

ORISSA HIGH COURT CUTTACK

CRLREV NO.697 OF 2004

From the order dated 12.08.2004 passed by Sri P.K. Panda, J.M.F.C.,
Nimapara, in G.R. Case No.374/54 of 1996.

Arjun Rout & another Petitioners

Versus

State of Orissa Opp. party

For petitioners : M/s P.K. Nayak(I), P.Mohanty
and M.K. Das

For Opp. party : Addl. Standing Counsel

PRESENT :

THE HONOURABLE SHRI JUSTICE PRADIP MOHANTY

Date of hearing and judgment : 02.08.2006

PRADIP MOHANTY, J. This revision is directed against the order dated 12.08.2004 passed by the J.M.F.C., Nimapara in G.R. Case No.374/54 of 1996. In the said G.R. Case, a petition was filed with a prayer to recall the orders dated 13.11.1997 and 27.11.2001 taking cognizance of the offences under Sections 341/323/294/34 IPC and to drop the proceeding against the petitioners. By the impugned order, however, the learned Magistrate refused to grant such prayer.

2. The case of the petitioners is that the occurrence took place on 17.04.1996 and charge sheet was filed on 13.11.1997. The Special Judge, Puri took cognizance of the offences under Sections

341/323/294/34 IPC read with Section 3 of S.C. & S.T. (P.A.) Act vide order dated 13.11.1997. On 20.12.2000, the learned Special Judge made over the case to the J.M.F.C., Nimapara to proceed with the same in accordance with law in view of the ratio decided in Gangula Ashok v. State of Andhra Pradesh, 2000(18) OCR 364(SC). On 27.11.2001, the learned J.M.F.C. again took cognizance under sections 341/323/294/34 IPC read with section 3 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and issued process against the accused-petitioners. Against the order of cognizance, the petitioners filed an application under Section 482, Cr.P.C. before this Court, which was registered as CRLMC No.403 of 2003. This Court, by order dated 17.04.2003 quashed the order of cognizance so far as it relates to the offence under Section 3 of S.C. & S.T. (P.A.) Act on the ground that the investigation had been conducted by an officer below the rank of D.S.P. This Court, however, directed that the proceeding so far as the offences under the Indian Penal Code shall continue. On 02.05.2003, the accused-petitioners filed a petition before the learned J.M.F.C. to recall the order taking cognizance and drop the proceeding since it was barred by section 468 Cr.P.C. On 04.07.2003, the learned Magistrate, after hearing the parties, rejected the said application with the observation that as cognizance had been taken, it was deemed that the court had condoned the delay. That order was carried in revision to this Court in CRLREV No.844 of 2003. By order dated 08.04.2004, this Court deprecated the above observation of the learned Magistrate, quashed the order impugned and directed him to reconsider the question of taking cognizance of the offences under sections 341/323/294/34 IPC by taking into account the provisions contained in sections 468 and 473 Cr.P.C. Thereafter, on 15.07.2004 the accused-petitioners filed an application under sections 468 and 473 Cr.P.C. before the learned Magistrate to recall the orders dated 13.11.1997 and 27.11.2001 taking cognizance and to drop the proceeding. The said petition was rejected after hearing the parties vide order dated 12.08.2004. In the said order, while referring to the

provisions of sections 468 and 473 Cr.P.C., the learned Magistrate observed that since the victim belongs to 'Kela' by caste and accused persons belong to higher caste, it was necessary for the interest of justice to ignore the delay and take cognizance of the above offences.

3. Learned counsel for the petitioners submits that the learned Magistrate has rejected the petition under Sections 468 and 473, Cr.P.C. without applying his judicial mind. The occurrence took place on 17.04.1996. Therefore, cognizance should have been taken on or before 17.04.1997. But the order taking cognizance has been passed on 27.11.2001, which is beyond the period of limitation. He further submits that as per the provisions of the Criminal Procedure Code the courts do not assume jurisdiction to condone the delay retrospectively. In support of his contention, he has relied on a decision in the case of **Subash Chandra Mohapatra v. M. S. Jaggi**, 53(1982) CLT 112. He further submits that in the instant case cognizance has been taken much after the period of limitation and while passing such order, nothing has been indicated regarding condonation of delay, as required by section 473 Cr.P.C. This mistake cannot be rectified by the J.M.F.C. at any subsequent stage. Therefore, the impugned order under Annexure-1 is liable to be quashed.

4. Mr. Parhi, learned Addl. Standing Counsel, vehemently urges that the learned Magistrate has rightly passed the order on 27.11.2001. He has complied with the requirements of section 473 Cr.P.C. while passing the said order.

5. In the instant case, the occurrence took place on 17.04.1996 and charge-sheet was filed on 13.11.1997 and the order taking cognizance was passed by the learned Special Judge on the same day. After the case was made over to the learned Magistrate, he again took cognizance on 27.11.2001. Section 468 Cr.P.C. lays down the period of limitation for taking cognizance. The said section is quoted below:-

“468. Bar to taking cognizance after lapse of the period of limitation. – (1) Except as otherwise provided elsewhere in this Code, no Court shall take cognizance of an offence of the categories specified in sub-section (2) after expiry of the period of limitation.

(2) The period of limitation shall be –

- (a) six months, if the offence is punishable with fine only;
- (b) one year, if the offence is punishable with imprisonment for a term not exceeding one year;
- (c) three years, if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years.

(3) For the purposes of this section, the period of limitation, in relation to offences which may be tried together, shall be determined with reference to the offence which is punishable with the more severe punishment or, as the case may be, the most severe punishment.”

The offences involved in this case are under sections 341/294/323/34 IPC. Out of the same, the offence under section 323 IPC is punishable with imprisonment for one year or fine of Rs.1000/- or both, which is the most severe punishment. Therefore, as per of the provisions of section 468 Cr.P.C., the period of limitation should be one year from the date of occurrence. But, cognizance has been taken on 13.11.1997, i.e., after more than one year from the date of occurrence. Cognizance was also taken by the learned Magistrate on 27.11.2001. In other words, cognizance has been taken beyond the period of limitation prescribed by section 468 Cr.P.C. But section 473 Cr.P.C. provides for extension of period of limitation in certain cases. According to this section, any Court may take cognizance of an offence after the expiry of the period of limitations, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary so to do in the interest of justice. In this connection, it is relevant to

quote the following observations made by the apex Court in the case of **State of Himachal Pradesh v. Tara Dutt and another**, AIR 2000 SC 297.

“ Section 473 confers power on the Court taking cognizance after the expiry of the period of limitation, if it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained and that it is necessary so to do in the interest of justice. Obviously, therefore, in respect of the offences for which a period of limitation has been provided in S. 468, the power has been conferred on the Court taking cognizance to extend the said period of limitation where a proper and satisfactory explanation of the delay is available and where the Court taking cognizance finds that it would be in the interest of justice. This discretion conferred on the Court has to be exercised judicially and on well recognised principles. This being a discretion conferred on the Court taking cognizance, wherever the Court exercises this discretion, the same must be by a speaking order, indicating the satisfaction of the Court that the delay was satisfactorily explained and condonation of the same was in the interest of justice. In the absence of a positive order to that effect it may not be permissible for a superior Court to come to the conclusion that the Court must be deemed to have taken cognizance by condoning the delay whenever the cognizance was barred and yet the Court took cognizance and proceeded with the trial of the offence.”

In the instant case, there is nothing to show that at the time of taking cognizance, the delay was properly explained by the prosecution. Nor has the Magistrate mentioned that it was necessary to condone the delay in the interest of justice. In view of the aforesaid observations made by the apex Court in **Tara Dutt's case** (supra), it is not permissible for this Court to come to the conclusion that the Magistrate must be deemed to have taken cognizance by condoning the delay. Further, a Court cannot exercise its jurisdiction in condoning the delay retrospectively. In **Subash Chandra Mohapatra's case** (supra) it has been held that section 473 Cr.P.C. does not warrant retrospective

condonation of delay. A Court is empowered to take cognizance of an offence after the period of limitation provided it is satisfied on the facts and in the circumstances of the case that the delay has been properly explained or that it is necessary to condone the delay in the interest of justice. Section 470 Cr.P.C. provides exclusion of time in certain cases. The relevant portion of section 470 Cr.P.C., i.e., sub-sections (1) and (2) thereof, runs as follows:-

“470. Exclusion of time in certain cases. –

(1) In computing the period of limitation, the time during which any person has been prosecuting with due diligence another prosecution, whether in a Court of first instance or in a Court of appeal or revision, against the offender, shall be excluded.

Provided that no such exclusion shall be made unless the prosecution relates to the same facts 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) Where the institution of the prosecution in respect of an offence has been stayed by an injunction or order, then, in computing the period of limitation, the period of the continuance of the injunction or order, the day on which it was issued or made and the day on which it was withdrawn shall be excluded.

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From the above provision, it is clear that in computing the period of limitation, pendency of the case before a higher forum can be excluded.

6. In the instant case, the date of occurrence was 17.04.1996 and cognizance was taken by the Special Judge on 13.11.1997, which was beyond the period of limitation. Further, nothing has been indicated in the said order about compliance of the provisions of section 473 Cr.P.C. Therefore, the said order is not sustainable in the eye of law. After the case was made over to the J.M.F.C., he took

cognizance on 27.11.2001. Even if as per the provisions of section 470 Cr.P.C. the period of pendency of the case before the Special Judge is excluded, the order taking cognizance by the Magistrate was also beyond the period of limitation and nothing has been mentioned in the said order that either the delay was properly explained by the prosecution or the Magistrate was satisfied that it was necessary to condone the same in the interest of justice. Of course, Pursuant to the direction of this Court vide order dated 08.04.2004 passed in CrI. Rev. No.844 of 2003 for reconsideration of the question of taking cognizance, the learned Magistrate in his order dated 12.08.2004 has assigned some reasons for taking cognizance beyond the period of limitation. But, in view of the ratio decided in **Subash Chandra Mohapatra's case** (supra), such defect cannot be rectified by a subsequent order.

7. For the foregoing discussions, the order taking cognizance is bad in law and is liable to be set aside. Therefore, this Court sets aside the order dated 12.08.2004 and consequently quashes the impugned orders of taking cognizance of the offence under sections 341/294/323/34 IPC.

8. In the result, the CRLREV is allowed.

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PRADIP MOHANTY, J.

Orissa High Court, Cuttack
 August 2, 2006 / *Samal*