

* **THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Crl. MC No.3152/2010 & Crl. M.A. 15900/2010**

Reserved on: 02.11.2011
Pronounced on: 15.11.2011

KARTAR SINGH Petitioner
Through Mr. Anil Kumar Gujral,
Advocate

Versus

STATE & ORS. Respondents
Through Ms Fizani Husain, Addl. PP

CORAM:
HON'BLE MR. JUSTICE M.L. MEHTA

- | | | |
|----|---|-----|
| 1. | Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not ? | Yes |
| 3. | Whether the judgment should be reported in the Digest ? | Yes |

M.L. MEHTA, J.

1. Vide this petition challenge is made to the order dated 27th August, 2010 of learned ACMM whereby an application under section 5 of Limitation Act filed for condoning the delay in filing the application under section 456 Cr. P.C. of the complainant was allowed.

2. Brief facts necessary for the disposal of the present petition are that the petitioner herein was convicted under section 448/34 IPC by learned MM, Delhi vide judgment dated 1st March 2008 in FIR No. 164/1989 of P.s. Vasant Kunj. Thereafter he was released

on probation of good conduct for a period of six months vide order dated 14th March 2008. While convicting the petitioner as above, the learned MM did not pass any order under section 456(1) of Cr. P.C. for restoration of the possession of the property measuring 2 *bigha* 14 *biswa*, forming part of *Khasra No. 1146* min, village Rangpur, Tehsil Mehrauli, New Delhi (hereinafter referred to as 'the said property') in favour of the complainants. Even no application in this regard was filed by the complainants for seeking restoration of the property allegedly trespassed by the petitioner. The complainants who are respondent No. 2 and 3 herein, filed an appeal against the impugned judgment of conviction and order on sentence of release of the petitioner on probation before the learned ASJ on 12.05.2009 vide Crl. Appeal No. 35/2009. They also prayed for restoration of the possession of the said property to them as per section 456(2) of Cr. P.C. The said appeal remained pending for adjudication before the learned ASJ and it was on 05.06.2010 when the same was dismissed as withdrawn. The order passed by learned ASJ reads as under:

"CA No. 35/09

05/06/2010

*Present: Sh. M.Z. Khan, Ld. Addl. PP
for State.*

*Sh. Sandeep Sehrawat,
counsel for petitioner.*

*Sh. Vishal Tokas, counsel for
R1*

Ld. counsel for petitioner seeks permission to withdraw the appeal with liberty to move appropriate application for restoration of possession before Ld. Trial Court.

In view of the facts and circumstances, the appeal is dismissed as withdrawn. TCR be sent back. Since the accused is a Sr. Citizen, Ld. Trial Court is requested to dispose of the petition as expeditiously as possible.

File be consigned to R.R.”

3. Now after withdrawing this appeal, the respondent No. 2 and 3 filed an application under section 456(1) of Cr P.C. before the MM for restoration of the possession of the said property. They also filed an application under section 5 of the Limitation Act for condoning the delay in filing the said application under section 456 Cr. P.C. This application under section 5 of the Limitation Act came to be allowed vide the impugned order dated 27th August 2010 which is under challenge in the present petition. The operative part of the impugned order reads like this:

“Accordingly, in view of these facts and circumstances, this court is of the considered view that sufficient cause has

been shown by the complainant/applicant, for delay in filing of the present application and thus, in the interest of justice the delay may be condoned. Therefore, in the interest of justice, I condone the delay in filing the present appeal. Case is now to come on 17.09.2010, for reply, if any, to the application under section 456 Cr. P.C. and arguments on the said application.”

4. The impugned order is assailed mainly on the ground that the order for restoration of the possession under Section 456 (1) Cr. P.C. was discretionary and since it was not passed by the learned MM while convicting the petitioner under section 448 of IPC, or within one month thereof, the trial court had no power to pass order of restoration after the expiry of long period of more than three years. The learned counsel submitted that there was no provision in Cr. P.C. for condonation of delay in filing application under section 456(1) cr.P.C. and that the provisions of Limitation Act were not applicable in the criminal proceedings. The learned counsel as relied upon the judgments in the cases of – **(1) Krishnan Moothan Vs. V.K. A. Krishnakutty, (1960) Crl. L.J. 1464, Kerala High Court; (2) Joban Dass & Others Vs. Shibu, (1964) 2 Crl. L.J. 295, HP; (3) Subhan Vs. State, (1974) Crl. L.J. 731, Allahabad HC; and (4) Abdul**

Salam and Another Vs. Insp. of Police, R.I. Mambalam, P.S., (1994), Crl. L.J. 578, Madras HC to contend that the Court of MM became *functus officio* after the pronouncement of the judgment on 1st March 2008 and order on sentence on 14th March 2008 and that since no order was passed for restoration of possession within one month, the same could not be passed in view of the bar created by the proviso of section 456(1) Cr.P.C.

5. The learned counsel appearing for the respondents contended otherwise and submitted that the respondents had preferred an appeal against the impugned judgment and order dated 01.03.2008 and 14.03.2008 respectively of learned MM vide Crl. Appeal No. 35 of 20098 before the appellate court of ASJ and that since the appeal was not decided by the learned ASJ on merits and permission was granted to file an application for restoration of possession under section 456 Cr.P.C., the proviso to section 456(1) Cr.P.C. would not be attracted. In other words, the submission of the learned counsel was that the respondents availed the remedy of appeal as per the advice and since their appeal was not decided by the appellate court and no order was passed by the appellate court for restoration of possession, but the permission was granted to make application for restoration of possession, there was no bar for the MM to pass an order under section 456(1) Cr. P.C. The learned counsel for the respondent

replied upon the decision of ***H.P. Gupta Vs., Manohar Lal and Ors.***, AIR 1979 SC 443.

5. Before advertng to the rival submissions and the judgments cited by the petitioners and respondent, section 456 Cr. P.C., which is the subject matter of interpretation, may be noted. It reads thus:

“(1) When a person is convicted of an offence attended by criminal force or show of force or by criminal intimidation, and it appears to the court that, by such force or show of force or intimidation, any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order that possession of the same be restored to that person after evicting by force, if necessary, any other person who may be in possession of the property:

Provided that no such order shall be made by the court more than one month after the date of the conviction.

(2) Where the court trying the offence has not made an order under sub-section (1), the court of appeal, confirmation or revision may, if it thinks fit, make such order while

disposing of the appeal, reference or revision, as the case may be.

(3) Where an order has been made under sub-section (1), the provisions of section 454 shall apply in relation thereto as they apply in relation to an order under section 453.

(4) No order made under this section shall prejudice any right or interest to or in such immovable property, which any person may be able to establish in a civil suit”

6. A plain reading of the section reveals no ambiguity. Under sub section (1), the court convicting any person of an offence attended by criminal force or show of force or by criminal intimidation, may if it deems fit, order the restoration of the possession of the immovable property to the person dispossessed. However, there was a rider provided in the proviso that such order could not be made by the convicting court more than one month after the date of conviction. Admittedly, in the present case, no order of restoration of possession was passed by the learned MM while convicting the petitioner on 01.03.2008. Admittedly no application was also filed by the complainant/respondent during the pendency of the proceedings

or within one month of the conviction order. That being so, apparently, the Magistrate was not empowered to pass any order of his own or on the application after one month of recording of conviction. In this case the application for restoration was filed before the appellate court three months after the confirmation of conviction by it. In the case of **Krishnan Moothan** (*supra*) the Single Judge of the High Court held that it was not only that order of restoration under sub section (1) was subject to the limitation of one month, but the court of appeal, confirmation, reference or revision was also not free to pass such an order of reference at any time.

7. In the case of **Joban Dass & Others** (*supra*) also, the Himachal Pradesh High Court held that the period of limitation was one month from the date of conviction. It held as under:-

“The sub section does not authorize a Magistrate to pass such an order, beyond from the date of conviction. In the instant case, not only the order of restoration of possession was passed beyond one month from the date of conviction, but the application, itself, for passing the order was filed after that period. The learned Magistrate had no authority to pass the order, for restoration of possession. His order is illegal and liable to be quashed.”

8. Similar was the decision in the case of **Subhan (supra)**, by the Single Bench of Allahabad High Court. In the case of **Abdul Salam and Anr. (Supra)**, also, the Madras High Court had the similar view and held as under:

"The proviso to Section [456](#), Cr.P.C. appears to be mandatory in nature and if at all any order for the restoration for possession by the learned Magistrate is required to be passed, that can be done only within one month of the passing of the judgment of conviction. If this is so, the impugned order by the learned Magistrate for the restoration of possession of the rental premises for any reason whatsoever should have been on or before 9-12-1987 and beyond that, he is not competent to pass any order. It is under these circumstances, some force is available in the contention of the learned counsel for the revision petitioner.

22. In *K. Lakshamma v. State of A.P. (1980) MLJ (CrI) 294*, a Bench of the Andhra Pradesh High Court while dealing with the scope of Section [456](#), Cr.P.C. has observed as follows :

"The proviso to Section [456\(1\)](#), Criminal Procedure Code, leaves no doubt whatsoever that such order of restoration cannot be made by the Court more than

one month after the date of the conviction. There is no dispute that by 7th July, 1978 the period of one month had already elapsed, and the question is whether because the petition for restoration was filed within one month from the date of conviction, the Magistrate had the jurisdiction to pass an order for restoration on any day beyond the period of one month from the date of conviction. A plain reading of the section leaves no alternative but to hold that the Magistrate has become functus officio and had no longer any jurisdiction to pass such order of restoration after the expiry of one month from the date of conviction."

9. As stated above and in view of the decisions of the judgments as noted above, there cannot be any dispute that power of the Magistrate for restoration of possession of immovable property to the person dispossessed was limited by the proviso of sub section (1) of Section 456, CrPC. However, the question for consideration in the present case is on different facts and circumstances. In the present case, the respondent preferred an appeal against the order of conviction before the Appellate Court of learned ASJ. The matter remained pending before the

Appellate Court for considerable time and it was only on 5.6.2010 that the order permitting withdrawal of the appeal with liberty given to the respondent/complainant to move appropriate application for restoration of the possession before the trial court was passed by the court of ASJ. The said order has been reproduced above. It would be seen that this came to be passed in the presence of Sh. Vishal Tokas, learned counsel for the petitioner herein. The Appellate court of ASJ did not pass the order on merit, but allowed withdrawal of the appeal and granted liberty to the respondent to file appropriate application for restoration before the court of ACMM. It was thereafter that the respondents filed an application under Section 456 CrPC before the learned ACMM along with an application Sec. 5 of Limitation Act for condonation of delay in filing the said application. Vide the impugned order, the learned ACMM has only condoned the delay in filing the application under Sec. 456 CrPC and had fixed the matter for disposal of the said application on merits. Though such eventuality as has happened in this case, was not specifically dealt with by the provisions of Sec. 456 CrPC, but the order of the appellate court has lifted the bar of limitation provided in the proviso of sub-section (1). Under sub Sec. (2) there was no limitation prescribed on the powers of court of appeal, confirmation or revision, in passing an order of restoration of

possession. In the instant case, the appellate court judge instead of himself passing an order of restoration of possession of the premises to the respondents, has permitted them to make appropriate application in this regard before the trial court which had passed the order of conviction. There does not appear to be any impropriety or illegality for the appellate court in passing such an order. This order of the appellate court permitting filing of the application for restoration of possession before the trial court was passed in the presence of counsel for the petitioner and no objection was raised to the passing of such an order. If that was so, the court of MM being subordinate, was bound to entertain the application for restoration of possession. That being the factual situation, the petitioner can be presumed to have waived for period of limitation for passing an order of restoration.

10. In the case of **H.P. Gupta (Supra)**, Supreme Court while dealing with the question regarding the power of appellate court in restoring the possession of immovable property under Section 456(2) CrPC, held as under:

“The language of Sub-section (2) clearly shows that the same is applicable to a case where a conviction has been recorded by the trial Court and the trial Court has through mistake or inadvertence omitted to make an order for restoration of possession of immovable

property to the complainant or has refused to pass such order either because the offence was not attended by criminal force or show of force or by criminal intimidation or because the application in that behalf was made after expiry of 30 days and an appeal or revision either against the conviction or the order refusing restoration has been preferred; in such a case Sub-section (2) provides that the appellate Court or the revisional Court while disposing of such appeal or revision may make an order restoring possession of the immovable property to the complainant. The change in phraseology clearly suggests that Parliament did not intend to prescribe any limitation on the powers of the appellate Court or revisional Court : the words are not "when convicting" or "when upholding the conviction" but the words are "while disposing of the appeal, reference or revision" and these would mean in continuation of the disposal of the appeal, reference or revision and these words cannot be regarded as importing a limitation on the power to the effect that such order must be incorporated in the body of the judgment disposing of the appeal, reference or revision. In other words, the appellate or revisional Court acting under Section 456(2) will have jurisdiction or power to pass the order for restoration of possession at any time but it has to be exercised with

discretion within reasonable time of the disposal of the appeal, reference or revision.”

11. In view of my above discussion, I am of the considered view that in the given facts and circumstances of the case, learned ACMM rightly condoned the delay in entertaining the application under section 456(1) of Cr. P.C. of the respondents. Here, it may also be noted that it is only that the delay in filing the application that has been condoned and no order of restoration of possession has been passed by the learned ACMM. Needless to state that before passing any order of restoration of possession of immovable property to the respondents, the trial court would have to satisfy about the availability of the ingredients of sub section (1) of section 456 Cr.P.C. The appellant would have an opportunity to contest the said application.

12. The petition, in view of the above, is dismissed.

**M.L. MEHTA
(JUDGE)**

November 15, 2011
awanish