

(2008) 01 KL CK 0044

In the High Court Of Kerala

Case No : Criminal M.C. No. 3634 of 2007

K.P. Hameed and Another

APPELLANT

Vs

The State of Kerala and Another

RESPONDENT

Date of Decision : 17-01-2008

Acts Referred:

Constitution of India, 1950 — Article 14

Criminal Procedure Code, 1973 (CrPC) — Section 200, 468, 482

Penal Code, 1860 (IPC) — Section 323, 34, 341, 406, 506(1)

Citation : (2008) CriLJ 1587 : (2008) 1 ILR (Ker) 423 : (2008) 1 KLJ 440 :
(2008) 1 KLT 534

Hon'ble Judges : V. Ramkumar, J

Bench : Single Bench

Advocate : Sunil V. Mohammed, for the Appellant; K.S. Sivakumar, PP., for the Respondent

Final Decision : Dismissed

Judgement

1. In this petition filed u/s 482 CrI.P.C. the petitioners who are accused Nos. 1 and 2 in C.C. No. 119 of 2004 on the file of the J.F.C.M. Malappuram for offences punishable under Sections 323, 341 and 506(1) read with Section 34 IPC, seek to quash the aforesaid proceedings before the Magistrate.

2. Adv. Sri. Sunil V. Mohammed, the learned Counsel appearing for the petitioners/ accused made the following submissions before me in support of his contentions:

The alleged occurrence in this case took place on 17-11 -2000. The refer report was filed on 18-2-2001. The protest complaint was filed on 3-3-2001. The cognizance was taken by the Magistrate on 11 -2-2004. The cognizance so taken was clearly beyond the period of three years prescribed for the offence u/s 468 Cr.P.C. which 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 offence 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.

The date of filing of the complaint cannot be treated as the date of taking cognizance. Taking cognizance is different from filing the complaint. In *Krishna Pillai v. T.A. Rajendran and Anr.* 1990 (Suppl.) SCC 121, the Apex Court held as follows:

3. It is not disputed that cognizance has been taken by the court more than a year after the offence was committed. The counsel for the respondents has stated that since the complaint had been filed within a year from the commission of the offence it must be taken that the court has taken cognizance on the date when the complaint was filed. In that view of the matter there would be no limitation.

4. Taking cognizance has assumed a special meaning in our criminal jurisprudence. We may refer to the view taken by a five Judge bench of this Court in *A.R. Antulay v. Ramdas Srinivas Nayak* at p. 530 (para 31) of the reports this Court indicated:

When a private complaint is filed, the Court has to examine the complainant on oath save in the cases set out in the proviso to Section 200 Cr.P.C. After examining the complainant on oath and examining the witnesses present, if any, meaning thereby that the witnesses not present need not be examined, it would be open to the court to judicially determine whether a case is made out for issuing process. When it is said that court issued process, it means the court has taken cognizance of the offence and has decided to initiate the proceedings and a visible manifestation of taking cognizance process is issued which means that the accused is called upon to appear before the court.

The extract from the Constitution Bench judgment clearly indicates that filing of a complaint in court is not taking cognizance and what exactly constitutes taking cognizance is different from filing of a complaint. Since the magisterial action in this case was beyond the period of one year from the date of the commission of

the offence the Magistrate was not competent to take cognizance when he did in view of the bar u/s 9 of the Act. We accordingly allow the appeal and quash the prosecution.

This is a decision rendered by a three Judge Bench of the Supreme Court and decisions of the Supreme Court with lesser coram strength holding otherwise cannot prevail over Krishna Pillai 's case. Going by the decision of a Constitution Bench of the Supreme Court in Central Board of Dawoodi Bohra Community and Another Vs. State of Maharashtra and Another, the decision by the 3 Judge Bench in Krishna Pillai's case can be considered only by a larger Bench of the Supreme court and until then the verdict in Krishna Pillai's case will be binding on all the Courts. In Babu Parasu Kaikadi (Dead) by Lrs. Vs. Babu (Dead) through Lrs., it has been held by the Apex court that where an earlier decision has been unanimously rendered by a 3 Judge Bench of the Supreme Court a later decision rendered only by a majority of 2 :1 and that too without noticing the earlier binding precedent of a co-ordinate Bench will be treated per in curium. Hence, decisions rendered by the Apex Court with 2 Judges taking a view contrary to the one taken in Krishna Pillay's case cannot be treated as binding.

3. I am afraid that I cannot agree with the above submissions. The finding of a complaint or the initiation of criminal proceedings before a court and the taking cognizance of the offence or issuing process are distinct and different. So far as the complainant is concerned, as soon as he has filed a complaint before a competent court of law, he has done everything which is required to be done by him at that stage. Thereafter it is for the Magistrate to consider the matter, apply his mind and to take the appropriate decision of taking cognizance, issuing process or any other action which the law contemplates. The complainant has no control over the proceedings of the Magistrate. Due to various reasons it may not be possible for the court or the Magistrate to issue process or take cognizance. But the complainant cannot be penalised for such delay on the part of the court nor can he be non-suited for the failure or omission by the Magistrate in taking the appropriate action under the code. In a case where the complainant has approached the Court well within the time prescribed by law the proceedings cannot be abruptly terminated for the failure or omission on the part of the court in taking the above action prescribed by law. If the court were to penalise the complainant for no fault of his but for the delay or inaction on the part of the court itself, the court would be injuring the suitor for no fault of his, thereby attracting the maxim "actus curiae neminem gravabit" - (an act of Court shall not prejudice any party). If Section 468 were to be interpreted otherwise it may not survive the test of constitutionality when matched on the touchstone of Article 14 of the Constitution of India. (Vide *Japani Sahoo v. Chandrasekhar Mohanti* 2007 CrL. L.J. 4068 S.C.)

4. In *Rashmi Kumar (Smt) Vs. Mahesh Kumar Bhada*, another three Judge Bench of the Apex Court observed as follows:

15. The next question that needs to be answered is whether the complaint filed

by the appellant in September 1990 is time barred. Section 468 of the Code prescribes period of limitation. Under Sub-section (3) thereof, the period of limitation shall be three years if the offence is punishable with imprisonment for a term exceeding one year but not exceeding three years. Since the offence alleged to have been committed by the respondent is punishable u/s 406, viz. criminal breach of trust, and the punishment of imprisonment which may extend to three years or with fine or with both, the complaint is required to be filed within three years from date of the commission of the offence.

The said decision of the 3 Judges Bench has been followed in *Bharat Damodar Kale v. State of A.P.* 2004 SCC 39. The law is equally well settled that when there are conflicting decisions by Benches of co-ordinate strength, the last one will prevail, if so, Rashmi Kumar's case should receive precedence over Krishna Pillai's case. Moreover, in Krishna Pillai's case the passage extracted from the decision of the Constitution Bench in *A.R. Antulay's Case*, does not lay down the proposition that the date of filing the complaint is not the date which is relevant for reckoning the period of limitation. Hence, I am not inclined to uphold the contention raised by the petitioner for quashing the . proceedings before the Magistrate on the ground of limitation.

5. This Crl.M.C. is accordingly, dismissed.