THE SUPREME COURT ON THE BAR OF LIMITATION IN CRIMINAL CASES

By

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1. INTRODUCTION

The Code of Criminal Procedure, 1973 (*the Code hereinafter*) came into force on the first of April, 1974. In Chapter XXXVI of the Code containing sections 467 to 473 for the first time detailed general provisions have been enacted prescribing limitation for prosecution as part of procedure for trial of offences. From the first of April 1974 till the 13th March 2008, as far as decisions reported in Law Journals available to the writer go, the Supreme Court has spoken on one or the other of the provisions in Chapter XXXVI of the Code in twenty-five judgments. For obvious reasons all these twenty-five decisions do not speak in the same voice in all respects on one or the other of the different aspects of the law of limitation enacted in the Code. It is possible for one not adequately acquainted with the nuances of the doctrine of precedent to mis-appreciate and misapply one or the other of these judgments. It is therefore felt that an analytical conspectus of these twenty-five judgments is attempted. Cognate provisions of a few special law also needs to be understood. These are the twin reasons behind this essay. It will be useful to begin by reading the statutory provisions first.

2. THE STATUTORY PROVISIONS

Section 467 and 468 of the Code prescribe three kinds of period of limitation namely ; (1)for offences punishable with fine only the period is six months; (2)for offences punishable with imprisonment not exceeding one year the period is one year and lastly (3) for offences punishable with imprisonment exceeding one year but not exceeding three years the period is three years. Thus only for the offences punishable with imprisonment upto three years bar of limitation has been made applicable. Section 468 further provides that for offences triable jointly the period of limitation will be determined by the more and/or the most severe punishment among the above three categories. One other aspect of Section 468 requiring attention is its opening words which are, "Except as otherwise provided elsewhere in this Code." These words directly point to the provisions of section 199 (5) of the Code providing for a limitation of six months for an offence described in Section 199(2) of the Code as also to those in Section 198(6) & (7). The provisions of Section 4(2) and 5 of the Code also will have an oblique impact on these opening words of Section 468 of the Code. This aspect will be dealt with latter in this Writing.

Section 469 of the Code speaks of the commencement of the period of limitation and specifies broadly three alternatives for this. They are (1) the date of the offence or (2) the first date of knowledge about the commission of the offence, when it is not known or (3) the first date of knowledge of the identity of the offender when he is not known.

Section 469(2), 470 and 471 contain methods of computation of the period of limitation and broadly they are borrowed from the provisions of Section 4, 12, 14 and 15 of the Limitation Act, 1963 governing suits with required addition and modification suitable to a criminal case. The provisions of Section 472 relating to continuing offence are modelled on those of Section 22 of the Limitation Act, 1963 for continuing breach of contract and continuing tort. Lastly, Section 473 for extension of the period of limitation is modelled on Section 5 of the Limitation Act, 1963 suitably adopted for purpose of a criminal case.

3. THE DECISIONS OF THE SUPREME COURT.

(i) SURINDER MOHAN VIKAL VS ASCHARAJ LAL CHOPRA, AIR 1978 S.C. 984 decided on the 28th of February 1978 appears to be the first decision from the Supreme Court dealing with the question of limitation in a criminal case relating to an offence under the Penal Code. The principal question was the commencement of limitation of the defamation case there . The High Court held that "cause of action for defamation arose only after acquittal on 01.04.1975. The Supreme Court spoke thus :-

> **"We are constrained to say that the question of "cause of action" could not really arise in this case as the controversy relates to commission of an offence..... It would therefore follow that the date of offence was March, 1972 when the defamatory complaint was filed in the Court of the Magistrate, ..."**

The complaint was quashed by the Supreme Court as barred by limitation . Brief reference to Section 470 and 473 of the Code was also made and it was held that Section 470 is not at all applicable and that "the respondent has not sought the benefit of S. 473 which permits extension of the period of limitation in certain cases".

(ii) STATE OF PUNJUB –VS- SARWAN SINGH (1981)3 SCC 34 decided on the 2nd April 1981 was a case of misappropriation of the funds of a Co-operative Society by the accused Sarwan Singh . The charge-sheet was filed on 13.10.1976 and it showed that embezzlement was committed on 22.08.1972 and the audit report through which the offence was detected was dated 05.01.1973. On those dates both the High Court and the

Supreme Court held that prosecution was clearly barred by three year period of limitation within Section 468(2) of the Code. The Supreme Court also held that the object of enacting a bar of limitation on prosecution is in consonance with the concept of fairness of trial enshrined in Article 21 of the Constitution of India.

(iii) BHAGIRATH KANORIA AND OTHERS –VS- STATE OF M.P., AIR 1984 S.C. 1688, decided on the 24th of August 1984 breaks further ground on the question of limitation in prosecution of offences. The principal question in the decision was regarding continuing offence spoken about in Section 472 but the Supreme Court also drew pointed attention of the Courts to the provisions of Section 473 of the Code. On the concept of continuing offence in para 19 of the Judgment the Supreme Court spoke thus :-

> **"The question whether a particular offence is a continuing offence must necessarily depend upon the language of the statute which creates that offence, the nature of the offence and, above all, the purpose which is intended to be achieved by constituting the particular act as an offence."**

In para 22 of the Judgment it was held that Section 473 of the Code enacts an overriding provision and courts confronted with provision laying down a rule of limitation governing prosecution will give due weight and consideration to provisions of Section 473 and take cognizance evenafter expiry of limitation if interest of justice so requires.

(iv) SRINIVAS PAL –VS- UNION TERRITORY OF ARUNACHAL PRADESH, AIR 1988 S.C. 1729 decided on the 1st of August, 1988 was a decision dealing with rash and negligent driving. The offence took place in November 1976 and till the court's order of August 1987 no investigation had taken place. On those dates though the High Court remitted the matter on the holding that since taking cognizance without first condoning the delay was bad and without jurisdiction the Supreme Court short-circuited the entire matter by quashing the prosecution on the ground of enormous delay in prosecution without deciding the contention urged relating to the prescription of Section 473 of the Code.

(v) GOKAK PATEL VOLKART LTD. –Vs- DUNDAYYA GURUSHIDDAIAH HIREMATH AND OTHERS, (1991)2 SCC 141 decided on the 14th February 1991 contains a detailed enunciation of the law relating to continuing offence provided for in Section 472 of the Code. Offence dealt with was under Section 630 of the Companies Act, 1956 on the allegation of continuing to occupy premises allotted to employees by the Company even after their retirement. The period of limitation under Section 468 (2) (a) of the Code is six months since the offence is punishable with fine only.

The Trial Court held that the complaint having not been filed within six months of the retirement, the prosecution is barred by limitation. The High Court concurred. The Supreme Court reiterated the law laid down in BHAGIRATH KANORIA (Supra) and spoke thus in para 26 of the Judgment :-

> *"Applying the law enunciated above to the provisions of Section 630 of the Companies Act, we are of the view that the offence under this Section is not such as can be said to have consummated once for all. Wrongful withholding or wrongful obtaining possession and wrongful application of the company's property,..... cannot be said to be terminated by a single act or fact but would subsist for the period until the property in the offender's possession is delivered up or refunded ..... It will be a recurring or continuing offence until the wrongful possession, wrongful withholding or wrongful application is vacated or put an end to."*

Orders of the Trial Court and the High Court were, in view of the law laid down, set aside.

(vi) R. AGHORAMURTHY, REGISTRAR OF COMPANIES, BOMBAY –Vs- BOMBAY DYEING AND MANUFACTURING COMPANY LIMITED, 1991-JT-S-432, decided on the 7th March, 1991 was a prosecution for offences under Section 205 of the Companies Act, 1956. The principal question there was the date of knowledge of the offence of the complainant under Section 469(1)(b) of the Code. The Registrar of Companies issued notice to the company and on receipt of the reply sent a Report to the Department of Company Affairs, Govt. of India who ordered an Enquiry. Question was whether the date of knowledge would be the date of receipt of the Report. The Supreme Court agreed with the concurrent findings of the two Courts below and held that limitation is to be counted from the date of knowledge of the complainant that is when the notice was issued specially when the complaint did not approach the Court under Section 473 of the Code.

(vii) VANKA RADHAMANOHARI (SMT) –VS- VANKA VENKATA REDDY AND OTHERS, (1993)3 SCC 4 decided on the 20th April 1993 was a case where the Magistrate took cognizance of the offences under Section 498-A and 494 of the Penal Code. The High Court quashed the criminal proceedings on the ground of the bar under Section 468 of the Code since Section 498-A I.P.C prescribes punishment only upto three years imprisonment. The High Court did not notice that for offence under Section 494 I.P.C. punishable with imprisonment upto seven years no bar of limitation is applicable. The Supreme Court referred to SARWAN SINGH (Supra) and BHAGIRATH KANORIA (Supra) and held that the High Court should have

considered the provisions of Section 473 of the Code, specially in a case of cruelty against women. The crux of the judgment is the highlighting of the difference between the provisions of Section 5 of the Limitation Act, 1963 and those of Section 473 of the Code covering the same ground but with considerable difference in application. The Supreme Court applied Section 473 and condoned the delay. The order of the Magistrate was restored.

(viii) SUKHDEV RAJ –Vs- STATE OF PUNJUB, 1994 Supp (2) SCC 398, decided on the 28th of September, 1993 was a case where Sukhdev Raj was convicted and sentenced for an offence under Section 9 of the Opium Act, 1878. In the High Court the only point urged was that on the undisputed date of occurrence on 31.05.1974 and that of filing of the charge-sheet more than three years elapsed and thereafter on 29.08.1977 cognizance could not have been taken in view of Section 468 of the Code. An application under Section 473 of the Code filed almost at the close of the trial was held sufficient by the Supreme Court to condone the delay.

(ix) STATE OF MAHARASHTRA –VS- SHARADCHANDRA VINAYAK DONGRE AND OTHERS, AIR 1995 S.C. 231 decided on the 7th October, 1994 marks a watershed in the exposition of the law of limitation in criminal cases. This is a Three Judge unaminous decision of the Supreme Court. The police alongwith the charge-sheet filed two applications, one for condonation of the delay and the other seeking permission for further investigation and filing of additional charge-sheet. The Chief Judicial Magistrate kept the application for further investigation pending but allowed the application for condoning the delay and issued process against the accused persons. In the High Court, moved by the accused for quashing under Section 482 of the Code, the two-fold challenge to the order of the Chief Judicial Magistrate was (1) that cognizance could not have been taken on an incomplete charge-sheet and (2) that the delay could not have been condoned without notice to the affected party and without recording any reason. The High Court accepted both the contentions and quashed the proceeding. The State reached the Supreme Court via Article 136 of the Constitution. The Supreme Court disagreed with the High Court on the first contention by observing that the Magistrate's "power is not fettered by the label which the investigating agency chooses to give to the report submitted by it under Section 173(2) of Cr.P.C". For the purpose of this essay the more important of the two contentions is the second one and on it in para 5 of the Judgment the Three Judge Bench spoke thus :-

> **"***In our view, the High Court was perfectly justified in holding that 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 condonation of the delay.*

The Supreme Court remitted the case to the Chief Judicial Magistrate to decide the application by the prosecution for condonation of delay afresh after hearing both the parties. Thus while the decisions before this only emphasized the substantive aspects of the provisions of Section 473 of the Code the Three Judge Bench for the first time in no uncertain terms laid down the procedure to be followed in applying the said provisions.

(x) RASHMI KUMAR (SMT) –Vs- MAHESH KUMAR BHADA, (1997)2 SCC 397 decided on the 18th December, 1996 is another Three Judge decision of the Supreme Court dealing with a question of limitation in a criminal case under Section 406 of the Penal Code filed by a wife against the husband for committing breach of trust with respect to the "Stridhan" property of the wife. The High Court quashed the complaint. The Supreme Court dealt with the question of limitation arising in the case in para 15 of the Judgment thus :-

> **"***It is seen that the appellant has averred in paras 21 and 22 of the complaint that she demanded from the respondent return of the jewellery ..... and household goods..... on 05.12.1987 and the respondent flatly refused ..... The complaint was admittedly filed on 10.09.1990 meaning within three years from the date of the demand and refusal by the respondent. The learned Judge relied upon her evidence recorded under Section 200 of the Code.*
> *.....*
> *..... That view of the learned Judge is clearly based on the evidence torn of the context with reference to the specific averments made in the complaint and the evidence recorded under Section 200 of the Code."*

Thus on facts the complaint was held to have been filed in time.

(xi) STATE OF RAJASTHAN –VS- SANJAY KUMAR AND OTHERS, AIR 1998 S.C. 1919, decided on 1st May 1998 answers the question as to when does the period of limitation commence in a prosecution under the Drugs and Cosmetics Act 1940. It was held that the period of limitation commences not on the date when the sample was taken but commences only on the date of receipt of the Govt. analyst's Report within Section 469(1) (b) of the Code.

(xii) ARUN VYAS –VS- ANITA VYAS, (1999)4 SCC 690 decided on the 4th May 1999 is a decision where the Magistrate took cognizance of offences under Section 498-A and 406 of the Penal Code on a charge-sheet submitted on 22.12.1995. On the day fixed for framing of the charge, however, the Magistrate discharged the accused husband on the ground of limitation as because the complaint specifically gave the date of occurrence to be

13.10.1988. The High Court set aside the order of discharge directed him to decide the case in accordance with law. The Supreme Court in so far as the offence under Section 406 is concerned upheld the order of discharge passed by the Magistrate on the ground of bar of limitation in the absence of any explanation of the inordinate delay of about 4 years in filing the charge-sheet. But for the other offence that is one under section 498-A the Supreme Court followed VANKA RADHA MONOHARI (Supra) and remitted the matter to the trial court for consideration of "the question of limitation taking note of Section 473 Cr.P.C.". it was specifically held that any finding recorded by a Magistrate holding the complaint to be barred by limitation without considering the provisions of Section 473 of the Code will be a deficient and defective finding. The mandate for liberal construction of Section 473 of the Code in favour of the wife, a victim of cruelty was emphasized in this decision.

(xiii) STATE OF H.P. Vs- TARA DUTTA, (2000)1 SCC 230 decided on the 19th November 1999 is again a Three Judge decision of the Supreme Court on the question of limitation in criminal cases. Three Judge Bench was constituted on a reference by a Two Judge Bench holding that ARUN VYAS (Supra) needs reconsideration. Two important holdings in this decision are these :- (1) that Limitation is to be applied to the offence charged and not to the offence eventually found proved at the trial in view of sub-section (3) of Section 468 added in 1978. (2) Under Section 473 of the code a discretion has been vested in the Court taking cognizance to extend the period of limitation if the delay is satisfactorily explained and it is in the interest of justice to extend the period. The said discretion has to be exercised on judicially recognized grounds and through a speaking order. By way of cutting down the width of the statement of law in this regard in relation to the offence under Section 498-A the Supreme Court reiterated above exposition of the law while adopting the need for liberal construction of the provisions of Section 473 of the Code.

(xiv) REGISTRAR OF COMPANIES –Vs- RAJASHREE SUGAR & CHEMICALS LTD. AND OTHERS, AIR 2000 S.C. 1643 decided on the 11th May 2000, again by a three Judge Bench of the Supreme Court deals with limitation for an offence under Section 113(2) of the Companies Act, 1956. Offence is punishable by fine only and as such the period of limitation is six months. The Magistrate overlooked the provision of Section 469(1) (b) and dismissed the complaint as barred even though it was found that the offence came to the knowledge of the Registrar of Companies on examination of the Books of Accounts only on 20.07.1992 and the complaint was filed on 20.08.1992. In the High Court the point took a different turn. The High Court overlooked the provisions of Section 621 of the Companies Act, 1956 and held that the Registrar of Companies is neither a person aggrieved nor a police officer within Section 469 (1)(b). According to the High Court prosecution under Section 113 of the

Companies Act, 1956 can only be launched by an affected share-holder. The Supreme Court corrected the errors of the High Court and the Chief Judicial Magistrate by reading Section 469(1)(b) with Section 621 of the Companies Act and holding that the Registrar of Companies is a person aggrieved and competent to maintain the prosecution counting the period of limitation from the date of knowledge within Section 469(1)(b) of the Code.

(xv) RAKESH KUMAR JAIN –VS- STATE, AIR 2000 S.C. 2754, decided on the 8th August, 2000 deals with an offence under Section 5(4) read with Section 5(2) and (3) of the Official Secrets Act, 1923. The period of limitation in that case commenced from the 24th April, 1985 and the complaint was filed on the 19th of May 1988. Thus the complaint was filed beyond 25 days of the three years period of limitation for the offence. But both the Chief Metropolitan Magistrate and the High Court applied Section 470(3) of the Code by equating the provisions of Section 13(3) of the official Secrets Act, 1923 with provisions requiring sanction or consult. The Supreme Court held that Section 13(3) of the official Secrets Act, 1923 does not provide for requirement of any sanction or consent and as such as Section 470(3) would not be attracted. However, in para 10 of the Judgment, the Supreme Court held that the complaint deserves to be saved under Section 473 of the Code and the condoned the delay without remitting the case to the Trial Court.

(xvi) P.P.UNNIKRISHNAN AND ANOTHER –VS- PUTTIYOTTIL ALIKUTTY AND ANOTHER, AIR 2000 S.C. 2952 decided on the 5th September, 2000 is a decision where a Sub-Inspector and a Constable of Kerala Police sought to extricate themselves from a criminal complaint under Several Penal Code offences on the ground of limitation enacted in Section 64(3) of the Kerala Police Act, 1961 a provision similar to that of Section 42 of the Police Act, 1861. Failing before the Trial Court as also the High Court the two cops reached the Supreme Court to reiterate the bar under Section 64(3) of the Kerala Police Act. While upholding the conclusion of the two courts below the Supreme Court set aside the second reason for denying the protection on the ground that Section 473 of the Code additionally saves the prosecution. Thus the principal point of law laid down in this decision is that Section 473 of the Code is applicable only to the period of limitation oprescribed by the Code and not by anyother law such as the Kerala Police Act.

(xvii) RAMESH CHANDRA SINHA AND OTHERS –VS- STATE OF BIHAR AND OTHERS, (2003)7 SCC 254 decided on the 18th of August 2003 is yet another decision dealing with the application of Section 473 of the Code. In that case the Trial Court on an application under Section 473 of the Code condoned a delay of about three years on the ground that further

proceedings were stayed by the High Court. On facts it was found that there was no such stay. The High Court refused to interfere with the order condoning the delay. The Supreme Court set aside the order condoning the delay on irrelevant consideration and quashed the criminal proceedings because of the bar of limitation.

(xviii) BHARAT DAMODAR KALE AND ANOTHER –VS- STATE OF A.P., AIR 2003 SC 4560, (2003) 8 SCC 559 decided on the 8th October 2003 marks yet another watershed in the development of the law of limitation in criminal cases. The case arose out of a complaint by the Drugs Inspector for an offence under the Drugs and Magic Remedies (Objectionable Advertisements) Act 1954. Competence of the concerned Drug Inspector to file the complaint and the bar of limitation are the two points argued before the High Court in a petition under Section 482 of the Code to quash the criminal proceedings. Both the points were answered against the accused petitioners by the High Court as well as the Supreme Court. On the question of limitation in para 10 and 11 of the Judgment relying on the statutory indication available from the provisions of Section 469 and 470 of the Code and applying the legal maxim "actus curiae neminem gravabit" (an act of the court shall prejudice no man) the Supreme Court laid down the law that the provision of chapter XXXVI of the Code "clearly indicates that the limitation prescribed therein is only for the filing of the complaint or initiation of the prosecution and not for taking cognizance." The Judgment also drew support from the Three Judge decision in RASHMI KUMAR (Supra). In the case offence was detected on 05.03.1999 and the complaint was filed on 03.03.2000 well within the one year period of limitation. The cognizance, however, was taken on 25.03.2000 about 25 days after it was filed. On these facts applying the law as above the complaint was held not to be barred by limitation.

(xix) HARNAM SINGH –VS- EVEREST CONSTRUCTION CO AND OTHERS, 2004 Cri.L.J. 4178 decided on the 17th August 2004 deals with a case where offences under section 420, 467, 471 and 474 of the Penal Code were the subject matter of a complaint on which the Magistrate took cognizance and issued process. However, the High Court without considering the stark fact that none of the offences came within Section 468 of the Code quashed the complaint only on the ground of delay. The Supreme Court set aside the order remitted the matter to the High Court for fresh disposal in accordance with the law.

(xx) M/S ZANDU PHARMACEUTICAL WORKS LTD. AND OTHERS –Vs- MD. SHARAFUL HAQUE AND OTHERS, AIR 2005 S.C. 9, decided on the 1st of November 2004 again is a decision highlighting the error of the Magistrate in failing to notice, the provisions of Section 468 or Section 473 of the Code and taking cognizance of a complaint much delayed beyond the three year period of limitation. The High Court also failed to correct

the glaring error of law. The Supreme Court quashed the proceedings on the ground of the bar of limitation.

(xxi) RAMESH AND OTHERS –VS STATE T.N., (2005)3 SCC 507 decided on the 3rd March, 2005 was a case relating to offences under Section 498-A, 406 of the Penal Code and Section 4 of the Dowry Prohibition Act. Quashing of the criminal proceedings was sought on the ground of bar of limitation and lack of territorial jurisdiction. Failing in the High Court the accused persons reached the Supreme Court and urged the said two contention. The Supreme Court on the question of territorial jurisdiction relied on Y. ABRAHAM AJITH –VS- INSPECTOR OF POLICE, (2004)8 SCC 100 and came to the conclusion that the offences alleged cannot be said to have been committed wholly or partly within the territorial jurisdiction of the Trial Court and transferred the case to the Court at Chennai.

On the question of the bar of limitation relying on ARUN VYAS (Supra) held thus :

> *"..... The last act of cruelty would be the starting point of limitation. The three year period as per Section 468(2) (c) would expire by 14.10.2001 even if the latter date is taken into account. But that is not the end of the matter. We have still to consider whether the benefit of the extended period of limitation could be given to the informant."*

Proceeding thus considering the date of the F.I.R. etc applied the provisions of Section 473 of the Code and condoned the delay without remitting the matter of condonation of delay under Section 473 of the Code to the Trial Court.

(xxii) JAPANI SAHOO –VS CHANDRA SEKHAR MOHANTY, AIR 2007 S.C. 2762 decided on the 27th of July 2007 is important in as much as an attempt was made before the Supreme Court for reconsideration of BHARAT DAMODAR KALE (Supra) that limitation prescribed is only for filing of the complaint or initiation of proceedings and not for taking cognizance. But the attempt failed and the Supreme Court reiterated the law laid down in BHARAT DAMODAR KALE (Supra)

(xxiii) SANAPAREDDY MAHEEDHAR SESHAGIRI & ANR –Vs- STATE OF ANDHRA PRADESH & ANR, AIR 2008 SC 787, decided on the 13th of December, 2007 deals with the question whether the Magistrate could take cognizance of offences under Section 498-A and 406 of the Penal Code read with Section 4 and 6 of the Dowry Prohibition Act after expiry of three years. The Supreme Court reviewed the earlier decisions in STATE OF PUNJUB –VS- SARWAN SINGH (Supra), VANKA RADHAMANO HARI (Supra), ARUN VYAS (Supra), STATE OF H.P. –Vs- TARA DUTTA (Supra) and RAMESH (Supra) and answered the question thus :-

> **"***The ratio of the above noted judgments is that while considering applicability of Section 468 to the complaints made by the victims of matrimonial offences the court can invoke Section 473 and can take cognizance of an offence after expiry of the period of limitation***.**

Having held as above, however, on the facts and circumstances of that matrimonial case the Supreme Court set aside the decisions of the Trial Court and the High Court and quashed the criminal proceedings.

(xxiv) S.K. SINHA, CHIEF ENFORCEMENT OFFICER – VS- VIDEOCON INTERNATIONAL LTD. & ORS., 2008(2) SCALE 23 decided on the 25th of January 2008 finds place in this conspectus as it also deals with a question of limitation in a criminal case, though of a peculiar characteristics. The Foreign Exchange Regulation Act, 1973 (FERA) was repealed with effect from 01.06.2000 on coming into force of the Foreign Exchange Management Act, 1999 (FEMA) . Section 49(3) of FEMA says that notwithstanding in any other law ……., no Court shall take cognizance of an offence under the repealed Act……. after expiry of a period of two years from the date of coming into force of FEMA, A complaint under FERA was filed, taken cognizance of on May 24, 2002 and issue of summons also was ordered on the same day making the process returnable on 07.02.2003. Process, however was issued on February 3, 2003. On these facts the High Court equated taking cognizance with issue of process and held the complaint to be barred under Section 49(3) of FEMA. The Supreme Court referred to BHARAT DAMODAR KALE (Supra) and JAPANI SHAHOO (Supra) and set aside the order of the High Court and ordered the trial to proceed.

(xxv) P.K. CHOUDHURY –Vs- COMMANDER, 48 BRTF (GREF) 2008(3) SCALE 575 decided on the 13th of March 2008 reiterates SHARADCHANDRA VINAYK DONGRE (Supra) and says, among other observations, that "if the delay is not condoned, the court will have no jurisdiction to take cognizance".

4. ANALYSIS OF AND COMMENTS ON THE LAW LAID DOWN

The analysis and comments may conveniently be categorized into following four sub-headings. (i) Institution vis-à-vis taking cognizance; (ii) Application of Section 473 of the Code; (iii) Concept of continuing offence; (iv) Limitation prescribed for offences under Laws other than Penal Code.

*4.1 INSTITUTION VIS-À-VIS TAKING COGNIZANCE***.**

It has already been indicated that provisions of Chapter XXXVI of the Code by and large have been modelled on those of the Limitation Act, 1963 applicable to suits with necessary modification suitable for criminal

proceedings. Criminal Courts take cognizance of offence. In contrast Civil Courts do not take cognizance of civil suits or actions. The Limitation act, 1963 speaks of institution of suits and not cognizance of suits. However in applying the bar of limitation in criminal cases this apparent conceptual distinction between civil suits and criminal cases had not affected the observations in a few decisions of the Supreme Court. Examples are SURINDER MOHAN VIKAL (Supra) of the 28th February, 1978 SARWAN SINGH (Supra) of the 2nd April 1981, R. AGHORAMURTHY (Supra) of the 7th March 1991, RASHMI KUMAR (Supra) of the 18th December 1996 and REGISTRAR OF COMPANIES (Supra) of the 11th May 2000. The last two are rendered by Three Judge Benches of the Supreme Court.

At the time of drafting of the Code the draftsman had two different models in the existing law in Section 198 B (4) of the Code, 1898 and in Section 198 A of the same code to choose from in preparing the draft for Chapter XXXVI of the Code. Section 199 (5) of the Code as it existed even earlier clearly speaks of taking cognizance of a complaint made within six months. The draftsman could have obviated the lack of clarity in the law by adopting the existing model as in Section 199 (5) of the Code. The five decisions listed above have impliedly done the same thing and eventually BHARAT Damodar (Supra) of the 8th of October,2003 said so explicitly drawing support among other reasons from the observations by the Three Judge Bench in RASHMI KUMAR (Supra). JAPANI SHAHOO (Supra) reiterated the law laid down in BHARAT DAMODAR (Supra) with an additional reason based an Article 14 of the Constitution observing that if the limitation is for taking cognizance not for filing of the complaint or the charge-sheet the provisions would be arbitrary and thus will be in the teeth of the prescriptions of Article 14 of the Constitution.

Thus the law is firmly settled that as in filing a plaint in a civil suits limitation is for the filing of the complaint or the charge-sheet in a criminal case. A few special laws also contain provisions for limitation of prosecution for offences under them. However despite settlement of the law as indicated above a Division Bench of the Andhra Pradesh High Court in KIMBERLY CLARK LIVER LTD.-Vs.- STATE, 2006 CRI.L.J. 2438 chose to follow KRISHNA PILLAI Vs T.A. RAJENDRAN AND ANOTHER 1990 (Supp) SCC 121, a Three Judge decision of the Supreme Court interpreting Section 9 of the Child Marriage Restraint Act, 1929, which has now been repealed by the Prohibition of Child Marriage Act, 2006 operating from 01.11.2007. Incidentally Section 9 of the Child Marriage Restraint Act, 1929 is modeled on Section 198 A of the Code of Criminal Procedure 1898. No enunciation of the Doctrine of precedent permit the course adopted in KIMBERLY CLARK (Supra). The Judgment did not notice that BHARAT DAMODAR KALE (Supra) has relied on RASHMI KUMAR (Supra) a Three Judge decision. Above all did not consider impact of the provisions of Section 4(2) and 5 of the Code while considering the problem. It is undoubtedly a Judgment per in-curiam.

Lastly, it may not be out of place to mention at the end of the Section that the draftsman fulfilled the expectations of the Courts in the draft

of the provisions of Section 142 (b) of the Negotiable Instruments Act, 1881 in operation since 01.04.1989 and its proviso in operation since 06.02.2003 where making of the complaint within the period of limitation has been pinpointed.

4.2 SECTION 473 OF THE CODE

The provisions of Section 473 of the Code may be considered from two angles-one substantive and the other procedural. On the substantive aspect it will be useful to compare and contrast the language of two analogus provisions in Section 5 of the Limitation Act, 1963 and that of the proviso to Section 142(a) of the Negotiable Instruments Act, 1881 which came into force on and from the 6th of February, 2003. The key clause in Section 473 of the Code that is "or that it is necessary so to do in the interests of justice" is entirely absent in the provisions of Section 5 of the Limitation Act, 1963 and in the proviso to Section 142 (a) of the N.I. Act. Under Section 5 of the Limitation Act, 1963 it is the appellant or the applicant who has to satisfy the Court about the existence of sufficient cause for the delay. Similarly under proviso to Section 142(a) of the N.I. Act is the complainant who has to satisfy the court about existence of sufficient cause for the delay. In contrast under Section 473 of the Code because of the disjunctive proposition at the end of the section it is obligatory on the Court to consider whether interests of justice would be better served by extending the period rather than by terminating the prosecution on the ground of limitation. While for exercise of powers under Section 5 of the Limitation Act and under the proviso to Section 142 (a) of the N.I. Act the appellant or the applicant respectively has to move the Court for exercise of powers under Section 473 of the Code the Court can even act Suo Motu. This is so because unlike in a Civil Case where private rights are only involved in a criminal case in a way interest of the society at large and public right is involved and the Court must act as the guardian of those rights. None of the twenty-five decisions from the Supreme Court considered in para 3 above has specifically laid down as much but there are enough indications to that effect. An analysis of the said decisions of the Supreme Court exhibits three varying trends on the substantive aspect of Section 473 of the Code. SURENDRA VIKAL (Supra)of 1978 and R. AGHAROMURTHY (Supra) of 1991 imply that the complainant has to move the Court under Section 473 of the Code to obtain extension of the period. The observations in these two decisions carrying the said implication cannot however be elevated to the status of a binding precedent because such a question did not arise in these cases. The next trend is discernible first in BHAGIRATH KANORIA (Supra) of 1984 then in VANKA RADHAMANOHARI (Supra) of 1993 where the distinctions between the provisions of Section 473 of the Code and the cognate a provision of section 5 of the Limitation Act, which is already indicated had been highlighted. ARUN VYAS (Supra) also follow VANKA RADHAMANOHARI (Supra). Although the above two decisions deal with offence under Section 498-A that is cruelty against wife , the enunciation of the law there as regards Section 473 of the

Code has to be understood as illustrative of the phrase "interests of justice" in the provision and the law stated there is therefore of general application.

TARA DUTTA (Supra) though a Three Judge decision appears to have misread the provision of Section 473 of the Code in that it read the provision conjunctively instead of disjunctively thus implying that the prosecution has to satisfy the Court both as to existence of sufficient cause for delay as well as the requirement of the interest of justice.

On the procedural aspect of the provisions of Section 473 of the Code it will be useful to remember that the implication of the decisions discussed in this Section is that it is the duty of the Court to be alive to the provisions of Section 473 of the Code on its own at the time of taking cognizance of an offence as indicated in Section 468 of the Code. Next question that arises is when the prosecution applies under Section 473 of the Code should the application be filed alongwith the complaint or the charge-sheet as the case may be. In SUKHDEV RAJ (Supra) of 1993 the application was filed "almost at the conclusion of the trial and before judgment was delivered". It was observed that the words "so to do in the interest of justice" are wide enough to entertain and act on the application. However, the latter development of the law, to be considered shortly, would have certain impact on the entertainment of such an application not filed alongwith the complaint or the charge-sheet. The Three Judge decision in SHARAD CHANDRA VINAYAK DONGRE (Supra) of October 1994 the application for condonation of delay was filed simultaneously with the charge-sheet and the Court allowed the application, took cognizance and issued process against the accused. The Supreme Court set aside the order of the Chief Judicial Magistrate and remitted the application for fresh disposal after hearing both the prosecution and the would be accused. To that extent SUKHDEV RAJ (Supra) will be in the teeth of SHARAD CHANDRA (Supra) a Three Judge Bench and must yield to the later decision by a larger Bench. Still later Three Judge decisions in ADALAT PRASAD –VS- ROOPLAL JINDAL, AIR 2004 S.C. 4674 and SUBRAMANIUM SETHURAMAN –Vs- STATE OF MAHARASHTRA, AIR 2004 S.C. 4711 would make an application under Section 473 of the Code filed after taking of cognizance and issue of process only one dimensional. In other words on such application after hearing both sides the Court can only condone the delay but cannot give relief to the accused by terminating the prosecution on the ground of bar of limitation. To get relief by the accused on that score he has either to wait till the stage of framing of charge or till judgment depending on the nature of the case that is summons case or warrant case on police report or on private complaint.

It is surprising that SHARAD CHANDRA VINAYAK DONGRE (Supra) has been cited before the Supreme Court only in P.K. CHOUDHURY (Supra) of the 13th of March 2008. TARA DUTTA (Supra) another Three Judge decision on Section 473 of the Code did not notice it and only laid sown that the Court taking cognizance after the expiry of limitation must through a speaking Order say that it acted under Section 473 of the Code. It did not go far enough to emphasize the necessity of hearing both the sides and to say

that the delay cannot be condoned behind the back of the accused which is the essence of SHARADCHANDRA VINAYAK DONGRE (Supra). Lastly, on this aspect though in RAKESH KUMAR (Supra) another Three Judge Bench and in RAMESH (Supra) the Supreme Court had condoned the delay without remitting the matter to the Trial Court unlike in SHARAD CHANDRA (Supra) on the principle that the word rather than the deed of the Supreme Court is the law laid down and to be followed as such the course adopted in RAKESH KUMAR (Supra) need not be indeed cannot be followed by the High Courts and the subordinate Courts in view of the holding in SHARAD CHANDRA VINAYAK DONGRE (Supra).

4.3 CONTINUING OFFENCE

Continuance is two dimensional. Continuance may be in space or locality and/or may be in time. Section 178(c) of the Code speaks of the space dimension and Section 470 of the Code speaks of the time dimension. So far the clearest enunciation of the concept of continuing offence as regards limitation in time can be read in GOKAK PATEL (Supra). It also has relied on the earlier judgment of the Supreme Court in BHAGIRATH KANORIA (Supra). Tested in the light of the law enunciated in the above two cases what has been stated in ARUN VYAS (Supra) in relation to an offence under Section 498-A of the Penal Code as being a continuing offence cannot be correct. It was also not necessary for a decision of that case to determine whether the offence under Section 498-A of the penal code is a continuing offence or not. Indeed the second and the third sentence in para 13 of ARUN VYAS (Supra) do not match the statement of law in GOKAK PATEL (Supra). It is surprising that in TARA DUTTA (Supra) the Supreme Court thought that the one of the points falling for determination in ARUN VYAS (Supra) was whether the offence under Section 498-A of the penal code is continuing offence or not. ARUN VYAS (Supra) was concerned more with Section 473 of the Code, as has already been pointed out, and the matter of continuing offence was only a casual observation.

4.4 *LIMITATION OF PROSECUTION FOR OFFENCES UNDER LOCAL OR SPECIAL LAWS*

It has already been indicated that Section 4 and 5 of the Code have to be applied in understanding any enactment creating a bar of prosecution by reason of limitation. Special laws in this regard may be of three categories. Some statutes like the copyright Act, 1957 the Dowry Prohibition Act 1961, the Patent Act, 1970 the Wild Life (Protection) Act, 1972 and the Environment and Pollution Laws etc simply create the offence and prescribe the punishment and say nothing else. The provisions of Chapter XXXVI of the Code will determine the limitation for prosecution in such cases. In the second category will be statutes like the Indian Police Act 1861 the Trade Marks Act 1999, and the Geographical Indication of Goods (Registration and Protection) Act 1999. In cases under those Acts limitation will be governed by the period

prescribed there and not under the Code. Most importantly Section 473 of the Code also will not be applicable and as such there will not be any scope for extension of period of limitation. P.P. UNNI KRISHNAN (Supra) leaves no room to argue otherwise. In the third category will be statutes like the Negotiable Instruments Act 1881 where the special law not only creates the offence prescribes the period of limitation but also prescribes special provision for extension of limitation. In such cases also the provisions of the Code will not apply. Though the Child Marriage Restraint Act, 1929 has been replaced by the Prohibition of Child Marriage Act, 2006 with effect from 01.11.2007 there may still be some statutes adopting the model in Section 198(6) of the Code. In such cases neither Chapter XXXVI of the Code nor decisions like BHARAT DAMODAR KALE (Supra) and JAPANI SHAHOO (Supra) will apply.

5. CONCLUDING COMMENTS

Four key features emanating from these twenty-five decisions of the Supreme Court appears to be (1) to emphasize that limitation is for institution; (2) to remind the Trial Courts to consider the question of limitation before taking cognizance; (3) to remind the trial Courts about the difference between the power of extension of limitation under Section 5 of the limitation Act and Section 473 of the Code and; (4) Lastly to hear the affected person that is the would be accused before deciding to extend the period even if sought to be done Suo Motu and pass a reasoned order on the matter.