

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2595 OF 2019

Alka Khandu Avhad	]	
Aged, Adult, Occ : Housewife	]	
Res/at, 1302, Raheja Atlantis,	]	 Petitioner
Ganpata Rao Kadam Marg,	]	(Org.Acc.No.2)
Lower Parel (W), Mumbai – 400 013	]	

versus

1] Amar Syamprasad Mishra	]	
Aged Adult, Occ : Advocate	]	
Res/at, C-11, Tilak Complex, Ekasar Road,	]	
Shanti Ashram, Borivali (West),	]	
Mumbai – 400103	]	
And	]	
Sai Mauli Apartment, Achole Cross Road,	]	
Nalasopara (E), Thane – 401209	]	
	]	
2] The State of Maharashtra	]	 Respondents.

Dr. Samarth S Karmarkar a/w Ms. Supriyanka G Maurya i/by Karmarkar & Associates for the Petitioner.

Ms. Sheetal Goad for Respondent No.1

Mr. A R Patil, APP, for the Respondent/State.

CORAM : S. S. SHINDE J.
Reserved on : 08th August 2019
Pronounced on : 21st August 2019.

JUIDGMENT

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

2 The above Writ Petition takes an exception to the order dated 23/02/2018 passed by the learned Metropolitan Magistrate, 43rd Court at Borivali, Mumbai in C.C. No.2802/SS/2016 thereby issuing the process against the Petitioner and Co-accused No.1.

3 The facts giving rise for filing of the present Writ Petition, can in brief be stated thus :-

Respondent No.1 herein is the original Complainant who is a practicing advocate and is a partner in a solicitor firm in Mumbai known as SRM Law Associates. The Petitioner is the original accused No.2 and, wife of original Accused No.1 – Mr. Khandu Kacharu Avhad. It is the case of Respondent No.1 Complainant that both the accused, who are husband and wife, approached to the Complainant through one of his client Mr. Nitul Unadkani in a legal matter with Mr. Chetan Desai. It is the contention of the complainant that from Jun 2015 till April 2016, the complainant assisted accused Nos.1 and 2 in preparing replies and notice of motion, conference, co-ordinating with counsel, filing vakalatnamas and appearing through advocates' office and also as counsel in Summary Suit Nos.399 of 2015 (Sion Finance and Leasing private Limited v/s. Alka Avhad); , 400 of 2015 (Sion finance and Leasing Private Limited v/s. Khandu Avhad), and 1171 of 2015 (A R Shetty v/s Khandu Avhad) in the City Civil Court at Bombay. The Complainant has stated that there are approximately 40 emails exchanged

between the complainant, accused Nos.1 and 2, and Mr. Nitu Unadkant between June 2015 and April 2016. The complainant has raised a professional bill for the legal work done by him to represent the accused Nos.1 and 2 in legal proceedings between the said period. It is the case of the complainant that thereafter in partial discharge of legal liability, accused No.1 informed the complainant that due to severe financial stress, they are not able to pay professional fees immediately. Thereafter accused No.1 handed over to the complainant a post dated cheque dated 15th March, 2016 bearing No.227050 drawn on Union Bank of India of Rs.8,62,000/-. It is further stated in the complaint that, when the said cheque was presented for encashment, the same was returned unpaid with endorsement "funds insufficient". Thereafter the complainant sent advocate's notice dated 21/05/2016 to the accused calling upon them to pay the amount of Rs.8,62,000/- within 15 days from the date of receipt of said notice. It is also stated that in said notice that the amount has wrongly been mentioned Rs.8,62,500/- in stead of Rs.8,62,000/-. The said notice was duly served upon the accused. However, the accused neither replied the said notice nor made the payment of the aforesaid dishonoured cheque. The Complainant therefore filed a complaint for the offence punishable under Section 138 of the Negotiable Instruments Act against Accused Nos.1 and 2.

4 The learned Metropolitan Magistrate, 43rd Court, Borivali, Mumbai

after going through the allegations made in the complaint, verification and the documents placed on record and after hearing the learned advocate representing for the complainant, came to a conclusion that prima facie case has been made out against both the accused for an offence punishable under Section 138 r/w 141 of the Negotiable Instruments Act, and accordingly by order dated 23/02/2018 directed to issue process against both the accused for the offence punishable under Section 138 r/w 141 of the Negotiable Instruments Act. It is the said order which is taken exception to by way of the above Writ Petition.

5 Heard the learned counsel appearing for the respective parties. With their able assistance I have perused the pleadings, grounds taken in the Petition, and annexure thereto and the affidavit in reply of Respondent No.1 herein, as also the reasons assigned by the trial court in the impugned order dated 23/02/2018.

6 The learned counsel for the Petitioner submits that the husband of the Petitioner Mr. Khandu K Avhad, who is original accused No.1 in the complaint, had appointed Respondent No.1 herein as an advocate to act, appear and plead for him in the litigation. It is also submitted that Respondent No.1 has taken accused No.1 in confidence and made him to issue blank cheque to Respondent No.1. The husband of the Petitioner has timely paid

Respondent No.1 his litigation fees.

7 According to the Petitioner and her husband, Respondent No.1 was not properly following his matter and not attending the same, hence accused No.1 asked Respondent No.1 to give his no objection on the vakalatnama, and after lot of effort Respondent No.1 has given his no objection upon receipt of the due amount of the professional fees. It is submitted that Respondent No.1 used the blank cheque signed by accused No.1 Mr. Khandu K Avhad against him with wrongful intention and then he filed a complaint against the Petitioner and her husband – accused No.1. It is submitted that Respondent No.1 has, with an oblique motive, filed the complaint against the Petitioner and accused No.1, not disclosing true and correct facts. It is done with a deliberate malafide intention to put pressure and blackmail to the Petitioner and her husband. Respondent No.1 without applying his mind has made the Petitioner as co-accused as the Petitioner is victims of circumstances. It is submitted that neither the said notice nor the complaint in any manner establishes the role of the Petitioner with the context to the alleged transaction between Respondent No.1 and co-accused i.e. her husband. The learned Magistrate while issuing the said process has ignored that the cheque in question does not bear the name or signature of the Petitioner and also does not taken into consideration the fact that the Petitioner is not connected with the said transaction. The learned counsel for the Petitioner submits that the

Petitioner has no role in the so called transaction, and the cheque in question has been allegedly issued at the instance of co-accused vide his personal account in his independent capacity. The learned counsel for the Petitioner therefore prays that the Petition deserves consideration.

8 The learned counsel for Respondent No.1 original complainant submits that the complainant has raised a professional bill for the legal work done by him on behalf of the accused Nos.1 and 2 for the period from Jun 2015 till April 2016 as the complainant legally advised, assisted and represented accused Nos.1 and 2 in Summary Suit Nos.399 of 2015 (Sion Finance and Leasing private Limited v/s. Alka Avhad); , 400 of 2015 (Sion finance and Leasing Private Limited v/s. Khandu Avhad), and 1171 of 2015 (A R Shetty v/s Khandu Avhad) in the City Civil Court at Bombay. It is also submitted there are approximately 40 emails exchanged between the complainant, accused Nos.1 and 2, and Mr. Nitu Unadkant during the said period. It is also submitted that towards discharging the said legal liability, the accused handed over cheque dated 15th March, 2016 bearing No.227050 drawn on union Bank of india of Rs.8,62,000/- and when the said cheque was presented for encashment, the same was returned unpaid with endorsement "funds insufficient". It is submitted that though a demand notice has been served upon the accused, the accused neither replied the said notice nor made the payment of the aforesaid dishonoured cheque. It is also submitted that the

learned Magistrate therefore has rightly come to a conclusion that prima facie case has been made out against both the accused for the offence under Section 138 of the Negotiable Instruments Act, and therefore the order of issuing process needs no interference. The learned counsel for Respondent No.1/Complainant submits that this Petition is not maintainable since it is preferred against order passed by the learned Magistrate issuing summons against the accused, as the Petitioner did not avail the remedy before the revisional court and has directly approached this Court praying to stay the trial which has to commence on the next fixed before the trial Court. It is submitted that though the said summoning order was served upon the Petitioner, the Petitioner chose not to appear before the magistrate, and it is after bailable warrant was issued, she appeared before the trial court and obtained the bail, and the plea was recorded. The learned counsel for Respondent No.1/Complainant submits that since the Petitioner was medically unfit, her husband has issued the cheque on her behalf to fulfill her legal obligation and therefore, there is a joint liability of the Petitioner as well as her husband. It is submitted that since the Petitioner and her husband were the clients of Respondent No.1, a bill in the name of the Petitioner's husband was raised considering the condition of the Petitioner. In support of the aforesaid contentions, the learned counsel for Respondent No.1 relied upon the judgments of the Delhi High Court in the case of **Rajesh Agarwal v/s. State and Anr** in **Cri. M. C. No.1996/2010** and in the case of **Ambica Plastopack Pvt. Ltd**

and anr. v/s. State and Anr. in Cri. M. C. No.2698/2011 . He therefore submits that the Petition may be rejected.

9 It is an undisputed fact that the Petitioner and Co-accused No.1 Khandu K Avhad are the wife and husband. It is an admitted position that the cheque issued by the husband of the Petitioner on presentation in the bank came to be dishonoured due to insufficient funds. The learned counsel for Respondent No.1/Complaint invites attention of this Court to the Bill of Costs raised by Respondent No.1 dated 15th February 2016, which is at page 36 of the Writ Paper book wherein the complainant has specifically given the reference of case numbers and the parties name. The said bill is in respect of professional bill in three matters mentioned therein, out of which in two matters the husband of Petitioner – Mr. Khandu Avhad was the Respondent, and in one matter Petitioner herself was the Respondent. In the said bill the complainant has given details about the charges of the legal assistance given by him to the Petitioner and her husband in the aforesaid three matters. Prima facie it appears that the complainant assisted and represented both the Petitioner and her husband in the Court.

10 To buttress his case, Respondent No.1/complainant has filed his affidavit in reply. It is stated in the affidavit in reply that since the bailable warrant was issued by the trial court against the Petitioner, the Petitioner

appeared before the trial court on 06th February 2019 to obtain the bail and his plea was recorded. But during recording of plea, there was no defence raised by the Petitioner before the trial Court to prove her innocence. She did not raise any objection or defence which clearly suggests legally enforceable liability of the Petitioner towards Respondent No.1. It is also stated in the said affidavit in reply that the Petitioner and her husband have approach Respondent No.1 to defend them in the civil suits Nos.399/2015 and 400/2015 before the City Civil Court, Mumbai. It is also stated that Respondent No.1 was informed by the husband of the Petitioner that the Petitioner is not medically fit thus the husband of the Petitioner will be coordinating with Respondent No.1. It is also stated that Respondent No.1 has at all times and at every date attended the matter and have sent the emails. The Respondent No.1 stated that since the Petitioner was medically unfit, her husband has issued the cheque on her behalf to fulfill her legal obligation and therefore there is a joint liability of both the Petitioner and her husband. The learned counsel for Respondent No.1 invites attention of this Court to the Case Status/Case Details which are annexed to the affidavit in reply at Exhibit A. Perusal of the said case status indicates that it relates to the notice of motion, and in the column of Respondent and Advocate the name of Petitioner Mrs. Alka Avhad and the name of advocate Ms. SRM Law Associates appear. The learned counsel for Respondent No.1 also invites the attention of this Court to e-mail dated 08/01/2016 sent by Respondent No.1 to the husband of Petitioner and one Mr.

Nitul Bhai which is annexed to the affidavit in reply at Exhibit B on page 62. A careful perusal of the said email would disclose that there is a specific reference regarding notice of motion and condonation of delay in Summary Suit No.399. There is also reference of Summary Suit No.400 and Summary Suit No.1171 of 2015. Respondent No.1 has placed on record the emails exchanged between him and the husband of the Petitioner. In the said emails also reference of all the aforesaid three suits have been mentioned. There is e-mail dated 20/01/2016 on record which sent by Respondent No.1 to the husband of the Petitioner and Mr. Nitul Bhai. The said email refers to Draft Reply for approval, Suit No.399 of 2015. It is also mentioned in the said email that Ms. Alka Avhad (i.e. the Petitioner herein) has to come to affirm the said reply in their office at fort. In another email dated 18/03/2016 Respondent No.1 informed the husband of the Petitioner regarding dishonoured of the cheques and intimating about the discharged in all the three suits due to non-payment of fees. A demand notice dated 21/05/2016 sent by Respondent No.1 through advocate Virenderakumar Gupta under Section 138 of the Negotiable Instruments Act to the Petitioner and her husband is also placed on record. Perusal of the aforesaid material would prima facie reveal that the Petitioner and her husband were legally assisted and represented before the City Civil Court by Respondent No.1 in the summary suits. There are specific allegations made by Respondent No.1 in the complaint that accused No.1 and 2 i.e. the Petitioner and her husband were referred to the complainant by a common

friend in the legal matter. It is also alleged that there are approximately 40 emails exchanged between the Petitioner and her husband at the relevant time.

11 Respondent No.1 herein lodged a complaint before the learned Magistrate for offence punishable under Section 138 of the Negotiable Instruments against the present Petitioner and her husband. In support of the said complaint, Respondent No.1 has filed verification, emails exchanged between him and the Petitioner and her husband and the said Mr. Nitul Bhai, as also the professional bill raised by Respondent No.1 for the legal charges, and demand notice before the Trial Court. The Trial Court has come to a conclusion that prima facie case has been made out against both the accused for an offence punishable under Section 138 r/w 141 of the Negotiable Instruments Act and therefore issued process against both the accused. The contention of the Petitioner that Respondent No.1, with malafide intention, has filed the complaint against the Petitioner and her husband, and without applying his mind the complainant has made Petitioner as co-accused, can be considered and decided only during trial after giving opportunity to the parties to lead evidence in that regard. It is an undisputed fact that the cheque issued by the husband of the Petitioner was dishonoured. Whether the said cheque was issued towards discharging the legal liability of both the accused or, according to Petitioner, Respondent No.1 used the blank cheque signed by her husband with wrongful intention is a matter of evidence, which will be

adduced during the trial.

12 Now coming to the judgments cited by the learned counsel for Respondent No.1. In ***Rajesh Agarwal's*** case the Delhi High Court in paragraph 8 of the said Judgment observed thus :-

“Since offence under section 138 of N. I. Act is a document based technical offence, deemed to have been committed because of dishonour of cheque issued by the accused or his company or his firm, the accused must disclose to the Court as to what is his defence on the very first hearing when the accused appears before the Court. If the accused does not appear before the Court of MM on summoning and rather approaches High Court, the High Court has to refuse to entertain him and ask him to appear before the Court of MM as the High Court cannot usurp the powers of MM and entertain a plea of accused why he should not be tried under section 138.”

In ***Ambica Plastopack Pvt. Ltd's*** (supra), the Delhi High Court in paragraph 9 referred the decision in *Rajesh Aggarwal v State*, 2010(171) DLT 71 wherein it is observed as under :-

“this Court noted that the High Court is flooded with petitions under Section 482 Cr.PC for challenging the summoning order passed by the Magistrate under Section 138 of the Negotiable Instruments Act. This Court further noted that the accused rush to the High Court on mere passing of summoning order and are successful in halting the proceedings before the Magistrate on one or the other ground while the kind of defence raised by the petitioners is required to be raised before the Magistrate at the very initial stage as per the law.”

In the present case also, Respondent No.1 Complainant in his affidavit in reply has specifically stated that though the order of the learned Magistrate served upon the Petitioner, she did not appear before the trial Court, but since the bailable warrant was issued by the trial court against the Petitioner, then the Petitioner appeared before the trial court to obtain the bail, and her plea was recorded. It is also specifically stated that at the time of recording of plea, there was no defence raised by the Petitioner before the trial court to prove her innocence. It is informed that the matter is fixed for recording of evidence. This court is of the considered view that filing of present Petition is nothing but an attempt to prolong the matter.

13 In the light of aforesaid discussion and considering the allegations made in the complaint, the material placed on record, no case is made out to cause interference in the order of issuance of process. The Writ Petition stands rejected. Rule stands discharged.

14 All contentions raised on merits are kept open for being agitated before the Trial Court. Needless to state that the observations made herein above are prima facie in nature and confined to the adjudication of the present Writ Petition.

[S.S. SHINDE, J.]