

(1998) 11 KL CK 0044

High Court Of Kerala

Case No: Criminal M.P. No. 222 of 1998 in Criminal R.P. No. ... of 1998

K. Kuttan Nair

APPELLANT

Vs

P. Mammi and Another

RESPONDENT

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**Date of Decision:** Nov. 3, 1998**Acts Referred:**

- Limitation Act, 1963 - Section 5
- Negotiable Instruments Act, 1881 (NI) - Section 138

**Citation:** (1999) 96 CompCas 453 : (1999) CriLJ 260 : (1999) 1 RCR(Civil) 685 : (1999) 4 RCR(Criminal) 428**Hon'ble Judges:** K.A. Mohamed Shafi, J**Bench:** Single Bench**Advocate:** Mathew Zachariah, for the Appellant; B. Sudheendrakumar and Public Prosecutor, for the Respondent**Final Decision:** Dismissed

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**Judgement**

K.A. Mohammed Shafi, J.

This application is filed by the revision petitioner to condone the delay of 123 days in preferring the CrI. R. P. u/s 5 of the Limitation Act.

2. The CrI. R. P. is filed against the order dated June 5, 1997, passed by the Judicial First Class Magistrate's Court, Tirur, in S. T. No. 212 of 1996 dismissing the complaint filed by the petitioner against the respondent alleging offence punishable u/s 138 of the Negotiable Instruments Act finding that the complaint is not maintainable since there was no proper notice as contemplated under proviso (b) to Section 138 of the Negotiable Instruments Act relying upon the decision of the Calcutta High Court in Gopa Devi Ozha v. Sujit Paul [1996] 2 KLT 886.

3. The petitioner has contended that after the order was passed, his counsel advised that there is little scope to challenge the order of dismissal of the complaint in view of the judgment of the Calcutta High Court in Gopa Devi Ozha v. Svjit Paul [1996] 2

KLT 886. Subsequently when he contacted his counsel in November, 1997, he was informed by counsel that the legal position has been changed in view of the subsequent decision of this court reported in *Kunjan Panicker v. Christudus* [1997] 2 KLT 539. Therefore, he immediately applied for a certified copy of the order on November 13, 1997, obtained the copy on December 4, 1997, and he made arrangements to file the revision petition before this court on December 20, 1997. He has further contended that due to some personal problems he could meet his counsel only on January 9, 1998, and the revision petition was preferred on January 15, 1998. Therefore, according to him, there is absolutely no laches or negligence on his part in preferring the revision petition and the delay of 123 days in filing the revision petition which was occasioned due to the wrong advice of his counsel, is liable to be condoned.

4. The first respondent vehemently opposed the application by filing a counter-affidavit. According to him, there are deliberate laches and negligence on the part of the petitioner in preferring the revision petition and he has not explained the delay in preferring the revision petition properly. He has also contended that after the impugned order was passed by the lower court on June 5, 1997, the petitioner did not take any step even to obtain a certified copy of the order till the position of law was changed by the subsequent decision of this court. He has also contended that even after applying for the certified copy there is considerable unexplained delay in obtaining the certified copy, in engaging the counsel and preparing the above revision petition. Therefore, according to him, the delay cannot be condoned.

5. The petitioner has contended that when the lower court dismissed the complaint on the ground that the notice sent by the petitioner was not legal and valid relying upon the decision reported in *Gopa Devi Ozha v. Sujit Paul* [1996] 2 KLT 886, his counsel advised him that there is no scope to challenge the dismissal of the complaint and it is only subsequently in November, 1997, that counsel informed him that the legal position is changed regarding the validity of notice by a subsequent decision of this court in his favour and, therefore, he applied for a certified copy of the order and preferred this revision petition. Therefore, according to him, there are absolutely no laches or negligence on his part in preferring this revision petition and it was only due to the wrong advice given by his counsel that he could not prefer the revision petition in time and as such the delay is liable to be condoned. Counsel for the petitioner also submitted that a very huge amount is involved in this case and by rejection of the complaint at the threshold, irreparable injury and loss will be caused to the petitioner. Therefore, a lenient view should be taken in considering this application for condonation of delay in preferring the revision petition.

6. It is well settled that the delay occurred in preferring the appeal or revision due to a wrong or mistaken advice given by the counsel can be condoned if the legal advice is found to be honestly given and the case of the petitioner is not tainted with any

mala fides or element of recklessness or ruse, in an application for condonation of delay filed u/s 5 of the Limitation Act. But the question to be considered in this case is whether the opinion alleged to have been given by counsel for the petitioner was wrong entitling the petitioner to seek condonation of delay in preferring the revision petition on the ground of wrong advice given by the counsel.

7. It has to be noted that when the lower court dismissed the complaint relying upon the decision in *Gopa Devi Ozha v. Sujit Paul* [1996] 2 KLT 886 and the counsel gave the advice that there is no scope for challenging that order, it was not a wrong advice and it was perfectly legal and valid advice in accordance with the position of law then existing due to the pronouncement of the judgment in *Gopa Devi Ozha v. Sujit Paul* [1996] 2 KLT 886. The fact that the decision of a Division Bench of this court subsequently changing the position of law and holding that the earlier decision is incorrect, will not make the advice given by counsel earlier based on the earlier decision wrong or incorrect, cannot be disputed. Therefore, the contention of the petitioner that on the basis of the wrong advice given by his counsel not to prefer any revision against the order of dismissal of the complaint passed by the lower court restrained him from preferring the revision petition within the time stipulated under law, is not sustainable since the advice given by his counsel during the relevant period was perfectly legal and valid and based on the law then in force. The fact that long after the order was passed by the trial court relying upon a particular decision which was reversed in some case wherein the earlier decision was challenged by somebody, will not be a ground to find that the earlier advice given by counsel on the basis of the law then in existence is wrong.

8. The contention of the petitioner that the provisions of Section 138 of the Negotiable Instruments Act and the allied provisions are recently introduced by the Legislature by amendment of the Negotiable Instruments Act and the position of law with regard to the various aspects arising u/s 138 of the Negotiable Instruments Act are not settled even now and, therefore, the reversal of the earlier judgment by the subsequent judgment should be treated as a good ground for condonation of delay in preferring the revision petition, is not sustainable. If such a contention is accepted it will enable the litigants to prefer appeals or revisions at any time whenever the position of law is changed by overruling the earlier decision or otherwise, by filing a petition to condone the delay u/s 5 of the Limitation Act. According to me, if such a position is accepted it will not only unsettle the settled position regarding the rights and liabilities of the litigants arrived at by the final adjudication of their cases, but also will lead to the opening of the floodgates of litigations causing chaos and confusion in the society. This view expressed by me is supported by the judgment of this court in *Ponnamma Pillai v. Vdayudhan* [1981] 21 KLT 23, wherein a single judge of this court has observed as follows :

"The advice given by the learned counsel as aforesaid could not be characterised as a wrong advice, or a mistaken advice at the time it was made. The fact is that the

plaintiffs did not dare to challenge the correctness of that decision by pursuing the matter before the lower appellate court and this court by preferring appeals against the decision in the trial court. That long thereafter somebody else dared to challenge the correctness of the decision in *Victor Fernandez v. Albert Fernandez* [1971] KLT 216 (Ker) [FB] and that thereupon this court held that the aforesaid decision lays down bad law is not, in my view, a sufficient cause for condonation of the delay in preferring an appeal. If it be otherwise, then an appeal could be preferred before the appellate court on every occasion when a principle stated is overruled by another decision of this court even if it be after a very long time."

9. Therefore, the contention of the petitioner that he could not prefer the revision petition due to the wrong advice given by his counsel and hence the delay in preferring the revision petition should be condoned, is not sustainable.

10. Counsel for the petitioner vehemently argued that in considering the application for condonation of delay u/s 5 of the Limitation Act, the court should adopt a liberal and humanitarian approach so as to advance the cause of justice rather than throw out a good cause at the threshold. In support of this contention he relies upon the decision in [Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others](#), wherein the Supreme Court has observed as follows :

"It is common knowledge that this court has been making a justifiably liberal approach in matters instituted in this court. But the message does not appear to have percolated down to all the other courts in the hierarchy. And such a liberal approach is adopted on principle as it is realised that :

(1) Ordinarily a litigant does not stand to benefit by lodging an appeal late.

(2) Refusing to condone a delay can result in a meritorious matter being thrown out at the very threshold and the cause of justice being defeated. As against this when a delay is condoned the highest that can happen is that a cause would be decided on the merits after hearing the parties.

(3) "Every day"s delay must be explained" does not mean that a pedantic approach should be made. Why not every hour"s delay, every second"s delay ? The doctrine must be applied in a rational common sense pragmatic manner.

(4) When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred for the other side cannot claim to have a vested right in injustice being done because of a non-deliberate delay.

(5) There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.

(6) It must be grasped that the judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

Making a justice-oriented approach from this perspective, there was sufficient cause for condoning the delay in the institution of the appeal."

11. It is true that a liberal and justice oriented approach should be made in order to find out whether sufficient cause is made out to condone the delay in preferring the appeal or revision. But even by applying the principles laid down in the above decision regarding the liberal approach to be made by the courts, the petitioner has not made out sufficient cause to condone the delay in the affidavit filed in support of this petition. As already noted after the order was passed by the trial court on June 5, 1997, the petitioner applied for certified copy of the order on November 13, 1997. Though the copy was made ready on November 26, 1997, the counsel for the petitioner received the copy of the order only on December 4, 1997. According to the petitioner, he received the certified copy from his counsel on December 16, 1997, and he went to the office of his counsel at Ernakulam on December 20, 1997, and was informed that counsel will be in station only on the reopening of courts after the Christmas vacation. But he met counsel only on January 9, 1998, and the revision is preferred on January 15, 1998.

12. The petitioner has not offered any explanation for the delay in receiving the copy on December 4, 1997, even though it was ready on November 26, 1997. He has not stated anything regarding the delay of twelve days till December 16, 1997, after receipt of the certified copy of the order from counsel and to go to Ernakulam to meet his counsel on December 20, 1997. Even though he was advised to go to counsel on the reopening of the courts after the Christmas vacation, he went to the office of counsel only on January 9, 1998, stating that due to some personal reasons he could not go to Ernakulam. Even thereafter the revision is preferred and filed along with this application before this court on January 15, 1998. The petitioner has not offered any explanation for all these delays in receiving the certified copy, meeting his counsel at Ernakulam and preferring the revision petition with the above petition to condone the delay.

13. Relying upon these facts counsel for the first respondent submitted that the petitioner is not entitled to the condonation of delay in filing the above revision petition, even if a very lenient view is taken in this case in accordance with the principle laid down by the Supreme Court in the above referred decision since the petitioner has not at all given any explanation for the delay in all those aspects.

14. But it is pertinent to note that even if the delay subsequent to the filing of the application for the certified copy is condoned in this case by taking a very lenient and liberal view for the advancement of substantial justice, the petitioner cannot succeed in this case, since I have already found that the delay in filing the

application for certified copy from June 5, 1997, to November 13, 1997, cannot be condoned since the ground alleged for condonation of delay, viz., the wrong advice given by counsel for the petitioner, is not a valid and sustainable ground and no other ground is alleged to condone the delay occurred during that period. Therefore, it is clear that the petitioner has not made out sufficient cause to condone the delay in filing the revision petition as contemplated u/s 5 of the Limitation Act and as such the above petition is liable to be dismissed.

15. Hence the Crl. M. P. is dismissed.