

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

**CRIMINAL WRIT PETITION NO. 1310 OF 2018**

1. Komal W/o Babasaheb Kharote,  
Age: 26 years, Occu: Nil,  
R/o. C/o. Raju Karbhari Gaikwad,  
Behind Saidham Mandir,  
Ambikanagar, Kopargaon,  
Tq. Kopargaon,  
Dist. Ahmednagar - 423603
  2. Gargi d/o Babasaheb Kharote,  
Age: 04 years (Minor),  
u/g of petitioner no.1  
R/o. C/o. Raju Karbhari Gaikwad,  
Behind Saidham Mandir,  
Ambikanagar, Kopargaon,  
Tq. Kopargaon,  
Dist. Ahmednagar - 423603
- ... **Petitioners**

**VERSUS**

1. The State of Maharashtra  
(Deleted as per Court order Dt.27.09.2018)
  2. Babasaheb s/o Abhiman Kharote,  
Age: 36 years, Occu: Service, (as a Head Master)  
R/o. Sukdev Madhyamik, Uccha  
Madyamik Vidyalaya, Indiranagar,  
Udyan colony, Wadala-Pathardi Road,  
Nashik, Tq. & Dist. Nashik.
- ... **Respondent**

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Mr. Kiran Nagarkar, h/f. Mrs. Smita S. Kulkarni, Advocate and Mr. M.L. Joshi (Kulkarni) for Petitioners.  
Mr. Suresh Pidgewar, h/f. Mr. N.L Choudhari, Advocate for Respondent No.2.

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**CORAM : MANGESH S. PATIL, J.**

**DATE OF RESERVING THE JUDGMENT : 26.08.2019**  
**DATE OF PRONOUNCING THE JUDGMENT : 03.09.2019**

**JUDGMENT :**

Heard. Rule. The Rule is made returnable forthwith. Learned advocate waives service for the respondent. At the request of both the sides the matter is heard finally at the stage of admission.

2. The petitioners are taking exception to the judgment and order dated 08.06.2018 passed against them by the learned Additional Sessions Judge-2, Kopergaon in Criminal Revision No.04 of 2018 whereby the learned Additional Sessions Judge partly quashed and set aside the judgment and order passed by the learned Judicial Magistrate First Class, Kopergaon in Criminal Misc. Application No.354 of 2015 dated 01.01.2018 whereby the learned Magistrate had directed the respondent herein to pay maintenance to the petitioners at the rate of Rs.3,000/- each under the provisions of Section 125 of the Code of Criminal Procedure from the date of the application i.e. 18.06.2015. The learned Additional Sessions Judge reduced the quantum of maintenance awarded to petitioner no.2 from Rs.3,000/- per month to Rs.1,000/- and rejected the application outrightly qua petitioner no.1.

3. The learned advocate submitted that there are ample circumstances on record showing that the respondent has refused and neglected to maintain the petitioner no.1. The learned Additional Sessions Judge has simply overlooked those and has given importance

only regarding the suspicion entertained by her about his character, conveniently ignoring a similar doubt raised by him about her. The appreciation of evidence by the learned Additional Sessions Judge is lopsided and faulty.

4. The learned advocate for the petitioners further submits that the view taken by the learned Additional Sessions Judge is perverse and arbitrary. The respondent being the husband, the burden was on him under Section 106 of the Indian Evidence Act to prove his income. Instead the learned Additional Sessions Judge has illegally expected the petitioners to discharge the onus. The respondent is admittedly serving as a Head Master in a school which according to him does not receive any grant-in-aid. However, no cogent and reliable evidence has been placed on record by him to substantiate his claim that he has been receiving a partly sum of Rs.3,500/- per month as salary. The view taken by the learned Additional Sessions Judge cannot sustain in law. An attempt by the petitioners to secure information regarding the respondent's salary also did not yield any fruit since under his own signature he refused to furnish the information saying that the provisions of Right to Information Act were not applicable to a private school which does not receive grant-in-aid. Therefore an adverse inference deserves to be drawn against him for not proving his income. Ignoring all these facts the learned Additional Sessions Judge has

reduced the maintenance by accepting his version about his income as a gospel truth. Therefore the impugned judgment and order be set aside and one passed by the learned Magistrate be restored.

5. The learned advocate for the respondent submitted that no fault can be found with the view taken by the learned Additional Sessions Judge when there is absolutely no evidence about the income of the respondent. The learned Magistrate had without referring to any evidence has randomly awarded the maintenance which has been curtailed by the learned Additional Sessions Judge. Similarly on fresh scrutiny of evidence he has rightly come to the conclusion and has assigned cogent reasons pointing out as to how petitioner no.1 is entitled to claim maintenance.

6. So far as the right of the petitioner no.1 to claim maintenance is concerned, the learned Magistrate has minutely scrutinized the material and has taken a plausible view in concluding that the conduct of the respondent is sufficient to show that he has been refusing and neglecting to maintain her. Even on an independent scrutiny it can easily be said that since he has admitted not to have provided for the maintenance of the petitioners for their livelihood and also having admitted not to have initiated any proceeding against her for restitution of conjugal rights that in itself would be sufficient to conclude that he has been refusing and neglecting to maintain her.

7. In addition to the above circumstance, it is equally important to note that the respondent has also raised a question about the fidelity of the petitioner no.1 by attributing that she has some illicit relation with a person named in his say. However except his isolated and bald statement there is absolutely nothing to show that there are any circumstance which even remotely would give rise to any such suspicion on the character of the petitioner no.1. Therefore the conduct of the respondent in doubting her fidelity and not making any attempt to substantiate it itself is sufficient to entitle her to stay separate and claim maintenance under Section 125 of the Code of Criminal Procedure.

8. Surprisingly, the learned Additional Sessions Judge has found fault with the petitioner no.1 whereby she also raised doubt about the character of the respondent but has failed to establish it. Making capital out of it the learned Additional Sessions Judge has observed that the conduct of such a wife to raise a doubt about the character of her husband but failure to substantiate it would amount to cruelty. One wonders as to how the same analogy would not work against the respondent. He has also been levelling aspersions on the character of the petitioner no.1 but has failed to substantiate it. The learned Additional Sessions Judge has astonishingly refused to apply the same analogy in her favour and has rather over looked it. The observations and the

conclusions of the learned Additional Sessions Judge in holding that the petitioner no.1 is not entitled to claim maintenance under Section 125 of the Code of Criminal Procedure is certainly perverse, arbitrary and capricious and needs to be quashed and set aside.

9. The petitioners have been asserting that the respondent is serving as a Head Master and earning Rs.40,000/- to Rs.50,000/- per month besides his father also receives pension. However, except the bald statement to the extent of the income there is no evidence laid by them albeit the fact that the respondent is serving as a Head Master in a school stands duly proved during his testimony as well as the testimony of his witness.

10. As against this, though the respondent has been asserting that the petitioner no.1 is also earning her livelihood there is equally no material to substantiate his such version.

11. Income of the respondent, is indeed a fact which would be within his exclusively knowledge and therefore as contemplated under Section 106 of the Indian Evidence Act the burden to prove his income would be on him alone. Conveniently, except denying the quantum of salary which he has been receiving he has not led any evidence to substantiate his version that he has been earning barely Rs. 3,500/- per month since the school in which he has been serving is being run

without any grant-in-aid from the Government. Taking into account the fact that he is the Head Master of the school, he could have easily examined any of his staff members particularly from the accounts department to demonstrate as to how much salary he has been receiving. It is a school being run by the Management, some sort of accounts must have been maintained by the Management and certainly there could have been a concrete material to prove his salary. Neither such record has been produced nor has the respondent examined any witness from the Management. It is in view of such state of affairs that one can easily conclude that the respondent has miserably failed to discharge the burden under Section 106 of the Indian Evidence Act and has failed to prove his income. Rather, an adverse inference is available to be drawn against him for not leading concrete evidence which in all probabilities must be available with the Management of the school in which he is the Head Master.

12. In this respect, one more supervening circumstance needs to be considered. An attempt was made by the petitioner to secure the information regarding respondent's salary by submitting an application under the Right to Information Act, 2005. However as is demonstrated by the petitioners, the respondent under his own signature has refused to disclose the information under the pretext that it is the information pertaining to an individual and cannot be disclosed. We may not be

concerned with the illegality or otherwise of the conduct of the respondent in refusing to divulge the information under the Right to Information Act, 2005. But the circumstance would certainly reflect on the conduct of the respondent and is indeed a strong circumstance to corroborate the conclusion of drawing an adverse inference against him regarding his monthly salary.

13. In view of such state of affairs, though the learned Magistrate has not assigned aforementioned reasons, the conclusion drawn by him in quantifying the maintenance to be paid to the petitioners at the rate of Rs.3,000/- per month each from the date of the application cannot be said to be either perverse or arbitrary.

14. On the contrary, without assigning any cogent and convincing reasons, the learned Additional Sessions Judge has expected the petitioners to prove respondent's salary and has accepted his version that he has been receiving only Rs.3,500/- per month and has reduced the maintenance by the impugned judgment and order. The observations and the conclusions drawn by the learned Additional Sessions Judge that the respondent is receiving merely a salary of Rs. 3,500/- per month and reducing the maintenance awarded to the petitioner no.2 and refusing to award any maintenance to the petitioner no.1 is quite perverse, arbitrary and capricious.

15. In the result, the Writ Petition deserves to be allowed and is accordingly allowed. The impugned judgment and order passed by the learned Additional Sessions Judge, Kopargaon in Criminal Revision No. 04 of 2018 dated 28.06.2018 is quashed and set aside and the one passed by the learned Judicial Magistrate First Class, Kopargaon in Criminal Misc. Application No.354 of 2015 dated 01.01.2018 is restored.

16. The Rule is accordingly made absolute.

**(MANGESH S. PATIL, J.)**