

(2013) 10 KL CK 0034

In the High Court Of Kerala

Case No : Criminal L.P. No. 620 of 2013 and connected cases

Sree Gokulam Chit and Finance Co. (P) Ltd. and Another

APPELLANT

Vs

T. Krishnakumar and Others

RESPONDENT

Date of Decision : 30-10-2013

Acts Referred:

Citation : (2013) 4 ILR (Ker) 866

Hon'ble Judges : P. Bhavadasan, J

Bench : Single Bench

Advocate : P. Vijayab Banu, Sri S. Sreekumar, Sri Sunny Mathew, Sri S. Rajeev, Sri V. Philip Mathew, Sri Kaleeswaram Raj, Sri S.U. Nazar, Sri V.N. Ramesan Nambisan and Sri Tom Jose Padinjarekkara, Additional Director General of Prosecution, for the Appellant;

Judgement

P. Bhavadasan, J.—A common issue as to the applicability of the amended Section 372 of the Code of Criminal Procedure arises for consideration in all these cases, and hence, they are being disposed of by a common judgment. The issue that is being agitated is whether the complainant in a private complaint, on which cognizance was taken and which ended in acquittal of the accused, can resort to the new statutory remedy by way of appeal provided u/s 372 proviso or is he confined to the earlier remedy provided for u/s 378(4) Cr.P.C. of filing an appeal before the High Court after obtaining special leave.

2. An unimaginative hasty amendment, little aware of its consequences, though intended to be progressive and beneficial, has created confusion regarding the remedy available to certain group of persons. The matter has engaged the attention of various High Courts in the country, but the decisions have not been uniform. While some of the High Courts have taken the view that a complainant in a private complaint, which after trial ends in the acquittal of the accused, can now, if he falls within the definition of victim u/s 2(wa) of Cr.P.C., resort to the remedy by way of appeal as provided under the proviso to Section 372 of Cr.P.C., some other High Courts have taken the view that in the light of the earlier

provision, namely, Section, 378(4) Cr.P.C. which continues to exist in the statute book and is unamended, the remedy of the complainant is only to resort to the remedy under that provision.

3. Most of the cases dealt with in this judgment arise out of acquittal of accused in a private complaint filed for the offence u/s 138 of Negotiable Instruments Act. In all these cases, the complainants were issued with cheques by the accused persons allegedly due for repayment of debts due to the former. Those cheques, on presentation, bounced, mostly for insufficiency of funds and in some cases for other reasons which fall within the ambit of Section 138 of the N.I. Act. After the statutory formalities were complied with, since the debts remained undischarged, complaints have been laid before the appropriate courts. In almost all cases herein, after trial, the accused were acquitted and in some cases, due to the absence of the complainant, the accused were acquitted u/s 252(1) Cr.P.C. In law, it makes little difference, as far as the right to appeal is concerned, as to whether acquittal is on merits or on default.

4. Senior Advocate Shri Vijaya Bhanu, Senior Advocate Shri S. Sreekumar, Adv. Sunny Mathew, Adv. S. Rajeev, Adv. V. Philip Mathew, Adv. Kaleeswaram Raj, Adv. S.U. Nazar, Adv. V.N. Ramesan Nambisan and Additional Director General of Prosecution Shri Tom Jose Padinjarekkara were heard in the matter.

5. Two views were expressed by the learned counsel appearing for the parties. One group pointed out that the amendment, namely, Amendment Act 5 of 2009, has amended Section 372 Cr.P.C. incorporating a right of appeal to the victims and also introducing definition of "victim" as per Section 2(wa) of Cr.P.C. is intended to benefit a specific group of persons falling within the ambit of the definition of victim. It was contended that these persons had no remedy earlier against acquittal and they had no role to play in the proceedings. It was felt that the victims were the most affected persons in a crime, and in the absence of any provision in the Cr.P.C. for them to participate in the proceedings or to agitate the matter when they feel aggrieved by the final decision, it was thought necessary that they should be provided with some remedies, and it is with that object and purpose that the amendments have been introduced. Heydon's Rule of Interpretation was invoked in support of this contention. It was also pointed out that as far as the complainants in a private complaint are concerned, there already existed a remedy by way of appeal by Special Leave u/s 378(4) Cr.P.C. and the amendment to Section 372 Cr.P.C. and the introduction of the definition u/s 2(wa) Cr.P.C. is not intended to cover them as they were already conferred with statutory remedies. The court has to see the object and purpose of the amendment and that the right introduced by way of amendment must remain confined to those persons who are intended to be conferred a statutory benefit. The learned counsel supporting this view contended that by a process of interpretation, the scope of the amendment cannot be enlarged. According to them, if this Court is to hold that the complainant in a private complaint, who may be a victim also, is entitled to the benefit of the proviso to Section 372

Cr.P.C., then there will be an apparent conflict between the said proviso and Section 378(4) Cr.P.C., which necessarily needs to be avoided. The Legislature was fully aware of the existence of remedy by way of Section 378(4) Cr.P.C. in favour of the complainants and it must be presumed that by conferring a new right of appeal to the victims, the legislature did not intend that the same benefit should be extended to the complainants, who already had a remedy. In support of these contentions, the Law Commission Report and Justice Malimath Committee Report and also the Rules of Interpretation were referred to. It was then contended that if this Court is to hold that the complainants in private complaints are also entitled to the benefit of the proviso to Section 372 Cr.P.C., then Section 378(4) Cr.P.C. may become redundant. It was highlighted that in case of acquittal, the Legislature felt that interference should be only in absolutely deserving cases and that is the reason why in Section 378(4) Cr.P.C. it was provided that the appeal can be filed by the complainant against the acquittal before the High Court only after obtaining special leave. There is some element of discretion vested with the High Court and the complainant cannot walk in with an appeal as a matter of right. This restriction is preserved even after the amendment and that would show that the amendment was not intended to cover those persons.

6. The rival contention is that when the statute provides a remedy, it is not for the court, by an interpretative exercise, to limit the scope of the provision and to deny the benefit of the provision to those who are entitled to the same. If the complainant answers the definition of victim as contained in Section 2(wa) Cr.P.C., then there is no justification to deny such a person a right of appeal as provided under the proviso to Section 372 Cr.P.C. It was also contended that the legislature must be bestowed with the knowledge of the existence of Section 378(4) Cr.P.C. in the statute book and in spite of the existence of such a provision, while incorporating proviso to Section 372 Cr.P.C. and incorporating the definition of "Victim" u/s 2(wa) Cr.P.C., the Legislature did not exclude complainant. The mere fact that the complainant may have two remedies by itself is not a ground to deny them the benefit of the amended provision. It is fallacious to say, according to the learned counsel who support this view, that merely because the complainant is represented by a counsel in court, he is in a better position. Most often, the complainants are forced to file complaints not by choice but by compulsion of the statute or due to the inaction on the part of the State to take appropriate action against the offenders.

7. As long as a complainant satisfies the definition of "victim" as now provided under the Cr.P.C., there is no justification to take them out of the ambit of the proviso to Section 372 Cr.P.C. That may in fact lead to the creation of a separate class of persons who are similarly placed as victims in a case instituted on a police report contemplated under the new amended provision and such a classification cannot be said to have any nexus to the object sought to be achieved. Moreover, it is pointed out that as far as the proviso to Section 372 Cr.P.C. is concerned, right of appeal is available on three grounds, while u/s

378(4) Cr.P.C. the right of appeal is confined to only as against acquittal and under no other grounds. Merely because a victim of offence may be driven to the necessity of filing a private complaint to have his grievances redressed, it cannot be said that he is disentitled from the benefits conferred on a victim. By adopting the contention that since Section 378(4) Cr.P.C. has not been amended, the right of complainants against an order of acquittal is confined to the remedy u/s 378(4) Cr.P.C., those complainants who are compelled to file private complaints either statutorily or otherwise, would be losing a valuable right which certainly is not intended. It is incorrect to say that by extending the benefit of the proviso to Section 372 Cr.P.C. to the complainant in private complaints also, Section 378(4) Cr.P.C. becomes redundant. There may be umpteen cases where the complaint may be filed by statutory authorities where there may not be victims as defined u/s 2(wa) Cr.P.C. and those complainants continue to be governed by Section 378(4) Cr.P.C. Attention was also drawn to the fact that it may so happen that in a private complaint, complainant and the victim may be different. In such situation, if after trial, the accused is acquitted, the remedies available to the complainant and the victim are different. While the complainant can resort to the remedy available u/s 378(4) Cr.P.C. only, the victim can resort to the remedy provided under the proviso to Section 372 Cr.P.C.

8. Learned counsel supporting the above view also pointed out that to place complainants in a disadvantageous position merely because they were driven to the necessity to file a private complaint may not be in tune with the object and purpose of the amended provision. Even assuming that a complainant who satisfies the definition of "Victim" may have two remedies against the order of acquittal, namely, an appeal as provided under the proviso to Section 372 Cr.P.C. and also u/s 378(4) Cr.P.C. before the High Court by special leave, the rule of hierarchy of courts demands that the appeal be filed in the lowest forum. Even assuming that such a person has two remedies by itself is not a ground to deny the benefit of the relief under the proviso to Section 372 Cr.P.C. which has larger scope and is more beneficial to a victim as he can file an appeal as a matter of right. It is therefore contended that there is no justification in excluding complainants in a private complaint within the ambit of the proviso to Section 372 Cr.P.C.

9. The learned Addl. D.G.P. Shri Tom Jose Padinjarekkara supported the view that the proviso to Section 372 Cr.P.C. and the definition of "victim" Section 2(wa) Cr.P.C. has only a limited scope and cannot take in complainants in a private complaint. According to the learned Addl. D.G.P., if there is any ambiguity or inconsistency between the two provisions, then it is necessary to look into the object and reasons for the amendment. According to the learned Addl. D.G.P., the mischief rule should be invoked in such cases and for the said purpose, he relied on the decision reported in *Shivanarayan Kabra v. State of Madras* 1967 K.H.C. 613. Reliance was also placed on the decision reported in *Shashikant Laxman Kale and Another Vs. Union of India (UOI) and Another*, Learned Addl. D.G.P. contended that the purpose and object of the amendment was to provide

relief to the victims of offence who hitherto had no role to play in the criminal proceedings and who were to remain as mere spectators even though they were the really affected parties. It is with that object that the amendment to Section 372 Cr.P.C. was made and the definition of "victim" incorporated. It is not to cover a situation where the complainant in a private complaint who already had a remedy by way of appeal for redressal of his grievances. Accordingly, it is contended that the proviso to Section 372 Cr.P.C. enabling the victim to file an appeal cannot cover the complainant in a private complaint.

10. To understand the controversy involved in these cases, it becomes necessary to refer to the various provisions regarding appeal and the rights of the State, complainant, victim etc.

11. Earlier the victims of crimes had no role to play in the prosecution except to remain as mute spectators. If the prosecution ended in acquittal of the accused, and if the State did not prefer appeal against the acquittal, the de facto complainant or the victim as the case may be could only resort to the remedy by way of revision which is limited in its scope and content.

12. It is necessary to refer to the law as it existed before the amendment by way of Act 5 of 2009.

13. As per the provisions contained in the Cr.P.C. there are three modes of taking cognizance of an offence. They are (i) on a police report u/s 173(2) Cr.P.C., (ii) on a private complaint filed by the complainant, and (iii) suo motu proceedings. In a case in which cognizance is taken on a police report, the State is the prosecutor and the prosecution is either conducted by the Assistant Public Prosecutor or the Public Prosecutor as the case may be. In a case instituted on a private complaint, the complainant is at liberty to engage his counsel and conduct the proceedings. However, in case the complaint relating to an offence triable by a court of sessions, after committal, when the matter is before the Sessions Court, further proceedings can be conducted only by the Public Prosecutor.

14. The right of appeal is a statutory right and is circumscribed by the parameters prescribed by the statute. The State had remedy by way of appeal against acquittal and inadequacy of sentence. Against an order of acquittal in a case in which cognizance was taken on a police report, prior to Amending Act 25 of 2005, the State had right of appeal only to the High Court and that too after obtaining leave of the High Court u/s 378(1) Cr.P.C. The State had also a right of appeal regarding the inadequacy of sentence awarded by the trial court u/s 377 Cr.P.C.

15. As far as the complainant was concerned, he had a remedy by way of appeal to the High Court after obtaining special leave only against an order of acquittal u/s 378(4) Cr.P.C. He had no right of appeal against inadequacy of sentence or on any other grounds. The accused were entitled to file an appeal u/s 374 of Cr.P.C. against conviction. The powers of the appellate court are enumerated u/s

386 Cr.P.C. The procedures for filing of an appeal, admission and further hearing are governed by Sections 383, 384 and 385 of Cr.P.C. It must at once be noticed that against an order of acquittal, in a case cognizance of which was taken on police report, the de facto complainant or the victim as the case may be had no remedy by way of appeal. They could only invoke the revisional jurisdiction which is more in the nature of supervisory jurisdiction.

16. By the amending Act 25 of 2005, Section 378(1) Cr.P.C. was amended incorporating Section 378(1)(a) and (b). Those provisions provided right of appeal to Sessions Court and High Court from acquittal on direction by the District Magistrate or State Government as the case may be. However, the provision that the State had to obtain leave for filing appeal against acquittal to High Court continues to exist

17. By the amending Act 5 of 2009, as far as the cases on hand are concerned, two provisions were introduced They are (i) proviso to Section 372 Cr.P.C. and (ii) definition of "victim" was provided as per Section 2(wa) Cr.P.C. Those provisions read as follows:

372. * * * * *

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.

(wa) "victim" means a person who has suffered any loss or injury caused by reason of the act or omission for which the accused person has been charged and the expression "victim" includes his or her guardian or legal heir

18. It is significant to notice that the definition of victim not only takes in victim, but also guardian and legal heir. Therefore, the claim for compensation does not die with the person, but survives to the legal heir also.

19. The question that is posed for consideration is when a case instituted on a private complaint ends in acquittal and if the complainant satisfies the definition of "victim" as contained in Section 2(wa) Cr.P.C., is he precluded from resorting to the appellate remedy provided under the proviso to Section 372 Cr.P.C. because of the continuance of the statutory remedy by way of appeal as provided u/s 378(4) Cr.P.C. In other words, the question would be whether the complainants in private complaints are not entitled to the benefit of the amendment and whether they continue to constitute a class of their own, confined to the remedy u/s 378(4) Cr.P.C.

20. Before going further, it will be useful to refer to the decision of various High Courts in this regard. The High Court of Bombay has been consistent in its approach and in various decisions rendered have taken the view that complainant in a private complaint which ends up in acquittal is not entitled to take the benefit of the proviso to Section 372 Cr.P.C. In fact in the decision in Crl.

Appeals 991 of 2011 and 992 of 2011 disposed of by judgment dated 21-9-2011 after referring to the various decisions and also taking aid of the Haydon's Rule or what is popularly known as "Mischief Rule", the High Court of Bombay came to the conclusion that complainants are excluded from the purview of Section 372 proviso. In various decisions, the High Court of Bombay has taken the view that the benefit of appeal as provided u/s 372 proviso is only available to victim in a case, cognizance of which is taken on a police report and is not available to a complainant in a private complaint. The view of the High Court of Bombay is that the definition of victim does not cover complainant in a private complaint. In fact the view taken was that proviso to Section 372 Cr.P.C. comes into play only if the State does not go up in appeal against acquittal or the leave to appeal by State is rejected. It was also held that a complainant in a case filed u/s 138 of N.I. Act is not a victim. So is the view taken by the High Court of Punjab and Haryana also following the decision of Bombay High Court. However, the High Court of Jharkhand is of the view that complainant in a prosecution u/s 138 of N.I. Act answers the definition of "victim" as contained in Section 2(wa) of Cr.P.C. and therefore, such a person is entitled to take the remedy provided for u/s 372 proviso. The High Court of Madras has taken the view that the victim as well as the complainant in a private complaint who are interested persons can file appeal on acquittal before the District Court as provided u/s 372 proviso. The High Court of Allahabad while dealing with a private complaint in which offences under Sections 498A, 323, 504 and 506 of I.P.C. and Section 34 of Dowry Prohibition Act were alleged which ended in acquittal of the accused took the view that the complainant who is equivalent to the victim in such case is entitled to take the benefit of the proviso to Section 372 Cr.P.C. The High Court of Rajasthan has also taken the view that complainant who answers the definition of victim can avail of the remedy as per the proviso to Section 372 Cr.P.C. The High Court of Rajasthan also held that assuming that remedy u/s 378(4) continued to exist, the issue can be resolved by resorting to principle of hierarchy of courts whereby the action has to be preferred before court of lowest forum which is competent to entertain the action.

21. The present situation has been brought about only because of the indifferent and casual attitude of the draftsman in the drawing up of the amending provisions. As regards the amending legislation is concerned, it will be useful to refer to the principles laid down in Legislative Drafting by G.C. Thornton, Second Edition, page 311. They are:

1. The language and style of the Amending Act must be consistent with that of the principal Act to be archaic or otherwise capable of improvement. A change in language is likely to give rise to an unintended inference that a change in meaning is intended. Consistency in style produces neater and more easily understood legislation which more readily forms an intelligible whole with the principal legislation.

2. The effect on other legislation of the instructed amendments must be studied

and all necessary consequential amendments made.

3. The amending provisions must where necessary be related to circumstances as they exist when those provisions come into force by specific commencement, application or transitional provisions.

If enough attention had been bestowed before bringing the amendment, the anomalies could have been easily avoided.

22. The current trend seems to be to draw up new statute and amending provision paying little attention to the consequences and more dangerously, without ascertaining the impact on other statutes covering the same subject. Recent legislations expose poor draftsman skill. The position is worse with regard to amending provision. Amendments are made at will and without bothering to ascertain whether by bringing in the amendment, if any other provision will have to be amended and that the amending Act is consistent with other provisions of the statute.

23. It is well-settled that there is no inherent power of appeal and the right of appeal is a creation of a statute. The right of the State and the individual to prefer appeal is limited into specific grounds.

24. It may be remembered that in a complaint (i) a complainant may also be the victim, (ii) complainant and victim may be different, and (iii) in a case cognizance of which is taken on police report also, complainant and victim may be different. As far as the third category is concerned, prior to the amendment brought about by Act 5 of 2009, neither the complainant nor the victim had a right of appeal. In the case of acquittal on a private complaint, the complainant had a right of appeal u/s 378(4) Cr.P.C. after obtaining special leave to the High Court.

25. The Law Commission as well as Justice Malimath Committee had taken note of the fact that victims of offence had practically no role to play in the prosecution of the cases in which they were the really affected parties. They were silent spectators unable to participate in the proceedings nor could seek any remedy against any order that may be passed in the proceedings including the acquittal of the accused. If the case in which cognizance is taken on a police report ended in acquittal, only the State had right of appeal, and in case the State did not avail of that remedy, the victim was left helpless except to resort to the revisional remedy.

26. International conventions and the jurisprudence of victimology highlighted the necessity for participation of the victim in the proceedings, because they are the persons affected by the crime and it was felt necessary that they should be conferred with such rights which would enable them to agitate their grievances. This is highlighted by the Law Commission Report as well as Justice Malimath Committee Report.

27. Presumably, it is in order to give effect to the above principle that the

amendments have been introduced.

28. Before going further, it is necessary to refer to a few definitions to understand the real controversy involved in these proceedings. Sections 372 and 2(wa) Cr.P.C. have already been referred to. The words "loss" or "injury" appearing in Section 2(wa) Cr.P.C. have not been defined in the Cr.P.C. But then, there is Section 2(y) of Cr.P.C. which reads as follows:

2(y) words and expressions used herein and not defined but defined in the Indian Penal Code (45 of 1860) have the meanings respectively assigned to them in that Code.

In Section 23 of I.P.C. what is defined is "wrongful loss" which reads as follows:

"Wrongful loss".--"Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Section 44 of I.P.C. defines "injury" which reads as follows:

44. "Injury".--The word "injury" denotes any harm whatever illegally caused to any person, in body, mind, reputation or property.

Property now means both movable and immovable property. Section 22 of I.P.C. defines "movable property", which reads as follows:

22. "Movable property".--The words "movable property" are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

Section 372 proviso confers right of appeal to a victim under three contingencies which hitherto was unknown. They are (i) against an order of acquittal, (ii) against an order of conviction for a lesser offence, (iii) an order imposing inadequate compensation. It must at once be noticed that no right of appeal is conferred on the victim against inadequacy of sentence and appeal in that regard remains as a prerogative of the State.

29. Heydon's Rule of Interpretation has been invoked to agitate for the position that the term "victim" does not include complainant. The rule stipulates that when construing a statute, it is necessary to ascertain

(i) what is the object of the enactment.

(ii) what was the existing law before the legislation was passed,

(iii) what was the mischief or defect for which the existing law had not provided,

(iv) what remedies the legislation has provided for, and

(v) reasons for such remedy.

30. In the decision reported in *Shivanarayana Kabra v. State of Madras* 1967 K.H.C. 613, it was held as follows:

7.....It is a sound rule of interpretation, that a statute should be so construed as to prevent the mischief and to advance remedy according to the true intention of the makers of the statute. In construing, therefore, S. 2(c) of the Act and in determining its true scope it is permissible to have regard to all such factors as can legitimately be taken into account in ascertaining the intention of the legislature, such as the history of the statute, the reason which led to its being passed the mischief which it intended to suppress and the remedy provided by the statute for curing the mischief. That was the rule laid down in Heydon's case.

31. It is contended that amendment brought about is only to confer a right of appeal to the victim of offence. It is also contended that the complainant had a right of appeal by taking recourse Section 378(4) Cr.P.C. and therefore, conferment of a right of appeal on the victim under the proviso to Section 372 Cr.P.C. could not be one intended to benefit the complainant also.

32. The above argument overlooks one crucial aspect It pre-supposes that the amendment brought about deals with only a right of appeal to the victim. It is not so. By the same Amendment Act, Section 357A of Cr.P.C. has also been introduced which reads as follows:

357A. Victim compensation scheme.--(1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Services Authority or the State Legal Services Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial court, at the conclusion of the trial, is satisfied, that the compensation awarded u/s 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry-award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of me police officer not below the rank of the officer-in-charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

Section 357A of Cr.P.C. provides for victim compensation scheme and the provision does not draw a distinction between a victim in a case cognizance of which is taken on a police report and cognizance is taken on a private complaint. It deals with adequate compensation and other measures for the victims of the offence. It is to be noted that going by Section 357A(3) of Cr.P.C., the trial court, on conclusion of trial, for reasons stated therein, can make recommendation for compensation, then, the liability falls in the State Government. As per Section 357A(4) Cr.P.C., even if the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents can make an application to the State or the District Legal Services Authority for award of compensation. It is significant to note that while in the definition of "victim" the words used are "guardian" or "legal heir", the word used in Section 357A(4) Cr.P.C. is "dependents". Sections 357B and 357C of Cr.P.C. may also be of some relevance in this context. It is, therefore, necessary to consider the various amendments brought into the statute book conferring new benefits to the victims, and it is in that context, Section 372 proviso will have to be read, understood and applied. If in other provisions referred to, the word "victim" will include "complainant" also, there is no reason to take a different view with respect to Section 372 Cr.P.C.

33. It cannot be said that relief available to a person, who suffers injury or loss as a result of an act committed by the accused, referred to as victim, must be identified on the basis of the proceedings that is initiated in the court. To say that if the proceedings are on a police report, victim stands on a better footing and if the proceedings are on a private complaint, the victim has to suffer, does stand to reason. The issue is not regarding victim of prosecution, but the victim of offence. The victim of offence remains the same whether the proceedings are instituted on a police report or on a private complaint.

34. To draw a distinction between a victim in a private complainant and a victim in a police report solely based on the fact that in a private complaint, the complainant is able to engage a counsel of his own would also be fallacious. In many cases, persons are driven to file private complaint not out of volition or choice, but out of compulsion.

35. It may so happen that the police after investigation might file a refer report. As per the existing law, notice has to go to the de facto complainant who may file a protest complaint, and the court may take cognizance on the protest complaint. It may also happen that the police may be inactive and passive, which may necessitate the person aggrieved to file a private complaint. Apart from the above aspects, there are statutory stipulation that certain offences can be agitated only through a private complaint. In all these cases, the person who suffered loss or injury at the hands of the accused has necessarily to be treated as a victim.

36. Again, it may so happen that the complainant in a private complaint and the victim may be different. It may be that both are one and the same person. If one

is to say that complainant in a private complaint can never be a victim, then necessarily, that would mean that the complainant in a private complaint who is also the victim will be deprived of the benefit of Section 357A Cr.P.C. and other provisions of the Code. That certainly cannot be the purpose and intention of the legislature. There cannot be a situation that for certain purposes a complainant can be held as a victim and for certain other purposes, it cannot be so.

37. Further, Section 372 proviso, as already mentioned, provides appeal under three contingencies. But u/s 378(4) Cr.P.C., the right of appeal is confined to an order of acquittal alone. It does not provide for appeal against conviction for a lesser offence or for inadequacy of compensation. To differentiate between a victim in a case instituted on a police report from a case instituted on a private complaint, may not be justifiable and may not be legally valid also.

38. One aspect has to be noticed here. Even though right of appeal is conferred on a victim u/s 372 proviso, the procedure to be followed in filing an appeal, the procedure in dealing with such an appeal and the powers of the appellate court while dealing with such an appeal have not been enumerated. Any how, that aspect need not detain this Court now.

39. If as a matter of fact, the Legislature wanted to exclude complainant from the definition of victim, it could have easily done so. Going by the definition of "victim" as contained in Section 2(wa) Cr.P.C. and also the benefits the victim is entitled to under Sections 357, 357B and 357C Cr.P.C., no distinction is possible between a victim in a case instituted on a police report and a victim in a case instituted on private complaint. It is true that Section 24(8) of Cr.P.C. gives right to the victim to engage a counsel to assist the Public Prosecutor. It must also be remembered here that if a private complaint is filed disclosing sessions offence, after committal, it is the Public Prosecutor who conducts the prosecution. The private counsel engaged has no further role to play. It is thus not possible to say that in all private complaints filed, the complainant can engage a counsel of his own.

40. An impression seems to have been formed while considering the scope of Section 372 Cr.P.C. that it is intended to benefit a victim in a case based on police report only who had no statutory right till the introduction of the proviso to Section 372 Cr.P.C. It is assumed that in a private complaint case, the complainant is able to engage competent counsel and therefore, he is in an advantageous position.

41. The above view overlooks one aspect. The complainant does not have the vast resources the State has at its command for investigation of a crime and efficiency and competency to collect the necessary evidence. Viewed from this angle, complainants are certainly in a disadvantageous position.

42. It does not appear proper to assume that in all cases conducted by the Public Prosecutor or the Assistant Public Prosecutor, there is want of diligence and in cases based on private complaint, the counsel who appear always are efficient

and competent. A number of private complaints end in acquittal.

43. This Court has occasion to consider certain aspects of the amendment brought to Section 372 Cr.P.C. In the decision reported in John Vs. Shibu Cherian and Others, this Court has occasion to consider the applicability of the proviso to Section 372 Cr.P.C. That was a case in which cognizance was taken on a police report and the prosecution ended in acquittal of the accused. This Court opined that after the introduction of proviso to Section 372 Cr.P.C., the victim has a right of appeal in the court to which the appeal is provided for. In the said decision it was held as follows:

4. Mr. Sooraj T. Elenjickal, counsel appearing for the respondents has taken a preliminary objection against the maintainability of the appeal itself on the basis of proviso to S. 372 of Cr.P.C. which objection, according to me, is sustainable. The judgment sought to be challenged is connected with the case instituted upon a police report and therefore, the provisions contained under S. 372 are not applicable. Recently an amendment is brought to S. 372 of Cr.P.C., which came into force with effect from 31-12-2009 and thereby, a proviso is introduced to S. 372 of Cr.P.C. which reads as follows:

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.

Thus, in the light of the above proviso to S. 372 of Cr.P.C., the remedy is available to the victim to file an appeal before the Court in which the appeal will ordinarily lie against the order of conviction. Thus, according to me, the present appeal preferred by the de facto complainant before this Court is not maintainable. It is also relevant to note that prior to the above amendment, this Court used to entertain the Revision Petition in deserving cases against the order of acquittal at the instance of the de facto complainant. The reason stated in the affidavit in support of the above delay petition is that the appellant himself has filed a revision petition before this Court and the Registry has raised an objection stating that the remedy is to file an appeal. It is, thereafter, the present appeal is preferred. However, on receiving the appeal memorandum, the Registry has failed to take note of the amendment brought to S. 372 of Cr.P.C.

44. In the decision reported in Balakrishnan Master, T. Vs. Ramachandran Master, K.M. and another, this Court had occasion to observe as follows:

When such be the position of law, where a right is conferred on the victim to prefer an appeal in the circumstances enumerated under the proviso to S. 372 of the Code by the Amendment Act (Act 5 of 2009), such right will be presumed to be retrospective applying to orders subsequently made in pending proceedings, as and when the amendment came into force, that is, on 31-12-2009. Prospective operation of the proviso to S. 372 of the Code will not enable the victim to prefer appeal where judgment had been rendered prior to the coming

into force of the Amendment Act 5 of 2009. In cases where judgment is rendered on or after 31-12-2009, after the commencement of the Act 5 of 2009, and that too, where any of the circumstances covered by the proviso, the victim has a right to prefer an appeal before the competent court to which an appeal ordinarily lies in the event of conviction of the accused in such case. The incident giving rise to the prosecution of the accused was before the commencement of the operation of the proviso to S. 372 of the Code cannot be given any merit in deciding the right conferred on the victim to prefer the appeal, which has to be looked into with reference to the date of commencement of the amending Act and also the circumstances enabling the victim to prefer the appeal against the accused.

45. In the decision reported in N.P. Ahammed Vs. Abdul Latheef and Another, this Court had occasion to consider the question whether the victim or the complainant, as the case may be, is entitled to file an appeal against inadequacy of sentence. In the said decision, it was held as follows:

The impugned order in this case is not an order of acquittal. It is not an order convicting the accused for a lesser offence. It is also not an order, directing payment of any compensation. Learned counsel for petitioner argued that petitioner is aggrieved since lower court did not allow any compensation and hence, petitioner can file an appeal against compensation, under S. 372 of the Code. From a reading of the proviso to S. 372 of the Code, it is quite clear that what can be challenged thereunder is inadequacy of compensation and not, failure or omission to order compensation.

Only if compensation is ordered, question of adequacy or inadequacy of compensation arises. But, in this case, no compensation is ordered. Hence, no appeal can be filed by the victim or legal heir of the victim under the proviso to S. 372 of the Code challenging failure or omission on the part of the court to pass an order of compensation. The request for treating this petition as an appeal under S. 372 of the Code cannot, therefore, be accepted.

46. In an unreported decision of this Court in Crl. R.P. 1310 of 2013 disposed of by order dated 15-7-2013, this Court had considered the question as to whether complainant in a proceedings initiated u/s 138 of N.I. Act can be treated as a victim and held that he cannot be treated as a victim. For reaching the above conclusion, the learned Judge took the view that the victim does not include a complainant since the definition of victim does not mention about a complainant and also took the view that the word "victim" appearing in Section 372 of Cr.P.C. has to be given a contextual interpretation. For the said purpose, reliance was placed on the following:

2. Definitions.--In this Code unless the context otherwise requires,--

47. Relying on the various decisions of the Supreme Court interpreting the words "context unless otherwise requires" went on to hold that it may be possible in certain circumstances that a word may carry different meanings in different

Sections of the same statute. Therefore, the Court went on to hold that the complainant in a proceedings u/s 138 of N.I. Act cannot be treated as a victim. The learned Judge was of the view that to hold otherwise would result in conflict between Section 378(4) and Section 372 of Cr.P.C. giving rise to two forums for appeal to same person which is inconceivable in law. The learned Judge also sought the aid of Section 357A of Cr.P.C. to come to the conclusion that the word "victim" appearing in Section 372 Proviso does not comprehend a complainant.

48. In the unreported decision referred to above, it is significant to notice that the various provisions regarding the rights conferred on the victim were not considered and it may not be possible to say that complainant in a proceedings u/s 138 cannot be a victim. A complainant in a proceedings u/s 138 of N.I. Act is certainly a person who has suffered loss and also injury going by the definition of "victim", "loss" and "injury" as already noticed. It may not be correct to say that determination of loss or injury to such a person depends on the outcome of the prosecution. There may be cases where after conviction for offence u/s 138 of N.I. Act, the compensation awarded may be inadequate. He then certainly can take recourse to proviso to Section 372 Cr.P.C. and file an appeal, otherwise he will have to be satisfied with whatever compensation awarded by the court. Probably, he may not be able to take aid of Section 357A of Cr.P.C., but, he is certainly a person who is affected by the act of the accused. This Court in the unreported decision was primarily guided by the fact that Section 372 proviso is intended to confer a new benefit only to a victim who hitherto has no right of appeal against acquittal. Apart from the fact that it may not be possible to say that the complainant in a proceedings u/s 138 of N.I. Act is not a victim, it is also not possible to understand how a distinction can be drawn between complainant in a proceedings u/s 138 of N.I. Act and a complainant in a private complaint in respect of an offence under the I.P.C. The procedure followed for the trial of both the cases is as contemplated under the provisions of the Cr.P.C. It may also be remembered that a private complaint alleging offences both u/s 138 of N.I. Act and Section 420 I.P.C. can be instituted. Further, it will not be appropriate to hold that status of a person as victim is determined by the result of prosecution. In order to qualify as a victim going by the definition of victim and 2(wa) Cr.P.C., the ingredients are

- (i) The person has suffered loss or injury.
- (ii) Loss or injury must have been caused by or,
- (iii) an act or omission for which the accused has been charged.

49. The word "loss" is not seen defined. I.P.C. Only defines "wrongful loss". As per Law Lexicon by P. Ramanath Aiyar the word "loss" means deprivation. In its most general sense the word loss means deprivation. In some cases, it must mean that which can never be recovered and in others that of which a party is dispossessed. In Oxford Advanced Learner's Dictionary, the meaning of the word loss is given as thus:

The state of no longer having sth or as much of sth; the process that leads to this. Money that been lost by a business or an organization. The death of a person. The disadvantage that is caused when somebody leaves or when a useful or valuable object is taken away; a person who causes a disadvantage.

In Black's Law Dictionary, the meaning of the word loss is given as thus:

an understandable out of a risk; the disappearance or diminution of value, usu. In an unexpected or relatively unpredictable way. When the loss is a decrease in value, the usual method of calculating the loss is to ascertain the amount by which a thing's original cost exceeds its later selling price. The excess of a property's adjusted value over the amount realized from its sale or other disposition. The amount of financial detriment caused by an insured person's death or an insured property's damage, for which the insurer becomes liable. The failure to maintain possession of a thing.

If one considers the definition of the words loss or injury, movable property etc., there can be no manner of doubt that complainant in a proceedings u/s 138 of N.I. Act is also a victim.

50. If infact the Legislature wanted to exclude the category of complainant from the term victim, as already stated, it could have been easily done. The Legislature must be deemed to be aware of the existing law. The Legislature must have known that Section 378(4) Cr.P.C. existed in the statute book and still continues to exist. The Legislature must also be credited with the wisdom that they were aware of the fact that the complainant, who may also be the victim in a private complaint, is also entitled to compensation and it is significant to notice that no distinction is drawn regarding victim and complainant in Section 357A Cr.P.C.

51. New rights have been created by the Amending Act 5 of 2009 introducing various provisions. It has conferred various benefits on the victims of offence. Substantive rights have been conferred on the victims which hitherto were unknown.

52. True, the complainant in a private complaint had remedy by way of appeal after obtaining special leave of the High Court. As already noticed, there may be compelling circumstances which has driven a person to file a private complaint. Just because his cause is agitated through private complaint, to deprive him of the statutory benefits would not be just, legal and reasonable.

53. A person who is a victim in a case instituted on a police report does not cease to be so when he files a private complaint. To put the victim on a police report on a higher pedestal who are entitled to more benefits and to deny the same benefit to the victim in a private complaint cannot have legal sanction. As already noticed, the existing remedy available to a private complainant is only against an order of acquittal.

54. It will not be proper to hold that in case of acquittal of an accused in a

proceedings initiated on a private complaint, the complainant who is also the victim has to prefer appeal against acquittal u/s 378(4) Cr.P.C. with special leave of High Court and for other grounds of appeal mentioned under the proviso to Section 372 Cr.P.C. he may approach the sessions court. To say that proviso to Section 372 Cr.P.C. is not available to a private complainant would be to say that even if he is dissatisfied with the compensation awarded to him, he has to suffer. But if he is a victim in a case instituted on a police report, he will be in a more fortunate position. The status of a victim of offence certainly cannot change depending upon the nature of proceedings, A victim remains a victim, whether it be in a case instituted on a police report or on a private complaint. On a plain reading of Section 2(wa) of Cr.P.C. along with various provisions already made mention of under the I.P.C., it is extremely difficult to say that a complainant in a proceeding u/s 138 of N.I. Act stands excluded from the definition of the term "victim" and that he stands on a different footing than a complainant in a private complaint alleging offence under various other penal statutes.

55. There may be some practical difficulties in a case where order of acquittal is passed by the Sessions Court, regarding proceedings which originated on a private complaint. The victim in such a case will have a right of appeal as a matter of right. To say that a complainant, who may also be the victim, will have to take recourse to Section 378(4) Cr.P.C. does not appear to be reasonable. The position would be different if the complainant and the victim are not the same person. We need not consider this aspect as it does not arise for consideration in these proceedings. But it would appear that statute having given a substantive right of appeal to a victim, the complainant, who is also the victim, will have as a matter of right, to prefer an appeal before the High Court and Section 378(4) Cr.P.C. in such cases may not be an impediment.

56. It was strenuously argued that if a private complainant is to be treated as a victim u/s 372 proviso, then Section 378(4) Cr.P.C. will be rendered redundant. It may not be so. There are several circumstances when there may be a complainant but no victim as defined u/s 2(wa) of Cr.P.C. For example, statutory offences in which complaint has to be filed by the statutory authorities. There may be cases where the complainant and victims are different in a private complaint. In all these cases, the remedy available in a case of acquittal is u/s 378(4) Cr.P.C. The difficulty arises only when the complainant is also the victim in a private complaint.

57. Well, at best it could be said that such persons may have two remedies open to them. But merely because of the existence of two remedies, to deny the substantive statutory remedy provided u/s 372 proviso will be illegal. In such cases, the principle of hierarchy of courts applies and the appeal will have to be filed in the lowest forum competent to institute an appeal.

58. Reliance was placed on the decision reported in National Commission of Women Vs. State of Delhi and Another, to contend for the position that in a case of acquittal on a private complaint, the only remedy available is u/s 378(4)

Cr.P.C. In fact, in the decision reported in National Commission of Women Vs. State of Delhi and Another, the issue considered was whether an appeal lies regarding inadequacy of sentence at the instance of a private person. The Apex Court held that such a right is not available to a private person including the victim as the newly introduced proviso to Section 372 Cr.P.C. does not provide for an appeal against inadequacy of sentence also. That right still remains confined to the State. In the decision reported in Subhash Chand Vs. State (Delhi Administration), , it was held as follows:

Therefore, a complainant can file an application for special leave to appeal against an order of acquittal of any kind only to the High Court. In the present case, the complaint alleging offences punishable under Sections 16(1) and (1 A) read with Section 7, PFA Act and the Rules was filed by complainant, the Local Health Authority of the Delhi Administration. The appellant was acquitted by the Metropolitan Magistrate. The complainant could challenge the order of acquittal by filing an application for special leave to appeal on the High Court and not in the Sessions Court.

59. A reading of the decision shows that that was a case in which proceedings were initiated for the offence under the Prevention of Food Adulteration Act and there is nothing to show that the issue as to who is the victim and what are the rights of the victim and whether the private complainant can be a victim were considered at all. Therefore, it may not be possible to say that the principle laid down in that decision that on acquittal in a proceedings based on a private complaint, the only remedy available is appeal u/s 378(4) Cr.P.C., can apply to the facts of the present case.

60. For the reasons already stated, this Court finds no reason or justification to consider the proviso to Section 372 Cr.P.C. which creates a substantive right in such a manner to exclude the complainant in a private complaint from the ambit of the provision. It is felt unnecessary to undertake an exercise of interpretation and to read something into the Statute which is neither intended nor is desirable.

61. From the above discussion, the following conclusions emerge: (a) Complainants in private complaints, who satisfy the definition of victim as contained in Section 2(wa) of Cr.P.C., are entitled to file appeal as provided under the proviso to Section 372 Cr.P.C. as a matter of right.

(b) Complainant in a complaint u/s 138 of N.I. Act is also a victim and is entitled to the same benefit as the victim in any other case instituted on a private complaint.

(c) In case of acquittal of accused on a private complaint, if the complainant is also the victim, he may have two remedies, namely, appeal under the proviso to Section 372 Cr.P.C. as a matter of right, and appeal to High Court after obtaining special leave. But going by the principle of hierarchy of courts, the aggrieved person will have to approach the lower forum which is competent to entertain the appeal. If he avails of one of the two remedies, he is precluded from resorting to

the other remedy.

(d) Right of appeal under the proviso to Section 372 Cr.P.C. is available in all cases where the judgments are rendered after 31-12-2009.

(e) In case of acquittal in a private complaint by the Sessions Court, if the complainant is also the victim, he has a statutory right of appeal as per proviso to Section 372 Cr.P.C. and the stipulation in Section 378(4) Cr.P.C. to obtain special leave may not apply in such a case.

Hence, it is held that in all cases where the judgment is rendered after 31-12-2009, appeal lies to the court made mention of under the proviso to Section 372 Cr.P.C. The Registry will return the records to the respective parties to enable them to prefer appeals before the appropriate forum. If they so choose to file appeals within a month from the date of this order before the competent forum, the time during which the matter was pending before this Court will be taken note of in applying Section 14 of the Limitation Act.

These matters are disposed of as above.