

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.6145/2019

**1.M/S SOLUTIONS ADVERTISING PRIVATE
LIMITED**

A company incorporated under the
Companies Act, 1956, having
its office at 204, India Bulls Mint
building, behind Hiranandani Meadows,
near Hyde Park, Br.Nath Pai road,
Thane(W) 400 601.

2.MR.PRAVIN SOLANKI

Proprietor of M/s Solutions
Advertising Private Ltd.

.... PETITIONERS.

V/s.

1. THE STATE OF MAHARASHTRA

Copy to be served upon
office of Public Prosecutor High
Court, Appellate Side, Mumbai.

**2.PROACTIVE IN & OUT ADVERTISING
PRIVATE LIMITED**

A Private Limited Company registered
under the Companies Act, 1956 having
its office at B wing, 3rd floor, Samkeet
Apt, Sant Janabai Marg, Off. Hanuman
road Vile Parle(E), Mumbai 400 057.

(Copy of the respondent no.1 be
served on the office of Public Prosecutor
High Court Appellate Side, Mumbai)

...RESPONDENTS.

.....

Mr.Avinash Fatangare, Advocate i/b Prashant Jadhav for the
Petitioner.

Mr.R.M.Pethe, APP for State.

Mr.I.J. Nankani and Associates for respondent no.2.

.....

CORAM : A. M. BADAR, J.

DATE : 22ND JANUARY 2020.

JUDGMENT:

1. Heard. Rule. Heard forthwith.

2. By this petition, the petitioners/accused in a complaint bearing number Summons Case SS/1781/2018 filed by respondent no.2 herein for offence punishable u/s 138 of the Negotiable Instruments Act, is challenging order dated 3.12.2019 passed by the learned Metropolitan Magistrate, 58th Court, Bandra, Mumbai thereby rejecting application for cancellation of non bailable warrant issued by the said court on 30.11.2019.

3. Heard learned counsel appearing for petitioners as well as respondent no.2 herein.

4. From the submissions of the parties and from evaluation of record produced by the parties, following fact situation emerges.

a) On 27.5.2019 in subject criminal case, after recording verification and after considering the material before it, the learned trial Magistrate issued process against accused for offence punishable under Section 138 of the Negotiable Instruments Act. Summons came to be issued and in pursuant thereof, on the very next date i.e. on 2.8.2019, the petitioners herein i.e. accused persons appeared before learned trial Magistrate. They were released on bail after recording their plea.

b) Complaint case was adjourned to 24.9.2019. However, on that date learned trial Magistrate had discharged its

board and the case was adjourned to 30.11.2019. On 30.11.2019 it was virtually second date in the matter. Roznamas on 2.8.2019 and 24.9.2019 are not reflecting the fact that evidence on affidavit was tendered by respondent no.2/original complainant before the court on those dates. I am told that even prior to recording of plea of the accused persons evidence on affidavit came to be tendered before the learned trial Magistrate.

c) On the adjourned date i.e. 30.11.2019 the subject criminal case came up before learned trial Magistrate. Surprisingly, the learned trial Magistrate without following principles of natural justice by supplying copy of evidence on affidavit if any to the accused persons straightway marked absence of accused persons by rejecting application for their personal exemption. Roznama of 30.11.2019 reflects that accused persons appeared through their advocates before the learned trial

Magistrate. They had preferred an application for their personal exemption which came to be rejected by the learned trial Magistrate. Not satisfied with this, acting on application for issuance of bailable warrant against accused persons submitted by the complainant on that day, in utter non application of mind and contrary to law settled by the Hon'ble Apex Court, the learned trial Magistrate proceeded to issue non bailable warrant against accused persons on 30.11.2019 itself. All this happened when accused persons were represented by their Advocate and they had not even received the copy of evidence on affidavit tendered by the complainant.

d) The matter does not end here. Learned counsel for the accused persons then diligently applied for cancellation of non bailable warrant, by moving an application to that effect. On 03.12.2019 following order came to be passed by the learned trial Magistrate on the said application and that is how the application for

cancellation of non bailable warrants in bailable offence came to be rejected. The order reads thus;

On 30.11.2019 the complainant was present. The accused was absent and his advocate was not ready to cross examine the witness. Hence, upon application of the complainant warrant is issued. The accused also absent on today. His advocate prayed for cancellation of warrant. Thus, I hold that warrant can not be cancelled as present of accused is necessary to conduct further trial. Hence application is rejected.

5. Illegality of this order is writ large on the face of record. On 30.11.2019 or earlier thereto, the record does not reflect that the accused persons were served with copy of evidence on affidavit of the complainant. As such, they could not have been insisted to cross examine the complainant on the same day. Despite application for exemption by the accused persons, the learned trial Magistrate recorded illegal finding in the said order dated 3.12.2019 that presence of accused is necessary for conducting further trial.

6. At this juncture, it needs to mention here that the learned trial court utterly failed to keep in mind the law laid down by the Hon'ble Apex Court in the matter of **Inder Mohand Goswami and Another Vs. State of Uttaranchal and others , 2007 DGLS(SC) 1126**. Relevant portion of paragraph no. 51 to 54 of that judgment reads thus.

51. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilized society. Sometime in the larger interest of the Public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non bailable warrants should be issued.

When non-bailable warrants should be issued.

52. Non-bailable warrant should be issued to bring a person to court when summons of bailable warrants would be unlikely to have the desired result. This could be when;

- * it is reasonable to believe that the person will not voluntarily appear in court; or
- * the police authorities are unable to find the person to serve him with a summon; or
- * it is considered that the person could harm

someone if not placed into custody immediately.

53. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

54. In complaint cases, at the first instance, the court should direct service of the summons alongwith the copy of the complaint. If the accused seem to be avoiding the summons, the court in the second instance should issue bailable warrant. In the third instance, when the court is fully satisfied that the accused is avoiding the court's proceeding intentionally, the process of issuance of non-bailable warrant should be restored to. Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

7. It needs to point out further that, the impugned order is

in utter ignorance of judgment of this Court in the matter of

Bhaskar Sen Versus State of Maharashtra & Others 2004(2)

Bom.C.R. (Cri.)674. In paragraph 10 of that judgment, this

court has given following guide-lines which the learned trial

court ought to have kept in mind prior to rejection of

application by the impugned order. Paragraph 10 reads thus;

10. A large number of cases are being filed into this Court seeking cancellation of NBW issued either while rejecting the application for exemption or for non appearance of the accused on one date of hearing even if Advocate for the accused appears on his behalf. It is also observed that the complaints under Section 138 of the Act are being filed against the companies in which all the directors are being arraigned as accused and their presence is being insisted on every date of hearing and no proceedings are being taken up in their absence. It is further observed that progress of the cases under section 138 impedes for want of their presence. The fact remains as to why their presence is being insisted on every date of hearing. The idea is to see that the progress of the case is not hindered for want of presence of the accused or even the complainant for that matter. Keeping this in view and against a backdrop of the observations made in the foregoing paragraphs, I deem it appropriate to issue the following directions to the courts trying summons cases and in particular, cases under section 138 of the Act.

(i) Ordinarily the Court should be generous and liberal in exercising powers under sections 205 and 317 of the Code and grant exemption to the accused from personal appearance unless presence is imperatively needed or becomes indispensable. While considering the application for exemption, the Court should also bear in mind the nature of accusations and prejudice if any, likely to be caused to the prosecution or the complainant, if personal attendance of the accused is dispensed with or to the accused if personal attendance is insisted upon, as case may be.

(ii) If an accused makes even the first appearance through a Counsel, he may be allowed to do so.

(iii) If an accused is seeking permanent exemption in a case, the Court, while dealing with such application, should take precautions that the accused gives an undertaking to the satisfaction of the Court that he would not dispute his identity as the particular accused in the case, and that a Counsel on his behalf would be present in the Court on all dates of hearings and that he has no objection for recording a plea on his behalf of a Counsel and in taking evidence in his absence.

(iv) While dealing with the application seeking permanent exemption from appearing in the case as aforesaid, if, the Court for any reasons is of the opinion that such exemption should not be granted, it may do so by recording or indicating reasons for rejecting such prayer.

(v) It is open for the Court to grant exemption

which is either permanent or for a specific period, depending upon the facts of each case, on the conditions as it deems fit and proper, requiring the accused to file an undertaking as indicated earlier.

(vi) In a given case, the Court may record a plea of the accused even when his Advocate makes such plea on his behalf in a case where personal appearance of the accused is dispensed with on his furnishing the undertaking in terms of Clause (iii). However, it is open for the Court to refuse such permission for reasons to be recorded separately.

(vii) The Court should avoid issuance of non-bailable warrant in the first instance to secure presence of the accused facing trial and it should be applied as a last resort.

(viii) If a Counsel for the accused fails to appear in the matter and his absence impedes further progress of the proceedings including examination of witnesses, the Court may resort to any other course as may be available under the provisions of the Code to secure presence of the accused, including issuance of NBW and may cancel the order of exemption and in such case may or may not grant exemption any more.

(ix) The Court should avoid requiring the accused or his Advocate to apply for exemption on every date of hearing.

(x) While exercising the powers to grant exemption under any circumstance, the Court shall not compromise with the further progress of

the proceedings and see to it that the presence or absence of either of the parties does not impede the proceedings.

(xi) In a given case, similar parameters be applied for granting exemption to the complainant if his absence is not likely to cause prejudice, if any, to the accused or hinder the progress of the case/complaint.

8. In the light of forgoing reasons, impugned order is perverse, illegal and unsustainable. The petition, therefore, needs to be allowed. Hence, the order.

ORDER

- (i) Rule is made absolute in terms of prayer clause (a).
- (ii) Petition is disposed of accordingly.

(A. M. BADAR, J.)

