

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL REVISION APPLICATION NO.96 OF 2020

Ganesh s/o Vithalrao Tapkire,
Age 40 years, Occupation Driver,
R/o Ward No.7, Morge Vasti,
Shrirampur Tq. Shrirampur
Dist. Ahemadnagar.

...Applicant

VERSUS

The State of Maharashtra.

...Respondent

.....
Advocate for Revision Applicant : Mr. R. P. Mote.
APP for Respondent-State : Mr. S. B. Pulkundwar.
.....

CORAM : SMT.VIBHA KANKANWADI, J.

**Date of Reserving The Order :
28-09-2020**

**Date of Pronouncing the Order :
24-11-2020**

ORDER :

1. Present revision application has been filed by the accused who has been convicted in Summary Criminal Case No.442 of 2009, by learned Judicial Magistrate, First Class, Rahata for allegedly committing offence punishable under Section 304-A, 279, 337, 338 of the Indian Penal Code and under Section 184 of the Motor Vehicles

Act. He wanted to challenge the said conviction in appeal before the learned Additional Sessions Judge, Kopergaon, however there was delay of 10 days and, therefore, he had filed Criminal application for Condonation of Delay No.25 of 2016. It appears that, notice was issued to the respondent by order dated 28-12-2016. The State who was the only opponent, failed to file say and, therefore, an order came to be passed on 17-01-2018 for proceeding the application without say. However, it appears that on the next date i.e. on 19-01-2018, the applicant as well as his Advocate were absent and, therefore, that application came to be dismissed. Thereafter, it appears that, again a delay condonation application was filed bearing 02 of 2018 for getting delay of 423 days condoned in filing the appeal. The prosecution objected the said application on the ground for reason for condoning the delay is not legal and reasonable. After hearing both sides, the learned Additional Sessions Judge has rejected the application on 06-02-2020. Hence, present revision.

2. Heard learned Advocate Mr. R. P. Mote for revision applicant and learned Additional Public Prosecutor Mr. S. B. Pulkundwar for respondent-State.

3. It has been vehemently submitted on behalf of the applicant that, though the first application was filed wherein the delay was only ten days, it appears that, due to some mistake or otherwise that application came to be dismissed and the learned Advocate representing the revision applicant was of the view that application for restoration of that application which has been dismissed is not maintainable, and therefore, he filed second application. While giving reason for the delay of 423 days, it was submitted that the applicant is a driver and was out of station i.e. Kerala from 18-11-2016 till 17-12-2016. The applicant is the only earning member of the family, and therefore, he prayed for the said condonation of delay which ought to have been allowed. The applicant intends to challenge his conviction in appeal which is his substantial right and it could not have been taken away by the learned Additional Sessions Judge in such a way. This Court together with the powers under Section 397 of Code of Criminal Procedure, can use the power under Section 401 and 482 of the Code of Criminal Procedure to set aside the said order passed by the learned Additional Sessions Judge. He relied on the decision in *Krishnan v. Krishnaveni and another*, reported in *AIR 1997 (SC) 987 : 1997 (1) Mh.LJ. 509*, wherein it has been held that,

“Though revision before High Court under Section 397 (1) of Code of Criminal Procedure is prohibited under Section 397 (3), inherent powers of High Court is still available under Section 482 of Code of Criminal Procedure and its paramount power of continuous superintendence of High Court under Section 483 of Code of Criminal Procedure.”

4. Per contra, the learned Additional Public Prosecutor submitted that, the second application for condonation of delay was not at all maintainable. Even if for the sake of arguments it is accepted that it was maintainable, yet taking into consideration the reason that was mentioned, the learned Additional Sessions Judge was justified in holding that he has not shown reasonable ground to condone the delay.

5. At the outset, it will have to be observed with pains that learned Additional Sessions Judge has not efforts to master the facts giving rise to the application before him. Therefore, it has become inevitable for this Court to consider the facts in detail. It is to be noted that the present revision applicant, who was the accused in Summary Criminal Case No.442 of 2009, was convicted by the Judicial Magistrate, First Class, Rahata on 18-11-2016. He wanted to challenge the said conviction, and therefore, filed appeal along with

application for condonation of delay bearing No.25 of 2016. At that time there was delay of only 10 days. Notice was issued to the respondent-State but the State failed to file say. That means, whatever was stated in the application for condonation of delay, ought to have been accepted by the learned Additional Sessions Judge as a good ground to condone the delay as there was no challenge, and therefore, without even the presence of the applicant or his Advocate, the application could have been allowed by the learned Additional Sessions Judge. It appears that on 19-01-2018 the said application has been dismissed in default. In catena of Judgments, the Hon'ble Apex Court as well as this Court has taken a view that applications for condonation of delay should be liberally construed and the Courts need not insist upon the technical issues. When there was absolutely no challenge from the other side to the application for condonation of delay and the duration of delay was rather small, there was no hurdle for the learned Additional Sessions Judge to accept and allow the said application.

6. It appears that, after that application for condonation of delay was dismissed in default, due to the impression of the learned Advocate for the applicant that he cannot file an application for

restoration of the dismissed application for condonation of delay, a second application has been filed. We may go into that aspect as to whether that recourse was available to the applicant or not, yet the fact remains that as fresh application was filed for condonation of delay, the period of limitation would have started from 18-11-2016, i.e. when the applicant was convicted. Secondly, the learned Additional Sessions Judge has not dismissed the second application on the ground that it was not maintainable. Thus, by that time the delay has been computed at 423 days. The learned Additional Sessions Judge has totally failed to consider the period which the applicant was required to spend on the prosecution of his earlier application for condonation of delay. That first application was filed on 28-12-2016 and was dismissed in default on 19-01-2018. The second application has been filed on 14-02-2018. Under such circumstance the effective period which should have been considered by the learned Additional Sessions Judge was from 19-01-2018 to 14-02-2018 which comes to 26 days, which can be said to be negligible. There is absolutely nothing on record to show that because of the delaying tactics by the applicant, the decision of the earlier application was dragged from 28-12-2016 to 19-01-2018. The learned Additional Sessions Judge ought to have given due

regard to the prompt prosecution by the applicant in pursuing the earlier application. The application was directed to be proceeded without the say of the respondent i.e. prosecution by order dated 17-01-2018. That means, say was not at all filed by the prosecution from the date which was returnable in view of notice directed to be issued by order dated 28-12-2016 till 17-01-2018. Those days which were spent by the applicant in prosecuting earlier application, ought to have been deducted by the learned Additional Sessions Judge from the total period of 423 days. The order that has been passed now rejecting the application appears to be without proper application of mind. At the cost of repetition it can be said that when the matter was directed to be proceeded without say by order dated 17-01-2018 and the matter was kept on 19-01-2018, that is immediate next date, the concerned Court could have either adjourned the matter due to the absence of the applicant and his Advocate or could have straightway allowed that application as the contentions had gone unchallenged on record. Absence of one day need not be harshly considered when it comes to application for condonation of delay. Further from the wordings and the order dated 19-01-2018 it appears that the order was passed around 03.30 p.m. When the Courts are expected to be lenient while

deciding application under Section 5 of the Limitation Act, such a hurry is not is not expected.

7. From the impugned order which has been passed on 06-02-2020 it also appears that an opportunity to lead evidence was not granted to the applicant as there is no reference either to the evidence or to the pursis that might have been passed if the applicant would have expressed not to lead any evidence. It has been observed in the impugned judgment that,

“Hence, the applicant had to file his appeal along with Criminal Delay Application No.25 of 2016. The said application for delay was dismissed in default as the applicant and his Advocate were continuously absent”. (Stress supplied by me).

Again at the cost of repetition it can be said that, when the order for proceeding the matter without say was passed for the first time on 17-01-2018, till then the presence of applicant and his Advocate might not have been required at all. After that order was passed, it seems to be the next day only, that too within two days i.e. 19-01-2018, when the application came to be dismissed. Under such circumstance, after perusing which documents these observations have been made by the learned Additional Sessions Judge would be a mystery. Even when the second application was filed, that

application ought to have been considered liberally when the intention behind filing those applications was to challenge the conviction. Filing of appeal challenging conviction is definitely a substantial right which cannot be negated by not taking liberal view. In other words, liberal approach ought to have been taken on both the occasions by the Appellate Court.

8. In the aforesaid Judgment of *Krishnan v. Krishnaveni and another* (*Supra*) Hon'ble Supreme Court has observed thus ;

“9. The inherent power of the High Court is not one conferred by the Code but one which the High Court already has in it and which is preserved by the Code. The object of Section 397(3) is to put a bar on simultaneous revisional applications to the High Court and the Court of Sessions so as to prevent unnecessary delay and multiplicity of proceedings. As seen, under sub-section (3) of Section 397, revisional jurisdiction can be invoked by “any person” but the Code has not defined the word ‘person’. However, under Section 11 of the Indian Penal Code, ‘person’ includes any Company or Association or body of persons, whether incorporated or not. The word ‘person’ would, therefore include not only the natural person but also juridical person in whatever form designated and whether incorporated or not. By implication, the State stands excluded from the purview of the word ‘person’ for the purpose of limiting its right to avail the revisional power of the High Court under Section 397(1) of the Code for the reason that the State, being the prosecutor of the offender, is enjoined to

conduct prosecution on behalf of the society and to take such remedial steps as it deems proper. The object behind criminal law is to maintain law, public order, stability as also peace and progress in the society. Generally, private complaints under Section 202 of the Code are laid in respect of non-cognizable offences or when it is found that police has failed to perform its duty under Chapter XII of the Code or to report as mistake of fact. In view of the principle laid down in the maxim Ex debito justitiae, i.e., in accordance with the requirements of justice, the prohibition under Section 397(3) on revisional power given to the High Court would not apply when the State seeks revision under Section 401. So the State is not prohibited to avail the revisional power of the High Court under Section 397(1) read with Section 401 of the Code.”

“10. Ordinarily, when revision has been barred by Section 397 (3) of the Code, a person – accused/ complainant – cannot be allowed to take recourse to the revision to the High Court under Section 397 (1) or under inherent powers of the High Court under section 482 of the Code since it may amount to circumvention of the provisions of Section 397 (3) or Section 397 (2) of the Code. It is seen that the High Court has suo motu power under Section 401 and continuous supervisory jurisdiction under Section 482 of the Code. So, when the High Court on examination of the record finds that there is grave miscarriage of justice or abuse of process of the courts or the required statutory procedure has not been complied with or there is failure of justice or order passed or sentence imposed by the Magistrate requires correction, it is but the duty of the High Court to have it corrected at the inception lest grave

miscarriage of justice would ensue. It is, therefore, to meet the ends of justice or to prevent abuse of the process that the High Court is preserved with inherent power and would be justified, under such circumstances, to exercise the inherent power and in an appropriate case even revisional power under Section 397 (1) read with Section 401 of the Code. As stated earlier, it may be exercised sparingly so as to avoid needless multiplicity of procedure, unnecessary delay in trial and protraction of proceedings. The object of criminal trial is to render public justice, to punish the criminal and to see that the trial is concluded expeditiously before the memory of the witness fades out. The recent trend is to delay the trial and threaten the witness or to win over the witness by promise or inducement. These malpractices need to be curbed and public justice can be ensured only when expeditious trial is conducted.”

Though the facts and circumstances under which the powers those were exercised in the above said case are different, yet the ratio would be applicable here. When the Appellate Court has erred in not exercising its powers, that too under given circumstances, then definitely the powers are available with this Court to set aside those impugned orders and give an opportunity to the original accused to file his appeal.

9. For the above said reasons, following order is passed.

ORDER

- 1) The revision application stands allowed.
- 2) The Judgment and order passed in Delay Condonation Application No.02 of 2018, by learned Additional Sessions Judge, Kopargaon, on 06-02-2020, is hereby set aside. The said application stands allowed.
- 3) The delay caused in filing appeal challenging the conviction of the revision applicant by learned Judicial Magistrate, First Class, Rahata, in Summary Criminal Case No.442 of 2009 on 18-11-2016, is hereby condoned.
- 4) The office of the learned Additional Sessions Judge to verify and register the appeal and the Additional Sessions Judge to deal with the said appeal as per the provisions of Law.

(SMT. VIBHA KANKANWADI)
JUDGE

vjg/-