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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.1125 OF 2015

Topspin Indian Healthcare Private Limited and Anr.	...Applicants
Versus	
Almac Sports (India) Private Limited and Anr.	...Respondents

Mr.Mohammed Amin Haroon Solkar, for the Applicants.

Mr.D.H.Shah, for the Respondent No.1.

Mr.Samir Dhruve, Director of Respondent No.1 present in Court.

Mr.Avinash Kamkhedkar, A.P.P for the Respondent No.2-State

***CORAM : REVATI MOHITE DERE, J.
DATE : 21st NOVEMBER, 2016***

P.C. :

1. Heard learned counsel for the parties.

2. Rule. Rule is made returnable forthwith with the consent of the parties and is taken up for final disposal. Learned Counsel Mr.Shah, waives service on behalf of respondent no.1. Learned APP waives service on behalf of Respondent No.2– State.

3. By this application, the applicants have impugned the order dated 23rd June, 2015, passed by the learned Metropolitan Magistrate, 14th Court, Girgaum, Mumbai, in C.C.No.2414/SS/2011, in so far as it relates to imposition of costs of Rs.10,000/-.

4. Learned Counsel for the applicants submits that the learned Metropolitan Magistrate has erred in imposing costs of Rs.10,000/-, while allowing the application filed by the applicants seeking recall of PW.1. He submits that there was some confusion regarding when the matter would be taken up, as on earlier dates, the matter was kept for cross examination at 2.45 p.m., however on 23rd June, 2015, there was no endorsement regarding the time of hearing. He submits that since inception, the matter was kept for hearing in the 2nd sessions at 2.45 p.m. He submitted that imposition of costs of Rs.10,000/- is exorbitant. Mr.Solkar submitted that the impugned order was passed in the morning session, whereas the Advocate for the applicants remained present in the 2nd session at 2.45 p.m., for proceeding with the cross-examination.

5. Learned Counsel for the respondent no.1 vehemently opposed

the application. He submitted that there is no infirmity in the impugned order. He submits that even on earlier occasions the learned Metropolitan Magistrate had imposed costs on the applicants of Rs.2,000/- and 5,000/- respectively, as the applicants' advocate had failed to conduct the cross-examination of the respondent no.1-original complainant. He submits that the case is an old case and that the applicants have been delaying the trial. According to the learned counsel, the respondent no.1-original complainant was cross examined for the first time, after almost 2 years, after the respondent No.1 filed his affidavit of evidence in the said case. He submitted that considering the conduct of the applicants, no interference was warranted in the impugned order.

6. Perused the application, including the Roznama in the said case. It appears that on 16th April, 2012, the respondent no.1 (original complainant) filed his affidavit-in-evidence in the said case. It appears that thereafter the applicants filed an application under Section 91 of Code of Criminal Procedure and the matter was adjourned from time to time for hearing of the said application and for passing orders. It appears that on 7th January, 2013, the Advocate for the respondent no.1 (original complainant)

filed a list of documents in the Court of the learned Metropolitan Magistrate, which was seen and filed and a copy was served on the applicants and the matter was adjourned for arguments. Thereafter, on 22nd July, 2013, the learned Magistrate was pleased to pass an order of 'no cross' as the Advocate for the applicants as well as the applicants were absent and the matter was posted for further evidence on 16th August, 2013. On 16th August, 2013, the applicants filed an application (Exhibit – 16), seeking recall of PW.1 and the matter was adjourned to 11th September, 2013 at 2.45 p.m. for say of the respondent no.1. On 11th September, 2013, the respondent no.1's Advocate filed his reply to the said application (Exhibit – 16) and the matter was adjourned for arguments to 7th October, 2013. On 7th October, 2013, the recall application was allowed and the matter was adjourned for cross-examination to 7th November, 2013 at 2.45 p.m. On 11th November, 2013, the matter was taken on board as 7th November, 2013 was declared as a holiday and the matter was adjourned for cross on 5th December, 2013 at 2.45 p.m. On 5th December, 2013, the cross-examination of respondent no.1 (original complainant) commenced and the matter was adjourned for further examination on 16th January, 2014 at 11.00 a.m. On 16th January, 2014, as the learned Metropolitan Magistrate was on

leave the matter was adjourned to 10th February, 2014. On 10th February, 2014, it is recorded as under:-

“Complainant present with his advocate. Accused present, his advocate absent. Adv. for accused absent till 1.10 p.m. Hence cross-examination is closed. Adj. For evidence. Adj. to 24.3.14. Later on adv for accused came. Advocate for accused filed application for recalling on witness PW.1. Other side to say. Adj. For say on 24.3.14.”

Thereafter on 24th March, 2014, it was adjourned to 29th April, 2014, for say of the respondent no.1 on the recall application. On 29th April, 2014, reply was filed by the respondent no.1 to the application dated 10th February, 2014 and the matter was adjourned for arguments on 23rd June, 2014 at 2.45 p.m. The learned Magistrate was pleased to pass the following order on 23rd June, 2014, after hearing the parties:-

“Accused and his advocate are absent. Heard ld. Advocate for complainant. Record shows accused is adjourning trial by hook or crooks under guise of opportunity. So there is need to curb delayed tactics by imposing heavy costs.

“Hence application allowed, subject to costs Rs.10,000/-”

Thereafter, the matter was adjourned from time to time. On 1st February, 2016, the learned Metropolitan Magistrate was pleased to pass the following order:-

“Witness present. Case is very old. Accused was permitted to cross examine on costs Rs.10,000/- vide order below exh 17, but he didn’t.

No re-exam.”

7. It appears from the perusal of the ‘Roznama’ that the matter was kept on some dates at 2.45 p.m., for conducting the cross examination. It appears, that on 16th January, 2014, the matter was adjourned, as the concerned learned Metropolitan Magistrate was on leave to 10th February, 2014. No time was mentioned. It appears that on 10th February, 2014, the matter was called out by the learned Magistrate, in the morning session, pursuant to which the impugned order was passed. It appears that the Advocate for the applicants appeared before the learned Metropolitan Magistrate and filed an application praying for recall of the witness. It is specifically stated in the said application that since inception, the matter was kept for hearing in the 2nd sessions at 2.45 p.m., and that the Advocate for the applicants was under a bonafide impression that the matter will be

called out in the 2nd session and hence was not present in the morning session. No doubt there is some substance in the submission advanced by the learned counsel for the applicants, but the fact remains that the applicants and their Advocate ought to have been diligent and should have noticed that no time was mentioned in the Roznama. However, considering the facts, the costs imposed appear to be exorbitant.

8. Accordingly, the application is partly allowed. The impugned order dated 23rd June, 2015, passed by the learned Metropolitan Magistrate, 14th Court, Girgaum, Mumbai, in C.C.No.2414/SS/2011, in so far as it relates to imposition of costs of Rs.10,000/-, is set aside. The costs of Rs.10,000/- is modified. Accordingly, the applicants shall now pay costs of Rs.2,000/-. The said costs be paid to the complainant within two weeks from today. The applicants shall also file an undertaking in the trial Court, stating therein, that they shall not seek any adjournment in the trial Court and that they will proceed with the case on the dates given by the trial Court. The trial Court shall make an endeavor to dispose of the case as expeditiously as possible, considering that the case is of 2011.

9. The application is partly allowed in the aforesaid terms and is accordingly disposed of.
10. All concerned to act on the authenticated copy of this order.

REVATI MOHITE DERE, J.