

(2013) 04 JH CK 0159

In the Jharkhand High Court

Case No : Acquittal Appeal (DB) No. 04 of 2013

Maresh Kumar Sinha

APPELLANT

Vs

The State of Jharkhand and Binod Kumar Das

RESPONDENT

Date of Decision : 15-04-2013

Acts Referred:

Constitution of India, 1950 — Article 136
Criminal Procedure Code, 1973 (CrPC) — Section 372, 378, 378(2), 378(4)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 3 AJR 487 : (2013) 2 JLJR 567

Hon'ble Judges : S. Chandrashekhar, J;Dhirubhai Naranbhai Patel, J

Bench : Division Bench

Advocate : Jay Prakash Jha, Mr. Aishwarya Prakash and Mr. Ashish Thakur, for the Appellant;

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J.—The present appeal has been preferred against the judgment and order of acquittal passed by the Judicial Magistrate First Class, Dhanbad in C.P. Case No. 1320 of 2011. The judgment and order of acquittal passed by the Judicial Magistrate First Class, Dhanbad on 14.02.2013 and the respondent-accused has been acquitted from the charges u/s 138 of Negotiable Instrument Act against this judgment the present appeal has been preferred. We have heard counsel for the appellant at length. It is submitted by the counsel for the appellant that in fact the present appellant is seeking leave to prefer appeal under Sub-section 4 of Section 378 of Code of Criminal Procedure and if the same is granted acquittal appeal will be argued at length. Counsel for the appellant has also submitted that the present appellant is a complainant, who has preferred a complaint case before the Judicial Magistrate First Class, Dhanbad for the offence u/s 138 of the Negotiable Instruments Act and therefore, upon acquittal present appeal has been preferred along with the prayer for grant of special leave to appeal.

2. We have heard counsel appearing for the State i.e. respondent No. 1, who has raised preliminary objections that the present appellant has efficacious remedy available under the Proviso to Section 372 of the Code of Criminal Procedure. It is also submitted by the counsel for the respondent No. 1, APP that the appellant is not remediless. Whenever efficacious alternative remedy by way of statutory appeal is provided under the Code of Criminal Procedure, special leave to appeal may not be granted by this Court. Hence this appeal may not be entertained by this Court.

3. Having heard counsel for both the sides and looking to the facts and circumstances of the case we see no reasons to grant special leave to appeal to this appellant against the judgment and order of acquittal passed by the Judicial Magistrate First Class, Dhanbad dated 14.02.2013 In CP Case No. 1320 of 2011, mainly for the following facts and reasons:

(i) It appears from the facts of the case that the present appellant is a complainant, who has preferred complaint before the learned Trial Court u/s 138 of the Negotiable Instrument Act.

(ii) It appears that the Judicial Magistrate First Class, Dhanbad upon evidences on record acquitted the respondent-accused from the charges u/s 138 of Negotiable Instrument Act.

(iii) Thus, it appears that the present appellant is a complainant as well as victim. Proviso to Section 372 of the Code of Criminal Procedure 1973, reads as under:

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:

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.

(Emphasis Supplied)

Under this proviso, the victim has statutory right to prefer an appeal. As stated hereinabove the present appellant is complainant as well as victim. Therefore, the present appellant has right to prefer statutory appeal. Thus. Ubi Jus Ebi Remediam the appellant is not remediless. There is availability of efficacious alternative remedy by way of statutory appeal with this appellant before the Sessions Court at Dhanbad.

(iv) The counsel for the appellant has submitted vehemently that appellant is complainant and he has right to prefer an application under Sub-section 4 of Section 378 of Code of Criminal Procedure and therefore, he is seeking special leave to prefer an appeal. Section 378(4) of Code of Criminal Procedure reads as

under:

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.

Looking to the aforesaid provisions, it appears that the complainant can prefer an application under Sub-section 4 of Section 378 seeking special leave to prefer an appeal. The argument canvassed by the counsel for the appellant appears to be very attractive, but, we are not inclined to accept the same, because the present appellant is complainant as well as victim, victim has right to prefer statutory appeal. Thus, whenever statutory right to prefer an appeal is available, we are not inclined to give special leave to prefer an appeal to the very same person under Sub-section 4 of Section 378 of Code of Criminal Procedure. Efficacious alternative remedy by way of statutory appeal is thus available to the complainant, whenever complainant is victim.

(v) Counsel appearing for the appellant submitted that the provision of Sub-section 4 of Section 378 cannot be made redundant in the facts of the present case. This contention is also not accepted by this Court, mainly for the reasons that the two provisions namely Proviso to Section 372 and sub-section 4 of Section 378 are operating in separate fields, but, it appears to be overlapping and it appears that both remedies are available. whenever the complainant and victim are coinciding with each other, but, there are several cases in which the complainant and the victim are different personality like income tax officer may a complainant or Labour Commissioner Office may a complainant or sometimes Food Inspector under the provisions of Food Adulteration Act may be the complainant but they are not the victim and, therefore, if these type of complainants are filing complaint before the Judicial Magistrate First Class for certain peculiar offences under this special enactment and whenever acquittal from such type of charges by the Judicial Magistrate First Class then such complainant can come under sub-section 4 of Section 378 of Code of Criminal Procedure, before this Court because these types of complainants have no statutory right to prefer an appeal under Proviso to Section 372, because, Income Tax Officer or Factory Inspector or Food Inspector or Labour Commissioner Officer are not the victims, therefore, no statutory right to prefer an appeal is given to them under proviso to Section 372 of Code of Criminal Procedure and, therefore, they can come against the order of acquittal passed by the Judicial Magistrate First Class under sub-section 4 of Section 378 of Code of Criminal Procedure. Thus Sub-section 4 of Section 378 is not made redundant by addition to proviso of Section 372 of Code of Criminal Procedure.

(vi) As stated herein above, the present appellant is both namely, complainant as well as victim and, therefore, against the impugned order of acquittal of the Judicial Magistrate First Class, Dhanbad, the present appellant, who is complainant has right to prefer an statutory appeal as victim also and whenever,

statutory right to prefer an appeal is also provided under this special enactment, we are not inclined to give special leave to prefer an appeal under Sub-section 4 of Section 378 of Code of Criminal Procedure.

It has been held by this Court in the case of Vivekanand Pathak and Another Vs. State of Jharkhand and Others, in paragraph 6 as under:

VII. In view of the aforesaid sub-section, the present application has been preferred for getting Special Leave to Appeal. We are not in agreement with the counsel for the petitioners mainly for the reason that in the facts of the present case, when the victim and the complainant are the same person(s), then the complainants have a right to prefer statutory appeal u/s 372 of the Code of Criminal Procedure and, therefore, the Special Leave to Appeal cannot be granted in the facts and circumstances of the present case. Whenever the statutory appeal is provided, the parties have to avail the statutory right to prefer an appeal.

VIII. It further appears that in the facts of the present case and also looking to both the aforesaid provisions i.e. Sections 372 and 378(4), when the complainant is not the victim like in the case, an officer of the income tax Department, or the Labour Department or the Food Adulteration Department, etc., though they have preferred the complaint case, but, the victims are somebody else, in those cases, application u/s 378(2) of the Code of Criminal procedure is tenable at law, because they have no right to prefer the statutory appeal under the provision of Section 372 of the Code of Criminal. Procedure. Whereas, the cases in which the complainant and the victim are the same person, then they have to avail the statutory remedy by way of appeal instead of preferring an application for getting Special Leave to Appeal directly the High Court.

IX. Moreover, in a judicial hierarchy, whenever any appeal or application is tenable at law before the lower Court, then always the applicant should approach the lower forum first so that after exhausting the said remedy, still if the petitioner is aggrieved, he can approach the higher forum. Thus, the petitioners are not remediless. Moreover, the higher forum will have an advantage of one more judgment over and above, the judgment of lower court on the point of facts and law. In a judicial hierarchy, instead of approaching directly higher forum, if law permits, always matter should be filed in lower forum. Against the judgment and order of learned single judge of the High Court, whenever Letters Patent Appeal or any appeal, is tenable, normally Special Leave to Appeal under Article 136 of the Constitution of India is not granted.

(Emphasis Supplied)

In view of the aforesaid decision, whenever statutory right to prefer an appeal is given to a victim (who is incidentally also a complainant) then in that case application under Sub-section 4 of Section 378 of Code of Criminal Procedure for seeking special leave to prefer an appeal cannot be granted.

4. In view of this facts, reasons and judicial pronouncements, there is no substance in this appeal and therefore, we are not inclined to grant special leave to prefer an appeal to this appellant under Sub-section 4 of Section 378 of Code of Criminal Procedure. He has statutory right to prefer an appeal hence this application/appeal is hereby dismissed. At this stage, counsel for the appellant has submitted that they are ready to prefer an appeal, but, delay condonation will come in their way and let this Court observe that nothing on merit is decided. In view of this submission delay will be condoned by the Lower Appellate Court in accordance with law because of the time consumed in this acquittal appeal. So far as merit is concerned the learned Lower Appellate Court will decide the statutory appeal, if preferred by this appellant, in accordance with law, on the basis of evidence on record and on its merit. "We have not decided this appeal on the merits. Accordingly, this appeal is dismissed on the ground of availability of efficacious, alternative remedy.