

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION NO.260 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.261 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.262 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.263 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.264 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.265 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.266 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.267 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.268 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.269 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.270 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

WITH

CRIMINAL APPLICATION NO.271 OF 2020

1) SHREE SIDDHIVINAYAK DEVELOPERS)
2) NITIN NAGARJI MEHTA)...APPLICANTS

V/s.

1) THE STATE OF MAHARASHTRA)
2) M/S. KIMAYA WELLNESS LTD.)...RESPONDENTS

Ms.Mallika Ingale a/w. Mr.Rushit Thakkar, Advocate for the Applicants.

Mr.A.R.Kapadnis, APP for the Respondent – State.

Mr.Siddesh Bhole, Advocate for Respondent No.2.

CORAM : A. M. BADAR, J.

DATE : 18th FEBRUARY 2020

ORAL JUDGMENT :

1 All these applications can be decided conveniently by this common judgment as prayers made in all these petitions are identical but for the prayers made in Criminal Application bearing No.261 of 2020.

2 By these applications under Section 482 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C. for the sake of brevity), applicants/original accused are praying for quashing and setting aside the order dated 28th January 2020 passed in subject criminal cases by the learned Metropolitan Magistrate, 20th

Court, Mazgaon, Mumbai, whereby applications filed by respondent no.2 herein/original complainant for quashing of trial of twelve complaint cases for the offence punishable under Section 138 of the Negotiable Instruments Act came to be allowed and after closure of re-trial, the learned trial Magistrate was pleased to direct the original complainant/respondent no.2 herein to take necessary steps for issuing conviction warrants against the original accused/applicants herein. In Criminal Application No.261 of 2020, in addition to challenging the order dated 28th January 2020 directing closure of trial, the applicants/original accused are also praying for quashing and setting aside orders dated 8th November 2019 and 23rd November 2019 whereby the learned trial Magistrate had passed no-cross order so far as PW1 is concerned and rejected to recall the PW1. For the sake of convenience, parties shall be referred to in their original capacity.

3 Heard. Rule. Rule made returnable forthwith. Heard finally by consent of parties.

4 Facts necessary for deciding the present applications can be summarized thus :

(a) Way back in the year 1997, complainant preferred complaints for the offence punishable under Section 138 of the Negotiable Instruments Act alleging that cheques for Rs.5 lakh issued for satisfaction of legally enforceable debt by accused persons came to be dishonoured. During pendency of those complaints, they came to be dismissed in the year 2013 and then were restored in the year 2014. Subsequently, accused persons failed to appear before the learned trial Magistrate. Instead of taking steps for securing presence of accused persons, the learned trial Magistrate proceeded ex parte in those criminal complaints. Evidence affidavit came to be accepted. No statement of the accused under Section 313 of the Cr.P.C. came to be recorded and ultimately, in absence of accused persons, they came to be convicted for the offence punishable under Section 138 of the Negotiable Instruments Act and were sentenced accordingly.

(b) Dissatisfied with the conviction and the resultant sentence, accused persons preferred individual appeals before the learned Sessions Judge, Greater Bombay, and those appeals came to be allowed on 25th January 2019. For the sake of convenience, operative portion of one order from the appeal is reproduced hereunder. It reads thus :

“ **ORDER**

1. Criminal Appeal No.763/15 is allowed on depositing cost of Rs.50,000/- which is to be deposited by the appellant on or before 01.02.2019, which shall be payable to the respondent no.1.
2. If the appellants fails to deposit the amount of cost within the stipulated period the appeal shall be treated as dismissed.
3. On depositing the cost by the appellant the order passed by the learned Magistrate, shall be quashed and set aside and the matter shall be remanded to the learned Metropolitan Magistrate for trial afresh from the stage of cross-examining the complainant and his witness, if any.

4. The parties are directed to appear before the learned Magistrate on 08.02.2019 at 11.00 sharp.
5. The learned Magistrate need not to issue notices to the parties.
6. He shall see that the matter is disposed of on or before 08.03.2019, if the appellant fails to extent co-operation for expeditious disposal of the matter in that case, he shall not hesitate to proceed further with the matter.”

(c) Accused persons, feeling aggrieved by imposition of costs of Rs.50,000/- per appeal, approached this court by filing Writ Petition Nos.546 of 2019 to 557 of 2019. Those petitions came to be disposed off by this court on 19th June 2019. Paragraph 4 of the common order passed in those twelve writ petitions reads thus :

“4 Learned counsel appearing for petitioner on instructions does not press substantive relief claimed in terms of prayer clause (b) in these petition. Learned counsel appearing for petition on

instructions makes a statement that the petitioner will apply on or before 24th June 2019 before the Trial Court for withdrawal of amount of Rs.30,000/- in each case forthwith and after receiving the said amount same will be given to the respondent no.2. In case such applications are filed by the petitioner, Trial Court to ensure that the said amount is returned to the petitioner forthwith. After receiving said amount by the petitioner on very next day petitioner shall give it to the respondent no.2.”

- (d) Thus, obligation was cast on accused persons to apply for withdrawal of amount of Rs.30,000/- per complaint on or before 24th June 2019 and on withdrawing the said amount, accused persons were made duty bound to pay that amount to the complainant immediately on the very next day of receipt of that amount from the trial Court.
- (e) It is reported that applications for withdrawal of amount from the trial Court were moved by accused persons on 24th June 2019. An amount of Rs.3 lakh came to be credited to

the account of accused persons on 27th September 2019. However, instead of paying the same to the complainant, the said amount, it appears, was utilized for some other purpose by accused persons. Similarly, it is reported that trials continued even after failure on the part of accused persons to pay the amount of Rs.30,000/- per complaint case.

- (f) In one of the Criminal Case bearing no.4447/SS/2011, on 8th November 2019, no cross order came to be passed as no cross examination of the complainant was conducted on three consecutive dates. Then an application for recall (Exhibit 42) of PW1 came to be moved by accused persons. Vide order dated 23rd November 2019, the said application came to be rejected with an observation that order of this court is not complied by accused persons by payment of balance amount of costs of Rs.30,000/- to the complainant.
- (g) Subsequently, it is seen that, the complainant preferred applications in all twelve complaint cases on 23rd November

2019 for closure of trial of those complaint cases because of non-fulfillment of condition imposed by the learned Additional Sessions Judge in appeals, which came to be confirmed by this court in Writ Petition bearing nos.546 of 2019 to 557 of 2019. Those applications came to be replied by accused persons and on 28th January 2020, impugned orders came to be passed by the learned Metropolitan Magistrate, 20th Court, Mazgaon, Mumbai. All applications filed by the complainant came to be allowed. Retrial of subject criminal cases came to be closed. The complainant was directed to take necessary steps for issuance of conviction warrants.

5 Heard the learned counsel appearing for applicants/original accused persons. She accepted the fact that applicants/accused persons were duty bound to comply with the appellate order as well as order passed by this court confirming the said appellate order in time bound manner. However, as per her submissions, accused Nitin Mehta is an old aged person, aged

about 67 years and he is suffering from various ailments. It is further argued that there was no intention to disobey the order but due to financial constraints, those orders could not be complied with. It is further submitted that interest of the complainant can be taken care of by imposing further costs.

6 As against this, the learned counsel appearing for the complainant vehemently opposed these applications by pointing out pleadings made in the applications so also in the application dated 28th January 2020 moved by accused persons before the learned trial Magistrate. He argued that contention in the said application that third party withdrew the amount from account of accused person is per se false. The learned counsel further submitted that pleading in that regard made in these applications are also incorrect and the person who is coming before the court with unclean hands is not entitled for any relief.

7 I have considered the submissions so advanced and also perused the impugned orders of closure of retrial. Conduct of

accused persons in defending the complaints is far from satisfactory. Despite service of summons, accused persons had chosen to remain absent during trial of the offence punishable under Section 138 of the Negotiable Instruments Act. The learned trial Magistrate had not cared to secure their presence and the complaints were virtually decided *exparte* by recording the conviction and resultant sentence. The Appellate Court showed indulgence by keeping in mind the fact that evidence came to be recorded in absence of accused persons, accused persons were not examined under Section 313 of the Cr.P.C. and judgments were pronounced in their absence. However, costs imposed by the Appellate Court was not deposited and direction of this court to pay an amount of Rs.30,000/- per complaint case immediately on the next day of the withdrawal is also not followed by accused persons.

8 Still, the fact remains that complaints were decided *exparte*. Primary function of the court is to adjudicate the dispute on its own merits. In the case in hand, the dispute is of criminal

nature and the ultimate result is award of imprisonment and compensation by proceeding exparte against accused persons. Therefore, in my considered opinion, order of retrial passed by the Appellate Court is required to be complied with by imposing suitable costs on applicants/accused persons for their subsequent defaults.

9 It is reported that accused persons are not appearing before the trial Court and even they had chosen not to file any application under Section 205 of the Cr.P.C. It is further argued that the complaints were to be disposed off in a time bound manner and because of persistent default of accused persons, though the complaints are of the year 1997, they are not yet taken up for recording of evidence. By keeping this aspect in mind, the following order :

ORDER

i) Criminal Applications are allowed by quashing impugned orders subject to payment of costs quantified at Rs.25,000/- per application.

- ii) Cost so imposed along with the balance amount of cost imposed by the learned Appellate court should be paid to the complainant by 25th February 2020.
- iii) If this compliance is done, then the learned trial court shall take up subject criminal complaints for retrial on 28th February 2020.
- iv) Parties shall remain present before the learned trial Magistrate on 28th February 2020 if conditions imposed by this order are complied by accused persons.
- v) Needless to mention that accused persons shall attend the learned trial Magistrate on each and every date except on dates on which their personal appearance is exempted by the learned trial Magistrate for reasons to be recorded in writing.

- vi) Accused persons shall co-operate the learned trial Magistrate in disposal of subject criminal complaints by not seeking any adjournment and the learned trial court is requested to complete the trial of subject criminal cases within two months from 28th February 2020.
- vii) Rule is made absolute in above terms.

(A. M. BADAR, J.)

Arti V.
Khatate

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by Arti V. Khatate
Date: 2020.02.20
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