

(1991) 01 KAR CK 0045

In the Karnataka High Court

Case No : Criminal Revision Petition No. 462 of 1987

State of Karnataka

APPELLANT

Vs

Laxminarayana Bhat and another

RESPONDENT

Date of Decision : 25-01-1991

Acts Referred:

Constitution of India, 1950 — Article 17
Criminal Procedure Code, 1973 (CrPC) — Section 167 (5), 258, 397, 4, 401
Protection of Civil Rights Act, 1955 — Section 15, 4 (1)

Citation : (1991) CriLJ 2126 : (1991) 1 KarLJ 257

Hon'ble Judges : K.B. Navadgi, J

Bench : Single Bench

Advocate : B.R. Nanjundaiah, Addl. State Public Prosecutor, for the Appellant;
R.B. Deshpande, for the Respondent

Judgement

1. This is a Revision Petition filed u/s 397 read with Section 401 of the Code of Criminal Procedure ("the Code" for short). It is directed against the order dated 27-1-1987 made by the Judicial Magistrate, First Class, Udupi, in C.C. No. 210/86 on his file. Under the order impugned in this Revision Petition, the learned Magistrate has stopped the proceedings u/s 258 of the Code and has discharged respondents Nos. 1 and 2 of the offences alleged against them.

2. The learned Additional State Public Prosecutor for the petitioner-State and the learned counsel for respondents Nos. 1 and 2 (accused Nos. 1 and 2) are heard. The record of the matter and the record and proceedings of the Court below are perused and examined.

3. To decide the correctness, legality or propriety of the order assailed in this Revision Petition, it is necessary to refer to the facts leading to this Revision Petition. Briefly stated, the facts are as under :

On 22-11-1982 at about 5 p.m., N. R. Nadumani, the Deputy Superintendent of Police, Udupi, conducted raid on the Tea Hotel owned and run by respondents Nos. 1 and 2 in Innanje village on the basis of a petition filed by one Gopala

Krishna Rao, the Chairman of the Panchayat Committee, Pangala village, in the presence of the said Gopala Krishna Rao and one Chinnappa, the resident of village Innanje, belonging to Harijan community. During the course of the raid, he found certain utensils having been kept in the hotel separately for the use of persons belonging to Scheduled Caste (Harijans) . He noticed respondents Nos. 1 and 2 enforcing disability against Harijans on the ground of untouchability.

On the basis of the complaint lodged by the said Gopala Krishna Rao, Raghunath Rao, the Head Constable bearing Buckle No. 855, attached to Shirva Police Station, registered a case against respondents Nos. 1 and 2 in Crime No. 92/82 under sub-sections (i) and (ii) of Section 4 of the Protection of Civil Rights Act, 1955 (hereinafter referred to as "the Act" for short), issued F.I.R. and took-up investigation. The complaint was lodged on 22-11-1982 at about 4.30 p.m. and the case was registered at 5 p.m. on the same day.

The allegations in the complaint are that Laxminarayana Bhat, respondent No. 1, and Shashikanth Bhat, respondent No. 2, who are father and son and who were accused Nos. 1 and 2 respectively in the Court below (hereinafter referred to as accused No. 1 and accused No. 2 respectively) committed the offences specified in sub-sections (i) and (ii) of Section 4 of the Act punishable thereunder. Accused Nos. 1 and 2, as noticed earlier, are the owners of a Tea Hotel run by them in village Innanje within the limits of Pangala Panchayat Samithi.

During the course of the raid, the Deputy Superintendent of Police, Udupi, seized a lower part of a coconut chip alleged to have been kept by accused Nos. 1 and 2 in their hotel for drinking tea by the members belonging to Scheduled Caste, sitting outside the hotel. The article was seized during the course of observation panchanama. It was produced before the Magistrate by Raghunath Rao, the Head Constable, seeking permission to retain it till the completion of investigation.

During the course of investigation, Raghunath Rao, the Head Constable arrested accused No. 2 on 22-11-1982 at about 6.30 p.m. in the village. Accused No. 2 was produced before the Magistrate the next day and was released on bail.

It appears, H. L. Ravi Kumar, then working as Sub-Inspector of Police in Shirva Police Station, cited as CSW-5 in the chargesheet, took-over further investigation from Raghunath Rao. Later H. L. Ravi Kumar questioned and recorded the statements of Madhava Murthy, CSW-7 and Sunder, CSW-6 on 30-11-1982 and of Chinnappa, CSW-2 on 2-3-1983.

H. L. Ravi Kumar, CSW-5, practically completed the investigation by 24-1-1983 and prepared the final report for being submitted to the jurisdictional Magistrate along with accused Nos. 1 and 2 for trial of the offences. But the final report was not laid in the Court since according to the prosecution, accused No. 1 had successfully gone beyond the arm of law. The efforts set afoot by the Police to reach him proved successful and they were able to arrest accused No. 1 on 20-11-1985. Accused No. 1 was produced before the Magistrate on the same day. He was released on bail.

It appears from the record that B. V. Gururaj, the Sub-Inspector of Police, Shirva Police Station, who succeeded H. L. Ravi Kumar, placed charge-sheet against accused No. 1 and accused No. 2, prepared by H. L. Ravi Kumar, in the Court on 12-12-1985. Since the charge-sheet came to be filed beyond time, B. V. Gururaj presented an application u/s 473 of the Code with a prayer to condone the delay in filing the charge-sheet. He appended his affidavit to the application in support of the prayer for condonation of delay. In the affidavit, B. V. Gururaj swore that he was not able to file charge-sheet as accused No. 1 was evading arrest by absconding and that the delay was not intentional but bona fide.

The Magistrate heard the officer in charge of the prosecution (Assistant Public Prosecutor) on the application filed by the prosecution to condone the delay and by the order dated 23-1-1986, allowed the application and condoned the delay. He took cognizance of the offences alleged against accused Nos. 1 and 2, directed the registration of a criminal case against accused Nos. 1 and 2 and issued summons to them making the same returnable by 11-3-1986.

The order made by the Magistrate reads as under :

"In the case on hand, a case was registered against the accused persons alleging that they have committed an offence punishable u/s 4(i) and (ii) of the Protection of Civil Rights Act on 22-11-198 and as the said offence was punishable with imprisonment for a term exceeding one year, but not exceeding three years, charge-sheet should have been filed on or before 22-11-1985. In the case on hand, charge sheet has been laid on 13-12 1985 and thereby there is a delay of one month. In the instant case A-2 was arrested and produced before the Court on 23-11-1982. The application for condoning delay has been filed by the S.I. of Police of Shirva, who is the Investigating Officer in this case, on the ground that A-1 could not be arrested, as he was avoiding arrest. The said accused was arrested and produced before this Court on 20-11-1985. Hence, when the charge-sheet goes to show that the offence has been registered against two persons and one person has not been arrested, it is not proper to file charge sheet also against one accused only. Further, having regard to the nature of the offences alleged, viz., as it is a social offence, it is a fit case to condone the delay. Hence, the application filed under S. 473, Cr.P.C. is hereby allowed. Cognizance of the offence taken. Register a Criminal case against the accused persons and issue summons to the accused, returnable by 11-3-1986."

In response to the summons, accused Nos. 1 and 2 entered appearance and sought bail. They were granted bail.

On 26-6-1986, both accused Nos. 1 and 2 presented an application u/s 468(2) of the Code seeking stoppage of further proceedings against them and their discharge on the ground that their prosecution was barred by time. The prosecution filed its objections contending, inter alia, that the application was not maintainable inasmuch as the Court had condoned the delay earlier on the request of the prosecution by application of its judicial mind to the facts stated in

the application filed by the prosecution and the affidavit of B. V. Gururaj, Sub-Inspector of Police, filed in support of it, giving reasons for delay and on being satisfied that the delay had been properly explained and on the ground that condonation of delay was necessary in the interests of justice. It also contended that the Court had no jurisdiction to review its earlier order in view of the bar u/s 362 of the Code.

The learned Magistrate heard both the sides on the application filed by accused Nos. 1 and 2 and by the order challenged in this Revision Petition. held that the reasons given by the prosecution for the delay were not convincing and acceptable; that the delay, therefore, could not be condoned and that accused Nos. 1 and 2 were entitled to the prayer made in the application. In that view of the matter, he stopped further proceedings and directed discharge of accused Nos. 1 and 2.

4. It is this order that is challenged by the State in this Revision Petition.

5. Section 4 of the Act so far relevant for the present purpose reads as under :-

"Whoever on the ground of "untouchability" enforces against any person any disability with regard to -

(i) access to any shop, public restaurant, hotel or place of public entertainment; or

(ii) the use of any utensils, and other articles kept in any public restaurant, hotel dharmashala, sarai or musafirkhana for the use of the general public or of any section thereof; or (shall be punishable with imprisonment for a term of not less than one month and not more than six months and also with fine which shall be not less than one hundred rupees and not more than five hundred rupees).

(Explanation - For the purposes of this action, "enforcement of any disability" includes any discrimination on the ground of "untouchability".)

6. The offences alleged against accused No. 1 and accused No. 2 are cognizable offences (vide Section 15(1) of the Act as substituted by Act No. 106/1976 with effect from 19-11-1976). The punishment provided for the offence is imprisonment for a term of not less than one month and not more than six months and also fine of not less than one hundred rupees and not more than five hundred rupees. In view of the punishment provided for the offences, the case of accused No. 1 and accused No. 2 would come within the meaning of the expression, "summons case" In Section 2(w) of the Code. u/s 4(2) of the Code the offences in question had to be investigated into and were required to be inquired into, tried and otherwise dealt with according to the provisions contained in the Code. Since there are no provisions in the Act regulating the manner or place of investigating, inquiry into, trying or otherwise dealing with the offences under it, except the provision providing for summary trial of the offences under the Act.

7. In the present case, the first question that has to be considered and determined is, what is the effect of the breach of the imperative provisions of Section 167(5) of the Code, in so far as it relates to the case of accused No. 2.

8. Section 167(5) of the Code reads :

"If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months is necessary."

9. In the present case, the offences alleged against both the accused persons are said to have been committed on 22-11-1982. Accused No. 2 was arrested on the same day at 6.30 p.m. The case against accused No. 2 is triable as a summons case. As a matter of fact, the procedure adopted by the learned Magistrate to try the offences alleged against both the accused persons, as is seen from the record of the trial Court was one prescribed for the trial of the summons case by the Magistrate appearing in Chapter XX of the Code. The charge sheet came to be filed on 12-12-1985. There was no motion by the investigating officer to satisfy the learned Magistrate that for special reasons and in the interests of justice the continuation of the investigation beyond the period of six months from the date of arrest of accused No. 2 was necessary. Added to that, there was no order made by the learned Magistrate stopping further Investigation into the offences alleged against accused No. 2 after the expiry of six months from the date of arrest.

10. Section 2(h) of the Code defines the expression "investigation" as under :

"investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf".

11. As noticed earlier, the investigation in to the offences alleged against accused No. 2 was almost complete by 24-1-1983. If the investigation is understood as proceedings under the Code for the collection of evidence conducted by a Police officer or by any person other than a Magistrate, who is authorised by a Magistrate in that behalf, it can be said, as urged on behalf of the petitioner-State, that there was no breach of the mandate of law embodied in Section 167(5) of the Code. If the expression used is taken to mean in its wider sense, as proceedings taken under the Code for collection of evidence from the date of registration of the case to the date of submission of the final report, it may be said that there was non-compliance with the provisions contained u/s 167(5) of the Code in regard to the case of accused No. 2.

12. Assuming for the sake of arguments taking the expression in its wider meaning, that there was breach what then is the effect of the breach of

mandatory provision on the action taken by the Magistrate in taking cognizance of the offences alleged against accused No. 2 and directing process after initiation of the proceedings.

13. An analysis of the provisions contained in Section 167(5) of the Code extracted earlier would show if in any case triable as a summons case, investigation is not completed within a period of six months from the date on which the accused was arrested, the Magistrate shall order stopping further investigation of the offence unless the officer making investigation into the offence before the expiry of the said six month's period satisfied the Magistrate that for special reasons and in the interests of justice, the continuation of the investigation beyond the period of six months is necessary. The investigation conducted beyond the period of six months, without the permission of the Magistrate, as contemplated by the sub-section would be in clear breach of the direction given under the subsection. The failure on the part of the Magistrate to stop investigation on the expiry of six months as provided under the sub-section will not ipso facto be deemed to be an implied permission by the Magistrate to the Investigating officer to continue the investigation beyond the prescribed period as the continuation of the investigation beyond the prescribed period would be permitted by the Magistrate only for special reasons and in the interests of justice.

14. In the case on hand, as observed earlier, the investigation that is the collection of evidence had been over by 24-1-1983 within six months from the date of arrest of accused No. 2. In that view of the matter it may be said that there is no illegality in the act of Magistrate in taking cognizance of the offences alleged against accused No. 2 and initiating proceedings by issuing process. Even if we take the meaning of expression "investigation" in its wider sense in view of the emergence of principles as a result of judicial consensus the disobedience of the peremptory provision of the sub-section cannot impress the act of the Magistrate in taking cognizance and initiating proceedings against accused No. 2 with any taint or illegality.

15. Cognizance was taken on 23-1-1986 by the Magistrate, competent to try the offences and the proceedings were commenced on the same day against accused No. 2. It is by now well settled that once a case is taken cognizance of by a competent Court and the proceedings in the case are commenced, the antecedent illegality or irregularity in the investigation on the basis of which the final report has been filed will not invalidate or vitiate the proceedings, unless it is shown that prejudice has been caused thereby to the accused or any miscarriage of justice has resulted thereby. Thus the illegal investigation conducted beyond the period of six months without an order of the Magistrate would not taint the action in taking cognizance of the offence and the subsequent proceedings, with any illegality without proof or prejudice or miscarriage of justice.

16. In a similar situation in *D. Kumar Vs. State of Karnataka*, Learned single

Judge of this Court dealing with a similar question held that :

"The bar under S. 167(5) of the Code is for investigation and not for the Court taking cognizance of the case and that, therefore, at best it can be said that the filing of the chargesheet by the Investigating Officer beyond the period of six months from the date of arrest of the accused was illegal and the evidence collected by the investigating officer after the period of six months has to be excluded from consideration. But it is well settled that a defect or illegality in investigation however serious has no direct bearing on the competence or the procedure relating to cognizance."

17. In view of the well settled principles that are deducible from the judicial decisions I am in respectful agreement with the view taken by the learned single Judge of this Court in Kumar's case (*supra*). Following the said view and for the reasons stated by me earlier, I hold assuming that there was breach of S. 167(5) of the Code in respect of the case of accused No. 2 that breach has not rendered the action of the Magistrate of taking the cognizance of the offences alleged against accused No. 2 and commencing the proceedings thereafter.

18. The next question for consideration is :

Whether the bar enacted in S. 362 of the Code precluded the Magistrate from considering the application filed by accused No. 1 and accused No. 2 under S. 468(2) of the Code with a prayer to stop the proceedings and discharge them ?

19. Having regard to the punishment provided for the offences alleged against accused No. 1 and accused No. 2 and having regard to the date of the offence and the date of charge-sheet, it can be said that the prosecution launched against accused Nos. 1 and 2 attracted the provisions contained in S. 468(2) (b) of the Code. Under the said sub-clause the period of limitation is one year if the offence is punishable with imprisonment for a term not exceeding one year. The date of the alleged offences is 22-12-1982. The date of the charge-sheet is 12-12-1985. Obviously as on 12-12-1985, there was an injunction against the Magistrate under S. 468(1) of the Code from taking cognizance of the alleged offences, since the charge-sheet came to be filed after the expiry of the period of limitation of one year.

20. It was precisely for the said reason that the Sub-Inspector of Police who laid charge-sheet, filed an application under S. 473 of the Code supported by his affidavit. That prayer was to condone the delay. It was on this application, the learned Magistrate passed the order extracted earlier on 23-1-1986. It was only after removal of the bar, the Magistrate took cognizance of the offences and directed summons to the accused Nos. 1 and 2.

21. Section 362 of the Code reads thus :-

"Court not to alter judgment :-

Save as otherwise provided by this Code or by any other law for the time being

in force, no Court, when it has signed its judgment or final order disposing of a case, shall alter or review the same except to correct a clerical or arithmetical error."

22. Both accused Nos. 1 and 2 filed application on 26-6-1986.

23. The question for consideration is :

Whether on 23-1-1986 the case of accused Nos. 1 and 2 had been before the Magistrate ?

24. The word "case" is derived from Latin "casus" meaning fall or chance. From this it came to mean from in 1596 a thing that befalls or happens - an event, occurrence or chance. The expression "the case" meant the actual state of matters. In law in due course it acquired four meanings :

1. A cause or suit;
2. Statement of fact of the matter sub-judice for a higher Court;
3. A decided case; and
4. The case as put by one of the parties. (vide Shorter Oxford English Dictionary 3rd Edition 1959 page 270).

25. The word "case" is not defined by the Code. But its meaning is well understood in legal world. In criminal jurisdiction it means ordinarily a proceeding for the prosecution of a person alleged to have committed an offence. In other contexts it may represent other kinds of proceedings.

26. If the meaning of the word "case" is a proceeding for the prosecution of a person alleged to have committed an offence, which in the end results either in discharge or conviction or acquittal of the person accused of the offence, it cannot be said that as on 23-1-1986 the case of accused Nos. 1 and 2 had been filed before the Magistrate and was pending on that date. Because as on 23-1-1986 the Magistrate by virtue of the prohibition imposed by law was not competent to take cognizance of the offences. It was to remove this prohibition that the Sub-Inspector of Police presented an application under S. 473 of the Code which reads as under :

"Extension of period of limitation in certain cases : Notwithstanding anything contained in the foregoing provisions of this Chapter, any Court may take cognizance of an offence after the expiry of the period of limitation, 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 interest of justice."

27. Section 473 invests a Court notwithstanding anything contained in Sections 467 to 472 a power to take cognizance of an offence after expiry of the period of limitation 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 interest of justice.

28. Discretion given to the Court is indeed very wide and not being circumscribed by any limitations or fetters. But though wide enough, it has to be exercised judiciously on well settled principles. In the very nature of things no hard and fast rules can be laid down as to the manner in which the discretion has to be exercised in a given case. The learned Magistrate considered the application filed by the petitioner-State and held taking into consideration the facts of the case and the nature of the offences alleged against accused Nos. 1 and 2 that the delay had been properly explained and it was a fit case in the interest of justice to condone the delay. It was in that view of the matter he granted the application.

29. The consideration of the application and the grant of the prayer made therein obviously was without notice to accused Nos. 1 and 2. They, on entering appearance, filed the application to stop the proceedings and discharge them on the ground that their prosecution was barred by time and the delay had not been properly explained.

30. There is no gainsaying the fact that the Magistrate by the order dated 23-1-1986 had not disposed of the case of accused Nos. 1 and 2 finally. As a matter of fact, by passing the order he removed the bar and commenced the proceeding by issuing summons. In that view of the matter, it cannot be said by that there was any bar for the Magistrate for taking up the application filed by accused Nos. 1 and 2 for consideration. The bar enacted in Section 362 of the Code was not attracted to the facts of the present case. It is by now well settled by a series of decisions that in a case where the Magistrate condones the delay, takes cognizance of the offence and issues process; the accused after entering appearance may object to the prosecution on the ground of it being barred by limitation. That is what exactly was done by accused Nos. 1 and 2 in the present case.

31. But the meat of the matter is whether the order made by the Magistrate condoning the delay without notice of the application filed by the petitioner State to accused Nos. 1 and 2 and on the basis of such order his act of taking cognizance of the offences and issuance of process can be said to be without jurisdiction on the ground of violation of the principles of natural justice.

32. The rule against bias and the rule of the right to be heard, the two rules are the essential characteristics of natural justice. They can be said to be the twin pillars supporting the principles of natural justice. The Romans put them in the two maxims : *Memo judex in causa sua*, and *Audi alteram partem* (vide Lord Denning's *The Discipline of Law* page 84). These two maxims have been put in the recent times in the two words impartiality and fairness. The principles of natural justice in express terms have not been incorporated in Section 473 of the Code. Though it can be said that by implication the rule of natural justice is not excluded in Section 473, nonetheless the fact that cannot be ignored is that it is not included expressly and explicitly in Section 473.

33. In this view of the matter and having regard to the stage at which the Court

has to consider the application for condonation of delay, it is difficult to accept the contention urged on behalf of accused Nos. 1 and 2 that the proceedings in which the delay was condoned and the time was extended, without notice to the accused vitiated and, therefore, illegal.

34. Such a conclusion cannot be drawn on the plain language employed by the legislature in Section 473 of the Code.

35. Indeed it is true once the period of limitation prescribed under the Code for prosecuting a person for the offence alleged to have been committed by him expires, valuable right accrues to him to the effect that there would be no prosecution thereafter. In that view of the matter it may be desirable to issue notice to the accused of the motion made by the prosecution and to give him an opportunity for meeting the case in regard to the extension of time. Such a course undoubtedly would be in consonance with the salutary principles of natural justice and in the interest of justice. But the failure on the part of the Court to take the course as indicated above, in view of the absence of incorporation of the rule of natural justice in Section 473 of the Code would not render the grant of extension of time and the action of taking the cognizance of the offence and commencement of the proceedings invalid.

36. As a broad proposition it may be stated that whenever a complaint or charge sheet is filed at the instance of any person or any police officer, the Court must see in the first instance as to whether S. 468 of the Code is attracted or not. If section is attracted to the offence alleged in the complaint or charge sheet as the case may be, it would be in the interest of justice and in consonance with the rules of natural justice to register the application as miscellaneous case, issue notice to the person or persons accused of the offence or offences with a view to give opportunity to him or them of being heard and pass orders thereafter on the application granting or rejecting the prayer on merits.

37. For the reasons stated earlier, I find it difficult to agree with the view taken by the learned single Judge of this Court in Ladder Siddabasappa Vs. The State of Karnataka, to the effect that the proceedings would stand vitiated in a proceeding barred by time in which the Court condones the delay without hearing the accused and takes cognizance thereafter. The view taken by the Magistrate following the decision of this Court in Ladder Siddabasappa's case (supra), to the effect that the order made by his predecessor on 23-1-1986 was an order made with out justification and therefore a nullity, therefore, it cannot be upheld. The only question left over for consideration is.

Whether the view taken by the Magistrate that the prosecution had not properly explained the delay is sustainable in law ?

38, The material part of the investigation was done by H. L. Ravikumar CSW-5 the Sub-Inspector of Police, Shirva Police Station, who was the predecessor in office of B. V. Gururaj. The main reason given by the petitioner State for the delay in filing the charge sheet was that accused No. 1 was absconding till

20-11-1985. Under sub-section (4) of S. 470 of the Code which provides for exclusion of time in certain cases, says that in computing the period of limitation, the time during which the offender has been absent from India or from any territory outside India which is under the administration of the Central Government, or has avoided arrest by absconding or concealing himself, shall be excluded. True in the instant case, there was no impediment for the prosecution to file charge sheet within the time forwarding only accused No. 2 and showing accused No. 1 as absconding in the charge sheet. In that event, the Magistrate might have either issued process to secure the presence of accused No. 1 before him to take the trial or would have split up the case of accused No. 2 from the case of accused No. 1 and proceeded with the trial of the offences in so far as they related to accused No. 2. But the fact that the prosecution did not do so and waited for the arrest of accused No. 1 before submitting the charge sheet cannot be a foundation to reach a conclusion that the delay in filing the charge sheet was due to negligence or inaction or want of bona fide on its part. It is true that it was H. L. Ravikumar SCW 5, who completed the investigation and prepared the charge sheet and not B. V. Gururaj his successor in office. But there is no denial of the fact that it was B. V. Gururaj, who filed the charge sheet in the Court on 12-12-1985. There is also no denial of the fact that accused No. 1 was arrested on 20-11-1985.

39. It is difficult to support the reasoning of the Magistrate that B. V. Gururaj was not competent to swear about the abscondence of accused No. 1 may be as observed by the Magistrate, B. V. Gururaj might have assumed charge of the office of the Sub-Inspector of Shirva Police Station in the beginning of 1985. But to hold that the prosecution did not show to the Court that till the end of 1984, accused No. 1 was absconding on the basis of the assumption of charge of the police station by B. V. Gururaj in beginning of 1985 and the absence of recitals in his affidavit, that after perusing the case diary of his predecessor in office, he came to know that accused No. 1 was absconding, would be a conclusion opposed to human experience and the presence of probabilities involved in the case. If accused No. 1 was not absconding, there was absolutely no reason for the Investigating Officer, who had completed the investigation as early as on 24-1-1983 to keep the charge sheet in the police station without being submitted to the Court. It is difficult to accept the view of the Magistrate that the Investigating Officers might have thought of not arresting accused No. 1 till 20-11-1985. The view has no basis and if I may say so it is purely based on a surmise or conjecture which a Court of law cannot afford to do. The fact that B. V. Gururaj, who filed the charge sheet is not cited as a witness in the charge sheet did not disqualify him from filing an application to condone the delay. He was the officer-in-charge of the jurisdictional police station on the date on which the charge sheet was filed.

40. If the prosecution did not produce the case diaries, the Magistrate in the exercise of jurisdiction with a view of do justice should have called for the case diaries for perusal, and perused them to decide about the allegation of

abscondence of accused No. 1. Be that as it may, on the facts brought on record it cannot be said that the statement made by the prosecution in its application and in the affidavit of B. V. Gururaj that accused No. 1 was absconding till 20-11-1985 to be unacceptable.

41. The finding of the Magistrate that the prosecution has failed to prove that accused No. 1 was absconding from the date of offence till the date of his arrest is not based on the proper and correct appreciation of the material. It is infirm and, therefore, cannot be sustained.

42. Section 473 of the Code gives discretion to the Court to take cognizance of offence after expiry of the time of limitation 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 to do so in the interest of justice. In the case on hand, the conclusion of the learned Magistrate that the delay has not been properly explained is not correct and that therefore, cannot be sustained.

43. Added to that, it is pertinent to note that the Magistrate, while considering the application filed by the accused Nos. 1 and 2 did not examine the question as to whether taking cognizance of the offences alleged against accused Nos. 1 and 2, even after the expiry of the period of limitation was necessary in the interest of justice. Though the Magistrate has taken pains to consider the questions of law invoked in the matter and questions of fact as to whether the delay has been properly explained or not, it is unfortunate that he has not bestowed his attention to the question as to whether the delay was required to be condoned in the interest of justice.

44. Article 17 of the Constitution abolishes untouchability and forbids its practice in any form. It declares the enforcement of any disability arising out of untouchability as an offence punishable in accordance with law. The Act has been enacted to prescribe punishment for the preaching and practice of untouchability, for the enforcement of any disability arising therefrom and for matter connected therewith. In the present case, accused No. 1 and accused No. 2 were prosecuted with the allegations of having enforced disability against the members of Scheduled Caste community on the ground of untouchability, with regard to the access of the members of said community to a Tea hotel and with regard to the use of utensils and other articles kept there for the use of the general public. Having regard to the mandate of our Constitution in Article 17 of the Constitution, the object and purpose of the Act, the nature and the gravity of the allegations made against accused Nos. 1 and 2, the seriousness of the charge, which totally escaped the attention of the Magistrate when he proceeded to consider the question as to whether the delay should or should not be condoned; in their cumulative and total effect would show that this is a fit case to take cognizance of the offences alleged against accused Nos. 1 and 2 after expiry of the period of limitation, in the interest of justice.

45. In the result, for all the reasons aforesaid, I hold that the order impugned in

this petition is incorrect, illegal and improper. It is liable to be set aside. The revision petition is, therefore, allowed. The order dated January 27, 1987 made by the Judicial Magistrate First Class Udupi in (C.C. No. 110/1986 dropping the proceedings u/s 258 of the Code and discharging accused Nos. 1 and 2 is hereby set aside.

46. The application filed by the petitioner State on 12-12-1985 to condone the delay is hereby allowed.

47. The application filed by accused Nos. 1 and 2 on 26-6-86 to stop further proceedings and direct their discharge is hereby dismissed.

48. The Magistrate is hereby directed to proceed with the trial of the offences and to conclude as early as possible and in any event, within six months from the date of receipt of the record and proceedings in C.C. No. 210/86 along with the copy of this order.

49. Retransmit the record and proceedings of the Court below called for reference and perusal in this petition along with the copy of this order forthwith.

50. The Magistrate shall submit his report with regard to the compliance of the direction given by this Court in the matter of disposal of the case.

51. The office shall place the matter before the Court after receipt of compliance report from the Magistrate.

52. Order accordingly.