

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.391 OF 2018

Ms. Catherine Rochelle Rodrigo	.. Applicant
Vs.	
The State of Maharashtra & Ors.	.. Respondents

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Mr.R.V. Sipahimalani, Advocate for the Applicant.
Ms.N.S. Jain, APP for the Respondent – State.
Ms.Laxshmi Raman, Advocate for Respondents.

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CORAM : PRAKASH D. NAIK, J.

DATED : AUGUST 7, 2018.

P.C. :

Applicant is aggrieved by the order dated 12th February, 2018, passed by Learned Additional Sessions Judge, Dindoshi, Mumbai, rejecting the application for condonation of delay.

2 Applicant is wife of respondent no.2. She initiated the proceedings under the Protection of Women From Domestic Violence Act ("DV Act", for short), before the Court of learned Metropolitan Magistrate 17th Court at Borivali, Mumbai. Applicant had preferred interim application seeking urgent interim relief. The trial Court by order dated 12th August, 2016,

partly allowed the interim application and directed respondent no.2 to pay an amount of Rs.10,000/- per month towards maintenance and Rs.12,000/-, per month towards rent to the applicant.

3 The said order dated 12th August, 2016, was challenged by respondent no.2 by preferring an Appeal before the Sessions Court, Dindoshi, Mumbai. The said Appeal was numbered as Appeal No.186 of 2016. The applicant was aggrieved by the said order to the extent to quantum of maintenance and, therefore, she had also preferred an Appeal seeking enhancement. There was delay in preferring appeal. Appeal preferred by the applicant was assigned to Court No.9 whereas the Appeal preferred by respondent no.2 were assigned to Court No.10. The matters came up for hearing before the Court No.10 on 18th November, 2016. Roznama dated 18th November, 2016, indicate that the counsel for the applicant had pointed out to the Court that applicant's Appeal is pending before the Court Room No.9 and she had prayed to club both the Appeals in one Court. The advocate for respondent no.2 submitted that his client did not receive any notice. Appeal No.186 of 2016 was thereafter adjourned for hearing to 14th

December, 2016. The applicant preferred transfer application seeking transfer of her appeal from Court No.9 to Court No.10. The said application was allowed and the Appeal along with M.A.No.218 of 2016 was transferred to Court No.10. The applicant preferred an application for issuance of distress warrant on 7th February, 2017, since the maintenance was not paid and there was no stay granted by Court. On 18th March, 2017, the Court passed order partly allowing the Appeal preferred by respondent no.2. The order directing payment of Rs.12,000/-, per month as rent for alternative accommodation from the date of application till disposal of original application was set aside. Rest of directions were maintained. However, the order was kept in abeyance in view of the submissions advanced by the advocate for the applicant that appeal preferred by applicant is still pending. The Court, however, recorded the submissions advanced by the advocate for the applicant that the cross appeal filed by the respondent therein is pending and the above said finding will affect the said Appeal, and, therefore, the adverse finding was kept in abeyance, till the cross appeal is heard. It was also submitted by advocate for applicant that till the decision of that Appeal, the respondent i.e. original applicant will not enforce warrant against respondent no.2. The learned

Judge accepted the said submissions as fair and kept the said order dated 18th March, 2017, in abeyance till cross Appeal is heard. At the same time, respondent no.1 herein was directed to deposit the interim maintenance as ordered by the trial Court within a reasonable period and at the most within a period of one month from the date of the said order. According to applicant respondent no.2 failed to deposit arrears and also neglected to appear before trial Court on 6th May, 2017 and 15th July, 2017. The applicant, thus, pressed for orders on pending application dated 7th February, 2017, the trial Court issued distress warrant. The learned Presiding Officer was transferred to Court No.2 from Court NO.10. The applicant preferred another application for transfer before Principle Judge which was allowed on 29th September, 2017. The said Presiding Officer was then transferred to Court No.7. The proceedings were, however, not traceable. Thereafter, matter was heard and the application for condonation of delay was rejected on 12th February, 2018. The applicant herein is aggrieved by the said order. While rejecting the application for condonation of delay, the Court has observed that there was a delay of about 57 days in preferring the Appeal. The Court also took into consideration the conduct of the applicant which is apparently seen from the tenor of the impugned order.

The Court noted that no prejudice or injustice would be caused to the applicant, if delay is not condoned in filing the said Appeal. The grounds to condone the delay needs to be sufficient and the period of delay is not relevant, if there is sufficient ground to condone the same. It was further observed that, the facts revealed that the applicant had failed to prove sufficient ground to condone the delay in the said matter. The Court had also noted that the conduct of the applicant show that when her advocate made statement in Criminal Appeal No.186 of 2016 on 18th March, 2017, that the impugned order will not be enforced, the applicant proceeded to initiate action for execution of warrant.

4 Learned counsel for the applicant submitted that sufficient cause was shown in the application for condonation of delay. The observations of the Sessions Court that no prejudice would be cause or that no injustice would be caused to the applicant, are improper. The applicant is indeed prejudiced by the orders passed by the trial Court and had preferred an Appeal challenging the said order. It is further submitted that the applicant could not engage the advocate on account of financial constraints. Applicant was required to initiate the proceedings for execution of warrant on account of the fact that the order of

maintenance was not complied by respondent no.1. It is also submitted that even while keeping the order in abeyance, the Sessions Court had directed respondent no.1 to clear the arrears towards the maintenance within stipulated period and since the said order was not complied, the applicant was required to initiate the proceedings for execution of the said order. It is submitted that the Sessions Court has adopted a hyper-technical view in rejecting the application for condonation of delay.

5 Learned counsel for respondent, however, submitted that there is no reason to set aside the impugned order. The Sessions Court has taken into consideration the conduct of the applicant and has also observed that there was no sufficient cause to condone the delay. In the circumstances, and in the light of the reasons assigned by the Sessions Court, delay may not be condoned.

6 It is noted that the applicant had preferred an Appeal for enhancement of the quantum of maintenance awarded by the trial Court by preferring an Appeal. Unfortunately, the two Appeals were placed before different Court. It is also required to be noted that the applicant had moved an application before the

competent Court for transferring the Appeal which was assigned to another Court. It is also pertinent to note that the maintenance order awarded by the trial Court and even the directions of the Sessions Court were not complied, and, therefore, at that point of time, the applicant had moved an application for distress warrant. In any case, while dealing with the application for condonation of delay, the Court cannot adopt hyper-technical approach. Everyday delay is not required to be explained. In several decisions, the Supreme Court as well as this Court has observed that the parties should be given an opportunity to challenge the proceedings on merits and should not be thrown out of Court only on the point of delay, unless the delay is exorbitant. In the interest of justice, the delay ought to have been condoned. In the circumstances, the order passed by the Sessions Court rejecting the application for condonation of delay is required to be set aside.

7 Hence, I pass the following order:

:: ORDER ::

(I) Criminal Application No.391 of 2018 is
allowed;

- (ii) The impugned order dated 12th February, 2018, passed by the Additional Sessions Judge, Borivali, Dinodish, Mumbai, in Miscellaneous Application No.2018 of 2016, is set aside and the delay is condoned;
- (iii) The Sessions Court is directed to hear the Appeal preferred by the applicant on merits and in accordance with law;
- (iv) Criminal Application No.391 of 2018, stands disposed of.

(PRAKASH D. NAIK, J.)