

Court No. - 43

Case :- GOVERNMENT APPEAL No. - 591 of 2022

Appellant :- State of U.P.

Respondent :- Vakil S/O Babu Khan

Counsel for Appellant :- Shiv Kumar Pal

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Shiv Shanker Prasad,J.

1. A short but interesting question arises in this appeal as to whether this Court, while exercising its power to grant leave to the State to institute appeal under sub-section 3 of Section 378 Cr.P.C. is required to summon the lower court record, first, before proceeding to consider the prayer made for grant of leave?

2. Section 378 Cr.P.C. provides for filing of appeal in case of acquittal by the State. Sub-section 3 of Section 378 Cr.P.C. contemplates for grant of leave for entertainment of such appeal. Sub-section 3 of Section 378 Cr.P.C. reads as under:-

"3. No appeal under Sub-Section (1) or Sub-Section (2) shall be entertained except with the leave of the High Court."

3. It is urged by Sri S. A. Murtza, learned A.G.A. for the State that the State cannot be treated differently in the matter of filing of appeal vis-a-vis the victim and since the requirement of seeking leave under Section 372 Cr.P.C. stands dispensed with by virtue of proviso added to Section 372 Cr.P.C., conferring right upon a victim to prefer appeal against the order of acquittal or convicting the accused for a lesser offence or imposing inadequate compensation, as such the State being repository of the interest of society at large must be treated at par with the victim. It is also submitted that though the Code of Criminal Procedure provides for summary dismissal of appeal yet sub-section 2 of Section 384 Cr.P.C. nevertheless provides that before dismissing an appeal, summarily, the Court may call for record of the case. Sub-section 2 of Section 384 Cr.P.C. relied upon by learned A.G.A. is extracted hereinafter:-

"(2) Before dismissing an appeal under this section, the Court may call for the record of the case."

4. It is urged that appeal is a creature of statute and Chapter XXIX of the Code provides for the procedure to be followed for its adjudication, therefore, it would be necessary for this Court to summon the lower court record first before examining the question of grant of leave. It is also urged that the refusal to grant leave results in affirmance of the order impugned in the appeal as such the decision affects the victim as his right of appeal would be adversely affected. Attention of the Court has been invited to the judgment of the Supreme Court in ***State of Maharashtra Vs. Sujay Mangesh Poyarekar (2008) 9 SCC 475***, wherein the Supreme Court observed as under in paragraph Nos. 19 to 21:-

"19. So far as an application for leave to appeal by the State is concerned, the High Court rejected it without considering the evidence of the prosecution. In the impugned order, the High Court noted that it had heard the learned Assistant Public Prosecutor. It went on to state that none of the injuries sustained by the victim was 'fatal'. According to the High Court, the cause behind the assault was that the complainant-advocate was teasing the wife of the accused, who was also working in the Court.

20. It then proceeded to observe;

"The trial Court has appreciated the evidence properly and has also taken into consideration the number of complaints filed against the said advocate complainant including the apology tendered by the complainant to the President, Bar Association, Dahanu and the action taken by the Bar Council. The trial Court found inherent improbabilities in the case of the complainant and therefore acquitted the accused. The judgment of the trial Court cannot be said to be perverse. No interference is called for. Application rejected".

21. Now, Section 378 of the Code provides for filing of appeal by the State in case of acquittal. Sub-section (3) declares that no appeal "shall be entertained except with the leave of the High Court". It is, therefore, necessary for the State where it is aggrieved by an order of acquittal recorded by a Court of Session to file an application for leave to appeal as required by sub-section (3) of Section 378 of the Code. It is also true that an appeal can be registered and heard on merits by the High Court only after the High Court grants leave by allowing the application filed under sub-section (3) of Section 378 of the Code.

5. The judgment in ***Sujay Mangesh Poyarekar (Supra)*** has been followed by the Supreme Court in ***State of Uttar Pradesh Vs. Anil Kumar @ Badka and Others (2018) 9 SCC 492***, wherein the Supreme Court observed as under in paragraph No. 5 and 11:-

“5. The State of U.P., fet aggrieved by the respondent’ acquittal, filed an application for leave to appeal before the High Court under Section 378(3) of the Code. By the impugned order the High Court declined to grant leave and accordingly rejected the application made by the State. It is against this order, the State has filed this appeal by way of special leave petition in this Court.

*11. We are constrained to observe that the High Court grossly erred in passing the impugned order without assigning any reason. In our considered opinion, it was a clear case of total non-application of mind to the case by the learned Judges because the order impugned neither sets out the facts nor the submissions of the parties nor the findings and nor the reasons as to why the leave to file appeal is declined to the appellant. We, therefore, disapprove the casual approach of the High Court in deciding the application which, in our view, is against the law laid down by this Court in *State of Maharashtra Vs. Sujay Mangesh Poyarekar.*”*

6. Learned State Counsel has also referred to the judgment of the Supreme Court in ***Mallikarjun Kodagali Vs. State of Karnataka and Others (2019) 2 SCC 752***, wherein the Supreme Court examined the scope of Section 372 and observed as under in paragraph Nos. 75 and 76:-

" 75. Under the circumstances, on the basis of the plain language of the law and also as interpreted by several High Courts and in addition the resolution of the General Assembly of the United Nations, it is quite clear to us that a victim as defined in Section 2(wa) of the Cr.P.C. would be entitled to file an appeal before the Court to which an appeal ordinarily lies against the order of conviction. It must follow from this that the appeal filed by Kodagali before the High Court was maintainable and ought to have been considered on its own merits.

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 of the Cr.P.C. is quite clear, particularly when it is contrasted with the language of Section 378(4) of the Cr.P.C. 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) of the Cr.P.C. 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 of the Cr.P.C. is concerned."

7. Section 384 of the Code provides for summary disposal of appeal and is reproduced hereinafter:-

"384. Summary dismissal of appeal.

(1) If upon examining the petition of appeal and copy of the judgment received under section 382 or section 383, the Appellate Court considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily: Provided that-

(a) no appeal presented under section 382 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same;

(b) no appeal presented under section 383 shall be dismissed except after giving the appellant a reasonable opportunity of being heard in support of the same, unless the Appellate Court considers that the appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case;

(c) no appeal presented under section 383 shall be dismissed summarily until the period allowed for preferring such appeal has expired.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case.

(3) Where the Appellate Court dismissing an appeal under this section is a Court of Session or of the Chief Judicial Magistrate, it shall record its reasons for doing so.

(4) Where an appeal presented under section 383 has been dismissed summarily under this section and the Appellate Court finds that another petition of appeal duly presented under section 382 on behalf of the same appellant has not been considered by it, that Court may, notwithstanding anything contained in section 393, if satisfied that it is necessary in the interests of justice so to do, hear and dispose of such appeal in accordance with law."

8. So far as Section 384 of the Code is concerned it confers power upon the appellate court to dismiss an appeal summarily. The language employed by the Statute in sub-section (1) is that upon examining the petition of appeal and copy of the judgment received under Section 382 or Section 383 the appellate court considers that there is no sufficient ground for interfering it may dismiss the appeal, summarily. The proviso to sub-section 1 only provides that before such dismissal the appellant or his pleader would be given a reasonable opportunity of being heard in support of such petition. Similarly in respect of an appeal preferred under Section

383 Cr.P.C. the dismissal shall be after giving the appellant a reasonable opportunity of being heard unless the appellate court considers that appeal is frivolous or that the production of the accused in custody before the Court would involve such inconvenience as would be disproportionate in the circumstances of the case.

9. Sub-section 2 of Section 384 Cr.P.C. then provides that before summarily dismissing an appeal under Section 383 Cr.P.C. the appellate court may call for record of the case. The conjoint reading of sub-section 1 and 2 of Section 384 Cr.P.C. clearly conveys that the appellate court upon examining the petition of appeal and copy of the judgment received under Section 382 or 383 can summarily dismiss the appeal, if it considers that there is no sufficient ground for interference. The specification of the material to be relied upon in sub-section (1) for the purposes of considering the appeal for summary dismissal denotes the legislative intent that the only material which is required for consideration by the appellate authority is the petition of appeal and the copy of the judgment. Sub-section (2) only enables the appellate court to call for the records of the case even before it proceeds to summarily dismiss the appeal. The Code vests discretion with the appellate court to summon the lower court record before summarily dismissing the appeal, or not. This discretion is to be exercised by the appellate court depending upon the requirement of lower court record for formation of opinion whether sufficient ground exists for interference in appeal.

10 The provision has been considered by the Supreme Court in *Hanumat Das Vs. Vinay Kumar AIR 1982 SC 1052*, wherein their Lordship observed that non summoning of lower court record in appeal against conviction is not fatal.

11. The use of expression 'may' in sub-section (2) clearly suggests that the power to summon the record is only an enabling provision and is not to be read as shall as is suggested by the learned counsel.

12. Before proceeding to examine the contention raised we would like to refer to the judgment of the Supreme Court cited at the Bar. In *Sujay Mangesh Poyarekar (Supra)* while considering the scope of sub-section 3 of Section 378 the Court observed that the High Court while exercising the power to grant or refuse leave must apply its mind and consider where a prima facie case has been made out or arguable points have been raised and not whether the order of acquittal would or would not be set aside. In paragraph 21 the Court clearly observed that every petition seeking leave to prefer an appeal is not required to be allowed by the appellate court nor that every appeal filed has to be admitted. The two observations are a clear pointer to the legislative intendment. Every appeal is not required to be admitted inasmuch as leave must not necessarily be granted in every matter and the exercise of power in that regard is dependent upon a prima facie assessment of the material placed before the Court so as to ascertain whether the appeal raises arguable points or not.

13. The object of incorporating provision for grant of leave has a purpose to subserve. It is not that in every matter the State is expected or required to file an appeal and even if such an appeal is routinely filed, the Court is not required to entertain every such appeal as a matter of course. The purpose of grant of leave by the High Court is that a prima facie assessment would be required to determine whether the appeal raises arguable points or not. The reason for grant or refusal to leave must be reflected from the order passed by the High Court. The Supreme Court has clearly disapproved the practice of rejection of prayer for grant of leave to file appeal by passing orders which do not reflect proper application of mind by the appellate court within the scope of powers to be exercised.

14. The observations of the Supreme Court, relied upon by the State Counsel, would not lead to an inference that just because the victim has a right of appeal as such the State must also be recognized as having right

to prefer appeal against any order of acquittal or conviction for a lesser offence or imposing inadequate compensation.

15. The purpose of grant of leave is merely to embark upon a prima facie assessment so as to decide which of the matters would require examination by the appellate court. The refusal to grant leave would not mean that the order of acquittal merges in the order of the High Court. The right of the victim to file an appeal by virtue of proviso to section 372 Cr.P.C. would, therefore, not be adversely affected by the refusal to grant leave under Section 378(3) Cr.P.C. by the High Court. The right of the victim to file an appeal in terms of proviso to Section 372 Cr.P.C. would thus stand unhindered. The above interpretation would subserve the object of provision for grant of leave to the State to file an appeal against the order of acquittal while maintaining the right of a victim to prefer an appeal under Section 372 Cr.P.C.

16. The up shot of the above deliberation is that it is not mandatory for the High Court to summon the lower court record in every case before deciding the application for grant of leave under Section 378(3) Cr.P.C. We hasten to add that the right of the appellate court to summon the lower court record in an appropriate matter always subsists. It is for the High Court to decide on the basis of facts and circumstances of each case whether the application for grant of leave requires the perusal of the lower court records or not? We, therefore, hold that it is not necessary for this Court to call for the lower court records for consideration of application under Section 378(3) Cr.P.C., in every case or as a matter of routine.

17. As prayed by Sri S.A. Murtaza, learned A.G.A., put up this case, once again, on 29.09.2022 for consideration of application by the State filed under Section 378(3) Cr.P.C.

Order Date :- 26.9.2022
Abhishek Singh