
(2012) 10 JH CK 0005

In the Jharkhand High Court

Case No : Criminal M.P. No. 312 of 2012

Vivekanand Pathak and Another

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 03-10-2012

Acts Referred:

Constitution of India, 1950 — Article 136, 226, 32
Criminal Procedure Code, 1973 (CrPC) — Section 372, 378, 378(2), 378(4)
Negotiable Instruments Act, 1881 (NI) — Section 138

Citation : (2013) 1 JLJR 1

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

Bench : Division Bench

Advocate : Ashutosh Anand, for the Appellant; Ravi Prakash, for the Respondent

Final Decision : Dismissed

Judgement

Dhirubhai Naranbhai Patel, J.—The present application has been preferred u/s 378 of the Code of Criminal Procedure for getting Special Leave to Appeal against the judgment and order dated 12th December, 2011 passed by the learned Judicial Magistrate, 1st Class, Ranchi in Complaint Case No. 978/2004 (Tr. No. 1851/ 2011) whereby the complaint case filed by the petitioners has been dismissed. The complaint case was filed by the complainants-petitioners before the Chief Judicial Magistrate, Ranchi for allegedly committing an offence u/s 138 of the Negotiable Instruments Act against the Opposite Party Nos. 2 to 4. There were several cheques which were given by the said opposite parties to the petitioners and they were dishonoured for want of sufficient fund in their bank accounts.

2. Counsel for the petitioners 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 petitioners are the complainants, they have preferred this appeal for grant of Special Leave to Appeal u/s 378(4) of the Code of Criminal Procedure as a complainant. Counsel for the petitioners 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 these petitioners 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 provision 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 remedyless. They have a right to prefer an statutory appeal against the very judgment of the Judicial Magistrate, Ranchi before the Sessions Court/Judicial Commissioner, Ranchi. Thus, the Special Leave to Appeal may not be granted to these petitioners. Counsel for the State has also pointed out that whenever victim is also the complainant himself, then in alt 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 Mah. 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 petitioners are the victim as well as the complainant and, therefore, they have remedy of Section 372 of the Code of Criminal Procedure available to them to file an appeal against the impugned judgment and order passed by the Judicial Magistrate, Ranchi, 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 petitioners are the complainants as well as victims. They have preferred a complaint case under the Negotiable Instruments Act before the Chief Judicial Magistrate, Ranchi.

(II) The learned trial Court by judgment and order dated 12th December, 2011 passed in Complaint Case No. 978/2004 (Tr. No. 1851/2011) dismissed the complaint preferred by these petitioners.

(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 petitioners, who are also the victims, they have statutory right to prefer an appeal against the impugned judgment and order passed by the learned Judicial Magistrate, Ranchi.

(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 subsection, 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 remedyless. 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 are the same person and their complaint under the Negotiable Instruments Act has been dismissed by the learned Judicial Magistrate, they should first exhaust the remedy available to them under the provision of Section 372 of the Code of Criminal Procedure, by preferring an appeal, before the learned Sessions Judge/ Judicial Commissioner, Ranchi. As a cumulative effect of the aforesaid facts and reasons and judicial pronouncements, we hereby refuse to give Special Leave to Appeal, the present petitioners, u/s 378(4) of the Code of Criminal Procedure Ubi jus ibi remedium. Petitioners are not remedyless under proviso to Section 372 of the Code of Criminal Procedure. Let the remedy by way of statutory appeal be exhausted first.

Thus, this appeal is hereby dismissed.