

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE V.G.ARUN

Tuesday, the 27th day of June 2023 / 6th Ashadha, 1945

CRL.L.P. NO. 164 OF 2023(FILING NO.)

CC 1023/2017 OF JUDICIAL FIRST CLASS MAGISTRATE COURT, ANGAMALY, ERNAKULAM

PETITIONER/COMPLAINANT:

PAULOSE, AGED 69 YEARS, S/O PAULOSE, KAITHAVALAPPIL HOUSE, KORATTY VILLAGE, VAZHACHAL DESOM, CHALAKKUDY. NOW RESIDING AT PALISSERY DESOM, KARUKUTTY P.O, PIN - 683572

BY ADVS.PRABHU K.N. & MANUMON A.

RESPONDENT/ACCUSED AND STATE:

1. BAIJU, AGED 51 YEARS, S/O PIOUS, ARACKAL HOUSE, ANCHERI, MARIYAPURAM, OLLUR, THRISSUR, PIN - 680006
2. THE STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031

This unnumbered Criminal leave petition (filing No.164/2023) having come up for orders on 27.06.2023, the court on the same day passed the following:



(p.t.o)

V.G.ARUN, J.

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Crl.L.P. No.....of 2023
(F.No.164/23)

Dated this the 27th day of June, 2023

ORDER

The leave petition is filed against the order of the Judicial First Class Magistrate Court, Angamaly acquitting the accused/first respondent in the complaint filed by the petitioner under Section 142 of the Negotiable Instruments Act. The Registry noted defect since the leave petition is filed beyond the period of limitation, without appending a petition for condoning the delay.

2. In his answer to the defect, learned Counsel for the petitioner stated that in **Sobhanakumari K. v. Santhosh @ Pallan Shaji [2018 (1) KHC 195]**, the Full Bench has observed that, after the Code of Criminal Procedures Amendment Act, 2008 came into force, the victim has a right of appeal against an order passed by

the court acquitting the accused and no period of limitation is prescribed for filing the appeal. The only requirement being that notwithstanding the absence of any period, the victim must prefer the appeal after obtaining leave of the Court. Further, even if no period of limitation is prescribed, the appeal must be filed within a reasonable period of 90 days from the date of the order appealed against. The defect was hence answered by asserting that there is no delay since the period of 90 days from the date of order ended during vacation and the leave petition was filed on the reopening day.

3. When the matter was taken up in court, learned Counsel for the petitioner contended that the complainant in a prosecution under Section 138 of the Negotiable Instruments Act falls within the meaning of 'victim' as defined in Section 2(wa) of the Criminal Procedure Code and

is entitled to file appeal based on the proviso to Section 372 of the Code.

4. The above contention is liable to be rejected outright in view of the declaration of law by the Division Bench in **Omana Jose v State of Kerala [2014(2) KLT 504]**. Therein, after considering the relevant provisions, the Division Bench found that the expression 'victim' requires an interpretation in the context of the provisions in Sections 372 and 378, to exclude the complainant in a complaint case, who is also the victim, from the purview of the definition of 'victim' under Section 2(wa). Based on the finding, it is specifically held that the complainant in a case under Section 138 of the Negotiable Instruments Act cannot challenge the order of acquittal before the Sessions Court under the proviso to Section 372 of the Code of Criminal Procedure and his remedy is to file an

appeal to the High Court with special leave under Section 378 (4) of the Code.

5. Learned Counsel for the petitioner argued that Omana Jose (*supra*) is no longer good law in the light of the Apex Court decision in **Mallikarjun Kodagali (Dead) represented through Legal Representatives v. State of Karnataka and Others [(2019) 2 SCC 752]**. In support of this contention, reliance is placed on the following paragraph in the judgment.

“76. As far as the question of the grant of special leave is concerned, once again, we need not be overwhelmed by submissions made at the Bar. The language of the proviso to Section 372 CrPC is quite clear, particularly when it is contrasted with the language of Section 378(4) CrPC. The text of this provision is quite clear and it is confined to an order of acquittal passed in a case instituted upon a complaint. The word “complaint” has been defined in Section 2(d) CrPC and refers to any allegation made orally or in writing to a Magistrate. This has nothing to do with the

lodging or the registration of an FIR, and therefore it is not at all necessary to consider the effect of a victim being the complainant as far as the proviso to Section 372 CrPC is concerned."

In my opinion, the above finding, only affirms the declaration of law in **Omana Jose** (*supra*). In this context, it is essential to understand the meaning of the term 'complaint' as defined in Section 2(d) of the Code. Going by the definition, any allegation made orally or in writing to a Magistrate that some person, whether known or unknown, has committed an offence, will fall within the meaning of 'complaint'. Pertinently, the definition specifically excludes a police report. It is also necessary to note that Section 378(4) provides the complainant with the right to file appeal against acquittal in a case instituted upon a complaint, once special leave to appeal is granted by the High Court. In

Mallikarjun Kodagali (*supra*), the Apex Court held Section 378(4) to be confined to an order of acquittal passed in a case instituted upon a complaint. The position is further clarified by the observation that the word 'complaint' as defined in Section 2(d) of the Cr.P.C. refers to any allegation made orally or in writing to a Magistrate and has nothing to do with the lodging or registration of an FIR. The above being the finding in **Omanajose** (*supra*) also, the contention that the complainant in a prosecution under Section 138 falls within the definition of 'victim' under Section 2(wa) and is therefore entitled to file appeal under Section 372 of the Code can only to be rejected. Consequently, the defect pointed out by the Registry is sustained.

Sd/-

V. G. ARUN
JUDGE

Scl/