

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.1319 OF 2014

1.Pravinbhai Gambhichand Shah & Ors. ...Petitioners/Applicants
Vs.
1.Mr.Nenshi V.Khirani & Ors. .. Respondents.

Mr.Prem Keshwani, for the Applicants.

Mr.Arfan Sait, APP for the State.

**CORAM : G.S.KULKARNI, J.
(VACATION JUDGE)**

DATED : 29th DECEMBER,2014.

P.C. :

1. The urgency as urged on behalf of the applicants is on account of non-bailable warrants issued to the petitioners by the impugned order.

2. The challenge in this application filed under Section 482 of the Code of Criminal Procedure is to an order dated 27.11.2014 passed by the learned Metropolitan Magistrate, 61st Court, Kurla, Mumbai. By the impugned order the learned Trial Judge has issued non-bailable warrants against accused nos.2 to 21 and 23 to 28 in the proceedings of Private Complaint Case No.243/SS/2005, to secure their presence before the Court on 5.1.2015. The

reason for issuance of non-bailable warrant being that the Junior Advocate attached to the chamber of Shri.H.K.Prem does not have vakalatnama to represent the applicants.

3. Learned Counsel for the applicants has submitted that initially vakalatnama in the private complaint case was filed on behalf of the applicants-accused by Advocate Shri.H.K.Prem. It is submitted that the junior of Advocate Shri.H.K.Prem, Advocate Shri.Vineet R.Randive was attending the proceedings of this private complaint case from the year 2013. On behalf of the complainant an objection was raised that Shri.Randive does not have vakalatnama to represent the accused. Shri.Randive, learned Advocate had urged before the learned Metropolitan Magistrate that as he was attending the matter as Junior of Advocate Shri.H.K.Prem and was instructed by him, he however submitted that nonetheless he would procure vakalatnama from the concerned non-applicants/accused and would file the same. On behalf of the applicant it is submitted that vakalatnama on behalf of three accused was accordingly obtained and that the learned Advocate was in the process of obtaining vakalatnama from the other accused as many of them were not immediately available. It is submitted that some of them were old and some of them were dead. However, by the impugned order the learned Trial Judge at the instance of the complainant has issued non-bailable warrants against the applicants being accused nos.2 to 21 and 23 to 28 as according to the learned

Metropolitan Magistrate, Shri.Randive was appearing without vakalatnama. Learned Counsel for the applicants submits that it was not the case that these accused (applicants in this application) had discharged Advocate H.K.Prem, and his vakalatnama continued to be valid to represent the said accused. My attention is also drawn to an order dated 27.3.2006 passed by the learned Single Judge of this Court in criminal application No.7019 of 2005 wherein the following observations were made dispensing the presence of the applicants at the trial:-

“2. I find from the record that there is a private dispute between the members of the religious trust. There are in all 29 accused. In the circumstances, in my view, the matter should be proceeded with expeditiously and disposed of without insisting on the presence of the accused persons unless absolutely required. The Advocate for the respondent nos.1 to 6 also states that he has no objection if exemption is granted to all the applicants. In the circumstances, general exemption is granted to all the applicants and the trial will proceed in their absence. Even the plea may be recorded through the Advocate on record. The trial Court will however, be at liberty to ask for the presence of the accused if their presence is specifically required by the Magistrate for any reason. With these observations application stands disposed of.”

(emphasis supplied)

4. On behalf of the applicant my attention is drawn to the roznama

and the proceedings before the Trial Court. On 27.11.2014 an application came to be moved by Shri.Randive Advocate on behalf of non applicants and accused nos.1, 22 and 29 for recalling of witnesses under Section 311 of the Cr.P.C. In this application, it was stated that the examination in chief of the complainant's witness no.2 was recorded and the matter was kept for cross-examination. It was stated that the accused have been exempted from personally attending the matter by the orders of this Court in Criminal Application no.7019 of 2005. It was stated that on 14.11.2014 Shri.Randive, Advocate was present instructed by Advocate Shri.H.K.Prem who was the Advocate on record. It was stated that as it was found that vakalatnama of Advocate Shri.Randive was not on record, his appearance was not recorded and hence, the learned Trial Court had passed an order of "no cross in the matter". It was stated that on that date Shri.Randive Advocate had filed vakalatnama on behalf of accused nos.1, 22 and 29. It was, therefore, prayed that the complainant's witness No.2 be recalled under Section 311 of Cr.P.C. for cross-examination. To this application, a reply was filed on behalf of the complainant to state as under:-

"From the record Adv. Randive is appearing on behalf of all the accused. Now all of a sudden he is making a statement he is not Advocate on record. The tactics are only to gain time.

The complainant prays that NBW be issued against all the 23 Accused as mentioned in Application.

Sd/-"

5. On the same day i.e. on 27.11.2014 an application came to be filed on behalf of the complainants that Mr.Randive Advocate had filed vakalatnama on behalf of only three accused and that there are 29 accused in the complainant. It was submitted that 26 accused are not present before the Trial Court nor they are represented by any Advocate. It was, therefore, prayed that NBW be issued against 26 accused namely accused nos.2 to 21 and 23 to 28 who are not present before the Court nor are represented by any Advocate. The learned Metropolitan Magistrate passed a handwritten order on the said application. The handwritten order was required to be understood, with great difficulty and an attempt was made on the part of all the Counsels to read the same. After quite a struggle what is seen from the order is that the learned Metropolitan Magistrate thought it fit to give a chance to the accused to defend themselves. He had taken note of the order passed by this Court dispensing with the presence of the accused during trial. He, therefore, observed that it will be harsh to issue NBW at once. Therefore, the learned Metropolitan Magistrate issued notice to accused nos.2 to 21 and 23 to 28. It appears that this order was passed when Mr.Randive Advocate was present in the Court on 27.11.2014.

6. What has happened thereafter is really shocking. The learned Metropolitan Magistrate has proceeded to pass the impugned order issuing non

bailable warrant against accused nos.2, to 21 and 23 to 28 on the assumption that neither Advocate Shri.Randive is appearing for these accused nor Advocate Shri.H.K.Prem is appearing for these accused.

7. It is submitted on behalf of the applicants that when on the same day an order was already passed by the learned Metropolitan Magistrate to issue notice to accused nos.2 to 23 and 23 to 28 it was not appropriate for the learned Magistrate to pass an order issuing non bailable warrants to these accused. He submits that in fact in passing the earlier order of issuance of notice, the learned Magistrate had given due regard to the order passed by this Court on 27.3.2006 in Criminal Application No.7019 of 2005. It is submitted that many of the applicants are senior citizens and when their appearance was dispensed by an order passed by this Court, it was not necessary to secure their physical presence.

8. Having considered the submissions as made on behalf of the applicants and the learned APP for the State, I am of the opinion that the learned Metropolitan Magistrate, 61st Court, Kurla, Bombay ought not to have passed the impugned order issuing non bailable warrant against accused nos.2 to 21 and 23 to 28. The learned Metropolitan Magistrate had already passed an order on 27.11.2014 taking into consideration the orders passed by this Court in Criminal Application No.7019 of 2005 and had issued notices to accused Nos.2

to 21 and 23 to 28. However, contrary to the same, the impugned order has been passed on the same day. In passing the impugned order, it appears that the learned Metropolitan Magistrate has not taken into consideration the application filed by Advocate Shri.Randive on behalf of the non-applicants wherein it was specifically averred that Advocate Shri.Randive was appearing instructed by Advocate Shri.H.K.Prem. It is surprising as to how the learned Metropolitan Magistrate could pass two contrary orders on the same day. Further, in any event, it is judicial duty of the learned Metropolitan Magistrate to record appropriate reasons before issuance of non bailable warrant in the nature of the case the Court was dealing. I find no consideration to the submission as made on behalf of the applicants that he is in the process of securing a vakalatnama to enable Advocate Shri.Randive to represent the applicants in the trial. Even otherwise, it was not a case that the applicants had discharged Advocate Shri.H.K.Prem and his vakalatnama continued to be on the file of learned Metropolitan Magistrate and as also it was not the case of the complainant that Advocate Shri.H.K.Prem was discharged by the non-applicants. Moreover, Advocate Shri.Vineet Randive who was attached to the chamber of Advocate Shri.H.K.Prem was attending the case and in this situation he had fairly stated to the Court that he would obtain vakalatnama on behalf of non-applicants to whom he would represent. Further in view of the specific order passed by this Court there was no extraordinary circumstance for the Learned Metropolitan Magistrate to secure the physical presence of the

applicants. The learned Metropolitan Magistrate ought to have discharged his judicial duties with greater circumspection and accountability in exercising the coercive powers vested in him.

9. At this stage it may be relevant to make a reference to the Rules framed by this Court under Section 34(1) of the Advocates Act, 1961 which lay down the conditions subject to which an Advocate would be permitted to appear before the Court. First proviso to sub-rule (2) of Rule 2 permits an Advocate to plead on behalf of any party if appointed by another Advocate or Attorney. Sub-rule 2 of Rule 2 reads thus:-

“(2) No Advocate who has been engaged for the purpose of pleading only shall plead on behalf of any party unless he has filed in Court a memorandum of appearance signed by himself and stating (a) the names of the parties to the suit, (b) the name of the party for whom he appears and (c) the name of the person by whom he is authorised to appear:

Provided that nothing in sub-rule (2) shall apply to any Advocate engaged to plead on behalf of any party by another Advocate or Attorney who has been duly appointed to act in Court on behalf of such party.”

A reference is also required to be made to sub-rule (2) of Rule 7 which provides the contingency in which an Advocate who is appointed by party can instruct another Advocate to appear on his behalf. Sub-rule (2) of Rule 7 reads

thus:-

“7(2) Where an Advocate appointed by a party in any of the proceedings is prevented by a reasonable cause from appearing and conducting the proceedings at any hearing he may instruct another advocate to appear for him at that hearing....”

Sub-rule (2) of Rule 8 is also relevant which provides for continuation of the appointment of an advocate unless his appointment is determined as provided in this rule. Sub-rule (2) of Rule 8 reads thus:-

“8(2) In Criminal cases, the appointment of an Advocate shall be deemed to be in force until determined with the leave of the Court by writing signed by the client or the Advocate as the case may be, and filed in Court or until the client or the Advocate dies, or until all proceedings in the case are ended so far as regards the client.”

10. The object of the aforesaid rules is to facilitate smooth judicial functioning of the Court in different contingencies. What is important for the Court is to have a judicial approach in implementation of the procedural requirements which are aimed at delivering justice to the litigants.

11. The aforesaid rules were required to be applied in its letters and spirit by the learned Metropolitan Magistrate before passing the impugned

order. It was necessary for the learned Metropolitan Magistrate to ascertain as to whether it could be said in the given circumstance that the applicants were no more represented by an Advocate and that there was no valid vakalatnama on behalf of the applicants in the proceedings in issue. It is clear that there is total non adherence on the part of the learned Metropolitan Magistrate to these binding rules and their application. The impugned order, therefore, was highly uncalled for. The learned Metropolitan Magistrate has caused serious prejudice to the applicants by issuing non bailable warrants against them.

12. In the light of the aforesaid deliberation, the impugned order dated 27.11.2014 passed by the learned Metropolitan Magistrate of issuing non-bailable warrant against non-applicants – accused nos.2 to 21 and 23 to 28 deserves to be quashed and set aside. The learned Counsel appearing on behalf of the applicants/appellants states that in any event a vakalatnama would be filed on behalf of the non-applicants / accused nos.2 to 21 and 23 to 28 on the adjourned date of hearing and proceed with the hearing of the case before the learned Metropolitan Magistrate.

13. Criminal application is accordingly allowed in terms of prayer clause (b). No order as to costs.

14. Learned APP undertakes to inform this order to the concerned

police station.

15. A copy of this order be forwarded by the Office of this Court to the learned Metropolitan Magistrate, 61st Court, Kurla who has passed the impugned order.

Parties to act on an authenticated copy of the order.

(G.S.KULKARNI, J.)