

(2011) 11 SHI CK 0278

High Court of Himachal Pradesh

Case No: Criminal MMO No. 185 of 2011

Sandeep Kumar

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision: Nov. 30, 2011

Acts Referred:

- Limitation Act, 1963 - Section 5
- Penal Code, 1860 (IPC) - Section 160

Hon'ble Judges: Kuldip Singh, J

Bench: Single Bench

Final Decision: Allowed

Judgement

Kuldip Singh, Judge

1. The order dated 27.7.2011 passed by Additional Sessions Judge, Fast Track Court, Shimla in Cr. M.P. No. 50-S/4 of 2011 has been assailed in the petition. The Additional Sessions Judge has dismissed the application u/s 5 of the Limitation Act for condonation of delay in filing the appeal.

2. The facts in brief are that the petitioner and one Suresh Kumar were prosecuted for offence punishable u/s 160 IPC, both were convicted on 5.9.2007 and keeping in view of their poor status and young age both accused were ordered to pay fine of ` 100/- each u/s 160 IPC and were awarded sentence till rising of the court by Judicial Magistrate 1st Class, Court No. VI, Shimla in Criminal Case No.161-2 of 2006.

3. The petitioner filed appeal against the judgment dated 5.9.2007. The appeal was barred by time, therefore, an application u/s 5 of the Limitation Act for condoning the delay in filing the appeal was also filed. It has been stated in the application that the order was passed on 5.9.2007. The petitioner is away from Shimla for his livelihood and earning his bread and butter. The petitioner filed an application for appointment in Government service and passed all the examinations for getting the

Government job. The petitioner was asked to bring character certificate from the concerned authority, which was refused by the authority with the reasons that there is a finding of the Judicial Magistrate 1st Class, Shimla against the petitioner. It has been stated that the petitioner was under the wrong impression that the case has been settled and he has undergone the sentence imposed upon him by the Judicial Magistrate. It has been stated that the judgment of the Judicial Magistrate has put the stigma on the petitioner. The delay is neither intentional nor wilful. The prayer for condoning delay of 1186 days was made. The application was contested by filing reply and was dismissed on 27.7.2011 by the Additional Sessions Judge, hence petition for setting aside order dated 27.7.2011.

4. I have heard the learned counsel for the petitioner and the learned Additional Advocate General and also gone through the record. The learned counsel for the petitioner has fairly stated that the application for condonation of delay is not elaborate. He has submitted that in substance the petitioner was under the impression that the Judicial Magistrate has given the verdict and the case has been closed. The petitioner was not aware of the implication of the verdict which has deprived him government job even though he was selected inasmuch as he was not given character certificate in view of his indictment by the Court in the criminal case. On realizing the implication and seriousness of the matter, the petitioner had filed the appeal to challenge his conviction and sentence vide judgment dated 5.9.2007 so that the said judgment may not again be used by the authorities to deprive the petitioner public employment. It has been stated that the petitioner is 24 years and the alleged offence was committed when the petitioner was hardly 18 years old. The learned Additional Advocate General has supported the impugned order.

5. In [N. Balakrishnan Vs. M. Krishnamurthy](#), it has been held that length of delay is no matter, acceptability of the explanation is the only criterion. Once the Court accepts the explanation as sufficient, it is the result of positive exercise of discretion and normally the superior Court should not disturb such finding, unless the exercise of discretion was on wholly untenable grounds or arbitrary or perverse. But it is a different matter when the first court refuses to condone the delay. In such cases, the superior court would be free to consider the cause shown for the delay afresh and it is open to such superior court to come to its own finding untrammelled by the conclusion of the lower court. The rules of limitation are not meant to destroy the rights of the parties. The object of providing a legal remedy is to repair the damage caused by reason of legal injury. The law of limitation is thus founded on public policy. There is no presumption that delay in approaching the court is always deliberate. The words "sufficient cause" should receive a liberal construction. In every case of delay, there can be some lapse on the part of the litigant concerned. That alone is not enough to turn down his plea and to shut the door against him. If the explanation does not smack of mala fides or it is not put forth as part of a dilatory strategy, the court must show utmost consideration to the suitor.

6. In [M.K. Prasad Vs. P. Arumogam](#), it has been held that in construing Section 5 of the Limitation Act, the Court has to keep in mind that discretion in the section has to be exercised to advance substantial justice. Even though the appellant appears not to be as vigilant as he ought to have been, yet his conduct does not, on the whole, warrant to castigating him as an irresponsible litigant. He should have been more vigilant but his failure to adopt such extra vigilance should not have been made a ground for ousting him from the litigation with respect to the property, concededly to be valuable.

7. The Supreme Court in Ram Nath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others AIR 2002 SC 1201 has held that one thing is clear that the Court should not proceed with the tendency of finding fault with the cause shown and reject the petition by a slipshod order in over jubilation of disposal drive. The acceptance of explanation furnished should be the rule and refusal an exception more so when no negligence or inaction or want of bona fide can be imputed to the defaulting party. The Supreme Court further held by taking a pedantic and hypertechnical view of the matter the explanation furnished should not be rejected when stakes are high and/or arguable points of facts and law are involved in the case, causing enormous loss and irreparable injury to the party against whom the lis terminates either by default or inaction and defeating valuable right of such a party to have the decision on merit. While considering the matter, Courts have to strike a balance between resultant effect of the order it is going to pass upon the parties either way. The Supreme Court has also held that while considering the matter the Courts should not lose sight of the fact that by not taking steps within the time prescribed a valuable right as accrued to the other party which should not be lightly defeated by condoning the delay in routine like manner.

8. It has been argued on behalf of the petitioner that petitioner belongs to S.C. category he was selected as Constable in the police department but was not sent for training on account of his conviction and sentence u/s 160 IPC by the Court. It has been submitted that no malafides can be imputed to the petitioner inasmuch as the petitioner did not get any benefit for not challenging the appeal against the judgment dated 5.9.2007 of the trial Court in time.

9. The Additional Sessions Judge has proceeded with the assumption that the ground set up in the application is that petitioner was away from Shimla on 5.9.2007 in connection with his livelihood. It has been observed that petitioner has tried to show that judgment of conviction and order of sentence was passed in his absence, he was unaware of it. The Additional Sessions Judge has misconstrued the application of the petitioner u/s 5 of the Limitation Act. In the application, it has been pleaded that order was passed on 5.9.2007 and the petitioner is away from Shimla for his livelihood. It has not been pleaded in the application that the order was passed in absence of the petitioner on 5.9.2007. The petitioner as PW-1 has stated that on the date of judgment he was present in the Court. The petitioner in

the application has pleaded that he is away from Shimla for livelihood meaning thereby on the date of filing of the application the petitioner was away from Shimla and not on the date of passing of the order dated 5.9.2007.

10. There is ring of truth in the explanation of the petitioner when he has stated that he took that the matter has been closed by the judgment dated 5.9.2007 and therefore, he has not filed the appeal. He came to know the implication of the judgment only when after his selection as Constable in the Police Department he was refused the appointment on the ground that he is a previous convict and, therefore, he took immediate steps for filing the appeal with condonation of delay application. No doubt, the delay is of 1186 days but the petitioner has not gained anything by making his appeal defective on account of delay. The petitioner is about 24 years, the conviction and sentence dated 5.9.2007 has deprived him atleast one chance to settle in life as he was not given clearance for appointment as Constable on the basis of conviction and sentence dated 5.9.2007. The State is not going to be prejudiced if appeal of the petitioner is decided on merits. The application for condonation of delay appears to be bonafide. The Additional Sessions Judge has not appreciated the condonation of delay application in right perspective. The impugned order is liable to be set-aside.

11. In view of above, the petition is allowed, order dated 27.7.2011 passed by Additional Sessions Judge, Fast Track Court, Shimla in Cr.M.P.No. 50-S/4 of 2011 is set-aside. The application for condonation of delay in filing the appeal, filed by the petitioner in the lower Appellate Court is allowed, delay condoned. The parties through their counsel are directed to appear in the lower Appellate Court on 14.12.2011. The Additional Sessions Judge, Fast Track Court, Shimla is directed to decide the appeal on merits in accordance with law. The record be sent back immediately so as to reach before the date fixed