

# **A QUESTION OF LIMITATION**

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## **1. THE BACKGROUND**

**Sri K. Dahotia, Additional District & Sessions Judge, Sibsagar brought up a question of limitation, the theme of this writing, during a telephonic conversation on the 13<sup>th</sup> of October, 2006. The substance of the conversation was this. There is a conflict between a Three Judge decision of the Supreme Court of 1989 and a Two Judge decision of the Supreme Court of 2003 on the question and the Andhra Pradesh High Court has in 2006 resolved the conflict by accepting the older Three Judge decision of 1989 as the law on the point in preference to the latest decision of 2003. What follows is in response to a promise to Sri K. Dahotia to have a close look at this interesting question.**

## **2. THE QUESTION**

**The question is how to count the period of limitation in a criminal case. Is it to be counted like in a Civil Case, where the concept of taking cognizance is foreign ? In other words would the material date (terminus ad quem) be the date of filing of a case or the date of taking cognizance of the offence by the Court. The question assumes importance because unlike in a Civil Case where the date of filing is the only date material for the purpose in criminal cases the date of filing in most cases may not coincide with the date of taking cognizance by the Court. The three decisions mentioned above may now be closely analyzed.**

## **3. THE SUPREME COURT, 1989 – KRISHNA PILLAI –VERSUS- T.A. RAJENDRAN AND ANOTHER 1990 (SUPP) SCC 121**

**On the 16<sup>th</sup> of November 1989 a Three Judge Bench of the Supreme Court quashed the prosecution of Krishna Pillai on a complaint under the Child Marriage Restraint Act, 1929 ( the 1929 Act**

hereinafter) holding that the cognizance of the offence was barred under Section 9 of the 1929 Act which reads thus :-

**“ 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.”**

The matter reached the Supreme Court on refusal by the High Court to quash the complaint on the application of Krishna Pillai under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C hereinafter). The argument that the complaint in fact had been filed within one year of the commission of the offence and only the date of taking cognizance was beyond the one year period did not prevail with the Supreme Court. The Supreme Court on the basis of A.R. ANTULAY Vs RAMDAS SRINIWAS NAYAK, (1984) 2 SCC 500 a Five Judge Constitution Bench decision held thus :

**“..... filing of a complaint in court is not taking cognizance and what exactly constitutes taking cognizance is different from filing of a complaint. Since the magisterial action in this case was beyond the period of one year from the date of commission of the offence, the magistrate was not competent to take cognizance when he did in view of the bar under Section 9 of the Act.”**

**4. THE SUPREME COURT, 2003 - BHARAT DAMODAR KALE Vs STATE OF A.P. AIR 2003 S.C. 4560, 2003 Cri.L.J 4543, (2003) 8 SCC 559.**

In BHARAT DAMODAR (Supra) decided on the 8<sup>th</sup> of October, 2003 the Supreme Court dealt with an order of refusal to quash a complaint under the provisions of the Drugs and Magic Remedies (objectionable Advertisement) Act 1954. Two contentions urged before the Supreme Court were, (i) that the concerned Drugs Inspector lacked competence to file the complaint and (ii) that the complaint was barred by limitation as prescribed under Section 468 of the Cr.P.C. The Supreme Court rejected both these contentions and upheld the order of the High Court refusing to quash the complaint. The second contention only is material for purposes of this writing.

In the case the offence was detected on 05.03.1999. The complaint was lodged on 03.03.2000 which is within the period of limitation of one year under Section 468 of the Cr.P.C. However, the Magistrate took cognizance of the offence on 25.03.2000. The contention relating to bar of limitation centered round the fact that

obviously 25.03.2000 the date of taking cognizance was beyond the one year period of limitation under Section 468 Cr.P.C. In para 10 of the Judgment the Supreme Court going behind the literal meaning of the provisions of Chapter XXXVI of the Cr.P.C. containing sections 467 to 473 of the Cr.P.C found statutory indication against the literal meaning of the provisions in Section 469 and 470 and held thus :

**“All these provisions indicate that the court taking cognizance can take cognizance of an offence the complaint of which is filed before it within the period of limitation prescribed and if need be after excluding such time which is legally excludable . This in our opinion clearly indicates 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 instituted beyond the period of limitation prescribed under the Code.”**

Apart from the statutory indication the Supreme Court found additional assurance for the view as above in the legal maxim “actus curiae neminem, gravabit” by observing that taking cognizance being an act of the Court over which the complainant or the prosecuting agency has no control a complaint filed within the period of limitation cannot be made infructuous by an act of court. Delay on the part of the Court in taking cognizance cannot be visited upon the complainant since an act of court shall prejudice no one.

**5. ANDHRA PRADESH HIGH COURT, 2006 –KIMBERLY CLARK LIVER LTD. Vs STATE, 2006 CRI. L.J 2438.**

The case before the Andhra Pradesh High Court decided on 10<sup>th</sup> of March, 2006 arose out of a complaint filed under Section 72 of the Standards of Weights and Measures Act, 1976 (the Act hereinafter). Brief facts are these. On 04.09.2002 the Inspector of Weights and Measures visited the trading premises of the firm KIMBERLY CLARK LIVER LTD. and detected violation of the Rules 6(1)(a) read with Rule 10 and Rule 23(i) punishable under Rule 39(2) of the Standards of Weights and Measures (Packaged Commodities) Rules 1977. The Inspector seized two Retail packets of Kotex Sanitary pads and issued notice to the accused firm informing them of the offence and also that the same can be departmentally, compounded under Section 73 of the Act. The accused failed to respond to the notice and thereafter the complaint was filed on 03.03.2003. The Court took cognizance on 10.03.2003. The accused reached the High Court through Section 482 Cr.P.C. seeking quashing of the complaint on the ground of bar of limitation on the

forefront of the three fold grounds urged in support. The High Court accepted the contention that the complaint was barred by limitation in view of the fact that the cognizance of the offence was taken on 10.03.2003 beyond the period of six months limitation although the complaint was filed on 03.03.2003 within six months of the date of offence on 04.09.2002. During arguments both KRISHNA PILLAI (Supra) and BHARAT DAMODARKALE (Supra) were placed by learned counsels for the accused and prosecution. The High Court read the said Judgments of the Supreme Court as conflicting with each other and preferred KRISHNA PILLAI (Supra) being rendered by a Three Judge Bench to BHARAT DAMODAR KALE (Supra) rendered by a Two Judge Bench.

## 6. ANALYSIS OF KIMBERLY CLARK (SUPRA)

It is remarkable that the High Court did not notice that KRISHNA PILLAI (Supra) is a case interpreting Section 9 of the Child Marriage Restraint Act, 1929 while KIMBERLY CLARK (Supra) is a case concerned with the bar of limitation as prescribed in the Cr.P.C. 1973. In 1929 Limitation in a criminal case like in a original civil case was unknown to the law in India. Section 9 of the Child Marriage Restraint Act, 1929 even does not mention the word limitation. The Section was drafted more as a special provision relating to competence of the Court as a sort of addition to what is provided under Section 190 of Cr.P.C., 1898. Indeed, Section 8 of the 1929 Act with the heading "Jurisdiction under this Act" begins with the non-obstante clause "Notwithstanding anything contained in Section 190 of the Code of Criminal Procedure, 1898". Section 9 just following thereafter begins with the heading "Mode of taking cognizance of offence". In the entire judgment in KRISHNA PILLAI (Supra) the word "Limitation" occurs only once and that too in noting the contention of the counsel.

The 1929 Act is a special law. To understand the procedure for trial and otherwise dealing with an offence under a Special or Local Law one has to read the provisions of Section 1(2) and Section 4 of the Cr.P.C. 1898 which correspond to Section 5 and 4 respectively of the Cr.P.C. 1973. These provisions say that special law of procedure will prevail over the general law contained in the Cr.P.C. Thus a case where Section 468/469 of the Cr.P.C. 1973 has to be applied cannot be decided on the basis of a virtual provision for limitation enacted in the special provision of Section 9 of the 1929 Act. One is almost tempted to use the expression in *pari materia* in connection with the two Supreme Court Judgments considered by the High Court in KIMBERLY CLARK (Supra) although the phrase is used only in interpreting statute law. If one may say so the two Judgments are not in *pari materia*. The factual similarity that complaints in each case were filed within the respective periods prescribed under Section 9

of the 1929 Act and under the Cr.P.C 1973 and that the cognizance in each case was taken on a date beyond that period resulting in two different conclusions in the two cases do not amount to a conflict in the law laid down because law applicable in the two cases are different. Conflict would arise only if the same law is interpreted differently in two cases. Unfortunately the High Court was straightaway persuaded to read a conflict between KRISHNA PILLAI (Supra) and BHARAT DAMODAR (Supra) without appreciating the difference between the law applicable.

Having concluded that there is a conflict between the law laid down in the Three Judge decision in KRISHNA PILLAI (Supra) and the Two Judge decision in BHARAT DAMODAR (Supra) the High Court considered AIR 1974 SC 1596, AIR 1976 SC 2547 and two constitution Bench decisions in AIR 1989 SC 1933 and AIR 2002 SC 1652 relied on by the learned counsel for the petitioner and reached the conclusion that the Three Judge decision in KRISHNA PILLAI (Supra) on the authorities as above has to be followed. A brief look at the nature of the conflict between decisions of a Larger Bench and a Smaller Bench of the Supreme Court considered in the above four decisions of the Supreme Court will be useful.

In MATTULAL VS RADHELAL, AIR 1974 SC 1596 the conflict was between a Four Judge decision of the Supreme Court and a Three Judge decision relating to the question whether the finding as to bonafide requirement of a Landlord in a Landlord Tenant Suit is a question of fact not amenable to interference by the High Court in second appeal or not. The question arose in relation to pari-materia provisions in two pari materia statutes relating to Rent Control of two different states. Evenso, the conflict between the Four Judge decision holding that such a finding being a finding of fact cannot be interfered in second appeal and the later Three Judge decision holding otherwise is patent and the four Judge decision prevailed. Such is not the case between KRISHNA PILLAI (Supra) and BHARAT DAMODAR (Supra) because the law applicable far from being pari-materia are as different as chalk from cheese.

In STATE OF UP Vs RAM CHANDRA, AIR 1976 SC 2547 the Supreme Court did not find any conflict between the SUGHAR SINGH, AIR 1974 S.C 423 and previous decisions of the Supreme Court relating to Article 311(2) or Article 16 of the Constitution of India. Thereafter in para 22 of the Judgment the Supreme Court cautioned the courts to follow the decision of the Larger Bench even if a conflict is discovered. No two statutes as in the case before the High Court in KIMBERLY LIVER (Supra) were involved.

In UNION OF INDIA Vs RAGHUBIR SINGH, AIR 1989 SC 1933 the Constitution Bench dealt with the question as to

interpretation Section 30(2) of Land Acquisition (Amendment) Act 1984 regarding the period between which the benefit of enhanced solatium at 30% of the market value is payable. There can be no quarrel that in such a situation the view of the Larger Bench may even of a co-ordinate earlier Bench will bind the subsequent smaller or co-ordinate Bench.

Lastly, the question before the Constitution Bench of the Supreme Court in CHANDRA PRAKASH AND OTHERS Vs STATE OF UP AND ANOTHER, AIR 2002 SC 1652 was the conflict as between the larger and smaller Bench of the Supreme Court on the interpretation of Rule 7 of U.P. Regularization of Ad-hoc Appointments (on post within the purview of Public Service Commission) Rules, 1979. As in RAGHUBIR SINGH (Supra) the Larger Bench decision prevailed as it must on the true application of the Doctrine of Precedent.

In KRISHNA PILLAI (Supra) the Supreme Court responded to the counsel's argument 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" by holding with the aid of ANTULAY (Supra) that filing of a complaint in court is not taking cognizance. BHARAT DAMODAR (Supra) does not say anything to the contrary. The later case only held with the aid of the statutory indication in Section 469 and 470 of the Cr.P.C. as also with the aid of the legal maxim *actus curiae neminem gravabit* that if the filing is within the period of limitation prescribed in Section 468 and 469 of the Cr.P.C taking of cognizance beyond such period will not attract the bar of limitation. In the Act of 1929 there was no such statutory indication and the legal maxim *actus curiae neminem gravabit* must yield to the clear language of the provision of Section 9 of the 1929 Act.

Section 5 of the Cr.P.C 1973 says that "nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed by any other law for the time being in force". There can be no doubt that the 1929 Act is a "special" "any other law for the time being in force" and Section 8 and 9 thereof provides for a "special jurisdiction" and "special form of procedure prescribed" by the 1929 Act for trial of offences thereunder. Statutorily those provisions cannot be affected by Section 468/469 Cr.P.C. nor can Section 468/469 Cr.P.C. affect those provisions. If that be so any decision interpreting Section 9 of the 1929 Act cannot be read as conflicting with any other decision interpreting Section 468/469 Cr.P.C. irrespective of strength of the Bench rendering such judgments.

The High Court in KIMBERLY LIVER (Supra) has allowed the decision in KRISHNA PILLAI (Supra) to affect the decision in

**BHARAT DAMODAR (Supra)** merely on the ground of strength of the Bench deciding these two cases relying solely on factual similarity centering round the dates of filing and taking of cognizance in each case.

## **6. THE ANSWER**

From what has been discussed above the answer to the question posed at the beginning of this writing that emerges is that **KIMBERLY LIVER (Supra)** has been wrongly decided. Being a case governed by the Cr.P.C. 1973, the general law of Criminal Procedure the High Court has to follow **BHARAT DAMODAR (Supra)** and not **KRISHNA PILLAI (Supra)** governed by the special law prescribed by the 1929 Act. The Judgment of the Andhra Pradesh High Court is per incuriam in that it failed to apply Section 4(2) and 5 of the Cr.P.C 1973 and the binding precedent in **BHARAT DAMODAR (Supra)**.

## **7. THE POSTSCRIPT**

One must confess that exposition of the “statutory indication” in **BHARAT DAMODAR (Supra)** based on Section 469 and 470 Cr.P.C in the face of the language of the heading of Chapter XXXVI Cr.P.C. 1973 is not easy to understand and digest. The Supreme Court has also mentioned Section 473 Cr.P.C. in the Judgment but in another context. It appears that Section 473 Cr.P.C contains a clearer “statutory indication” mentioned in the Judgment.

The delay between the date of filing and the date of taking cognizance is a delay caused by the Court. Delay caused by the Court cannot obviously be explained by the complainant. Therefore the statutory indication is clear that delay spoken of in Section 473 Cr.P.C. is delay in filing beyond the period of limitation and not delay in taking cognizance.