

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

CRIMINAL WRIT PETITION NO. 1011 OF 2019

Rizwana w/o Shaikh Ashfaque,
Age 26 years, Occ. Household,
R/o Makranpur, Tq. Kannad,
District – Aurangabad.

... **PETITIONER**

Versus

Shaikh Ashfaque s/o Shaikh Mukhtar
Age 31 years, Occu. Business,
R/o Talwada, Tq. Vaijapur,
District - Aurangabad.

... **RESPONDENT**

...
Advocate for Petitioner: Mrs. Kazi Fatema.
Advocate for Respondent: Mr. M.V. Narwade.
...

**CORAM : MANGESH S. PATIL, J.
RESERVED ON: 01.10.2019
PRONOUNCED ON: 05.11.2019**

JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. Learned advocate Mr. Narwade waives service for the Respondent. With the consent of both the sides the matter is heard finally at the stage of admission.

2. The facts leading to the filing of the Writ Petition may be summarized as under:

The Petitioner is the wife of the Respondent. Their marriage was solemnized on 21.02.2013 and couple was blessed with a son. Alleging that she was subjected to ill-treatment and he having refused and neglected to maintain her she filed a proceeding under Section 125 of the Code of Criminal Procedure claiming maintenance for herself and for the son. The Respondent contested the proceeding and alleged that she was reluctant to cohabit with him. He had to file suit for restitution of conjugal rights and in spite of passing of the decree therein she failed to resume cohabitation. The learned Magistrate by the judgment and order dated 03.05.2018 directed him to pay maintenance to her at the rate of Rs. 2,000/- per month from the date of the application and also directed him to pay Rs.1,000/- per month as maintenance to the son. Being aggrieved and dissatisfied by such judgment and order he preferred a revision under Section 397 of the Code of Criminal Procedure before the Sessions Court. By the impugned judgment and order the revision was partly allowed. The order passed by the Magistrate to the extent of granting maintenance to the Petitioner was quashed and set aside. However the order directing the Respondent to pay maintenance to the son was confirmed and to that extent the revision was dismissed. Hence this Writ Petition. The Respondent husband has not preferred to challenge this order.

3. The learned advocate for the Petitioner submitted that the

Respondent was all the while reluctant to maintain the Petitioner and had filed false suit for restitution of conjugal rights. He never provided for her maintenance which was sufficient to enable the Magistrate to draw an inference that he had refused and neglected her. The learned Additional Sessions Judge grossly erred in simply relying upon the circumstance of he having obtained a decree for restitution of cognizable rights. The learned Additional Sessions Judge failed to take into account the fact that he had never made any provision for her maintenance. This conduct of his was sufficient to infer that he was indeed refusing and neglecting to maintain her. The decision of the Magistrate was based on plausible reasons which could not have been lightly interfered with by the learned Additional Sessions Judge in revision. The decision of the Magistrate was not perverse or arbitrary which could have been intervened by invoking the powers of revision under Section 397 of the Code of Criminal Procedure.

4. The learned advocate for the Respondent supported the impugned judgment and order. He submitted that there was a decree for restitution of conjugal rights which was sufficient to demonstrate that the Petitioner was refusing to cohabit with the Respondent and had no sufficient cause to claim maintenance by virtue of Sub-section 4 of Section 125 of the Code of Criminal Procedure.

5. I have carefully gone through the record and the judgments of the two Courts below.

6. Needless to state that while deciding a proceeding under Section 125 of the Code of Criminal Procedure and to ascertain if it can be said that the husband has refused or neglected to maintain his wife and that whether she is refusing to cohabit with him without there being sufficient cause are pure questions of facts and have to be appreciated and decided on the basis of the evidence on record and the interferences deducible in the facts and circumstances.

7. Admittedly, the Respondent is armed with a decree for restoration of conjugal rights. It is apparent that he filed Regular Civil Suit No.318 of 2015 seeking restitution on 06.07.2015 whereas the Petitioner filed the instant proceeding under Section 125 of the Code of Criminal Procedure on 03.11.2015. However simply on the basis of such sequence one cannot jump to the conclusion that it was the Petitioner who had deserted the Respondent. In fact it is pertinent to note that except having been able to procure a decree for restitution of conjugal rights which the Petitioner had failed to contest by leading evidence, there is no other circumstance to positively demonstrate that he had ever made any attempt to enforce such a decree by preferring any

execution proceeding. He seems to be contained in obtaining the decree. If really he was interested in resumption of marital relations, he would have also promptly put the decree to execution. His such conduct in not proceeding to file such execution is eloquent enough.

8. Besides, it is equally important to note that as has been rightly noticed by the learned Magistrate, though the Respondent has successfully obtained a decree for restitution of conjugal rights, it is equally important that he has not made any provision for the maintenance of the petitioner which tantamounts to his refusing and neglecting her. The learned Additional Sessions Judge has failed to take into consideration both these circumstances while drawing an inference that it was she who had deserted him without sufficient cause. The learned Additional Sessions Judge failed to consider that beyond obtaining a decree for restitution of conjugal rights he had not taken any step to enforce that decree. The learned Additional Sessions Judge also failed to take into consideration the fact that there was no evidence to show that he had made any provision for her maintenance since the couple had separated, albeit the son was in her custody.

9. The learned Additional Sessions Judge seems to have swayed away by the mere factum of passing of a decree for restitution of conjugal

rights in favour of the Respondent but has overlooked the aforementioned circumstances. At least, the aforementioned circumstances clearly indicate that the observations and the conclusions of the learned Magistrate were neither perverse nor arbitrary which could have enabled the learned Additional Sessions Judge to interfere with the discretion exercised by the learned Magistrate judiciously and to replace it with his own discretion.

10. The impugned judgment and order passed by the learned Additional Sessions Judge is illegal and is liable to be quashed and set aside and the one passed by the Magistrate deserves to be restored.

11. The Writ Petition is allowed. The impugned judgment and order passed by the learned Additional Sessions Judge in revision allowing it partly and quashing and setting aside the order of the Magistrate to the extent of the Petitioner is quashed and set aside and the one passed by the Magistrate in her favour is restored. The Rule is accordingly made absolute.

[MANGESH S. PATIL, J.]