

(1978) 10 KL CK 0022
In the High Court Of Kerala
Case No : Criminal R.P. No. 219 of 1978

Krishanlal Oberoi

APPELLANT

Vs

Corporation of Cochin and Another

RESPONDENT

Date of Decision : 06-10-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 256(1), 299(2), 378(4), 397, 401(4)
Kerala Municipal Corporation Act, 1961 — Section 288(1), 378(1)

Citation : (1978) 10 KL CK 0022

Hon'ble Judges : Subramonian Poti, J

Bench : Single Bench

Advocate : V.K. Hamza and K. Sikhivahanan, for the Appellant; Abdul Khader, for the Respondent

Judgement

Subramonian Poti, J.—Does an appeal lie under the Code of Criminal Procedure, 1973 against an order of acquittal in a case instituted upon complaint? On the answer to this question depends the fate of this revision. If an appeal lies, no appeal having been brought the prohibition u/s 401(4) of the Code of Criminal Procedure that no proceeding by way of revision shall be entertained at the instance of the party who could have appealed, will operate as a bar against this revision. Under Sub-section (4) of Section 378 of the Code of Criminal Procedure, the High Court, on an application made by the complainant for special leave against an order of acquittal passed in a case instituted on complaint may grant special leave to appeal. On such special leave being granted the complainant may present such appeal to the High Court. There, against an order of acquittal, the complainant does not seek special leave to appeal to the High Court but files a revision u/s 397 of the Code of Criminal Procedure to the Court of Sessions is the revision barred by reason of Sub-section (4) of Section 401 of the Code? That is the question I am called upon to answer here.

2. Without the aid of any precedents and on the plain language of Sub-section (4) of Section 401, I am inclined to say that an appeal does lie against an order

of acquittal in any case instituted upon complaint. Of course an appeal lies on when special leave is obtained. The requirement that the complainant has to seek special leave and only if it is granted he can present the appeal, does not, according to me, mean that no appeal lies against the order of acquittal. Appeal does lie, but subject to special leave. The contention of the complainant that appeal must lie as a matter of right in order to attract the bar of Section 401(4) of the Code is, as observed by the High Court of Allahabad in *City Board, Mussoorie Vs. Sri Kishan Lal*, to read in place of the words, "where under this Code an appeal lies" the words "where under the code an appeal lies as a matter of right". The High Court of Madras has in the decision reported in *Municipal Commissioner Vs. S. Annapakkiyam and Another*, expressed the same view. That leave has to be obtained before an appeal is filed does not amount to saying that there is no right of appeal is the view expressed by many of the High Court in India. The High Court of Allahabad in the decisions in *Ram Narain Vs. Mool Chand and Others*, has expressed this view. The same view has been expressed by the High Court of Assam in *Abdul Majid Vs. Adai and Others*, the High Court of Bombay in the decision reported in *State of Bombay Vs. N.G. Tayawade and Another*, the Gujarat High Court in the decision in *Sankalchand Varchhaji Vs. Khengaram Vardhaji and Others*, and the High Court of Madras in *In Re: Seenil Ammal, Municipal Commissioner, Nagarcoil Vs. M. Chinnammal*, and in the later decision in *Municipal Commissioner Vs. S. Annapakkiyam and Another*, already adverted to. The mere fact that right of appeal is made subject to obtaining leave makes no difference is the view expressed by the decision of the Orissa High Court in *Dukhishyam Sahu Vs. Bidyadhar Sahu*, Relying on the decision of the Allahabad High Court in *City Board, Mussoorie Vs. Sri Kishan Lal*, that of the Bombay High Court in *State of Bombay Vs. N.G. Tayawade and Another*, and that of the Punjab High Court in *Shiv Parshad Vs. Bhagwan Das and Another*, the same view was expressed in *Chairman, Village-Panchayath Magathihalli v. N. Thimmasetty* AIR 1956 Mys 62. This Court had in the decision in *Antony v. Ibrahimkutty* 1960 KLT 481 expressed the same view and Chief Justice Sankaran expressed the view where an appeal could be filed by a complainant in a private complaint and he has not sought to file an appeal, a revision at his instance would not be entertainable.

3. I may notice the contrary view of Judicial Commissioner of Tripura in the decision in *Raj Kumar Paul Vs. Amar Chand Das and Others*, . The view expressed therein is that it cannot be said that the complainant has a right of appeal against an acquittal within the meaning of Section 439(5) and that is because it is subject to obtaining special leave and therefore the right is only to file an application for leave. The learned Judicial Commissioner has noticed the contrary view expressed by many of the High Courts in India and I do not think that the reasoning in those decisions has been properly met by the learned Judicial Commissioner in the Tripura case. In fact it is evident from the judgment that the view expressed by the learned Judicial Commissioner is merely obiter. Though the Judicial Commissioner, Manipur in the decision in *Raringsui Thaghkhul*

v. Yangmaso AIR 1963 Manipur has expressed the view that a revision could be entertained by the Sessions Judge in a case where an appeal lies at the instance of the party who could have applied for special leave to appeal, the judgment is not supported by any reasoning, and the learned Judicial Commissioner merely follows his earlier decisions. Though the contrary view of the Bombay and Allahabad High Courts is noticed the learned Judicial Commissioner observes that he sees no reason to change his view. I may notice here that the said view has not been followed by the same Court later in Sapam Laingam Singh Vs. Kakyengpaibam Amuyaima Singh and Others, . It has been noticed by the Judicial Commissioner, Manipur that the earlier decision does not discuss the question and the Commissioner prefers to follow the preponderance of the authorities to the contra.

4. Now to the facts of this case: The Petitioner in this revision is a hotelier running a restaurant at Ernakulam. The 1st Respondent herein, the Corporation of Cochin represented by its Commissioner, filed a complaint against the Petitioner for offences punishable under Sections 288(1) and 378(1) of the Kerala Municipal Corporation Act. That complaint was taken on file by the Judicial Second Class Magistrate, Ernakulam, as C.C. No.215 of 1975. The case against the Petitioner was that he had defaulted payment of licence fee for the period from 1st April 1973 to 31st March 1974 for the conduct of the restaurant within the limits of the Cochin Corporation. The case of the accused was that for the self-same offence C.C. 1597 of 1975 had been initiated and that had been disposed of. The case was posted for hearing in this question to 20th June 1977. The 1st Respondent, the Corporation of Cochin, was unrepresented at the hearing. The lawyer was absent and none on behalf of the Corporation appeared. There appears to have been subsequent postings. On 4th July 1977 the Petitioner was acquitted u/s 256(1) of the code of Criminal Procedure, in view of the absence of the Respondent and his lawyer. Aggrieved by this the 1st Respondent filed a revision before the Sessions Court, Ernakulam. The 1st Additional Sessions Judge, Ernakulam, heard the revision and allowed it by the order dated 4th February, 1978. The order of acquittal by the Second Class Magistrate was set aside and the case was remanded for trial. It is against this order that the accused has come up in revision.

5. The main point urged before me by the Petitioner is that the Additional District and Sessions Judge ought not to have entertained the revision, since it was barred by reason of Section 401(4) of the Code of Criminal Procedure read with Section 299(2) of the Code. Where an appeal lies and no appeal is brought, no revision will lie at the instance of the party who could have appealed, is a proposition on which there is no dispute. But the question here is whether an appeal lay. The authorities of the various High Courts in India and that of even this Court should have left the court in no doubt that no revision would lie to the court in the matter. The learned Additional Sessions Judge without advertting to any of the decisions and even to the decision of this Court, seems to have felt that since there is no remedy of right of appeal as of right and since special leave

has to be obtained to file an appeal against acquittal in a case instituted on a private complaint a revision would lie. The consideration of this question is, to say the least, thoroughly unsatisfactory and the learned Judge has erred into holding that the revision would lie to that court. In the circumstances, this revision petition succeeds. The order of the learned Additional Sessions Judge, Ernakulam is set aside and the revision filed before the learned Judge is dismissed. Disposed of as above.