

(1978) 09 BOM CK 0010
In the Bombay High Court
Case No : Criminal Appeal No. 49 of 1976

Sagunabai Lahanu Shende

APPELLANT

Vs

Patru Goma Lengure and others

RESPONDENT

Date of Decision : 04-09-1978

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 249, 256, 378, 378(4), 378(5)
Limitation Act, 1963 — Section 10, 11, 12, 13, 14
Penal Code, 1860 (IPC) — Section 109, 323, 34, 354, 447

Citation : (1979) MhLj 18

Hon'ble Judges : V.V. Joshi, J

Bench : Single Bench

Advocate : M.D. Zoting, for the Appellant; S.P. Vaidya for respondents Nos. 1 to 5 and G.D. Patil, Asstt. Govt. Pleader, for the Respondent

Final Decision : Allowed

Judgement

V.V. Joshi, J.—This is an appeal by the original complainant under sections 478 (4) and (5) of the Criminal Procedure Code, 1973, against the order passed by the trial Magistrate on 6-9-1975 dismissing the present appellant's complaint for want of prosecution on the ground that the complainant and his counsel were both absent.

2. Briefly stated the facts are that the present appellant filed a private complaint in the Court of the Judicial Magistrate, First Class, Chandrapur, against the present respondents Nos. 1 to 5 complaining of offences punishable under sections 323 and 354 read with section 109 of the Indian Penal Code. This complaint came to be registered on 17-10-1973. The case was a warrant case and was treated as such by the trial Court. Some witnesses were examined and eventually on 29th March 1975 a charge came to be framed against the accused persons only u/s 447 read with section 34 and section 323 of the Indian Penal Code. Thereafter, there were some adjournments. The case was fixed for evidence after charge for 6-9-1975. On that date neither the complainant nor his

advocate nor his witnesses were present. Therefore, the learned Magistrate passed the order in the following terms:

"The complainant and advocate Shri R. V. Deo absent. Case is dismissed for want of prosecution."

The aggrieved complainant preferred a revision petition to the Sessions Court of Chandrapur, but the said petition came to be dismissed on the ground that it was not maintainable as a revision petition since the order passed by the trial Court amounted to an order of acquittal of the present respondents Nos. 1 to 5. That is how the aggrieved complainant has filed this appeal against the said order as an appeal against the acquittal. It may be mentioned here that the application for special leave to appeal u/s 378 (4) of the Criminal Procedure Code, 1973, was filed after a delay of 40 days after the expiry of period of 60 days prescribed under sub-section (5) of section 378 of the Criminal Procedure Code. An application for condonation of delay u/s 5 of the Limitation Act, 1963 was filed and the delay was condoned and the appeal was entertained.

3. Prima facie it would seem that the order passed by the learned trial Magistrate was an illegal order. Once he had started the case as a warrant case, the case could not be dismissed in default of the appearance of the complainant after the charge was framed. The provisions of section 249, Criminal Procedure Code could have no application, because in this case, the charge had already been framed against the accused persons.

4. Miss Vaidya appearing for the respondents Nos. 1 to 5 has taken a preliminary objection. She contends that the provisions of section 5 of the Limitation Act, would have no application to an appeal filed by private complainant under the provisions of section 378 (4) of the Criminal Procedure Code, 1973. Such an appeal has to be dismissed if it is filed after an expiry of the period of 60 days stipulated under the provisions of section 378 (5). For this proposition she has placed reliance on the observations of the Supreme Court in *Kaushalya Rani Vs. Gopal Singh*, .

5. Another contention put forth by Miss Vaidya for the respondents Nos. 1 to 5 is that although this case started as a warrant case, eventually the charge against the respondents Nos. 1 to 5 came to be framed only under sections 447 and 323 of the Indian Penal Code i. e. in respect of the offences which were triable as summons case and therefore, the order passed by the learned trial Magistrate could be construed as an order u/s 256 of the Criminal Procedure Code, 1973. It would make no difference that the case had originally been started as a warrant case. For this proposition Miss Vaidya has placed reliance on the observations in : *Venkatrama Aiyar Vs. Sundaram Pillai and Others*, , *Bodu Ram v. Uda Ram* I L R(1963) 13 Raj. 632 and *Daulat Ram Vs. Ram Kishan and Others*, .

6. In reply Mr. Zoting for the appellant has drawn my attention to the fact that the Supreme Court decision in *Kaushalya Rani v. Gopal Singh* related to a case before the coming into force of the Limitation Act, 1963 Under the provisions of

section 29 (2) of the Indian Limitation Act, 1908, the provisions of section 5 of the said Limitation Act had not been made applicable to cases governed in the matter of period of limitation by any special or local law. Section 29 (2) (b) of the Indian Limitation Act, 1908, on the other hand specifically prescribes that the remaining provisions of that Act would not govern those cases in which special period of limitation has been prescribed under any special or local law. This was the main ground on the basis of which the decision of the Supreme Court in *Kaushalya Rani v. Gopal Singh* proceeded. However, a difference in this matter has been created by the provisions of section 29 of the Limitation Act, 1963, which has clearly made all the provisions of the said Limitation Act, under sections 2 to 24 (inclusive) applicable to cases where a special period of limitation different from that prescribed in the Limitation Act, is prescribed by any special or local law. The terminology of the provisions of section 378 of sub-sections (4) and (5) of the Criminal Procedure Code, 1973, is the same as it was before under the provisions of analogous sub-section of section 417 of the Criminal Procedure Code, 1898. There are no express words either in section 417, sub-sections (3) and (4) of the Criminal Procedure Code, 1898 or in sub-sections (4) and (5) of section 378 of the Criminal Procedure Code, 1973 specifically excluding the applications of section 5 of the Limitation Act, 1963 to those provisions. Therefore, it was urged on behalf of the appellants that after the enactment of the Limitation Act, 1963, the observations on this point of the Supreme Court in *Kaushalya Rani v. Gopal Singh* would not be applicable. On this point reliance has been placed on behalf of the appellant in *Health Inspector, Badagara Municipality Vs. Puzhakkal Kelappan*, and *Kosana Ranganayakamma Vs. Pasupulati Subbamma and Others*, . This contention seems to be correct. After the enactment of the Limitation Act of 1963 the provisions of section 5 of the said Act have been made applicable to the cases governed by period of limitation prescribed by any special or local law except where such application is specifically excluded in the said special or local law itself. There is no such exclusion of section 5 of the Limitation Act, 1963, or application in the provisions of section 378, sub-sections (4) and (5).

7. The result is that section 5 of the Limitation Act, would govern the present appeal. There was an application for condonation of delay and this Court has already condoned the delay. So this objection taken on behalf of the respondents Nos. 1 to 5 cannot prevail.

8. On the second point, the Learned Counsel, for the appellant has drawn my attention to the Division Bench authority of the Punjab High Court in *Banta Singh and Another Vs. Gurbux Singh*, . In this decision, the entire case law on the point has been discussed and it has been held :

"Once the trial is rightly started as the trial of a warrant case, there is no provision in the Code under which at a later stage the procedure can be changed to one prescribed for trial of a summons case. It is absolutely immaterial that the charge which is framed may relate to an offence triable as a summons case. If

the change of procedure is permitted in most of the cases, it may act to the prejudice of the accused inasmuch as he may lose the right of double cross-examination."

In this Division Bench case of the Punjab High Court, the earlier decision of the same High Court in Daulat Ram v. Ram Kishan, was not approved. The decision of the Madras High Court in Venkataram Iyer v. Sundaram Pillai has also been discussed in this Punjab Division Bench authority. It is needless to pursue the point further because it would appear this point is covered by the Division Bench decision of this Court in Kanji Vijpal Vs. Pandurang Keshav Rane, , where it has been observed :

"In our opinion, it is permissible in a case of this sort, where there are two charges arising out of the same transaction, one triable as a summons case and the other as a warrant case, for the learned Magistrate to try them together; but if he does so, he must follow the procedure laid down for warrant cases and he cannot, whilst proceeding with the two cases together, treat them separately. If he wishes to do that, he must deal with them separately from the inception."

9. In view of these authorities, it would seem to me that once the learned trial Magistrate had started this case as a warrant case, it was not correct for him on 6-9-1975 to dismiss the case for want of prosecution merely because the complainant and his advocate were absent. The said order passed by the learned Magistrate is not a legal order and will have to be set aside.

10. In the result, this appeal is allowed. The order passed by the trial Magistrate on 6-9-1975 dismissing the complaint for want of prosecution is set aside and the case is sent back to the trial Court for hearing from the stage at which it was dismissed and for disposing it of according to law. The parties shall appear before the learned trial Magistrate on 9th October 1978.