

(2001) 07 CAL CK 0058**Calcutta High Court****Case No:** C.R.R. No. 1650 of 2000

Sujit Chatterjee

APPELLANT

Vs

Rita Chatterjee

RESPONDENT

Date of Decision: July 31, 2001**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 125, 126(2), 401, 482
- Limitation Act, 1963 - Section 5

Citation: (2002) 3 CALLT 260**Hon'ble Judges:** Asit Kumar Bisi, J**Bench:** Single Bench**Advocate:** Tridib Sarkar, for the Appellant; Ranjit Kumar Roy and Ketaki Ganguli, for the Respondent**Final Decision:** Dismissed

Judgement

Asit Kumar Bisi, J.

The instant revisional application under Section, 401 and 482 of the Code of Criminal Procedure has been preferred by the petitioner against the Order dated 19.4.2000 passed by the learned Judicial Magistrate, 2nd Court, Barasat, in M. Ex. Case No. 50 of 97. By the impugned order the learned Court below rejected the petition u/s 5 of the Limitation Act and the petition u/s 126(2) of the Code of Criminal Procedure filed by the present petitioner who figures as opposite party in the said case before the learned Magistrate.

2. The facts anterior to the filing of the revision application may briefly be narrated as follows:-

The present O.P. No. 1 wife filed the petition u/s 125 of the Criminal Procedure Code claiming maintenance before the learned Court below. The said maintenance case was ultimately heard ex-parte and by the order dated 3.6.97 passed in M. cases No. 169 of 1995, maintenance was awarded at the rate of Rs. 800/- (Rupees Eight

Hundred) per month in favour of the wife and Rs. 350/- (Rupees Three Hundred Fifty) per month in favour of her minor son with effect from the date of filing of the petition. Since the husband did not take any step for payment of maintenance in terms of the order of the Court, the Execution Case being M. Ex case No. 50 of 1997 was initiated by the wife against the husband in the Court below for realisation of arrears of maintenance. It is at that stage the husband moved the learned Court below with a petition u/s 5 of the Limitation Act along with the petition u/s 126(2) of the Code of Criminal Procedure.

3. The learned Judicial Magistrate on considering the materials on record has arrived at the finding that the present petitioner/husband has failed to afford any satisfactory ground on the basis of which delay can be condoned and in that view of the matter the petition u/s 5 of the Limitation Act and the petition u/s 126(2) of the Code of Criminal Procedure have been rejected.

4. The sole point cropping up for consideration in the instant revision is whether or not the impugned order passed by the learned Court below is legally sustainable on the face of the materials on record.

5. Proviso of Section 126(2) of the Code of Criminal Procedure clearly lays down that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is wilfully avoiding service or wilfully neglecting to attend the Court, the Magistrate may proceed to hear and determine the case ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof, subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper. In the case in hand I find that the order of maintenance u/s 125 of the Code of Criminal Procedure was passed by the learned Magistrate on 3.6.97 and both the petition u/s 126(2) of the Code of Criminal Procedure and the petition u/s 5 of the Limitation Act were filed by the present petitioner husband on 10.9.98. It is manifestly clear that both the said petitions were filed by the present petitioner husband in the Court below near about 15 months from the date of the ex-parte order of maintenance. The materials on record makes it quite clear that the petitioner husband who was the O.P. in the maintenance proceeding filed show cause and as such it can in no way be inferred that he was not at all aware of the maintenance proceeding. The only point to be looked into is whether or not the present petitioner has been able to offer satisfactory explanation for condonation of delay as sought.

6. The present petitioner/husband, as it appears, has taken the plea in his application u/s 5 of the Limitation Act filed in the Court below that he was seriously ill and it was not possible on his part to appear before the Court to contest the case. Nowhere in the four corners of the petition for condonation of delay u/s 5 of the Limitation Act there is anything to show during which period and from what date the petitioner was lying ill. It has been pertinently pointed out by the learned Court

below in the impugned order that if for the sake of argument it is presumed that the husband was ill for three months just after passing of the ex-parte order, then the remaining period of delay for 12 months becomes unexplained and as such in no way such delay can be condoned.

7. Mr. Sarkar, learned advocate for the petitioner submitted that sufficient cause has to be construed liberally so as to advance the cause of justice and not the cause of technicalities.

8. Mr. Sarkar has cited the case of Paid Patel Maganlal Dhanjibhai Godhasara and Another Vs. Patel Laxmidas Naranbhai Kansagara, wherein it has been held that as far as possible the case should be decided on merit and a party should not be deprived of his right to get the case examined on merits.

9. Mr. Sarkar has further cited the case of Balbir Singh Vs. Bogh Singh, where prosecution of appeal in a wrong Court was considered to be a bonafide mistake and the said mistake was not detected by Court also. It is in such context the Hon'ble Apex Court has held that delay in filing the appeal in proper forum must be condoned. However, on perusal of the above noted decisions cited by Mr. Sarkar, learned advocate for the petitioner I am clearly of the view that the facts and circumstances of the above noted two cases are clearly distinguishable from the facts and circumstances of the present case and those decisions have got no manner of applicability to the instant case.

10. Mr. Roy, learned advocate for the O.P./wife has cited the case of Smt. Madhuribai Vs. Grasim Industries Ltd., Nagda, wherein it has been held that each day's delay is to be explained. In the said case cited by Mr. Roy the appellant produced medical certificate explaining part of the period of delay and there was no explanation for remaining days. So delay was refused to be condoned. In my view, the facts and circumstances of the above noted case are more or less identical with the case in hand and as such the principle of law enunciated therein applies here.

11. It is well-settled principle of law that a party who is not vigilant about his right must explain every day's delay. In this context reference can be made to the case of Mahant Bikram Dass Chela Vs. Financial Commissioner, Revenue, Punjab, Chandigarh and Others, wherein it has been clearly laid down by the Hon'ble Apex Court that Section 5 of the Limitation Act is hard task-master and judicial interpretation has encased it within a narrow compass. It has been further held that a large measure of case laws has grown around Section 5, its highlights being that one ought not easily to take away a right which has accrued to a party by lapse of time and that therefore, a litigant who is not vigilant about his rights must explain every day's delay. It is thus quite clear that where a case for condonation of delay has not been satisfactorily made out, the application for condonation of delay u/s 5 of the Limitation Act is liable to be dismissed. Mr. Ray, learned advocate for the O.P./wife has pertinently cited the case of Madan Gopal v. Lt. Governor of Delhi and

Anr., reported in 1973 Cr LJ 131 on this score.

12. Having regard to the above noted principles of law emerging from the materials on record, I find that delay in the matter of filing the application u/s 126(2) of the Criminal Procedure Code has not at all been cogently explained by the petitioner and that being so, the petitioner/ husband cannot take away the right which has accrued to the O.P. No. 1 wife by lapse of time and that as evidently more so when no explanation for the entire period of delay worthy of credit is forthcoming from the petitioner/ husband whose utter lack of vigilance about his right is palpable on the face of the materials on record.

13. For the foregoing reasons I find that the learned Court below is quite justified in dismissing the petition u/s 5 of the Limitation Act and the petition u/s 126(2) of the Code of Criminal Procedure filed by the present petitioner before him. The impugned order cannot be interfered with, the instant application for revision is devoid of merit, and as such the same is liable to be dismissed. The revisional application is dismissed accordingly. If any interim order of stay was passed earlier, the same is vacated. There will be no order as to costs.

Let a copy of this order be sent to the learned Court below forthwith.

Xerox certified copy of the order, if applied for, be supplied to the party expeditiously.