

IN THE HIGH COURT OF BOMBAY AT GOA**CRIMINAL WRIT PETITION NO. 44 OF 2016**

1. Mr. Anthony Johnson, s/o W. Johnson, Major of age, Married, Working in Indian Army,
 2. Mr. W. Johnson, Major of age, Both R/o Illppakunam II, Kasthampadi, Post, Polur Taluka, TV Malai Dist. Tamil Nadu.
- Petitioners

Versus

1. Mrs. Kavita Glory, D/o Mr. Lourdhnanadhan, Major of age, Married, R/o C/o, Lourdhanathan, Quarter No. 273/8, Defence Colony, Bambolim Camp, Bambolim.
 2. State of Goa, Through Public Prosecutor, High Court of Bombay at Panaji-Goa.
- Respondents

Mr. Ganesh R. Naik, Advocate for the Petitioners.

Mr. Euclid P. Heredia, Advocate for Respondent No. 1.

CORAM:- C.V. BHADANG, J.

DATE:- 13th APRIL, 2016.

ORAL JUDGMENT:

Rule. Rule made returnable forthwith. Mr. Heredia, learned Counsel waives service on behalf of respondent no. 1. Respondent no. 2-State is a formal party. Heard finally, by

consent of the parties.

2. This is the second round of litigation before this Court wherein the petitioners are challenging the order dated 20.11.2015, passed by the learned Additional Sessions Judge, Panaji, thereby dismissing the Criminal Appeal No. 184/2015 filed by the petitioners, in default.

3. The respondent no. 1 had filed Criminal Case No. AOA/161/2012/D, against the petitioners under the provisions of Protection of Women from Domestic Violence Act, 2005. The learned Judicial Magistrate First Class, Panaji by an order dated 30.06.2014 has partly allowed the said application directing the petitioner no. 1 to pay maintenance at the rate of Rs.8,000/- per month to the respondent no. 1. The petitioners sought to challenge the said order in an appeal, which was barred by time. As such the petitioners had filed Criminal Miscellaneous Application No. 127/2014 for condonation of delay, which was dismissed in default on 13.04.2015. That, was challenged by the petitioners before this Court in Criminal Writ Petition No. 117/2015, which was allowed on 15.10.2015, thereby restoring the application for condonation of delay, subject to payment of

costs of Rs.2,000/-. Thereafter, the application for condonation of delay was heard by the learned Sessions Judge and the same was allowed and the application was registered on 19.11.2015 as Criminal Appeal No. 184/2015. On the very next date i.e. on 20.11.2015, on account of absence on behalf of the petitioners, the appeal came to be dismissed in default, which order is subject matter of challenge in this petition.

4. It is submitted on behalf of the petitioners that the Counsel appearing for the petitioners on account of his health could not attend the appeal on 20.11.2015. He submits that this was the first date after the appeal was registered on 19.11.2015, where the appeal was dismissed for want of prosecution. The learned Counsel has placed reliance on the decision of the Hon'ble Apex Court in the case of **Bani Singh Vs. State of Uttar Pradesh, 1996 (4) SCC 720**, in order to submit that a criminal case cannot be dismissed in default.

5. The learned Counsel appearing for respondent no. 1 submits that the petitioner no. 1 has not complied with the order of maintenance and the petitioners are only trying to gain time. It is also submitted that the medical certificate

establishing the inability of the learned Counsel to appear on behalf of the petitioners on 20.11.2015, is not produced. It is also submitted that the case of **Bani Singh** (supra), arose out of the case under the Indian Penal Code and as such, similar principles may not apply in respect of the appeal, which is arising out of the Domestic Violence Act, where the dispute is essentially of a civil nature.

6. I have considered the circumstances and the submissions made. Without going into the aspect whether an appeal under the Domestic Violence Act can be discussed in default, I find that in the facts of the case and in order to afford fair opportunity to the petitioners, the impugned order needs to be set aside, subject to the condition of deposit of costs. It may be noticed that after the application for condonation of delay was restored, under the orders of this Court, the petitioners had argued the same and the same was allowed and the appeal was registered on 19.11.2015.

7. Considering the overall circumstances the following order is passed:

ORDER

- (a) The petition is allowed.
- (b) The impugned order dated 20.11.2015 is hereby set aside, subject to payment of costs of Rs.10,000/-, to the respondent no. 1, within a period of two weeks from today.
- (c) The Criminal Appeal No. 184/2015 is restored to the file of the learned Sessions Judge for disposal in accordance with law.
- (d) Parties to appear before the learned Sessions Judge on 27.04.2016.
- (e) The learned Sessions Judge shall decide the appeal and the application for stay, if any, on its own merits.
- (f) Rule is made absolute in the aforesaid terms.

C.V. BHADANG, J.