

The State Vs. Chhing and ors.

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Court : Allahabad

Decided On : Dec-11-1981

Reported in : 1982CriLJ885

Judge : P.N. Goel, J.

Appellant : The State

Respondent : Chhing and ors.

Judgement :

P.N. Goel, J.

1. The memo of appeal along with application Under Section 378(3) Cr.P.C. and another application Under Section 5, Limitation Act was filed before the Registrar on 3-4-1981 at his residence. The order of acquittal was passed by the First Additional Sessions Judge, Mathu-ra in S. T. 105 of 1980 on 3-12-1980. Application for copy of the order/judgment was moved on 12-12-1980, Notice of the preparation of the copy was given on 7-14-1981. Copy was actually taken on 14-1-1981, The office rightly reported that the memo of appeal and application Under Section 378(3) Cr.P.C. were filed beyond time by 4 days.

2. Notice of the application Under Section 5 62'the Limitation Act was issued to the respondents opposite parties. One Alis Das, a pairokar of the respondents filed counter-affidavit. Sri Keshav Sahay Advocate, appeared on behalf of the

respondents: Chhinga, respondent No. 1 filed another counter-affidavit. He was represented by Sri Tejpal, Advocate.

3. The learned State counsel filed re-Joinder affidavit. In support of the application Under Section 5 of the Limitation Act, Shitla Prasad Shukla, an official in the office of the Government Advocate, filed affidavit. He deposed that the proposal for filing appeal was received at the residence, of the Government Advocate on 2-3-1981 i.e. within the period of limitation' for filing appeal etc. He further deposed that the office of the High Court as well as the office of the Government Advocate were closed on account of strike with the result that the file retarded at the residence of the Government Advocate up to 1-4-1981. He then deposed that the office of the Government Advocate opened on 1-4-1981 (Thursday, that file was marked to Sri V.P. Goel, Deputy Government Advocate to ..prepare the memorandum of appeal and leave petition, that the said documents were prepared on 2-4-1981 and then they were filed.

4. learned Counsel for the parties were heard at length.

5. I would first of all deal with the contention of Sri Tejpal. His contention is that an application Under Section 5 of the Limitation Act does not lie in view of the provisions of Section 378 and Article 114(a), Crim. P.C., He referred to 3 cases also-

(1) Hukumdev Narain. Yadav v. Lalit Narain Mishra : [1974]3SCR31 ;

(2) Raja Pandey v. Sheo Pujan Pandey AIR 1942 All 429(FB); and

(3) Kaushalya Rani v. Gopal Singh : [1964]4SCR982 .

6. Under the old Cr.P.C. the State had a right to file an appeal against an order of acquittal without obtaining the leave of the Court; but if a complainant wanted to file an appeal against an order of acquittal, he was required to obtain leave of the Court (vide Section 417(1)(3) and (4)). An application for leave to appeal was to be filed within 60 days from the date of the order of acquittal. Under the new Crim. P. C, 1973, which came into force from 1-4-1974, not only the complainant but also the State have to obtain leave to file appeal. The relevant portion of Section 378(1) of the new Code which corresponds to Section 417(1) of the old Code

reads as follows:

378(1)...Subject to the provision of Sub-sections (3) and (5), the State Government may, in any case, direct the Public Prosecutor to present an appeal to the High Court from an original or appellate order of acquittal passed by any Court other than a High Court'. Sub-sections (3) and (5) run as follows:

(3) No appeal under Sub-section (1)...shall be entertained except with the leave of the High Court.

(5) No application...for the grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of...90 days...computed from the date of that order of acquittal.

7. Sub-section (4) of Section 378 provides for an application for leave to appeal if the case arose on a complaint and the complainant desired to file an appeal against the order of acquittal.

8. Article 114-A of the Lim. Act, 1973 provides 90 days time for an appeal from an order of acquittal under Sub-section (1) of Section 417 of the old Cr.P.C. from the date of the order appealed from.

9. Section 5 of the Lim. Act, 1963 provides that any appeal or any application may be admitted after the prescribed period if the appellant or the applicant satisfied the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

10. It will be noticed that the Schedule given at the end of the Limitation Act does not provide any period of limitation for an application for leave to appeal. The period of limitation for filing an application for leave to appeal was provided Under Section 417 of the old Code and is now in Section 378 of the new Code. It is well settled that the provision of the limitation provided in the old code of Section 417 was a special law vide *Kaushlyia Rani v. Gopal Singh* : [1964]4SCR982 .

11. Section 29(2) of the Lim. Act, 1963 provides that where any special law prescribed for any suit, appeal or applica- tion, a period of limitation different from

the period prescribed by the schedule the provision of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation for any suit, appeal or application by any special law, the provisions contained Under Sections 4 to 24 inclusive shall apply only in so far and to the extent to which, they are not expressly excluded by such special law.

12. The above section is obviously applicable where any special law prescribes a period of limitation different from the period prescribed by the schedule. As the Limitation Act does not provide a period of limitation for an application for leave to appeal and 378 of the new Code prescribes a period of limitation for such an application, it is apparent that the special law is different from the schedule given in the Limitation Act. Its necessary consequence is that Sub-section (2) of Section 29 is applicable to the present case.

13. Where Sub-section (2) is applicable, two consequences follow :

(1) the provision of Section 3 of the Lim. Act: becomes applicable, and

(2) the provisions contained in Sections 4 to 24 become applicable.

In this way it is evident that Section 5 of the Limitation Act is applicable to applications for leave to appeal Under Section 378. There is, however, one exception to this rule. The exception is if the provisions of, the special law do not expressly exclude the provisions contained in Sections 4 to 24. A bare reading of Section 378 will indicate that there is no express prohibition against the applicability of Section 5.

14. Sri Tejpal has contended that taking into consideration the language of Section 378 and the other provisions contained in the Code, it should be held that there is implied prohibition. He has made reference to Sections 116(6) 468 read with 473 and 484(3) of the new Code. It is true that the language of Sub-section (5) of Section 378 is prohibitive and mandatory. But as said above this section does not lay down that if an application under Sub-section (3) is moved after the expiry of 90 days, it will have to be rejected irrespective of any provision contained in the

Limitation Act.

15. Section 116(6) lays down that an enquiry into the proceedings Under Sections 107 to 110 shall be completed within a period of 6 months from the date of its commencement and if such enquiry is not so completed, the proceedings, on the expiry of the said period, stand terminated unless for special reasons to be recorded in writing, the Magistrate otherwise directs. It will be noticed that this Sub-section (is complete in itself, but Section 378 does not contain similar provision.

16. Section 468 lays down period of limitation for instituting criminal cases in respect of offences of petty nature or offences which are not serious. Section 473 permits the courts to take cognizance of the offences even after the expiry of the period of limitation prescribed in Section 462. It was urged by Sri Tejpal that the provision like the one contained in Section 473 could be incorporated in Section 378 itself. This is true, but the Parliament made such a provision in the general law of limitation contained in the Limitation Act. Sri Tejpal conceded that the period of limitation for filing an appeal, against an order of acquittal was prescribed in the Schedule of the Limitation Act and that therefore Section 5 of the said Act was applicable. In view of this the contention based on Sections 468 and 473 falls to the ground,

17. Section 484 lays down that the old Cr.P.C. will stand repealed. Then sub-sections (2) and (3) indicate the effect of the repeal. Therefore Sub-section (3) of Section 484 is not relevant for the purpose of the point involved. -

18. Giving careful consideration of what has been stated above, I am of the opinion that Section 378 contains special law and to this section, Section 5 of the Limitation Act is obviously applicable because of the provisions contained in Section 29(2) of the Limitation Act. It has to be repeated that the new Code of Criminal Procedure does not expressly exclude the application of Section 5 to an application for leave to appeal on behalf of the State..'

19. Sri Tejpal referred to the case of Kaushlya Rani v. Gopal Singh : [1964]4SCR982 . This is based on Section 417(4) of the old Cr.P.C. and Section

29(2)(a) and (b) of the old Limitation Act. It is evident that in this case Section 29(2) of the new Limitation Act was not considered. In this case two principles of law were laid down - (1) Section 417 which allows a complainant to file an appeal against an order of acquittal in a case which arose on the basis of a complaint is special law, and (2) the complainant who wishes to file an appeal against the order of acquittal, has to obtain leave of the Court within the period of limitation mentioned in Section 417 itself and that he cannot get benefit of the provisions of Section 5 of the Lim. Act. This view is based on a plain reading of Section 29(2)(a) and (b). Section 29(2)(a) lays down that where any special law prescribed for any appeal or application a period of limitation, for the purposes of determining period of limitation prescribed by special law the provisions contained in Section 4, Sections 9 to 19 and Section 22 shall apply. It is apparent that Section 5 is/was not included in Clause (a). Then Sub-section (b) further lays down that the remaining provisions of this Act were not applicable. It means that this Clause (b) clearly excluded Sections 5 and 19 to 21. But in the new Limitation Act there is a clear departure from els. (a) and (b) of Section 29(2) of the old Act. There is no corresponding clause or provision like Clause (b). Then Clause (a) makes Sections 4 to 24 of the Lim. Act applicable. It follows from the above that the case of Kaushalya Rani (1964(1) Cri LJ 152)(SC) is not of any help to the respondents-

20. Sri Tejpal then referred to two other cases:

(1) Raja Pandey v. Sheo Pujan Pandey AIR 1942 All 429(FB).

This case related to Provincial Insolvency Act and the question for consideration was whether Section 4 of the Limitation Act was applicable. It was held that the Provincial Insolvency Act was special law and that by virtue of Section 10 of the General Clauses Act, the applicant could take advantage of the period of vacation and not on account of the provisions of Section 4.(2) Hukumdev Narain Yadav v. Lalit Narain Misra : [1974]3SCR31 :This case related to an election petition filed under the Representation .-> of the People Act, 1951. On a consideration of the provisions of the said Act specially Section 86, it was held that the provisions of Section 5 of the Lim. Act were not applicable.

21. The two cases cited above have been decided on the provisions of the special Acts. Similar provisions do not exist in Cr, P. C. 1973. Therefore the respondents cannot get any advantage from these cases.

22. On the other side the learned State counsel deferred to the case of Parsano v. Hazara Singh . In this case the provisions of Section 417(3) of Cr.P.C. and Section 29(2) of the new Limitation Act were considered and it was held that the delay in filing application for leave to appeal could be condoned Under Section 5 of the Limitation Act. In this case the ratio of the case of Kaushlya Rani (1964(1) Cri LJ 152)(SC)(supra) for obvious reasons was explained and not followed.

23. The learned State counsel next referred to the case of Mangu Ram v. Municipal Corporation of Delhi : 1976 CriLJ179 . In this case the Municipal Corporation of Delhi filed an application for leave to appeal Under Section 417(3) of the old Cr.P.C. against an order of acquittal after the period of limitation prescribed in Sub-section (4) of Section 417. The High Court condoned the delay in filing the application. Taking into consideration the provisions of Section 29(2) of the new Lim- Act. the Supreme Court rejected the application for special leave to appeal against the order of the High Court. In this case it was pointed out that the case of Kau-shlva Rani (1964(1) Cri LJ 152)(SC)' was based on the provisions of the old Lim. Act and not that of the new Lim. Act. In other words the Supreme Court upheld the High Court's order condoning the delay in filing application for leave to appeal. It means that Section 5 of the Lim. Act was held applicable.

24. Sri Tejpal raised 2 points against this decision (1) it was not law which the courts subordinate to the Supreme Court should follow and (2) this case was decided by a Bench of 2 Judges whereas the case of Kaushlya Rani (1964(1) Cri LJ 152)(SC) was decided by 3 Judges.

25. Both these contentions are wholly without substance. With regard to the first contention Article 141 of the Constitution clearly lays down that the law declared by the Supreme Court shall be binding on all Courts. It will be noticed that the case of Mangu Ram (1976 Cri LJ 179)(SC) has been decided purely on a question of law and not on a question of fact. The Supreme Court on a consideration of the various provisions contained in the Cr.P.C. and Limitation Act has held that

Section 5 of the Lim. Act was applicable to an application for leave to appeal Under Section 417(3) of the old Code. In this way the view taken by the Supreme Court has to be followed by the Courts subordinate to it in view of the clear provision of Article 141 of the Constitution.

26. With regard to the second contention the case of Kaushlya Rani was not decided on the basis of the provisions of the new Limitation Act and therefore this case is not a decision on the provisions of the New Limitation Act which were considered by two Hon'ble Judges in the case of Mangu Ram (1976 Cri LJ 179)(SC).

27. In case the contention of Sri Tej-pal is accepted a peculiar position will arise. It arises in this way that for filing an appeal against an order of acquittal, Section 5 of the Lim. Act is undoubtedly applicable. But if Section 5 of the Limitation Act is not made applicable to an application for leave to appeal, then the applicability of Section 5 of the Lim. Act to the filing of appeal becomes nugatory. The provisions of the Code and that of the Limitation Act have to be read in continuation or addition of each other and a harmonious construction has to be placed on them. If Section 5 of the Lim. Act is applicable to the filing of appeals then there appears no reason why it is not applicable to applications for leave to appeal. It will be noticed that an appeal against an order of acquittal as well as an application for leave to appeal are required to be filed within the same period of limitation i.e. 90 days from the date of the order. Therefore what happens is that an application for leave to appeal and the appeal are filed together. Taking into consideration these broad facts and provisions, the contention of Sri Tejpall cannot be accepted otherwise it would lead to absurd result.

28. For all what has been discussed above, it is not correct to urge that Section 5 of the Lim. Act is not applicable to the instant application.

29. Sri Keshav Sahay has raised 3 contentions- (1) Section 378 does not give an absolute right to the State to file an appeal. The accused have acquired a right if an appeal against an order of acquittal is not filed within the period of limitation. In case an appeal, is allowed to be filed beyond the period of limitation it would infringe the liberty, of the accused and thereby violate Article 21 of the

Constitution. (2) The reason assigned by the State for not filing the application within time is the strike by the Advocates. And (3) The application could be filed on 2-4-1981 because the file was available to the Government Advocate on 1-4-1981. While claiming the benefit of Section 5 of the Lim. Act, each day's delay has to be satisfactorily explained. As the period of limitation for filing an application for leave to appeal had already expired, the State counsel should have shown extra diligence.

30. With regard to the first contention it has to be remarked that Section 5 of the Lim. Act is applicable to an application for leave to appeal. Article 21 of the Constitution simply says that no person shall be deprived of his life or personal liberty except according to procedure established by law. It will be noticed that the State counsel wants to file an appeal against the order of acquittal. Appeal is a creation of Statute. If the Statute permits an appeal to be filed, it cannot be said that it violates the provisions of Article 21 of the Constitution. The Limitation Act is also a part of the procedural law. In filing an appeal or application for leave to appeal claiming benefit of Section 5 of the Limitation Act the State is following the procedure laid down by law. The State is not adopting a procedure which is not permitted by law or Statute. In view of this, the first contention is wholly without substance. The order of acquittal becomes final only if an appeal is not filed against it. But where an appeal is filed in accordance with the provisions of law contained in the Cr.P.C. and the Limitation Act, it cannot be said that the order of acquittal has become final and as such the accused have acquired a right not to be punished in the case.

31. With regard to the 2nd and 3rd contentions, this case presents an unusual and extraordinary position. The Advocates and lawyers of this Court as well as the staff of this Court, it is well known, resorted to strike from 16-3-1981 to 4-5-1981. In this period the Judges were not allowed to come to the Court. They were not allowed to do work even at their residences. The office of the Court was allowed to be opened for a couple of days for a limited purpose, namely, for the drawal and disbursement of pay to the staff and not for any other purpose, It was not allowed to be opened for doing any judicial work. As the office of the State counsel was opened on 1-4-1981, the Government Advocate could lay his hands on the file. He

marked this file to a Deputy Government Advocate. The Deputy Government Advocate prepared memo of appeal, application for leave to appeal as well as application Under Section 5 of the Limitation Act on 2-4-1981. Then he presented it to the Registrar, not to any Judge, at his residence and not at his office in court. I would not have been surprised if the appeal.etc. had been presented in Court on 5-5-1981. In these special conditions and circumstances the two contentions of Sri Keshav Sahai have absolutely no force. In fact if the appeal etc. had been filed on 5-5-1981, this Court would have been well justified in condoning the delay Under Section 5 of the Limitation Act.

32. No other point was urged.

33. The result of the above discussion is that application Under Section 5 of the Limitation Act is maintainable and it assigns good reason for condoning the delay of 4 days only. Consequently the application is allowed and the delay in filing the appeal is condoned.

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