

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

921 CRIMINAL WRIT PETITION NO.1711 OF 2018

**KAMAL W/O. SANTOSH SHELKE
VERSUS
SANTOSH S/O. SUKHDEV SHELKE**

Mr.S.A. Nagarsoge, Advocate for the petitioner.
None for the respondent.

**CORAM : KISHORE C. SANT, J.
DATED : 06.12.2022**

PC :-

01. This is a writ petition filed by the wife challenging the judgment and order passed by the learned Additional Sessions Judge-12, Aurangabad dated 29.09.2018 in Criminal Revision No. 280 of 2017. Though the respondent has appeared, nobody is present today. Even on the last occasion, no one was present on behalf of the respondent. Today, the matter was called out in the morning session, since the respondent was not present, the matter was kept back in the second session. Even thereafter no one has turned up.

02. The petitioner wife had filed Criminal Misc. Application under section 125 of the Criminal Procedure Code in the Court of learned Judicial Magistrate, First Class, Aurangabad, bearing Criminal Misc. Application No.621 of 2014 seeking maintenance at the rate of Rs.5000/- per month from

her husband. The learned JMFC vide judgment and order dated 27.10.2017 was pleased to reject the prayer for maintenance. He framed following points for consideration.

Sr.No.	Points	Findings
1.	Whether the applicant proves that she is unable to maintain herself?	Yes
2.	Whether applicant proves that non-applicant despite having sufficient means/income has neglected and refused to maintain her?	Yes
3.	Whether non applicant proves that applicant without any sufficient reason, refuses to live with him?	Yes
4	Whether non applicant proves that applicant is living in adultery?	No
5	Whether the applicant is entitled for maintenance? If yes, at what rate?	Yes
6	What order?	Application is rejected.

03. Though the learned JMFC has answered first four points in affirmative i.e. in favour of the wife, still has held that the applicant is not entitled for maintenance. Though in earlier four points the Court has given finding in favour of the wife only on point No.5, it is answered that the applicant is not entitled for any maintenance. The only reason assigned for coming to this conclusion is that in the evidence of wife, the wife has stated

that she is residing separately since 2011. The learned Court below has thus inferred that when the wife is residing separately without any sufficient reason, she is not entitled to receive maintenance. This order was challenged by wife by filing revision in the Sessions Court, Aurangabad bearing Cr. Revision No.280 of 2017. The learned Sessions Court also confirmed the reasons assigned by the learned JMFC. In para 9 it is observed that the wife is residing separately since last seven years. It is further discussed that witness No.2 also stated to the effect that it is wife who has started residing separately. It is submission of the petitioner that in-fact because of the harassment and neglect on the part of the husband, she was constrained to reside separately. This aspect is not considered by both the Courts below.

04. It needs to be kept in mind that Non-Applicant Witness No.2 is not interested person, so as to consider her evidence as admission under section 18 of the Evidence Act. Her evidence need not be thus considered to refuse maintenance to wife. When the Court has relied upon evidence of wife that she is residing separately, it was equally necessary for the Courts below to see that in her evidence, she has also stated that she was constrained to reside separately from her husband. The learned Advocate for the petitioner

relied upon judgment reported in **2002 (3) JT 409** in the case of **Laxmi Bai Patel Vs. Shyam Kumar Patel**. In para 6 of the said judgment, it is held that simply because wife has left matrimonial house voluntarily and even if she is earning Rs.50/- per day by agricultural work, it will not dis-entitle her to receive maintenance from her husband. It is further observed that such statement of the wife without anything more would not be sufficient to deny maintenance to her from her husband. For ready reference, para 6 of the said judgment is reproduced as below :-

“6. Therefore, the question that arises for consideration is whether on the facts and circumstances it can be said that the case made out by the petitioner before the High Court was an exceptional one in which allowing the order passed by the learned magistrate, which was confirmed by the learned 4th additional sessions judge in revision to stand, would result in abuse of the process of the court and lead to failure of justice. To put it differently, does the statements made by the wife that she had left the matrimonial home voluntarily and that she was earning Rs. 50/- per day by agricultural operations, disentitle her to receive maintenance from her husband? It is our considered view that such statements without anything more would not be sufficient to deny maintenance to the wife from her husband . It is to be kept in mind that it is the responsibility of the husband to maintain his wife and wife has the right to claim maintenance so long as she stays away from the matrimonial home under compelling circumstances. The wife's right to claim maintenance under Section 125 Cr.PC. can be denied only in the circumstances provided under Sub-section (4) of the said section. On the facts and circumstances of the case as found by the courts below the said sub-section is not attracted. Therefore, the High Court was clearly in error on upsetting the order passed by the learned judicial magistrate first class granting maintenance @ Rs. 250/- per month to the wife which was confirmed in revision by the 4th additional sessions judge. In the result, the appeal is allowed, the order dated 2.8.2000 of the High Court in miscellaneous criminal case No. 2472 of 1999 is set aside and the order dated 27.1.1998 passed by the learned judicial magistrate first class, Jabalpur in misc. criminal case No. 188 of 1997 which was confirmed by the order dated 19.2.1999 of the 4th upper additional sessions judge, Jabalpur in criminal revision No. 42 of 1998 is restored.”

. Thus, in that case also the facts were similar to the facts of this case to the extent that wife had left matrimonial house and was residing separately. However, maintenance was granted to the wife.

05. Considering the submissions and the material before this Court, this Court finds that the learned Sessions Judge has committed mistake by refusing to grant maintenance to wife thereby miscarriage of justice is done. Coming to the quantum of maintenance, it is to be seen as to whether there is something on record to show income of the husband. In the application itself, wife had stated that the husband is having total 2 H 20 R agricultural land and the land is well irrigated land and the husband is earning Rs.3 lakhs per year. Further, there is nothing on record either to prove to disprove the income. This Court has to infer that husband is earning as per minimum wages, still his income will have to be considered as Rs.15,000/- per month. Considering that, it would be reasonable to award Rs.3000/- (Rupees Three Thousand) per month to the wife as husband must be spending even on the agricultural land. It would be just and proper to award Rs.3000/- (Rupees Three Thousand) towards of costs of litigation. The maintenance to be paid from the date of application i.e. 26.03.2014.

06. Hence, the writ petition is allowed. The respondent is directed pay maintenance of Rs.3000/- (Rupees Three Thousand) per month from the date of application i.e. 26.03.2014. The respondent is also directed to pay Rs.3000/- (Rupees Three Thousand) towards costs of the litigation.

07. Learned Advocate Mr. S.A. Nagarsoge has been appointed through Legal Aid to represent the petitioner and he has taken pains to draft the petition and present the case before this Court. His fee is quantified at Rs.7500/- (Rupees Seven Thousand Five Hundred) to be paid by High Court Legal Services Sub-Committee, Aurangabad.

[KISHORE C. SANT, J.]