section 372 of the CrPC and he may exercise such an option and he need not then elect to proceed under Section 378 of the CrPC.

7.9 In this context, we wish to state that the proviso to Section 372 does not make a distinction between an accused who is charged of an offence under the penal law or a person who is deemed to have committed an offence under Section 138 of the Act. Symmetrical to a victim of an offence, a victim of a deemed offence under Section 138 of

the Act also has the right to prefer an appeal against any order passed by the court acquitting the accused or convicting for a lesser offence or imposing an inadequate compensation. When viewed from the perspective of an offence under any penal law or a deemed offence under Section 138 of the Act, the right to file an appeal is not circumscribed by any condition as such, so long as the appeal can be premised in accordance with proviso to Section 372 which is the right to file an appeal by a victim, provided the circumstances which enable such a victim to file an appeal are met. The complainant under Section 138 is the victim who must also have the right to prefer an appeal under the said provision. Merely because the proceeding under Section 138 of the Act commences with the filing of a complaint under Section 200 of the CrPC by a complainant, he does not cease to be a victim inasmuch as it is only a victim of a dishonour of cheque who can file a complaint. Thus, under Section 138 of the Act both the complainant as well as the victim are one and the same person.

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8. *The right to prefer an appeal is no doubt a statutory right and the right to prefer an appeal by an accused against a conviction is not merely a statutory right but can also be construed to be a fundamental right under Articles 14 and 21 of the Constitution. If that is so, then the right of a victim of an offence to prefer an appeal cannot be equated with the right of the State or the complainant to prefer an appeal. Hence, the statutory rigours for filing of an appeal by the State or by a complainant against an order of acquittal cannot be read into the proviso to Section 372 of the CrPC so as to restrict the right of a victim to file an appeal on the grounds mentioned therein, when none exists.*

9. *In the circumstances, we find that Section 138 of the Act being in the nature of a penal provision by a deeming fiction against an accused who is said to have committed an offence under the said provision, if acquitted, can be proceeded against by a victim of the said offence, namely, the person who is entitled to the proceeds of a cheque which has been dishonoured, in terms of the proviso to Section 372 of the CrPC, as a victim. As already noted, a victim of an offence could also be a complainant. In such a case, an appeal can be preferred either under the proviso to Section 372 or under Section 378 by such a victim. In the absence of the proviso to Section 372, a victim of an offence could not have filed an appeal as such, unless he was also a complainant, in which event he could maintain an appeal if special leave to appeal had been granted by the High Court and if no such special leave was granted then his appeal would not be maintainable at all. On the other hand, if the victim of an offence, who may or may not be the complainant, proceeds under the proviso to Section 372 of the CrPC, then in our view, such a victim need not seek special leave to appeal from the High Court. In other words, the victim of an offence would have the right to prefer an appeal, inter alia, against an order of acquittal in terms of the proviso to Section 372 without seeking any special leave to appeal from the High Court only on the grounds mentioned therein. A person who is a complainant under Section 200 of the CrPC who complains about the offence committed by a person who is charged as an accused under Section 138 of the Act, thus has 51 the right to prefer an appeal as a victim under the proviso to Section 372 of the CrPC.*

10. *As already noted, the proviso to Section 372 of the CrPC was inserted in the statute book only with effect*

from 31.12.2009. The object and reason for such insertion must be realised and must be given its full effect to by a court. In view of the aforesaid discussion, we hold that the victim of an offence has the right to prefer an appeal under the proviso to Section 372 of the CrPC, irrespective of whether he is a complainant or not. Even if the victim of an offence is a complainant, he can still proceed under the proviso to Section 372 and need not advert to sub-section (4) of Section 378 of the CrPC.”

5. Considering the above position of law as laid down by the Supreme Court, the learned Counsel appearing in the matter for appellant submitted that under proviso to Section 372 of the Code of Criminal Procedure, since the victim has a right to prefer an appeal against the order passed by the Court acquitting the accused or convicting accused for lesser offence or imposing inadequate compensation, such appeal shall lie to the Court to which the appeal ordinarily lies against the order of conviction. In view of said proviso, the learned Counsel prays that the matter be transferred to the concerned District and Sessions Court for its disposal in accordance with law.

6. In this view of the matter and considering the observations of the Supreme Court referred above, the appeal is required to be

7

transferred for its disposal to the concern District Court. Needless to mention that the District Court shall take into consideration the observations of the Division Bench of this Court in respect of the answer to the question referred to it. Hence the following order.

ORDER

- (1) The Appeal is transferred to the District and Sessions Court, Washim who shall after registering the Appeal, deal with the same in accordance with law, and the above quoted observations in the matter.
- (2) Parties shall appear before the District and Sessions Court, Washim on 13.10.2025.
- (3) The District and Sessions Court, Washim shall treat this appeal under proviso to Section 372 of the Code as per the observations of the Supreme Court in case of Celestium Financial (supra).
- (4) Registrar (Judicial) of this Court to take further necessary action for transferring this matter to the District and Sessions Court, Washim immediately.

JUDGE