

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 1518 OF 2019
WITH
CRIMINAL WRIT PETITION NO. 4066 OF 2019

Mr. Samir Omesh Karnik]
S/o. Omesh Keshav Karnik]
Aged about 43 years,]
Indian Inhabitant and Sole Proprietor]
of M/s. Top Angle Production having]
its Address at Flat No. 201, 2nd Floor,]
Saptarshi Building, D.N. Nagar,]
Andheri (W), Mumbai- 400 053.]...Petitioner/ Ori.
Accused.

Versus

1. The State of Maharashtra]
]]
2. Mr. Tushar Kapur]
Through its authorised representative]
Mr. Deepoo Vaswani residing at]
JVPD Scheme, Juhu, Vile Parle (W).]...Respondents/Ori.
Complainant.

Appearances-

Mr. Ashok M. Saraogi, Advocate for Petitioner.
Mr. Vivek Patil a/w. Mr. Hafeez Patanwala i/b. Mr. Vivek Patil &
Associates, for Respondent No. 2.
Mr. N.B. Patil, APP for Respondent-State.

CORAM : S. S. SHINDE, J
RESERVED ON : 30th AUGUST 2019
PRONOUNCED ON: 11th SEPTEMBER 2019.

JUDGMENT

1. Rule. Rule made returnable and heard with the consent of learned
counsel appearing for the parties.

2. Both the petitions are filed by the same Petitioner arising out of same proceedings, however, challenging two different orders. Therefore, learned counsel appearing for the Petitioner and contesting Respondent jointly submitted that, both the petitions can be heard together, since arising out of same pending proceedings before the Trial Court. Hence, both the petitions are heard together and being disposed of by common order.

3. The writ petition no. 1518/2019 is filed with following substantive prayer-

a) that this Hon'ble Court be pleased to pass appropriate writ, order and direction directing the quashing of the impugned order dated 28/12/2018 passed on Exhibit-50 the Application taken out in case No. 2422/SS/2012 on such terms as this Hon'ble Court may deem fit and proper and allow the said Application.

4. The writ petition no. 4066/2019 is filed with following substantive prayer-

a) that his Hon'ble Court be pleased to pass appropriate writ, order and direction directing the quashing of the order being the order dated 7th August 2019 whereby, the examination in chief of the Petitioner came to be closed in connection with Case No. 2422/SS/2012 on such terms as this Hon'ble Court may deem fit and proper.

5. Brief facts leading for filing the present writ petition are as under-

It is the case of the Petitioner that, the Petitioner is shown as an accused in connection with a complaint filed by Respondent No. 2 before the Hon'ble Metropolitan Magistrate 63rd Court at Andheri, Mumbai filed under the provision of Section 138 of Negotiable Instruments Act (for short "NI Act"). The learned Magistrate proceeded to record the evidence of the complainant and his witnesses. Thereafter, the Petitioner cross examined the witness on behalf of Respondent No. 2. The aforesaid matter was proceeded with from time to time. It is the case of the Petitioner that, the aforesaid matter was listed before the Trial Court on 30th June, 2018 when in the absence of the Advocate of the Petitioner, the Court has closed the cross examination and accordingly passed the order on said date. The Petitioner had presented an application for setting aside the said order, and to allow the Petitioner to further cross examine the witness. However, by order dated 28th December 2018, the learned Judge rejected the said application. Hence, the Petitioner has filed Writ Petition No. 1443/2019.

6. In Writ Petition No. 4066/2019, at the outset it is relevant to mention that, the Petitioner has not filed the impugned order on record, in spite of giving undertaking by the Advocate for the Petitioner to the Registrar (Judicial) that such order will be produced on record within one week from 09/08/2019. Be that as it may, the Petitioner has placed on record, the simple

copy of the Roznama. It appears that, said copy is neither certified nor there is certificate annexed with Roznama of by the Advocate of the affidavit of Petitioner that it is true copy of the Roznama. It appears from the said copy produced on record by the Petitioner that on 7/08/2019 in Roznama it is stated thus-

Complainant present with Advocate. Accused absent. His Advocate present. Ex.58 An application for exemption of accused. o/p granted for today. Ex. 59 An application for adjournment on behalf of accused. FRSR rejected. Order passed below ex. 1 Despite of rejection of adjournment application accused did no adduce evidence in defence. No evidence in defence by the accused. Order below Ex. 1 After passing aforesaid order ld advocate for complainant showed willingness to argue the matter finally. Considering the age of matter he was permitted to argue. Accordingly he advanced his final argument. ld advocate for accused did not advance he argument. No argument of accused matter be posted for judgment.

7. It appears that, even on 7/8/2019 the accused was absent and his advocate was present and he filed application for exemption of the accused and same was granted by the Court. Again an attempt was made by the Advocate for the accused to seek adjournment. However, said prayer for

adjournment was rejected. Learned Judge has observed that despite of rejection of adjournment application, accused did not adduced evidence in defence. Therefore, it was observed that, no evidence in defence by accused. Advocate for the complainant did argue the matter and accordingly keeping in view the pendency of the case from the year 2012 and since inspite of having opportunity, learned Advocate for accused did not lead evidence in defence or advanced his arguments, learned Judge closed the case for judgment and accordingly said judgment was to be pronounced on 03/09/2019. However, this Court on 30/08/2019 heard counsel for the parties and closed the matter for judgment and it was observed that till 11th September 2019, the Trial Court shall not pronounce the judgment.

8. Learned counsel appearing for the Petitioner made following submissions-

That, the learned Trial Judge ought to have considered the fact that, the proceedings under the provisions of Section 138 of NI Act are in the nature of penal proceedings and in the absence of the Petitioner being permitted to defend himself, there are possibilities of the Petitioner being put behind the bar. The Learned Trial Judge ought to have considered the fact that, the nature of the proceedings if any, attended properly, could curtail the liberty of the Petitioner. The learned Trial Judge ought to have considered that, the Advocate for the Petitioner remained absent due to the circumstances

beyond his control. The Advocate for the Petitioner had already suffered heart ailment and had undergone necessary Angioplasty and in view thereof, he was required to take utmost care in respect of his health. The Trial Judge ought to have considered the fact that, though the Advocate have made himself available to appear before the Hon'ble Court, however, it was unfortunate that, he suffered some chest pain and accordingly, was removed to a Hospital where he has been taking treatment regularly. The learned Trial Judge erred in coming to the conclusion that from time to time, the matter is being dragged on without there being any justified reason. Amount of Rs. 2,000/- was charged for adjournments and despite the same, though, the accused have been paid the Advocate have failed to appear. It is submitted that, since the matter is too old, the same cannot be adjourned and deserves to be proceeded ex-parte. It is submitted by the learned counsel for the Petitioner that, Learned Trial Judge has erred in dismissing the application. Therefore, learned counsel appearing for the Petitioner submits that, writ petition deserves to be allowed.

9. In addition to aforesaid arguments, in Writ Petition No. 4066/2019, learned counsel submitted that, due to circumstances beyond the control of the Petitioner and his Advocate, the further cross examination could not be conducted. In the meanwhile, the matter appeared before the Trial Court on 7th August 2019, when the Petitioner was directed to file his affidavit by way of examination in chief. The Petitioner had lost his father at Sawai

Madhopur, Rajasthan on 22/7/2019 and accordingly, the Petitioner was required to leave the city of Mumbai immediately as the Petitioner is the only son and as such, was required to perform various such formalities. Accordingly, the Advocate for the Petitioner presented an application for exemption and also for adjournment of the matter. Though the exemption came to be granted however, the request for adjournment came to be rejected and in the absence of availability of the Petitioner, even the evidence of the Petitioner came to be closed. The Petitioner has applied for getting the certified copy of the order however, in the meanwhile, there are every possibility of the Court proceeding to pronounce the judgment. The Petitioner in view of aforesaid facts, without waiting for the order, has filed the present petition invoking writ as well as inherent jurisdiction.

10. Learned counsel appearing for Respondent No. 2 strongly opposed the prayer in the petition. It is submitted that, complainant has produced on record all relevant documents. Thereafter, complainant has been partly cross examined in the year 2016. Thereafter, time and again accused sought adjournments. However, the accused did not complete the cross-examination. Consequently, no cross order was passed which was later on set aside subject to cost of Rs. 2,000/-. Thereafter, also accused did not complete the cross-examination. Consequently, order in question came to be passed. It is submitted that, application itself is sufficient to show for how much period

accused is accommodated by granting adjournments. Though in the present application medical ground of advocate is pleaded, no documents to that effect are produced on record.

11. In addition to above learned counsel appearing for contesting Respondent in Writ Petition no. 4066/2019 submitted that, since from the beginning conduct of the Petitioner is to delay the proceeding and defeat the cause brought by Respondent No. 2 before the Court. It is submitted that, the application was filed for exemption of accused from appearing. Learned Judge granted exemption of the accused from appearing, however, Advocate of the Petitioner did not co-operate the Court thereby advancing his arguments on said date. It is submitted that, in proceeding under Section 138 of the Negotiable Instruments Act, it is possible for the accused to authorize Advocate by way of filing affidavit before the concerned Court to conduct the proceeding on his behalf including recording of the evidence in case of genuine difficulties faced by the accused in attending the Court proceedings. However, the Petitioner since beginning had intention to delay the proceedings thereby taking frivolous reasons for the adjournments. Therefore, it is prayed that Court may not cause interference in the impugned order.

12. I have given due consideration to the pleadings and grounds taken in the petition, annexures thereto and affidavit in reply filed by the

parties and impugned order. During the course of hearing, learned counsel for the Petitioner has tendered across the bar the affidavit's of the Petitioner and Advocate on record for the Petitioner. It appears that, the Trial Court has meticulously perused the Roznama and observed that, on every date the accused has tried to prolong the pending proceedings thereby asking for an adjournment casually. It would be apt to reproduce herein below para 5 and 6 of the impugned judgment, which reads as under-

5. In the light of this application, I perused record and proceeding. Upon perusal, it is appearing that after considering the say of accused, documents are exhibited on 19/08/2014. After taking time of more than two years, on 15/10/2016, accused took cross examination partly. Till 09/02/2018, he did not proceed with further cross-examination, therefore, on said date, no cross order came to be passed against him which later on set aside by the order dated 05/04/2018. Said order was conditional and no cross order was set aside subject to payment of cost of Rs. 2,000/- payable to the complainant. In the roznama dated 14/06/2018, there is an endorsement that said cost is paid by accused to complainant. Therefore, on 30/06/2018, matter was listed for further cross-examination of complainant. On 30/06/2018, adjournment application was moved on behalf of accused which was rejected. Despite of rejection application, accused did not take further cross-examination of

complainant. Consequently, impugned order came to be passed.

6. In the adjournment application dated 30/06/2018, it is stated that, senior advocate is held up in one urgent matter at Bombay City Civil Court and in the present application, it is stated that on 30/06/2018, when he left his office, he suffered minor pain and was required to be taken in the hospital. Both reasons are not identical. It also creates doubt on the genuineness of the averments made in the application.

13. An aforesaid reasons assigned by the Trial Court makes it abundantly clear that, the case is pending from the year 2012. The documents in the case are executed on 19/08/2014. It is also mentioned by the Trial Court that after taking time of more than two years on 15/10/2016 the accused took cross-examination partly. Till 09/02/2018, the accused did not proceed for further cross-examination. Therefore, on said date no cross order came to be passed against the accused which later on set aside by the order dated 05/04/2019. The said order was conditional and no cross order was set aside subject to cost of Rs. 2,000/- payable to the complainant.

It further appears that, again matter was listed on 30th June 2018 for cross examination of the complainant. It is relevant to mention that, keeping in view the observations made by the Trial Court in Para 5, learned

counsel for the accused should have made endeavour to complete the cross-examination at the earliest. Even if the affidavit of Advocate on record for the Petitioner in this petition is considered, it appears that, he was not present on 30th June 2018 in the Court due to reasons stated in the said affidavit. However, in the said affidavit it is mentioned that, one Advocate colleague Mr. Pritam Sunder Bhandari, who is permanently looking after all important matter pending in the Metropolitan Magistrate Court at Andheri, was accordingly appearing in the same Court on behalf of Advocate on record. In that view of the matter, and keeping in view the fact that, the case is pending from the year 2012 and as already observed by the learned Magistrate that the accused on numbers of dates has sought adjournments and on one occasion even no cross order was passed. It was duty of the Petitioner to make arrangement to complete the cross-examination. The another advocate for the accused, as mentioned in the affidavit of the Advocate on record is permanently looking after his important matters in the said Court. Therefore, in the absence of Advocate on record, said learned Advocate ought to have conducted the cross-examination. The trial in view of mandate of Section 143(3) of the N.I. Act, the Court is obliged to make endeavor to conclude the trial within six months from filing the complaint. Section 143 of the N.I. Act reads as under:-

1]143. Power of Court to try cases summarily.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), all offences under this Chapter shall be tried by a Judicial Magistrate of the first class or by a Metropolitan Magistrate and the provisions of sections 262 to 265 (both inclusive) of the said Code shall, as far as may be, apply to such trials:

Provided that in the case of any conviction in a summary trial under this section, it shall be lawful for the Magistrate to pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees:

Provided further that when at the commencement of, or in the course of, a summary trial under this section, it appears to the Magistrate that the nature of the case is such that a sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Magistrate shall after hearing the parties, record an order to that effect and thereafter recall any witness who may have been examined and proceed to hear or rehear the case in the manner provided by the said Code.

(2) The trial of a case under this section shall, so far as practicable, consistently with the interests of justice, be continued from day to day until its conclusion, unless the Court finds the adjournment of the trial beyond the following day to be necessary for reasons to be recorded in writing.

(3) Every trial under this section shall be conducted as expeditiously as possible and an endeavour shall be made to conclude the trial within six months from the date of filing of the complaint.

(Underlines added)

14. The Hon'ble Supreme Court in the case of **Indian Bank Association and others Vs. Union of India & Others reported in (2014) 5 Supreme Court Cases 590** held as under:-

(5) The Court concerned must ensure that examination-in-chief, cross-examination and re-examination of the complainant must be conducted within the three months of assigning the case. The Court has option of accepting affidavits of the witnesses, instead of examining them in Court. Witnesses in the complaint and accused must be available for cross-examination as and when there is direction to this effect by the Court.

15. As already observed, the complaint filed by the second Respondent is pending from the year 2012, and showing further indulgence without having any valid reasons to interfere in the impugned order, may defeat the legislative intent to hear such case under Section 138 of the Negotiable Instruments Act expeditiously and dispose of the same within six months, and also directions of the Hon'ble Supreme Court in the case of **Indian Bank Association** (supra) that, the recording of the evidence shall be completed within three months from assigning the case.

15. It needs to be noted that, the Petitioner challenged the order dated 28.12.2018 impugned in this petition, by filing writ petition no. 1518 of 2019 on 09.03.2019. This itself *prima facie* shows the intention of the Petitioner to delay the proceedings.

16. It *prima facie* appears that, Petitioner made attempts to seek adjournments and trying to protract the proceedings, which are pending from the year 2012. In that view of the matter no case is made out to grant any relief to the Petitioner. Hence, both the writ petitions stand rejected.

[S. S. SHINDE , J]

After pronouncement of Judgment

Date- 11/09/2019.

At this stage learned counsel appearing for the Petitioner prays for continuation of ad-inteim order which was passed by this Court on 30th August 2019. The said prayer is vehemently opposed by the learned counsel appearing for the contesting Respondent. In fact, there was no any ad-interim/interim order operating during the pendency of this petition. However, since the Trial Court fixed the matter on 03.09.2019 for pronouncement of its judgment, by the said order dated 30th August 2019, this Court stayed the pronouncement of judgment by the Trial Court till pronouncement of today's judgment. In peculiar facts of the present case, since the proceedings before the Trial Court

are pending since 2012, this Court is not inclined to accede to the prayer of the learned counsel appearing for the Petitioner to continue the said order passed by this Court on 30th August 2019. Hence, the said prayer of the learned counsel for the Petitioner stands rejected.

[S. S. SHINDE , J]