

(1999) 07 BOM CK 0100

In the Bombay High Court

Case No : Criminal Rev. Application No. 83 of 1996

Raja Upadhyay

APPELLANT

Vs

State of Maharashtra and another

RESPONDENT

Date of Decision : 27-07-1999

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 256(1), 378(3), 378(4), 378(5), 401(4)

Negotiable Instruments Act, 1881 (NI) — Section 138, 142

Citation : (1999) 07 BOM CK 0100

Hon'ble Judges : J. N. Patel, J

Bench : Single Bench

Advocate : B. N. Mohta, for the Appellant; A. V. Bhide For non-applicant No. 2, for the Respondent

Judgement

J. N. Patel, J.—This Revision is preferred by the original accused impugning the order dated 19-3-1997 of the 3rd Additional Sessions Judge, Nagpur, under which the learned Additional Sessions Judge allowed the revision filed by the non-applicant No. 2/Complainant against the order of dismissal of complaint and discharge of the accused by the trial Court in Complaint Case No. 28/94.

2. The non-applicant No. 2 filed a complaint case against the applicant/accused on 14-1-1994 for having committed offences u/s 138 read with section 142 of the Negotiable Instruments Act, 1881 (hereinafter referred to as "the NI Act"). The complaint was registered and the learned Magistrate issued process u/s 138 of the NI Act against the applicant/accused. It so happened that when on the date, i.e., 5-4-1995, the case was fixed for hearing, the non-applicant/complainant remained absent. It was kept back till 1.30 p.m., in the afternoon and as none appeared for the non applicant/complainant, it came to be adjourned to 6-4-1995. On that day, it appears that the Court waited for the non-applicant/complainant till 4.00 p.m., and as none appeared for him till that time, the complaint came to be dismissed for want of prosecution and the accused was discharged.

3. This order was impugned by the non-applicant/complainant by preferring a revision before the Court of sessions at Nagpur, which came to be registered as Criminal Revision No. 924/95. The revision was heard and allowed in favour of the non-applicant/complainant by the impugned order.

4. It is submitted by the applicant/accused that the said order allowing the revision by the learned Additional Sessions Judge was without any jurisdiction and, therefore, is invalid and non est. It is submitted that the learned Magistrate has passed an order u/s 256(1) of the Criminal Procedure Code, 1973 as the complainant did not appear, dismissed the complaint and discharged the accused, which order ought to have been of acquittal. It is submitted that the complainant has wrongly invoked the revisional jurisdiction of the Court of Sessions in the matter; though in the facts and circumstances of the case and particularly when the complaint had been dismissed for absence of the complainant and its non prosecution, the accused was entitled for acquittal and was so acquitted, the only remedy available to the complainant was by way of an appeal to the High Court by special leave of the Court u/s 378(4) of the Criminal Procedure Code, 1973 and the revision is expressly barred u/s 401(4) of the said Code.

5. Mr. Mohta, learned Counsel for the applicant/accused has relied upon the following cases : (1) Swaroop Singh Vs. Emperor, ; (2) Municipal Committee Vs. Labhu Ram and Others, , Punjab & Haryana High Court; (3) Supinder Singh vs. Provident Fund Inspector, 1998 (II) CCR 83, Punjab & Haryana High Court; and (4) Thampi vs. Sadanandan, 1998 (II) CCR 213 (Kerala High Court); and submitted that all these authorities are consistent on one point that in case the complaint is dismissed u/s 256(1) of the Criminal Procedure Code, 1973, then the consequential order would be acquittal of the accused and not discharge, and even if the trial Court has passed an order of discharge, it would mean an acquittal and, therefore, in no case, the complainant had a remedy of invoking the revisional powers of the Court of Sessions and ought to have filed an appeal before the High Court. In the circumstances, it is submitted that the impugned order deserves to be quashed and set aside.

6. Mr. Bhide, learned Counsel for the non-applicant No. 2/Complainant, submits that the complainant was justified in invoking the revisional powers of the Court of Sessions as the order was passed by the learned Magistrate which clearly recorded that the applicant/accused has been discharged and, therefore, against an order of discharge, the only remedy available to the complainant was to file a revision.

7. Mr. Bhide submitted that even otherwise the remedy, which was available to the complainant, was by way of revision and not appeal, as there is no appeal provided against an order passed u/s 256(1) of the Criminal Procedure Code 1973, but the only remedy which was available was to move an application before the High Court to obtain special leave to prefer an appeal as contemplated u/s 378(3) of the said Code (section 417(3) of the old Criminal Procedure Code

of 1898) and, therefore, if section 378(3) of the new Code (section 417(3) of the old Code) is read with section 401(4) of the new Code (section 439(5) of the old Code), there is no bar to the complainant for invoking revisional jurisdiction of the Court of Sessions or High Court and, therefore, the complainant was justified in approaching the Court of Sessions by filing a revision and relied upon the case of Raj Kumar Paul Vs. Amar Chand Das and Others,

8. Therefore, the only question, which deserves consideration is as to what remedy was available to the complainant against the order passed by the learned Magistrate u/s 256(1) of the Criminal Procedure Code, 1973. There is no dispute about the fact that the learned Magistrate has dismissed the complaint u/s 256(1) of the Criminal Procedure Code, 1973, as the complainant remained absent and as a consequence of such dismissal, passed an order that the accused is discharged. Obviously, the order of the learned Magistrate discharging the accused was incorrect to the extent that he ought to have acquitted the accused in terms of section 256(1) of the Criminal Procedure Code, 1973. The complainant appears to have been misled by the fact that the Magistrate having discharged the accused, he could avail the remedy of preferring a revision and that is what appears from of the Memo of Revision preferred by the complainant before the Court of Sessions. In the circumstances, the learned Additional Sessions Judge ought to have summarily rejected the Revision Application directing the complainant to prefer an appeal against the order passed by the Magistrate u/s 256(1) of the Criminal Procedure Code, 1973; but the learned Additional Sessions Judge committed an error in entertaining the revision on merits and interfering with the order passed by the learned Magistrate.

9. It cannot be gainsaid that merely because the Magistrate committed an error in recording the order of discharge, that would invest the complainant with a right to prefer a revision and he was justified in doing so. As the order itself is very clear that it has been passed u/s 256(1) of the Criminal Procedure Code, 1973. it will necessarily have to be construed an order of acquittal u/s 256(1) and not that of discharge. There is one more distinction which will have to be kept in mind and that is, that once an order of acquittal u/s 256(1) of the Criminal Procedure Code, 1973 is passed, then the complainant is debarred from filing a second complaint on the same facts so long as the order of acquittal is not set aside. Therefore, the only course open to the complainant was to prefer an appeal in the High Court against the said order of the learned Magistrate by special leave of the Court u/s 378(5) of the Criminal Procedure Code, 1973.

10. In the result, the impugned order is quashed and set aside. It will be open for the complainant to seek appropriate remedy, subject to the period of limitation. Rule is made absolute, with no order as to the costs.