

(2017) 03 GAU CK 0008
In the Gauhati High Court
Case No : Case No. CrI.A. 220 of 2016

Bhabesh Chandra Barman

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 24-03-2017

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 378, Section 378(1)

Citation : (2017) 2 GauLT 389

Hon'ble Judges : Mr. Ajit Borthakur, J.

Bench : Single Bench

Advocate : Mr. A.K. Bhuyan, Mr. N. Choudhury and Mr. M. Borah, Advocates, for the Petitioner; Mr. D.C.C. Phukan, P.P. Assam, and Mr. M. Chiring, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. Ajit Borthakur, J. (CAV) - This is an appeal under Section 378 Cr.P.C. preferred against the judgment and order of acquittal of the respondent No. 2 herein, dated 30.11.2015, passed by the learned Sub-Divisional Judicial Magistrate (S), Kamrup (M) at Guwahati, in C.R. Case No. 1029/2013 under Section 138 of the Negotiable Instruments Act (for short "N.I. Act"), 1981.

2. The complainant-appellant's case, precisely, is that the respondent No. 2 issued a cheque, bearing No. 285016, dated 21.11.2012 amounting to Rs. 1 lac in his favour for liquidating a legally enforceable debt. However, the cheque was dishonoured by the bank on presentation, on 23.01.2013 due to insufficient fund. The appellant issued demand notice to the respondent No. 2, on 18.02.2013, which was delivered to him, on 25.02.2013. But the respondent No. 2 did not make payment of the cheque amount. Therefore, the complainant - appellant herein lodged a complaint under Section 138 of N.I. Act before the Court of learned Chief Judicial Magistrate, Kamrup (M) at Guwahati against the accused-respondent No. 2 herein. On being made over, the trial commenced in the Court of learned Sub-Divisional Judicial Magistrate (S), Kamrup (M) at Guwahati and

after completion of trial, the learned trial Court by the impugned judgment and order acquitted the accused-respondent No. 2 of the charge under Section 138 of the N.I. Act.

3. Now, by the instant appeal, the complainant-appellant has assailed the above impugned judgment and order, on the grounds, interalia, that the learned Trial Court failed to appreciate the evidence adduced by both the sides along with the statement of the accused-respondent No. 2 recorded under Section 313 Cr.P.C. from proper perspective.

4. Mr. A.K. Bhuyan, learned counsel for the complainant-appellant submitted that the learned Trial Court wrongly held that the complainant failed to prove the pre-requisite of the existence of a legally enforceable debt misinterpreting the cogent evidence on this count and in view of various admissions of the accused respondent No. 2 in cross-examination of the witnesses as well as in his statement under Section 313 Cr.P.C. Mr. Bhuyan, learned counsel for the complainant-appellant further submitted that the instant appeal being filed after obtaining special leave to appeal as required under Section 378 (4) Cr.P.C., the appeal against acquittal in a complaint case is maintainable to the High Court. Learned counsel also submitted to remand the case to the learned Trial Court to deliver a fresh judgment upon hearing of both the sides.

5. Mr. S.K. Bhuyan, learned counsel for the complainant-appellant herein submitted that in the case of Satya Pal Singh v. State of M.P. & Ors., rendered in Criminal Appeal No. 1315 of 2015 [arising out of SLP (Crl.) No. 7954 of 2014] (supra), cited by the defence, the Apex Court dealt with the question of appeal against acquittal by the victim in a case instituted on police report, whereas the instant case relates to appeal by the victim against acquittal recorded by Magistrate in a complaint case under Section 138 of the N.I. Act. Therefore, Mr. Bhuyan submitted that the proviso to Section 372 Cr.P.C. should be read in conjunction with Section 378 (3) and 378 (4) Cr.P.C. as the victim here is the complainant in the 138 N.I. Act proceeding by reason of acquittal of the accused-respondent No. 2 by the learned Trial Magistrate for which appeal has been preferred to the High Court with prior leave already granted for the purpose. According to Mr. Bhuyan, learned counsel for the appellant, the present appeal is maintainable in view of the clear provision in Section 378 (4) Cr.P.C.

6. Mr. D.C.C. Phukan, learned counsel for the accused-respondent No. 2 submitted that the substantive proviso to Section 372 Cr.P.C. provides right to appeal to the complainant - victim against an order of acquittal by the Magistrate to the court, to which an appeal ordinarily lies against the order of conviction for a lesser offence or imposing inadequate compensation. Mr. Phukan argued that the legislature has further incorporated Section 378 Cr.P.C. clearly defining the scope of appeal against acquittal by the Magistrate to the Court of Session only. Quoting from the decision of the Apex Court rendered in the case of Pillai v. V.R. Pattabiraman reported in (1985) 1 SCC 591, Mr. Phukan submitted that a proviso must be construed with reference to the preceding parts of the clause to which it

is appended. Thus, Mr. Phukan, learned counsel for the respondent No. 2 primarily focused on the maintainability of the appeal instead of on the grounds of appeal of the complainant - victim.

7. Section 372 Cr.P.C. provides that 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. The proviso to the said Section provides that the "victim", defined in Section 2 (wa), shall have a right to prefer an appeal against any order passed by the court acquitting the accused or conviction 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. A proviso, it is well settled, is not a separate or independent enactment, but subordinate to the enacting clause which needs to be read in the context of the Section to understand its true meaning. In Principles of Statutory Interpretation at Page-225 by Justice G.P. Singh it has been stated that where there is a proviso, the former part which is described as the enacting part, must be construed without reference to the proviso and one must read the whole clause before attempting to construe any portion of it, and a perusal of the proviso fixes the meaning of the words which precedes.

8. Coming to sub-sections (1) and (2) of Section 378 Cr.P.C., it is noticed that the procedure for preferring appeal in case of acquittal in a case instituted on a police report and investigated by the State investigating agency or the Delhi Special Police Establishment or by any other agency empowered to carry investigation either to the court of Session or the High Court specified therein. In other words, the Section provides for an appeal against acquittal by (i) the Government with leave of the High Court and (ii) and also by a private party in a case instituted upon complaint, when special leave is obtained from the High Court. However, in case of appeal against acquittal in any case instituted upon complaint, it is provided in sub-section (4) of Section 378 Cr.P.C. that the High Court, on an application made to it by the complainant in this behalf, if grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.

9. The appeal in hand, has been preferred against the judgment and order of acquittal, dated 30.11.2015 passed by the learned S.D.J.M. (Sadar), Kamrup (M) at Guwahati in C.R. Case No. 1029/2013 under Section 138 N.I. Act, that is, in a complaint case. In Satya Pal Singh Case (supra), the Apex Court laid the rules of interpretation of a "proviso" to a statute and observed that "proviso" of a statute must be interpreted and understood in the context of the enacting provision and accordingly held that "proviso" to Section 372 Cr.P.C. should be read conjointly with the provisions of Section 378 Cr.P.C. The Apex Court further held that such appeal against acquittal shall lie to the High Court only after obtaining leave as required under sub-section (3) to Section 378 Cr.P.C..

10. In Subhas Chand v. State (Delhi Administration) reported in (2013) 2 C Cr LR (SC) 151, the Apex Court held that an appeal against an order of acquittal in a

case instituted upon complaint can be filed only in the High Court after obtaining special leave to appeal under sub-section (4) of Section 378 Cr.P.C. and the complainant cannot file an appeal against an order of acquittal passed by a Magistrate in a case instituted upon complaint before the Session Court. Therefore, the law is clear that an appeal against an order of acquittal in a case instituted upon complaint can only be preferred to the High Court, provided special leave is granted under sub-section (4) of Section 378 Cr.P.C., on an application made to it by the complainant.

11. Thus, placing reliance on the Subhas Chand's case, this Court is of the opinion that the instant appeal against the impugned judgment and order of acquittal passed by the Court of learned Magistrate in the aforesaid complaint case under Section 138 of the N.I. Act to the High Court is maintainable, as the complainant obtained special leave for such appeal under sub-section (4) to Section 378 Cr.P.C. vide order, dated 28.07.2016 passed in CrI. L.P. 6/2016.

12. With regard to the above grounds of appeal, learned counsel for the respondent No. 2 has preferred to argue on the preliminary point of controversy relating to the above question of maintainability of the appeal. It is noticed from the impugned judgment and order that the learned Trial Court failed to appreciate the evidence of complainant-P.W.1 in support of his claim of issue of the cheque in question amounting to Rs. 1 Lac by the accused-respondent No. 2 in discharge of debt or liability and the accused-respondent No. 2's oblique replies to the incriminating pieces of evidence emerged from the evidence of P.W.1.

13. The accused-respondent No. 2 simply denied handing over of the cheque to the complainant-appellant and that the latter did not approach him on demand for payment of the cheque amount and further, even failed to remember whether he received the demand notice, on 25.02.2013. In his evidence, the accused-respondent No. 2 (D.W.1), interalia, stated that he took a loan of Rs. 1 Lac in the year 2004 from the complainant-appellant herein and repaid the said loan amount by 3 (three) number of cheques, each of Rs. 6000/- and remaining amount in cash vide Ext. "A", "B" and "C" are the bank statements and Ext. "D", the certificate issued by Co-operative City Bank. In cross-examination, he admitted to have obtained the legal notice from one Bhabesh Barman, but did not make any reply. Therefore, it appears that the factual findings given by the learned Trial Court are contrary to the material on record and plausible reasons, which need to be re-appreciated applying the sound principles of appreciation of evidence in the context of the ingredients of the offence under Section 138 of the N.I. Act. However, as submitted by the learned counsel for the complainant-appellant, the entire matter is left to the discretion of the learned Trial Court to decide.

14. Accordingly, the appeal stands party allowed and the case is remanded to the learned Court below to deliver a fresh judgment upon hearing arguments of both the sides.

15. Let the LCR along with a copy of this judgment and order be forwarded to the learned Court below.

16. The appeal stands disposed of.