



GAHC010139032019

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IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM : NAGALAND : MIZORAM AND
ARUNACHAL PRADESH)

I.A.(Crl.) No. 496/2019
in Crl.Rev.P. No. 35/2017

Shri Bikash Bhuiya

S/O: Late Binod Bihari Bhuiya,
R/O: Bhuyan Road, Janiganj,
Silchar Town, Pargana: Barakpar,
Dist: Cachar, Assam

..... Applicant.

- Versus -

1. Nepal Chandra Das

S/O: Late Gopendra Chandra Das,
R/O Malugram, P.O: Silchar,
P.S.: Silchar,
Cachar, Assam, PIN: 788001

2. The State of Assam

..... Respondents.

Advocates for the Applicant : Mr. P.K. Deka

Advocate for the Respondents : 1. Mr. A. M. Borah, Senior Advocate (R-1)
2. Mr. B.J. Dutta, Addl. PP, Assam (R-2)

BEFORE
HON'BLE MR. JUSTICE AJIT BORTHAKUR

Date of Hearing : **09.10.2020**

Date of Order : **11.11.2020**

ORDER

Heard Mr. P.K. Deka, learned counsel for the applicant/ revision petitioner. Also heard Mr. A.M. Borah, learned Senior counsel appearing for the respondent No. 1 and Mr. B.J. Dutta, learned Addl. PP., for the respondent No. 2/ State.

2) This interlocutory application is filed by the applicant in CrI. Revision Petition No. 35/2017 praying for converting the aforesaid Criminal Revision to a Criminal Appeal under Section 401 (5) of the Code of Criminal Procedure, 1973 ('Cr.P.C.' for short).

3) The applicant/ revision petitioner has preferred CrI. Rev. Petition No. 35/2017 against the judgment and order dated 08.12.2016 passed by the learned Addl. Sessions Judge, F.T.C., Cachar at Silchar in CrI. Appl. No. 14/2016 setting aside the judgment and order, dated 24.05.2016 passed by the learned Addl. Chief Judicial Magistrate, Cachar at Silchar in N.I. Case No. 39/2011 convicting the respondent No. 1 under Section 138 of the Negotiable Instruments Act ('N.I. Act' for short) and sentenced him to pay an amount of Rs. 1600000/- in total to the applicant/ revision petitioner, in default to undergo simple imprisonment for 2 (two) years.

4) It is contended that being aggrieved with the aforesaid judgment and order, dated 08.12.2016, passed by the learned Addl. Sessions Judge, F.T.C., Cachar the applicant filed CrI. Revision Petition being No. 35/2017. The aforesaid revision petition was admitted and heard on several occasions. However, in course of hearing, it came to light that the applicant ought to have preferred an appeal instead of a revision petition and therefore, this Court by order dated 28.05.2019 permitted the applicant/ revision petitioner to file an application under Section 401 (5) Cr.P.C. Hence the instant interlocutory application is filed praying for converting the Criminal Revision Petition No. 35/2017 to a Criminal Appeal Petition.

5) Mr. P.K. Deka, learned counsel for the applicant/ revision petitioner, contends that in the backdrop of facts stated in the application and as the revision petition was filed within the prescribed period of limitation, by virtue of Section 401 (5) Cr.P.C., this Court in exercise of its discretion and in order to meet the ends of justice, can treat the Criminal Revision as a Criminal Appeal Petition. Mr. Deka further contends that the respondent No. 1 was acquitted of the offence under Section 138 of the N.I. Act on misappreciation of the evidence on record and as the applicant preferred the revision petition on an erroneous bonafide belief that no appeal lies, the revision petition may be converted to a Criminal Appeal lest the applicant's meritorious case will fail without adjudication causing injustice to him.

6) Controverting the above argument advanced by the learned counsel for the applicant, Mr. A.M. Borah, learned Sr. Counsel appearing for the respondent No. 1, submitted that under Section 378 (4) Cr.P.C if an order of acquittal is passed in any case instituted upon complaint, the complainant must obtain special



7) Mr. B.J. Dutta, learned Addl. PP for the respondent No. 2/ State has concurred with the submission made by learned Senior counsel appearing for the respondent No. 1.

9) It may be mentioned that the Criminal Procedure Code is the main legislation on procedure to try criminal offences. It contains a comprehensive and exhaustive procedural law for conducting a criminal trial. On the other hand, it is one of the cardinal principles of interpretation that the Court cannot read or add/substitute anything in a statutory provision when the same is plain and unambiguous. To speak it differently, the basic rule of interpretation of any statutory provision is that the plain and unambiguous words of a statute must be given effect to that meaning. In *Gurudev datta VKSSS Maryadit Vs. State of Maharashtra*, reported in AIR 2001 SC 1980, the Supreme Court observed:-

31. The same view has been taken by this Court in *S.Mehta v. State of Maharashtra*, 2001 (8) SCC 257 : (AIR 2001 Sc 3774 : 2001 AIR SCW 3492) (vide para 34) and *Patangrao Kaddam v. Prithviraj Sajirao Yadav Deshmugh*, AIR 2001 SC 1121 : (2001 AIR SCW 871).

10) In the context of the applicant's case, I find it apposite to extract Sections 401 and 378 Cr.P.C., which read as under:-

"401. High Court's Powers of revisions.- (1) In the case of any proceeding the record of which has been called for by itself or which otherwise comes to its knowledge, the High Court may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 386, 389, 390 and 391 or on a Court

of Session by section 307 and, when the Judges composing the Court of revision are equally divided in opinion, the case shall be disposed of in the manner provided by section 392.

(2) No order under this section shall be made to the prejudice of the accused or other person unless he has had an opportunity of being heard either personally or by pleader in his own defence.

(3) Nothing in this section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(4) Where under this Code an appeal lies and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

(5) Where under this Code an appeal lies but an application for revision has been made to the High Court by any person and the High Court is satisfied that such application was made under the erroneous belief that no appeal lies thereto and that it is necessary in the interests of justice so to do, the High Court may treat the application for revision as a petition of appeal and deal with the same accordingly."

" **378 Appeal in case of acquittal.**-(1) Save as otherwise provided in sub- section (2) and subject to the provisions of sub- sections (3) and (5),-

(a) the District Magistrate may, in any case, direct the Public Prosecutor to present an appeal to the Court of Session from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(2) If such an order of acquittal is passed in any case in which the offence has been investigated by the Delhi Special Police Establishment constituted under the Delhi Special Police Establishment Act, 1946 (25 of 1946), or by any other agency empowered to make investigation into an offence under any Central Act other than this Code, [the Central Government may, subject to the provisions of sub-section (3), also direct the Public Prosecutor to present an appeal]-

(a) to the Court of Session, from an order of acquittal passed by a Magistrate in respect of a cognizable and non-bailable offence;

(b) to the High Court from an original or appellate order of an acquittal passed by any Court other than a High Court [not being an order under clause (a)] or an order of acquittal passed by the Court of Session in revision.]

(3) [No appeal to the High Court]under sub- section (1) or sub- section (2) shall be entertained except with the leave of the High Court.

(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) No application under sub- section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.

(6) If in any case, the application under sub- section (4) for the grant of special leave to appeal from an order of acquittal is refused, no appeal from that order of acquittal shall lie under sub- section (1) or under sub- section (2).

11) Section 378 Cr.P.C provides for an appeal against acquittal by (i) the Government with leave of the High Court and (ii) also by a private party in a case instituted upon complaint when special leave is obtained from the High Court. Section 378 (4) Cr.P.C applies to acquittal recorded either by the trial Court or the appellate Court. On the other hand, Section 401 Cr.P.C. provides a kind of supervisory jurisdiction over subordinate criminal Courts in order to correct miscarriage of justice arising from misconceptions of law, irregularity of procedure, which is distinguished from an appeal jurisdiction. An appeal is a vested right, where the appellate Court is empowered to review the evidence unlike in a revision petition. Thus, an appeal is a continuation of the proceedings.

12) A Single bench of Orissa High Court, in *Rabindra Behera Vs. Sridhar Samantray & Ors.*, reported in 1996 Cri. L.J. 832, while allowing a revision petition directed against order of acquittal of the accused following dismissal of complainant under Section 256 Cr.P.C. observed as under:-

"6. Law is very clear on the subject that against an order of acquittal passed in a case arising out of a complaint, appeal lies to the High Court under Section 378 Cr.P.C and such an appeal can only be entertained after leave of the High Court is obtained. In view of this, it is to be considered whether the present revision challenging the order of acquittal can be treated as an appeal or this Court sue motu can revise the order, when trial court appears to have done grave injustice to the petitioner by illegally recording an order of acquittal in favour of the opposite parties.

7. I am reminded of what the apex Court has said in a different context that it must be grasped that judiciary is respected not on account of its power to legalise injustice on technical ground but because it is capable of removing injustice and is expected to do so. It is one's inherent right to seek redress in the court of law against a wrong doer. To achieve that right, certain procedures are prescribed in the Code of Criminal Procedure. If the victim adopts some wrong procedure, the court, whose primary duty is to impart justice, should not dismiss his case and perhaps because of this reason, the Legislature has provided in sub-Section (5) of Section 401, Cr.P.C that if a revision is filed on an erroneous belief that no appeal lies, the High Court in the interest of justice can treat the revision application as a petition of appeal and decide the same accordingly. Even otherwise, this Court is not denuded of its power to suo motu revise an order of inferior court where there is glaring defect in the procedure or manifest error on a point of law resulting in flagrant miscarriage of justice."

13) Again another Single bench of Kerala High Court in *State of Kerala Vs. Sebastian*, reported in 1983 Cri. L.J. 416, while converting a revision petition preferred against order of discharge of the accused in a case instituted on report of police, to an appeal observed as extracted hereinbelow:-

"6..... In substance and effect such an order is one of acquittal. The proper remedy for the State was therefore to file an appeal against the order under attack. A right of appeal is a creature of statute and carries with it a right of rehearing on law as also on facts. Generally there is no right of hearing on facts or appreciation of evidence in a revision.

7..... Revisional Jurisdiction conferred under S.401, Cr.P.C is very wide and cannot therefore be lightly exercised. Powers under this section can be exercised where interests of public justice require interference for the correction of a manifest illegally or the prevention of a gross miscarriage of justice. The whole matter has now been brought to the notice of this Court on the revisional side. Notwithstanding the bar or exceptions contained in S.401, Cr.P.C., the High Court has jurisdiction suo motu to set aside an illegal order of acquittal in exercise of the revisional powers. It is not disputed that this petition has been filed within the period of limitation prescribed for filing an appeal against an order of acquittal. On the facts and in the circumstances of this case, by virtue of the provision in sub-sec. (5) of S.401, Cr.P.C., this Court can treat this revision as an appeal. It makes no difference and is of no serious consequence, whether this petition is heard as a petition of appeal or revision, as the orders under challenge are manifestly and glaringly illegal and are passed without jurisdiction."

14) In *Subhash Chand Vs. State (Delhi Administration)*, reported in (2013) 2 SCC 17, the Supreme Court held that when in a case instituted on complaint, an order of acquittal is passed, the complainant can file application under Section 378 (4) Cr.P.C. seeking special leave to appeal against that order in the High Court.

15) A Single Bench of the High Court of Kerala in *Benny Daniel Vs. Gold Galaxy & 2(two) Ors.*, reported in 2017 SCC Online Ker 10914, deliberated primarily on the implication of Sections 378 and 401 Cr.P.C and observed in para-18 of the order as under:-

"18 It has been held by the Apex Court in *Pudhu Raja and another Vs. State* reported in (2012) 11 SCC 196 = (2013) 1 SCC (Cri) 430, that, the elementary principle of criminal jurisprudence in commonwealth jurisdictions is that the accused is presumed to be innocent until he is found guilty in the trial and over and above that, the acquittal rendered by the trial court would bolster the innocence of the accused. When that be the position, the Parliament has felt it necessary that stringent provisions as in Sec.378 (4) of the Cr.P.C should be engrafted so as to strictly fetter and regulate the appellate process to impugn involving acquittal of the accused. It may also be noted that for the cases covered by sub-secs.(1) & (2) of Sec.378, the Parliament has envisaged that appeals in such cases would be instituted only with "leave of the High Court". Whereas in the case of acquittal in private complaints, Parliament has more emphatically mandated in Sec.378(4) that special leave of the High Court has to be obtained before the institution of Criminal Appeal to impugn the judgment of acquittal. So compared to the provisions in Sub-secs.(1) and (2) of Sec.378 or other provisions facilitating appellate remedy, the Parliament has certainly envisaged a more strict and rigorous filtering process before a Criminal Appeal could be instituted in acquittal matters and such criminals appeals could be filed only after securing special leave of the High Court in terms of Sec.378(4) of the Cr.P.C. These aspects should be viewed from the backdrop of the principles in criminal jurisprudence that criminal legal system should not be permitted to be shamefully perverted to serve private purposes and also taking into account the crucial principles that the acquittal of an accused would bolster his innocence. It is to be seen that these provisions as in Sec.378(4) of the Cr.P.C should be strictly construed for its effective enforcement as otherwise it would lead to upsetting the whole scheme laid down by the Parliament for regulating the appeals against acquittal which should be appreciated in the backdrop of the above said crucial principles of criminal jurisprudence as mentioned hereinabove. Moreover, the beginning portion of Sec.401 (5) containing the words "where under this Code, an appeals lies....." should be understood in the context of the requirement in that provision, that the revision petition should be capable of being directly converted as an appeal. Where the applicant is compelled at the threshold to seek special leave for getting permission to file appeal, there is no question of directly converting the wrongly filed revision as an appeal, as institution of appeal at that stage cannot even be contemplated. So the inevitable consequence flowing from these aspects in that conversion of such a wrongly filed revision shall

have the drastic effect of overriding the provisions in sub-secs.(4) & (5) of Sec.401 as well as that in sub-secs.(4), (5) & (6) of Sec.378. An accused in a complaint who has lawfully secured acquittal can be subjected to an appellate process only after strict compliance of those provisions, as otherwise it will amount to violating the "due process clause" of just, fair and reasonable procedure engrafted in Article 21 of the Constitution of India. In the light of these aspects, this Court is constrained to take the view that without securing special leave, there is no question of institution of Criminal Appeal and therefore, there is no question of converting a revision into an appeal in a case like this by invoking the provisions in sub-sec.(5) of Sec.401. It is primarily because, as of now without securing special leave there is no question of institution of a criminal appeal for challenging the judgment of acquittal in a private complaint. In case an accused is convicted and he wrongly files a revision without invoking the appellate remedy against conviction as envisaged in Sec.374 of the Cr.P.C., then certainly the accused could seek conversion of his wrongly filing Criminal Revision Petition as a Criminal Appeal as he has the right to file an appeal against conviction in terms of Sec.374 of the Cr.P.C, which is not hedged with any conditions requiring special leave or leave, etc.

16) In a similarly situated case, another single Bench of the *High Court of Madras in M. Ramamurthy Vs. N.A. Ramakrishnan*, reported in 2015 (2) MWN (Cr.) DCC 35 (Mad) reiterated the view of need of obtaining special leave to appeal before presenting an appeal against acquittal in a complaint case. The said Court in para 15 and 16 held as hereinbelow extracted:-

"15. Of course, it is true that when a Revision is filed by a person with a belief that no Appeal lies, the High Court under Section 401(5) can treat the Revision as an Appeal Petition and dispose of the same. The above said general provision shall be applicable in all cases wherein there is no condition precedent is prescribed for preferring the Appeal. Moreover, sub- Section 5 of Section 401, does not make it mandatory on the High Court to treat the Revision as an Appeal and it gives a discretion (of course, a judicial discretion) to the High Court to treat the Revision as an Appeal Petition. In a case wherein the presentation of the Appeal itself is made contingent on the grant of "Special Leave", an Application seeking Special Leave for filing Appeal is to be preferred within the time stipulated under sub-section (5) of Section 378, Cr.P.C converting a Revision when no "Special Leave" was obtained, that too after the period stipulated in sub-section (5) of Section 378, Cr.P.C. will amount to improper exercise of the discretion. Conversion of such Revision into Appeal which shall have a drastic effect of making the provisions found in Sub-sections (4) and (5) of Section 378, Cr.P.C a dead letter in statute book so far as that particular case is concerned. The proper exercise of such discretion shall be to reject the prayer for conversion of the Revision into an Appeal, if such a request is not made within the time prescribed under sub-section 5 of Section 378, Cr.P.C. and no such Application seeking Special Leave contemplated under sub-Section 4 of Section 378, is filed within that time. If the time stipulated in sub-section (5) of Section 378 Cr.P.C. is allowed to expire, thereafter, the prayer for conversion of the Revision into an Appeal cannot be entertained and the exercise of the discretion in favour of such conversion shall be an improper exercise of the judicial discretion. Hence, this Court comes to the conclusion that the submission made by the learned Counsel for the Petitioner that the Revision can be treated as an Appeal Petition and the same can be heard and disposed of as an Appeal, is bound to be rejected.

16. *For all the reasons stated, this Court comes to the conclusion that the Revision is not maintainable and that using the discretion of the High Court under sub-section (5) of Section 401, also the Revision cannot be converted into an Appeal in this case, because such a prayer for conversion was not accompanied with an Application seeking "Special Leave" under sub-section (4) of Section 378 Cr.P.C. filed within the time stipulated in sub-section 5 of Section 378, Cr.P.C."*

17) In para-19 of the judgment rendered by the Apex Court in *Subhash Chand (supra)*, held as under:-

"19. Sub-Section (4) of [Section 378](#) makes provision for appeal against an order of acquittal passed in

case instituted upon complaint. It states that in such case if the complainant makes an application to the High Court and the High Court grants special leave to appeal, the complainant may present such an appeal to the High Court. This sub-section speaks of 'special leave' as against sub-section (3) relating to other appeals which speaks of 'leave'. Thus, complainant's appeal against an order of acquittal is a category by itself. The complainant could be a private person or a public servant. This is evident from sub-section (5) which refers to application filed for 'special leave' by the complainant. It grants six months' period of limitation to a complainant who is a public servant and sixty days in every other case for filing application. Sub- Section (6) is important. It states that if in any case the complainant's application for 'special leave' under sub-Section (4) is refused no appeal from the order of acquittal shall lie under sub-section (1) or under sub- section (2). Thus, if 'special leave' is not granted to the complainant to appeal against an order of acquittal the matter must end there. Neither the District Magistrate nor the State Government can appeal against that order of acquittal. The idea appears to be to accord quietus to the case in such a situation."

18) On a close scrutiny of the provisions of Sections 401 and 378 Cr.P.C *vis-a-vis* the interpretations thereof illustrated in various judgments of the High Courts and the Apex Court particularly in *Subhash Chand (Supra)* case as well, it is revealed that Sub-Section (5) of Section 401 Cr.P.C provides that if an application for revision is filed against a decision which is appealable and the High Court if satisfied that the appeal was not filed due to any erroneous belief and the interest of justice so requires, may treat the revision petition as petition of appeal. However, Section 378 (4) Cr.P.C. requires that in the event of acquittal of accused in a case instituted upon private complaint, the appeal can be filed only after obtaining a special leave to appeal from the High Court on an application of the complainant. Because sub-Section (4) of Section 378 Cr.P.C creates a statutory bar in entertaining such an appeal against acquittal in 'complaint' case, defined in Section 2 (d) Cr.P.C unless the High Court is satisfied on exceptional grounds and special circumstances cited in such application filed separately by the complainant seeking grant of special leave to appeal within a period of sixty days. Therefore, there can be no revision or conversion of a revision to appeal against an order of acquittal in complaint case and since appeal against order of acquittal under 'original' or 'appellate' jurisdiction lies under Section 378 (4) as such in view of Section 401 (4) Cr.P.C, revision against such an order is not sustainable.

19) Considered thus in detail, as the applicant/ revision petitioner has not satisfied the first procedural requirement of Section 378 (4) Cr.P.C, which is a condition precedent to prefer an appeal against acquittal in complaint case, this Court is not in a position to convert the revision application to an appeal application applying Section 401 (5) Cr.P.C overriding the aforesaid provision of Section 378(4) Cr.P.C. incorporated by the legislature.

20) Accordingly, **the Interlocutory Application stands dismissed.**

21) The applicant/ revision petitioner is, however, given liberty to approach the appropriate Court afresh, if so advised, following the prescribed procedure.

Accordingly, I.A. stands disposed off.



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JUDGE

Comparing Assistant