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HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1043 of 2005

26-02-2014

Petta Satya Govinda Ramachandra Rao @ Babji....Appellant

Yarlagadda Vijaya Kumar and another.... Respondents

Counsel for the Appellant : Sri K.Srinivasa Rao

Counsel for the Respondent No.2 : Public Prosecutor

<Gist :

>Head Note:

? Cases referred:

1. 2005(2) ALD(Crl.) 171
2. AIR 1996 (SC) 2439
3. (1996)9 SCC 372
4. (2006)6 SCC 456
5. (1999)7 SCC 510
6. (2004)8 SCC 774
7. 2003(1) LS 467
8. AIR 2011 SC 1137
9. AIR 1966 (ALL.)84(FB)
10. 1982(2) (SC) APLJ 43
11. AIR(SC)2004-408: (para-12)
12. 2011(1) ALD (Crl.) 201 (AP)
13. (1983)1 SCC 177
14. AIR 1965 SC 444
15. (2013)11 SCC 451
16. (2005)2 SCC 400
17. (1990)4 SCC 366
18. AIR 1961 SC 1596
19. AIR 1976 SC 997
20. AIR 1977 SC 265
21. (2001)8 SCC 61

22. (2002)3 SCC 533
23. 1990 SC 981
24. (2002)4 SCC 297
25. AIR 1996 SC 2184
26. 2013(3) Crimes (P&H)-613
27. 2011(2) JCC 777
28. 2013(1) ALT (Crl.) 18 = 2013(1) ALD (Crl.) 366
29. 1976(1) SCR-803
30. AIR 1960 (AP) 425
31. 2012 BCR(Cri)632
32. (2004)11 SCC 26
33. (2005)3 SCC 313
34. AIR 1980 AP 154
35. AIR 1999 SC 1149

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL APPEAL No.1043 of 2005

JUDGMENT:

The appellant is no other than complainant of the private complaint case for the offence under Section 138 of the Negotiable Instruments Act filed under Section 200 Cr.P.C. and taken cognizance under Section 190(1)(a) read with Section 204 Cr.P.C and against acquittal judgment dated 15.04.2005 after full dressed trial before the V Metropolitan Magistrate Court, Visakhapatnam in C.C. No.77 of 2000 as per summons procedure that was as per the law as on the date of commencement and conclusion of the trial though subsequently by N.I. (Amendment) Act 55/2002 came into force with effect from 06.02.2003 incorporating Section 143 with non-obstanti clause mandating commencement of trial as summary trial case vide decision Dilip Kulakarni V. Bahadurmal Chowdary¹. It is also to clarify that, the Judicial magistrates and Metropolitan Magistrates irrespective of what is contained in Sections 260, 261, 461, 464 and 465 Cr.P.C are competent to try summarily the cases covered by Section 138 of the Negotiable Instruments Act, 1881 without any specific empowerment from the High Court because of the statutory mandate and empowerment by Section 143(1) of the N.I.Act.

2) Against said acquittal judgment the complainant preferred the appeal before this High Court under Section 378(4) Cr.P.C with leave that was granted on 11.07.2005 as per the Law as on that date (since Section 372 Cr.P.C came into force from 31.12.2009). The criminal appeal No.1043 of 2005 was later admitted and ordered issue of summons to the 1st respondent (accused before lower Court) and also notice to the State represented by the public prosecutor. It was on dated 13.03.2012 this Court permitted the counsel for the appellants to take personal notice to the respondents by registered post with acknowledgement due and to file proof.

3) The said order for summons with appeal grounds to send by post is for the reason that as per the Negotiable Instruments Act, 1881 by amended Act 1981 covered by Act 66 of 1988 which came into force with effect from 01.04.1989 introduced chapter-17 under the BPFI and NI laws amended Act incorporating the offence for dishonour of the cheques by Sections 138 to 142 among other provisions and it is by further amendment under Act 55 of 2002 which came into force with effect from 06.02.2003 incorporating new Sections 143 to 147 in this chapter by amending the existing sections among 138 to 142 to some extent; by introduction of Section 144 regarding mode of service of summons with non-absolute clause which reads: 'notwithstanding anything contained in the Code of Criminal Procedure, 1973 and for the purposes of this chapter, a Magistrate issuing summons to an accused or a witness may direct a copy of summons to be served at the place where such accused or witness ordinarily resides or carries on business or personally works for gain, by speed post or by such other courier services as are approved by Court of Session. Where an acknowledgement purporting to be signed by the accused or the witnesses or an endorsement purported to be made by any person authorised by the postal department or the courier services that the accused or the witness refuses to take delivery of summons has been received, the Court issuing summons may declare that the summons has been duly served. It is to say Section 144 of the Negotiable Instruments Act provides in the complaint cases taken cognizance before the Magistrate Court concerned, the issuing summons under Section 204 Cr.P.C need not be through police, it can be by speed post or approved courier service and the endorsement of the authorities of the postal department or the courier service of refused to take delivery, can be taken to declare duly served. It is no doubt before the trial Court, the further procedure from such service declared duly served if any is to issue either bailable warrant or non-bailable warrant as the case may be to say generally bailable warrant under Section 70 Cr.P.C with direction under Section 71 Cr.P.C for execution of personal bond for such sum with or without sureties if not, even under Section 81 Cr.P.C for his attendance before the Court on the further dates being fixed for proceeding with trial of the case. No doubt there is no prohibition even for the Court wants to issue summons simultaneously through police for appearance. It is once

appeared, the recourse before trial Court is to obtain bond under Section 88 Cr.P.C. It is needless to say the difference in taking of bonds as per Sections 81, 88 and 89 Cr.P.C to suit the contingency and as per the form to be kept in mind.

4) Coming to the appeal against acquittal with leave under Section 378(4) Cr.P.C as per Section 384 read with 385 Cr.P.C where the appeal is not dismissed summarily but admitted, notice shall be issued to the accused (or his advocate/pleader if already, appearance is there on record, while granting leave or while hearing for admission), with copy of grounds of appeal and call for record of the trial Court (if not already called for admission under Section 384(2) Cr.P.C) for hearing and disposal on merits under Section 386 Cr.P.C. It is to say, in case of appeal against acquittal under Section 378 Cr.P.C (same procedure that applies even to Section 372 Cr.P.C) as per Section 386 Cr.P.C after perusing the record and hearing the appellant or his pleader if he appears; the public prosecutor if he appears; besides the respondent (accused) if he appears and otherwise to decide on merits. By such merits disposal, the appellate Court may either dismiss the appeal or reverse order of acquittal and direct further enquiry or retrial or find the respondent-accused guilty and pass sentence according to law. Even in case of appeal against conviction under Section 374 Cr.P.C (subject to 375 and 376 Cr.P.C) by accused or by the State under Section 377 Cr.P.C against insufficiency of sentence (same procedure that applies even to Section 372 Cr.P.C) as per Section 386 Cr.P.C same is the procedure for hearing by issuing notice to the appellant(accused) and his pleader or other appellant and respondent-accused for appearance and hearing. If the parties failed to appear both or any of them including Advocate/s, from the record of the lower Court and the Grounds of Appeal, the appellate Court has to decide the matter on merits.

5) In this regard the Three Judge bench expression of the Apex Court in Bani Singh V. State of U.P² in answering a reference on the conflict of views between Syam Deo case (AIR 1971 SC 1606) and Ram Naresh Yadav case (AIR 1987 SC 1500) (with reference to Section 386 (equal to old section 423) and Section 385 Cr.P.C by upholding the view in Syam Deo (supra) as a sound one after complying the requirements if the appellant/respondent or their pleaders or the public prosecutor (even the accused is respondent) to decide on merits from the material on record and need not postpone for absence. In fact, the apex Court in the latest expression in Surya Baksh Singh V. State of U.P. in Crl.Appeal No.1680 of 2013 held that Section 482 Cr.P.C stands in solitary splendour. It preserves inherent powers of the High Court. It would be an abuse of process of the Court to allow any action which would result in injustice and prevent promotion of justice. Inherent powers have to be invoked therefrom it referred the three judge bench expression in Kishan Singh V. U.P³ holding that "in an appeal by convict on bail and not in custody, and even required him to surrender, fails to do so; the appeal can be dismissed for default without going into merits". Thus, inherent powers under Section 482 Cr.P.C can be invoked for this purpose, that was not considered by the Bani Singh (supra). As such it does not require any reference to answer for invoking Section 482 Cr.P.C. This power is saved similar to Section 151 C.P.C. At para 13 it was held that, "when the High Court notices that there has been failure of Justice or misuse of judicial mechanism or procedure, sentence or order is not correct, it is but the salutary duty of the High Court to prevent the abuse of the process or miscarriage of justice or to correct irregularities. Inherent

powers of the High Court is not one conferred by the code; but one which the High Court already has in it and it is preserved by the Court.

6) It is to be made clear to leave no scope for ambiguity including from the combined reading of the above expressions till date that even an appeal is admitted under Section 385(1) Cr.P.C to decide on merits; as it arises to decide on merits under Section 386 Cr.P.C only after causing service of notice on the respondent (more particularly in appeal against private complaint cases and further in particular (appeal against acquittal), if the appellant fails to take notice to respondent ordered, the Court can dismiss the appeal for such default and need not keep the matter pending with no progress for years together, since at that stage deciding on merits without service of notice to other party does not arise.

7) Now, coming back to the appeal case on hand, it was on 13.03.2012 even ordered serving of summons/notice by post by personal service, proof not filed of service, then again on 03.04.2012 this Court ordered personal service afresh directing the appellant(complainant) to the 1st respondent accused through courier also and to file proof. The unserved cover was there from filed before the Registry. It was the registered post acknowledgement due to the address of the 1st respondent to the appeal (accused before the trial Court) and the endorsement speaks 'left' and again the endorsement on the reverse with rubber stamp as 'left' it was dated 26.03.2012 underneath there is a writing 'no such addressee in the door number-returned' to sender again of the same date it is confirmed as 'left'. The registered post was No.RLAD 4362/20.03.2012. In this regard it is to mention as per the settled law regarding service of notice (including for the statutory notice after the cheque was returned dishonoured) like any other demand notice is sent by registered post and returned with endorsement 'door locked' or 'addressee left or not available' court may presume receipt of the notice by the addressee. It is after scanning the law by the settled expression of the Apex Court in D.Vinod Shivappa V. Nanda Billappa⁴ (which is approved by the later three Judge bench expression in answering a reference therefrom) referring to the earlier expressions in K.Bhaskaran V. Sankaran V.Bala⁵ that was reiterated in V.Raja Kumari V. T.Subbarama Naidu⁶, that initial burden is no doubt on the complainant to show that the accused managed to get incorrect postal endorsement. The law is fairly settled even referring to Section 27 of the General Clauses Act of once notice is sent by registered post even no proof of service received as deemed service. More particularly in civil matters regarding proof of service of summons and in suit for eviction under Section 106 of the Transfer of Property Act of the prior notice that is required to issue. In a similar case in M.A.Ghani V. P.Rami Reddy⁷ referring to AIR 1989 SC 630 and 1991(1) APLJ 17(SC) it was held under Section 114 of the Indian Evidence Act, Section 27 of General Clauses Act and Section 106 of Transfer of Property Act regarding the quit notice sent by registered post returned with endorsement 'as addressee absent'; if he is absent for continuous 7 days without making arrangement to receive, it can be presumed as duly served. Apart from the fact of the accused herein is no other than manager of the cinema theatre at Alipuram, Visakhapatnam by name Geeth Sangeeth, having appeared before the trial court with same address, the

question of incorrect address even to believe any postal endorsement to that extent does not arise, but for if at all to show he is no longer manager to serve and the other two endorsements as left; that once he left without making arrangement it has to be taken for all purposes as duly served. Apart from it, there was by substituted service as an abundant caution (though not provided like in civil matter under Order V Rule 20 C.P.C in the Cr.P.C. in this regard) also ordered and published twice in the news paper for appearance that was not even complied with by respondent-accused.

8) No doubt Section 144 of N.I.Act regarding service of summons before the trial Magistrate discussed supra is not extended specifically by any provision for the appeals either against acquittal or against conviction, particularly against acquittal for service of notice on the accused for appearance and for execution of bond under Section 88 Cr.P.C for further appearance, but for to say since appeal is continuation of the case before trial Court from the statutory right of appeal provided under Cr.P.C with procedure thereunder save to the extent specifically provided by the N.I.Act as a special provision, is applicable to adopt. In this regard it is apt to refer the expression of the Apex Court in *Rajendra Prasad Gupta V. Prakash Chandra Mishra*⁸ referring to Allahabad High Court full bench expression in *Raj Narain Saxena V. Bhim Sen*⁹ that courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed. Thus, suffice to say the sending of notice in the appeal by registered speed-post or courier and from avoidance a deemed service, that is suffice to say once notice contemplated by Section 385 Cr.P.C read with Section 144 of N.I.Act is served or deemed served, the appeal can be proceeded to decide on merits under Section 386 Cr.P.C even in the absence of any of the parties to it with reference to the lower Court record. For non- appearance of the accused, (even accused-respondent of appeal against acquittal) the need of issuing warrant under Section 70 Cr.P.C and waiting for its execution and securing presence of respondent/accused before the Court, not compulsory; but for if at all the appellate Court chooses to do so; more particularly after Cr.P.C amended Act 5 of 2009 came into force requiring bond from accused acquitted by the trial Court under Section 437A of Cr.P.C.

9) It is because when the trial Court disposed of the appeal in 2005, the obtaining of a bond from accused of a case ended in acquittal was not known to law but for now under Section 437-A Cr.P.C incorporated by the Cr.P.C Amended Act, 5 of 2009. No doubt, it appears said provision is virtually an extension to the expression of the Apex Court *Free Legal Aid Committee, Jamshedpur V. State of Bihar*¹⁰ to be followed by the trial Magistrate/committal Courts of obtaining bonds whenever bail granted not only to appear at pre-committal enquiry but also thereafter before Court of Session and in any other Court till end of trial, in now the provision saying after end of trial against acquittal for undertaking to validate the bond for six months to appear before any higher court whenever required to appear.

10) It is needless to say, but for contextually in connection with Section 437-A Cr.P.C supra-that, the appeals for admission against acquittal of a cheque dishonour case till Cr.P.C amended Act 5 of 2009 came into force is with leave of the High Court only under Section 378(4) Cr.P.C and as against conviction the provision governed is Section 374(3) Cr.P.C (subject to Sections 375 and 376 Cr.P.C).

11) It is now by virtue of the Cr.P.C amended Act 5 of 2009 incorporating the proviso to Section 372 Cr.P.C which came into force with effect from 31.12.2009 by providing as an independent right. Section 372 Cr.P.C proviso speaks that : "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." This proviso incorporated after Section 372 that reads 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 time being in force.

12) It is to say a right of appeal is provided to the victim by virtue of the proviso to Section 372 Cr.P.C by this amendment and Section 2(w)(a) Cr.P.C which is also incorporated by the amendment speaks 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. In this context though above definition of victim no way referred 'complainant' or 'informant to police' or 'defacto-complainant' (which may be relevant to some extent for purpose of initiation of proceedings and cognizance of offences under chapter XIV Cr.P.C, but for those who suffered loss or injury within its sweep, there is also no need to go into chapter XV Cr.P.C and the definition of 'Complaint' in Section 2(d) for purpose of that chapter). Thus, complainant of a cheque case against acquittal is also within the meaning of the victim (as suffered loss of injury from such a dishonour¹¹) to maintain an appeal before the Court of Session (by a combined reading of Section 374 (3) read with the proviso to Section 372 Cr.P.C- with the wording the victim shall have a right to prefer an appeal - acquitting the accused, and such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such court).

13) No doubt, these are the two provisions one subject to grant of leave under Section 378(4) Cr.P.C to invoke the conditional statutory right and the other without even leave to invoke the absolute statutory right. The same are no way in conflict, with any irreconcilability. However, it cannot be readily presumed to say gives concurrent jurisdiction to approach having the option to the appellant for selecting one among them as observed by this Court earlier in G.Baswaraj V. State of Andhra Pradesh¹² at para 12 middle that 'in case the victim is also the complainant in a case instituted by way of a private complaint, then such person has got two options to file appeal against an order of acquittal recorded by the trial Court, either to the High Court under Section 378(4) Cr.P.C or to the Sessions Court/High Court under proviso to Section 372 Cr.P.C. It is open to that person who is a victim as well as a complainant to choose one of the two remedies

available in law and to approach the appellate Court of his choice depending upon the trial Court which recorded order of acquittal-----'. It is for the following reasons that were fallen for consideration to above conclusion:

14) It is also to say Article 20(1) of the Constitution of India (which is corresponding to Article 11 of the universal declaration of the Human Rights, 1948) as one of the fundamental rights under Part-III; is running in two parts imposing the bar i.e., (i) for conviction of an offence except for violation of

law in force at the time of commission of the offence and (ii) for penalty greater than which might have been inflicted under the law in force at the time of commission of the offence. It is the well settled proposition that, the constitutional guarantee under the Article is applicable in respect of the substantive law inflicting conviction and sentence if not beneficial to accused and it does not extend to mere procedural law and change in the rules of evidence, which no way prejudice his rights, since there is no guarantee that accused has a right to be tried by a particular Court or under a particular procedural law (muchless any such right or guarantee to the complainant or victim). It is more particularly and with reference to the above from the settled principle that, if two views possible, the view favourable to the accused, subject to the larger public interest over the individual interest, to prevail vide -the three Judge bench expression of the Apex Court in T.Barai V. Henry¹³ following Ratanlal V. State¹⁴. Thus, for so to decide, the rights of the accused present and/or prospective also have to be borne in mind to decide which is beneficial to prevail.

15) It is to say instead of filing appeal under Section 372 Cr.P.C, if allowed to file under Section 378(4) Cr.P.C with leave, it takes away the prospective likelihood of approaching by accused to avail right of appeal under Section 378(4) Cr.P.C before High Court. It is because, the absolute statutory right without even leave of Court to file appeal before Court of Session which is available with effect from 31.12.2009, if availed by the complainant under Section 372 Cr.P.C and did so, in the event of that Court deciding the appeal against such acquittal by reversing and for any reason convicting, there is right of appeal under Section 378(4) Cr.P.C to such accused to approach the High Court with leave. Without invoking such right before Court of Session by the complainant as appellant against acquittal by trial Court and allowed to proceed before High Court by granting leave, it is nothing but taking away said right of the accused in future of remedy to approach the High Court in such event and one way interfering with such right. It is for the reason that any right of revision or approaching by invoking Section 482 Cr.P.C or writ jurisdiction no way substitute to the right of appeal. Thereby also, it is the duty of the appellant-complainant rather than approaching the high court for filing appeal with leave under Section 378(4) Cr.P.C; to approach the Court of Session where no leave is required to file such appeal there. Needless to say by virtue of the amended provision without invoking the Court of Session for filing appeal against acquittal, approaching the High Court by saying concurrent right and there from, granting leave by the Court by exercise of discretion since amounts to interference with such right of accused and taking away another future right of appeal in such contingency to approach the High Court and as the

discretion is to be exercised judiciously within the canons of law, and this is when taken into consideration, this Court under Section 378(4) Cr.P.C must be slow for grant of such leave but for any special reasons and for any exceptional circumstances to accord by so assigning besides the party approaching for filing appeal to satisfy by giving the reasons and exceptional circumstances in the Leave application. As such, no appellant of appeal against acquittal can say that there are two forums with concurrent jurisdiction available and he got right to approach any of the forums and thereby can file appeal before the High Court and grant of leave or not is though the discretion of the High Court on such filing.

16) It is also for the reason that it is by virtue of the latest incorporation by Amended Act 5 of 2009 as an absolute statutory right of appeal without need of seeking for leave to prevail even under the interpretation of statutes for the complainant of an acquittal case to approach the Court of Session by filing of an appeal as of right under Section 372 proviso of Cr.P.C, which speaks such appeal shall lie to the Court to which an appeal ordinarily lies against the order of conviction of such Court. It is also for the reason that Section 374(3) Cr.P.C speaks the person convicted against the conviction judgment of Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of First Class or Second Class may appeal to the Court of Session. It is also for the other reason that the subsequent amendment provision will prevail over the earlier existing provision to say as a special provision over the general provision, apart from a right absolutely created has to be given prevalence over a right conditionally created. In this regard, the Apex Court in Rohitash Kumar V. Om Prakash Sharma¹⁵ held at para 22 that in a normal course, a proviso can be distinguished from an exception for the reason that exception is intended to restrain the enacting clause to a particular class of cases while the proviso is used to remove special cases from the general enactment provided for them specially. Thus, appeal has to be filed before the Court of Session with the absolute statutory right provided by this proviso to Section 372 Cr.P.C being a special provision and not by approaching the High Court to file appeal with the conditional right subject to leave under Section 378(4) Cr.P.C being a general provision with special permission.

17) The Apex Court three Judge bench expression in Manik Lal V. Gouranga Chandra¹⁶ in dealing with a rent control matter regarding appeal right and limitations, on interpretation of statutes at para-8 observed that the intention of the legislature as per the settled principle, must be found by reading the statute as a whole in order to ascertain the meaning of a clause, at what precedes and what succeeds also and not merely the clause itself to look into. In another earlier expression of Shashikant Laxman Kale V. Union of India¹⁷ in interpreting the provisions of the tax legislation (I.T. Act) observed at paras 15 to 18 that there is a distinction between the legislative intention and the purpose or object of the legislation in providing a remedy for malady and meaning or exposition of the remedy and for so determining it is permissible to look into the circumstances which prevailed when the law was passed and which necessitated the passing of the law and for the limited purpose of appreciating the background leading to the legislation it is permissible to look into the statement of objects and reasons of the bill which actuated the step to provide a remedy for the then existing malady.

It is indicating there from that, while interpreting any particular provision or proviso, it is necessary to consider what was the lacunae which was prevalent before the amendment was made and what was the lacunae which was sought to be filled by said amendment. A proviso added to Section or Rule of enactment may be to clarify or create an exception and/or to create a substantive right irrespective of what is in the main Section or Rule as held in *Shah BKOM & G Factory V. Subhash C.Y.Sinha*¹⁸. The aims and objects which are mentioned before the amendment was made by the legislature had thought it fit to bring the victim's appeal on par with the appeal filed by the accused, from said wording of proviso to Section 372 which gives a substantive right if one has to take into consideration the real purpose for which the proviso is inserted to the existing section, while interpreting the same.

18) In the Apex Court's expression¹⁹ it was held that the general rule of construction is not only to look at the words but also to look at the context, the connection and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning that is intended to be conveyed by use of the words under the circumstances.

19) In *Swaran Singh*²⁰ at page 274 it was held that the statutory interpretations have no conventional protocol. The object and purpose of a legislation assume greater relevance if language of the law is obscure and ambiguous.

20) In *Dental Council of India V. Hari Prakash*²¹ at para-7 page 69 held that 'the intention of the legislature is primarily to be gathered from the language used in the Statute, thus paying attention to what has been said as also to what has not been said.

21) In *Padma Sundera Rao V. State of Tamil Nadu*²² and *Union of India V. Filip*²³ and *Grasim Industries V. Collector of customs*²⁴ it was held that "no words or expressions used in any statute can be said to be redundant or superfluous. In matters of interpretation, one should not concentrate too much

on one word and pay too little attention to other words. No provision in the statute and no word in any section can be construed in isolation. Every provision and every word must be looked at generally and in the context in which it is used. The textual interpretation must match the contextual interpretation is a well known rule of interpretation. The text and the context of the entire Act must be looked into while interpreting any of the expressions used in a statute. The Courts must look the object which the Statute seeks to achieve while interpreting any of the provisions of the Act and a purposive approach is then necessary to adopt (vide decision *S.Gopal Reddy V. State of A.P.*²⁵)

22) It is said that every statute is an edict of the legislature. The elementary principle of interpreting any word while considering a statute is to gather the means or sentence legis of the legislature.

23) It is not just to conclude with, for the reason that the right of victim under the proviso to Section 372 Cr.P.C is an independent, absolute and unfettered right

from the intention of the Legislature based on Government of India, report (which was based to some extent of the Law Commission of India 154th report Chapter-15): Committee on draft National policy on Criminal Justice (Ministry of Home Affairs, 2007) - which recommended for empowering the victim with the right to plead themselves as a party, right to be represented by the counsel, right to produce independent evidence and cross-examine witnesses with leave of the Court, right to be heard in the matter of bail, right to continue with the case if the prosecution sought withdrawal, the right to advance arguments and to prefer an appeal against an adverse order. The Full Bench expression of Gujarat High Court in Bhavaben Dineshbhai Makwana V. State of Gujarat (Criminal appeal No.238 of 2012, dated 23.10.2012); the majority view of the Full Bench expression of the Bombay High Court in Balasaheb (supra), the Full Bench expression of Punjab & Haryana High court to a major extent in this regard in Tata Steel Ltd; kesar Singh V. Atma Tube Products Ltd²⁶ and of the Delhi High Court in Jagmohan Bhole V. Dilbagh Rai Bhole²⁷ (Crl.A.No.793/2010 dated 24.01.2012) lends support to the conclusion. In the Judgment of the Kerala High Court in John V. Shibu Cherian it is categorically and succinctly held that in the light of the proviso to Section 372 Cr.P.C, it is the efficacious remedy available to the victim to file an appeal before the Court in which the appeal will ordinarily lie against the order of conviction and thus the present appeal preferred by the defacto-complainant before the High Court is not maintainable (under Section 378(4) Cr.P.C). By referring to the said expression and of the other it was while interpreting the definition of victim under Section 2(w)(a) Cr.P.C, who got the statutory right to file appeal under Section 372 Cr.P.C, a division bench of this Court in D.Sudhakar V. Panapu Srinivasulu @ Evone Water Srinivasulu²⁸ held at para-10 in its conclusion that it is the intention of the legislature to give right of appeal to the legal heir within the meaning of victim and the appellant in that case will not fall within said definition thereby not entitled to prefer the appeal under Section 372 Cr.P.C against acquittal of the accused. Thus, the division bench expression is also crystal clear in saying it is the victim who got the absolute statutory right as held in the expression of High Court of Kerala supra, of right of appeal under Section 372 Cr.P.C and once the appellant is not within the definition of the victim, this provision is not available.

24) The victim's right is thus no way controlled by Section 378(4) Cr.P.C and there is nothing to infer any requirement of leave u/s.378(4) Cr.P.C to file appeal under Section 372 Cr.P.C (against acquittal or conviction of accused for a lesser offence or for inadequate compensation), but for at best to say when against same acquittal two appeals filed one by other than victim under Section 378(4) and one by the victim under Section 372 Cr.P.C. the proper course is to withdraw and call for the matter before the Court of Session to the High Court to decide both at a time by it by common disposal or under Section 381 Cr.P.C the High Court by special order transmit the appeal before it to the Court of session where other appeal is pending for common disposal, the power of the High Court under section 482 Cr.P.C in this regard also enables to subserve the ends of Justice and to avoid conflicting findings; like, in case and counter case, and for no such

provision even specifically provided like in Section 210 Cr.P.C. of police case and private complaint case.

25) When such is the case, even any leave granted so far and any appeal admitted so far after the appeal provision with absolute statutory right provided from dated 31.12.2009, this Court no way a functuous officio for return to present before the Court of Session to proceed with or even within its power under Section 381(2) Cr.P.C by special order made over and direct the Court of Session to proceed with the appeal by taking on file and decide under Section 372 Cr.P.C in order to protect the rights of the accused for prospective right of appeal against such decision if at all under Section 378(4) Cr.P.C. The same recourse is to promote Justice and for that this Court can invoke its inherent power also under Section 482 Cr.P.C as laid down in para 13 of the apex Court's latest expression in *Surya Baksh Singh (supra)*. In *Nawabganj Sugar Mills V. Union of India*²⁹ it was held that the inherent power has its roots in necessity with its length and breadth co-extensive with the necessity. This conclusion is lending support from a close reading of para-6 observations of the Division Bench of this Court in *D.Sudhakar (supra)* referring to the Apex Court's observation in the judgment of *The National Commission for Women V. State of Delhi* referring to Section 372 Cr.P.C. in saying the proviso to this Section gives right of appeal to the victim in limited area against acquittal or convicting for lesser offence or on imposition of inadequate compensation and not against inadequacy of sentence that is taken care by Section 377 Cr.P.C.

26) From that analogy also, Section 372 Cr.P.C (proviso) that has to be invariably invoked as a special provision within that limited area with absolute right conferred and not to invoke the general provision with conditional right subject to leave under Section 378(4) Cr.P.C. In addition what is discussed supra of the appeal against acquittal under Section 372 Cr.P.C proviso since lies before the Court of session as also held by this Court earlier in more than one cases some by returning to present before the Court of Session under Section 372 Cr.P.C with such directions to take on file, leave apart the other procedure to invoke under Section 381(2) Cr.P.C. It is since the law is well settled including by the Division bench of this Court in *M.Narayanamma V. Satyanarayana*³⁰ in *G.Baswaraj (supra)* that the words in Section 409(2) Cr.P.C (old) (equal to section 381(2) under the present Code) are plain and emphatic which enjoins an Additional Sessions Judge to hear such appeals as the State Government (now the High Court) under the present Code may by general or special order direct.

This is apart from the power of this Court under Section 482 Cr.P.C discussed supra. It is thus to say, in matters already leave granted and admitted even under Section 378 Cr.P.C against acquittal in N.I.Act cases, this Court can and otherwise for subserving ends of justice has to direct the Sessions Judge or Additional Sessions Judge by specifically so ordering to hear and dispose of the appeal on merits by made over. In CrI.P.No.5987 and 9726 of 2009 dated 21.10.2010 this Court in answering the query raised by filing a quash proceedings of the appeal entertained by the Court of Session against the acquittal few days prior to coming into force of the Amended Act 5 of 2009, Section 372 proviso as if under Section

372 instead of not entertaining appeal by then as only from the available provision before the High Court is Section 378(4) Cr.P.C; instead of quashing it was answered as just to call for by transfer of the record from the Court of Session to the High Court to cure the defect and to sub serve the ends of Justice. It was specifically observed that the statutory right of appeal after the amended Act 5 of 2009 against acquittal before a Magistrate lies to the Court of Session for a cheque bouncing case under Section 138 of N.I Act.

27) Coming to period of limitation to file appeal, for the offence under Section 138 of N.I.Act is by private complaint and the complaint got deemed knowledge from date of judgment/order, further from the wording of the proviso to Section 372 Cr.P.C, the period of limitation provided for conviction to appeal under Section 374 Cr.P.C equally to apply to appeal against acquittal, in case of any confusion from Article 114 and 115 of the Indian Limitation Act regarding different periods of limitation for appeal against conviction and acquittal.

28) Coming to decide what is the procedure to be adopted for an appeal against acquittal before the Court of Session for not specifically provided for by any of the amended provisions of Cr.P.C, the proviso to Section 372 Cr.P.C itself by a close reading clarifies to adopt the procedure for appeal against conviction under Section 374 Cr.P.C before Court of Session as laid down in Sections 380- 385, 387-389 Cr.P.C. The majority view of the Full Bench expression of the Bombay High Court in Balasaheb Rangnath Khade V. State of Maharashtra³¹ by referring to other expressions held that the non-availability of Section 390 Cr.P.C to Section 372 Cr.P.C if any for not specifically provided would be filled the procedural lacunae by the newly added Section 437-A Cr.P.C. It is in addition to Section 437-A Cr.P.C that protects to secure presence of accused from bond obtained while acquitting by lower Court; Section 144 of the N.I.Act as discussed supra provides service of notice for purpose of hearing the appeal under Section 386 Cr.P.C also, by speed post and courier and there from it is the duty of the respondent-accused to appear in person or through Advocate to contest and else to decide on merits as discussed supra.

29) Besides the above, Section 386, 390, 393 and 394 Cr.P.C also can be applied by giving purposive interpretation as per the legislative intent to fill the legislative silence on the procedure by following the principle laid down in Rohitesh Kumar (supra) and in directing the Court of Sessions reading for Section 378 as also of Section 372 Cr.P.C (till specific procedure, if any, is provided by the State or Central Legislature as the subject is in the concurrent list) to the extent practicable before the appellate Court of Sessions. To be more elaborate regarding applicability of Section 386, 390, 393 and 394 Cr.P.C to read for Section 378 as also of Section 372 Cr.P.C (till specific procedure, if any, is provided by the State or Central Legislature) from the legislative silence concerned:

30) In addition to what is discussed supra, it is to recollect that, legislative silence conveys signals and thus it is the duty of the interpreter to interpret the meaning and for that the interpretation and construction have same effect by identifying the legislative intent as part of duty of the Court since the legislative authorities are functuous officio after the legislation is passed.

31) Justice Frankfurter of U.S Supreme Court observed in his article published in (47 Columbia Law Reports 527) titled as some reflections on the reading of statutes that 'legislation has an aim, it seeks to obviate some mischief, to supply an adequacy, to effect a change of policy, to formulate a plan of Government. That aim that policy is not drawn, like nitrogen, out of the air; it is evidenced in the language of the statute, as read in the light of other external manifestations of purpose".

32) In the year 1947 Justice Frankfurter went to the extent of describing the meaning of the word LAW in the phrase DUE PROCESS OF LAW as "not the Law as it is, but the Law as it ought to be".

33) Lord Denning of the United Kingdom in his book - The Family Story, page 174 published in the year 1981 expressed the view that "my root belief is that the proper role of the Judge is to do justice between the parties, if there is any rule of law which impairs the doing of justice, then it is the province of the Judge to do all that he legitimately can, to avoid that Rule or even to change it - so as to do justice in the instant case before him. He need not wait for the legislation to intervene because that can never be of any help in the instant case. I would emphasise the word legitimately. The Judge is himself subject to the law and must abide by it.

34) As per Lord Denning if a defect appears, the Court cannot sit blaming the legislature but for to interpret by iron of creases as the words are meant to serve and not govern.

35) Prof.Reeddickerson once quoted - "Legal drafting is not for children, gabblers, amatures. It is a highly technical discipline. The most rigorous form of writing outside of Maths. Drafting cannot be picked up by mere experience. Skill and High order are required in this regard. It must be known - what are to be written." It is also because all legislations are legal writings but all legal writings are not legislations.

36) As per Plowden "the intent of statutes is more to be regarded and pursued than the precise letter of them..... and the best way to construe an act of Parliament is according to the intent rather than according to the words..... Each law contains of two parts viz., of BODY and SOUL, the letter of the law is the body of the Law and the sense and reason of the Law is the Soul of Law..... when the words of statute enact one thing, they enact all other things which are in the like degree".

37) As per Austin - When the words are ambiguous or of doubtful significance, the intention of the legislature must be interpreted.

38) Lord Goddard once said, the Legislation should be construed and interpreted with commonsense and not to defeat the purpose for which it is brought.

39) As per Salmond on the cordial principles of construction in ascertaining meaning of the Statute, the authority of the Legislation is to be respected and where the words are clear, plain and unambiguous literal construction be given,

otherwise the Statute must be read as a whole with reference to the labelling definition, referential definition, inclusive definition, exclusive definition, comprehensive definition, informed determination/approach to be saying in ambiguity existence or not and the statutory contextual interpretation from the text to context as required with reference to compelling rule, settled rule and the like.

40) It indicates the statutory provisions may be extended to situations which although they do not fall within the language of the statute, do fall within the general principle or social purpose envisaged by the statute.

41) In interpreting an Act the proper course is the first instance to examine the language of the Statute and to ask what is the natural meaning influenced by the considerations derived from the previous state of the law and not to start with inquiring how the law previously stood, and then assuming that it was probably intended to leave it unaltered to see if the words of the enactment will bear an interpretation in conformity with the view.

42) The Heydons Rule (Heydons case 1524-76 English Reports 637) also mostly speaks the same. As per the Rule, four things are to be considered in true and sure interpretation of statutes (i) what was the law before making of the Act, (ii) what was the mischief or defect for which the law did not previously provide, (iii) what remedy the Parliament has resolved, to prevent the mischief or to cure the defect; (iv) the true reasons of the remedy; and then the Courts have to construct the statute to prevent the mischief or to cure the defect and add force and life to cure and remedy according to the time, the intent of the makers of the Act *pre bono publico*.

43) Needless to say that Indian Courts are Courts of Equity like the Common Law Courts. The law should not be seen to sit limply while those who defy it go free and, those who seek its protection loose hope. Law is dynamic and not immutable or static. It constantly adopts itself to critically changing compulsions of society vide *State of Punjab V. Devans Modern Bewaries Ltd.*³²

44) When jurisprudence is science of law, interpretation is the technology of law. In *B.P.A Anand V. S.A.Reddy*³³ at page 318, the Apex Court observed - referring to 'Law in the scientific era and the theory of dynamic positivism by J.M.Katju; Ciero on Jurisprudence; Justinian's *Corpus Juris Civilis*, Lord Denning's - the due process of law and from Hart's open texture of Law; that - "Justice is constant wheel to render every one that to which he is entitled. Justice is the disposition of the human mind to render every one the due. Law does not remain static or stand still; it does not operate in a vacuum. It moves constantly so as to serve the needs of the time. As social values and norms change; laws too have to be interpreted and recasted. Law is really a dynamic instrument, fashioned by society for the purposes of achieving harmonious adjustment of human relations by elimination of conflicts. An unusual fact situation posing issues for resolution is an opportunity for innovation. Thus life if law generally speaking, is not logic but experience, which is the basis for development and evaluation of law. In fact, legislation alone cannot radically change the fabric of society in a span of time.

Attitude and values in the society have to change, for common good. The latin maxim "Salus Populi est suprema lex" is thus to mean, regard for public welfare is the highest law. That is why Lord Cardozo also quoted 'the final cause of law is the welfare of the Society'.

45) It is thus, where a new combination of facts or circumstances arise, it is incumbent upon the Court to apply the rule of law which could be derived from the general principles in furtherance of Justice and in the common good.

46) Max-well on interpretation of Statutes stated that where an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts or employing such means, as are essentially necessary.

47) The Division Bench of this Court in M.V.V.S.Chowdary V. State³⁴ at para 7 observed that "economics without value, aesthetics without expression, ethics without duty, logic without the concept and right without remedy are inconceivable.

48) Thus, even no specific procedure provided for the appeal under Section 372 Cr.P.C the procedure applicable to appeal against acquittal generally provided in the chapter XXIX Cr.P.C that is applicable automatically, so also the period of limitation.

49) It is because every right must have a remedy is the dogms of the English law; ubi jus ibi remedium, ubi remedium ubi jus may be truer. Where there is a right, then there is a remedy, since remedies are the life of rights and remedy is the sole of Anglo Saxon jurisprudence.

50) In fact the procedural rules are generally to be interpreted in accordance with substantial law to subserve the purpose of the same.

51) In fact the procedural law is the handmade and not mistress of justice. Once even the legislative in its wisdom not drawn the attention to specify like in Section 401 Cr.P.C of the High Court's power of revision while speaking from revisional powers under Section 397 Cr.P.C, for not saying by specific words the procedure law in appeals under Section 378(4) Cr.P.C that equally applied to read wherever Section 378 Cr.P.C occurs also as Section 372 Cr.P.C for the appeals before the Court of session to the extent practicable that is applicable to said Court of Session to deal with an appeal entertained out of the statutory right of the complainant against the acquittal provided by Section 372 Cr.P.C proviso, till any specific procedure is specified by any State Legislature or the Central Legislature from the subject is within the concurrent list, the same has to be adopted save the procedure covered by Section 374 and Section 437A Cr.P.C and Section 144 N.I.Act.

52) Now, so far as the appeal filed before this High Court under Section 378(4) Cr.P.C concerned, the procedure after appeal is presented (subject to leave with or without notice and subject to admission with or without notice), Section 390 Cr.P.C speaks that when an appeal is presented under Section 378 Cr.P.C the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is

brought may commit him to prison pending disposal of the appeal or admit him to bail. It is regarding securing the presence of the accused in an appeal admitted under Section 378(4) Cr.P.C as a general provision to adopt. Now, coming to the offences under Section 138 of the Negotiable Instruments Act concerned from what is stated of Section 144 of N.I.Act commences with non- obstanti clause to prevail over Cr.P.C provision though it is the mode of serving summons on the accused to secure his appearance before the trial Magistrate by virtue of Section 386 Cr.P.C which deals with powers of the appellate Court though not specifically stated the appellate Court got same powers, it is by implication from reading of said provision. It is apart from the basic principle that appeal is continuation of the trial Court proceeding either civil or criminal by applying the doctrine of merger to prevail the appeal judgment indicating in the judgment operative and result portion, any modification or alteration or setting aside, as the case may be, and in criminal case i.e., the conviction or acquittal or modification of sentence in different forms of sentence specified in Section 53 I.P.C.

53) Thus, this Court rightly invoked Section 144 of N.I.Act in this appeal in ordering notice by registered post to the accused-1st respondent for appearance and the same since appears prima facie from the endorsements as of left unclaimed as on a sufficient service and even thereafter the Court as an abundant caution though not specifically provided under the Cr.P.C provisions for substituted service by paper publication like the one specifically provided under Order V Rule 20 C.P.C within the power under Section 482 Cr.P.C which is the inherent power that inheres on this Court and the substitute service also complied with and even the 1st respondent-accused did not chose to turn up. It is there from this Court though that was not required within its discretion, but for from the enabling provision under Section 390 supra, ordered bailable warrant against the 1st respondent accused, by directing the police to produce the 1st respondent before this Court on or before 15.02.2013 by order dated 23.01.2013. It is there from, even the warrant was prepared and the Registry dispatched on 26.06.2013 same to the concerned police of Visakhapatnam, the police did not execute or return by expressing any inability to execute like immediate non-availability of men and at least to return the warrant with such reason, if any, but for submitting by the learned Public Prosecutor that there is want of men in entrusting the warrants thereby it could not be executed and a fresh warrant may be issued. In fact once the warrant is pending unless the same is recalled or cancelled under Section 70(2) Cr.P.C, the question of giving fresh warrant does not arise but for to take the factum of non-availability of men to invoke other procedure if any. However, other circumstances also justify this Court in this matter for the warrant to cancel forthwith under Section 70(2) Cr.P.C, to issue fresh warrant under Section 390 read with Sections 70-73 Cr.P.C.

54) In Section 72(1) Cr.P.C it clearly speaks a warrant of arrest shall ordinarily be directed to one or more police officers; but the Court issuing such a warrant may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons and such person or persons shall execute the same. It is the submission by the counsel for the appellant by drawing attention of this Court from interpretation of wording of Section 6(a) of

Hindu Minority Guardianship Act, "the father and after him the mother" by the Apex Court in the case of Githa Hariharan V. Reserve Bank of India³⁵ that the word after need not necessarily mean 'after the life time'. It means in the absence; the word absence therein referring to the father's absence from the care of the minors' property or person for any reason whatever. That purposive interpretation equally applicable from the object of the provisions in Cr.P.C as well as the Negotiable Instruments Act of securing the presence of the accused on execution of the warrant (bailable or non-bailable as the case may be as per the direction of said warrant) for police not executing for want of men to entrust to any other person for its execution. The word 'ordinarily' and the word 'no police officer is immediately available' cannot be rigidly considered to say in the entire State there are police stations everywhere and the question of non-availability does not arise at all forever, but for what the learned Public Prosecutor represented of immediate non-availability of men to construe and once the police are not able to spare their men to execute the warrants more particularly in N.I.Act and other private complaint cases by keeping the warrants in cold storage or by misplacing and not responding, that causes an acute delay in proceeding with the dishonour of cheque cases without progress for the warrants pending for pretty long time and in most of the cases that defeats the very purpose of the provision to achieve the objects for interpreting the word from non-availability of men to spare is nothing but no police officer is immediately available. Thereby at the request of the appellant, the Court can permit and accordingly permitted for execution of the warrant through Advocate-Commissioner by issuing fresh bailable warrant. The learned Sessions Judge has to issue bailable warrant with personal bond for a sum of Rs.5,000/- by naming the advocate to entrust the warrant pursuant to this order to cause execute and secure presence of the accused before the Court. The personal bond for appearance before the Court if given by accused to release by following the procedure under Section 88 read with 81 Cr.P.C (for not a case to invoke Section 89 Cr.P.C like non-appearance by committing breach of bond executed under chapter XXXIII Cr.P.C.) in directing said accused to appear before the Court either in person or through an advocate to proceed with the appeal for deciding on merits under Section 386 Cr.P.C.

55) Before parting with, it is needful to emphasise the importance of Section 437-A Cr.P.C that is incorporated by the Cr.P.C Amendment Act 5 of 2009, which reads: "Bail to require accused to appear before the next appellate Court

(1) before conclusion of the trial and before dismissal of the appeal, the Court trying the offence or the appellate Court as the case may be, shall require the accused to execute bail bonds with sureties, to appear before the higher court as and when such Court issues notice in respect of any appeal or petition filed against the judgment of the respective Court and such bail bonds shall be in force for 6 months, (2) if such accused fails to appear the bond stand forfeited and the procedure under Section 446 shall apply". Once the trial Court acquits the accused in any criminal case if not also by the Court of session as a first appellate Court, while reversing conviction or even sitting against the acquittal judgment under Section 372 proviso of Cr.P.C and finds the accused not guilty, said Court shall comply Section 437-A Cr.P.C to obtain bond from such accused either as

appellant or respondent in the appeal as the case may be for 6 months to bind to appear as and when directed in the event of appeal or revision or other application before this Court or any other higher Court as the case may be, to keep such bond in force and if such course is adopted for this Court after any appeal entertained under Section 378(4) Cr.P.C with leave by admission to secure the appearance of the accused by directing the learned Magistrate or the first appellate Court of session to cause direct the accused to appear before this Court and any violation to the compliance of the bond not only entitles to proceed under Section 446 and 446-A Cr.P.C but also prone to legal consequences under Section 229A I.P.C covered by Amended Act 25 of 2005 with effect from 23.06.2006; besides the power of Court to exercise for deciding on merits by appointing an amicus curie to defend such accused or to dismiss for default said appeal as per the context as laid down in Surya Baksh Singh (supra).

56) Having regard to the above, coming back to the factual matrix of the case, with reference to above propositions, it is the submission by learned counsel for the appellant that as the appeal is pending in the High Court from the year 2005 with no progress to secure the appearance of the accused-1st respondent and because the appeal if decided by a Court of Session either under Section 372 Cr.P.C which is beneficial to the accused from what is discussed supra or even by this Court by special order made over and direct the Court of Session to decide within the power under Section 381 Cr.P.C, it can be easy for the complainant to cause execute through appointing a commissioner-advocate for entrustment of the warrant with police assistance to secure the presence of the accused-respondent before said Court and proceed with the appellant as early as possible and said submission is considered just.

57) Accordingly and in the result, the appeal is made over to the Metropolitan Sessions Judge, Visakhapatnam by this Special Order under Section 381(2) read with Section 482 Cr.P.C either to decide or to made over to any of the Additional Metropolitan Sessions Judge of the Sessions Division to issue Bailable Warrant against the accused-respondent either directing the police or if they file any memo of non-availability of men from such non-availability, through an Advocate-Commissioner for taking custody by execution of the warrant with police aid and if he fails to execute bond for the sum specified in the warrant, to hand over to the police for their in turn production of the accused who is 1st respondent in the appeal before the learned Judge and on such presence/production to obtain bond under Section 88 read with 81 Cr.P.C as per the bailable warrant for a sum of Rs.5,000/- personal bond for his due appearance before that Court for future dates of hearing and after appearance to hear the appeal by supply of copy of the grounds of the appeal with lower Court Judgment to submit arguments either in person or through advocate and for any inability by appointing any legal aid counsel for submitting arguments on his behalf or otherwise to decide on merits, under Section 386 Cr.P.C. Needless to say the compliance of Section 437-A Cr.P.C while final disposal of the appeal.

Dr. B. SIVA SANKARA RAO, J

Date: 26-02-2014