

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

907 SECOND APPEAL NO. 828 OF 2012
WITH CA/14256/2012 IN SA/828/2012

SHIVAJI RAGHUNATH GAIKWAD
VERSUS
VIMALBAI SHIVJAI GAIKWAD

Shri. V.D. Gunale, Advocate, for appellant.

Shri. T.M. Venjane, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 10th AUGUST 2016

ORDER:

1) The appeal is filed against the order made by the District Judge-1 Udgir in MARJI No.22/2011 which was filed by the present appellant for condonation of delay. Special Civil Suit No.98/2010 was filed by the wife of present appellant for relief of maintenance under the provisions of Hindu Adoption and Maintenance Act. The trial Court granted maintenance at the rate of Rs.2000/- per month and past maintenance for 3 years was also granted. This decision was given on 1-2-2011. Application for condonation of delay was filed as delay of around 10 days was caused in filing first appeal.

2) It was the case the present appellant, husband in the aforesaid application that he had applied for certified copy of the judgment and decree of the trial Court on 1-2-2011 and the certified copy was delivered to him on 24-3-2011. He contended that since 8-4-2011 he was not feeling well and he was under treatment of one Dr. Jadhav on O.P.D. basis. It is his case that he was taking treatment as indoor patient from 23-4-2011 to 28-4-2011 in the hospital of Dr. Baheti and thereafter he was required to take treatment on O.P.D. basis. It is contended that in ordinary course he was required to file appeal before 22-4-2011 but due to aforesaid circumstances he could not file appeal in time.

3) In support of the aforesaid contention, no record was produced and no witness was examined. The District Court held that delay is not properly and satisfactorily explained.

4) In the present matter learned counsel for the appellant submitted that due to the order made by the District Court the appellant has lost his right to challenge

the decision by filing first appeal. When learned counsel for the appellant was asked to show that he has some arguable case in the appeal, learned counsel submitted that he wants to point out to the District Court that there is right to the husband to adjust the amount of maintenance which he has already paid to the wife as per the order made in the proceeding under section 125 of the Criminal Procedure Code. Learned counsel submitted that in that proceeding the appellant is paying amount of Rs.900/- per month and the trial Court has not made it clear that the aforesaid amount awarded is in addition to the amount which the husband is already paying to the wife under the Cr.P.C. or whether the said amount can be adjusted in the amount of Rs.2000/-.

5) To ascertain the force in the aforesaid contention, this Court has carefully gone through the judgment delivered by the trial Court. The trial Court has considered this circumstance at para 15. Thus after considering the fact that the husband was paying Rs.900/- per month under order of the Magistrate, the Court fixed the amount of maintenance as Rs.2000/- per month. In

view of the reasoning given and the operative order it needs to be presumed that amount of Rs.2000/- is in addition to the amount which the husband is paying under order of the Magistrate. For that, the capacity of the husband to pay on the basis of his income from agriculture etc is considered by the trial Court. It appears that husband has married second wife and he has at least 4 issues from second wife. The case of the husband that he had given some land to the plaintiff is also considered. In the year 2008 the wife had given her age as 50 years and it is clear that she was not able to do any work and she she had rushed to the Court.

6) Learned counsel or the appellant placed reliance on a case reported as **2005(2) Bom.C.R. 905 (Sanjay Poundlikrao v. Swati Sanjay)**. This Court has discussed the right of the wife to get maintenance under the Criminal Procedure Code and also under the provisions of the Hindu Marriage Act, section 24, and it is observed that the amount can be adjusted. It is true that when Magistrate makes order to pay maintenance he is expected to take into consideration the amount which the

husband is paying as per order made by civil Court. Similarly, the Civil Court is also expected to consider the amount which the wife is receiving under the order of other Court like Magistrate Court. The two proceedings are totally separate and the purpose behind them is different. In both the proceedings requirements of the wife need to be considered and the capacity of the husband also needs to be considered. In the present matter, these things are considered by the trial Court.

7) Condonation of delay is within the discretion of Court. At appellate stage, the appellate Court is not expected to lightly interfere in the order made by the trial Court or the first appellate Court on the basis of discretionary powers. This Court has no hesitation to hold that no sufficient cause was shown and further there was virtually no arguable case with the husband in the first appeal. No substantial question of law as such is involved in the present matter. In the result, the appeal stands dismissed. Civil Application is disposed of.

Sd/-
(T.V. NALAWADE, J.)

rs1