

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

CRIMINAL WRIT PETITION NO. 1819 of 2017

Ganesh s/o Baburao Antarkar,
Age 32 years, Occ. Service,
R/o. C/o. Zilla Parishad Primary
School Padve No. 1, Tukrulwadi,
Tq. Rajapur, Dist. Ratnagiri.

... **Petitioner.**

VERSUS

Manisha w/o Ganesh Antarkar,
Age 26 years, Occ. Household,
R/o. C/o. Bhausahab Vishwanath
Peherkar, At Post Ganori, Tq.
Phulambri, District Aurangabad.

... **Respondent.**

...

Advocate for the petitioner : Mr. Mane Dhananjay A.
Advocate for the respondent : Mr. D.K. Thoke.

CORAM : MANGESH S. PATIL, J.

DATE : 01/10/2019

ORAL JUDGMENT :

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

2. The petitioner is the husband of the respondent and is taking exception to the judgment and order passed by the Sessions Court under section 397 of the Code of Criminal Procedure whereby the

judgment and order passed by the Magistrate in a proceeding initiated by her under section 125 of the Code of Criminal Procedure was dismissed. The learned Additional Sessions Judge instead allowed that application and directed him to pay to her an amount of Rs. 5000/- per month as maintenance from the date of the revision. Hence this Writ Petition.

3. The learned advocate for the petitioner submits that there was no sufficient and cogent reason for the Sessions Court to intervene. The order passed by the Magistrate after correct appreciation of the evidence and assigning cogent and plausible reasons ought not to have been interfered with by the Sessions Court. There was enough material before the Magistrate to show that the respondent had left the matrimonial house shortly after the marriage on her own without there being sufficient cause. In spite of several attempts she had not resumed cohabitation. The evidence was writ large to demonstrate that she was staying at her parental home of her free will without there being any cause much less sufficient to demonstrate that petitioner was not ready and willing to maintain her.

4. The learned advocate submits that by virtue of Sub Section 4 of Section 125 of the Code of Criminal Procedure the respondent was not entitled to claim any maintenance and was rightly refused to be

granted. Without there being any cogent and convincing reason for the Sessions Court, in exercise of the revisional powers under section 397 of the Code of Criminal Procedure, it ought not to have interfered and reversed the judgment and order of the Magistrate. Therefore, the impugned judgment and order passed in the revision may be quashed and set aside and the one passed by the Magistrate be restored.

5. The learned advocate for the respondent submits that the petitioner is taking a spacious plea of the respondent having left the matrimonial home and has been staying at her parental home of her free will. It was a matter of appreciation of all the facts and circumstances which clinchingly indicated that the petitioner has been refusing or neglecting to maintain her which was sufficient to award her maintenance. The learned Magistrate had grossly erred in observing and appreciating the evidence in the correct perspective in respect of all the attending circumstances. He had drawn jumping conclusions based on surmises and conjectures and had erred in expecting her to have been more positive in resuming the cohabitation but simultaneously ignoring the conduct of the petitioner in remaining a silent spectator. The observations of the Magistrate that the respondent having started residing separately of her own free will ignoring the tacit conduct of the petitioner clearly shows that the

observations made by the Magistrate were perverse and arbitrary and the Revisional Court has rightly stepped in. No fault can be found in the judgment and order of the learned Additional Sessions Judge in laying emphasis on the circumstances which had been overlooked by the Magistrate and in concluding that the petitioner had refused and neglected to maintain the respondent and the latter was entitled to claim maintenance. He has also taken into consideration the income of the petitioner, his gross as well as net salary and has fixed the quantum at reasonable rate. This Court under the writ jurisdiction may not interfere.

6. I have carefully gone through the judgments of both the Courts. Admittedly the marriage was solemnized on 02.06.2013 and after cohabitation for some time the respondent went back to her parental home and since thereafter has been residing thereat. True it is that in her cross-examination she admitted that on 30.05.2014 her father and uncle had been to her matrimonial home and she went along with them to her parental home. She also admitted that the couple had cohabited for about three months. As far as the other aspects are concerned, the evidence is more in the nature of oath against oath. She alleged about he having driven her out and the latter denied it.

7. However, it is necessary to bear in mind that the law expects a wife to establish that she has been neglected or refused to be maintained by the husband in order to claim maintenance under section 125 of the Code of Criminal Procedure. It is certainly a matter of drawing inference based on all the attending circumstances to decide whether it can be said that the husband has refused or neglected to maintain the respondent. There were number of circumstances which cumulatively are sufficient to reach to reasonable conclusion about the petitioner having refused or neglected the respondent.

8. For whatever reason, admittedly the respondent was residing at her parental home. She had once issued him a notice calling upon him to resume cohabitation. However, he has not replied that notice. Similarly he has also not filed independently any proceeding for restitution of conjugal rights. There is no evidence to show that he himself had either replied the notice issued by her or had independently served her any notice calling upon her to resume cohabitation. Apart from that there is also no evidence about he ever having made any attempt to resume cohabitation by offering to maintain her either directly approaching her or through some third persons or mediators. As has been rightly appreciated by the learned

Additional Sessions Judge these are indeed strong circumstances which clearly speak in volumes about the conduct of the petitioner. His such passive attitude towards her clinchingly demonstrates that he was not interested in resuming cohabitation and was happy that she was staying at her parental home. In my considered view, therefore, no fault can be found with the observation and conclusion of the learned Additional Sessions Judge in reading all these circumstances as indicative or tantamount to his refusal and neglect to maintain her.

9. As a corollary, as far as the submission of learned advocate for the petitioner referring to Sub Section 4 of Section 125 of the Code of Criminal Procedure, again, the wording is eloquent. It is only when a wife refuses to live with her husband that she is not entitled to any maintenance. The use of the word 'refusal' clearly indicates that there should be some positive denial by the wife to resume cohabitation. It would be presuppose that the husband had shown his willingness to resume cohabitation and it is thereafter that her denial would be material. Unless there is an offer, there cannot be a refusal. As is pointed out herein above, the aforementioned circumstances clearly show that at no point of time he had offered to maintain her consequently there is no question of her refusal to cohabit with him. The learned Additional Sessions Judge even has borne in mind this

aspect of the matter.

10. True it is that he has not specifically commented upon the observations and conclusions of the Magistrate to objectively demonstrate that those were perverse, arbitrary and capricious and that was the reason for him to intervene. However, when the judgment and order passed by the Magistrate clearly demonstrates that in spite of the circumstances having been brought to his notice, which have been discussed herein before, he simply overlooked all these circumstances and perhaps was expecting the respondent to independently come out with some evidence about petitioner having refused or neglected her. Needless to state that the evidence is to be scanned bearing in mind all the attending circumstances. A cumulative effect of the circumstances leading to some inference has to be analyzed. Instead of following such treaded course, the Magistrate has simply on the basis of the admission of the respondent that she had left matrimonial home along with her father and parental uncle and has been residing at the parental home has drawn a jumping conclusion that she was residing at her parental house on her own and had left the matrimonial house without sufficient reason.

11 Without repeating the circumstances, the Magistrate has overlooked the circumstances which were clinchingly demonstrating

that the conduct of the petitioner was such as would be sufficient to infer that he was refusing or neglecting to maintain her. The observations by the Magistrate are clearly perverse and arbitrary and the learned Revisional Court was right in invoking the power under section 397 of the Code of Criminal Procedure, albeit the learned Additional Sessions Judge has not specifically mentioned that he was invoking the power because of the judgment and order of the Magistrate being perverse and arbitrary. No fault can be found in the impugned judgment and order merely for this reason.

12. Based on the evidence before the Magistrate regarding the income of the petitioner, the learned Additional Sessions Judge has reached at a reasonable inference that he was in a permanent employment and was also getting gross salary of Rs. 24,000/- and his net salary was Rs. 17,000/-.

13. There is a say to the main proceeding. The petitioner had come out with an evasive denial to the assertion by the respondent that his salary was Rs. 25,000/- per month. However, he did admit that he was serving as a Primary Teacher in a Zilla Parishad School. Conspicuously he specifically omitted to disclose his salary. Taking into account the fact that, the burden was on him to prove his salary/income as is contemplated under section 106 of the Indian

Evidence Act and he is having failed to establish it, no fault also can be found with the observation and conclusion of the learned Additional Sessions Judge in proceeding on the premise that he was getting salary of Rs. 24,000/- per month and awarded maintenance to the respondent at the rate of Rs. 5000/- from the date of the revision.

14. The upshot of the above mentioned discussion is that the order passed by the Magistrate was indeed perverse and arbitrary and has rightly been interfered in revision by the learned Additional Sessions Judge and therefore this Court need not intervene.

15. The Writ Petition is dismissed. The rule is discharged.

(MANGESH S. PATIL, J.)

mkd