

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.209 OF 2016
IN
CRIMINAL REVISION APPLICATION (STAMP) NO.252 OF 2016

FLORA SAINI)...APPLICANT

V/s.

THE STATE OF MAHARASHTRA & ANR.)...RESPONDENTS

Ms.Snehal Khainar i/b. Ms.Anandini Fernandes, Advocate for the Applicant.

Mr.P.H.Gaikwad-Patil, APP for the Respondent - State.
None for Respondent No.2.

CORAM : A. M. BADAR, J.

DATE : 22nd MARCH 2017

P.C. :

1 This is an application for condonation of delay in filing the revision petition challenging the order dated 25th August 2009 passed by the learned 5th Ad-hoc Assistant Sessions Judge, Greater Bombay, Mumbai, by allowing the application at Exhibit 6 moved

by respondent no.2 / original accused and thereby discharging him of the offence punishable under Section 376 of the IPC. The delay occasioned in challenging the order dated 25th August 2009 at the instance of the present applicant / the first informant is reported to be about 6 years and 129 days.

2 Heard the learned advocate appearing for the applicant / the first informant. She argued that the quantum of delay is not material but what is relevant is the reason for seeking condonation of delay. In submission of the learned advocate for the applicant / the first informant, if the applicant / the first informant makes out a sufficient cause then the quantum of delay pales into insignificance. The learned advocate further argued that in the case in hand, on the basis of the FIR lodged by the applicant / the first informant, the crime in question came to be registered against respondent no.2 / original accused and on the basis of statement of the applicant / the first informant Section 376 of the IPC came to be added to the case diary of the crime. The learned advocate further argued that ultimately respondent

no.2 / original accused was charge-sheeted for several offences including the one punishable under Section 376 of the IPC and on committal of the case, respondent no.2 / original accused had moved an application titled as "Application for remitting the matter to the Magistrate's Court." By construing that application as an application for discharge from the offence, the learned 5th Ad-hoc Assistant Sessions Judge allowed that application by discharging respondent no.2 / original accused from the offence punishable under Section 376 of the IPC. According to the learned advocate appearing for the applicant / the first informant, the first informant was an essential party for adjudication of the matter of discharge from the offence punishable under Section 376 of the IPC. However, she has not been noticed by the learned 5th Ad-hoc Assistant Sessions Judge, Greater Bombay, Mumbai, while deciding the application at Exhibit 6, and as such, the applicant / the first informant was not aware about discharge of respondent no.2 / original accused. With this, the learned advocate prayed for condonation of delay in filing the revision petition.

3 Record shows that on 19th September 2016, Mr.P.J.Desai, the learned advocate appeared for respondent no.2 / original accused and by consent, the application was adjourned to subsequent date. Apart from this, it is seen from the record that respondent no.2 / original accused by appearing in the matter, has filed his counter affidavit dated 9th August 2016 opposing the application for condonation of delay in filing the revision petition. None appeared for respondent no.2 / original accused today when the matter is called out for hearing.

4 The learned APP appears for respondent no.1 / State of Maharashtra i.e. the prosecuting agency. He submits that appropriate order may be passed in the matter.

5 I have carefully considered the submissions so advanced by the learned advocate for the applicant / the first informant. I have also perused the record made available including the charge-sheet in Crime No.42 of 2007 registered at the instance of revision petitioner / the first informant. It is seen

that charges for offences punishable under Sections 376, 417, 326, 325, 406, 427, 506(2) of the IPC came to be leveled against respondent no.2 / original accused on completion of investigation. On committal, Sessions Case bearing no.268 of 2009 came to be registered against respondent no.2 / original accused in pursuance to the FIR lodged by the revision petitioner / the first informant. It is apparent from the record that during pendency of the sessions case, respondent no.2 / original accused moved an application which is titled as the application for remitting the matter to the Magistrate's court. The form in which the application is made, so also the title of the application is not relevant. Suffice to state that by moving this application at Exhibit 6, what is sought virtually is discharge of respondent no.2 / original accused from the offence punishable under Section 376 of the IPC. The grounds raised were to the effect that no offence punishable under Section 376 of the IPC is made out as even in the FIR there are no allegations in respect of the offence punishable under Section 376 of the IPC. It was further averred in the application that history mentioned to the Medical Officer was that of a love affair and

subsequently after five days after lodging the FIR allegations of rape were made by the prosecutrix.

6 It is seen that the learned trial court called say of the learned APP on the application at Exhibit 6 by which literally discharge was claimed. It is also clear from the record that subsequently the learned trial court heard the learned advocate appearing for respondent no.2 / original accused as well as the learned APP and decided the application at Exhibit 6 vide order dated 25th August 2009, which is sought to be impugned by filing the revision petition, in which the present application for condonation of delay is moved. Perusal of the application at Exhibit 6 so also the order dated 25th August 2009 passed by the learned 5th Ad-hoc Assistant Sessions Judge, Greater Bombay, Mumbai, allowing that application nowhere shows that the applicant / revision petitioner / the first informant was noticed or heard in the matter of discharge of respondent no.2 / original accused from the offence punishable under Section 376 of the IPC leveled against him at the instance of the present applicant / revision petitioner / the first informant.

7 The reply affidavit placed on record by respondent no.2 / original accused reflects the stand of respondent no.2 / original accused in opposing the application for condonation of delay. Respondent no.2 / original accused averred that the present applicant / revision petitioner / the first informant had filed transfer application bearing no.170/TA/2014 before the learned Chief Metropolitan Magistrate, Esplanade, Mumbai, seeking transfer of the case in which he has averred about dropping of the charge for the offence punishable under Section 376 of the IPC with further averment that she is inclined to approach this court. Therefore, it is contended by respondent no.2 / original accused that the applicant / the first informant had sufficient knowledge about the fact of discharge of respondent no.2 / original accused from the offence punishable under Section 376 of the IPC. It is further averred that on rejection of the application for transfer of the case, the present applicant / the first informant has also made serious allegations against the learned Metropolitan Magistrate where her case was pending. Other averments regarding other litigations between the parties are also

made in the revision petition but which are not material or relevant for deciding the instant application.

8 It is a basic principle of jurisprudence that the justice should not only be done but it must be seen to have been done. In that sense, the principle *audi alteram partem* assumes significance. It is necessary that all affected parties should be heard prior to passing any adverse order in the matter. Viewed from this angle, *prima facie*, it appears that it was incumbent on the part of the learned trial court to issue notice of the application at Exhibit 6, by which discharge from the offence punishable under Section 376 of the IPC was claimed, to the present applicant / revision petitioner, she being the first informant alleging commission of offence punishable under Section 376 of the IPC against her by respondent no.2 / original accused. It appears that without noticing the revision petitioner / the first informant and without hearing the revision petitioner / the first informant, the learned 5th Ad-hoc Assistant Sessions Judge, Greater Bombay, Mumbai, passed an order on 25th August 2009 by which the application at Exhibit 6

came to be allowed and respondent no.2 / original accused came to be discharged from the offence punishable under Section 376 of the IPC. This aspect is of prime importance and will have to be kept in mind while deciding the instant application for condonation of delay.

9 It appears that the present applicant / revision petitioner had moved an application bearing no.CC/170/TA/2014 seeking transfer of her case from the file of the Metropolitan Magistrate, Railway Mobile Court, Andheri, to some other court, wherein her pleadings reflected that she was aware about discharge of respondent no.2 / original accused. Even if it is accepted that subsequently the applicant / revision petitioner / the first informant was knowing about discharge of respondent no.2 / original accused by the learned trial court, that does not prevent her from seeking condonation of delay in filing a revision petition challenging the discharge of respondent no.2 / original accused. It is case of the applicant / revision petitioner / the first informant that because of the incident in question, she suffered

severe depression and was unable to think and act rationally. This aspect requires consideration from the angle that the offence alleged is one punishable under Section 376 of the IPC which caused severe psychological as well as physical trauma to the victim.

10 The Hon'ble Apex Court in the matter of **Collector Land Acquisition, Anantnag & Anr. vs. Mst. Katiji & Ors.**¹ has given the following guidelines for condonation of delay, which read thus:

- “1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.
2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.
3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay?

1 1987 AIR 1353

The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.”

11 It is held by catena of judgments by Hon'ble Apex Court that the words “sufficient cause” deserves liberal interpretation and when technicalities are pitted against the cause of substantial justice, then, the cause of substantial justice should always get precedence. In the case in hand, quantum of delay is of no consequence because the applicant / revision petitioner /

the first informant was not noticed by the learned 5th Ad-hoc Assistant Sessions Judge, Greater Bombay, Mumbai, while entertaining the application for discharge by the respondent no.2 / original accused. By condoning the delay, the ultimate result will be examination of order of discharge passed by the learned trial court within the parameters of the limited revisional jurisdiction of this court. No prejudice would be caused to respondent no.2 / original accused if the matter is decided by this court on merit by condoning the delay.

12 In the result, by holding that the applicant / revision petitioner / the first informant was prevented by sufficient cause in not preferring the revision petition within limitation for the reasons stated in her application, I proceed to pass the following order :

- i) Delay in filing the revision petition is condoned.
- ii) The application is accordingly disposed of.

(A. M. BADAR, J.)