

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.T.RAVIKUMAR

TUESDAY, THE 31ST DAY OF MARCH 2015/10TH CHAITHRA, 1937

Crl.Rev.Pet.No. 392 of 2015 ()

AGAINST COMMON ORDER DATED 25.02.2015 IN CMP 185/2015 AND CMP
275/2015 IN CC.515/2012 OF JFCM,KATTAPANA

REVISION PETITIONER(S)/2ND ACCUSED:

JOHNY MATHAI
S/O.MATHAI, CHEERAMKUNNEL HOUSE, KATTAPANA VILLAGE
KATTAPANA KARA.

BY ADVS.SRI.BABU KARUKAPADATH
SMT.M.A.VAHEEDA BABU
SRI.K.A.NOUSHAD
SRI.P.U.VINOD KUMAR
SRI.KANDAMPULLY RAHUL
SRI.MITHUN BABY JOHN
SRI.J.RAMKUMAR

RESPONDENT(S)/COMPLAINANT/1ST AND 3RD ACCUSED:

1. STATE OF KERALA
REPRESENTED BY THE SUB INSPECTOR OF POLICE
KATTAPANA POLICE STATION
THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA
ERNAKULAM- 682 031.
2. K.J.CHACKO,
S/O.JOSEPH, KARUKAPPALLIL HOUSE, VALLAKADAVU KARA
KATAPPANA VILLAGE -685 001.
3. C.K.PREMAN,
S/O.KRISHNABAVA, THULASEEMADAM HOUSE
VENGALLUR VILLAGE, THODUPUZHA TALUK 686 001

R1 BY PUBLIC PROSECUTOR SRI.N.SURESH

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
31-03-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

CRL.R.P.392 OF 2015

APPENDIX

PETITIONER'S EXHIBITS:

ANNEXURE A1:A TRUE COPY OF THE FINAL REPORT/CHARGE IN C.C.NO.515/2012
OF THE HON'BLE JUDICIAL FIRST CLASS MAGISTRATE COURT,
KATTAPANA.

ANNEXURE A2:A TRUE CERTIFIED COPY OF THE COMMON ORDER DATED
25.02.2015 IN C.M.P.NO.185/2015 AND C.M.P.NO.275/2015 IN
C.C.NO.515/2012 OF THE HON'BLE JUDICIAL FIRST CLASS
MAGISTRATE COURT, KATTAPANA.

RESPONDENTS' EXHIBITS:NIL

//TRUE COPY//

P.A.TO JUDGE

“C.R”

C.T. RAVIKUMAR, J.

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CRL.R.P. No.392 OF 2015

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Dated this the 31st day of March, 2015

ORDER

This revision petition is directed against the common order dated 25.2.2015 in C.M.P.Nos.185 and 275 of 2015 in C.C.No.515 of 2012 passed by the Court of Judicial First Class Magistrate, Kattappana. The revision petitioner is the second accused therein. He moved the said petitions along with other accused with the prayer to drop the proceedings in the calender case. Earlier, F.I.R was registered against the revision petitioner on 22.12.2010 and the final report was filed on 10.04.2011. Cognizance of the aforesaid offences was taken and it was taken on file and registered as C.C.No.515 of 2012 and the revision petitioner was charged for commission of offence punishable under section 406 read with section 34 IPC.

2. The case of the prosecution is that the Board Members of the Idukki District Wholesale Consumer Store bearing No.K.444 viz., the Managing Director and Salesman, have committed breach of trust in respect of the property of the said consumer store and thereby caused a loss to the tune of ₹9,06,904.34 during the period between 2004 and 31.12.2006. In C.C.No.515 of 2012, the revision petitioner filed the above miscellaneous petition, in the year 2015, taking up the contention that it was after the period of limitation that cognizance was taken in the year 2012 and therefore, it is bad in law in the light of the provisions under section 468, Cr.P.C. The learned Magistrate after hearing the revision petitioner and the learned Assistant Public Prosecutor considered the aforesaid question and passed the impugned order dismissing the petition and condoning the delay. The said order is under challenge on various grounds.

3. I have heard the learned counsel for the revision petitioner and the learned Public Prosecutor. As noticed hereinbefore, the

contention of the revision petitioner is that, he along with the co-accused are charge sheeted for the commission of offence punishable under section 406 read with section 34 of the Indian Penal Code and since the maximum sentence that could be imposed for the offence under section 406 IPC is only three years, the period of limitation prescribed under section 468 (2)(c) Cr.P.C would apply in the matter of taking of cognizance of the said offence and therefore, it ought not have been taken after the period of limitation viz., after three years. Per contra, the learned Public Prosecutor contended that no legal infirmity or illegality could be attributed in the matter of condoning the delay and also in taking cognizance of the aforesaid offence against the revision petitioner and therefore, this revision petition is liable to be dismissed.

4. Indisputably, in this case, the final report was laid beyond the period of limitation. Paragraph 4 of the impugned order would reveal that the learned Magistrate had perused the prosecution records

and found that the final report was filed beyond the period of limitation and also that the prosecution had not explained the delay in filing the final report. Evidently, it is after taking note of all such aspects and taking note of the nature of the offence alleged against the revision petitioner and the co-accused and upon arriving at the conclusion that it is necessary to condone the delay in the interest of justice that the impugned order was passed.

5. Certain aspects emerging from the very impugned common order require consideration while considering its sustainability. It would reveal that even prior to condoning the delay in filing the final report, cognizance of the offence under section 406, IPC was taken and it was registered as C.C.No.515 of 2012. Though cognizance was taken and the case was taken on file and registered as C.C.No.515 of 2012 as early as in the year 2012, the revision petitioner did not challenge the same and in fact, he took up the challenge against the said action in taking cognizance only now when his application for

dropping the proceedings on the ground of taking cognizance of the offence under section 406, IPC after the period of limitation, was dismissed as per the impugned order dated 25.2.2015. In the contextual situation, for a proper consideration and disposal of the case it is relevant to refer to sections 468, 469, 472 and 473 of the Code of Criminal Procedure. Section 468, Cr.P.C reads as follows:-

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 category specified in sub-section (2), after the 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.

6. A disputed question would emerge in the contextual situation though, in view of the facts and circumstances, it would not assume much relevance in this case. The question is whether an offence punishable under section 406, IPC is a continuing offence or it is a non-continuing offence. Needless to say that if it is a continuing offence no question of limitation could arise in the light of the provisions under section 472, Cr.P.C and if it is not a continuing offence the provisions under section 468, Cr.P.C would operate and in such eventuality, there would be legal bar in the matter of taking cognizance after the expiry of the limitation period. Still, it is legally permissible to take cognizance in such circumstances in terms of the power under section 473, Cr.P.C.

7. Now, reverting to the question regarding the nature of offence punishable under section 406, IPC, there are divergent decisions on the said point. While discussing the question as to when an offence could be said to be a continuing offence, the Hon'ble Apex

Court in the decision in **Bhagirath Kanoria and others v. State of M.P [AIR 1984 SC 1688]** quoted with agreement paragraph 5 of the decision in **State of Bihar v. Deokaran Nenshi (AIR 1973 SC 908)** and it reads thus:-

5.Continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasioned on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

8. After quoting the said passage, the Hon'ble Apex Court

went on to hold thus:-

“This passage shows that apart from saying that a continuing offence is one which continues and a non-continuing offence is one which is committed once and for all, the Court found it difficult to explain as to when an offence can be described as a continuing offence. Seeing that difficulty, the Court observed that a few illustrative cases would help to bring out the distinction between a continuing offence and a non-continuing offence. The illustrative cases referred to by the Court are three from England, two from Bombay and one from Bihar.”

9. The Hon'ble Apex Court referred to the illustrative cases referred to in **Deokaran Nenshi's** case (supra) and it was held further that the question whether a particular offence is a continuing offence or not must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and above all, the purpose which is intended to be achieved by constituting the particular act as an offence.

10. As noticed hereinbefore, a deep consideration of that question is absolutely uncalled for in the instant case owing to the fact

that as per the impugned order, now, the delay was condoned and the petition filed to drop the proceedings citing the aforesaid reason, was dismissed. Therefore, even if the question whether it is a continuing offence is answered in the negative its effect will stand effaced by the impugned order. Evidently, the court below found that there was delay in the matter of filing the final report and then condoned it without referring to any particular provision in the Code. There can be no doubt with respect to the position that non-mentioning of the provision in the matter of exercising a particular power would become inconsequential if an enabling provision for such exercise of power, in truth, available at the time of its exercise. In the light of the specific contention of the revision petitioner that the prosecution had not filed any application for condoning the delay the question is whether there is any enabling provision to condone the delay and even if it is there whether it could be condoned without any application in that regard. I have already referred to the enabling provision in the Code viz., section 473, Cr.P.C. Indubitably, the provisions under section 473,

Cr.P.C empowers courts to take cognizance of an offence even after the expiry of the period of limitation, notwithstanding anything contained in the earlier provisions in Chapter XXXVI, of the Code. The power under section 473 is one for extending the period of limitation and it is certainly an exception to section 468 which bars the court from taking cognizance of an offence if it is beyond the prescribed period of limitation provided under sub-section 2 of section 468, Cr.P.C. It is appropriate to refer to section 473 Cr.P.C in this context and it reads thus:-

“473.Extension of period of limitation in certain cases-Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may make 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 interests of justice.”

11. Section 473 Cr.P.C is a non-obstante provision and it confers power on court for taking cognizance of an offence even after the expiry of the period of limitation in two eventualities viz.,

- i)if the court is satisfied on the facts and in the circumstances of the case that the delay has been properly explained, or
- ii)that it is necessary to do so in the interest of justice.

12. There cannot be any doubt with respect to the position that whenever a complaint or charge sheet is filed before a court, it is incumbent on that court to see at the first instance as to whether section 468, Cr.P.C is attracted or not in the fitness of things. If the provisions under section 468, Cr.P.C is attracted to the offence alleged in the complaint or in the charge sheet, as the case may be, it would be in the interest of justice and also in consonance with the principles of natural justice to register the application as a miscellaneous case and to issue notice to the person/persons accused of the offence/ offences with a view to give an opportunity of being heard prior to the passing of the order granting or rejecting the prayer. Though there is no rule of law requiring the court to issue notice to the proposed accused on an application for condoning the delay, interest of justice and principles of natural justice require such notice before the disposal of

such an application. In short, though the court is not obliged to give an opportunity to the proposed accused of being heard prior to the passing of an order condoning the delay and taking cognizance, it is only appropriate to issue notice and afford such an opportunity in the interest of justice and to follow the principles of natural justice. In this case, though there was no application for condoning the delay, evidently, the delay was condoned only after hearing the revision petitioner and the other accused while considering application filed for the purpose of dropping the proceedings on the ground that cognizance was taken after the period of limitation. In other words, they were afforded with opportunity to advance the arguments that in this case the period of limitation in terms of section 468, Cr.P.C is applicable and hence cognizance could not have been taken after expiry of the period of limitation. The factual position emerging in this case would reveal that delay was condoned only after cognizance of offence under section 406 IPC was taken. Therefore, another question also would crop up for consideration as to whether the power

to condone the delay could be exercised even after taking cognizance. That question came up for consideration before this Court in **R.V.Kunhiraman v. Inspector of Police, S.P.E, C.B.I, Cochin [1998 Crl.L.J 3679 (Ker.)]**. In fact the said position was settled by the Hon'ble Apex Court earlier in the decision in **Sukhdev Raj v. State of Punjab [1994 SCC Crl. 1480]**. In the decision in **R.V.Kunhiraman's** case (supra), it was held that the power to condone delay could be exercised even after taking cognizance as condonation of delay is not a pre-condition to take cognizance of offence after the period of limitation. In **Sukhdev Raj's** case (supra), it was held:-

“In the appeal before the High Court the only question raised was that though occurrence took place on 31.5.1974 challan was filed on 29.8.1977, therefore, no cognizance could have been taken in view of Section 468 CrPC The High Court has considered this aspect and after referring to Section 473 CrPC held that in the facts and circumstances of the case the court can take cognizance if the delay has been properly explained or that it is necessary to do so in the interest of justice. In any event in this

case an application was filed for condoning the delay and also explaining the delay at a later stage. According to the learned counsel for the appellant such an application was filed only after almost at the time of conclusion of trial and before judgment was delivered. It may be noted Section 473 CrPC does not in any clear terms lay down that the application should be filed at the time of filing challan itself. The words “so to do in the interest of justice” are wide enough and the court accepted the explanation. Therefore, there are no merits in this appeal. The appeal is accordingly dismissed.”

13. A perusal of section 473 Cr.P.C itself would reveal that power is conferred thereunder to take cognizance of an offence after the expiry of the period of limitation provided for the particular offence, evidently under section 468, Cr.P.C and subject to the satisfaction of one or both of the aforementioned eventualities viz., satisfaction of the court on the facts and in the circumstances of the case that the delay has been properly explained, or that it is necessary to take cognizance in the interest of justice. In this context, it is

relevant to refer to a decision of the High Court of Madras in **Sulochana v. State Registrar** [1978 Crl.L.J 116 (Mad.)]. It was held thereunder that a petition for condonation of delay could be filed at any point of time before the conclusion of the trial and even when no such petition is filed the delay could be condoned by the court in suitable cases. A scanning of section 473 Cr.P.C would indubitably reveal the existence of the power of court to condone the delay and also that it could be exercised suo motu. Though section 473 Cr.P.C is in the nature of an exception to 468 Cr.P.C, it is proper to consider the question of condonation of delay prior to the taking of cognizance of an offence, in the manner aforesaid. At the same time, in the light of the decision of the Hon'ble Apex Court in **Sukhdev Raj's** case (supra) and **R.V.Kunhiraman's** case (supra), the fact that the delay was condoned after taking cognizance cannot be a reason for interfering with the order condoning the delay if the discretion in condoning the delay has been exercised properly. In the light of the above discussions, what survives for further consideration is whether

the discretion available under section 473 Cr.P.C was exercised properly by the learned Magistrate. I have already adverted to the case of the prosecution. Essentially, it is one of commission of breach of trust in respect of the property of Idukki District Wholesale Consumer Store and causing loss to it to the tune of ₹9,06,904.34. There cannot be any doubt that ends of justice has to reign supreme. The learned Magistrate considered the question whether interest of justice demands condonation of delay. Such consideration in detail with application of mind is reflected in the order itself. Paragraph 4 of the impugned order is worthy to be extracted in this context. It reads thus:-

Heard both sides. Perused the prosecution records. Prosecution case is that the petitioners are the Board Members as well as Managing Director and Salesman of Idukki District Wholesale Consumer Store bearing No.K.444. Between 2004 and 31.12.06 they committed criminal breach of trust in respect of the property of the said consumer store and thereby caused loss to the tune of Rs.9,06,904.34. Prosecution records reveals that the final report was filed beyond the period of limitation. Prosecution did not explain the delay for filing the final report. It is well

settled that even if the prosecution did not explain the delay, court can condone the delay if it is necessary in the interest of justice. The court has to consider the facts and circumstances of the case and the position of the defacto complainant. It is the duty of the court to protect the obstructed and punish the obstructer. In this case the full details regarding the offence as well as offenders were came to know on the basis of an enquiry report submitted by Co-operative Society Assistant Registrar (General), Idukki (CW2). That report was submitted in the year 2007. This case was registered on the basis of said report. That report was forwarded to Superintendent of Police, Idukki by the Co-operative Society Joint Registrar (General), Idukki (CW1). The covering letter forwarded by CW1 shows that in the year 2007 itself the matter was already intimated to Superintendent of Police, Idukki. It shows that there was no willful latches or negligence on the part of the defacto complainant. Idukki District Wholesale Consumer Store is a legal entity and it can act only through human agency. The offence committed against it will affect public interest. Under the above mentioned facts and circumstances I am of the opinion that in the interest of justice it is necessary to condone the delay. Thus this petition is liable to be dismissed.

A careful scanning of paragraph 4 of the impugned order would

reveal that the question whether interest of justice demands condonation of delay has been considered by the learned Magistrate and discretion in condonation of delay available by virtue of the provisions under section 473 Cr.P.C was exercised properly with application of mind. When such a power is available under section 473 which in essence is in the nature of exception to 468 Cr.P.C, the contention of the revision petitioner that the delay could not have been condoned and cognizance of offence under section 406 IPC could not have taken against him in the light of section 468 Cr.P.C cannot be sustained. While considering matters like this under revisional jurisdiction it is apposite to bear in mind the decision in **State of Kerala v. Govinda Kurup Karunakaran [1986 (1) Crimes 290 (ker.)]**. It was held therein that the courts are established and exist for dispensation of justice, according to law and for that purpose in spite of lapse of time, courts would be justified in extending its power in appropriate cases. The long and short of the discussions as above is that there is no merit in this revision petition and that the court below

was perfectly justified in condoning the delay though after taking cognizance in this matter. This revision petition is liable to fail. Accordingly, it is dismissed. It is made clear that this Court has only decided the legality and correctness of the impugned order in the light of the relevant provisions and authorities on the subject and has not made any observation regarding the culpability of the revision petitioner or in that matter that of any other accused.

Sd/-

**C.T. RAVIKUMAR
(JUDGE)**

spc/

C.T. RAVIKUMAR, J.

JUDGMENT

September, 2010

