

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL WRIT PETITION NO. 18 OF 2015

Shri Kashinath Naik
S/o Laxman Naik,
Age 44 years, Service,
R/o H. No. 33,
Raigini, Bandorea,
Ponda-Goa.

.. Petitioner

V/s

1. State of Goa
Through Public Prosecutor,
High Court of Bombay
at Panaji-Goa
2. Smt. Geeta Naik,
D/o Vishnu Naik,
Major of age (age not known),
R/o H. no not known,
Parampai, Marcaim, Ponda-Goa .. Respondents

Mr. Gaurish Agni, Advocate for the petitioner.

Mr. M. Amonkar, Additional Public Prosecutor for the respondent no. 1.

Mr. D. Gaonkar, Advocate for the respondent no. 2.

CORAM :- C. V. BHADANG, J.

Date : 20th March, 2015.

ORAL JUDGMENT :

Rule. Rule made returnable forthwith.

2. The learned Counsel for the respondents waive notice on behalf of the respondents.

3. Taken up finally with the consent of the learned Counsel for the parties.

4. The brief facts are that the respondent no. 2 has filed an application for grant of maintenance under Section 125 of the Code of Criminal Procedure (Cr.P.C., for short) against the petitioner herein, being Maintenance Application No.2/2013/A, which is pending on the file of the learned Judicial Magistrate, First Class at Ponda, Goa. The Second respondent is claiming maintenance of Rs.5,000/- per month from the petitioner. According to the second respondent, she was married with the petitioner on 22/01/2007. After marriage, she had gone to reside with the petitioner at Raigini, Bandora, Ponda, Goa. Shortly thereafter, the marriage ran into rough weather and the parties started staying separately. It appears that the petitioner had filed a Matrimonial Petition No.9/2009/A against the second respondent in the Court of the learned Senior Civil Judge at Ponda for a decree for annulment of marriage and for declaring the marriage as nullity. It appears that the said petition has been decreed vide judgment and order dated 26/02/2013 and marriage between the

parties (registered in the office of Civil Registrar at Ponda against entry No.66/2007) has been annulled and declared as null and void. It is undisputed that the second respondent has unsuccessfully challenged the said judgment and decree before the learned District Judge. Thus, the said decree of annulment of marriage has attained finality. Be that as it may, the second respondent, as stated earlier, had filed an application for maintenance under Section 125 of Cr.P.C. on 02/03/2013. The second respondent also filed an application for grant of interim maintenance therein, claiming a maintenance of Rs.5,000/- per month, pending disposal of the application. It appears that the petitioner filed a reply to the application opposing the same. It was, *inter alia*, contended that there was misrepresentation by the second respondent, as to her date of birth and the marriage was null and void and was so declared in the Matrimonial Petition No.9/2009/A. The petitioner also denied all the adverse allegations, including about his earning Rs.15,000/- per month. It was contended that the second respondent is not entitled to maintenance as claimed.

5. The learned Magistrate, by an order dated 17/01/2014, has granted interim maintenance of Rs.5,000/- per month against the petitioner. It further appears that the petitioner filed an

application under Section 127 of Cr.P.C. for cancellation of order of interim maintenance. That application was filed on 15/02/2014. The learned Magistrate, by an order dated 25/06/2014, was pleased to dismiss the application, *inter alia*, on the ground that the said application under Section 127 of Cr.P.C. was not maintainable. The learned Magistrate also refused to accept the contention of the petitioner that he was not heard. It was found that the petitioner was present and was represented by an Advocate. The learned Magistrate found that the prayer made in the application does not fall under the provisions of subsection (1) to subsection (4) of Section 127 of Cr.P.C. and the Magistrate was not competent to recall his own order. In the face of such finding, the application came to be rejected.

6. It is after this, that the petitioner, instead of challenging the order dated 25/06/2014, chose to file an “appeal” against the original order granting interim maintenance dated 17/01/2014. That appeal was filed along with an application for condonation of delay to the extent of 168 days. The second respondent filed her reply and opposed the condonation of delay, *inter alia*, on the ground that order dated 17/01/2014 is not appealable and as such, an application for condonation of delay in filing the proceedings styled as an “appeal”, would not be

maintainable. It was contended that the application nowhere specifies the reasons for delay and as such, no case has been made out for condoning the same. The learned Sessions Judge, by an order dated 17/12/2014, has dismissed the application for condonation of delay. Feeling aggrieved, the petitioner has approached this Court.

7. I have heard the learned Counsel for the applicant and the second respondent. With the assistance of the learned Counsel for the parties, I have perused the copies of the record produced and the impugned orders passed.

8. It is submitted by the learned Counsel for the petitioner that the application for maintenance itself was filed after the marriage was declared as null and void. It is submitted that as such, the petitioner had a strong prima facie case against the impugned order of grant of interim maintenance. The learned Counsel has submitted that the time spent while the petitioner prosecuted the application under Section 127 of Cr.P.C., could be excluded both under Section 14 of the Indian Limitation Act and Section 470 of Cr.P.C. The learned Counsel would submit that even otherwise, the Courts have to take a pragmatic approach while considering the prayer for condonation of delay. It is

submitted that the learned Sessions Judge has erroneously held that the petitioner was derelict in challenging the order, in as much as the petitioner had already availed the remedy of filing an application under Section 127 of Cr.P.C. He, therefore, submitted that the delay deserves to be condoned.

9. On the contrary, the learned Counsel for the second respondent submitted that the order granting interim maintenance is not appealable and as such, the application for condonation of delay in filing the proceedings styled as an appeal, would not be maintainable. It is submitted that there is delay of 168 days in challenging the order of interim maintenance and no circumstances or reasons are shown for condoning the delay. The learned Counsel has also advanced the submission in order to demonstrate that the petitioner was indeed represented and was heard before the order of interim maintenance was passed. He, therefore, urged that no case is made out and the application for condonation of delay is rightly dismissed.

10. I have considered the rival circumstances and the submissions made. At this stage, it is necessary to state that it is neither necessary nor proper to go into the merits of the impugned orders passed. The issue presently before this Court essentially is,

as to whether the petitioner can be justifiably permitted to challenge the order before the Sessions Court.

11. A party, applying for condonation of delay, has to show sufficient cause for not approaching the Court within time. The Courts are obliged to take a pragmatic view in the matter. The Hon'ble Apex Court as far back as in the year 1987, in the case of ***“Collector, Land Acquisition, Anantnag and another Vs. Katiji and others”***, reported in AIR 1987 SC 1353, has, *inter alia*, held that no party stands to gain by approaching the Court late and there is no presumption that the delay is intentional. These are the basic principles, which are to be kept in mind before the Court considers the facts in each case.

12. Turning to the present case, undisputably, after the interim order was passed on 17/01/2014, the petitioner, on legal advice, had taken recourse to filing of an application under Section 127 of Cr.P.C., which was filed on 15/02/2014. That application was prosecuted and was ultimately dismissed on 25/06/2014. The learned Counsel for the petitioner has made certain submissions in order to show that the said application was also erroneously rejected, particularly in view of the provisions of Section 127(2) of Cr.P.C. and in the face of the orders passed by the Civil Court. I

would not to go into this issue, particularly when the petitioner has now opted to challenge the original order of grant of interim maintenance dated 17/01/2014. It would also not be necessary to go into the question whether an appeal or revision lies. The parties would be entitled to raise appropriate contentions in this regard and the learned Sessions Judge would decide the issue in accordance with law. If at all, as urged on behalf of the respondent no. 2, the order is not appealable and a revision lies against the same, the quantum of delay would be further reduced in as much as the period of limitation for filing of a revision would be 90 days (as against thirty days for filing an appeal). Be that as it may, I find that on application of principles akin to Section 14 of Indian Limitation Act, the delay deserves to be condoned. There are no circumstances on record to show any negligence or lack of diligence on the part of the petitioner.

13. In the result, the petition is allowed.

14. Rule is made absolute in terms of prayer clauses (a) and (b). The impugned order dated 17/12/2014 is hereby quashed and set aside. The delay in approaching the learned Sessions Judge is hereby condoned, subject to the petitioner depositing costs of Rs.2,000/- before the learned Sessions Judge. It is made

clear that all the points on merits, including about the maintainability of the proceedings, are kept open.

15. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

SMA