

(2013) 03 JH CK 0129
In the Jharkhand High Court
Case No : C.M.P. No. 145 of 2009

Nirmal Kumar Agarwal

APPELLANT

Vs

The State of Jharkhand and Another

RESPONDENT

Date of Decision : 21-03-2013

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 JLJR 42

Hon'ble Judges : S. Chandrashekhar, J; D.N. Patel, J

Bench : Division Bench

Advocate : A.K. Chaturvedi, for the Appellant; Rajan Raj, for the Opposite Party No. 2 and , Assistant Public Prosecutor for the State, for the Respondent

Final Decision : Dismissed

Judgement

1. The present petition has been preferred praying for leave to prefer an appeal against judgment and order dated 20th November, 2008, passed by the Sub Divisional Judicial Magistrate, Latehar in Complaint Case No. 71 of 2007. Counsel appearing for the opposite parties has raised objection to the effect that because of amendment in the Criminal Procedure Code, especially looking to the Proviso to Section 372 of the Cr.P.C. now petitioner has efficacious alternative remedy by way of statutory appeal before the Sessions Judge, Jamshedpur and therefore, prayer for leave to file an appeal may not be entertained.

2. Counsel for the applicant has relied upon the decision rendered by the Hon'ble Supreme Court in National Commission of Women Vs. State of Delhi and Another, and submitted that the order dated 20th November, 2008 was passed before the proviso was inserted to Section 372 of Cr.P.C. (with effect from 31-12-2009) and therefore, this new amendment, i.e. proviso to Section 372 of the Cr.P.C. will not be applied in the facts of the present case.

3. Having heard both sides and looking to the facts and circumstances of the

present case, it appears that the applicant has filed a complaint case, being Complaint Case No. 71 of 2007 u/s 138 of the Negotiable Instruments Act against Opposite Party No. 2. Learned Sub Divisional Judicial Magistrate, Latehar, vide order dated 20th November, 2008 had dismissed the complaint case. Against this judgment present application has been preferred under Sub Section 4 of the Section 378 of the Cr.P.C. seeking leave to prefer an appeal.

4. Due to amendment of 2009 in Code of Criminal Procedure, a new proviso has been inserted to Section 372 (with effect from 31.12.2009), said section 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)

This proviso has been added with effect from 31st December, 2009 and it is procedural in nature and therefore, it is applicable to all such applications pending before this court under Sub Section 4 of Section 378 of the Cr.P.C.

5. It has been held by the Hon'ble Supreme Court in K. Kapen Chako Vs. The Provident Investment Company (P) Ltd., in para 39 as under:--

Again in Smithies v. National Union of Operative plasterers Section 4 of the Trade Disputes Act, 1906 which enacted that an action for tort against a trade union shall not be entertained by any court was held not to prevent the courts from hearing and giving judgment in actions of that kind begun before the passing of the Act. It is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. But there is an exception to this rule, namely, where enactments merely affect procedure and do not extend to rights of action. See Re Joseph Suche & Co. Ltd. If the legislature forms a new procedure alterations in the form of procedure are retrospective unless there is some good reason or other why they should not be. In other words, if a statute deals merely with the procedure in an action, and does not affect the rights of the parties it will be held to apply prima-facie to all actions, pending as well as future.

(Emphasis supplied)

6. In view of the aforesaid decision also the present application is not tenable at law because there is alternative efficacious remedy available to the applicant by way of statutory appeal.

7. Moreover, this court has held in Vivekanand Pathak and Another Vs. State of Jharkhand and Others, in paragraph No. 6(VII), (VIII) and (IX) as under:

6.

(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 to 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)

Thus, as per the aforesaid decision, whenever right to statutory appeal is provided, leave to prefer an appeal is not to be granted because applicant who has preferred an application under sub-section 4 of Section 378 of the Code of Criminal Procedure, are not without remedy.

8. "Ubi jus ibi remedium": In view of this maxim, as there is efficacious remedy available to this applicant and though this court has power to grant leave to

prefer an appeal, we are not inclined to do so because this court will have advantage of two judgments, i.e. of the trial court and that of the learned appellate court, if the appeal is being preferred and decided by the learned appellate court. This peculiar fact makes the present case different, on factual aspect. Therefore, ratio of decision cited by the counsel for the applicant is not applicable to this case. In view of these reasons, it appears that there is no substance in the application and hence the same is hereby dismissed.