

M.Cr.C.No.7437/2016
(Vinod Chaurasiya & Ano. v. R.S. Bhadoriya)

16/02/2017

Shri Sunil Kumar Jain, Counsel for the applicants.

Shri S.S. Dhakad, Counsel for the respondent.

With the consent of the parties, heard finally.

This petition under Section 482 of Cr.P.C. has been filed against the order dated 14-6-2016 passed by IVth A.S.J., Gwalior in Cr.R. No. 600205/2016 arising out of order dated 21-3-2016 passed by J.M.F.C., Gwalior in Criminal Complaint Case No. 3311/2014, by which application filed by the respondent under Section 142 of Negotiable Instruments Act, 1881 (In Short NI Act, 1881), has been allowed and the delay in filing the complaint under Section 138 of NI Act, 1881 has been condoned.

The facts necessary for the disposal of the application in short are that a criminal complaint under Section 138 of NI Act, 1881, has been filed by the respondent against the applicant. The complaint was filed on 03-6-2014 along with an application under Section 5 of Limitation Act for condonation of delay. It was pleaded in the application that the complainant is the legal heir of holder of Cheque, who died on 28-4-2014 and as the complainant was busy in performing last rites of the holder of cheque therefore, the complaint could not be filed within a period of limitation.

The Magistrate issued notice to the applicants

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of application filed under Section 5 of Indian Limitation Act. The applicants filed their reply and submitted that the application under Section 5 of Indian Limitation is not maintainable. Thereafter, another application was filed by the respondent under Section 142 of NI Act, 1881 seeking condonation of delay in filing complaint under Section 138 of NI Act, 1881. It is also not out of place to mention here that initially, in the application filed under Section 5 of Indian Limitation Act, it was mentioned that there is a delay of 15 days in filing the complaint under Section 138 of NI Act, 1881, however, in the application under Section 142 of NI Act, 1881, it was mentioned that there is a delay of 20 days.

The applicants filed their reply to the application filed under Section 142 of NI Act, 1881 and prayed that the respondent has failed to explain the delay and therefore, the delay in filing the complaint under Section 138 of NI Act, 1881 may not be condoned.

The Magistrate after considering the applications filed under Section 5 of Indian Limitation Act as well as under Section 142 of NI Act, 1881, and considering the fact that the holder of the cheque had expired on 28-4-2014 and by holding that the delay of 17 days in filing the complaint appears to be bonafide, accordingly condoned the delay and fixed the case for hearing

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on the question of registration of complaint.

Being aggrieved by the order of the Magistrate, the applicants filed a Criminal Revision No. 600205/2016 before the Revisional Court, which too has suffered dismissal by order dated 14-6-2016. Hence, this Petition under Section 482 of Cr.P.C.

It is contended by the Counsel for the applicants that initially, the complaint was filed along with an application for condonation of delay under Section 5 of Limitation Act, and since, the provisions of Limitation Act are not applicable, therefore, the Magistrate should have rejected the application even without issuing notice to the applicants. Further more, the application under Section 142 of NI Act, 1881 was filed only after an objection by the applicants with regard to non-maintainability of application under Section 5 of Limitation Act was raised and as the application under Section 142 of NI Act, 1881 was filed at a belated stage therefore, the said application should not have been entertained. It is further submitted that the moment, Magistrate issued notice under Section 5 of Limitation Act, it would mean that he has taken cognizance of offence which in fact was not permissible. It was further submitted that in the application under Section 5 of Limitation Act, the condonation of 15 days delay was sought, whereas in the application filed under Section 142 of

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NI Act, 1881, condonation of 20 days was sought, and thus, the respondent has not properly explained the delay. At the last, it was submitted by the Counsel for the applicants, that even otherwise, the application filed under Section 142 of NI Act, 1881 does not disclose sufficient cause for condonation of delay.

Per contra, it is submitted by the Counsel for the respondent that an application for condonation of delay was filed along with the complaint, and merely because a wrong provision of law was quoted, it would not mean that the delay in filing the complaint cannot be condoned. Further it is submitted that as the holder of the cheque had expired on 28-4-2014, therefore, the respondent being the wife of the holder of cheque was busy in performing last rites and ceremonies of holder of cheque, therefore, the delay in filing the complaint has rightly been condoned by the Magistrate.

Heard the learned Counsel for the parties.

The undisputed facts are that the cheque was issued on 3-3-2014 and it was returned back by the Bank on 3-3-2014 itself. Statutory Notice was given on 29-3-2014 which was received by the applicants on 31-3-2014. Therefore, the complaint should have been filed on or before 15-5-2014 but the complaint was filed on 3-6-2014 and there is a delay of 17 days. Undisputedly, an application under Section 5 of Limitation Act was filed along

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with the complaint for condonation of delay of 15 days.

Referring to the Judgment of Supreme Court in the case of **Subodh S. Salaskar Vs. Jayprakash M. Shah and another (2008) 13 SCC 689** it is submitted by the Counsel for the applicants, that the provisions of Limitation Act are not applicable therefore, the Trial Court should have rejected the application for condonation of delay outrightly and even should not have issued notices. It is further submitted that the application under Section 142 of NI Act, 1881 was filed only after the objection with regard to the maintainability of application under Section 5 of Limitation Act was raised by the applicants, and since, the application under Section 142 of NI Act, 1881 should be filed along with the complaint therefore, the said application was not maintainable. To buttress his submission, the Counsel for the applicants have relied upon the judgment of a co-ordinate bench of this Court passed in the case of **Keshav Chouhan Vs. Kiran Singh 2015(4) MPLJ 230**.

So far as the case of **Keshav Chouhan** (Supra) is concerned, in the said case, the application under Section 142 of NI Act, 1881 was filed for the first time at the stage of defence evidence. It was further observed as under :

"16. Madras High Court has taken this view in the light of the judgment of

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Hon'ble Apex Court in the case of subodh S. Salaskar (Supra), therefore, I am of the considered view that an application as per proviso to clause (b) of Section 142 of the Act must be filed along with complaint and such application is not maintainable at subsequent stage i.e., after taking the cognizance and if the Magistrate took cognizance on the basis of time barred complaint then this defect cannot be cured by filing an application for condonation of delay at later stage."

Thus, it is clear that an application under Section 142 of NI Act, 1881 is to be filed along with the complaint under Section 138 of NI Act, 1881 and once the cognizance is taken on the basis of a time barred complaint, then the defect cannot be cured by filing an application under Section 142 of NI Act, 1881 at a later stage.

If the facts of this case are considered in the light of the judgment passed in the case of **Keshav (Supra)**, then the following circumstances would emerge :

1. Complaint was filed on 03-6-2014 along with an application for condonation of delay of 15 days.
2. The Magistrate issued notice on application under Section 5 of Limitation Act and did not take cognizance of the complaint.
3. An objection with regard to maintainability of application under Section 5 of Limitation Act was raised.

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4. Another application under Section 142 of NI Act, 1881 was filed for condonation of delay of 20 days.
5. The reason for condonation of delay in both the applications was that the holder of the cheque had expired on 28-4-2014 i.e., well within the period of limitation Act, and as the complainant who is the legal heir of holder of cheque was busy in performing the last rites and ceremonies, therefore, the complaint could not be filed within the period of limitation.
6. The Magistrate after calculating the delay, came to the conclusion that in fact there is a delay of 17 days in filing the complaint and the reason for not filing the complaint within the period of limitation appears to be bonafide and sufficient, therefore, condoned the delay.

Thus, it is clear that along with the complaint an application for condonation of delay was filed by mentioning wrong provision of law. It is not the case of the complainant that there is no provision for condonation of delay, but the contention is that application under Section 5 of Limitation Act was not maintainable. When there is a substantive provision for condonation of delay then taking a too technical view that as the application for condonation of delay was filed by mentioning wrong provision of law and therefore, the same was not

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maintainable and the complaint was liable to be dismissed as barred by time would not be in the interest of justice. An application is not to be decided on the basis of the provision of law mentioned in it, but it is to be decided on the basis of the relief sought by it. Therefore, merely because the Lawyer instead of filing the application under Section 142 of NI Act, 1881, chose to file application under Section 5 of Limitation Act, therefore, the complaint cannot be dismissed as barred by limitation. It is also a well established principle of law that a party should not suffer for the mistake committed by the Lawyer. From the facts of the case, it is clear that the complainant/respondent had already disclosed that there is a delay in filing the complaint which is required to be condoned by filing an application for condonation of delay, but it is not expected of a complainant that he/she must be knowing each and every provision of law. It is the duty of the lawyer to instruct his client. Thus, viewed from this angle also, the application filed under Section 5 of Limitation Act cannot be ignored by taking a too technical approach.

Thus, this Court is of the considered opinion that merely because the application under Section 5 of Limitation Act was filed instead of filing the same under Section 142 of NI Act, 1881, the complaint cannot be dismissed as barred by limitation.

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Further more, the application under Section 142 of NI Act, 1881 was also filed before the cognizance was taken and therefore, no illegality has been committed by the Magistrate by entertaining the applications filed under Sections 5 of Limitation Act and under Section 142 of NI Act, 1881.

The next contention raised by the Counsel for the applicants is that in the application filed under Section 5 of Limitation Act, the total period of delay was mentioned as 15 days whereas in the application filed under Section 142 of NI Act, 1881, the total delay was mentioned as 20 days, therefore, it is clear that the complainant/respondent has failed to explain the delay.

If both the applications are considered, then it would be clear that the Counsel for the complainant/respondent once again committed mistake in calculating the period of delay. The Magistrate has come to a conclusion that the total delay is of 17 days. However, in both the applications, the reason for not filing the complaint within the period of limitation is one i.e., death of holder of cheque. Undisputedly, the complainant/respondent is the wife of holder of cheque. Thus, merely because incorrect period of delay was calculated, therefore, that by itself cannot be a ground to dismiss the application for condonation of delay.

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It is further contended by the Counsel for the applicants that even otherwise, the complainant/respondent has failed to satisfactorily explain the delay in filing the complaint. The applicants have not disputed the date of death of the holder of cheque i.e., 28-4-2014. The statutory notice was already issued during the life time of the holder of cheque and the period of limitation had not expired on the date of death of holder of cheque. The contention of the complainant, that She was busy in performing the last rites and ceremonies of the holder of cheque cannot be said to be not sufficient to condone the delay. Further considering the fact that the delay is only of 17 days, therefore, this Court is also of the view that complainant has satisfactorily explained the delay in filing the complaint.

The next contention raised by the Counsel for the applicants is that by issuing notice under Section 5 of Limitation Act, the Magistrate had in fact taken cognizance of the offence cannot be accepted and the same is rejected. The word Cognizance has not been defined. It means that when the Magistrate applies his judicial mind for the first time to the accusation made in the complaint. The Supreme Court in the case of **S.R. Sukumar v. S. Sunaad Raghuram, (2015) 9 SCC 609**, has held as under :

“12. “Cognizance” therefore has a

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reference to the application of judicial mind by the Magistrate in connection with the commission of an offence and not merely to a Magistrate learning that some offence had been committed. Only upon examination of the complainant, the Magistrate will proceed to apply the judicial mind whether to take cognizance of the offence or not. Under Section 200 CrPC, when the complainant is examined, the Magistrate cannot be said to have ipso facto taken the cognizance, when the Magistrate was merely gathering the material on the basis of which he will decide whether a prima facie case is made out for taking cognizance of the offence or not. "Cognizance of offence" means taking notice of the accusations and applying the judicial mind to the contents of the complaint and the material filed therewith. It is neither practicable nor desirable to define as to what is meant by taking cognizance. Whether the Magistrate has taken cognizance of the offence or not will depend upon the facts and circumstances of the particular case."

The order sheets of the Trial Court have been placed on record. The order sheets reveal, that the Magistrate after receiving the complaint did not apply its judicial mind to the accusation made in the complaint, but merely issued notice of the application filed under Section 5 of Limitation Act. It is only after condoning the delay, the Trial Court fixed the case for consideration on the question of registration of complaint. Thus, it is clear that till the delay in filing the complaint was condoned, the Trial Court did not take cognizance of the complaint,

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therefore, it cannot be said that without condoning the delay, the Trial Court had taken cognizance of the complaint. Further as the complaint was not filed within the period of limitation, therefore, before condoning the same, it was obligatory on the part of the Magistrate to decide the application only after giving an opportunity of hearing to the applicants. Therefore, in the considered opinion of this Court, the Trial Court adopted the correct method by issuing notice on the application for condonation of delay before taking cognizance of the complaint.

Hence, this Court is of the considered opinion that the Magistrate did not commit any mistake in condoning the delay of 17 days in filing the complaint under Section 138 of NI Act, 1881, and further no mistake was committed by the Revisional Court by dismissing the revision.

Hence, this application fails and is hereby **dismissed.**

(G.S.Ahluwalia)
Judge