

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. MMO No.1022 of 2026

Reserved on: 21.09.2026

Date of Decision: 30.09.2026

Ravinder Kumar**.... Petitioner****Versus**

Bhupesh Gupta**.... Respondent**

Coram***Hon'ble Mr Justice Rakesh Kainthla, Judge.******Whether approved for reporting? No.*****For the petitioner : Mr Prikshit Rathour, Advocate.****For respondent : Nemo**

Rakesh Kainthla, Judge

The petitioner has filed the present petition against the order dated 15.06.2026, passed by learned Chief Judicial Magistrate Nalagarh, District Solan, H.P. (learned trial Court), vide which the application for condonation of delay in filing the complaint was allowed. (*The parties shall hereinafter be referred to in the same manner as they were arrayed before the learned trial Court for convenience*).

2. Briefly stated, the facts giving rise to the present petition are that the complainant filed a complaint before the learned trial Court against the accused for the commission of an offence punishable under Section 138 of the Negotiable Instruments Act (NI Act). It was asserted that the accused and the complainant were known to each other. The accused borrowed ₹30,00,000/- from the complainant. He issued a cheque to return the amount. The complainant presented the cheque before the bank, but it was dishonoured with an endorsement, 'insufficient funds'. The complainant served a notice upon the accused, but the accused failed to repay the money. Hence, the complaint was filed against the accused for the commission of an offence punishable under Section 138 of the NI Act.

3. An application under Section 5 of the Limitation Act was also filed for condoning the delay in filing the complaint. It was asserted that the complainant had engaged an Advocate to issue notice and file the complaint. The Advocate assured the complainant that he would file the complaint within the stipulated period of limitation; however, the complainant found after inquiries that no complaint was filed on his behalf. The applicant/complainant cannot be faulted for the lapse of the

counsel. Hence, it was prayed that the delay in filing the complaint be condoned.

4. The application was opposed by filing a reply asserting that the application does not disclose sufficient cause for condonation of delay. The litigant cannot take advantage of his negligence in pursuing the matter. The application was filed under Section 5 of the Limitation Act. However, a specific provision under Section 142(b) of the NI Act exists for condoning the delay, and the application was not maintainable under Section 5 of the Limitation Act. Hence, it was prayed that the application be dismissed.

5. The learned trial Court held that the application could not be dismissed for mentioning the wrong provision of law. The complaint was silent regarding the actual date of service of notice; therefore, the presumption of service has to be applied, which can be applied after 30 days of the issuance of the notice. The complaint was within the limitation period after applying the presumption. In any case, the delay was only of 10 days, which occurred because of the lapse of the counsel. There was no negligence on the part of the applicant/ complainant. A litigant

cannot be penalised for the lapses of the counsel. Hence, the delay was condoned.

6. Being aggrieved by the order passed by the learned trial Court, the accused/petitioner has filed the present petition asserting that the complainant has not filed the track consignment report or any acknowledgement along with the complaint. The learned trial Court erred in relying upon the presumption under Section 27 of the General Clauses Act. The order passed by the learned trial court was contradictory, because on the one hand the delay was condoned and on the other hand it was stated that the complaint was within limitation. The plea taken by the complainant was not plausible. Therefore, it was prayed that the present application be allowed and the order passed by learned trial Court be set aside.

7. Mr Parikshit Rathour, learned counsel for the petitioner/accused, submitted that the order passed by the learned trial Court is contradictory. It was held on the one hand that the complaint was within limitation and on the other hand the delay was condoned. The reason assigned by the applicant was not plausible and did not constitute a sufficient cause. The

application should have been filed under Section 142(b) of the NI Act, and the application filed under Section 5 of the Limitation Act was not maintainable. Therefore, he prayed that the present petition be allowed and the order passed by the learned trial court be set aside.

8. I have given considerable thought to the submissions made at the bar and have gone through the records carefully.

9. Section 142(b) proviso of the NI Act provides that the Court can take cognisance of the complaint filed after the prescribed period if the complainant satisfies the Court that he had sufficient cause for not filing the complaint within the prescribed period. A specific provision has been enacted by the legislature under the Negotiable Instruments Act, which would override the provisions of Section 5 of the Limitation Act. Therefore, the application should have been filed under Section 142 (b) of the NI Act and not under Section 5 of the Limitation Act.

10. It was submitted that the application under Section 5 of the Limitation Act was not maintainable and the same should have been dismissed. This submission cannot be accepted. It was

laid down by the Hon'ble Supreme Court in *Pruthvirajsinh Nodhubha Jadeja v. Jayeshkumar Chhakaddas Shah*, (2019) 9 SCC 533; (2019) 4 SCC (Civ) 638: 2019 SCC OnLine SC 1308 that mere mentioning of an incorrect provision of law is not fatal if the jurisdiction to pass an order is available to the court. It was observed:

“8. It is well-settled law that mere non-mentioning of an incorrect provision is not fatal to the application if the power to pass such an order is available with the court.”

11. A similar view was taken by the Delhi High Court in *Vijay Kumar Nagpal v. Parveen Kumar Nagpal*, (2022) 1 HCC (Del) 25: 2022 SCC OnLine Del 4, wherein it was observed:

“11. Regarding the objection raised by the learned counsel for the defendant that the present application is filed under Section 151 CPC instead of under Order 9 CPC. However, under Section 151 CPC, this Court has inherent power to consider an application wherein a wrong provision is mentioned. It cannot be an obstacle to granting the relief as made out from the contents of the application, as held in the *Gotham Entertainment Group LLC case* [*Gotham Entertainment Group LLC v. Diamond Comics (P) Ltd.*, 2009 SCC OnLine Del 4009].

12. It is trite that quoting a wrong statutory provision does not create a bar and stand in the way of considering the application, as held in the *Nitish Arora case* [*Nitish Arora v. State of Delhi*, 2007 SCC OnLine Del 142: (2007) 141 DLT 21]. Thus, on this aspect, this Court is not convinced by the contention of learned counsel for the defendant.

13. Undisputedly, the applicant plaintiff filed the present suit for partition in which he is claiming a 60% share in the suit property and recovery of Rs 86,50,000 with interest thereon, which is the subject matter of trial. However, at this stage, the claim cannot be considered as false and based on a concocted story.”

12. Therefore, the application could not have been dismissed on the ground that the wrong provision of law was mentioned when the court exercising jurisdiction could have exercised it under some other provision of law.

13. The Complainant/applicant specifically asserted that he had handed over the documents to his learned counsel, who had issued the notice with an instruction to file the complaint within the period of limitation. The learned counsel had assured him that he would file the complaint. However, the complainant found on enquiry that no such complaint was filed. Therefore, as per the averments in the application, the delay occurred because the learned counsel had not filed the complaint. The learned trial Court had rightly held that the litigant cannot be faulted for the negligence of his Advocate and the complainant had a reasonable cause for not filing the complaint within limitation.

14. The learned trial Court also held that no proof of service was filed and the complaint was within limitation. It was

submitted that the complainant had withheld the track consignment report or the acknowledgement card to gain the period of limitation. This is a plea to be adjudicated during the trial, and nothing is required to be said at this stage. The learned trial Court would also have been well advised not to dilate on this aspect at this stage, because it is a matter of proof whether the notice was duly served upon the accused and, if so, on which date, and it was premature to speculate on this aspect without recording the evidence. Thus, the findings recorded by the learned trial court regarding the complaint within limitation are held to be unnecessary for the adjudication of the application and will not prejudice any person from establishing the respective pleas taken by them.

15. No other point was urged.

16. The present petition has been filed under Section 528 of the CrPC, which is an extraordinary jurisdiction vested with the Court. This jurisdiction is to be exercised sparingly. The present matter does not show any reason for exercising the jurisdiction vested in this Court. Hence, the present petition fails, and it is dismissed.

17. The observations made hereinabove are regarding the disposal of this petition and will have no bearing whatsoever on the merits of the case.

(Rakesh Kainthla)
Judge

30th September, 2026
(Ravinder)