

(2009) 07 CAL CK 0004**Calcutta High Court****Case No:** C.R.R. No. 1130 of 2003

Shyamal Kanti Saha

APPELLANT

Vs

State of West Bengal and
Another

RESPONDENT

Date of Decision: July 16, 2009**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 473
- Negotiable Instruments Act, 1881 (NI) - Section 138, 142

Hon'ble Judges: Partha Sakha Datta, J**Bench:** Division Bench**Advocate:** Kaushik Gupta, Anirban Tarafder, for the Appellant;**Judgement**

1. Heard Mr. Kaushik Gupta, learned Advocate for the petitioner. Affidavit-of-service has been filed showing service as per AD card upon the opposite party No.2 on 24.6.2009. None appears for the opposite party No.2 Affidavit of service filed be kept with the record.

2. Heard Mr. Gupta, learned Advocate for the petitioner. Proviso to clause (b) to section 142 of the N.I. Act reads as follows:

"Provided that the cognizance of a complaint may be taken by the Court after the prescribed period, if the complainant satisfies the Court that he had sufficient cause for not making a complaint within such period."

This proviso has been brought in the statute by amendment with effect from 6.2.2003.

3. The opposite party No.2 lodged a petition of complaint with the learned Chief Metropolitan Magistrate, Calcutta on 29.12.2008 u/s 138 of NI Act against the petitioner alleging non-payment of the amount covered under the bounced cheque despite service of statutory notice. A petition was filed praying for condonation of

delay of 44 days in filing the petition of compliant and grounds of delay were advanced in that application. Learned Magistrate, instead of treating the application for condonation of delay, kept the application pending observing that the matter of delay is a matter of evidence and instead of condoning the delay or not condoning the delay, he admitted the petition of complaint provisionally and took cognizance of offence.

4. The approach of the learned Magistrate is wholly erroneous and unsustainable in law and reference in this connection may be had to the decision of this Court in Gautam Kumar De & Anr. vs. M/s. Prime Movers Auto Associates (P) Ltd. & Anr. reported, in 2009(1) C Cr LR (Cal) 580 wherein this Court dealt with the situation extensively and it is profitable to reproduce the reasonings of the Court as follows:

Now the question is whether the proposed accused persons have right of audience in the matter of condonation of delay in making the complaint u/s 138 of the NI Act. The proviso to clause (b) to section 142 of the Act giving power to the Magistrate to condone the delay if sufficient causes are shown was not originally there in the said section 142 but has been introduced by amendment of the Act with effect from 6th February. 2003. However, when the petition of complaint was filed, the amendment has come into force, as such the prayer for condonation of delay was entertainable. Now a Division Bench of this Court way back in 1981 in Asiatic Oxygen & Acetylene Company Ltd vs. Registrar of Companies, West Bengal reported in 1981(2) CHN 412 held at paragraph 7 as follows:

"From the, discussion of the rulings of the different High Court it appears to us that the proper and legitimate course for taking cognisance of an offence after extension of the paned of limitation as contemplated u/s 473 Cr.PC is to give prior notice to the proposed accused of the petition of complaint and the reasons put forward in a petition u/s 473 Cr.PC for extending the period of limitation so that the accused can be heard before the offence is taken cognizance of and the Court taking cognizance of the offence can avoid the necessity of reviewing its own tentative decision. That procedure was not followed in the case before us while the learned Chief Metropolitan Magistrate recorded orders dated 18.8.78 and 6.3.80. The aforesaid orders were passed in violation of rules of natural justice. We, therefore, set aside the orders dated 18.8.78 and 6.3.80 passed by the Chief Metropolitan Magistrate in case No.C/1147 of 1978. The learned Chief Metropolitan Magistrate will, however, be at liberty to give notice to the accused named in the petition of complaint of the petition for condonation of delay filed by the complainant u/s 473 Cr.PC and hear the proposed accused and thereafter to pass appropriate orders on the said petition".

This decision has surveyed a decision of the Privy Council in Krishnasamy vs. Ramasamy, reported in ILR 41 Mad 412 and the decision in Krishna Sanghi and Others Vs. The State of Madhya Pradesh, In Roja Kamalam Vs. The State, it has been held:

"When the Court extends the time, it means it is interfering with the rights of the accused which have vested in him by virtue of the expiry of period of limitation. Therefore, even though there is no rule of law requiring the Court to issue notice to the proposed accused and to give him an opportunity for meeting the case of the complainant in regard to the extension of time, interest of justice and principles of natural justice require that the condonation of the delay and extension of time can be done only after giving a reasonable opportunity to the proposed accused. It would be violating the very principles of natural justice and, in fact, the very spirit of administration of justice, if a party prosecuted in a Court of law after the period prescribed for launching of the prosecution has been over and without giving him an opportunity to explain his case as to why the delay should not be condoned. Absence of a rule of law shall not enable the Court to extend time for final prosecution without hearing the proposed accused".

5. The decisions of Allahabad High Court in Prakash Chandra Sharma v. Kaushal Kishore of the Rajasthan High Court in Panney Singh and Others Vs. State of Rajasthan, and Delhi High Court in Jagmohan Vs. The State, in support; of the proposition that proposed accused should be heard have been noted in the Division Bench decision of this Court.

6. Since in the application it was, averred that the petition of complaint was barred by limitation for 44 days, the legal existence of a petition of complaint at stake. Unless the Magistrate condones the delay, petition of complaint is not legally recognizable mid entertainable. Taking cognizance of offence without condoning the delay is patently illegal and in view of the decision cited above, it is but appropriate that the magisterial order should be set aside.

7. Accordingly, I allow the revisional application and set aside the order dated 29.12.2008 and also subsequent orders and direct the learned Magistrate to proceed first with the application for condonation of delay only upon service of notice of that application upon the petitioner and upon recording of evidence, if necessary, shall dispose of the same and then if he chooses to condone the delay, he then only can proceed with the petition of complaint, in accordance with law.

8. The application being CRAN No. 1468 of 2009 which is treated as on day's list, stands also disposed of.

9. A copy of the order shall be sent to the learned Chief Metropolitan Magistrate, Calcutta for information and necessary action.

10. Criminal section is directed to supply certified copy of this order, if applied for, to the learned Advocate for the petitioner expeditiously.