

(2012) 12 JH CK 0052
In the Jharkhand High Court
Case No : Criminal M.P. No. 1984 of 2012

Ram Prasad Halwai

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 19-12-2012

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 372, 378(2), 378(4)
Penal Code, 1860 (IPC) — Section 147, 34, 341, 379, 427

Citation : (2013) 2 AJR 239 : (2013) 1 JLJR 517

Hon'ble Judges : Prashant Kumar, J; Dhirubhai Naranbhai Patel, J

Bench : Division Bench

Advocate : M.B. Lal, for the Appellant; Pankaj Kumar, Assistant Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J.

1) The present application has been preferred under 378(4) of the Code of Criminal Procedure for getting Special Leave to Appeal against the judgment and order dated 17th July 2012 passed by the learned Judicial Magistrate, 1st Class, Dhanbad in Complaint Case No. 1998 of 2007 whereby the complaint case filed by the petitioner has been dismissed. The complaint case was filed by the complainant-petitioner before the Chief Judicial Magistrate, Dhanbad for allegedly committing an offence under Sections 147 /341 /427 /447 /379 /34 of the Indian Penal Code against Opposite Party Nos. 2 to 8. The case of the complainant-petitioner, as per the complaint petition, is that opposite party No. 2 to 8 (original accused nos. 1 to 7) forming an unlawful assembly, armed with deadly weapons, entered into the tank, belonging to the complainant-petitioner and started catching fish, reared by the complainant-petitioner and when the complainant-petitioner protested the same, opposite party No. 2 to 8 used filthy language and threatened him to kill.

2) Counsel for the petitioner has submitted that though there is provision for statutory appeal under the newly inserted proviso to Section 372 of the Code of Criminal Procedure, as the petitioner is the complainant, he has preferred this appeal for grant of Special Leave to Appeal u/s 378(4) of the Code of Criminal Procedure. Counsel for the petitioner has pointed out several aspects of the matter based upon the evidence recorded by the trial Court and has submitted that Special Leave to Appeal may kindly be granted because there are several errors on the facts and law, committed by the trial Court.

3) Counsel for the State-A.P.P. has taken a preliminary objection as to statutory provision is provided u/s 372 Code of Criminal Procedure, but Special Leave to Appeal may not be granted to the petitioner and let the right of statutory appeal be exhausted and thereafter they may come to this Court. The learned A.P.P. also submitted that the provisions of Code of Criminal Procedure has been amended with effect from 31st December, 2009 based upon 154th report of the Law Commission of India. It is submitted by the A.P.P. that whenever statutory provision of preferring an appeal is given by law, the remedy must be exhausted first and, thereafter, they can approach this Court. The learned A.P.P. has also taken analogy from writ petition preferred under Article 32 of the Constitution of India for violation of fundamental rights and in those cases, normally the Hon'ble Supreme Court is sending the petitioners to the concerned High Courts under Article 226 of the Constitution of India. Similarly, against the judgment and order of learned Single Judge of the High Court, whenever Letters Patent Appeal is tenable, normally Special Leave to Appeal under Article 136 of the Constitution of India is not granted. Similarly, counsel for the State has relied upon decisions rendered by the Full Bench of Hon'ble Patna High Court in Syed Zafrul Hassan and Another Vs. State, that whenever there is a concurrent jurisdiction for grant of anticipatory bail i.e. both by the Sessions Court as well as by the High Court, normally the anticipatory bail applications should be preferred before the Sessions Court. In view of this analogy, it is submitted by the counsel for the State that in the facts of the present case, the parties are not remedy-less. They have a right to prefer an statutory appeal against the very judgment of the Judicial Magistrate, Dhanbad before the Sessions Court, Dhanbad. Thus, the Special Leave to Appeal may not be granted to the petitioner. Counsel for the State has also pointed out that whenever victim is also the complainant himself, then in all such cases statutory provision of Section 372 of the Code of Criminal Procedure should be resorted to and whenever the complainant is not the victim like the cases in which the complainant is income tax Officer or the officer of the Labour Department, or the Officer of the Food Adulteration Department, in all those cases, complainant and the victims are different persons, in those cases, instead of preferring an appeal u/s 372 of the Code of Criminal Procedure, they can prefer an application u/s 378(4) of the Code of Criminal Procedure for getting Special Leave to Appeal. But whenever the complainant and the victim are the same person, then statutory right of preferring appeal must be availed first and in those circumstances, without preferring an appeal u/s 372 of the

Code of Criminal Procedure, Special Leave to Appeal u/s 378(4) of the Code of Criminal Procedure may not be entertained by this Court.

4) Counsel for the petitioners have also relied upon the decisions reported in 2011 Mh Cr. L.J. 3473; Dharmveer Singh Tomar Vs. Shri Ramraj Singh Tomar, , We have perused the aforesaid decisions. The facts of the present case are absolutely different because the present petitioner is the victim as well as the complainant and, therefore, they have remedy of Section 372 of the Code of Criminal Procedure available to him to file an appeal against the impugned judgment and order passed by the Judicial Magistrate, Dhanbad, instead of preferring an application for granting Special Leave to Appeal u/s 378(4) of the Code of Criminal Procedure.

5) Having heard learned counsel for both the sides and looking to the preliminary objection raised by the A.P.P. it appears that the present appeal preferred u/s 378(4) of the Code of Criminal Procedure deserves to be dismissed mainly for the following reasons:-

(I) The present petitioner is the complainant as well as victim. He has preferred a complaint case under Sections 147 /341 /427 /447 /379 /34 of the Indian Penal Code before the Chief Judicial Magistrate, Dhanbad.

(II) The learned trial Court by judgment and order dated 17th July 2012 passed in Complaint Case No. 1998 of 2007 dismissed the complaint preferred by the petitioner.

(III) Against the said judgment and order, there is a remedy of appeal as provided under the proviso of Section 372 of the Code of Criminal Procedure. Section 372 of the Code of Criminal Procedure 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 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)

(IV) The aforesaid proviso has been inserted by way of amendment in the Code of Criminal Procedure with effect from 31st December, 2009 based upon the 154th report given by the Law Commission of India.

(V) Thus, the petitioner, who is also the victim, he has statutory right to prefer an appeal against the impugned judgment and order passed by the learned Judicial Magistrate, 1st Class, Dhanbad.

(VI) The present application has been preferred by the petitioners u/s 378(4) of

the Code of Criminal Procedure for getting leave to appeal. Section 378(4) of the Code of Criminal Procedure reads as under:-

378. Appeal in case of acquittal.-

(1)...

(2)...

(3)...

(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.

(5)...

(6)...

(Emphasis supplied)

(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. Section 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 petitioner is not remedy-less. 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.

6) Thus, in the facts and circumstances of the case, the victim and the complainant being the same person and the complaint petition, registered by the complainant-petitioner for the offence under Sections 147 /341 /427 /447 /379 /34 of the Indian Penal Code, having been dismissed by the learned Judicial Magistrate, he should first exhaust the remedy available to him under the provision of Section 372 of the Code of Criminal Procedure, by preferring an appeal before the learned Sessions Judge, Dhanbad. As a cumulative effect of the aforesaid facts and reasons and judicial pronouncements, we hereby refuse to grant leave to Appeal to the present petitioner u/s 378(4) of the Code of Criminal Procedure Ubi jus ibi remedium. Petitioner not being remedy-less under proviso to Section 372 of the Code of Criminal Procedure, let the remedy by way of statutory appeal be exhausted by him first.

Thus, this Criminal Misc. Petition is hereby dismissed.