

Did Sara Mathews Overrule Sharadchandra Vinayak?

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Abstract

This legal essay was written to dispel some confusion in a section of legal fraternity on whether or not notice to be given to the accused prior to excusing the delay in commencing prosecutions for all offences subject to period of limitation prescribed in any legislation on the foundation of Latin Maxim of 'Audi alteram partem' (or 'audiat et altera pars'). The confusion may be due to the misunderstanding of the decision on the strength of facts in 5 Justices Bench of Sarah Matthews that 'notice need not be given to the accused' to think that Sharadchandra Vinayak Dongre was declared as bad law, consequently similar rulings. The Author wants to tell that Sharadchandra Vinayak Dongre was not overruled but still holds the field since there was no impending necessity to do so as the facts then issues in those two appeals are completely distinct.

Keywords: Sarah Matthews, offences, Sharadchandra Vinayak Dongre, accused, Code of Criminal Procedure 1973

INTRODUCTION

The impetus for writing this essay happened to be that there was an opinion among a section legal fraternity that **'there was no necessity to give notice to the accused before excusing the delay in filing the complaint'** in prosecutions not only for the offence of dishonor cheques [1] but for offences in Chapter XXXVI of the Code of Criminal Procedure, 1973 [2] (Known as 'The Code') on the authority of 5 Judges Bench [3] in *Sarah Mathew* [4].

The Author begs **to differ** with the above opinion on meticulous examination of facts as well as rulings of important appeals brought before the Supreme Court.

This essay starts with *Sharadchandra Vinayak Dongre*, **which in the opinion of the Author was never overruled in Sarah Mathew**, then to *P.K. Choudary* [5] with similar decisions coming from the SC.

THE PROCEEDINGS

In *Sharadchandra*, the Prohibition and Excise Dept. of the State of Maharashtra, as the prosecuting agency stated in the first application that 'though the nature of the offence registered against the respondent under the Bombay Prohibition Act, 1949' was a **'continuing one'** [6] and therefore 'there was no delay in filing the charge-sheet' but 'if for any technical reason it appeared to the court that there was some delay in filing the same then, considering the nature and gravity of the offence, the delay may kindly be condoned.'

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On the same dt. i.e., 21-11-1986, the lower court took cognizance of the offence on allowing the first application for excusing the delay, with process issued against the respondents, *Sharadchandra*.

The lower court neither gave reasons on whether or not the offence is continuing offence, and if not,

on what factors the delay was condoned was absent since there was no hearing of both parties. But if the court has come to the opinion that it is really a continuing offence, cognisance of the offence can be taken forthwith since no limitation rule applies

Agreeing with the High Court that “the delay, if any, for launching the prosecution, could not have been condoned without notice to the respondents and behind their back and without recording any reasons for excusing the delay,” **Lord Justices A.S. Anand, R.M. Shahai and N.P. Singh**, after observing that the High Court should have remitted the case back but did not do so, held that “it is after hearing both parties on the application for excusing the delay, afresh, in accordance with law that the lower court shall proceed further in the matter” after observing that the High Court should have remitted the case back but did not do so.

The appeal succeeds on first issue [7] by sending the records back to lower Court

Following *Sharadchandra*, Lord Justices S.B. Sinha and V.S. Sirpurkar in *P.K. Choudary*, after observing that ‘lower Court did not hear the appellant before excusing the delay since (no evidence that) any notice was served upon him to show cause as to why the delay shall not be condoned,’ held that ‘there cannot be any doubt whatsoever that appellant was entitled to get an opportunity of being heard before the delay could be excused’ [8].

In *Sarah Mathews*, **5 Justices Bench** was asked to decide since there were conflict of opinions in earlier decisions [9] whether for the purposes of computing the period of limitation under Sec. 468 of the Code, **‘the relevant date is the date of filing of the complaint or the date of institution of prosecution or whether the relevant date is the date on which a Magistrate takes cognizance of the offence’ as the single but most important question of law** but ‘not on issue of hearing the opposite party before condonation of delay in initiation of prosecution when application moved for the purpose.’

After extensive arguments of the Lawyers on both sides, exhaustive discussion on ‘the principles of interpretation of statutory provisions, assessing the reasons and objects for the introduction of Chapter XXXVI of the Code, referring to the recommendation of Law Commission of India and finally, on application of appropriate Latin Maxims found essential,’ **their Lordships** gave the answer to the above only question of law as follows.

In an unanimous ruling, Lord Justice Ranjana Prakash Desai wrote that ‘for the purpose of computing the period of limitation’ under Sec. 468 of the Code **‘the relevant date is the date of filing of the complaint or the date of institution of prosecution’ but ‘not the date on which the Magistrate takes cognizance’** [10] declaring that ‘*Bharat Kale* which is followed in *Japani Sahoo* lays down the correct law and *Krishna Pillai* was not correct.’

The absurdity and futility of the stand of appellant that ‘relevant date for computation of period is the date of taking cognizance of the offence,’ was neatly highlighted by **Lord Justice Ranjana Prakash Desai** in passage given below:

‘If the date of taking cognizance is considered to be relevant then, if the Court takes cognizance within the period of limitation, there is no question of the complaint being time barred. If the Court takes cognizance after the period of limitation, then, the question is how will Sec. 473 of the Code, will work. The complainant will be interested in having the delay condoned. If the delay is caused by the Magistrate by not taking cognizance in time, it is absurd to expect the complainant to make an application for condonation of delay. The complainant surely cannot explain that delay. Then in such a situation, the question is whether the Magistrate has to issue notice to the accused, explain to the accused the reason why delay was caused and then hear the accused and decide whether to condone

the delay or not. This would also mean that the Magistrate can decide whether to condone delay or not, caused by him. Such a situation will be anomalous and such a procedure is not known to law.'

Following *Bharat Damodar Kale*, **Lord Justices C.K. Thakker and Tarun Chatterjee in Japani Sahoo**, [11] too firmly held 'that once it is accepted (and there is no dispute about it) that it is not within the domain of the complainant or prosecuting agency to take cognizance of an offence or to issue process and the only thing the former can do is to file a complaint or initiate proceedings in accordance with law. If that action of initiation of proceedings has been taken within the period of limitation, the complainant is not responsible for any delay on the part of the Court or Magistrate in issuing process or taking cognizance of an offence. Now, if he is sought to be penalized because of the omission, default or inaction on the part of the Court or Magistrate, the provision of law may have to be tested on the touchstone of Article 14 of the Constitution. It can possibly be urged that such a provision is totally arbitrary, irrational and unreasonable. It is settled law that a Court of Law would interpret a provision which would help sustaining the validity of law by applying the doctrine of reasonable construction rather than making it vulnerable and unconstitutional by adopting rule of 'litera legis.' Connecting the provision of limitation in Sec. 468 of the Code with issuing of process or taking of cognizance by the Court may make it unsustainable and ultra vires Article 14 of the Constitution.'

Their Lordships held that 'for the purpose of computing the period of limitation, the relevant date must be considered as the date of filing of complaint or initiating criminal proceedings and not the date of taking cognizance by a Magistrate or issuance of process by a Court. We, therefore, overrule all decisions in which it has been held that the crucial date for computing the period of limitation is taking of cognizance by the Magistrate/Court and not of filing of complaint or initiation of criminal proceedings.'

Finally, **Their Lordships** said that 'in the instant case, the complaint was filed within a period of three days from the date of alleged offence. The complaint, therefore, must be held to be filed within the period of limitation even though cognizance was taken by the learned Magistrate after a period of one year. Since the criminal proceedings have been quashed by the High Court, the order deserves to be set aside and is accordingly set aside, as expeditiously as possible.

Appeal was accordingly allowed by directing the Magistrate to proceed with the case and pass an appropriate order in accordance with law.

In *Bharat Damodar Kale*, [12] **Lord Justices N. Santosh Hegde and B.P. Singh** clearly held that 'the limitation prescribed is not for taking cognizance within the period of limitation, but for taking cognizance of an offence in regard to which a complaint is filed or prosecution is initiated beyond the period of limitation prescribed under the Code. Apart from the statutory indication of this view of ours, we find support for this view from the fact that taking of cognizance is an act of the court over which the prosecuting agency or the complainant has no control. Therefore a complaint filed within the period of limitation under the Code cannot be made infructuous by an act of court. The legal phrase "actus curiae neminem gravabit" which means an act of the court shall prejudice no man, or by a delay on the part of the court neither party should suffer, also supports the view that the legislature could not have intended to put a period of limitation on the act of the court of taking cognizance of an offence so as to defeat the case of the complainant.'

Then **their Lordships** also held that 'if this interpretation of Chapter XXXVI of the Code is to be applied to the facts of the case then we notice that the offence was detected on 5.3.1999 and the complaint was filed before the court on 3.3.2000 which was well within the period of limitation, therefore, the fact that the court took cognizance of the offence only on 25.3.1999 about 25 days after it was filed, would not make the complaint barred by limitation.'

In view of above finding, **Lord Justices N. Santosh Hegde and B.P. Singh did not** think it is necessary for us to go to the next question argued on behalf of the appellants that the court below was in error in invoking Sec. 473 of the Code for extending the period of limitation nor is it necessary for us to discuss the case of Tara Dutt relied on by the appellants.

THIS APPEAL WAS DISMISSED

In *Krishna Pillai*, it was held that ‘since the Magistrate took cognizance beyond the period of one year from the date of commission of the offence, the bar under Sec. 9 of the Child Marriage Restraint Act, 1929 [13] came into force in not allowing the prosecution against the accused.’

The contention of the respondent In *Krishna Pillai* that ‘since the complaint had been filed within a year from the commission of the offence it must be taken that the court has taken cognizance on the date when the complaint was filed and therefore, the complaint cannot be said to be barred by limitation’ was rejected.

Sarah Mathews declared that *Krishna Pillai* ‘is not the authority for interpretation of provisions of Chapter XXXVI of the Code,’ it be restricted to its own facts.

Lord Justices K. Ramaswamy, S.B. Majumudar, G.T. Nanavati too in *Rashmi Kumar (Smt.)* [14] declared ‘thus, for the purpose of computation of period of limitation, the date of filing of the complaint was held to be relevant’

The Five Judge Bench rightly did not discuss the decision given by **Lord Justices G.B. Pattanaik, M. Srinivasan and M.B. Shah** in *State of Himachal Pradesh* [15] as in that appeal ‘the main issue was about the interpretation and application’ of sec. 468 (3) of the Code

Now coming to the decision given in prosecution under the NI Act against the drawer, Lord Justices Shiva Kirthi Singh and Deepak Misra in *K.J. Joseh* [16] clearly held as follows.

The other plea relating to delay of 62 days and taking of cognizance without issuing notice to dispense with such delay is however found to have substance it has been shown and “the orders of the Magistrate do not show any application of mind to the issue of delay nor has delay been condoned before issuance of summons.”

Their Lordships sent back the records to the lower court to decide the issue fresh after hearing both parties [17].

Significantly Lord Justices Shiva Kirthi Singh and Deepak Misra, while coming to their ruling, has accepted the citation of *P.K. Choudhury* by **accused-drawer as correct**.

In coming to the final stage of the essay, the Author puts forward these comments

It is in the context of the argument of appellant in *Sarah Mathews* that Mr. Luthra A.S.G., Advocate has very interestingly pointed out that the word ‘or’ in Sec. 473 of the Code is ‘very significant’ suggesting that ‘for the first part i.e. **to find out whether the delay has been explained or not, notice will have to be issued to the accused**’ and for the latter part i.e. “**to decide whether it is necessary to do so in the interest of justice, no notice will have to be issued.**”

Though Their lordships said that ‘**this question has not directly arisen before us and we do not want to express any opinion of the necessity of Sec. 473 of the Code to be bifurcated or not**’ but in the firm opinion of the author, there were enough hints that ‘no notice will have to be issued to the accused before condonation of delay in the interest of justice’ i.e., for the latter part of Sec. 473 of the Code and totally ridiculous to even think of these points in view of appellant’s absurd arguments.

There was absolutely ‘**no necessity to extensively quote and approve** *Bharat Damodar Kale and Japani Sahoo*’ in *Sara Matthews*, had the main, and identical issue had not been similar in all appeals

Neither *Sharadchandra* was declared as ‘per curiam, nor shall ‘even be assumed that it was ‘impliedly overruled’ since ‘the facts as well as questions of law are completely distinct.’ Otherwise, certainly the Five Justices should have certainly and specifically declared that *Sharadchandra* was ‘overruled.’

In fact there is no reason for overruling *Sharadchandra* that decision, merely because it was referred to in *Sarah Mathews* only to a limited extent.

Though *Sharadchandra* was not cited in *K.J. Joseph*, but even assuming that Lord Justices Kirth Singh and Deepak Misra are presumed to know all along that *Sara Mathews* overruled *Sharadchandra*, then they would have certainly refused to direct lower court to hear the opposite party on the issue of excusing the delay’ but referred the issue to larger Bench since *K.J. Joseph* was an appeal under separate, different legislation.

On reading the expression ‘**delay is properly explained**’ found in Sec. 473 of the Code, the Author, after completely agreeing with the arguments of Mr. Luthra A.S.G., Advocate, says that it is not sufficient if the Court, i.e., the presiding Judge was aware and was satisfied with explanation offered for excusing the delay, without necessity of hearing the opposite party on such explanation, as it offends the natural principle of justice as expressed in Latin Maxim ‘*Audi Altem Partem*’ [18] that has to be followed in all appropriate circumstances.

Coming to different view, if the delay is to be excused ‘**in the interests of justice**,’ then notice to opposite party may or may not be given in discretion of the Court.

If we read the opinion of **Lord Justices K Singh and N. Singh in *Vanka Radhamanohari (Smt)*** [19] that ‘**for excusing the delay in the interest of justice**, it is always ‘the Court that has to take note of the nature of offence, etc., with ‘**no role to the complainant or prosecution agency**,’ thereby, ‘no necessity to give notice to the opposite party,’ then it becomes clear that Mr. Luthra was perfectly correct in his argument with reference to second part of Sec. 473 of the Code.

As Sec. 473 of the Code having overriding effect to Sec. 468 of the Code, deprives the accused of a valuable right given under the latter provision in cases of avoiding prosecution not brought within time limits, is not advisable that notice should be given to the accused may be debatable.

Let us hope that there may be another opportunity for the Supreme Court to clarify the issue kept open on importance of the word ‘**OR**’ in Sec. 473 of the code.

CONCLUDING REMARKS

Lord Justices Ms. Banerjee and Krishna Murari in *Sesh Nath* [20] held that ‘delay can be condoned even in absence of application, in filing of application under Sec. 7 of Insolvency and Bankruptcy Code beyond the period of limitation’ on the reason that ‘S. 5 of Limitation of Act does not use the word ‘application.’

The Author thinks that their Lordships in *KJ Joseph* ‘should have settled the law on application of Sec. 202 of Code without any further doubts on following the precedents,’ though the appeal was allowed on the main issue.

The Author is firm that this ruling shall be restricted only to Insolvency Proceedings but not to other proceedings as it reverses the settled position of giving notice to opposite party on filing of

application for prayer of condonation of delay, further on looking at the clear observations of the SC that ‘however, the Court can always insist that an application or an affidavit showing cause for the delay be filed. No applicant or appellant can claim condonation of delay under Sec. 5 of the Limitation Act as of right, without making an application.’

Therefore, when application for condonation of delay is filed an opportunity shall certainly be given to opposite party to oppose the application.

As of today, on the issue of ‘**excusing the delay either way**’ in prosecutions initiated on **complaints filed in identical legislations**, *Sharadchandra, P.K. Choudhury and K. Joseph* are authoritative precedents.

Of Course, Sarah Mathews holds the field forever on main issue.

REFERENCES

1. Sec. 138 of the Negotiable Instruments Act, 1881
2. ‘Limitation for Taking Cognizance of Certain Offences’
3. Lord Justices P. Sathasivam, B.S. Chauhan, Ranjana Prakash Desai, Ranjan Gogoi and S.A. Bobde
4. Sarah Mathew v. Inst. For Cardiovascular Diseases & on 26 November, 2013 (FB)
5. P.K. Choudhury v. Commander, 48 Btrf (Gref) Also ref. Krishna Sahai v. State of MP 1997 Cr.LJ 90 (MP) for similar ruling
6. Ref. Bhagirath Kanoria and others V. State of M.P., AIR 1984 SC1688, Gokak Patel Volkart Ltd.v. Dundayya Guru Shiddaiahhiremath and others, (1991) 2 SCC 141
7. Though not relevant here, on the second issue of ‘whether the lower court can take cognizance of the offence on incomplete report’ when investigating authorities sought permission to file ‘additional charge-sheet within six months from the date of the application on collecting further additional evidence in further investigation’ the SC and High Court differed in their rulings
8. At paras. 5, 9. The SC did not agree with the High Court on next issue, not necessary here, on ‘obtaining prior sanction from appropriate authority ‘to prosecute the accused’
9. Bharat Damodar Kale & Anr vs State Of A.P on 8 October, 2003 and Janani Sahoo vs Chandra Sekhar Mohanty on 27 July, 2007 ‘on one side’ and Krishna Pillai v. T.A. Rajendran & Anr. (1990) supp. SCC 121 ‘on opposite side’
10. ‘In another interesting and contrary submission, after reference to Krishna Pillai, Mr. Padmanabhan and Mr. Amrendra Sharan submitted that ‘the legislature has been very specific wherever time limit has to be fixed for initiation of prosecution by reference to the Negotiable Instruments Act, 1881 that bar of limitation is not co-related to taking cognizance of an offence by a court, but it is co-related to filing of a complaint within a specific period but it is apparent that the bar under Chapter XXXVI of the Code must be co-related to taking cognizance of an offence by the court in view of specific language used by the relevant sections to support the view that relevant date is the date of taking cognizance of an offence by the court. Their Lordships finally rejected this submission.’
11. Accused charged with offences punishable under Sections 161, 294, 323 and 506 of the IPC
12. The accused was tried for the offence under the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 that was detected on 5/3/1999
13. “No court shall take cognizance of any offence under this Act after the expiry of one year from the date on which the offence is alleged to have been committed.”
14. Rashmi Kumar (Smt.) v. Mahesh Kumar Bhada, (1997) 2 SCC 397
15. State of Himachal Pradesh v. Tara Dutt and anr on 19 November 1999
16. K.J. Joseh v. Philips Carbon Private Ltd., 11 April 2016
17. On second issue of ‘whether the Magistrate has to conduct an enquiry when the accused-drawer was resident outside the jurisdiction of the court under Sec. 202 of Cr. PC,’ that was kept open in

K.J. Joseph despite the availability of decisions in *Vijay Dhanuka v. Najima Mamtaj*, (2014) 14 SCC 638 and *Udai Shankar Awasthi v. State Of U.P.& Anr* on 9 January, 2013, since their Lordships anyhow allowed the Appeal on the main issue ‘of condonation of delay,’ a 5 Justices Bench of the SC in 2021 ‘In Re Disposasl of Cases under Sec. 138 of NI Act, 1881 held that ‘such enquiry was necessary’

18. ‘hear the other side’, or putting it differently ‘no man should be condemned unheard’

19. *Vanka Radhamanohari (Smt) v. Vanka Venkata Reddy and Ors.* 1993 (2) SCALE 570, (1993) 3 SCC 4

20. *Sesh Nath v Baidyabati Sheoraphuli Co.* 22 March 2021