

MADHYA PRADESH HIGH COURT

Kantibai Kamal Singh

Vs.

Kamal Singh Thakur

First Appeal No. 33 of 1978

(A.P. Sen, C.J and J.S. Verma, J.)

02.05.1978

JUDGMENT

Verma, J.

1. By our order dated 13-4-1978, we have allowed the application made by the appellant under Section 5 of the Limitation Act, 1963, for condonation of the delay in filing this appeal. While doing so, in that order we had stated that the reasons for holding that Section 5 of the Limitation Act, 1963 applies also to appeals filed under Section 28 of the Hindu Marriage Act, 1955 as amended by the Marriage Laws (Amendment) Act, 1976 (Act No, 68 of 1976), will be given later. Accordingly, we are now stating the reasons for taking this view.

2. Sri V.S. Shrotri, learned counsel for the respondent, placing reliance on *Hukumdev Narain v. Lalit Narain*,¹ contended that the different limitation of thirty days prescribed in Sub-section (4) of Section 28 of the Hindu Marriage Act, 1955, as a result of the Amendment Act No. 68 of 1976, excluded the applicability of Section 5 of the Limitation Act, 1963 to appeals filed under Section 28 of the Hindu Marriage Act, 1955, by virtue of Sub-section, (2) of section 29 of the Limitation Act, 1963. In reply, Sri A.K. Khaskalam, learned counsel for the appellant, placed reliance on *Mangu Ram v. Delhi Municipality*,² to contend that Section 5 of the Limitation Act applies to such appeals, because provisions contained in Sections 4 to 24 (inclusive) of the Limitation Act, 1963, are made expressly applicable by Sub-section (2) of Section 29 of the Limitation Act, 1963, and that there is no express exclusion of the applicability of Section 5 of the Limitation Act, 1963, by the special Act, viz. Hindu Marriage Act, 1955 as amended by Act No. 68 of 1976.

3. Under the Limitation Act of 1908, Section 29 thereof did not expressly apply Section 5 of that Act as it did Section 4, Sections 9 to 18 and Section 22 of that Act unless they were expressly excluded by any special or local law, to a case where a different limitation was prescribed by any special or local law and it was also stated that the remaining provisions of that Act shall not apply to such cases. On the contrary, Section 29 of the Limitation Act, 1963 expressly applies Sections 4 to 24 (inclusive) in all such cases unless their application is expressly excluded by any such special or local law. The departure is clear and unequivocal inasmuch as Section 5 of the Limitation Act, 1963, is now ordinarily applicable to all such cases, unless there is express exclusion of its application in such cases by the special or local law. The scope of Section 5 as enacted in Limitation Act, 1963, is also wider than the corresponding provision in the Limitation Act of 1908. The result is that ordinarily Section 5 of the Limitation Act, 1963, must be held applicable even where Section 29 of the Act is attracted, there being a different limitation prescribed by any special or local law and the applicability of Section 5 can be excluded in such cases only when it is found that it has been expressly excluded by such special or local law. The conclusion would depend on the result of an enquiry made in this manner. Before examining the provisions of the Hindu Marriage Act, 1955, as amended by the Amendment Act No. 68 of 1976, we may refer to the principles laid down in the two decisions relied on from both sides.

4. In *Mangu Ram v. Delhi Municipality* (AIR 1976 Supreme Court 105) (supra) the question was whether Section 5 of the Limitation Act, 1963 applied to an application for special leave made under Section 417(3) of the Criminal Procedure Code 1898, in view of the imperative language used while prescribing a different limitation of sixty days in Sub-sec. (4) of Section 417, Criminal Procedure Code. Their Lordships, after examining the scheme of Section 29 of the Limitation Act of 1963, held that even though Section 29(2) was attracted to that case and the language in Sub-section (4) of Section 417 of the Cr. P. C., 1898 was mandatory and compulsive, yet Section 5 of the Limitation Act must apply to that case. Their Lordships, in taking that view, stated as under (at p. 108):-

"There is an important departure made by the Limitation Act, 1963 in so far as the provision contained in Section 29, Sub-section (2) is concerned. Whereas under the Indian Limitation Act, 1908, Section 29, Sub-section (2), Clause (b)

provided that for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law the provisions of the Indian Limitation Act, 1908, other than those contained in Sections 4, 9 to 18 and 22, shall not apply and, therefore, the applicability of Section 5 was in clear and specific terms excluded. Section 29, Sub-section, (2) of the Limitation Act, 1963 enacts in so many terms that for the purpose of determining the period of limitation prescribed for any suit, appeal or application by any special or local law the provisions contained in Sections 4 to 24, which would include Section 5, shall apply in so far as and to the extent to which they are not expressly excluded by such special or local law. Section 29, Sub-section (2), Clause (b) of the Indian Limitation Act, 1908 specifically excluded the applicability of Section 5, while Section 29, Sub-section, (2) of the Limitation Act, 1963 in clear and unambiguous terms provided for the applicability of Section 5,----- Since under the Limitation Act, 1963, Section 5 is specifically made applicable by Section 29 Sub-section, (2), it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the applicant can show that he had sufficient cause for not presenting the application within the period at limitation, It is only if the special or local law expressly excludes the applicability of Section 5, that it would stand displaced. Here, as pointed out by this Court in Kaushalya Rani's case (3) the time limit of sixty days laid down in Sub-section (4) of Section 417 is a special law of limitation and we do not find anything in this special law which expressly excludes the applicability of Section 5, It is true that the language of Sub-section (4) of Section 417 is mandatory and compulsive, in that it provides in no uncertain terms that no application for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of sixty days from the date of that order of acquittal. But that would be the language of every provision prescribing a period of limitation. It is because a bar against entertainment of an application beyond the period of limitation is created by a special or local law that it becomes necessary to invoke the aid of Section 5 in order that the application may be entertained despite such bar. Mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5." Thus, it was clearly held that mere peremptory or imperative language of the provision in the special law prescribing a different limitation, does not exclude the applicability of Section 5 of the Limitation Act, 1963,

without anything more expressly excluding its applicability.

5. In *Hukumdev Narain Yadav v. Lalit Narain Mishra* (AIR 1974 Supreme Court 480) (supra) their Lordships were dealing with the applicability of Section 5 of the Limitation Act, 1963 to an election petition filed under the Representation of the People Act, 1951. Their Lordships reiterated the view taken earlier in *Vidyacharan Shukla v. Khubchand Baghel*,³ and *D. P. Mishra v Kamal Narayan Sharma*,⁴ In Vidyacharan's case, it was held that Section 12 of the Limitation Act, 1908, applied to an election appeal filed under Section 116A of the Representation of the People Act, 1951. In D. P. Mishra's case, it was held that Section 12 of the Limitation Act, 1963, applied to an election appeal filed under Section 116A of the Representation of the People Act, Their Lordships in Hukumdev's case (supra) summarized the ratio of these two decisions as under (at p. 1480):--

"Following the decision in Vidyacharan Shukla's case this Court held, that Sections 4 and 12 of the Limitation Act would apply, because
"There is no provision in the Representation of the People Act, 1951, which excludes the application of Section 4 of the Limitation Act".

Thus, applicability of Sections 4 and 12 of the Limitation Act, both old as well as new, to an appeal filed under Section 116A of the Representation of the People Act, 1951, was reiterated by their Lordships and they then proceeded to examine whether Section 5 of the Limitation Act would apply to an election petition filed under Section 81 of the Representation of the People Act, 1951, in view of the nature of right and the scheme of the Representation of the People Act, 1951, In this connection, their Lordships examined the scope of Section 5 and Section 29(2) of the Limitation Act, both old as well as new, and pointed out that the new Section 5 is now of wider applicability. On an examination of the scheme of the Representation of the People Act, 1951, it was held that the Act was a self-contained Code and the provisions thereof read harmoniously, clearly indicated that the applicability of Section 5 of the Limitation Act, 1963, to an election petition was necessarily excluded/ Reliance was placed by their Lordships, inter alia, on Section 86 "of the Representation of the People Act, 1951, which contains peremptory command to the High Court to dismiss an election petition which does not comply with the provisions of Sections 81, 83 or 117. It was also pointed out that Sub-section (5) of Section 86 while giving latitude to the petitioner to amend the particulars of any corrupt practice alleged in the petition,

also laid down that the High Court shall not allow a new corrupt practice to be pleaded by amendment after expiry of the limitation prescribed for filing an election petition. It was, therefore, in the scheme of the Representation of the People Act, 1951, which was held to be a self-contained Code conferring the right itself to file an election petition and regulating the exercise of that right that it was held that the applicability of Section 5 was necessarily excluded by the provisions of the Representation of the People Act, 1951, read as a whole. It was pointed out that the right to file an election petition being itself conferred by the statute and the same not being a common law right, the statute itself must give the discretion to condone the delay. The ratio of that decision only is that even if the special law does not contain express words of exclusion, the nature of right and scheme of the special law must be examined to find out if they are inconsistent with these provisions of the Limitation Act, so that the latter are 'necessarily excluded', and if that conclusion is reached, then the particular provision of the Limitation Act which is so inconsistent, must be held to be excluded by virtue of Section 29(2) of the Limitation Act, 1963.

6. Some relevant extracts from their Lordships' decision in *Hukumdev's case* (supra) are as follows:-

"No doubt Section 5 would now apply where Section 29(2) is applicable to even applications and petitions, unless they are expressly excluded. Even assuming that the Limitation Act applies to election petitions under the Act, what has to be seen is whether Section 5 is excluded from application to such petitions (Page 488)."

"..... But what we have to see is whether the scheme of the special law, that is, in this case the Act, and the nature of the remedy provided therein are such that the Legislature intended it to be a complete code by itself which alone should govern the several matters provided by it. If on an examination of the relevant provisions it is clear that the provisions of the Limitation Act are necessarily excluded, then the benefits conferred therein cannot be called in aid to supplement the provisions of the Act, In our view, even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of those provisions or the nature of the subject matter and scheme of the special law exclude their operation..... Section 86 of the Act which gives a peremptory command that

the High Court shall dismiss an election petition which does not comply with the provisions of Sections 81, 82 or 117. It will be seen that Section 81 is not the only section mentioned in Section 86, and if the Limitation Act were to apply to an election petition under Section 81 it should equally apply to Sections 82 and 117 because under Section 86 the High Court | cannot say that by an application of Section 5 of the Limitation Act, Section 81 is complied with while no such benefit is available in dismissing an application for non-compliance with the provisions of Sections 82 and 117 of the Act, or alternatively if the provisions of the Limitation Act do not apply to Section 82 and Section 117 of the Act, it cannot be said that they apply to Section 81.

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But this Is not what Section 29(2) of the Limitation Act says, because it provides that Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law. If none of them are excluded, all of them would become applicable. Whether those sections are applicable is not determined by the terms of those sections, but by their applicability or inapplicability to the proceedings under the special or local law..... The applicability of these provisions has, therefore, to be judged not from the terms of the Limitation Act but by the provisions of the Act relating to the filing of election petition, it and their trial to ascertain, whether it is a complete code in itself which does not admit of the application of any of the provisions of the Limitation Act mentioned in Section 29(2) of that Act. (At p. 490)

In *Charan Lal Sahu v. Nand Kishore Bhatt*,⁵ it was held that there is no question of any common law right to challenge an election as such any discretion to condone the delay in presentation of the petition or to absolve the petitioner from payment of security for costs can only be provided under the statute governing election disputes. It was observed that if no discretion was conferred in respect of any of these matters, none can be exercised under any general law or on any principles of equity. If for non-compliance with the provisions of Sections 82 and 117 which are mandatory, the election petition has to be dismissed under Section 86(1) the presentation of election petition within the period prescribed in Section 81 would be equally mandatory, the non-compliance with which visits the penalty of the petition being dismissed." (At p.

7. The decision in Hukumdev's case (supra) relied on by Sri Shroti, learned counsel for the respondent, cannot, therefore, be understood as laying down that merely because a different limitation is prescribed by a special or local law, that by itself is a sufficient reason to exclude the application of Section 5 of the Limitation Act, by virtue of Section 29(2) of the Limitation Act, 1963, Sub-section (4) of Section 28 of the Hindu Marriage Act, as introduced by Amendment Act No. 68 of 1976, reads as under:--

"28. Appeal from decrees and orders-

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(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order."

This is the only provision which is relied on by Sri Shroti to contend that Section 5 does not apply to appeals filed under Section 28 of the Hindu Marriage Act. No other provision in the Hindu Marriage Act or the Amendment Act No. 68 of 1976 has been pointed out in support of this argument. In our opinion, the decision in Mangu Ram's case (supra) is a complete answer to the argument of Sri Shroti inasmuch as it lays down that the "mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of Section 5." The language of Section 417(4) of the Criminal Procedure Code which was construed in Mangu Ram's case, was far more strong and peremptory than Section 28(4) of the Hindu Marriage Act with which we are concerned. The conclusion reached in Mangu Ram's case is, therefore, even more justified in the present case. The nature of right of appeal under Section 28 of the Hindu Marriage Act or the scheme of the special law are in no way inconsistent with the applicability of Section 5 of the Limitation Act, 1963.

8. As already pointed out, Hukumdev's case (supra) does not in any way conflict with the view taken in Mangu Ram's case (AIR 1976 Supreme Court 105). It is reasonable to assume that in deciding Mangu Ram's case, their Lordships did not intend to lay down law inconsistent with that contained in their earlier decision in Hukumdev's case

(supra).

9. Sri Shrotri also urged that by its very nature, such proceedings must end expeditiously and certain amendments, including curtailment of the period prescribed for appeal, have been made by the Marriage Laws (Amendment) Act, 1976 (Act No, 68 of 1976), with that end in view. That it is so, is beyond dispute. However, that does not mean that the Court's discretion to condone delay in filing an appeal is inconsistent either with the nature of right or the scheme of the special law, so that applicability of Section 5 of the Limitation Act, 1963 is 'necessarily excluded.' It only means that the Court has to keep this end in view while exercising its power. We are unable to hold that the express exclusion contemplated by Section 29(2) of the Limitation Act, 1963, has been made in this manner.

10. Our conclusion, therefore, is that the applicability of Section 5 of the Limitation Act, 1963, to appeals filed under Section 28 of the Hindu Marriage Act, 1955, is not excluded since there is no such exclusion as contemplated by Sub-section (2) of Section 29 of the Limitation Act, 1963. However, the question whether delay in filing such an appeal should be condoned under Section 5 of the Limitation Act is one of fact in each case, to be decided on the facts and in the circumstances thereof.

Order accordingly.

Cases Referred.

1. AIR 1974 SC 480
2. AIR 1976 SC 105
3. AIR 1964 SC 1099: (1964) 6 SCR 129)
4. AIR 1970 SC 1477
5. AIR 1973 SC 2464 (1973 - 2 S.C.C. 530)