

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 46 OF 2015

Smita Halankar,
through her mother
Gokulla Phadte,
r/o House No.2066,
Bandar wada,
Bicholim Goa.

... Petitioner

V e r s u s

Mahendra Halarnkar,
major of age,
House No.
Palmar-Pomburpa,
Bardez Goa.

... Respondent

Mr. S. M. Singbal, Advocate for the petitioner.

Mr. P. S. Lotlikar, Advocate for the respondent.

CORAM : K. L. WADANE, J

JUDGMENT RESERVED ON : 08.10.2015

JUDGMENT PRONOUNCED ON : 30.10.2015

J U D G M E N T :

Heard Mr. S. M. Singbal, learned counsel appearing for the petitioner and Mr. P. S. Lotlikar, learned counsel appearing for the respondent.

2. Rule. Heard forthwith with the consent of the learned counsel.

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3. The present petition is filed by the petitioner seeking to quash and set aside the order passed by the Chief Judicial Magistrate, Panaji, dated 04.01.2013 on Exhibits 23 and 29 in Maintenance Application No. 4/99, by which the learned Magistrate has dismissed the applications for enhancement of maintenance and amendment. Thereafter, the petitioner presented an appeal before the Additional Sessions Judge, Mapusa, being Criminal Appeal No. 11/2013 which was also dismissed.

4. The brief facts of the case may be stated as follows :

That the petitioner had filed an application for maintenance bearing No.4/99 against the respondent before the Chief Judicial Magistrate, Panaji. The said maintenance application was allowed by judgment and order dated 27.10.2006 and the respondent was directed to pay to the petitioner through her mother an amount of Rs.500/- per month till she attains the age of majority.

5. Since the respondent was not making payment in terms of judgment and order dated 27.10.2006 passed by the Chief Judicial Magistrate, Panaji, the petitioner filed an application under Section 128 of the Criminal Procedure Code bearing Criminal Misc. Application No. 139/2008/A.

6. During the pendency of the aforesaid application filed under

Section 128 of the Criminal Procedure Code, the petitioner filed an application for enhancement of the maintenance under Section 12 read with Section 26 of the Protection of Women from Domestic Violence Act, 2005 (in short "the Act") wherein the petitioner has sought enhancement of maintenance from Rs.500/- to Rs.6850/- per month on the ground of inflation and to take the care of basic necessity of the child. The respondent filed his reply and contended that the application was not maintainable.

7. After hearing both sides, the learned Magistrate dismissed the application as indicated above. Being aggrieved with the same, the petitioner preferred an appeal bearing Criminal Appeal No.11/2013 under the provisions of Section 29 of the Act and after hearing both sides, the learned Additional Sessions Judge, Mapusa, dismissed the criminal appeal. Hence, the present petition.

8. I have heard the arguments of Mr. S. M. Singbal, learned counsel appearing for the petitioner and Mr. P. S. Lotlikar, learned counsel appearing for the respondent. The learned counsel appearing for the petitioner has relied upon the judgment in the case of **Ms. Aradhana Walkade V/s Mr. Chandrashekar Vaidya and another**, reported in **[(2014) 2 Goa L. R. 61 (Bom) (PB)]**.

9. I have also gone through the relevant records. On perusal

of the same, it appears that initially the petitioner has filed an application for maintenance under the provisions of Section 125 of the Criminal Procedure Code and it was allowed and the execution of the order of maintenance was filed and the same was pending before the Criminal Court.

10. During the pendency of the above petition, the petitioner filed an application under Section 12 read with 26 of the Act, and that too for enhancement of maintenance amount awarded under the provisions of Section 125 of the Criminal Procedural Code. I think the proper course for the petitioner was to either prefer a revision against the order of maintenance to the Sessions Judge within a period of 90 days or to file an application for enhancement of maintenance under the provisions of Section 127 of the Criminal Procedure Code instead of doing so in the pending Criminal proceedings under Section 128 of the Criminal Procedure Code, the petitioner moved an application under Section 12 read with 26 of the Act. During the course of the arguments, the learned counsel appearing for the respondent has argued that the application under Section 12 read with 26 of the Act is not maintainable as the petitioner is not in domestic relationship with the respondent. I do not agree with the submission of Mr. P. S. Lotlikar, learned counsel appearing for the respondent simply because in view of the provisions of Sections 20(d) and 26 of the Act, the aggrieved person as well as her children i.e. present petitioner is entitled to file an

application claiming any of the reliefs under the provisions of Sections 12, 20(d) and 26 of the Act. The learned counsel appearing for the petitioner has therefore rightly relied upon the judgment in the case of **Kishor s/o Shrirampant Kale v/s Sou. Shalini w/o Kishor Kale** passed in Criminal Writ Petition No. 37/2008. Therefore, the petition of the petitioner claiming maintenance appears to be maintainable. However, the way and the manner in which it was moved is improper and without following due procedure. If the petitioner had filed such application for maintenance independently, then it can be maintainable as per the provisions of the Act. In the present case, the order passed under Section 125 of Criminal Procedure Code, has been challenged/sought to be modified as per the provisions of Sections 12 read with 26 of the Act which is not permissible because efficacious remedy under the provisions of Section 127 of the Criminal Procedure Code is available to the petitioner. In absence of any order passed for maintenance under Section 12 read with 26 of the Act, such order cannot be challenged under the provisions of Section 29 of the Act. I am aware that the proceedings for the maintenance under the Act are in addition to the provisions of Section 125 of the Criminal Procedure Code. In the present case, instead of filing an application for maintenance under this Act separately, the petitioner has wrongly filed the petition in the pending proceedings under Section 128 of the Criminal Procedure Code and the order passed under Section 125 of the Criminal Procedure Code, cannot be challenged or modified as per the

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provisions of the Act.

11. In view of the above observations, there is no substance in the Writ Petition. Accordingly, it is dismissed. Rule stands discharged accordingly.

K. L. WADANE, J

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