THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appeal Jurisdiction)

SINGLE BENCH:- BHASKAR RAJ PRADHAN, JUDGE

I. A. No. 1 of 2017
IN
Crl. L.P. No. 10 of 2017

Ankit Sarda
S/o Shri Ravindra Kr. Sarda .... Appellant.
Age 31 years
R/o M. G. Marg,
Gangtok, East Sikkim.

versus

Subash Agarwal,
S/o Shri Om Prakash Agarwal,
Age 42 years,
M/s Anand Stores, M. G. Marg,
Gangtok, East Sikkim .... Respondent.

AND

I. A. No. 1 of 2017
IN
Crl. L.P. No. 11 of 2017

Ankit Sarda
S/o Shri Ravindra Kr. Sarda .... Appellant.
Age 31 years
R/o M. G. Marg,
Gangtok, East Sikkim.

versus

Kailash Agarwal,
S/o Shri Om Prakash Agarwal,
Age 40 years,
M. G. Marg,
Gangtok, East Sikkim .... Respondent.

Applications for condonation of delay in filing Criminal Leave to Appeal(s) under Section 5 of the Limitation Act, 1963.

Appearance:

Mr. Jorgay Namka, Ms. Panila Theengh, Mr. Karma Sonam Lhendup and Ms. Tashi Doma Sherpa, Advocates for the Appellant.

Mr. Rahul Rathi, Advocate for the Respondent.

O R D E R

(19.03.2018)

Bhaskar Raj Pradhan, J

1. The facts necessary for the purpose of disposal of the present applications for condonation of delay are limited. On 30.11.2016 and 01.12.2016 two judgments would be rendered by the learned Judicial Magistrate in P. C. Case No.03 of 2015 and P. C. Case No. 04 of 2015 respectively by which it would be held that the complainant, the appellant herein, had failed to prove the ingredients of Section 138 of the Negotiable Instruments Act, 1881 against the respondents and acquit them of the charge.

2. Against the said two judgments passed by the learned Judicial Magistrate the appellant would prefer appeals before the Sessions Court i.e. Criminal Appeal No. 10 of 2016 and Criminal Appeal No. 11 of 2016 respectively. Both the Criminal Appeals would be presented and registered on 28.12.2016 and decided on 25.09.2017. The learned Sessions Judge would hold that the appeal was not maintainable and dismiss the said appeals.

3. On 04.10.2017 the appellant would prefer Crl.L.P. No.10 of 2017 and Crl.L.P. No.11 of 2017 respectively before this Court against the judgments dated 30.11.2016 and 01.12.2016 adverted to above.

4. The above Criminal Leave Petitions would be preferred under Section 378 (4) of the Code of Criminal Procedure, 1973. Due to

the delay in filing the said Criminal Leave Petitions the appellant would also prefer the present interlocutory applications seeking condonations of delay. The said interlocutory applications would be preferred under Section 5 of the Limitation Act, 1963. The appellant would content that there is a delay of 218 days in preferring Crl. L.P. No. 10 of 2017 and a delay of 217 days in preferring Crl. L.P. No. 11 of 2017.

5. In both the interlocutory applications the appellant would plead that the appellant, represented by his Counsel, on the assumption that the complainant also fell in the category of the term *"victim"* was entitled to file an appeal before the Sessions Court. The appellant would further plead that until recently the High Courts of the country held two views on this aspect one of which clearly entitled the appellant to file an appeal before the Sessions Court.

6. Mr. Jorgay Namka, learned Counsel for the appellant would explain this further by citing two judgments of the High Court of Jharkhand and the Calcutta High Court.

7. In re: ***Mahesh Kumar Sinha v. State of Jharkhand & Anr.***[1] the High Court of Jharkhand would examine an appeal before it under the provisions of Section 378 (4) Cr.P.C. against an acquittal from the charge under Section 138 of the Negotiable Instruments Act, 1881. The High Court would, vide order dated 15.04.2013, ultimately come to the conclusion that:

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[1] **2013 SCC OnLine Jhar 1847**

> ***"7.*** *In view of this facts, reasons and judicial pronouncements, there is no substance in this appeal and therefore, we are not inclined to grant special leave to prefer an appeal to this appellant under sub-section (4) of Section 378 of the Cr PC. He has statutory right to prefer an appeal hence this application/appeal is hereby dismissed.***"**

8. In re: ***National Plywood Industries & Ors. v. State of West Bengal & Anr.*** [2] the Calcutta High Court would examine a petition under Section 401 read with Section 482 Cr.P.C. praying for setting aside the order passed by the Court of the Additional Sessions Judge entertaining an appeal against an acquittal in a case relating to Section 138 of the Negotiable Instruments Act, 1881. The High Court vide order dated 12.03.2013 would hold:-

> ***"****..... Therefore, if the definition of 'victim' given under Section 2(wa) read with Section 2(y) of the Code of Criminal Procedure along with definition of 'injury' given under Section 44 of the Indian Penal Code and Section 22 of the Indian Penal Code, which defines movable property, are taken into consideration, a liberal interpretation is to be given to hold that non-encashment of the cheque causes injury to the person in whose favour cheque has been issued. Therefore, holder of the cheque is to be determined both complainant and victim. Section 378(4) of the Code of Criminal Procedure, which gives right to a complainant to seek leave to appeal, vest right only to those complainants where complaints are filed in furtherance of common good. To illustrate this, complaint filed by a Food Inspector under the provisions of Food Adulteration Act, will vest a right in the complainant to seek leave to appeal under Section 378(4) of the Code of Criminal Procedure. The illustrations may be many, they cannot be put in watertight jackets. Suffice it to say that holder of the cheque is a victim and he can prefer an appeal by invoking proviso to Section 378 of the Code of Criminal Procedure.*
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> *Hence, the impugned order suffers from no infirmity as the Court below had rightly entertained the appeal. Having expressed the above opinion, this Court uphold the impugned order, hence, the present revision petition is dismissed.***"**

9. Mr. Jorgay Namka would, thus, submit that the appellant having filed the appeals before the Sessions Judge *bona fide* on the advice of his Counsel on a misconception of law and thereafter

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[2] **2013 SCC OnLine Cal 4421**

pursuing the said appeals before a wrong forum would be *"sufficient cause"* making it apparent that the delay was neither negligent or deliberate.

10. Mr. Rahul Rathi, learned Counsel on the other hand would vociferously submit that the contention of the appellant of there being two diverse views of the High Courts was incorrect as the matter had been authoritatively settled by the Supreme Court in re: ***Subhash Chand v. State (Delhi Administration)***[3] decided on 08.01.2013 in which it would be held:-

> ***"20.*** *Since the words "police report" are dropped from Section 378(1)(a) despite the Law Commission's recommendation, it is not necessary to dwell on it. A "police report" is defined under Section 2(r) of the Code to mean a report forwarded by a police officer to a Magistrate under sub-section (2) of Section 173 of the Code. It is a culmination of investigation by the police into an offence after receiving information of a cognizable or a non-cognizable offence. Section 2(d) defines a "complaint" to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under the Code, that some person, whether known or unknown has committed an offence, but does not include a police report. The Explanation to Section 2(d) states that a report made by a police officer in a case which discloses after investigation, the commission of a non-cognizable offence, shall be deemed to be a complaint, and the police officer by whom such report is made shall be deemed to be the complainant. Sometimes investigation into cognizable offence conducted under Section 154 of the Code may culminate into a complaint case (cases under the Drugs and Cosmetics Act, 1940). Under the PFA Act, cases are instituted on filing of a complaint before the Court of the Metropolitan Magistrate as specified in Section 20 of the PFA Act and offences under the PFA Act are both cognizable and non-cognizable. Thus, whether a case is a case instituted on a complaint depends on the legal provisions relating to the offence involved therein. <u>But once it is a case instituted on a complaint and an order of acquittal is passed, whether the offence be bailable or non-bailable, cognizable or non-cognizable, the complainant can file an application under Section 378(4) for special leave to appeal against it in the High Court. Section 378(4) places no restriction on the complainant.</u> So far as the State is concerned, as per Section 378(1)(b), it can in any case, that is, even in a case instituted on a complaint, direct the Public Prosecutor to file an appeal to the High Court from an original or appellate order of acquittal passed by any court other than High Court. But there is, as stated by us hereinabove, an important inbuilt and categorical restriction on the State's power. It cannot direct the Public Prosecutor to present an*

[3] **(2013) 2 SCC 17**

> *appeal from an order of acquittal passed by a Magistrate in respect of a cognizable and non-cognizable offence. In such a case the District Magistrate may under Section 378(1)(a) direct the Public Prosecutor to file an appeal to the Sessions Court. This appears to be the right approach and correct interpretation of Section 378 of the Code.***"**
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> *[Emphasis supplied]*

11. Mr. Rahul Rathi would further contend that the delay of 218 and 217 days respectively, as averred by the appellant are miscalculations and in fact the delay would be 248 and 247 days in terms of Section 378 (5) Cr.P.C. Sub-sections (4) and (5) of Section 378 Cr.P.C. reads thus:-

> ***"378 (4)*** *If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court.*
>
> ***(5)*** *No application under sub-section (4) for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of six months, where the complainant is a public servant, and sixty days in every other case, computed from the date of that order of acquittal.***"**

12. Mr. Rahul Rathi would thus contend that as the appellant was not a public servant an application under 378(5) Cr.P.C. ought to have been filed within a period of 60 days computed from the date of the order of acquittal.

13. This contention raised by Mr. Rahul Rathi is absolutely correct. Section 378 (5) Cr.P.C. itself prescribes a period of limitation for an application for grant of special leave to appeal to be made under Section 378 (4) Cr.P.C. The appellant has incorrectly calculated the delay in terms of Article 114 of the Limitation Act, 1963 which prescribes 90 days period to file an appeal from an order of acquittal under sub-section (1) or sub-

section (2) of Section 417 Cr.P.C. while seeking special leave to appeal under Section 378 (5) Cr.P.C.

14. The order of acquittal was dated 30.11.2016. 60 days computed from the order of acquittal would be 30.01.2017. The appellant, on the advice of his learned Counsel, admittedly preferred an appeal before the Sessions Court instead of approaching the High Court under the provision of 378 (5) Cr.P.C. Admittedly the appeals were pending before the Sessions Court from 28.12.2016 to 25.09.2017 till the orders, both dated 25.09.2017, were passed by the learned Sessions Judge. The Criminal Leave Petitions were filed before this Court on 04.10.2017 within a period of 10 days thereafter. It is also seen that a total number of 300 days were spent by the appellant pursuing a remedy before a Sessions Court out of the 309 days taken by the appellant to approach this Court under Section 378 (5) Cr.P.C. Time would begin to run against the appellant after the expiry of prescribed period of 60 days from the date of acquittal. As per Section 12 of the Limitation Act, 1963 the day from which such period is to be reckoned, shall be excluded so also the day on which judgment complained of was pronounced and the time requisite for obtaining a copy of the said judgment. So calculated, even if one were to take the calculation of Mr. Rahul Rathi to be correct it would be clear that substantially all the delay would be attributable to the appellant pursuing a wrong remedy. The appellant had preferred the appeals before the Sessions Court within a period of 28 days from the date of

acquittal. The issue that the said appeals were not maintainable was raised by the respondent before the Sessions Court which vide its order dated 25.09.2017 decided the issue and held that the said appeals before the Sessions Court were not maintainable. From the date of the said order dated 25.09.2017 the appellant took 10 days to prefer the Criminal Leave Petitions before this Court. Thus, excluding the time taken to pursue a wrong remedy before the Sessions Court a total number of 38 days were taken by the appellant to approach this Court well within the statutory period of 60 days under Section 378 (5) Cr.P.C. The only question, therefore, which needs examination is whether the time during which the appellant had been pursuing the appeals before the Sessions Court, if diligently, is liable to be excluded in computing the period of limitation?

15. Section 5 of the Limitation Act, 1963 provides:-

> ***"5. Extension of prescribed period in certain cases.***— *Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (5 of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.*
>
> *Explanation.— The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section."*

16. Section 14 of the Limitation Act, 1963 provides:-

> ***"14. Exclusion of time of proceeding bona fide in court without jurisdiction.*** *- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect*

of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3)Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation.— For the purposes of this section,—

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

*(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.***"**

17. Section 29 (2) of the Limitation Act, 1963 provides:-

"29. (2) *Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.***"**

18. The provision of Section 378 (5) Cr.P.C. is a special provision which has no express provision excluding the application of Section 5 or Section 14 of the Limitation Act, 1963. In view of Section 29 (2) of the Limitation Act, 1963, as quoted above, the provisions of Section 4 to 24 of the Limitation Act, 1963 to the

extent to which they are not expressly excluded are applicable even to Cr.P.C.

19. Under Section 5 of the Limitation Act, 1963 an appeal may be admitted after the prescribed period, if the appellant satisfies the Court that he had *"sufficient cause"* for not preferring the appeal within such period. The explanation to Section 5 of the Limitation Act, 1963 provides that the fact that the appellant was mislead by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be *"sufficient cause"* within the meaning of this section. Section 5 of the Limitation Act, 1963 gives the Court a discretion which is to be exercised upon principles which are well understood. The words *"sufficient cause"* must be liberally construed so as to advance substantive justice when it is apparent there is no negligence nor inaction nor want of *bona fides* attributable to the appellant.

20. Under Section 14 read with Section 29 (2) of the Limitation Act, 1963 in computing the period of Limitation for any appeal, the time during which the plaintiff has prosecuting with *"due diligence"* another proceeding, whether in a Court of first instance or of appeal or revision, against the respondent shall be excluded, where the proceedings relates to the same matter in issue and is prosecuted in *"good faith"* in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

21. *"Due diligence"* and *"good faith"* are two paramount requisites before the appellant could seek the benefit of Section 14 of the Limitation Act, 1963. *"Due diligence"* requires attention and care from the appellant in the given situation i.e. while prosecuting another proceeding. *"Good faith"* is defined in Section 2(h) of the Limitation Act, 1963 *as "nothing shall be deemed to be done in good faith which is not done with due care and attention"*.

22. Whereas the power to condone delay and extend the prescribed period under Section 5 of the Limitation Act, 1963 is discretionary, under Section 14 of the Limitation Act, 1963 the exclusion of time is mandatory if the appellant satisfied the conditions mentioned therein.

23. Whether an appeal would lie before the Sessions Court or the appellant was required to seek special leave to appeal under Section 378 (5) Cr.P.C. before the High Court is a pure question of law. In such matters of the law it is advisable that a litigant seek legal advice. The question, therefore, is what if the legal advice received was wrong? Would the act of the appellant to agree to file an appeal before the Sessions Court on the wrong legal advice of his Counsel lead to an inference that the appellant did not prosecute the appeal with *"due diligence"* and *"good faith"*?

24. Mr. Jorgay Namka has placed the judgment of the Jharkhand High Court which would hold that an appeal under the provision of Section 378 (4) Cr.P.C. was not maintainable and the Calcutta High Court which would hold that an appeal before the Sessions Court was maintainable. The appellant quite clearly

pleads in his interlocutory applications that he had approached the Sessions Court on the wrong advice of his Counsel. Mr. Rahul Rathi may be absolutely correct in his submission that the learned Counsel for the appellant ought to have been diligent to know that the Supreme Court had already settled the issue in re: ***Subhash Chand (supra)***. This lack of diligence of the appellant's Counsel may lead to an inference of the Counsel's carelessness but to saddle the lack of carelessness of the Counsel to the appellant and non-suit him on that count alone may lead to miscarriage of justice. There is no ground at all to suspect that the appeals filed before the Session Court were not *bona fide*. It does not stand to reason that the appellant would prefer the appeals before the Session Court having no jurisdiction instead of this Court for any *mala fide* reason.

25. In view of the aforesaid, this Court is of the view that the time taken by the appellant to *bona fide* pursue the appeals before the Sessions Court ought to be excluded while computing the period of limitation. In so doing, it is quite clear that the Criminal Leave Petitions are well within the prescribed period of 60 days under Section 378 (5) Cr.P.C. The present interlocutory applications i.e. I.A. No. 1 of 2017 in Crl. L. P. No. 10 of 2017 and I.A. No. 1 of 2017 in Crl. L. P. No. 11 of 2017 are allowed.

(Bhaskar Raj Pradhan)
Judge
19.03.2018

Approved for reporting: yes.
Internet: yes.

to